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## Approval of the Royal Decree on foreign investments

On 5 July 2023, the Official State Gazette published Royal Decree 571/2023, of 4 July, on foreign investments ("RD 571/2023"), which, among other matters, implements the provisions governing the suspension of the liberalisation regime for foreign direct investments (FDI) in Spain provided for in Law 19/2003, of 4 July, on the legal regime of capital movements and economic transactions abroad and on certain measures to prevent money laundering ("Law 19/2003")<sup>1</sup>.

- RD 571/2023 defines and, to a certain extent, clarifies the regulation of foreign direct investments in Spain included in the scope of the suspension of the investment liberalisation regime currently in force and, therefore, subject to prior administrative authorisation.
- In this context, the utility of the legislation lies mainly in providing regulatory coverage for interpretative criteria that were being applied in practice by the competent authorities, in particular, concerning transactions that were exempt from authorisation, and in developing the authorisation and consultation procedure, thereby providing certainty in this respect.
- The **regulation will enter into force on 1 September 2023 and does not apply to foreign investment authorisation applications the processing of which began before** the date of the law's entry into force.

Based on the concept of foreign direct investment and the system of supervision provided for in Article 7 bis of Law 19/2003<sup>2</sup>, in this Legal Briefing, we analyse the main new features introduced by this new regulation in relation to the suspension of the liberalisation regime for foreign investments.

### 1. Main aspects relating to investments subject to prior authorisation: Clarifications and exemptions

#### A. The concept of foreign direct investment subject to supervision

- a) It is expressly stated that both the examination of investments and the measures that may arise from them must **be necessary and proportionate to preserve public safety, health and order**.

Thus, more than three years after the approval of the amendment to Law 19/2003 that gave rise to the current regime for the supervision of foreign investments in Spain, RD 571/2023 reinforces the fact that the purpose and basis of the regulation of the supervision of foreign investment lie in supervision for reasons of national security and public order, consistent with the provisions of European Union law.

- b) The concept of foreign direct investment subject to supervision is specified<sup>3</sup>. Thus:

- Investment transactions that have little or no impact on the legal assets protected by these regulations are not subject to supervision<sup>4</sup>.

1. The law also governs (i) the declaration of foreign investments in Spain to the Registry of Investments as well as (ii) the declaration of Spanish investments abroad to the Registry of Investments, although these issues are not analysed in this legal briefing.

2. It should be noted that this article was introduced by Royal Decree-law 8/2020, of 17 March and subsequently amended by Royal Decree-law 11/2020, of 31 March, Royal Decree-law 34/2020, of 17 November and Royal Decree-law 20/2022, of 27 December.

3. For the purposes of the provisions of Article 7 bis of Law 19/2003.

- The following are not considered to be foreign direct investments susceptible to supervision: (i) internal restructurings within a group of companies, or (ii) increases in shareholdings in companies by a shareholder who already has a shareholding of more than 10% and which do not entail a change of control.
- c) The criterion already used in practice by the competent authorities is expressly included, whereby **the Management Companies of collective investment institutions** or closed-end collective investment undertakings, occupational pension funds or other retirement investment undertakings are considered to be the holders of the foreign investment, provided that their shareholders or beneficiaries do not legally exercise political rights or have privileged access to company information.

## B. Objective criterion: areas of investment

As is well known, under Article 7 bis of Law 19/2003, not all foreign direct investment in Spain is subject to prior authorisation, but rather only that which meets any of the objective or subjective criteria specified in paragraphs 2 and 3 of the same article.

In this context, and regarding the objective criterion, RD 571/2023 introduces certain clarifications to the definitions of the sectors of activity defined in section 2 of Article 7 bis in which a foreign direct investment may be subject to supervision<sup>5</sup>. Among these, the following are worth highlighting:

- a) Technologies developed under the auspices of programmes and projects of particular interest to Spain: These are expressly defined for the first time as those technologies that involve a substantial amount or percentage of funding from the EU or Spanish budget. Therefore, in addition to continuing to provide for the importance for supervisory purposes of certain classes or categories of technology (e.g., nanotechnology, biotechnology, etc.), public funding is expressly introduced as a possible determining factor of supervision.
- b) Critical inputs: Inputs provided by companies developing and modifying software used in the operation of critical infrastructure in strategic sectors (e.g., energy sector, telecommunications, health, transport, etc.) are included.

In addition, the following **exceptions to the prior authorisation regime are provided for**:

- c) In the energy sector, regardless of the size of the investment, investments to which the following circumstances apply<sup>6</sup>:
- Where the acquired companies or assets are not engaged in regulated activities<sup>7</sup>.
  - Where, as a result of the transaction, the company does not acquire the status of a dominant operator in the sectors of electricity generation and supply, production, storage, transport and distribution of fuels or biofuels, production and supply of liquefied petroleum gases or production and supply of natural gas<sup>8</sup>.

4. Specifically, Article 14.2 of RD 571/2023 refers to the legal assets protected under Article 7 bis of Law 19/2003, Article 65 of the Treaty on the Functioning of the European Union and Article 17 of RD 571/2023 itself.

5. In most cases, they do not represent a significant new development regarding Law 19/2003 or the authorities' own practice.

6. Provided that the investment is not subject to the prior authorisation regime due to the subjective scope, i.e., the characteristics of the competent investor.

7. These are understood to be the operation of the electricity system and market, the transport and distribution of electricity, the supply of electricity in non-peninsular territories, the technical management of the gas system, and the regasification, basic storage, transport and distribution of natural gas. Other activities established by the applicable sectoral legislation shall also be considered regulated activities.

8. Under the terms provided in Royal Decree-law 6/2000, of 23 June, on urgent measures to intensify competition in markets for goods and services.

- Where the investment involves the acquisition of electricity production assets, provided that the share of installed power by technology is less than 5%, under the calculation criteria provided for in RD 571/2023.
  - For the acquisition of companies engaged in the commercialisation of electricity with fewer than 20,000 customers.
- a) In the remaining strategic sectors subject to supervision (except for critical infrastructure and the aforementioned energy sector), foreign investments are exempt from prior authorisation when the turnover of the companies acquired does not exceed 5,000,000 euros<sup>9</sup> in the last financial year, provided that their technologies have not been developed under programmes and projects of particular interest to Spain<sup>10</sup>.
  - b) Investments through which real estate is acquired which is not assigned to any critical infrastructure or which is not indispensable and not substitutable for the provision of essential services.
  - c) Transitory investments, i.e., investments that have a short duration (hours or days) in which the investor cannot influence the management of the acquired company because they are underwriters and insurers of share issues and public offers for the sale or subscription of shares. In such cases, it is the ultimate investors who, where appropriate, need authorisation.

Finally, there is a requirement for the following investments **to be subject to authorisation at all times:**

- a) Investments in electronic communications operators that hold concessions for the use of the public radio-electric domain, in frequency bands harmonised under European Union legislation, licences for the use of orbit/spectrum resources under Spanish sovereignty or which have been classified as operators with significant influence in a relevant market in the electronic communications sector.
- b) Transactions relating to research activities and the exploitation of mineral deposits of strategic raw materials.

### C. Subjective criterion: characteristics of the investor

Regarding the subjective criterion, certain clarifications have been made regarding the cases in which, under Article 7 bis(3) of Law 19/2003, foreign investment is subject to supervision based on the characteristics of the investor, irrespective of the sector in which the investment is made.

Among other issues, RD 571/2023 specifies that in order to determine whether an **investor is controlled by the government of a third country:**

- An investigation may be carried out as to whether this supervision is provided through significant funding, including subsidies, by the government of a third country.
- There are specific rules for determining the existence of such supervision in the case of funds of a public nature, or public employee pension funds<sup>11</sup>.

9. The minimum threshold of 1 million euros provided for on a transitional basis in the Second Transitional Provision of Royal Decree-law 11/2020, of 31 March, is thus raised.

10. However, foreign direct investments will always be subject to authorisation in the following cases: (a) Where they take place in electronic communications operators which are holders of concessions for the use of the public radio-electric domain, in frequency bands harmonised under European Union legislation, licences for the use of orbit/spectrum resources under Spanish sovereignty or where they have been classified as operators with significant influence in any relevant market in the electronic communications sector.

(b) Where they are transactions related to research activities and the exploitation of mineral deposits of strategic raw materials.

11. Public supervision may be deemed not to exist if it is clear from the nature of the fund manager, the legal or statutory provisions for the appointment of its administrators or other statutory provisions relating to its management or nature, that its investment policy is independent and focuses exclusively on the profitability of its portfolios without the political influence of a third state.

## 2. Voluntary consultation procedure

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A voluntary consultation procedure has been formally introduced in order to determine whether investments are subject to prior authorisation with the following features<sup>12</sup>.

- A period of **30 business days to respond** has been established during which the opportunity to apply for an authorisation is suspended until the resolution is announced<sup>13</sup>.
- The consultation should be addressed to:
  - a) The **Directorate General of Armaments and Material** of the Ministry of Defence in the case of investments exclusively referring to activities directly related to National Defence.
  - b) The **Directorate General of International Trade and Investments** of the Ministry of Industry, Trade and Tourism in all other cases, including those that may be subject to more than one of the authorisation regimes (i.e., in addition to the cases governed by Article 7 bis of Law 19/2003, they may also be related to National Defence).
- The resolution of the consultation will be issued following a report by the Foreign Investment Board ("JINVEX") and will be binding on the bodies and entities of the Government consulted vis-à-vis the party that sought the consultation.
- The confidentiality of the proceedings is expressly established.

## 3. Prior authorisation procedure

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### A. New procedural features: Term, extension and effects and content of the authorisation resolution

The following provisions have been introduced with regard to the prior administrative authorisation procedure for foreign investments in Spain:

- a) The application for authorisation must be resolved and communicated to the interested party within a **maximum period of three months**<sup>14</sup>.
- b) The requirement for a prior report by the JINVEX is maintained and it is expressly provided that applications for the authorisation of investments of **five million euros or less will be decided by the head of the Directorate General of International Trade and Investments**.
- c) Regarding the **effects and content of the authorisation** and execution of the authorised investment, the following details are provided:
  - The authorised investments **must be executed within the period** specifically established in the authorisation or, failing this, within six months. Once this period has elapsed without the investment being carried out, the authorisation will lapse unless an extension is obtained.
  - An **extension of the authorisation period** may be requested (i) only once, (ii) for an additional six months, and (iii) always before the end of the original authorisation period.

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12. It should be noted that this voluntary consultation procedure had been applied in practice by the Subdirectorate General of Foreign Investments, although it was not specifically regulated.

13. Once this period has elapsed without an express resolution of the consultation, a request for authorisation of the investment may be submitted.

14. The consequences of failure to resolve the application for authorisation within the deadline are not expressly provided for, but we understand that administrative silence must be interpreted as a refusal. This is expressly provided for in RD 571/2023 for specific procedures for the authorisation of foreign investments in activities directly related to National Defence, and foreign investments in Spain in activities directly related to arms, ammunition, pyrotechnic articles and explosives for civilian use or other material for use by the State Security Forces and Corps.

- Alterations **to the terms of the authorised investment** (i) must be communicated to the Government body that processed the corresponding application; and (ii) where the alteration substantially modifies the terms of the investment, it must be resubmitted for authorisation.
  - It is expressly provided that the **authorisation resolution may be subject to conditions** imposed by the competent authority itself, or commitments submitted by the investor and accepted by the competent authority.
- d) The effects of carrying out **investment transactions without the required prior authorisation** are specified. RD 571/2023 provides that, as these transactions lack validity and legal effects, a foreign investor **may not exercise its economic and political rights in the Spanish company** until the necessary authorisation is obtained.
- e) RD 571/2023 expressly regulates the sending of a **communication to the National Securities Market Commission (CNMV)** in the event that the suspension of the general liberalisation regime and, therefore, the requirement for prior authorisation, may be applicable to acquisitions arising from a public offer to buy, sell or subscribe to shares admitted to trading on a Spanish regulated market, in order for the offeror to include this information in the documentation that may have to be disseminated in relation to the offer.
- f) Similarly, a notary who becomes aware that a foreign investment transaction is subject to prior authorisation must inform the applicants of the need to obtain such authorisation.
- g) The **confidential nature** of the information provided in the authorisation procedure is expressly included.

## B. Other provisions

- a) A single application for joint authorisation will be processed in the case of investments carried out with the agreement of two or more investors, in order to exercise joint control over the object of the investment.
- b) Two or more foreign investment transactions that take place within a two-year period between the same buyers and sellers shall be considered a single investment.
- c) Investments subject to both Industry and Defence supervision regimes shall be submitted simultaneously to the JINVEX and shall be submitted jointly in a single proposal for a resolution to the Council of Ministers<sup>15</sup>.

## 4. The specific case of activities directly related to National Defence or to weapons and explosives for civilian use

### A. Activities directly related to national defence

The supervision of investments in the area of defence is not a new development, as it predates even the reform introduced by Article 7 bis of Law 19/2003. However, Royal Decree 5221/2023 introduces certain clarifications:

- a) It amends the definition of the parties that may be holders of foreign investments in Spain for the purposes of supervision in the area of Defence. Thus, in addition to non-resident foreign investors, "resident" foreign individuals are included, regardless of their nationality.

15. This refers to authorisation application procedures that are subject to more than one of the authorisation regimes regulated by RD 571/2023 (i.e., investments subject simultaneously to one of the cases regulated in Article 7 bis of Law 19/2003, and to the authorisation regime for foreign investments in activities directly related to National Defence and/or activities directly related to arms, ammunition, pyrotechnic articles and explosives for civilian use or other material for use by the State Security Forces).

- b) The definition of activities directly related to national defence is clarified by specifying that they include activities that affect the industrial capacities and areas of knowledge necessary to provide the equipment, systems and services that provide the Armed Forces with the necessary military capabilities, as well as those that are intended for the production (understood as the design and manufacture), maintenance or trading of defence material in general.
- c) **The thresholds above which investments are subject to supervision** are specified:
- Investments that amount to less than 5% of the share capital are exempt from supervision if they do not allow the investor to be part, directly or indirectly, of their management body<sup>16</sup>.
  - Furthermore, **foreign investments will be exempt from authorisation and only subject to communication when they have reached between 5% and 10% of the share capital**, provided that the investor undertakes in a public deed not to use, exercise or transfer his voting rights to third parties, or to form part of any of the **listed company's** management bodies<sup>17</sup>.
- d) In those cases in which the foreign investment, due to its nature, characteristics or the value of the transaction, does not affect the essential interests of defence, it may be authorised by the head of the Directorate General of Armaments and Material, following a report by the JINVEX.

**B. Foreign investment in Spain in activities related to the manufacture, trade or distribution of arms, ammunition, pyrotechnic articles and explosives for civilian use.**

The supervision of foreign investment in activities related to the manufacture, trade or distribution of arms, ammunition, pyrotechnic articles and explosives for civilian use is established as a separate and distinct regime.

16. Therefore, in principle, it seems that the 5% capital limit is extended to unlisted companies.

17. This reference to listed companies in the literal wording of the regulation seems to be intended to limit the application of this exception to listed companies, but it would be useful to clarify this aspect.

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