SQUIRE PATTON BOGGS

New Spanish FDI Regulation Recently Enacted

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On Wednesday 5 July, Royal Decree 571/2023 of 4 July on foreign investment (RD 571/2023) was published in the Official State Gazette (BOE), presenting itself as the long-awaited regulatory development on foreign direct investment (FDI), and repealing the previous Royal Decree 664/1999 of 23 April on foreign investment.

Following the entry into force of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the union, together with a series of national legislative amendments that led to the introduction of Article 7 bis in Law 19/2003 of 4 July 2003 on the legal regime governing the movement of capital and economic transactions abroad and certain measures to prevent money laundering, a suspension of the general regime of liberalisation of foreign investment in Spain was incorporated into the Spanish legal system.

Since then, certain foreign investments have been subject to an obligatory control mechanism for reasons of security, public order and public health, which requires prior authorisation of the transaction, depending on either the name and characteristics of the investor or the impact of the investment on a national strategic sector.

However, this control mechanism suffered from the lack of a comprehensive and adequate regulatory development that could guarantee confidence, clarity and legal certainty for investors – shortcomings that RD 571/2023 seeks to remedy.

Among the main elements and changes of RD 571/2023 are the new definitions and delimitations of what are considered strategic sectors (in particular, it specifies when a company has access to sensitive information, clarifies what is understood by critical and dual-use technologies and narrows the definition of basic inputs), or investments that are subject to authorisation due to the inherent characteristics of the investor.

One of the most important developments is the revision of the exemption regime. The following are now exempt from the licensing regime:

- Foreign investments in strategic sectors where the turnover of the acquired companies does not exceed €5 million in the last closed accounting year
- Time-limited investments (i.e. investments of short duration), which do not create any real capacity to influence the company
- Certain operations in the energy sector that, by virtue of their characteristics, are not considered to pose a risk to national security

Of particular note is the removal of the general exemption for investments of less than €1 million.

Furthermore, RD 571/2023 provides that all applications for authorisation, regardless of the amount of the investment, will be decided under the ordinary procedure, subject to a general maximum decision period of three months.

The decision on these applications is generally taken by the Council of Ministers. However, for investments of €5 million or less, the head of the Directorate-General for International Trade and Investment is the relevant entity in charge of issuing the authorisation. Negative administrative silence is maintained.

In addition, internal restructuring within a group of companies and increases in shareholdings (by a shareholder holding more than 10%) that do not involve a change of control are not considered as direct investment.

With regard to investment funds, the application of beneficial ownership is explicitly clarified, taking into account management companies as such, provided that the shareholders or beneficiaries do not legally exercise political rights or have privileged access to the company's information.

Although the system of prior consultation is not presented as an innovation, as it was already integrated in practice, RD 571/2023 provides the missing legal grounds, establishing its binding nature for the bodies and entities of the consulted administration, as well as setting a deadline of 30 working days for the resolution of the consultation submitted.

Finally, although these aspects are already applicable, it is worth mentioning the following provisions of RD 571/2023:

- any transaction carried out without the required prior authorisation is null and void, which means that the foreign investor cannot exercise any political or economic rights in the Spanish company until the authorisation has been obtained;
- if the notary becomes aware that a transaction is subject to prior authorisation, they are obliged to inform the applicants of the need to obtain it;
- if the transactions are carried out under the agreement of two or more investors, only one authorisation is required;
- and if two or more foreign investment transactions are carried out within a period of two years between the same buyers and sellers, they will be considered as a single transaction carried out on the date of the last transaction.

RD 571/2023 will enter into force on 1 September 2023. However, as a transitional regime, it foresees that procedures initiated prior to that date will continue to be subject to the regime set out in Royal Decree 664/1999 of 23 April 1999 on foreign investment.

Finally, it should be noted that the exceptional and temporary regime set out by the Royal Decree-Law 34/2020 of 17 November, as amended by Article 62 of Royal Decree-Law 20/2022 of 27 December, remains in force until 31 December 2024, extending the subjective scope to investors resident in other EU and European Free Trade Association (EFTA) countries – including those resident in Spain whose beneficial ownership is held by an EU or EFTA resident – if the investment (i) is in one of the sectors classified as critical by Law 19/2003 of 4 July; (ii) affects public order, security and health; (iii) affects public order, public security and public health; and (iv) involves Spanish listed companies or, if not listed, the amount of the investment exceeds €500 million.

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