



Significant changes in the Spanish FDI regime: *broader scope and more protective rules that affect EU/EFTA investors*

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Spanish foreign direct investment (FDI) regime set out in Law 19/2003¹ has just been amended by Royal Decree-Law 34/2020, of 17 November (RDL 34/2020), which enters into force on 19 November 2020.

RDL 34/2020 introduces significant amendments to the current regime that hardens the conditions for the authorization of FDI. These amendments **significantly widen the investments subject to authorization**, both by **including new transactions under the FDI regime, as is the case of certain investments by EU/EFTA² residents** and by broadening **the concept of control**. The RDL 34/2020 clearly sets out that the purpose of these changes is no other than to increase the protection of strategic sectors of the Spanish economy in view of the effects of the crisis caused by Covid19.

Where do we start from? Brief overview of the FDI regime prior to RDL 34/2020

Before the approval of RDL 34/2020, the following transactions required prior government authorisation in Spain:

Current regime

Affected by RDL 34/2020?

any investment by (i) non-EU or non-EFTA nationals; or by (ii) EU or EFTA residents, where the real ownership³ of the investment corresponds to non-EU or non-EFTA residents

Yes. Additional types of investments (i.e. from EU or EFTA residents in certain cases) have been included.

where either 10% or more of the share capital of a Spanish company is acquired or when as a result of the transaction the investor participates effectively in the management or controls the Spanish target company

Yes. Concept of control has been broadened.

– in certain sectors (critical infrastructure, critical technologies and dual-use items, supply of fundamental inputs, sectors with access to sensitive information, media and other sectors where public security/order/health may be affected); **or**

Yes, the definitions of some of the strategic sectors change.

– if the foreign investor is directly or indirectly controlled by a foreign government, has made investments or participated in activities in sectors affecting public security/order/health and has any open administrative or judicial proceedings for criminal or illegal activities

Yes. The concept of control is broader and the existence of an administrative or judicial proceeding has been replaced by a risk assessment.

¹ Law 19/2003, of July 4, on the legal regime of capital movements and foreign economic transactions.

² European Free Trade Association.

³ Real ownership is deemed to exist when a non-EU or a non-EFTA resident owns or controls, directly or indirectly, more than a 25% of the investor's capital or voting rights, or when by other means it exercises direct or indirect control of the investor.

What are the changes in the FDI regime and how do they affect future transactions?

Broader concept of control

Before RDL 34/2020, a transaction would be considered a FDI and subject to authorization, if it resulted in a foreign investor “*effectively participation in the management or control*” of the target company. That control, according to article 42 Spanish Commercial Code, resulted when: (i) holding the majority of the voting rights, (ii) having the faculty to appoint or dismiss the majority of the members of the governing body, (iii) may having, by virtue of agreements entered into with third parties, the majority of voting rights; or (iv) having designated the majority of the members of the governing body.

RDL 34/2020 clarifies this concept and establishes that FDI are subject to authorization if they result in the “*acquisition of control*” according to article 7.2 of Law 15/2007, of July 3, on Antitrust Law (**AL**). Because of this amendment, the scope and number of FDIs that will require authorization may substantially increase since the concept of control in article 7.2 AL is much broader.

Article 7.2 AL not only includes a reference to the corporate control of a company according to article 42 of the Spanish Commercial Code, but also the control that results from contracts, rights or any other means that confer the possibility of exercising a decisive influence on a company, in particular, through:

- ownership rights or rights of use of all or part of the assets of a company;
- contracts, rights or any other means that allow decisively to influence the composition, deliberations or decisions of the company's bodies.

Changes in the characteristics of foreign investors whose investments are in any case subject to authorization (regardless of the sector)

In the Spanish FDI regime, certain FDI are subject to authorisation, regardless of the sector in which the target operates, due to the specific characteristics of the foreign investor. For example, an authorisation will be required to the extent that the foreign investor is directly or indirectly controlled by a foreign government or is involved in criminal or illegal activities⁴.

RDL 34/2020 also expands the cases in which, given the features of the foreign investor, it must request authorization. First, because the concept of control according to article 7.2 AL also applies in determining if a foreign government controls a foreign investor. This change may impact any previous analysis made on certain sovereign wealth funds or companies with state/public stakes.

In addition, because under RDL 34/2020, FDI must be authorised not when there is an open administrative or judicial proceeding against the foreign investor, but if there is “*a serious risk that the foreign investor carries out criminal or illegal activities*”. This element, which sits on a risk assessment, introduces uncertainty and a subjective appreciation to establish when a FDI requires an authorisation. Hopes are that the upcoming regulatory development of Law 19/2003 will clarify the parameters to consider when determining if there is such risk.

Changes in the definitions of strategic sectors

In an attempt to further clarify the activities included in the strategic sectors subject to FDI regime, RDL 34/2020 changes the following definitions:

- critical and dual-use technologies are now defined not by reference to Regulation

⁴ There is a third criterion that applies to foreign investor that is where they have made investments or participated in activities in sectors affecting public security/order/health in other EU Member States.

428/2009⁵, but with a specific list of activities. The list mentions, among others and as novelty, telecommunications, key technologies for industrial leadership and training, technologies developed under the programs or projects considered as of particular interest for Spain, advanced materials and advanced manufacturing systems.

- supply of inputs now comprises strategic connectivity services.
- media, which expressly refers to audiovisual communication services (as defined in the Audiovisual Communication Law, which will be governed by the provisions of said Law).

Introduction of a temporary regime for the investment of EU/EFTA residents

Until 30 June 2021, investments will also be subject to prior authorisation where **EU and EFTA residents** either (i) acquire 10% or more of the share capital or (ii) when as a result of the transaction EU and EFTA residents control:

- a listed company in Spain, considering as such those companies domiciled in Spain and whose shares are admitted to trading, in whole or in part, in an official secondary market, or
- non-listed Spanish companies if the value of the investment exceeds EUR 500 million.

This temporary regime only applies to Spanish companies which operates in one of the strategic sectors subject to FDI regime.

As provided for in the general FDI regime, as a way to cover indirect investment, this temporary regime **also applies where the investment is made by a Spanish resident whose beneficial ownership corresponds to EU or EFTA residents**. This beneficial ownership is deemed to exist when the EU or EFTA resident ultimately own or control, directly or indirectly, a percentage greater than 25% of the capital or voting rights of the Spanish investor.

Please note that this temporary regime affects only to FDI in strategic sectors and, therefore, it does not apply to FDIs that have to be authorised only due to the special features of the investors (i.e., where the investor is controlled by a EU or EFTA government, has made investments or participated in activities in sectors affecting public security/order/health or there is a serious risk that the foreign investor carries out criminal or illegal activities).

A key concern that this temporary regime raises is whether it captures or not transactions already signed and agreed upon as of 19 November 2020 but pending to be executed.

These amendments to the Spanish FDI (re)opens many questions on the need to obtain FDI authorisations that investors had already considered answered. Given that a FDI completed without the required prior authorisation will be invalid and without legal effect and may constitute a serious infringement, it is essential to clarify if these amendments apply to on-going transactions or by who and how the risk assessment on the criminal activities is carried out. Let us hope that, as RDL 34/2020 already anticipates, the imminent approval of the regulatory development of Law 19/2003 will clarify these many new grey-zones.

⁵ Regulation (UE) 428/2009, of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.

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