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SPANISH FOREIGN DIRECT INVESTMENT SCREENING MECHANISM

The Spanish Government amended the screening mechanism for certain foreign direct investments ("**FDI**") in November 2020 and June 2021 (the "**Screening Mechanism**").

The Screening Mechanism (i) extends the regulation to **EU investors** (including Spanish investors beneficially owned by EU residents) and (ii) modifies the criteria defining critical sectors and subjective conditions of investors. The following is a summary of the Screening Mechanism:

1. WHO IS A FOREIGN INVESTOR?

Until 19 November 2020, only "**Non-EU/EFTA Investors**" (with a minimum investment of **EUR 1 million**), namely:

(i) non-EU and non-European Free Trade Association ("**EFTA**") residents, and

(ii) EU/EFTA residents beneficially owned by non-EU and non-EFTA residents, that is, those in which a non-EU and non-EFTA resident ultimately owns or controls more than 25% of the share capital or voting rights of, or otherwise exercises control over, the EU/EFTA resident.

After 19 November 2020 and **until 31 December 2021**, Non-EU/EFTA Investors (with a minimum investment of EUR 1 million) and now, in addition, "**EU/EFTA Investors**" (provided they invest in **listed companies**, or more than **EUR 500 million** in private companies), namely:

(i) EU and EFTA residents in countries other than Spain, and

(ii) Spanish residents beneficially owned by EU or EFTA residents in countries other than Spain, that is, those in which a non-EU and non-EFTA resident ultimately owns or controls more than 25% of the share capital or voting rights of, or otherwise exercises control over, the EU/EFTA resident.

2. WHAT ARE FOREIGN DIRECT INVESTMENTS?

Investors are subject to the Screening Mechanism only if they qualify as "FDI" (see 2.1) and the investment is made in one of the critical sectors (see 2.2) or by investors that meet certain subjective criteria (see 2.3).

2.1 FDI

For the purposes of the Screening Mechanism, FDIs include:

(i) investments that result in a foreign investor reaching a stake of at least **10%** of the share capital of a Spanish company; and

(ii) any corporate or legal transaction or business action by which a foreign investor **acquires control** over a Spanish company; the possibility of exercising decisive influence as a result of an agreement or through the ownership of shares or interests in another person (directly or indirectly) is deemed to constitute "control" for these purposes.

2.2 OBJECTIVE CRITERIA – CRITICAL SECTORS

(i) **Critical infrastructure**, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, sensitive facilities, and land and real estate crucial for the use of such infrastructure.

(ii) **Critical and dual-use technologies**, key technologies for industrial leadership and training, and projects of particular interest to Spain.

(iii) **Supply of critical inputs**, energy, strategic connectivity services, **raw materials** and **food security**.

(iv) Sectors with access to or control of **sensitive information**, including personal data.

(v) **Media**.

(vi) Other sectors designated by the Spanish government from time to time (currently, none).

2.3 SUBJECTIVE CRITERIA – APPLICABLE ONLY TO NON-EU/EFTA INVESTORS, REGARDLESS OF THE SECTOR IN WHICH THEY INVEST

(i) Investors directly or indirectly **controlled by a Non-EU/EFTA government**, including state bodies, armed forces or sovereign wealth funds; the possibility of exercising decisive influence as a result of an agreement or through the ownership of shares or interests in another person (directly or indirectly) is deemed to constitute "control" for these purposes.

(ii) **Non-EU/EFTA Investors** that have **already made an investment affecting national security, public order or public health** in another EU Member State.

(iii) If there is a serious **risk that the Non-EU/EFTA investor engages in illegal or criminal activities** affecting national security, public order or public health in Spain.

3. PROCEDURE FOR THE SCREENING MECHANISM

FDIs subject to the Screening Mechanism are not forbidden, but do require prior administrative authorisation **from the Council of Ministers** The legal term for issuing a decision is six months – in our experience, the time required to obtain the authorisation is significantly shorter. By way of exception, the FDI authority has a fast-track 30-day procedure to authorise investments below EUR 5 million.

The investment will be deemed to have been rejected if the relevant authority does not respond within the statutory term. The information and documents required to request an authorisation include a three-year business plan for the investment in Spain.

4. CONSEQUENCES OF NOT GOING THROUGH THE SCREENING MECHANISM

Gun-jumping the Screening Mechanism (i.e. closing without the required authorisation) will render the transaction invalid and without any legal effect, until the required authorisation is obtained. In addition, fines up to the value of the investment could be imposed.

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