
THE FOREIGN INVESTMENT REGULATION REVIEW

SECOND EDITION

EDITOR
BRIAN A FACEY

LAW BUSINESS RESEARCH

THE FOREIGN INVESTMENT REGULATION REVIEW

The Foreign Investment Regulation Review

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This article was first published in The Foreign Investment Regulation Review - Edition

2

(published in August 2014 – editor Brian A Facey).

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THE FOREIGN INVESTMENT REGULATION REVIEW

Second Edition

Editor
BRIAN A FACEY

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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www.TheLawReviews.co.uk

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ISBN 978-1-909830-19-6

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ALI BUDIARDJO, NUGROHO, REKSODIPUTRO

ALRUD

AMARCHAND & MANGALDAS & SURESH A SHROFF & CO

AVENT ADVOKAT

BENTSI-ENCHILL, LETSA & ANKOMAH

BLAKE, CASSELS & GRAYDON LLP

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CONSORTIUM CENTRO AMÉRICA ABOGADOS

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ENGLING, STRITTER AND PARTNERS

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SPECHT BÖHM RECHTSANWALT GMBH

URÍA MENÉNDEZ

VIETNAM INTERNATIONAL LAW FIRM (VILAF)

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EDITOR'S PREFACE

I am pleased to present the second edition of *The Foreign Investment Regulation Review*. Building on the inaugural publication of last year, this edition provides insight into the national regulatory framework for foreign investment review in major jurisdictions around the world, as well as an overview of current trends and developments in this field.

Over the past few years, foreign investment has grown to match levels that were attained during the pre-economic crisis era of the mid-2000s. As national economies continue to recover from the global financial crisis, foreign investment often constitutes a source of capital that is key to promoting and sustaining domestic economic growth. From the perspective of investors, it can represent an important opportunity to expand into new markets or to implement efficiency enhancing improvements to a supply chain. Within this environment, legislators and regulators frequently face the challenge of attracting sufficient capital to develop the local economy while at the same time protecting national interests, including national security.

The diversity among foreign investment regimes reflects the fact that each nation has a unique set of goals and priorities to consider. Some countries, such as China, have recently introduced reforms aimed at attracting greater foreign investment. At the same time, the experience of jurisdictions such as Canada highlights that foreign investment review remains a balancing act between attracting foreign capital and protecting domestic interests in certain sectors of the economy. One common theme across jurisdictions is that foreign investment reviews continue to present complex issues for businesses, regulatory authorities and legal counsel alike.

Both legal practitioners and companies seeking to do business internationally will benefit by familiarising themselves with the regulatory frameworks outlined in this treatise. Of particular importance, this edition provides readers with practical guidance to navigate investments in major jurisdictions by anticipating key timing and substantive issues. We hope that it allows investors and businesses being acquired to better evaluate and manage risks associated with investments that may be subject to foreign investment review, ultimately reducing transaction uncertainty and delay.

This edition contains contributions from leading experts practicing in 23 jurisdictions around the world. I would like to express my gratitude to each author and law firm involved in this project for their commitment of both their expertise and time.

Please note that the views expressed in this book are those of the authors, and not those of their firms, any specific clients, the editor or the publisher.

Brian A Facey

Blake, Cassels & Graydon LLP

Toronto

August 2014

Chapter 19

SPAIN

Eduarne Navarro and Alfonso Ventoso¹

I INTRODUCTION

Foreign investment in Spain slowed significantly in 2011 and 2012 due to the crisis in the European financial and credit markets, the uncertainty regarding solvency and the potential risk of default on the sovereign debt of peripheral European countries (including Spain). The idea of a European country leaving the eurozone, whether voluntarily or involuntarily, and concerns regarding the viability of the euro and the European Monetary Union, also did nothing to help promote Spain as a target for foreign investment among international investors.

During the first half of 2013 the Spanish macro-economic framework stabilised, and the second half of 2013 and first semester of 2014 confirmed the positive expectations. In the last months of 2013, the Spanish economy emerged from technical recession, with a GDP increase by 0.5 per cent year-on-year and the government foreseeing an increase by the end of 2014 of 1.2 per cent and 1.5 per cent for 2015. This GDP growth is driven by an increase in exports and in private domestic demand, the easing of the financial tensions and the structural reforms that are being implemented since 2011. There are, however, some remaining problems in the Spanish micro-economic situation (exorbitant unemployment rates – despite a moderate improvement in the labour market in the past few months – and a lack of credit flow to small and medium-sized companies and individuals).

II FOREIGN INVESTMENT REGIME

Spain has a favourable legal framework for foreign investors. Spanish law has adapted its foreign investment rules to a system of general liberalisation, without distinguishing

¹ Eduarne Navarro and Alfonso Ventoso are partners at Uría Menéndez.

between European Union (EU) residents and non-EU residents. In fact, Spain is considered the ninth most open economy to foreign direct investment (FDI) according to the FDI regulatory restrictiveness index prepared by the Organisation for Economic Co-operation and Development.²

In addition to the general regime described below, Law 18/1992 of 1 July, establishing rules on foreign investments in Spain, provides a specific regime for non-EU persons investing in certain sectors: national defence-related activities, gambling, television, radio and air transportation.

For EU residents, the only sectors with a specific regime are the manufacture and trade of weapons or national defence-related activities.

i General regime for foreign investments

Royal Decree 664/1999 of 23 April, on external investments (RD 664/1999) established a liberalised system for foreign investments in Spain that provides two different declaration regimes to inform the Investments Registry of the Ministry of Economy and Competitiveness:

- a* an *ex ante* declaration regime that applies only to investments made from a country or territory identified as a tax haven in Royal Decree 1080/1991 of 5 July. No *ex ante* declaration is required if the investment is made in listed shares or investment funds registered with the Spanish Securities Exchange Commission (CNMV) or involves less than 50 per cent of the Spanish company's share capital; or for investments made in Spain by non-EU Member States acquiring property to be used as diplomatic and consular offices, except in cases where there is an agreement providing for deregulation under reciprocity rules in compliance with Additional Provision No. 3 of RD 664/1999. It is important to note that the *ex ante* declaration is not equivalent to a verification, non-objection or clearance requirement and, once the investment has been declared, the investor may carry out the investment; and
- b* an *ex post* declaration regime, which applies to all foreign investors, including those subject to an *ex ante* declaration, for administrative, statistical and economic purposes only.

The Council of Ministers can suspend this liberalised system on an *ad hoc* basis if investments affect, or may affect, public powers, public order, security or public health-related activities. If the liberalisation regime for foreign investments is suspended regarding a specific area or activity, such investment would require a prior administrative clearance from the Council of Ministers.

ii National defence-related activities

RD 664/1999 suspended the general liberalisation regime relating to foreign investments made in activities directly related to national defence, such as the manufacture or trade of weapons, ammunition, explosives and military equipment.

2 www.oecd.org/investment/fdiindex.htm (data as of September 2013).

Therefore, any investment in any of these activities will require an authorisation from the Council of Ministers,³ except if the investment is made in listed companies that render activities in this sector and is below 3 per cent of the share capital, and the investment does not allow the foreign investor to directly or indirectly become part of the managing bodies.

iii Gambling

Law 13/2011 of 27 May, on the gambling sector, which regulates gambling activities carried out within a country (including online gambling),⁴ provides that direct and indirect non-EU investments in Spanish entities operating in the gambling sector are subject to the provisions of RD 664/1999; therefore, they are liberalised.

However, a Spanish licence must be obtained to operate gambling activities in Spain. Moreover, to operate in-person gambling (and all other gambling carried out at an autonomous regional level), an additional authorisation must be obtained from each autonomous region where gambling is to be carried out.

The regulation, inspection and control of gambling activities in Spain is carried out by the General Directorate of Gambling Planning of the Ministry of Finance and Public Authorities.

iv Television and radio (audiovisual sector)

As a general rule, under Law 7/2010 of 31 March, on audiovisual communication, there are no restrictions on the acquisition of holdings in Spanish companies belonging to the audiovisual communication services sector.

However, investors who are citizens or residents in a country that is not a member of the European Economic Area (EEA) can only hold stakes and voting rights in a Spanish audiovisual communication services company that uses spectrum in accordance with the principle of reciprocity.

Additionally, the shareholding held, directly or indirectly, by a non-EEA person in these operators may not exceed 25 per cent of the share capital of the Spanish audiovisual communication services licence holder, and the total shareholding in a Spanish audiovisual communication licence holder by non-EEA persons must not exceed 50 per cent on aggregate.

Certain restrictions also exist regarding simultaneous shareholdings in Spanish licence holders that use spectrum.

The restrictions referred to in the two preceding paragraphs are supervised by the Ministry of Industry, Energy and Tourism.

3 Royal Decree 137/1993 of 29 January, on the regulation of weapons, and Royal Decree 230/1998 of 16 February, on the regulation of explosives, also establish the requirement of a special authorisation from the Council of Ministers for direct or indirect foreign investments in the following sectors: the firearm production and trade sector and the explosives production and trade sector.

4 Gambling carried out in an autonomous region range (including all in-person gambling) is governed by the regulations of the relevant autonomous region.

v **Air transportation**

Law 48/1960 of 21 July, on air navigation, and European Parliament and European Regulation 1008/2008 of 24 September, on common rules for the operation of air services in the European Community, provide that holders of operating licences of air transportation passengers must be majority-owned by EU nationals.

When an airline becomes aware that the maintenance of operating licences or the exercise of traffic rights are at risk,⁵ it must make such circumstance public and notify, *inter alia*, the State Agency for Aviation Safety, which will in turn notify the Ministry of Public Infrastructures. From the moment of notification, no acquisition or transfer of shares may be made by foreign individuals or legal entities, unless such acquisition or transfer is accompanied by a certification issued by the airline showing that such acquisition or transfer does not exceed the limits required by the applicable laws or the bilateral air traffic agreements signed by Spain regarding air transport.

Finally, if the airline is aware of any acquisition or transfer of shares that, in breach of the provisions described above, may jeopardise the requirements laid down in the laws and agreements mentioned above, the board of directors of such airline may acquire the shares in question for subsequent cancellation. In such case, and until such time as the shares are physically transferred to the airline, the board of directors may resolve to suspend the voting rights attached to such shares.

vi **Other sectors**

Telecoms sector

The acquisition of holdings in Spanish companies in the telecommunications sector is liberalised, but certain restrictions exist on the simultaneous holding of telecommunications operators in Spain (see below regarding the acquisition of simultaneous holdings in principal operators).

Moreover, in accordance with Law 9/2014 of 9 May, on the regulation of telecommunications, telecom activities can be rendered by EU companies and by non-EU companies provided that, in the latter case, there is an international treaty signed between Spain and the country of the relevant company. However, the Spanish government can authorise exceptions to this regime.

The rendering of telecom services is subject only to prior communication, except in cases where the use of spectrum is required. In the latter case, a prior concession granted by the Ministry of Industry, Energy and Tourism for the use of spectrum is required.

5 Pursuant to Law 14/2000 of 29 December, on fiscal, administrative and social measures, Spanish airlines holding an operating licence with registered shares of which the nationality of the shareholder must be expressly stated.

Energy sector

Under Law 3/2013 of 4 June, creating the National Commission on Markets and Competition (respectively, Law 3/2013 and NCMC), the Ministry of Industry, Energy and Tourism controls share⁶ and strategic asset⁷ acquisitions in the energy sector.

The most notable feature of this control is that it is made following an *ex post* communication regime (i.e., there is no proper authorisation). However, the Ministry of Industry, Energy and Tourism would be entitled to impose conditions in the following circumstances:

- a* there is a true and serious threat to the guarantee of electricity, gas or hydrocarbons supply; and
- b* the acquisition is made by an energy sector company or a non-EU or non-EEA resident company.

Apart from this, the acquisition of holdings in the market operators (i.e., Operador del Mercado Ibérico de Energía, Polo Español, Red Eléctrica de España, Enagás GTS and Compañía Logística de Hidrocarburos CLH) beyond a certain threshold is restricted, regardless of the nationality of the acquirer.⁸

Finally, Spanish regulations provide that individuals or entities that participate, directly or indirectly, in more than 3 per cent of the share capital of more than one principal operator (a utility company that is among the five companies with higher market value in the relevant sector) in the same energy market or industry among those specified in the above-mentioned provision (including power generation and electricity supply, and natural gas production and supply), may not exercise their voting rights in excess of the 3 per cent threshold or appoint any directors, unless upon a prior authorisation from the NCMC.⁹

Financial sector

Investments carried out by either local or foreign investors in certain financial entities, such as credit entities, insurance or reinsurance companies and investment services entities, must follow an authorisation or non-opposition process before the Bank of Spain, the General Directorate of Insurance and Pension Funds or the CNMV, respectively.¹⁰

6 The share acquisition should confer a significant influence over the acquired company (Law 3/2013 does not provide any threshold above which a 'significant influence' should be presumed).

7 Such as nuclear power stations, coal-fired power stations, oil refineries, oil pipelines and oil-bearing storage areas.

8 Red Eléctrica de España and Enagás GTS have additional restrictions in terms of the exercise of voting rights.

9 The NCMC, which has been operational since 6 October 2013, replaces the previous Spanish National Energy Commission.

10 Law 26/1988 of 29 July, on the discipline and intervention in credit entities; Law on Control and Supervision of Private Insurance (approved by Royal Decree-law 6/2004 of 29 October); and Law 24/1988 of 28 July, on the securities market.

The general threshold requiring the prior authorisation of such public regulators is 10 per cent or more of the voting rights, or a percentage that, although lower than 10 per cent, allows the exertion of a significant influence in the relevant entity.¹¹

Finally, the CNMV must also authorise the acquisition of a direct or indirect holding in Bolsas y Mercados Españoles (the holding of the Spanish stock exchanges) representing 1, 5, 10, 15, 20, 25, 33, 40 or 50 per cent of the voting rights, or a percentage that, despite being lower than 1 per cent, allows the exertion of a significant influence in the company.

III TYPICAL TRANSACTIONAL STRUCTURES

i Setting up a business in Spain

Investments in Spain may be carried out directly. There are two main structures available for conducting business operations in Spain: incorporating a subsidiary company (or acquiring an existing subsidiary company) or establishing a branch.

In practice, there are no operational differences between the two structures, and there are no business restrictions deriving from the type of structure. Both branches and subsidiaries must be registered at the Commercial Registry. In addition, the creation of such structures requires the execution of a public deed before a Spanish notary public. Moreover, both entities must comply with certain tax and accounting registrations and ongoing obligations.

Subsidiary

A subsidiary is a company (i.e., an independent legal entity) that may conform to any of the corporate structures provided for under Spanish law. A subsidiary enjoys full legal standing and decision-making autonomy. It has its own share capital, articles of association, management bodies and governing policies.

The investment corporate vehicles most frequently used in Spain are the public limited company and the private limited company. Both exclude shareholders' liability for the company's obligations or liabilities. Spanish law also regulates other types of entities, some of which entail a shareholder's liability for the company's obligations if not settled.

Branch

A branch has no separate legal personality different from the company to which it pertains. The head office and all its branches share the same legal personality (that is, they are all the same legal entity).

The establishment of a branch does not require compliance with all the requirements set out in Spanish law for the incorporation of a new company, but it is still necessary that a resolution be passed by the head office of the company, a notarial deed

11 Pre-approval must also be obtained when crossing thresholds of 20, 30 and 50 per cent, or whenever control of the entity could be obtained by means of an acquisition.

executed in Spain, and at least two managers be appointed and authorised to act in Spain on behalf of the branch. The branch must also comply with certain reporting obligations.

As regards the liability of the branch, since a branch has no separate legal personality, the foreign head company operating in Spain through a branch will be liable for the obligations of the branch.

ii Corporate law residency requirements

Under Spanish law, non-Spanish entities or individuals that carry out any activity with potential tax implications in Spain must obtain a tax identification number (tax ID) in Spain. The tax ID identifies individuals, legal entities and entities without legal personality pursuant to Law 58/2003 of 17 December, on general tax.

Regarding legal entities domiciled abroad, in order to obtain a tax ID, such foreign entities must submit the following documentation to the Spanish tax authorities:

- a* the corresponding tax ID application form (tax form 036);
- b* evidence of the valid formation and existence of the non-Spanish entity (an excerpt from the Commercial Registry where the entity is located or any other official document will suffice for this purpose); and
- c* if appropriate, a special power of attorney granted by the non-Spanish entity in favour of any Spanish individual or entity to request the tax ID on behalf of the foreign entity.

Documents listed in (a) and (b) must be duly notarised and legalised.

Foreign individuals must request a foreign identification number by filing the following documentation:

- a* the corresponding application form (EX-15 form) duly signed by the non-Spanish individual;
- b* declaration of the grounds for the application for the tax ID;
- c* a notarised copy of the complete passport duly apostilled; and
- d* if appropriate, a special power of attorney granted by the foreign individual in favour of any Spanish individual or entity to request the duly legalised tax ID on its behalf.

iii Takeover bids by foreign companies

Under Royal Decree 1066/2007 of 27 July, on takeover bids, the obligation to make a mandatory takeover bid would be triggered, irrespective of the nationality or residence of the bidders, if:

- a* a percentage of voting rights in the listed company equal to or in excess of 30 per cent of its voting rights is acquired, direct or indirectly; or
- b* upon an acquisition, the relevant company holds an interest carrying less than 30 per cent of the voting rights of the listed company, but within the 24-month period following the acquisition appoints a number of directors that, together with those already appointed, represent at least one-half plus one of the members of the board of directors of the listed company.

However, there are certain rules whose application may vary depending on the nationality of the bidder, such as the possibility of releasing the directors of the affected company from their duty of passivity if the applicable law of the country of origin of the foreign bidder does not provide for the duty of passivity as a general duty, and the bidder has also not submitted voluntarily thereto under a resolution adopted by its shareholders at a general meeting.

iv Other structures for ‘on grown’ presence in Spain

An alternative for marketing and distributing foreign products in Spain without creating a separate structure (i.e., neither a company nor a branch) is to enter into a distribution agreement or an agency agreement with a local company operating in Spain. Additionally, an investor may carry out a service in collaboration with another company through a joint venture.

Distribution and agency agreements must be carefully negotiated and drafted. When an agency agreement is terminated, the agent is entitled to claim an indemnity from the other company in consideration for the agent having attracted new clients for the principal party or increased sales to pre-existing customers. Courts have also expanded the indemnification obligation to distribution agreements not clearly separated from agency agreements. The indemnification cost may be significant.

Apart from contractual joint ventures, Spanish law provides for additional forms of joint venture:

- a* temporary business alliances (TBAs), which are established for the purpose of carrying out a specific project or service, allowing several companies to operate together in one common project;¹² and
- b* economic interest groupings (EIGs),¹³ which are commonly used to provide centralised services within the context of a broader association or group of companies, such as centralised purchasing, sales, information management or administrative services.

One of the key differences between TBAs and EIGs is that EIGs are commercial entities with a legal personality separate from their partners.

IV REVIEW PROCEDURE

i Definition of foreign investor and investment

Under Spanish law, foreign investors are defined as individuals not resident in Spain, legal entities domiciled abroad and foreign public entities.

With regard to foreign investment, this would include the following:

- a* holdings in Spanish companies;
- b* establishment and increase of capital allocated to branches;

12 Governed by Law 18/1982 of 26 May, concerning the tax regime of temporary business groupings and associations and regional industrial development companies.

13 Governed by Law 1/1991 of 29 April, on economic interest groupings.

- c* subscription for and acquisition of marketable debt security issued by residents;
- d* holdings in foreign investment funds registered with the CNMV;
- e* acquisition of property sited in Spain and valued at more than €3,005,060.52, or any investment from a tax-haven jurisdiction regardless of value of property; and
- f* formation of or participation in joint ventures, foundations, economic interest groupings, cooperatives and co-ownerships if the total value exceeds €3,005,060.52, or any investment from a tax-haven jurisdiction regardless of amount.

ii Review procedure

The review procedure by the relevant competent authority of an acquisition of an interest in, or an asset of, a Spanish company (or the concession of a licence) in the sectors described in Section II, *supra*, in which an authorisation is required differs between sectors, and varies depending the type of investment; in some cases, the nationality of the acquirer (e.g., EU versus non-EU investors) also introduces certain peculiarities. Due to the limited scope of this chapter, only a brief overview of the main features of this procedure is provided.

The authorisation period ranges from 30 days to six months, depending on the affected sector. It is important to highlight that, in general, these authorisation periods may be suspended by the relevant competent body (by means of information requests), and that the period can therefore be extended. As a general rule, if a resolution denying the acquisition is not issued after the expiration of such period, the authorisation can be presumed.

In the case of authorisations related to the financial sector, the information that must be provided in the authorisation request is broadly described in the applicable regulations, and generally aims to offer proof of the investor's integrity, experience, solvency and its ability to comply with all the applicable sectoral legislation.

Except in the case commented on in Section II.vi (Energy sector), *supra*, authorisations generally operate as a condition precedent, and the transaction cannot be closed until the authorisation is obtained.

During the review process, the public bodies have the obligation to keep the information confidential.¹⁴ However, the dissemination of information between different departments has an inherent risk of leakage. In such event, the existence of the transaction could reach the media, but normally information provided to the regulator is not leaked.

With the exception of competition files, in which other players in the sector may express their position regarding the potential acquisition, authorisation processes are handled only with the interested parties (the acquirer or the buyer, or both, as the case may be).

A public resolution denying an authorisation is subject to administrative or judicial challenge, or both.

¹⁴ Once the authorisation is granted, all or part of the information can be accessed by third parties in the internal registries that most regulatory bodies maintain.

iii Competition

Companies planning to enter the Spanish market should take into consideration the fact that the acquisition of, or merger with, companies active in Spain may be subject to a mandatory merger control review by the competition authorities. This mandatory review regime implies an obligation on the acquiring company or on the merging parties to notify the deal and to suspend its execution until its approval by the authorities.

Transactions that may be subject to merger control review are mergers of two independent companies; acquisitions of sole or joint control over undertakings; and the creation of a joint venture.

A notification and suspension obligation will apply provided that certain thresholds are met. In this regard, it is important to take into account that two different sets of rules apply to transactions affecting the Spanish market: EU merger control rules¹⁵ and Spanish legislation. For transactions that do not reach the EU thresholds (typically those of a smaller scale), Spanish merger control legislation may apply. According to this legislation, transactions must be notified to the national competition authority¹⁶ if one of the following alternative thresholds is triggered: if the transaction results in the acquisition or increase of a market share of 30 per cent or more in the relevant market in Spain; or if the combined turnover of the relevant undertakings in Spain amounts to €240 million, provided that at least two of the undertakings concerned have a turnover of €60 million in Spain.

However, transactions are exempt from the notification obligation where the turnover or assets in Spain of the acquired company do not exceed €10 million, as long as the parties do not have an individual or joint market share of 50 per cent or more in any of the markets concerned.

Public takeover bids will not be subject to the suspension obligation provided in the Spanish merger control legislation provided the following conditions are met: the transaction must be notified to the national competition authority within five days of the submission of the bid to the CNMV; and the acquirer must not exercise the voting rights attached to the shares acquired, or must do so only to maintain the full value of those investments and on the basis of a derogation granted by the competition authority.

V FOREIGN INVESTOR PROTECTION

With regard to multilateral international treaties related to the protection of foreign investments, Spain joined the International Centre for Settlement of Investment Disputes

15 If a transaction has an EU dimension, the European Commission will have exclusive jurisdiction over the merger, and the Spanish merger control procedure will not apply. In this regard, Council Regulation (EC) 139/2004 on the control of concentrations between undertakings sets out the relevant thresholds that trigger the obligation to notify the European Commission.

16 The NCMC was created by means of Law 3/2013 of 4 June. This new authority merged the prior competition authority, the National Competition Commission (CNC), with several sector regulators responsible for telecoms, energy, postal services, audiovisual, railway and airports.

(ICSID) in 1994, whose primary purpose is to provide facilities for conciliation and arbitration of international investment disputes. In 1998, Spain ratified its adherence to the Energy Charter Treaty, signed in Lisbon on 17 December 1994, which establishes a legal framework through which to promote long-term cooperation between its members in the energy field and provides protection to investors similar to that established in the bilateral investment treaties (BITs) described below.

Moreover, Spain has entered into BITs for the promotion and protection of investments with a significant number of countries.¹⁷ These BITs have been agreed with countries that are, or are meant to be, the main focus of Spanish investments and that have a similar structure, which can be summarised as follows:

- a* admission and promotion in their respective territories of investments coming from the other country;
- b* the obligation for the host country to bestow fair and equitable treatment to the foreign investment;
- c* non-discrimination, which obliges the host country to confer on investors of the signatory country the same beneficial rights as those offered to third-country investors (most-favoured nation clause) and to offer to such investors a treatment no less favourable than that granted to national investors (national treatment clause);
- d* the obligation for each country to allow investors from the other country to repatriate the rents, profits and any other payments related to the investments made; and
- e* the banning of expropriation or similar acts, except when due to public interest reasons, with no discrimination, the legal process is followed and there is an appropriate compensation.

The BITs include mechanisms enabling investors to bring any dispute to different international tribunals of arbitration after a period of friendly negotiations and, in some cases, after the submission of the dispute to the local jurisdiction. In connection with this, ICSID and the *ad hoc* arbitration set forth in the United Nations Commission on International Trade Law (UNCITRAL) Arbitral Regulations are the preferred tribunals of arbitration, but in some other BITs, such as those with Cuba and the Dominican Republic, parties direct their disputes to the International Court of Arbitration of the International Chamber of Commerce. Additionally, the Energy Charter Treaty allows disputes to be brought before the *ad hoc* arbitration of the UNCITRAL Arbitral Regulations or the Arbitration Institute of the Stockholm Chamber of Commerce.

In addition, from the perspective of the private relationships between investors, any person has the right to submit any controversy to the Spanish tribunals (whenever these are competent), which resolutions are appealable before a higher tribunal. Moreover, and regarding arbitration, Spain adhered in 1977 to the Convention on the Recognition and

17 The list of countries is available at www.comercio.gob.es/en/inversiones-exteriores/acuerdos-internacionales/acuerdos-promocion-proteccion-reciproca-inversiones-appris/pages/lista-appri-vigor.aspx.

Enforcement of Foreign Arbitral Awards of 10 June 1958, and has incorporated in its internal legislation¹⁸ the main features of the UNCITRAL Model Law on International Commercial Arbitration.

Finally, the Lisbon Treaty has given the European Commission full exclusive competence regarding foreign direct investment. Accordingly, the European Commission will gradually negotiate and sign new BITs on behalf of all 27 Member States with a view to the progressive replacement of Member State BITs that are in force or may enter into force. However, until such replacement occurs, it is provided that Member State BITs with third countries may be maintained in force or enter into force, as long as they do not constitute a serious obstacle to the negotiation or conclusion by the European Union of bilateral investment agreements with third countries.

VI OTHER STRATEGIC CONSIDERATIONS

The strategy to carry out foreign investment in Spain will obviously depend on the features of the potential investment and the target (e.g., acquiring a controlling stake differs from acquiring a minority stake, and whether a regulatory approval or an antitrust clearance is needed is also relevant).

As in every investment opportunity, beforehand it is critical to analyse the financial, legal and tax implications of the transaction and the resulting structure to make sure that any potential synergies are achieved. It is also advisable to gain an understanding of Spanish employment law and check that any labour plans for the target are lawful.

In the event of major investments triggering regulatory approvals by a supervisor (other than in a takeover bid scenario, where confidentiality is crucial), it is generally advisable to approach the relevant supervisor to explain the transaction and the proposed timetable. This will not guarantee that the transaction will be authorised, but it will certainly smooth the process (when public officers are informed in advance of a given transaction and its background, they are likely to be more interested in starting the file analysis). However, any such approach will be considered on a case-by-case basis, and balancing the consequences of potential information leaks.

VII CURRENT DEVELOPMENTS

i Relevant investments

Since December 2013, the most relevant investments made by foreign investors in Spanish companies or assets include the following:¹⁹

- a* the sale of ONO (the Spain's largest cable company) to Vodafone for approximately €7.2 billion;
- b* the sale of the real state loan portfolio of Eurohypo España to Lone Star and JPMorgan for €3.5 billion;

18 Law 60/2003 of 23 December, on arbitration.

19 Sales of foreign assets or companies held by Spanish companies – some of which have been very significant – are not included in this list.

- c* the acquisition by Aigon Capital (Malaysia) of a portfolio of non-performing loans of Catalunya Bank for €1.5 billion;
- d* the acquisition of Mivisa Envases (a Spanish-based company engaged in the business of manufacturing tinsplate packaging) by Crown Holdings from N+1 Mercapital and Blackstone for approximately €1.2 billion;
- e* the acquisition of NCG Banco by Banesco (a Venezuelan-based bank) from the Fund for the Orderly Restructuring of the Banking Sector (FROB) for €1 billion;
- f* the sale by Banco Santander of 50 per cent of its depositary business in Spain, Mexico and Brazil to Warburg Pincus and Temasek for €975 million; and Altamira Real Estate (its platform for recovery of credit in dispute and real estate management) to Apollo for €664 million;
- g* the acquisition of Campofrío (the leading processed meats company in Europe) through a takeover bid launched by Sigma Alimentos (Mexico) and WH Food Europe (China) for approximately €700 million;
- h* the acquisition of Everis group (one of the largest independent Spanish consulting and IT services providers) by NTT Data Corporation (Japan) for a purchase price of €599 million;
- i* the acquisition of Deoleo (the world's biggest bottled olive oil company) through a takeover bid launched by CVC Capital Partners for a purchase price of €440 million;
- j* the acquisition of Laboratorios Indas (a leading Spanish company in the manufacture of hygiene products) from Vista and Portobello Capital by Domtar Corporation (a Canadian manufacturer of products based on fibres) for a purchase price of approximately €400 million;
- k* the acquisition of a 10 per cent stake in Desigual (a Spanish fashion retailer) by Eurazeo (France) for €291 million;
- l* the acquisition of emblematic real estate properties, such as Edificio España (by Dalian Wanda, China, for €265 million), Santa Engracia 26 (by Finaccess, Mexico, €181 million), Castellana 200 (by Anchorage Capital for €148 million), Hotel Renaissance in Barcelona (by Qafip, Qatar, for €78.5 million) and Hotel InterContinental in Madrid (by Qatar Holding, Qatar, for €60 million);
- m* the acquisition by Goldman Sachs (together with Azora, a Spanish-based private investment firm) of 3,000 social houses under lease agreements from IVIMA (the Madrid Housing Institute) for approximately €205 million;
- n* the sale by SAREB of the Bull and Teide portfolios to HIG Capital and Fortress for €100 million and €146 million, respectively; and
- o* the acquisition by Apollo Management of EVO Bank for €60 million.

Moreover, the Spanish stock markets experienced a significant recovery during the first half of 2014, which has given rise to significant equity capital market transactions with a material foreign investment, such as seven IPOs (two of which are being marketed at the time of writing this chapter) and the sale of large stakes through block trades (e.g., 9.5 per cent of Repsol sold by Pemex for €2.5 billion, 4.97 per cent of Iberdrola sold by Bankia for €1.5 billion and 7.5 per cent of Bankia sold by the FROB for €1.3 billion). Moreover, following the trend started in the last half of 2013, during 2014 there has been a number of debt issues carried out by banks, listed companies and non-listed entities

(e.g., Banco Santander, la Caixa, Grupo Antolín and Adif) and addressed to institutional foreign investors.

ii Possible trends

Likely trends in foreign investments for the remaining months of 2014 (and possibly during 2015) may focus on the following areas:

a financial sector:

- the acquisition of asset portfolios from the Company for the Management of Assets Proceeding from the Restructuring of the Banking System (SAREB), which could include land, mortgage loans and both properties that are finished or under development; and
- the sale of industrial portfolios and non-core assets, and the run-off non-core activities by financial institutions with capital shortfalls that they are unable to meet without having recourse to state aid;

b public sector:

- the government is committed to achieving the budget deficit target for 2014 (2.8 per cent) through a combination of the austerity package passed earlier this year, the privatisation of public companies and the sale of assets and stakes it owns in different companies;
- regarding privatisations (from the central government), the main project that has been announced is AENA, which manages and operates 47 Spanish airports in Spain and participates directly or indirectly in the management of 26 airports around the world. There could also be privatisations at a regional level with respect to companies managing public services, such as water management and supply services, and hospitals and public health institutions; and
- regarding a potential sale of assets, SEPI (a government-owned holding company) holds a diversified and relevant equity portfolio in several companies that could eventually be placed in the market. Moreover, iconic real estate properties could be sold by the central or regional governments; and

c private sector:

- opportunities may still be found among Spanish companies that need to cut their debt by selling non-strategic assets as part of unveiled strategic plans, to preserve their investment-grade rating or to meet the demands of their creditors;
- in real estate, large companies (some of which are controlled by bank syndicates) are still facing difficulties, and investment opportunities may be pursued therein; and
- due to market recovery, it is probable that additional equity and debt capital markets transactions will take place in the next few months.

Appendix 1

ABOUT THE AUTHORS

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Edurne Navarro is the partner in charge of the Brussels office of Uría Menéndez. She joined the firm in 1992 and became a partner in 2002.

Her practice focuses on EU and Spanish competition law (principally merger control, state aid and cartels), as well as trade law (mainly antidumping and rules of origin). She acts for Spanish, European, North American and Asian undertakings in sectors such as telecommunications, energy, transport, pharmaceuticals, defence and banking.

Ms Navarro is regarded as a leading lawyer by the main international legal directories, including *Chambers & Partners, PLC* and *The International Who's Who of Lawyers*.

ALFONSO VENTOSO

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Alfonso Ventoso joined Uría Menéndez in September 2002. Prior to this, he amassed experience in real estate law and litigation, and worked in London in the insolvency department of a UK firm.

From January to July 2009, he was seconded to Davis Polk & Wardwell in New York, where he was assigned to the capital markets practice group as part of the firm's foreign temporary associates programme.

Mr Ventoso's practice is focused mainly on equity capital markets (including listings and delistings, public offerings and block-trades), and on providing general advice to investment firms, banks and listed companies on the regulatory aspects relating to securities markets and corporate governance.

In addition, he has ample expertise in M&A deals involving both listed and financial companies, and the issue of debt securities, especially hybrid instruments.

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