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Alert: Foreign investments

The Spanish government approves a Royal Decree on foreign investments

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On 5 July, Spain's Official State Journal (*Boletín Oficial del Estado*, or **BOE**) published Royal Decree 571/2023, of 4 July, on foreign investments (**RD 571/2023**), which implements Law 19/2003, of 4 July, on the legal regime applicable to the movement of capital and financial transactions abroad (**Law 19/2003**), which will enter into effect on 1 September 2023.

Content

Background

Following the approval 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 (**Regulation 2019/542**) and in the context of the measures approved as a result of the Covid-19 health crisis, the Spanish government modified the provisions for screening foreign investments in Spain.

Specifically, as explained here, Royal Decree-law 8/2020, of 17 March, on extraordinary measures to tackle the economic and social impact of Covid-19 (**RDL 8/2020**) included a new article 7 bis in Law 19/2003[1].

As a result, the former framework of liberalisation was replaced by a system of prior authorisation for certain investments made in Spain by investors that were not resident in the European Union (**EU**) or in the European Free Trade Association (**EFTA**) (or made by

[1] This new wording of article 7 bis of Law 19/2003 was later partially amended (including a number of minor details) by Royal Decree-law 11/2020, of 31 March, which adopts supplementary urgent social and economic measures to tackle COVID-19, by Royal Decree-law 34/2020, of 17 November, on urgent measures to support business solvency and the energy sector, and in matters of tax (RDL 34/2020) and by Royal Decree-law 20/2022, of 27 December, on measures in response to the economic and social impact of the War in Ukraine and to support reconstruction on the island of La Palma and other situations of vulnerability (RDL 20/2002).

resident investors whose beneficial owners were not resident in the EU or in EFTA) as a result of the sector that was being invested in or, in some cases, because of the characteristics of the investor.

Equally, Transitional Provision One of RDL 34/2020 applied that system of prior authorisation to certain foreign investments made by the residents of other EU or EFTA countries (or by investors resident in Spain whose beneficial owners are residents of other EU or EFTA countries), provided that those investments affect one of the restricted sectors referred to in article 7 bis.2 of Law 19/2003 and are made in listed undertakings, or unlisted undertakings if the value of the investment exceeds €500 million. The validity of that provision was initially limited to 30 June 2021, but was subsequently extended successively until 31 December 2021, 31 December 2022 and, finally (by article 62 RDL 20/2022), until 31 December 2024

On 24 March 2020, almost immediately after the approval of RDL 8/2020, the Spanish Council of Ministers authorised the urgent administrative processing of the draft royal decree on foreign investments, which would replace the pre-existing Royal Decree 664/1999, of 23 April, on foreign investments (**RD 664/1999**) by implementing the new provisions. The Ministry of Industry, Trade and Tourism submitted the draft royal decree to public consultation between 17 and 25 November 2021.

The newly approved RD 571/2023 is substantially identical to the draft royal decree that was submitted to public consultation and implements the provisions of Law 19/2003, in particular, its article 7 bis and related articles concerning the suspension of the framework of liberalisation regarding certain foreign investments.

It should be pointed out that, in general, this new regulation consolidates and implements certain criteria that had, implicitly or explicitly (it was even included in the foreign investments questionnaire that had to be completed to raise a consultation or obtain authorisation), been followed and that the Directorate General of Foreign Trade and Investment had been applying since RDL 8/2020 entered into effect; therefore, it is unlikely that this will have a significant change on how the provision is being applied in practice.

We set out below the essential content of RD 571/2023, with a particular reference to the elements that develop the provisions of Law 19/2003.

Effectiveness and application

RD 571/2023 enters into effect on 1 September 2023, although it is established that foreign investment authorisation procedures that start before that date will continue to be governed by the former regulation.

Delimitation of the concept of foreign investment: exclusion of internal restructuring and shareholding increases exceeding 10% that do not entail a change of control

Article 14 RD 571/2023 points out that the following will not constitute foreign direct investments, subject to authorisation pursuant to article 7 bis.1 of Law 19/2003:

i) Internal restructurings performed by groups of undertakings[2].

ii) Shareholding increases by a shareholder that already holds an equity interest of more than 10% if the shareholding increase does not result in a change of control[3].

It is also established that, if two or more foreign investment transactions take place between the same sellers and buyers within a period of two years, those transactions shall be taken as a single investment made on the date of the last transaction (which might prove significant from the perspective of the quantitative thresholds that trigger certain exemptions, as explained below). Although RD 571/2023 does not say so

[2] Law 19/2003 does not make an express reference to restructuring, although it is true that the Directorate General of Trade and Foreign Investment had laid down a certain standard practice in this regard which entailed exemption from prior authorisation: this criterion has been provided for in RD 571/2023.

[3] This can be inferred, *a sensu contrario*, from the literal wording of article 7 bis.1 of Law 19/2003 and is now provided for explicitly in RD 571/2023. It should be remembered that, in order to ascertain that control exists, article 7 bis of Law 19/2003 refers to the criteria of article 7.2 of the Spanish Competition Law 15/2007, of 3 July.

explicitly, it would seem reasonable to assume that this rule will require that successive investments have a certain degree of homogeneity among them.

Delimitation of the investor in certain circumstances: fund managers and collective investment schemes and the criterion of the beneficial ownership of EU and EFTA investors

Article 10.2 RD 571/2023 establishes that the fund managers of the following institutions or entities are understood as being the owners of the foreign investment, provided that the shareholders or the beneficiaries do not legally exercise shareholder rights or have privileged access to the undertaking's information:

i) Collective investment schemes or closed-ended collective investment entities resident in the EU or in the EFTA, or entities or similar undertakings that are resident in third countries.

ii) Employment pension funds or other retirement investment institutions that are authorised or resident in the EU or in EFTA, or entities or similar undertakings that are resident in third countries.

As the fund manager is understood as being an investor, the place of its corporate office will determine whether or not it is understood as being a foreign investor or even a foreign investor resident outside the EU and EFTA, irrespective of the place of residence of the fund or collective investment scheme.

Equally, article 7 bis.1 Law 19/2003 defines a foreign investor as an investor resident in the EU or EFTA but whose beneficial owner is a non-resident investor, pointing out that it shall be understood that beneficial ownership exists *"when the latter hold or ultimately control, directly or indirectly, more than 25% of the share capital or voting rights of the investor, or when it exercises direct or indirect control over the investor by any other means"*. RD 571/2023 now specifies that beneficial ownership will exist then that percentage or control is held or exercised either individually or in concert.

Delimitation of the restricted sectors defined in article 7 bis.2 of Law 19/2003

As mentioned above, article 7 bis of Law 19/2003 establishes that, among other criteria, the specific sector affected by a foreign investment will be taken into account to determine whether or not it will be subject to prior authorisation: paragraphs a) to e) of article 7 bis.2 list a series of sectors that are restricted as a result of their importance from a public order, public safety or public health perspective.

Article 7 bis.6 of Law 19/2003 allows the Spanish government to adjust the definition of those sectors by approving regulations in that regard. RD 571/2023 implements that provision and defines those sectors more precisely. Specifically, it establishes the following:

i) It points out that the *"critical dual-use technology"* alluded to (among other categories) in article 7 bis.2.b) of Law 19/2003 include, in any event and irrespective of those mentioned expressly, the technologies defined in article 2, paragraph 1 of del Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items, including telecommunications, artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantic and nuclear technologies, as well as nanotechnologies and biotechnologies.

ii) It states that *"key technologies for leadership and industrial capacity"* also alluded to in article 7 bis.2.b) of Law 19/2003, including enabling technologies that are essential for the future referred to in Council Decision (EU) 2021/764 of 10 May 2021 establishing the Specific Programme implementing Horizon Europe – the Framework Programme for Research and Innovation, and repealing Decision 2013/743/EU. This includes advanced materials and nanotechnology, photonics, micro-electronics and nano-electronics, life science technology, advanced manufacturing and transformation systems, artificial intelligence, digital security and connectivity.

iii) It states that *"technologies developed in programmes and projects of particular interest to Spain"*, as also alluded to in article 7 bis.2.b) of Law 19/2003, include technologies that entail a substantial percentage

or volume of funding from the EU or Spanish budget. These include technologies funded by the instruments listed in annex "List of projects or programmes of Union interest" referred to in article 8, paragraph 3 of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019.

iv) It states that the *"fundamental goods"* referred to in article 7 bis.2.c) of Law 19/2003 includes all of those goods that are understood as being indispensable and irreplaceable for the provision of essential services related to the maintenance of basic social functions, health, safety, the population's social and financial welfare, or the effective functioning of the State's institutions and public authorities, the disruption, failure, loss or destruction of which would have a significant impact. The following goods will, in particular, be understood as constituting fundamental goods:

   a) The goods provided by undertakings that develop and modify the software used in the operation of critical infrastructure (on the terms set out therein) in the energy, water, telecommunications, financial and insurance, healthcare, and transport sectors and in the area of food safety regarding the management of the installations or the systems used in the food supply.

   b) Other essential and irreplaceable goods that guarantee the integrity, security and continuity of activities that affect critical infrastructure, the water supply, energy (hydrocarbons, renewable gases, biofuels or electricity), strategic raw materials and telecommunications and transport services, healthcare services, food safety, research installations or the financial and tax systems.

v) The following are undertakings that have "*access to sensitive information"* according to article 7 bis.2.e) of Law 19/2003:

   a) Undertakings that have access to data on strategic infrastructure that, should such data be disclosed, could be used to plan and perform actions aimed at affecting or destroying such infrastructure, as set out in article 2 paragraph I) of Law 8/2011, of 28 April, which establishes measures for the protection of critical infrastructure.

   b) Undertakings that have access to data bases related to the provision of essential services of water supply, energy (hydrocarbons, gas or electricity) and telecommunications or transport services, healthcare services, food safety, research facilities, financial services or the tax system.

   c) Those that have access to official data bases that are not accessible to public.

   d) Undertakings that perform activities that trigger an obligation to conduct a personal data impact assessment, in accordance with article 35.3 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (**General Data Protection Regulation**).

Delimitation of the characteristics of an investor that triggers an obligation to obtain authorisation

Article 7 bis.3 of Law 19/2003 lists a number of investor characteristics that, in themselves and irrespective of the sector in which the investment is made, trigger an obligation to obtain prior authorisation.

RD 571/2023 specifies some of those characteristics in greater detail:

i) It states that, in order to establish that a foreign investor is controlled directly or indirectly by the government of a third country, including public institutions or the armed forces, for the purposes of article 7 bis.3.a) of Law 19/2003:

   a) Direct or indirect control may also be understood to exist where there is significant financing, including in the form of subsidies, by the government of a third country.

   b) Where investments are made by vehicles through which public funds or public employee pension funds invest, it can be understood that public control is not present – in other words, they would be

exempt from seeking authorisation – if their investment policy is independent and focuses exclusively on portfolio profitability, without any political influence whatsoever by a third State.

ii) It is specified that, in order to determine if the investments made or the activities in which the foreign investor has taken part could have affected public safety, order or health in another member State, for the purposes of article 7 bis.3.b) of Law 19/2003, it will be possible to use the information received in the context of the cooperation mechanisms for foreign direct investments provided by Regulation 2019/452 (in essence, the suggestion seems to be that, as expressed in the foreign investment questionnaire used up to now, it may be taken into consideration if the investor has had an investment authorised, declined or conditionally authorised in another member State).

iii) It is pointed out that, in order to ascertain whether there is a serious risk of the foreign investor performing criminal or illegal activities that affect public order, safety or health in Spain, for the purposes of article 7 bis.3.c) of Law 19/2003, the final administrative or court sanctions imposed on the investor in the past three years will be taken into account, preferentially, particularly in matters such as money laundering, the environment, tax or the protection of sensitive information.

Exemption of certain investments from authorisation

One new element introduced by RD 571/2023 has been to establish, in article 17, certain circumstances in which foreign investments will be exempt from prior authorisation given *"their negligible or scant impact on the elements protected by article 7 bis of Law 19/2003, of 4 July, and article 65 of the Treaty on the Functioning of the European Union"*[4].

By doing so, RD 571/2023 applies article 7 bis.6 of Law 19/2003, which authorises the Spanish government to pass regulations to establish *"the transaction categories and the value thresholds below which foreign direct investments will be exempt from the system of prior authorisation"*.

However, it is not completely clear if the exemption on transactions of less than €1 million established by the Second Transitional Provision of Royal Decree-law 11/2020, of 31 March, which adopts urgent supplementary social and economic measures to tackle Covid-19 (**RDL 11/2020**) still applies. Indeed, although that exemption was temporary, *"until regulations establish the minimum amount referred to in the final paragraph of article 7 bis.1 of Law 19/2003, of 4 July"*, the truth is that RD 571/2023 does not contain any provision whatsoever on a minimum amount given that the final paragraph of article 7 bis.1 was removed by RDL 34/2020.

We highlight the following exemptions:

i) **Turnover of the target**

Foreign investments in undertakings with a turnover that does not exceed €5 million in the last closed financial year are exempt from authorisation. However, that exemption will not apply:

a) If the investment is made in the critical infrastructure sector, as established by article 7 bis.2.a) of Law 19/2003, or in the energy sector.

b) When the technologies of the acquired undertakings have been developed in the context of programmes and projects of particular interest to Spain (see above).

c) If the investment is made in electronic communications operators which meet any of the following:

- they are the owners of concessions to use the public radio-electric domain, in harmonised frequency bands pursuant to EU legislation;
- they are the holders of a title enabling them to use the orbit spectrum resources in the context of Spanish sovereignty; or

[4] The following are protected by article 7 bis of Law 19/2003: public order, public safety and public health. The reference to article 65 of the Treaty on the Functioning of the European Union seems to refer to the principles of non-discrimination and freedom of movement of capital.

- they have been qualified as operators with a significant weight in an important market of the electrical communications sector.

d) When transactions refer to the research and exploitation of mineral deposits of strategic raw materials, these being as referred to in article 7 bis,2,c) of Law 19/2003, of 4 July, or, on a secondary basis, those identified by the European Commission in annex I of Communication (2020) 474 final, from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions Critical Raw Materials Resilience: Charting a Path towards greater Security, dated 3 September 2020, or legislative instrument that replaces it.

ii) Temporary investments

Temporary investments are exempt. Temporary investments are short-term investments (measured in hours or days) where the investor does not come to have the ability to influence the management of the acquired undertaking as the investor is a placement agent or an underwriter in the context of a rights issue and a public or subscription offering of shares. In this scenario it will be the ultimate shareholders, if any, that require authorisation.

iii) The object of the investment, certain investments in real estate and the energy sector

The following investments are exempt due to the object of the investment:

a) Investments, whatever their amount, to acquire real estate assets that are not attached to critical infrastructure or that are not indispensable and irreplaceable for the provision of essential services.

b) Investments in the **energy sector**, as provided for in article 7 bis.2.c) of Law 19/2003, will be exempt from authorisation, whatever the amount, provided that all of the following conditions are met:

- The investor does not meet any of the characteristics identified in article 7 bis.3 of Law 19/2003.
- The undertakings or assets acquired do not perform regulated activities, these being the operation of the electricity market or system, the transmission and distribution of electricity, electricity supply in non-peninsular territories, the technical management of the gas system, and the regassification, basic storage, transport and distribution of natural gas, as well as any other activities established by sector legislation.
- The acquirer does not as a result of the transaction become the dominant operator in the following sectors: the generation and supply of electricity, the production, storage, transport and distribution of fuels or biofuels, the production and supply of liquified petroleum gases or the production and supply of natural gas. The concept of dominant operator is established by the Third Additional Provision of Royal Decree-law 6/2000, of 23 June, on Urgent Measures to Intensify Competition in the Markets for Goods and Services, which establishes that a dominant operator is any undertaking or group that holds a market share of more than 10% in any of the aforementioned energy sectors.
- If the investment entails the acquisition of electricity production assets, when the share or quotient between the installed capacity owned by the investor (including the capacity already owned directly or indirectly by the investor and the capacity that will be acquired through the investment) and the total installed power of Spain's national electricity generation capacity, calculated by generation technology, is lower than 5%.

  For these purposes, the electricity generation assets must be weighted according to the degree of maturity and progress in the construction of the connected investment projects, taking into account the status of their administrative application processes. Furthermore, the installed power capacity share will be calculated taking into account the time horizons and the renewable energy integration targets established in the energy plan in force when the application is made seeking clearance for the foreign investment.
- If the investment entails the acquisition of undertakings that perform electricity commercialisation, the acquired undertaking must have fewer than 20,000 customers.

Procedure: prior consultation

RD 571/2023 expressly provides a mechanism of prior consultation before submitting an application for authorisation, something which was already being applied by the Directorate General of International Trade and Investment.

These prior consultations are discretionary (in other words, the investor may choose to make a prior consultation or to submit the application for authorisation directly) and should be submitted to the Ministry of Industry, Trade and Tourism's Directorate General of International Trade and Investment and/or, in the case of investments directly related with National Defence, to the Ministry of Defence's Directorate General or Armament and Material.

A response must be provided to the consultation within 30 working days after a favourable report has been obtained from the Foreign Investment Board. The consulting party will be unable to submit the application for authorisation for the investment until that term has elapsed unless a response to the consultation has been received beforehand.

The consultation body may request all information that it needs to provide a response, and any such demand for information will suspend the term of response. Finally, the consultation will be confidential, and the response will be binding *"on the bodies and entities of the consulted Authority in respect of the consulting party"*.

Procedure: authorisation

RD 571/2023 includes a number of provisions on the authorisation procedure:

i) **Single application in the event of joint investments:** Where an investment is made by means of an agreement between two or more investors, a single application for prior authorisation should be made by all of them.

ii) **Term:** The term for issuing a decision will be 3 months (formerly, the term was 6 months); lack of response shall be understood as a denial of authorisation.

iii) **A prior report must be obtained from the Foreign Investments Board** (the composition of which is set out in article 21 RD 571/2023).

iv) **Competence for issuing a decision:** In the cases set out in article 7 bis of Law 19/2003, the decision will be made by the Directorate General of International Trade and Investment if the value of the investment does not exceed €5 million, and by the Council of Ministers in all other cases. Where the investment is directly related to National Defence or weapons, ammunition, pyrotechnics and explosives for civil use or other materials for use by the State's Security Corps or Forces, the decision will be made by the Council of Ministers (except, where the investment is related to National Defence, if it is understood that the investment does not affect the essential interests of defence, in which case the investment may be authorised by the Directorate General of Armament and Material).

v) **Content of the decision:** The decision may establish the following: a) unconditional authorisation; b) denial of the authorisation; c) authorisation subject to conditions imposed by the authorising body or commitments made by the investor which have been accepted by that body; d) cancellation due to withdrawal of the application by the investor or on the understanding that the transaction does not require authorisation. If the authorisation establishes that the foreign investor must adopt measures, it will specify which body must supervise the fulfilment thereof; that body will be responsible for resolving any issues that may emerge and certify, after a report has been received from the Foreign Investment Board, that those measures or conditions have been met or fulfilled and that the supervision has come to an end.

vi) **Duration of the authorisation:** The investment must be made within the term established in the authorisation decision or, otherwise, within 6 months. If the investment has not been made within that timeframe, the authorisation will be rendered void. However, the investor may before the end of that term

request the authorising body for a one-off extension of 6 additional months. If the investment is not made within that additional period, the investment authorisation will be rendered void definitively.

vii) **Need for a new authorisation if the terms of the investment change substantially:** Any change to the terms of the authorised investment must be notified to the body that processed the authorisation. If the change amounts to a substantial modification of the terms of the investment, a new prior authorisation will have to be processed.

Furthermore, the simplified procedure no longer applies to investments from €1 million to 5 million, previously established by the Second Transitional Provision of RDL 11/2020, although applications submitted prior to 1 September 2023 will continue to be processed according to that procedure.

Information obligations

Two information obligations are established in relation to foreign direct investments that are subject to authorisation:

i) On the one hand, where a notary is aware that a foreign investment transaction is subject to prior authorisation, they must inform applicants that they must obtain that authorisation.

ii) On the other, when the Ministry of Industry, Trade and Tourism's Directorate General of International Trade and Investment, or the Ministry of Defence's Directorate General or Armament understand that acquisitions in the context of a public offering for the purchase, sale or subscription of shares traded on a Spanish regulated market may be subject to prior authorisation pursuant to Law 19/2003, they must notify the National Securities Market Commission (*Comisión Nacional del Mercado de Valores*, or **CNMV**) thereof so that the issuer may include that information in the documentation circulated in relation to the offering.

Specific rules for investments in activities related to National Defence

Finally, certain provisions have been established in relation to certain special categories of investments. These refer exclusively to investments in activities related to National Defence as provided for in article 18, which establishes the following (as well as the common procedural provisions mentioned above):

i) The Ministry of Defence's Directorate General of Armament and Material is responsible for handling the procedure and for responding to any prior consultations.

ii) The following are exempt from authorisation:

   a) Investments that do not reach 5% of the share capital of the Spanish undertaking, provided that the investment does not enable the investor to be a part, whether directly or indirectly, of the undertaking's management body;

   b) Investments of between 5 and 10% of the share capital, provided that the investor notifies the Directorate General of Armament and Material and the Directorate General of International Trade and Investment and attaches to the notification a document in which it makes a reliable commitment in a public deed not to use, its voting rights, exercise them or assign them to third parties, nor to be part of any of the management bodies in the listed undertaking.

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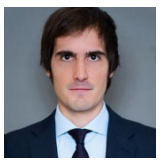

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