Legal News Alert

Foreign direct investment screening in the main continental European jurisdictions: trends and challenges

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INTRODUCTION

On October 11, 2020, Regulation (EU) no. 2019/452 of the European Parliament and of the Council dated March 19, 2019 - which establishes a framework for the screening of foreign direct investments into the Union (so-called “FDI Regulation”) - came into force.

While the FDI Regulation does not affect the power of each Member State to decide whether to set up a screening mechanism or to screen a particular foreign direct investment, it provides the Member States and the Commission with the instruments to address risks to security or public order, also allowing Member States to screen foreign direct investments taking into account their individual situations and national specificities.

On the one hand, the FDI Regulation provides certain criteria to be taken into account by Member States and the Commission in order to evaluate whether a foreign direct investment is likely to affect security or public order and applies to all sectors and assets, regardless of the economic value of the transaction, including *inter alia*: *(a)* critical infrastructures, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure; *(b)* critical technologies and dual use items, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies; *(c)* supply of critical inputs, including energy or raw materials, as well as food security; *(d)* access to sensitive information, including personal data, or the ability to control such information; or *(e)* the freedom and pluralism of the media.

On the other hand, the FDI Regulation also establishes certain cooperation mechanisms between the Member States and the Commission in order to enhance the efficiency of the screening mechanisms in place in each Member State (namely, the exchange of information). The new EU framework also encorages international cooperation on investment screening, fostering the sharing of experiences, best practices and information.

Futhermore, the FDI Regulation allows the Commission to issue opinions in case an investment could pose a threat to the security and public order of more than one Member States, or undermine a project of interest to the whole EU.

The FDI Regulation has become fully operational in a context now deeply affected by the current pandemic. Indeed, the COVID-19 outbreak galvanized the Commission to issue - on March 25, 2020 - a Communication inviting the Member States to make full use of their existing screening mechanisms in accordance with the FDI Regulation, or - as regards those Member States that did not have a screening mechanism in place at such date, or whose screening mechanisms did not cover all relevant transactions - to set up a fully-fledged screening mechanism and, in the meantime, to consider other available options, in full compliance with EU law and international obligations.

The need for guidance has been driven by the increased vulnerability of European companies operating in key sectors and their possible exposure to "*predatory buying*" by foreign investors in the current COVID-19 crisis. In particular, it was the European Commission's concern that the risk of foreign takeovers of European strategic players and assets could be further exacerbated by the volatility or the undervaluation of European stock markets.

Thus, the adoption of such Communication anticipated and accelerated the application of the FDI Regulation in order to ensure that the aforementioned companies and assets were properly protected from the very beginning of the pandemic, so calling upon Member States to be particularly vigilant and to use all instruments available at EU and national level to prevent the loss of strategic assets and technologies.

As a result, the majority of the Member States introduced (already before October 11, 2020) temporary and/or permanent provisions aimed at strenghtening their existing FDI screening mechanisms by widening both the sectors concerned and the triggering events which justify the use of the special powers granted under each different jurisdiction.

In light of the above, this memorandum offers a brief overview of the main innovations recently introduced in France, Germany, Italy, Portugal and Spain granting the respective national competent authorities deeper powers to protect companies and assets deemed "strategic".

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FRANCE

1. Overview of the Current French regime

The French legal regime focuses on sensitive sectors encompassing a broad list of activities which, even if only occasionally, involve or participate in the exercise of public authority or pertain to businesses (i) that may jeopardize public order, public safety or national defense interests, or (ii) relate to research in, manufacture or commercialization of weapons, ammunition, gunpowder or explosive substances.

A new legal framework for foreign investment control (FIC) was enacted in May and December 2019, and became effective as from April 2020. Under these new decrees and orders, the scope of the prior authorization regime has been substantially extended (notably to Biotechs), the procedure to obtain the authorization from the French Ministry of the Economy (the French Ministry) has been streamlined and the remedial and sanction powers of the French Ministry have been substantially reinforced.

The regime is now triggered by investments resulting in: (i) the acquisition of control within the meaning of Article L. 233-3 of the French Commercial Code of a legal entity governed by French law; (ii) the acquisition of all or part of a line of business of an entity governed by French law; or, except in certain cases relating to EU citizens, (iii) the crossing (upward), directly or indirectly, alone on in concert, of the threshold of 25% of the voting rights of a legal entity governed by French law.

2. Further Developments in 2020: FIC Regime for Listed Companies

Decree No. 2020-892 of July 22, 2020 and Ministerial Order of July 22, 2020, published in the French Official Gazette on July 23, 2020, have temporarily lowered one of the FIC triggers to 10% of voting rights in French companies listed on Euronext Paris. The implementation of this lower control threshold is accompanied by the implementation of a lighter screening procedure.

a. European Investors are Excluded

The investors concerned are only those outside the European Economic Area. Indeed, European investors do not fall within the scope of the text, provided that the chain of control does not include a non-European entity.

b. A lighter Screening Procedure

For investments falling within the scope of the screening, a prior notification procedure with the French FIC administration (so-called "Multicom 4" at Direction Générale du Trésor) has been put in place.

The information to be provided as part of the notification procedure corresponds in substance to the information that is already required to be provided to the French

financial markets authority (*Autorité des Marchés Financiers*) whenever a 10% threshold is crossed with respect to a listed company, i.e:

- The details of the shareholding and any financial instruments or contracts that are assimilated to the holding of shares;

- The intentions of the investor, and in particular if the investor intends to further increase his stake, to request the appointment of a representative within the issuer's corporate bodies, or more generally his strategy vis-à-vis the issuer.

At the end of a period of 10 working days, the authorization is deemed to have been granted (silence is tantamount to acceptance unlike in the ordinary screening procedure) and allows the acquisition of the shareholding to be completed within six months.

During this period of 10 working days, the FIC administration may oppose this simplified procedure and compel the investor to file for an authorization under the ordinary FIC procedure. This will result in a significant delay in the acquisition of a stake, given the time required to prepare the authorization file and the initial 30 working days available to the administration for reviewing the application.

c. A Temporary Regime Limited to 2020?

This new foreign investment authorization regime came into force a few days after its enactment (6 August 2020) and is planned to remain in force until the end of 2020. However, given the durable economic consequences of the COVID-19 outbreak, an extension of this derogated regime, although not confirmed, cannot be excluded.

3. Potential Impacts of the New FIC Coordination at European Level

Since October 11, 2020, the cooperation mechanism provided for in the 2019/452 EU Regulation is now fully operational.

Other member state comments or the opinion of the Commission can be issued up to 35 calendar days after notification of the screened investment to the other member states and the European Commission, whilst the French FIC administration must respond to the investor by notice, within thirty (30) business days of receiving a "complete request" for authorization. The articulation of both time periods in practice is yet to be determined, although the French FIC administration usually considers that the mechanism should not result in an extension of applicable time limits under the French FIC regime - which are currently handled in a very pragmatic way by the French administration. When the European coordination procedure is triggered, one may however assume that the French regulator will likely wait until the end of the 35-day coordination period before releasing its decision.
The way the outcome of the new European coordination procedure (whether comments being raised from, or a national screening being initiated by, other member states, or, where relevant, the issuance of an opinion from the European Commission) might be taken into account by the French administration is yet to be seen in practice.

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GERMANY

In Germany, the Federal Ministry for Economic Affairs and Energy (*Bundesministerium für Wirtschaft und Energie* – "**BMWi**") is entitled to review (direct and indirect) acquisitions of voting rights in German target companies by foreign investors, subject to certain thresholds. The German statutory rules on foreign investment control are developing constantly and provide for several categories of transactions which are subject to ministerial review powers (1.). 2020 has been a year of remarkably dynamic development in German foreign investment controls. The German Government has kicked off and has proceeded with a whole series of statutory reforms, which have already led (2.), and will further lead (3.) to a substantial tightening of the German foreign investment control regime with a material impact on cross-border M&A involving German target companies (4.).

1. Overview of the current German foreign investment rules

German foreign investment control law generally provides for two control regimes, both governed by the Foreign Trade and Payments Act (*Außenwirtschaftsgesetz* – "**AWG**") and the Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung* – "**AWV**"):

- For particularly sensitive industry sectors, such as manufacture or development of certain military equipment and development of encryption technology, the so-called **sector specific foreign investment control regime** applies to (direct or indirect) acquisitions of at least 10% of the voting rights in German target companies by any foreign investor. Investments of this kind are subject to a **regulatory approval requirement** and completion of such acquisitions is subject to a statutory condition precedent of BMWi's approval.

- Irrespective of the relevant industry, (direct or indirect) acquisitions of at least 10%/25% (as the case may be) of the voting rights in a German target company by investors with registered office outside the EU or EFTA are subject to the so-called **cross-sector foreign investment control regime**. Under this regime, the BMWi may review, restrict or even prohibit an acquisition if it poses a threat to public order or security. To this end, the transaction agreement is subject to a statutory condition subsequent of the BMWi prohibiting the intended acquisition. A 10% threshold and a statutory notification duty to the BMWi apply to certain **civilian security-relevant industries** such as the operation of so-called critical infrastructures (currently including energy, water, food, telecommunications, transport, finance, insurance, and healthcare) ("**Reportable Acquisitions**"), whereas all other industries are subject to the 25% threshold and no regulatory approval or notification requirement.

2. Substantial tightening in 2020

In 2020, the German Government kicked off a whole series of statutory reforms aimed at further tightening the German foreign investment control regime, of which the following have already entered into effect:

- In June 2020, the 15th amendment of the AWV, primarily triggered by the COVID-19 pandemic and driven by fears of potential comparable crises in the future, has **expanded the scope of Reportable Acquisitions** to cover foreign investments in a broad range of German target companies active in the **healthcare and infection protection sectors**. In particular, the rules on Reportable Acquisitions now cover acquistions of voting rights in German target companies active in the development and manufacture of certain pharmaceuticals (including the relevant raw materials and active ingredients), certain medical devices and personal protective equipment within the meaning of Regulation (EU) 2016/425.

  Furthermore, the German Government has taken the 15th amendment of the AWV as an opportunity for additional statutory changes not directly relating to the COVID-19 pandemic. In particular, foreign investments in German target companies that provide services in relation to state communication infrastructures (i.e. a digital voice and data transmission system for authorities and organizations with security functions) have been added to the scope of Reportable Acquisitions. In addition, in conducting its review, the BMWi is now explicitly entitled to take into account whether a foreign investor is state-owned or state-controlled or the investment is state-financed.

- Only one month later, in July 2020, the 1st amendment of the AWG introduced a **gun-jumping prohibition for Reportable Acquisitions** by two means: First, the consummation of such transactions is now subject to a condition precedent that the transaction is cleared by the BMWi or the relevant time-periods for its review have expired. Second, the new AWG rules now prohibit certain closing-related activities benefitting the purchaser, namely, any facilitation of the exercise of voting rights or grant of profit distribution claims connected with the acquisition. In addition, and very importantly, before ministerial clearance the provision of company-related information regarding the security-relevant activity of the German target company is prohibited. Furthermore, the gun-jumping prohibition is backed by **criminal sanctions**: Natural persons carrying out prohibited closing-related activities can face a prison sentence of up to five years or a fine.

  The 1st amendment of the AWG has also changed the **substantive review standard** of the German cross-sector foreign investment control regime: The BMWi's powers no longer only protect the public order and security of the Federal Republic of Germany; rather, the protection of the public order and security of other EU Member States and projects or programmes of EU interest (e.g. Galileo, Copernicus, Horizon 2020) are now also part of the ministerial screening rationale. In addition, since July 2020, foreign investments may already be restricted or prohibited if the acquisition "*potentially impairs*" public order or security, rather than the BMWi having to establish an *actual* threat to public order or security.

- In October 2020, the amended review standard was transposed into the AWV by way of the 16th amendment of the AWV.

3. Upcoming further tightening in 2021

Currently, the German Government is already preparing the next step of the reform of German foreign investment control law. The upcoming 17th amendment of the AWV will once again concern Reportable Acquisitions and is expected to further expand their scope in order to include foreign investment in companies active in the field of so-called critical technologies. The details of this legislative amendment are not known yet, but the new list of such critical technologies are likely to include in particular artificial intelligence, robotics, semiconductors, biotechnology and quantum technology. The completion of acqusitions in these industry sectors would in future also be subject to a statutory condition precedent of the BMWi's approval; closing-related activities would be prohibited until ministerial clearance and this prohibition would be backed by criminal sanctions. The 17th amendment of the AWV, expected to come into effect in Q1 2021, is intended to protect not only the public order and security of the Federal Republic of Germany, but also its future "technological sovereignty".

4. Material impact on cross-border M&A

The legislative reform series, which was kicked off by the German Government in 2020 and which is expected to continue in 2021 with the upcoming 17th amendment of the AWV, will certainly have a material impact on cross-border M&A involving German target companies. Not only has the German Government expanded, and will soon further expand, the scope of Reportable Acquisitions leading to more and more foreign investments in German target companies being caught by the lower 10 % voting rights threshold and being subject to a notification duty to the BMWi. In addition, the growing scope of Reportable Acquisitions has been combined with a ministerial approval requirement and a gun-jumping prohibition backed by criminal sanctions. For international investors, a detailed risk analysis under German foreign investment control law will become more crucial than ever in order to avoid obstacles to closing, unexpected delays in the deal schedule and even criminal sanctions. In this context, dealmakers have to take into account the notification duty and the gun-jumping prohibition in the timing, the closing mechanism and the risk assessment of a Reportable Acquisition. In addition, sellers in cross-border M&A transactions have to structure the due diligence process in such a way that no security-relevant information is disclosed to potential purchasers. These enhanced challenges are reinforced by the criminal sanctions attached to violations of the new gun-jumping prohibition.

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ITALY

In order to protect Italian public and private companies from speculative bidders in the emergency context, the Italian legislator introduced certain provisions aimed at strengthening the existing Italian regulation on foreign direct investment screening (set out in Law Decree no. 21/2012 and its implementing laws and regulations; so-called "Golden Power" regulation).

In summary, the main legislative changes - introduced by Law Decree no. 23 of April 8, 2020, converted with amendments into Law no. 40 June 5, 2020 - include: (i) the immediate and full application of the notification obligations to the economic sectors and assets referred to in EU Regulation no. 452/2019 (the "FDI Regulation"); (ii) the lowering of the percentage thresholds triggering the notification obligations, especially with reference to non-European transactions; (iii) the partial application of the notification obligations also to European Union investors (including, in certain cases, Italian investors), and (iv) the introduction of new powers enforceable *ex officio* by the Presidency of the Council of Ministers in the event of breach of any notification duty.

1. The extension of the strategic sectors concerned

For the entire duration of the pandemic (that we expect the Italian legislator will deem to be until June 30, 2021), the Italian Government may scrutinize investments in all the economic sectors referred to in the "FDI Regulation", such as (i) critical infrastructures, both physical and virtual, including energy, transport, water, health (now expressly including the production, import and wholesale distribution of medical devices and devices for personal protection), communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructures (which now expressly include the credit and insurance sectors); (ii) critical technologies and dual use products; (iii) supply of critical inputs, including energy or raw materials, as well as food security; (iv) access to sensitive information, including personal data, and (v) media freedom and pluralism.

On May 28, 2020, a draft Decree of the Presidency of the Council of Ministers was published, which specifically identifies - or provides the criteria to identify - the assets included in the strategic sectors generically referred to in the FDI Regulation. When such draft Decree enters into force, the assets indicated in the provisions contained therein will permanently replace those set out in the FDI Regulation.

In addition, on November 16, 2020, a further draft Decree of the Presidency of the Council of Ministers was published, which will update the list of relevant assets for the energy, transport and communication sectors. The Italian legislator intends by this Decree to further implement the provisions of the FDI Regulation, e.g. expressly including "road and highway networks" among the assets permanently falling within the scope of application of the Italian Golden Power regulation.

Without prejudice to the above, until June 30, 2021 - or the earliest date in which the aforementioned decrees will enter into force - companies holding assets or with relationships relating to the sectors generically referred to in the FDI Regulation are required to notify to the Presidency of the Council of Ministers any resolution, act or transaction which implies any change in the ownership, control or free availability of the strategic assets or the modification of their allocation. At the same time, whoever intends to acquire shares in the companies identified above is also required to comply with such notification obligations if the transfer of the shareholding causes various thresholds indicated below to be exceeded.

2. The introduction of new thresholds and conditions

The new legal framework also provides that, until June 30, 2021, the notification to the Italian Government is required either in case of acquisition of a controlling stake, even when by an EU purchaser, or in case of acquisition of a stake exceeding 10% of the voting rights or the share capital of the Italian strategic target company by a non-EU investor, provided that the investment has an overall value equal to, or higher than, Euro 1 million. Also acquisitions by a non-EU investor resulting in crossing the thresholds of 15%, 20%, 25% and 50% of the target's share capital must be notified according to the same rules.

In addition, during the same time period, companies holding significant assets and relationships in the strategic sectors mentioned above are required to notify all acts, resolutions and transactions involving a transfer of ownership, control or, in any case, of the free availability of the strategic assets or a modification of their allocation, regardless of whether or not the holder is an entity within the European Union. It should be noted that this obligation to notify applies also to transfers in favour of Italian entities, including intra-group transactions.

3. Failure to notify and subsequent intervention of the Italian Government

Finally, Law Decree no. 23/2020 amended on a permanent basis the Italian Golden Power regulation providing that the Italian Government may commence *ex officio* proceedings for the exercise of the special powers granted to it (namely, the power to veto/oppose the transaction and to impose specific requirements and conditions to the execution of the transaction itself) in the event of breach of any notification obligations provided under Law Decree no. 21/2012. In such instances, the term for completion of the governmental scrutiny runs not from the closing of the transaction, but from the end of the investigation activities aimed at assessing whether there has been a breach of the notification obligation. The new *ex officio* power supplements the ordinary sanctioning mechanisms in the event of non-compliance with the obligations arising from the Golden Power regulation, therefore ensuring a more effective protection of national interests.

4. The introduction of new forms for notifications

In addition to the above, on November 17, 2020 the Italian Presidency of the Council of Ministers adopted certain new draft forms to be used by market operators to notify the relevant transactions falling within the scope of application of the Italian Golden Power regulation. Such new draft forms - amended in order to comply with the information obligations provided under the FDI Regulation - refer, respectively, to the sectors of defence and national security, as well as energy, transport and communications (including for the purposes of Article 4, paragraph 1, of the FDI Regulation).

As a result, the Italian Government now requires a wider set of information concerning the transaction under scrutiny and the parties involved (such as, for instance, an indication of whether the transaction needs to be authorized in other EU Member States, including under the FDI Regulation) and expressly provides that all notifications and the relevant attached documents must be both in Italian and English.

5. Experience to date of the application of the new Italian provisions on FDI screening

Starting from the introduction of the aforementioned provisions the number of notifications filed by market operators (both European and non-European) significantly increased due to the extension of the economic sectors and assets falling within the scope of application of the regulations, as well as the widening of the triggering events provided thereunder.
Indeed, due to the uncertainties in the identification of the strategic sectors and assets listed in the FDI Regulation (which is now immediately applicable in Italy), investors commonly decide to file notifications “on a prudential basis” only, in order to avoid the burdensome sanctions provided in case of breach of the provisions set forth by the Italian Golden Power regulation.

In such a scenario the Italian Government may avail itself of highly discretional powers, which include the possibility to ask the notifying parties - as well as third parties – for further information concerning the transaction under scrutiny, thus suspending the time periods of the investigation and, as a consequence, lengthening the envisaged timing of the transaction. In addition, the Italian Government has been adopting an extensive interpretation of the conditions and events (e.g., the notion of change of “control” over the relevant assts) that may trigger the special powers granted to it under the Golden Power regulation.

In light of the above, market operators are highly recommended to carefully evaluate whether to notify or not any transaction which may potentially trigger the notification obligations provided under the Italian Golden Power regulation.

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PORTUGAL

There has been no "COVID-19 specific" foreign investment control legislation in Portugal to date; neither for private, nor for public (listed) companies or other assets.

Actually, there is an existing screening mechanism in Portugal, approved by Decree-Law no. 138/2014, of September 15[1] (the "**Decree-Law 138/2014**"). However, it is limited to strategic assets in particularly sensitive industry sectors, based on reasons of national defense and security and/or security of supply of services fundamental to the national interest, and, to our knowledge, has not been enforced to date.

Indeed, the Portuguese Governments have historically been very supportive and open to foreign investment, with strategic companies and infrastructures being controlled by foreign investors, some of them non-EU or EEA based, and unless some material changes in circumstances occur, we do not foresee a significant change in that political and economic approach.

Having said this, FDI Regulation mentioned in the Introduction above and which technically entered into force on October 11, 2020, establishes a framework relating to the control by Member states of foreign direct investment for security or public policy reasons which is automatically applicable in Portugal and may determine some changes in the national screening mechanisms.

1. Overview of existing restrictions on foreign investment

Although differing in design and scope from the mechanism provided in the FDI Regulation, Decree-Law 138/2014 also purports to screen foreign investments in respect of strategic assets, which are defined as the **main infrastructures and assets** related to (i) **national defense and security** and/or (ii) **the supply of essential services in the energy, transport and telecommunications sectors**.

Under this framework, the Portuguese Government may initiate an investigation and, ultimately, oppose transactions (ex post) regarding strategic assets that (i) directly or indirectly result in **direct or indirect control** by a person or persons from **non-EU or non-EEA third countries** (that is, whose domicile, registered office or headquarters and effective administration is located outside of the EU and the EEA) to the extent that (ii) such transaction represents, in a real and sufficiently serious way, a threat to **(a) national defense and security and/or (b) the security of supply of services fundamental to the national interest**.

Decree-Law 138/2014 has a less comprehensive scope when compared with the FDI Regulation and with screening requirements in other EU countries, as it only applies to certain economic sectors or industries and sets specific criteria to assess that there is a

[1] https://dre.pt/pesquisa/-/search/56819089/details/maximized

threat to national defense and security or to the national interest, namely on the grounds of risks to the international community as a result of the nature of the acquirer's alliances or relations with criminal or terrorist organizations, past uses of the control position to create serious difficulties in the regular provision of essential public services or changes in the destination of the strategic assets.

Where Decree-Law 138/2014 applies, the Portuguese Government may initiate an investigation procedure, within 30 days counted as from the conclusion of the transaction (or from the date the transaction becomes public) to assess the risk of the relevant transaction. In this context, the Portuguese Government may request from the acquirer all information it considers relevant. The Portuguese Government has a 60-day period (counted as from receiving all required information/documents) to adopt a decision. If no decision is taken within this period, a non-opposition decision is deemed to have been taken.

In case an opposition decision is taken, all contracts and legal acts relating to the transaction (including acts regarding the economic exploitation of and the exercise of rights over the relevant assets) are null and void.

The acquirers of strategic assets subject to screening may request the Portuguese Government's clearance (confirmation of non-opposition) to a given transaction. If no response is given or no investigation is initiated within 30 days from the request, a confirmation decision is deemed to have been granted.

2. Future developments on restrictions on foreign investment

Although Decree-Law 138/2014 appears to be compatible with the FDI Regulation it is certainly less restrictive; thus, it is possible, although not probable as explained above, that screening mechanisms in Portugal may be amended to accommodate the EU guidance on further foreign investment screening as singled out by the COVID-19 emergency, in particular in relation to the following aspects:

a. extension of its scope to include (i) critical infrastructures in other sectors such as healthcare capacities and related industries, water, communications, media, data processing or storage, electoral or financial infrastructure and sensitive facilities, (ii) critical technology, (iii) supply of critical inputs (energy, raw materials and food security), (iv) access to sensitive information or ability to control such information; and expand the screening to monitor health security risks;

b. Inclusion of procedural rules on the exchange of information and collaboration with other Member States and the Commission, as foreseen in the FDI Regulation. So far, the Portuguese Government has not indicated its intention to enact legislation to increase the screening of direct foreign investment, thus Decree Law 138/2014 shall be applicable until a new law or Decree Law expressly repeals it.

3. Impact on cross-border M&A

The EU guidance and trends is already impacting and will further impact cross-border M&A involving Portuguese target companies in strategic sectors.

The fact that the FDI Regulation entered into effect and its potential impact in the application (or future modification) of domestic legislation, and the increased awareness of authorities and players to the screening of direct foreign investment, is causing sellers and purchasers to carry out a risk analysis on potential FIC when selecting bidders or preparing a bid for assets in strategic sectors. In this context, dealmakers have to review alternative solutions to reduce uncertainty, including the possibility to carry out a notification, when applicable, in order to obtain a negative clearance from the member of the Government responsible for the area where the asset is included.

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SPAIN

Within the context of the COVID-19 crisis, Spain has enacted new legislation providing for prior authorization by the Spanish Government ("*Consejo de Ministros"*) of certain foreign direct investments in Spanish public and private companies. Such new legislation aims to further scrutinize certain investments from foreign investors in core strategic sectors in Spain.

The new legal framework in Spain entered into force on March 18, 2020 and it has been enacted in application of the FDI Regulation 2019/452 mentioned in the Introduction above, which established a framework relating to the control by Member states of foreign direct investment for security or public policy reasons. Such regulations have been subsequently amended by the Royal Decree-Law 34/2020 of November 17, 2020, extending and adjusting the suspension of liberalization of certain foreign investments.

1. Restrictions on foreign investments

Recent legislation in Spain has suspended the system for the liberalization of the so-called "direct foreign investment" as established back in 2003 approving a new regime which provides for a "prior authorization" from the Spanish Government for direct foreign investments under certain circumstances as described below.

For this purpose, "direct foreign investments" mean:

a. those investments made by (i) non-EU/EFTA residents or (ii) EU/EFTA residents where the beneficial owner is a non-resident (i.e., non-resident holding more than 25% of the voting rights or control on the EU/EFTA resident entity); provided that

b. such foreign investors become holders of, at least, a 10% stake in the target company or they acquire the control of the company as provided for in article 7.2 of Act 15/2007, the Spanish Antitrust Act (i.e., they are able to exercise deciding influence over the company).

The new legal framework provides for a "prior authorization" from the Spanish Government for such investments in the following cases:

a. **Based on the target's profile**, when the target operates in one of the "main strategic sectors in Spain", which affect public order, public security, and/or public health. These critical sectors are (i) critical infrastructures, both physical and virtual: energy, transport, water, healthcare, communications, media, data processing and storage, aerospace, defense, electoral, financial, sensitive facilities, and key land and real estate for use of those infrastructures; (ii) critical and double-use technologies, key technologies for industrial leadership and 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 fundamental inputs: energy, raw materials, and food security; (iv) information: access to or screening of sensitive data and personal data; and (v) media.

b. **Based on the investor's profile**, when (i) the investor is controlled directly or indirectly by a third-country government (including investments by public or publicly-controlled companies, or sovereign funds in third countries); (ii) it participates in sectors affecting public order, public security, and public health of another Member State; or (iii) it has had administrative or court proceedings brought against it in another State for exercising criminal or unlawful activities.

As a temporary measure, from November 19, 2020 until June 31, 2021, investments that cumulatively meet the following requirements will be subject to authorization:

(i) Investments made by residents of EU/EFTA countries other than Spain or by residents in Spain with a beneficial owner in an EU/EFTA country.

(ii) Investments whereby the investor becomes the holder of, at least, a 10% stake in the target company or it acquires the control of the company as provided for in article 7.2 of the Spanish Antitrust Act.

(iii) Investments made either in:

- companies listed in Spain (companies whose securities are totally or partially admitted to trading on an official Spanish secondary market and whose registered office is in Spain), or

- unlisted companies, if the value of the investment exceeds EUR 500,000,000.

(iv) The Spanish target company carries out its activities in any of the strategic sectors mentioned in section a above.

Investments under EUR 1,000,000 are temporarily exempted from the prior administrative authorization regime.

The process to obtain the prior administrative authorization from the Spanish Government is as follows:

1. Application to be filed before the General Director for International Trade and Investments ("*Dirección General de Comercio Internacional e Inversiones*"), attaching a set of required documents providing information about the transaction, investment, investors, management bodies, corporate purpose and annual accounts.

2. The Foreign Investment Board ("*Junta de Inversiones Extranjeras*") shall draft a report to be submitted to the Ministry of Industry, Trade and Tourism ("*Ministerio de Industria, Turismo y Comercio*"), who shall deliver a proposal of resolution to the Council of Ministers.

3. The Council of Ministers may grant a (conditional or unconditional) authorization or reject the authorization.

4. The decision made by the Council of Ministers shall be notified within 6 months from the date of application. In the absence of such express notification, the potential transaction will be considered as unauthorized.

Moreover, in addition to the above ordinary procedure, the new legal regime establishes a fast-track authorization procedure for certain transactions that are under way and transactions valued between EUR 1,000,000 and EUR 5,000,000 or whose price was fixed before March 18, 2020.

Lastly, any investments executed in Spain without the mandatory prior authorization, shall not be valid and shall have no legal effects, until the relevant authorization is granted. Moreover, the Administration can impose the following sanctions on the investor:

a. A fine, capped at the economic value of the transaction (and which cannot be lower than EUR 30,000); and

b. A public or private reprimand.

A regulatory development of this law is likely to be approved by the government in the coming weeks, which may establish the categories of operation and the amounts below which foreign direct investment operations will be exempted from the prior authorization regime. The definition of the critical sectors may also be limited by regulation.

2. Listed Companies

The Spanish Securities Market Act limits the bidder's freedom to establish the offering price of a voluntary takeover bid ("ToB") in certain cases to prevent bids from being launched at a price that does not reflect the value of the target company. These cases include, where, in the two years prior to the announcement of the bid, market prices in general or the price of the target company in particular were affected by "extraordinary events" (including situations derived from force majeure). In these cases, the ToB should be formulated at a price calculated under article 137.2 of the Spanish Securities Market Act (i.e. the higher of an equitable price and a multi-criteria pricing methodology including DCF; NAV; comparable transactions and companies, etc.) and should always include, at least as an option, a cash consideration.

For further information on foreign investments in Spain, please visit our legal flash on key questions or get in touch with the following or your usual Cuatrecasas contact:

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