URÍA
MENÉNDEZ

Client briefing

FOREIGN DIRECT INVESTMENTS

28 December 2022

Spanish Foreign Direct Investment Screening Mechanism – 28 December 2022 update

The Spanish Government has amended the screening mechanism for specific foreign direct investments ("FDIs") ("Screening Mechanism") as follows:

- **extending the application of the Screening Mechanism to FDIs made by European Union ("EU") or European Free Trade Association ("EFTA") non-Spanish investors through 31 December 2024 – the regime already applied indefinitely with respect to non-EU/EFTA investors; and**
- **clarifying that the Screening Mechanism does not only apply to share deals, but also to asset deals (i.e. where the transaction target is not shares but "all or part of a Spanish company" – "part" of a Spanish company intending to refer to assets or a business). As the Screening Mechanism was already being applied to asset deals, the amendment should not involve a significant change in practice.**

The Spanish Government extends the application of the Screening Mechanism to investments made by EU and EFTA residents in countries other than Spain (including Spanish investors beneficially owned by EU or EFTA residents) until **31 December 2024**. The Screening Mechanism will apply to non-EU/EFTA residents indefinitely.

The definition of FDI has also been amended: it is now clear that its scope is not limited to acquiring shares of a Spanish company, but also includes **acquiring control** of **all or part of a Spanish company (i.e. asset deals)**. But this amendment has not changed significantly in practice, as the Screening Mechanism has been applied to asset deals since March 2020, when it was first introduced in Spain.

We now summarise the Screening Mechanism pursuant to the current legal framework.

1. WHO QUALIFIES AS A FOREIGN INVESTOR FOR SPANISH FDI PURPOSES?

On the one hand, "**Non-EU/EFTA Investors**" (with a minimum investment of **EUR 1 million**), namely:

(i) non-EU/EFTA residents, and

(ii) EU/EFTA residents beneficially owned by non-EU/EFTA residents, i.e. those in which a non-EU/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.

On the other hand, **until 31 December 2024**, "**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 an EU or EFTA resident in countries other than Spain, i.e. those in which a non-Spanish EU/EFTA resident ultimately owns or controls more than 25% of the share capital or voting rights of, or otherwise exercises control over, the Spanish resident.

2. WHAT ARE FOREIGN DIRECT INVESTMENTS?

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

2.1 FDIs

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, or over all or **part** of it; the possibility of exercising decisive influence as a result of an agreement or by directly or indirectly owning shares or an interest in another legal person 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 using 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 the Spanish Government designates 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 that a **Non-EU/EFTA government directly or indirectly controls**, including state bodies, armed forces or sovereign wealth funds; the possibility of exercising decisive influence as a result of an agreement or by owning shares or an interest 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 investors engages in illegal or criminal activities** affecting national security, public order or public health in Spain.

3. SCREENING MECHANISM PROCEDURE

FDIs subject to the Screening Mechanism are not forbidden, but do require prior administrative authorisation **from the Council of Ministers**. Although the Council of Ministers has six months to decide whether to grant this authorisation, in our experience, it normally does not take that long. Exceptionally, the FDI authority has a fast-track 30-business-day procedure to authorise investments of less than 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 authorisation include a three-year business plan for the investment in Spain.

4. GUN JUMPING

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. Fines up to the value of the investment could also be imposed.

URÍA
MENÉNDEZ

5. CONTACT LAWYERS

Christian Hoedl Eigel
Partner
+34 91 586 04 63
christian.hoedl@uria.com

David López Velázquez
Counsel
+34 587 09 39
david.lopez.velazquez@uria.com

Edurne Navarro Varona
Partner
+32 263 964 64
edurne.navarro@uria.com

Manuel Vélez Fraga
Partner
+34 91 586 01 60
manuel.velez@uria.com