

## Spain: Royal Decree on foreign investments

### In brief

The Spanish State Gazette published yesterday (BOE) contains the Royal Decree 571/2023, of 4 July, on Foreign Investments ("**Royal Decree**") which is intended to (i) update the procedure for declaring foreign investments for statistical and information purposes (both foreign investments in Spain and Spanish investments abroad); and (ii) develop certain features of Law 19/2003, of 4 July, on the legal regime of capital movements and foreign economic transactions ("**Law 19/2003**") and its implementing regulations, particularly with regard to the introduction of Article 7bis, relating to the suspension of the liberalization regime, in order to provide greater legal certainty to the authorization procedure, for the cases in which this is meant to be mandatory.

In the following [link](#), you can access the full text of the Royal Decree.

### In depth

The Royal Decree that develops the regulation on certain foreign investments in Spain (and vice versa) contains the following updates.

1. The Royal Decree elaborates the objective scope of the declarations to the Investment Registry, both for foreign investments in Spain (such as the D-1A or D-2A forms that had been used to date) and for investments by Spanish residents abroad (such as the D-5A or D-7A forms that have been used to date), hitherto regulated by the Royal Decree 664/1999, of 23 April, on foreign investments and in the Order of 28 May 2001 (which develops such rule).

The main new features introduced by the Royal Decree are as follows: first, it sets forth new types of transactions that shall be declared and, second, it regulates certain transactions whose declaration shall be filed prior to the execution of the investment (rather than ex-post).

Pursuant to the above, the following investments are included as new types of investments that are subject to declaration before the Investment Registry of the Ministry of Industry, Trade and Tourism: (i) the acquisition of a stake in the share capital of a Spanish company, provided that the foreign investor holds or acquires a stake equal to or greater than 10% or its voting rights (previously non-limited); (ii) the acquisition of shares in collective investment institutions or closed-end collective investment entities, provided that the management company is resident and as a result it will acquire, or will have the right to acquire, a stake equal to or greater than 10%; (iii) shareholders' contributions to Spanish companies' equity (contributions to 118 account of the Spanish General Accounting Plan), provided that the shareholder holds a stake equal to or greater than 10%; (iv) financing Spanish companies or branches through debt instruments, provided that such financing exceeds EUR 1 million and its amortization period exceeds one year (temporarily non-declarable); (v) the reinvestment of profits, provided that such reinvestment is made by a non-resident investor holding a stake equal to or greater than 10% (temporarily non-declarable); (vi) other types of investments (such as the formalization of joint account agreement, TBAs, foundations, economic interest groupings, etc.) provided that the non-resident investor's stake represents a percentage equal to or greater than 10% of the total value and, in addition, is greater than EUR 1 million (instead of EUR 3 million); and (vii) the acquisition of real estate located in Spain by non-residents, provided that it exceeds EUR 500,000 (instead of EUR 3 million), or of real estate located abroad by Spanish citizens, provided that it exceeds EUR 300,000 (instead of EUR 1.5 million).

The declaration shall be submitted in advance in those cases where (a) the foreign stake exceeds 50% of the Spanish company's share capital (or the Spanish participation exceeds 10% of the foreign company); or (b) an investment in real estate (as described in point (vii) above) takes place. All other foreign investments in Spain or Spanish investments abroad will be declared after their execution.

2. **The Royal Decree contains a detailed regulation on the authorization process for certain foreign direct investments in Spain** which are subject to the suspension of the liberalization regime provided for in Law 19/2003. The main aspects subject to further development are the following:
- a. **Voluntary consultation.** One of the main features set by the Royal Decree is that, prior to executing an investment potentially subject to the suspension regime, the investors will be entitled to submit a prior consultation to the General Directorate for International Trade and Investment (DGCII) (or the General Directorate for Armaments and Material for investments related to national defense) on the applicability (or non-applicability) of said regime. Such resolution will be binding. The competent General Directorate shall respond within 30 business days. If a voluntary consultation is delivered, investors will be prevented from filing a formal authorization request during such period. Once such period has elapsed, investors will be entitled to request an authorization for the relevant transaction.
  - b. **Objective scope for foreign investments from non-EU and non-EFTA countries - strategic nature -.** Article 15 contains certain rules to clarify the list of sectors that are to be considered strategic according to Article 7a(2) of Law 19/2003. In summary, the Royal Decree contains a more exhaustive definition of the following concepts:
    - The concept of critical and dual-use technologies is defined by reference to Article 2(1) of Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021.
    - Critical infrastructures are those listed as such in the National Catalogue of Strategic Infrastructures. – Key technologies for industrial leadership and training. This category covers investments in key enabling technologies for the future according to the Horizon Europe Research and Innovation Framework Program (advanced materials and nanotechnology, photonics, microelectronics and nanoelectronics, life science technologies, advanced manufacturing and processing systems, artificial intelligence, digital security and connectivity).
    - Technologies that have been developed under programs and projects of particular interest to Spain. This category includes investments that have required a substantial amount or percentage of financing from the European Union's or from the Spanish Government's budget for its development.
    - Supply of essential inputs. The Royal Decree elaborates the concept of essential inputs, covering as such those that are indispensable and non-substitutable for the provision of essential services to maintain basic social functions (health, security, social and economic well-being of citizens, or the functioning of State Institutions and Public Administrations). In this regard, the Royal Decree contains a list of sectors that will be considered essential, which covers (i) inputs provided by companies that develop and modify the software used in the operation of critical infrastructures in the energy, water, telecommunications, financial and insurance, health, transport and food security sectors; as well as (ii) the supply of water, energy, strategic raw materials, telecommunications or transport services, health services, food security, research or the financial and tax system.
    - Sectors with access to sensitive information. The Royal Decree narrows down the scope of the concept of "sensitive information", which until now, under Law 19/2003, included a very broad concept of information. The Royal Decree provides that "companies with access to sensitive information" will be the following: (i) those with access to data on strategic infrastructure which, if disclosed, could be used to plan and carry out actions aimed at disrupting or destroying those; (ii) those with access to databases related to the provision of essential supply services; (iii) those with access to official databases that are not publicly accessible; and (iv) those that carry out activities that are subject to a mandatory personal data impact assessment in accordance with Article 35(3) of Regulation (EU) 2016/679.
  - c. **Term to authorize the investment.** The maximum period for notifying the decision to the investor is reduced from six to three months, which will significantly speed up this procedure. Once this period has elapsed without an express resolution having been issued, the application will be deemed to have been rejected (due to administrative silence ("silencio administrativo")).
  - d. **Subjective scope for foreign investments from non-EU and non-EFTA countries.** In relation to the investors prospectively subject to authorization, the Royal Decree sets forth: (i) the requirements for determining whether a foreign investor is controlled, directly or indirectly, by the government of a third country, including public bodies or armed forces (comprising certain cases of public funding); (ii) the criteria for determining whether the investments or activities carried out by a foreign investor may have three affected the security, public order or public health in

another EU Member State; and (iii) the aspects to be considered in order to determine the existence of a serious risk for the foreign investor to be engaged in criminal or illegal activities that may affect the security, public order or public health in Spain (taking into account administrative or judicial sanctions imposed during the last three years in certain areas).

- e. **Exceptions to the authorization regime for foreign investments from non-EU and non-EFTA countries.**
- Investments in the energy sector, regardless of the amount of the investment, provided that the investor does not meet any of the features set out in section 3 of Article 7bis of Law 19/2003 and that the following circumstances are met: (i) the companies or assets acquired are not be engaged in regulated activities; (ii) as a result of the investment, it does not acquire the status of dominant operator in the fields of generation and supply of electricity, production, storage, transport and distribution of fuels or biofuels, production and supply of liquefied petroleum gases or production and supply of natural gas; (iii) if the investment entails the acquisition of generation assets, the resulting share of installed capacity by technology, calculated based on the parameters set in the Royal Decree, is of less than 5%; and (iv) if the investment affects companies that are engaged in the activity of commercialization of electrical energy, those have less than 20,000 clients.
  - Generally, investments in companies whose turnover for the last closed financial year does not exceed EUR 5 million, provided that its technologies have not been developed under programs of special interest for Spain. Notwithstanding the foregoing, certain investments in electronic communications operators are exempt from this de minimis exception.
  - Investments in real estate not related to critical or essential infrastructures for the provision of essential services.
  - Short-term investments (hours or days) in which the investor does not have the capacity to influence the management of the acquired company for being underwriters and insurers of share issues and public offers for sale or subscriptions of shares. It will be the final investors who, if applicable, shall request such authorization.
  - Investments that have no or little impact on protected legal interests (public safety, health and order).
  - Finally (i) internal restructurings within a group of companies; or (ii) an increase in the stake held by a shareholder who already holds more than 10% of the share capital company but which do not entail a change of control, will not be considered direct investments and therefore the regime will not be suspended.
- f. **Common regime for authorizations.** The Royal Decree also clarifies the following:
- If the same sellers and purchasers intend to execute two or more foreign investment transactions within a two-year period, those will be considered as a single transaction carried out on the date of execution of the last transaction.
  - For investments carried out upon the agreement of two or more investors for the purposes of exercising a joint control over a specific company, a single joint application for prior authorization will be required for all the investors involved.
  - Resolutions may consist of: (i) an authorization without conditions; (ii) the denial of the authorization; (iii) an authorization subject to the conditions imposed by the relevant authority or setting forth the undertakings that have been submitted by the investor and have been accepted by the relevant authority; or (iv) the rejection of the application (“archivo”), either due to the withdrawal of the request filed by the investor or due to the fact that the transaction is deemed not to be subject to the suspension regime. In the event that the resolution requires the investor to adopt any measure, the resolution shall specify the administrative body that will be responsible for monitoring its compliance. To this extent, note that the former regime did not set forth the types of resolutions that may be delivered.
  - Once authorized, the investments shall be executed within a six-month period (unless otherwise specified in the authorization). Once this period has elapsed without the investment having been formalized, the authorization will be deemed to have lapsed, unless a single extension is obtained for a six-month additional period.

- Investment transactions carried out without the required prior authorization will lack validity and legal effect until those are legalized. Accordingly, the foreign investor will not be able to exercise the economic and political rights in the target company until the necessary authorization is obtained.
- The applications will be resolved by the Council of Ministers if the amount of the investment exceeds EUR 5 million (and by the DGCII, as long as the investment is greater than EUR 1 million, in cases not related to the defense sector, in which case it will be the responsibility of the General Directorate for Armaments and Material to resolve such case).

The Royal Decree will enter into force on 1 September 2023; notwithstanding the foregoing, the proceedings initiated before its entry into force will be resolved in accordance with the regulations in force by the time those were initiated. Although the entry into force of the Royal Decree represents a significant advance in the regulatory development of this field, it is considered that there are still features that may continue to create uncertainty.

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