

Spanish Foreign Direct Investment Screening Mechanism – December 2024 update

The Spanish Government has extended the application of the screening mechanism for specific foreign direct investments (“FDIs”) (“**Screening Mechanism**”) to FDIs made by non-Spanish European Union (“EU”) or European Free Trade Association (“EFTA”) investors to **31 December 2026**.

The Spanish Government has extended the application of the Screening Mechanism to investments made by EU/EFTA residents in countries other than Spain (including by Spanish investors beneficially owned by EU or EFTA residents) (the “**Non-Spanish Europeans**”) until **31 December 2026**.

The Explanatory Preamble justifies this extension on the need to “protect against risks in terms of public order, health and safety” in a “context of growing geopolitical tensions and instability, with a firm commitment towards economic security”. However, it also highlights the limited interference in transactions carried out by investors from other Member States: to date, only 3.5% of the transactions screened in Spain are made by Non-Spanish Europeans (i.e., 15 deals out of the 434 reviewed, the remainder by investors resident outside the EU/EFTA). This is due to much higher thresholds than those established under the investment screening framework for non-EU/EFTA investors.

For the avoidance of doubt, the extension of the application of the Screening Mechanism to specific investments by Non-Spanish Europeans is temporary – although it has been extended several times – and has no impact on the Screening Mechanism for non-EU/EFTA investors set out in article 7.bis of Law 19/2003, which is intended to be permanent. It is expected that the proposal for a new EU Regulation on the screening of foreign investments in the EU, which is currently undergoing the legislative process, will introduce significant changes to the current framework, as set out in our newsletter of 1 February 2024, available at this [link](#).

The Screening Mechanism does not prohibit foreign investment in Spain – instead, it is a mandatory authorisation procedure to be carried out prior to closing specific transactions. In particular, the Screening Mechanism brings the Spanish screening framework in line with that set out in the European Union laws; in particular, Regulation (EU) 2019/452, which gives Member States the opportunity to adopt mechanisms to screen FDIs in the EU.

We now summarise the Screening Mechanism in Spain.

1. THE SCREENING MECHANISM

- (A) The closing of FDIs subject to the Screening Mechanism requires 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 transaction cannot be completed 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.

1.1 FOREIGN INVESTOR AND FDI DEFINITIONS FOR THE PURPOSES OF THE SCREENING MECHANISM

- (A) Both “Non-EU/EFTA Investors” and “Non-Spanish EU/EFTA Investors” (the latter on a temporary basis until 31 December 2026), as defined below, are deemed to be foreign investors for the purposes of the 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 2026, “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 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 2026, after that date EU/EFTA Investors would not be subject to the Screening Mechanism.

1.2 SPECIFIC FDI'S SUBJECT TO THE SCREENING MECHANISM

- (A) Not all transactions that qualify as an FDI for the purposes of the 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 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 a significant amount or proportion of public financial support from the EU or from Spain.
 - (v) **Supply of critical inputs**, specifically (a) 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 abovementioned 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 a data protection impact assessment.
 - (vii) **Media**.
 - (viii) Other sectors the Spanish Government specifies from time to time (currently none).

- (C) In addition, the following Non-EU/EFTA Investors are subject to the 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.

1.3 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.

2. FREQUENTLY ASKED QUESTIONS

- A company carries out activities in a sector subject to the Screening Mechanism. Would its acquisition by a foreign investor be prohibited?
No. The fact that an investment is subject to the 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 the 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 the 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 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 Mechanism relates 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 the 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. 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 the 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, these screenings should be expected to be completed close to the three-month statutory term.

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