

## New Spanish Foreign-Direct-Investment Regulations

Royal Decree 571/2023, which will enter into force on 1 September 2023, amends and develops the Spanish foreign-direct-investment (“FDI”) framework and, in particular, the existing screening mechanisms for specific FDIs (“**Screening Mechanisms**”). In this regard:

- the **legal term** to undergo Screening Mechanisms is reduced from six to **three months**;
- there is a new **exemption regime** based on the business activities each target carries out;
- interpretation criteria for specific ambiguous issues are now expressly regulated, provided, however, that the criteria essentially formalise the authorities’ consistent application of existing FDI laws; and
- a new screening framework for **Defence** FDIs is approved, with new exemptions for investments below 5% and, subject to specific requirements, between 5% and 10% of the target’s share capital.

In general, the new regulations have been long-awaited and should afford increased **legal** certainty for transactions in the Spanish market.

The Spanish Government has approved Royal Decree 571/2023 of 4 July on foreign investments (“**New Spanish FDI Regulations**”), which repeals Royal Decree 664/1999 and develops Law 19/2003 of 4 July on the legal regime on capital movements and foreign economic transactions (“**Law 19/2003**”). The New Spanish FDI Regulations will come into force on **1 September 2023**, and their provisions will only apply to FDI filings submitted from that date – ongoing FDI filings will be governed by the former regulations. A summary of the former regulations is available through [this link](#).

These new Spanish FDI Regulations set out: (i) foreign investment post-closing notification obligations for statistical purposes; (ii) post-closing notification obligations for Spanish investments in foreign countries for statistical purposes; and (iii) as the most important topic, the amended and developed rules for Spanish FDI screening mechanisms (“**Screening Mechanisms**”), under which the closing of specific FDIs requires prior authorisation through both EU-law based general FDI screening, regulated in article 7 bis of Law 19/2003 (“**General FDI Screening Mechanism**”), and sector-specific screening, i.e. that applies to activities directly related to Spanish National Defence (“**Defence Screening Mechanism**”), to the acquisition of real estate for diplomatic purposes by non-EU Member States (“**Diplomatic Real Estate Screening Mechanism**”), or to investments in activities directly related to weapons, cartridges, pyrotechnic items and civil use explosives or other material to be used by the State Security Forces and Bodies, which is a new mechanism (“**Weapons Screening Mechanism**”).

These Screening Mechanisms **do not prohibit foreign investments in Spain** – rather, they are **mandatory authorisation procedures to be carried out prior to closing specific transactions**. In particular, the General FDI Screening Mechanism brings the Spanish screening framework in line with that set out in the

European Union (“EU”) laws; in particular, Regulation (EU) 2019/452, which gives Member States the opportunity to adopt mechanisms to screen FDI in the EU.

## 1. MAIN CHANGES TO THE EXISTING SPANISH FDI FRAMEWORK

The most important changes resulting from the New Spanish FDI Regulations are the following.

- (A) **Legal term.** The legal term for issuing decisions in relation to all Screening Mechanisms is reduced from six to **three months**. If no decision has been handed down when the legal term expires, the FDI authorisation request is deemed to be rejected. However, the FDI authorities are entitled to **request additional information** and suspend the legal term until this information is submitted.
- (B) **Voluntary consultation procedure.** The voluntary consultation procedure, which serves to confirm whether doubtful transactions will be subject to a Screening Mechanism, is now regulated. These voluntary consultations were previously being made without any legal provisions governing the process; specific rules now apply. Consultations must be answered within 30 business days; the answer regarding the need for a Screening Mechanism filing is **confidential and binding**.
- (C) **No 30-business-day fast-track screening.** The fast-track 30-business day General FDI Screening Mechanism process is removed. Transactions below EUR 5 million were previously eligible for this process, but it will no longer be available. All Screening Mechanisms will now be subject to the three-month legal term.
- (D) **Common provisions.** There is a new common framework for all Screening Mechanisms, the most notable provisions of which are as follows:
  - (i) the **consequences of gun-jumping** the obligation to undergo a Screening Mechanism are clarified: the unauthorised investor will not be entitled to exercise economic and voting rights until – and if – the mandatory authorisation is obtained;
  - (ii) FDI authorisations may be granted subject to **conditions or commitments** – this is something that already occurred in practice, but without any explicit legal provision permitting it.
  - (iii) transactions between the same buyers and sellers that occur within a two-year period will be deemed to be a single transaction occurring on the date of the most recent transaction – the New Spanish FDI Regulations refer to the same buyers and sellers, not necessarily the same target, but it seems unreasonable that the transaction should be treated as one if the targets differ; and
  - (iv) if multiple investors involved in the same deal are subject to the Screening Mechanism, a single FDI filing per transaction will have to be submitted, separate FDI filings per investor will not be accepted.
- (E) **Out-of-scope transactions.** Although the consistent application of existing Spanish FDI laws has already clarified these issues, there is now an explicit legal provision that states that the following transactions fall outside the scope of the General FDI Screening Mechanism: **internal**

reorganisations within a corporate group, acquisition of additional shares by investors who already hold at least a 10% stake in the Spanish company if such acquisitions do not entail a change of control – i.e. in the event that, as a result of the acquisition, the investor does not acquire joint or exclusive control. Another general reference is made to a transaction having little or no impact on the legal interests protected by FDI laws – an inherently ambiguous reference that could be used to justify issuing no-jurisdiction decisions for transactions with no material impact on public order, public security or public health in Spain – and those made through investment vehicles by government owned entities if there is evidence that their investment policies are independent, with no political influence by any country. These out-of-scope references apply exclusively to the General FDI Screening Mechanism and not to other Screening Mechanisms.

- (F) **Private equity: investor entity to be screened.** In line with the FDI authorities' consistently applied interpretations, in the event that an investment is structured through investment, pension or employment funds, undertakings for collective investment in transferable securities or other similar investment structures – all of which are frequently used in private equity–, the entity deemed to be under the obligation to undergo the Screening Mechanism is the management entity (including, as applicable, the general partner – GP – or investment advisor in structures that use these concepts), provided that the fund investors or beneficiaries do not legally exercise voting rights and do not have access to privileged information about the company. In other words, limited partners – LPs – are not relevant for Spanish FDI purposes to the extent that their role is purely passive and they lack access to privileged information – although the scope of this appears uncertain. These provisions are applicable to all Screening Mechanisms.
- (G) **Scope of FDI-subject sectors.** The New Spanish FDI Regulations develop the scope of the sectors subject to the General FDI Screening Mechanism (see Section 2.2 below).
- (H) **Subjective criteria.** The scope and sources of information regarding investors subject to the General FDI Screening Mechanism, regardless of the target's sector, have been clarified.
- (I) **Exemptions.** A new exemption arrangement is introduced for the General FDI Screening Mechanism. Under the previous framework, investments below EUR 1,000,000 were not screened. That general threshold will not apply when the New Spanish FDI Regulations enter into force and, instead, the following sector-based exemptions will apply.
  - (i) Investments in the energy sector will be exempt if they meet all of the following requirements:
    - (a) the target company does not carry out “regulated activities”, as defined in the New Spanish FDI Regulations,
    - (b) the company does not become a dominant operator (*operador dominante*) in the market as a consequence of the transaction,
    - (c) in the event of the acquisition of energy-generation assets, the aggregate installed capacity of the technology controlled by the investor is below 5% – the New Spanish FDI Regulations include a calculation formula for the market share that is not self-

explanatory and may be impossible for investors to calculate, given that the capacity of the assets to be acquired will be “weighted based on the progress and execution status of the projects, taking into account their administrative status”, without further clarification regarding the weighting rates to be applied or how the administrative status should be considered, and

- (d) with respect to **power suppliers** (*comercializadoras*), the target company has fewer than 20,000 customers.
  - (ii) The acquisition of **real estate not deemed to be crucial for the operation of critical infrastructures** and that is replaceable in connection with providing essential services is exempt; in other words, the acquisition of real estate property that falls within those categories will always be subject to screening.
  - (iii) For the remaining sectors enumerated in article 7 bis 2 of Law 19/2003, investments in companies whose annual **turnover is below EUR 5,000,000** are exempt from screening, with the following exceptions to the exemption – which are sufficiently broad that, in practice, the exemption is limited to companies active in the food security sectors, those that have access to sensitive information and the media sector. The exceptions to the exemption are the following:
    - (a) companies that have **developed technologies under programmes** and **projects** of particular **interest to Spain**;
    - (b) specific **electronic-communications** operators; and
    - (c) the investigation and operation of **strategic raw-material** mines.
  - (iv) **Temporary investments** are also exempt, i.e. short-term investments in which the investor lacks the ability to exercise influence over the target company’s management. In particular, the temporary acquisitions made by arrangers and underwriters in the context of IPOs are exempt. This exemption applies to the General FDI Screening Mechanism, but it does not apply to the Defence Screening Mechanism or the Weapons Screening Mechanism.
- (J) **New framework for the Defence Screening Mechanism.** The New Spanish FDI Regulations make the following changes to the Defence Screening Mechanism, in addition to reducing the legal term from six to three months:
- (i) the **scope of investors subject to screening is extended to non-Spanish individuals residing in Spain**, regardless of their nationality; under the former regulations, only investors residing outside of Spain were subject to screening;
  - (ii) new exceptions are established with respect to transaction thresholds:
    - (a) no screening is required for share acquisitions if the investor’s stake in the target company is below **5%**, provided that the investor lacks the right to directly or indirectly appoint any board member or member of the management body in general – under

the former regulations, this 5% threshold only applied to investments in listed companies and there was no threshold for non-listed companies –; and

- (b) a new conditional exception is introduced for investments between 5% and 10% of the target company's share capital: no prior authorisation will be required provided that the investor serves a post-closing notice to the Directorate General on Weapons and Material and to the Directorate General on International Trade and Investments with a notarial document executed by the investor that includes commitments not to assign the voting rights to third parties, and not to serve as a member of the board or any applicable management bodies. The New Spanish FDI Regulations state that the commitments should refer to the voting rights and board membership "of the listed company", which appears to be a drafting error, but will ultimately require clarification to confirm whether this 5-10% threshold is not exclusively applicable to listed companies.
- (K) **New Weapons Screening Mechanism.** A new Screening Mechanism is established that applies to activities directly related to the **manufacture, commercialisation and distribution of weapons, cartridges, pyrotechnic items and explosives for civil use**. With respect to the Weapons Screening Mechanism, there are no **thresholds** that exclude the obligation to request the authorisation (unlike the General FDI Screening Mechanism and the Defence Screening Mechanism), and the **subjective scope** is similar to the Defence Screening Mechanism.
- (L) **Other matters:**
- (i) **Notary public warning.** Any notary public (*notarios*) that becomes "aware that a foreign investment transaction required prior authorisation" will have the legal duty to warn "the parties so that they may request it".
  - (ii) **Foreign Investment Board.** The rules relating to the Board's powers and its composition are further developed, and the Board now has the authority to gather any information it deems necessary to comply with its duties.
  - (iii) **Confidentiality.** Information submitted to the Spanish authorities under the New Spanish FDI Regulations will be deemed confidential and may only be used for the purposes for which it has been requested.
  - (iv) **Transfer of registered office abroad.** The New Spanish FDI Regulations state that any changes to the registered office of legal entities, or changes to the residence of individuals, "will determine the categorisation of an investment as being a Spanish investment abroad or a foreign investment in Spain".

Considering that the General FDI Screening Mechanism is undoubtedly the most important Screening Mechanism in place, and given the number of M&A transactions subject to the process, the following is a summary of the main terms and mechanics once the New Spanish FDI Regulations come into force.

## 2. THE GENERAL FDI SCREENING MECHANISM, AS AMENDED AND UPDATED

The General FDI Screening Mechanism, as amended and updated by the New Spanish FDI Regulations, can be summarised as follows:

- (A) The closing of FDIs subject to the General FDI Screening Mechanism require prior administrative authorisation [from the Council of Ministers](#). If the value of the investment in Spain is below EUR 5 million, the [Directorate General on International Trade and Investments will grant the authorisation](#).
- (B) The statutory term to issue the decision is three months.
- (C) The investment will be deemed to have been rejected if the relevant authority does not respond within the statutory term, which may be suspended if the authorities issue requests for additional information. Nonetheless, the authorisation may still be granted after the expiry of this term, which will likely be the case for complex transactions or for those that require the investor to make commitments. In any case, the expiry of the statutory term allows the investor to bring a claim before the Spanish courts and the Spanish FDI authorities would still be under the obligation to issue a decision, with the potential for an authorisation to be granted.

### 2.1 FOREIGN INVESTOR AND FDI DEFINITIONS FOR THE PURPOSES OF THE GENERAL FDI SCREENING MECHANISM

- (A) Both “Non-EU/EFTA Investors” and “EU/EFTA Investors” (the latter on a transitional basis until 31 December 2024), as defined below, are deemed to be foreign investors for the purposes of the General FDI Screening Mechanism.
- (B) [“Non-EU/EFTA Investors”](#) are:
  - (i) non-EU/EFTA residents, and
  - (ii) EU/EFTA residents that are 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.
- (C) [Until 31 December 2024](#), [“EU/EFTA Investors”](#) will also be foreign investors (provided they invest in [listed companies](#) or more than [EUR 500 million](#) in private companies), i.e.:
  - (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 EU/EFTA resident.
- (D) For the purposes of the General FDI Screening Mechanism, FDIs consist of:
  - (i) investments that result in a foreign investor reaching a stake of at least [10%](#) of the share capital of a Spanish company; or

- (ii) any corporate or legal transaction or business action by means of which a foreign investor **acquires control** of a Spanish company, or over all or **part** of it – “control” meaning the ability to exercise decisive influence over the relevant company as per EU Merger Regulation criteria; and
- (iii) as a requirement for **EU/EFTA Investors** only, investments where the target company is **listed** in Spain or, if not listed, the transaction value in Spain exceeds **EUR 500 million**. This only applies until 31 December 2024, after that date EU/EFTA Investors would not be subject to the General FDI Screening Mechanism.

## 2.2 SPECIFIC FDIs SUBJECT TO THE GENERAL FDI SCREENING MECHANISM

- (A) Not all transactions that qualify as an FDI for the purposes of the General FDI Screening Mechanism are subject to such screening, but only those (i) made in FDI-subject sectors; and/or (ii) made by FDI-subject investors, regardless of the sector in which they invest.
- (B) FDI-subject **sectors** for the purposes of the General FDI Screening Mechanism are as follows:
  - (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**, including telecommunications, artificial intelligence, robotics, semiconductors, cyber security, aerospace, defence, energy storage, quantum and nuclear technologies, as well as nanotechnologies and biotechnologies.
  - (iii) **Key technologies for industrial leadership and training**, including advanced materials and nanotechnology, photonics, microelectronics and nanoelectronics, life science technologies, advanced manufacturing systems and transformation, artificial intelligence, digital security and connectivity.
  - (iv) Technologies developed pursuant to **projects or programmes of particular interest to Spain**, which include those that have received significant amount or proportion of public financial support from the EU or from Spain.
  - (v) **Supply of critical inputs**, in particular (a) those supply by companies developing and modifying software used to operate critical infrastructure in the energy, water, telecommunications, financial and insurance, health, transport and food safety sectors; as well as (b) other indispensable and irreplaceable critical inputs to ensure the integrity, safety or continuity of activities that may impact the aforementioned sectors, among others.
  - (vi) Sectors with access to or control of **sensitive information**, including personal data, specific data on critical infrastructure, databases related to the supply of essential services or that may not be publicly accessed, and those sectors that carry out activities requiring data protection impact assessment.
  - (vii) **Media**.

- (viii) Other sectors the Spanish Government specified from time to time (currently none).
- (C) In addition, the following Non-EU/EFTA Investors are subject to the General FDI Screening Mechanism for their FDIs, 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 ability to exercise decisive influence as a result of an agreement, by owning shares or an interest in another person/entity (directly or indirectly), or by providing significant funding, 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 engage in illegal or criminal activities** affecting national security, public order or public health in Spain.

### 2.3 GUN JUMPING

- (A) Gun jumping any Screening Mechanism (i.e. closing without the required authorisation) will render the transaction invalid and without any legal effect until (and if) the required authorisation is obtained. Under the New Spanish FDI Regulations, this means that the economic and voting rights of the foreign investor are suspended.
- (B) Fines up to the value of the investment could also be applied.

### 3. FREQUENTLY ASKED QUESTIONS

- A company carries out activities in a sector subject to a Screening Mechanism. Would its acquisition by a foreign investor be prohibited?

No. The fact that an investment is subject to a Screening Mechanism does not mean that it is prohibited, but rather that an administrative authorisation must be granted prior to closing the transaction.

- If a transaction is subject to a Screening Mechanism, can the parties sign the SPA before having received the relevant authorisation?

Yes. The agreement can be signed, provided however that the closing of the transaction does not take place before the mandatory authorisation is obtained.

- A transaction is subject to a Screening Mechanism. Can it be closed without waiting for the relevant authorisation, e.g. if the SPA does not include a condition precedent regarding such authorisation?

No, it cannot be closed. If it were to be closed without the required authorisation, the transaction would be ineffective and invalid in Spain with respect to the Spanish companies and assets. The unauthorised buyer would not be able to exercise its voting and economic rights as a shareholder



of the Spanish company until the authorisation is obtained and fines up to the value of the Spanish investment could be imposed.

- The target company does not carry out any of the FDI-sensitive activities. Can the Spanish FDI filing be ruled out?

No. There are subjective criteria that trigger the obligation to make an FDI filing under the General Spanish FDI Screening Mechanism; these aspects should also be taken into account if the buyer is deemed a Non-EU/EFTA Investor. The target sector analysis is not sufficient to complete the FDI assessment.

- The direct target is not a Spanish company, but there is a Spanish subsidiary within the deal perimeter whose shares would be acquired (indirectly) in the context of the transaction. As the Screening Mechanisms relate to foreign “direct” investments, can the Spanish FDI filing be ruled out for not being a “direct” investment?

No. Reference is made to “direct” investment as opposed to “portfolio” investments. Therefore, structuring a deal as an indirect acquisition would not rule out a Spanish FDI filing. The specific circumstances of the case would need to be assessed.

- There is uncertainty as to whether a transaction is subject to a Screening Mechanism. Is there any way for a foreign investor to obtain comfort from the Spanish FDI authorities?

Yes. In doubtful transactions custom and practice is to submit a voluntary consultation to the FDI authorities. According to the New Spanish FDI Regulations, the decision to be issued by the authorities will be confidential and binding, and must be issued within 30 business days.

- A transaction is subject to a Screening Mechanism. What will be the impact on timings? Are the three months actually necessary to obtain the authorisation?

The timing of Spanish FDI filings is very variable. Authorisation is granted in almost all cases (and most of the time, without conditions), but the time required depends on the complexity of the case and the workload of the authorities. In any event, based on our experience when the six month term was in place, these screenings should be expected to be close to the three-month statutory term.

#### 4. CONTACT LAWYERS



**Christian Hoedl Eigel**

**Partner**

+34 91 586 04 63

[christian.hoedl@uria.com](mailto:christian.hoedl@uria.com)

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**David López Velázquez**

**Counsel**

+34 91 587 09 39

[david.lopez.velazquez@uria.com](mailto:david.lopez.velazquez@uria.com)

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**Edurne Navarro Varona**

**Partner**

+32 263 964 64

[edurne.navarro@uria.com](mailto:edurne.navarro@uria.com)

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**Manuel Vélez Fraga**

**Partner**

+34 91 586 01 60

[manuel.velez@uria.com](mailto:manuel.velez@uria.com)

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