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# Foreign investment in Spain: key questions

Legal flash

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Following the entry into force of Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union, and the legal amendments approved as a result of COVID-19 but meant to be permanent following the health crisis, it is necessary to carry out a prior review to verify the applicable regime before investing in Spanish companies.

This document sets out, in an executive presentation, key questions regarding regulations that are now much more complex and could require specialized advice. It answers the following questions:

- > **What are the restrictions?**
- > **Who do these restrictions affect?**
- > **Are there any material thresholds?**
- > **What sectors are affected?**
- > **What are the authorization deadlines?**
- > **Can the authorities condition the terms of my investment?**
- > **What happens if there is a violation?**
- > **Is there an interim regime?**



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## 1. What is the general legal regime for foreign investments in Spain?

Foreign investments had been liberalized in Spain since 2003, with certain exceptions in specific sectors (e.g., activities related to national defense or affected by sectoral regulation such as air transportation or gaming).

However, since the entry into force 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 Union, and the legal amendments approved as a result of the COVID-19 crisis, this general liberalization regime has been modified and certain “foreign direct investments” are now subject to prior authorization (see questions 3 and 7).

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## 2. What impact have the new laws had on foreign investment in Spain?

Regulation of foreign investment in Spain is now more complex, which is why it is necessary to obtain legal advice to determine whether a transaction is subject to authorization or whether there are additional requirements. This counsel is crucial if we consider that the lack of prior authorization results, among others, in the investment being void and having no legal effect, as well as the application of significant fines (see question 10).

The new restrictions affect:

- > non-EU investors, particularly the sovereign funds and public companies of states outside of the European Union (“EU”) and the European Free Trade Association (“EFTA”), as well as those that have other investments in sectors that affect security, public order, and public health in other EU Member States (see question 3), and
- > as a temporary measure, from November 19, 2020, to December 31, 2022, any EU/EFTA investors outside Spain (see question 7).

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## 3. What does “foreign direct investment” mean in the new authorization regime?

Without prejudice to the transitional regime explained in question 7, which affects certain investments made by residents of EU/EFTA countries other than Spain, “foreign direct



investment” is an investment that meets the following two requirements:

- > It is carried out by a non-resident in the EU or in the EFTA (Iceland, Liechtenstein, Norway and Switzerland) or by a resident of the EU/EFTA whose beneficial ownership (*titularidad real*) is held by a non-resident (see question 4).
- > The investor becomes the holder of a participation equal to or greater than 10% of the capital of a Spanish company or, when as a result of the transaction, acquires the control of the company according to the terms of article 7.2 of Act 15/2007, the Spanish Antitrust Act.

Foreign direct investment is subject to authorization in either of these scenarios:

- > The investment affects one of Spain’s “main strategic sectors” (see question 5).
- > The investor (i) is controlled by a third-party government; (ii) participates in sectors that affect the public order, public security, or public health of another EU Member State; or (iii) represents a serious risk owing to its engagement in criminal or unlawful activities that may affect public order, public security or public health in Spain.

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#### 4. Indirect investments: when is the beneficial ownership of an investor resident in the EU/EFTA that of a non-resident?

When an investor who is not a resident of the EU/EFTA possesses or controls directly or indirectly more than 25% of the capital or the voting rights of the resident investor that invests in the Spanish company or, by other means, exercises direct or indirect control over it.

As a result, in each case, the chain of control of the investor acquiring a participation in the Spanish company must be confirmed (e.g., investments resulting from funds, as the law has not established specific rules in this case). The draft regulation on foreign investment published some weeks ago (and expected to be approved in the first quarter of 2022) deals with this issue. In the case of funds, it considers the management company to be the beneficial owner.

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#### 5. What strategic sectors are subject to authorization in the event of “foreign direct investment”?

Sectors that affect public order, public security and public health. As *numerus clausus*, the following are cited:

- > Critical infrastructures



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- > 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
- > Supply of fundamental inputs (energy, strategic connectivity services, raw materials, or food safety)
- > Sectors with access to sensitive information
- > Media (specifically, investments in audiovisual communication services will be governed by [\*Act 7/2010, the General Act on Audiovisual Communication\*](#))

In practice, the challenge is identifying the activities included in each of these sectors and, as such, the investments that will be subject to the authorization regime because of the breadth of the wording of the law, which does not include criteria for materiality, and, in the case of the critical nature of infrastructures, because the list of critical infrastructures in Spain is confidential. Thus, in each case, the activities carried out by the company that is the object of the investment must be analyzed to determine whether they fall under the scope of application of the authorization regime. The draft regulation on foreign investment provides some pointers that may be useful in this regard.

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## 6. Which investors must obtain authorization regardless of the sector in which they are investing?

Authorization is necessary when an investor that is not a resident of the EU/EFTA or an EU/EFTA-resident whose beneficial ownership corresponds to a non-resident (see question 4) becomes the holder of a participation equal to or greater than 10% of the capital of a Spanish company or, when as a result of the transaction, that investor acquires the control of the company according to the terms of article 7.2 of Act 15/2007, the Spanish Antitrust Act, if it is found to be in one of the following three situations:

- > It is controlled by a third-country government.
- > It participates in sectors that affect the public order, public security or public health of another Member State.
- > It represents a serious risk owing to its engagement in criminal or unlawful activities that may affect public order, public security or public health.

This provision will specifically affect sovereign funds and public companies dependent on third countries.



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### 7. Has any interim regime been planned for transactions made by residents from UE/EFTA countries?

Yes, as a temporary measure, from November 19, 2020 until December 31, 2022, investments that cumulatively meet the following requirements will be subject to authorization:

- > Those made by residents of EU/EFTA countries other than Spain or by residents in Spain with a beneficial owner in an EU/EFTA country.
- > Investments whereby the investor becomes the holder of a participation equal to or greater than 10% of the capital of a Spanish company or acquires the control of the company according to the terms of article 7.2 of Act 15/2007, the Spanish Antitrust Act.
- > Investments made in:
  - o 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
  - o unlisted companies, if the value of the investment exceeds €500 million.
- > The Spanish target company conducts its business in any of the strategic sectors mentioned in question 5 above.

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### 8. Who should authorize the investments and by what deadline?

The Council of Ministers must deal with the authorization, following a report by the Board of Foreign Investments, and the investor must receive notice within six months following receipt of the request for authorization. If the Council of Ministers does not make a decision within that period, then it will be considered that the transaction is not authorized (negative silence). However, in our experience, investments are being approved in a shorter period of time (3-4 months).

This is a discretionary action. The essential element that must be analyzed is how the investment affects order, security and public health. Regulation (EU) 2019/452 establishes a cooperation mechanism among Member States and the European Commission to facilitate the exchange of information and contribute toward a coordinated monitoring of the investments assessed by the authorities.



## **9. Can the authorization be made subject to conditions?**

Yes, it can be made subject to the completion of certain conditions, e.g., excluding from the transaction certain activities or lines of business that affect the critical sector at issue.

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## **10. What are the consequences if an investment is carried out without prior authorization?**

The transaction will be void and without legal effect.

Additionally, carrying out the transaction (i) without the required authorization, (ii) prior to obtaining it, or (iii) violating the conditions set out in the authorization are considered very serious infringements, which may be simultaneously punished with:

- > a fine of up to the economic value of the transaction, and no lower than €30,000; and
- > a public or private reprimand.

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## **11. Are there any exceptions for transactions with a lower value?**

Yes, transactions with a value equal to or greater than €1 million and less than €5 million benefit from a simplified authorization procedure. This procedure is resolved by the corresponding person at the General Directorate for International Trade and Investment instead of the Council of Ministers, which significantly reduces the time frames to obtain the authorization.

Investments worth less than €1 million are considered exempt and not subject to prior authorization.

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## **12. Are there other screening measures for foreign investments Spain?**

Yes, the new measures that subject “foreign direct investment” to prior authorization coexist with the exceptions to the principle of free investment that already applied in the Spanish market. These refer to (i) activities directly related to national defense; (ii) activities subject to sector-specific legislation (e.g., telecommunications, gaming and air transportation); and (iii) activities related to the exercise of public power or that affect or could affect public order, security and public health.



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### 13. How are the different applicable regimes coordinated?

The lawmaker has not established any rules to coordinate the restrictions on foreign investment that already applied in the Spanish market and the new restrictions, except investments in audiovisual communication services, which will be governed by Act 7/2010, the General Act on Audiovisual Communication.

Therefore, it is necessary to analyze the characteristics of each transaction to determine the authorizations and requirements that must be fulfilled.

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### 14. Is there a notification obligation for liberalized foreign investments?

Investments of non-residents that do not fall within the scope of application of the different screening procedures mentioned above are free; that is, investments in Spanish companies that are not affected by the new authorization regime in foreign direct investments (see questions 2 to 11) or by sector-specific laws (see question 12) are still liberalized and do not require prior authorization.

The only requirement is an *ex post* declaration of the investments within the month following the formalization of the investment for statistical purposes. However, when the investment comes from a tax haven and exceeds 50% of the capital of a Spanish company, a prior declaration must also be made.

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