ALLEN & OVERY

# Foreign direct investment regime in Spain: recent developments

Analysis of the main developments introduced by the Royal Decree 571/2023 in the Spanish FDI regime | July 2023

# Introduction

On 5 July 2023, Royal Decree 571/2023 on foreign investments (**RD 571/2023**), previously approved by the meeting of the Council of Ministers on 4 July 2023, was published in the Official State Gazette. It will enter into force on 1 September 2023 and aims to develop, with regard to foreign investments, Law 19/2003, of 4 July, on the legal regime of capital movements and foreign economic transactions (**Law 19/2003**).

RD 571/2003 regulates two clearly differentiated aspects:

(i) declarations to the Investment Register of both foreign investments in Spain and Spanish investments abroad (Chapters II and III of RD 571/2023); and

(ii) the so-called suspension of the general liberalisation regime for certain foreign investments (Chapter IV of RD 571/2023).

While the first block is aimed at investment declarations[1] with an eminently administrative or statistical purpose, the second block regulates relevant aspects of the procedure for screening and authorizing foreign investments prior to completing the investment.

In our opinion, it is the second block that has the most significant impact on the Spanish mergers and acquisitions market. RD 571/2023 develops the regulation of foreign investment in Spain. However, by its very nature, it is not intended to modify or replace the existing legal regime.

The most relevant legal provision in this subject is contained in article 7bis of Law 19/2003 and, to a lesser extent, the Single Transitory Provision of Royal Decree-Law 34/2020, of 17 November, on urgent measures to support business solvency and the energy sector, and in tax matters. They regulate the so-called foreign direct investment (**FDI**) regime[2]. This analysis focuses on the main novelties of the last of the aforementioned blocks (that is, the regime of prior authorization of foreign investments in Spain). RD 571/2023 does not differ significantly from what was already foreseen in the draft text of the Royal Decree that was published in November 2021 and, on many cases, it contains the criteria that the Public Administration has been applying in practice since the FDI regime was approved in Spain.

Along with the development of the general FDI regime, the Chapter IV of RD 571/2023 also regulates the prior authorization regime in other types of foreign investments in Spain: foreign investments directly related to National Defense; those related to weapons, cartridges, pyrotechnic and explosive articles for civilian use or other material used by the State Forces and Security Corps.; and those made to acquire real estate for diplomatic purposes of States not members of the European Union[3]. In addition, this Chapter also develops the possibility for the Council of Ministers to establish the need for prior authorization for other foreign investments in sectors and activities that may be related, even if only occasionally, to the exercise of public power, or activities directly related to national defense, or to activities that affect or may affect public order, public safety and public health.

Next, this analysis will focus on (i) the main developments that apply to all foreign investment regimes subject to prior authorization; (ii) the main developments in the FDI regime, in particular; and, finally, (iii) other relevant developments.

# Common features

## Voluntary consultation

One of the main novelties of RD 571/2021 is the regulation of a confidential voluntary consultation procedure on the need to obtain prior authorization for a specfic investment.

The Public Administration had already been admitting this type of consultation and they have been very useful, especially inmediately after the article 7bis of Law 19/2003 entered into force. However, it was an informal and no regulated procedure which, consequently, dependeded on the will and good work of the corresponding civil servants.

The Royal Decree provides that consultations must be addressed to the General Directorate of International Trade and Investment of the Ministry of Industry, Trade and Tourism or the General Directorate of Armament and Material of the Ministry of Defense depending on the type of activity in question.

---

1 These are post-investment declarations, unless the origin orThe investment is a country classified as non-cooperative jurisdictions regulated in Order HFP/115/2023, of 9 February, which determines the countries and territories, as well as the harmful tax regimes, that are considered non-cooperative jurisdictions, in which case the investment must be declared in advance.

2 It is necessary to take into consideration that in Spain there were also other regimes of prior authorization of foreign investments (i) in activities directly related to National Defense, such as those destined to the production or trade of arms, ammunition, explosives and war material; and (ii) for the acquisition of real estate intended for its Diplomatic or Consular Representations, and which are also developed in articles 18 to 20 of RD 571/2023.

3 Articles 18,19 and 20 of RD 571/2023.

The Public Administration has a period of thirty business days to respond to such inquiries (the deadline may be suspended if the Public Administration requires additional information), after issuing a favorable report by the Foreign Investment Board (**Jinvex**)[4]. After this period without express resolution, the interested party may submit a formal application for authorization of the investment transaction.

Likewise, it must be taken into account that, if voluntary consultation is presented, it is not possible to formally request authorization until the resolution of the same, unless the Public Administration does not respond to it within the aforementioned period of thirty business days. This forecast means that the presentation of the voluntary consultation must be assessed in practice, since it can affect the times of the operation.

## Subjects of authorised foreign investment

RD 571/2023 regulates, in general terms, the investors who may be subject to prior authorisation, without prejudice to the particularities of each of the regimes expressly set out in the regulation[5]:

i. "Non-resident" *foreign investors*. This includes individuals who have their habitual residence in foreign territory, accredited foreign diplomats and foreign staff of foreign embassies and consulates or in international organizations in Spain, legal entities with registered office abroad and branches and permanent establishments abroad of natural or legal persons resident in Spain.

ii. Foreign "resident" individuals, exclusively for the purposes of investments related to National Defense or in arms and explosives.

These provisions do not modify the definition of foreign investor included in Article 7bis.1 of Law 19/2003, for the purposes of the general FDI regime, but are added to what is already provided for in said Law 19/2003.

The regulation also adapts the concept of foreign investor to the reality and operating structure of investment funds, pension funds, collective investment institutions, closed-end collective investment entities and similar entities or figures. In these cases, it is clarified that the general partner will be considered as a foreign investor, in order to check whether prior authorization is required or not, except in those cases in which the limited partners or beneficiaries legally exercise voting rights or have privileged access to information of the company in which they invest. This is consistent with the fact that it is the general partner that usually control this type of entity and the partners or beneficiaries only hold economic rights.

## Common rules for authorisations

RD 571/2023 sets forth certain provisions that apply, in general, to all authorisations for foreign investments (both FDI and other). Below we detail the most relevant aspects:

- **Invalidity of investments**: investments subject to authorization may only be made once after having obtained the corresponding express administrative authorization and under the conditions established therein. Like the Law 19/2003, RD 571/2023 also insists that investments carried out without the mandatory prior authorization, when necessary, will lack validity and legal effects, as long as their legalization does not occur. RD 571/2023 specifies that, in these cases, the exercise of economic and political rights by the investor is not possible.

---

[4] The Jinvex is the interministerial collegiate body, attached to the General Directorate of International Trade and Investment of the Secretary of State for Trade, with investment reporting functions It has the following competences:
a) Report on those matters that, on specific foreign investments, their treatment, regulation or application thereof, are submitted to it by its President or by the body that is competent in the matter.
b) Report on the prior consultations contained in article 9, authorization proposals or surveillance files in the terms established by this royal decree.
c) Agree, where appropriate, communications on indicative or methodological criteria for the analysis and instruction of the operations that are submitted to it.
d) Report on any other matter that its President requests.
e) Any other attributions entrusted to it by current legislation.

[5] This is FDI, investments related to National Defence, investments related to weapons, cartridges, pyrotechnic articles and explosives for civilian use or other material used by the State Forces and Security Corps and acquisitions of real estate for diplomatic purposes of States not members of the European Union.

- **Telematic processing**: electronic processing will be mandatory at all stages of the procedure. Therefore, applications, communications and other required documentation will be submitted to the electronic registry of the Ministry of Industry, Trade and Tourism.
- **Accumulation criterion**: where two or more foreign investment operations take place within a period of two years between the same buyers and sellers, these shall be considered as a single investment made on the date of the last transaction, for the purposes of determining the possible authorisation requirement.
- **Single application**: in the case of investments carried out with the agreement of two or more investors, in order to exercise joint control of the company concerned, a single application by all investors will be required.
- **Resolution period**: in all cases, the Public Administration will have a maximum period of three months, prior report of the Jinvex to process and resolve the requests for authorization. This period would be interrupted in the event that the Administration requests additional information. Administrative silence is negative.
- **Amount:** In the case of the general FDI regime, applications will be addressed to the head of the General Directorate of International Trade and Foreign Investment and will be resolved by that same person, when the amount of the investment is equal to or less than 5 million euros and by the Council of Ministers, in the rest of the cases. This competence regime has not undergone any modification with respect to the one that was already applied prior to RD 571/2023.
- **Types of resolution**: the resolution of the request for authorization may be (i) an authorization without conditions; (ii) refusal; (iii) authorization subject to conditions, either imposed or proposed by the applicant; or (iv) archiving due to withdrawal or for being outside the prior authorization regime.
- **Maximum term of execution of the investment**: once an investment has been authorized, it must be completed within the period specifically indicated by the authorization or, in absence of that, within a maximum period of six months. After the period has elapsed without the investment having been completed, the authorization will be understood to have expired, unless an extension is obtained for another 6 months, which will be unique and if the operation has not been closed once the extension has been granted, it will be definitively understood as unauthorized.
- **Modifications in the authorized investment**: any alteration of the terms of the investment authorized in accordance with the previous sections, must be notified to the body of the Administration that processed the corresponding application and, if the modification is substantial, the investment must be submitted to a new authorization procedure.
- **Notarial authorization**: the notary who becomes aware that a transaction is subject to prior authorization, must inform the applicants of the need to obtain it[6].

[6] Article 12 of RD 571/2023 also establishes that *'Consuls or persons in charge of consular affairs exercising notarial functions abroad shall not be involved in investment operations subject to prior authorisation'*.

# Main developments in the FDI regime

## FDI Definition

Although RD 571/2023 does not alter the concept of FDI established in article 7bis.1 of Law 19/2003[7], it does establish two very specific exclusions to this concept:

a) Internal restructuring in a group of companies.

b) Increases in business holdings by a shareholder who already has a stake of more than 10% and which are not accompanied by changes in control.

Additionally, in order to verify whether an investor of the European Union or the European Free Trade Association can be controlled by someone who does not reside in those countries, RD 571/2023 establishes that *"the provisions of article 7.2 of Law 15/2007, of 3 July, on the Defense of Competition will apply"* and specifies that ***'that is to say, the examination of contracts, rights or any other means which, having regard to the factual and legal circumstances, confer the possibility of exercising decisive influence over the undertaking'***.

## Investment sectors subject to authorisation

Article 7bis.2 of Law 19/2003 lists a number of sectors in which foreign investments are subject to FDI authorization (**sectors subject to authorization**).[8]

RD 571/2023 delimits the scope of most of these sectors subject to authorization and defines, among others, which are critical infrastructures, dual-use technologies, fundamental inputs, or companies with access to sensitive information for the purposes of foreign investment regulations. Some particularities that stand out from these definitions are:

- The technologies developed under programmes and projects of special interest to Spain are those that involve a substantial percentage of funding from the European Union or Spanish public budget. RD 517/2023 does not delimit, however, what should be understood by *"substantial percentage"*.
- In general, it links the definition of essential inputs to those that *are "indispensable and non-substitutable"* for the provision of certain services that it considers essential. Additionally, it establishes certain specific forecasts

---

[7] That is, all those investments that, as a result of which, the investor happens to hold a participation equal to or greater than 10% of the share capital of a Spanish company, and all those others that, as a result of the corporate operation, act or legal business that is carried out, acquire control of all or part of it, by application of the criteria established in article 7 of Law 15/2007, of 3 July, on the Defense of Competition, provided that one of these circumstances occurs:
a) That they are made by residents of countries outside the European Union and the European Free Trade Association (**EFTA**).
b) That are made by residents of countries of the European Union or the EFTA whose real ownership corresponds to residents of countries outside the European Union and the EFTA. Such beneficial ownership shall be deemed to exist when the latter ultimately own or control, directly or indirectly, a percentage exceeding 25% of the capital or voting rights of the investor, or when by other means they exercise control, directly or indirectly, of the investor.

[8] Specifically, article 7bis.2 of Law 19/2003 lists the following sectors *'affecting public policy, public security and public health*:
*a) Critical infrastructures, whether physical or virtual (including energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructures, and sensitive facilities), as well as land and real estate that are key to the use of said infrastructures, understood as those contemplated in Law 8/2011, of 28 April, establishing measures for the protection of critical infrastructures.*
*b) Critical and dual-use technologies, key technologies for industrial leadership and training, and technologies developed under programmes and projects of particular interest to Spain, including telecommunications, artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, nanotechnologies, biotechnologies, advanced materials and advanced manufacturing systems.*
*c) Supply of fundamental inputs, in particular energy, understood as those that are regulated in Law 24/2013, of 26 December, on the Electricity Sector, and Law 34/1998, of 7 October, on the Hydrocarbons Sector or those referring to strategic connectivity services or raw materials, as well as food safety.*
*d) Sectors with access to sensitive information, in particular personal data, or with the capacity to control such information, in accordance with Organic Law 3/2018, of 5 December, on the Protection of Personal Data and guarantee of digital rights.*
e) *Media, without prejudice to the fact that audiovisual communication services in the terms defined in Law 7/2010, of 31 March, General of Audiovisual Communication, will be governed by the provisions of that Law.*

for the inputs provided by companies that develop and modify software used in the operation of critical infrastructures.

- Companies with access to sensitive information include all those that have access to databases related to the provision of financial services as well as those that carry out activities that require an impact assessment on personal data in accordance with GDPR. This criterion is fully in line with the questions already being asked by the Public Administration to analyse the notified transactions.

Finally, the absence of any reference to *"media"* in RD 571/2023 is striking, despite the fact that it is another sector subject to authorization under article 7bis.1.e) of Law 19/2003.

## Features of the investors

According to article 7bis.3 of Law 19/2003, there are certain foreign investors whose investments are always subject to prior authorization on FDI. Specifically, we refer to the following:

a) whether the foreign investor is controlled directly or indirectly by the government, including public bodies or armed forces, of a third country[9].

b) if the foreign investor has made investments or participated in activities in sectors affecting security, public policy and public health in another Member State, and in particular those listed in Article 7a(2).

c) if there is a serious risk that the foreign investor will engage in criminal or illegal activities that affect public security, public order or public health in Spain.

Although RD 571/2023 does not delimit each of the cases in detail, it does establish some criteria or guidelines to assess whether a foreign investor is in any of them that, in essence, coincide with those already being examined by the Public Administration in this regard[10]. Specifically, RD 571/2023 establishes:

- In relation to the case of control by a foreign government, it is reiterated that the concept of control provided for in the Law on Defense of Competition is applicable to determine when a foreign investor is controlled by a foreign government. In addition, that of RD 571/2023 provides that it may be investigated whether a foreign government can exercise control over the investor through significant financing.
- In relation to public funds (v.gr. sovereign wealth funds), RD 571/2023 clarifies that investments made by vehicles through which these funds invest may be understood not to be under public control (and, therefore, are exempt from the authorisation regime) if their investment policy is independent and focuses exclusively on the profitability of their portfolios without the political influence of a third State.
- In relation to the realization of certain investments in other countries of the European Union, RD 571/2023 only indicates that the information received within the framework of the cooperation mechanisms in relation to foreign direct investments provided for in 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, may be taken into account.
- In relation to the existence of a risk of carrying out illicit activities in Spain, RD 571/2023 states that final administrative or judicial sanctions imposed on the investor in the last three years will preferably be taken into account, in particular, in areas such as money laundering, the environment, taxation, or the protection of sensitive information.

[9] For the purposes of determining the existence of the aforementioned control, the criteria established in Article 7.2 of the Law on the Defense of Competition are applied.

[10] https://comercio.gob.es/InversionesExteriores/Documents/Formulario_28_03_2023.docx

# Exemptions

One of the most outstanding aspects of RD 571/2023 are the exemptions from obtaining prior authorization for certain investments that it listes and, specifically, the following:

### Energy sector

When the investor is not always subject to prior authorization and the following cumulative circumstances also concur:

- The companies or assets acquired do not exercise regulated activities[11].
- As a result of the operation, the company does not acquire the status of dominant operator[12].
- The share of installed power by resulting technology is less than 5% of the nominal total[13], in the event that the investment is aimed at the acquisition of electricity production assets.
- The number of customers of the acquired company is less than 20,000, in the event that the investment is aimed at the acquisition of companies that exercise the activity of commercialization of electrical energy[14].

### Rest of the sectors subject to authorization

Those investments where the turnover of the acquired companies does not exceed 5,000,000 euros in the last closed accounting year will be exempt, with the following exceptions in which prior authorization will be required:

- If the investment relates to critical infrastructure, whether physical or virtual, as well as land and real estate that are key to the use of such infrastructure.
- If the technologies of the target company have been developed under programs and projects of particular interest to Spain.
- If the investment is made in electronic communications operators in which any of the following conditions are met:

  1º That they are holders of concessions for the use of the public radio domain, in frequency bands harmonized in accordance with European Union legislation.

  2º That they are holders of titles enabling the use of orbit-spectrum resources in the field of Spanish sovereignty, or

  3º That they have been qualified as relevant operators in a significant market in the electronic communications sector.

- If the investment relates to research activities and exploitation of mineral deposits of strategic raw materials[15].

---

11 Understood as such the operation of the electricity system and market, the transport and distribution of electricity, the electricity supply in non-peninsular territories, the technical management of the gas system, and the regasification, basic storage, transport and distribution of natural gas. Likewise, those others established by the applicable sectoral legislation will be considered regulated activities.

12 In the sectors 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, in the terms regulated in Royal Decree-Law 6/2000, of 23 June, on urgent measures to intensify competition in markets for goods and services.

13 For the purpose of calculating market share by technology, they shall be taken into account in cUse the following criteria:
   1º The share of installed power is obtained as the quotient between the installed power in the hands of the investor and the total installed power of the national electricity generation park, calculated by production technology.
   2º For the purposes of calculating the installed capacity in the hands of the investor, all production assets already owned by the investor, directly or indirectly, at the time of the application for authorization of foreign investment, in addition to the assets susceptible to acquisition, will be computed.
   3º Electricity production assets must be weighted according to the degree of maturity and execution of the associated investment projects, taking into account their state of administrative processing.
   4º Likewise, the calculation of the installed capacity quota will be carried out taking into account the time horizons and objectives of integration of renewables foreseen in the energy planning instrument that is in force at the time of the application for authorization of foreign investment.

14 In accordance with the provisions of article 6.1.f) of Law 24/2013, of 26 December, on the Electricity sector.

15 Understood as those referred to in Article 7a(2)(c) of Law 19/2003 of 4 July 2003 or, in the alternative, those identified by the European Commission in Annex I to Communication (2020) 474 final, from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, of 3 September 2020, or the European legislative act replacing it.

### Real estate acquisitions

Investments through which real estate is acquired that is not used for any critical infrastructure or that is not essential and non-substitutable for the provision of essential services will be exempt from authorization.

### Transitional investments

Finally, RD 571/2023 also exempts from prior authorization investments of a short duration (either hours or days) in which the investor does not have the capacity to influence the management of the acquired company because they are underwriters and insurers of share issues and public offers of sale or subscription of shares. It also clarifies that, in these cases, it will be the final investors who, where appropriate, need authorization.

# Other novelties of RD 571/2023

## Other authorizations

RD 571/2023 also regulates other authorizations for foreign investment, specifically the following:

### Investments in activities directly related to National Defense

Activities directly related to National Defense should be understood as those that affect the industrial capabilities and areas of knowledge necessary to provide the equipment, systems and services that provide the Armed Forces with the necessary military capabilities, as well as those destined to production (understanding by such design and manufacturing), the maintenance or trade of defence material in general, in accordance with Law 18/1992, of 1 July, establishing certain rules on foreign investments in Spain.

However, RD 571/2023 also provides for the following exemptions:

(i) Investment in Spanish companies when they do not reach 5% of the share capital of the Spanish company, as long as they do not allow the investor to be part, directly or indirectly, of its administrative body.

(ii) When between 5% and 10% of the share capital has been reached, provided that the investor notifies the operation to the General Directorate of Armaments and Material and the General Directorate of International Trade and Investments, and accompanies said notification with a document in which he reliably undertakes in a public deed not to use, exercise or assign to third parties their voting rights, or to be part of any administrative bodies of the listed company.

### Investments in activities directly related to weapons, cartridges, pyrotechnic articles and explosives

RD 571/2023 states that the liberalization regime is suspended and will require authorization regarding foreign investments in Spain in activities related to the manufacture, trade or distribution of weapons, cartridges, pyrotechnic articles and explosives for civilian use[16].

### Acquisitions of real estate for diplomatic purposes

The requirement of prior administrative authorization is also maintained for investments, direct or indirect, made in Spain by States not members of the European Union for the acquisition of real estate for their diplomatic or consular representations, unless there is an agreement to liberalize them on a reciprocal basis.

[16] These activities are configured in accordance with Law 18/1992, of 1 July; the provisions of the Weapons Regulation, approved by Royal Decree 137/1993, of 29 January; the Explosives Regulation, approved by Royal Decree 130/2017, of 24 February; and the Regulation of pyrotechnic articles and cartridges, approved by Royal Decree 989/2015, of 30 October.

# JINVEX

Among the highlights of RD 571/2023 is also the regulation of Jinvex, which is an interministerial collegiate body attached to the General Directorate of International Trade and Investment of the Secretary of State for Trade, with reporting functions on foreign investments.

Specifically, Jinvex is responsible for:

a) Report on those matters that, on specific foreign investments, their treatment, regulation or application thereof, are submitted to it by its President or by the body that is competent in the matter.

b) Report on the prior consultations contained in article 9, authorization proposals or surveillance files in the terms established by this Royal Decree.

c) Agree, where appropriate, communications on indicative or methodological criteria for the analysis and instruction of the operations that are submitted to it.

d) Report on any other matter that its President requests.

e) Any other attributions entrusted to it by current legislation.

RD 571/2023 regulates the composition of the Jinvex and its mode of operation. Likewise, RD 571/2023 specifies that the actions of Jinvex and its deliberations will be confidential and that Jinvex may obtain from any administration, body, entity or public agency, as well as from any private natural or legal person, the information it needs for the exercise of its powers and must be provided within ten working days.

# Communication to the CNMV

In the event that the suspension of the general liberalisation regime and, therefore, the subjection to prior authorisation, may be applicable to acquisitions arising from a public offer to buy, sell or subscribe shares admitted to trading on a Spanish regulated market, the public administration body competent to grant the prior authorisation in question will notify the CNMV so that the offeror includes this information in any documentation to be disseminated in connection with the offer.

# Contacts


**Pablo Mayor**
Partner
Phone +34 91 782 98 48
pablo.mayor@allenovery.com

**Inigo del Val**
Partner
Phone +34 91 782 98 32
inigo.del.val@allenovery.com

**Ignacio Hornedo**
Partner
Phone +34 91 782 98 31
ignacio.hornedo@allenovery.com

**Bosco de Checa**
Partner
Phone +34 91 782 98 18
bosco.decheca@allenovery.com

**Leopoldo Reaño**
Senior Associate
Phone +34 91 782 98 51
leopoldo.reano@allenovery.com