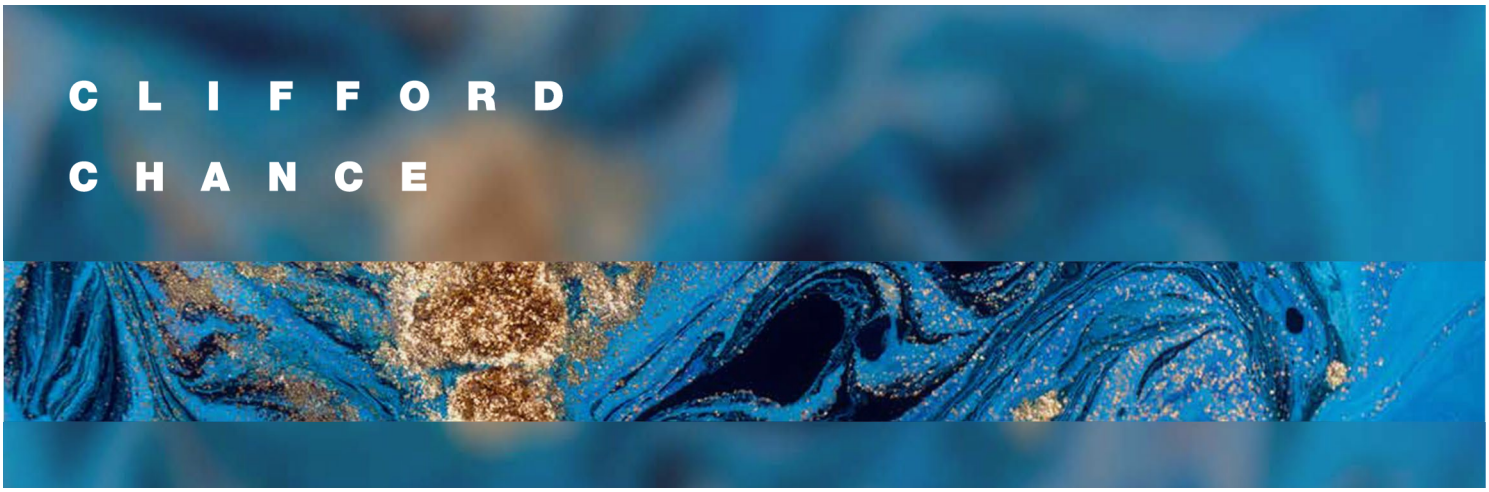

CORONAVIRUS: NEW BARRIERS TO FOREIGN DIRECT INVESTMENT IN SPAIN (UPDATED IN ACCORDANCE WITH ROYAL DECREE-LAW 11/2020, OF 31 MARCH)

Spanish Royal Decree-Law 8/2020, of 17 March, on urgent extraordinary measures to address the economic and social impact of COVID-19 (the "**RDL 8/2020**"), amended by Royal Decree-Law 11/2020, of 31 March, has suspended, effective as of 18 March 2020, the regime on the deregulation of foreign direct investment in Spain, indefinitely, until the Spanish Government decides otherwise. It has added a new Article 7 bis for this purpose and has established new rules on sanctions in Articles 8 and 12 of Act 19/2003, of 4 July, on the legal regime governing the movement of capital and financial transactions with foreign countries. RDL 8/2020 is based in this regard on 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 ("**Regulation 2019/452**"), and reproduces some of its provisions practically word for word. However, the rules of RDL 8/2020 have been partially amended by Royal Decree-Law 11/2020, of 31 March, which adopts urgent supplementary measures in the social and economics fields to deal with COVID-19 ("**RDL 11/2020**").

The consequence of this suspension will be that it will now be necessary to first obtain an administrative authorisation from the State in order to be able to make these investments in Spain.

In practice, the aim of this regime is to supervise the acquisition of Spanish companies by investors from non-EU countries or countries not signatories of the European Free Trade Agreement ("**EFTA**") with a view to avoiding what the

Key issues

- Do these measures apply to investments from any foreign countries?
- Does the new regime of administrative authorisation have a limited duration?
- What is foreign direct investment?
- Does it affect foreign direct investment in any activity?
- What sectors are considered strategic and require administrative authorisation?
- Is authorisation required when the company's participation in these sectors is minimal?
- What other foreign direct investment requires administrative authorisation?
- Are there any exemptions to the requirement to obtain authorisation for foreign investments?
- Does it affect operations already in progress?
- What effect do investment operations performed without authorisation have?
- Should this authorisation be obtained prior to the authorisation for a potential takeover bid by the CNMV?
- How long does the Administration have to decide on the authorisation?
- Do these rules replace other foreign investment control regimes?

Government could see as opportunistic acquisitions of listed and non-listed Spanish companies whose equity value has fallen.

1. DO THESE MEASURES APPLY TO INVESTMENTS FROM ANY FOREIGN COUNTRIES?

No, because investments from European Union countries, Norway, Iceland, Switzerland and Liechtenstein are not considered foreign direct investment, for this purpose.

During the Brexit transition period, the United Kingdom will retain the status of Member State of the European Union, pursuant to Article 127.6 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. This transition period ends on 31 December 2020, although it may be extended by one or two years.

2. DOES THE NEW REGIME OF ADMINISTRATIVE AUTHORISATION HAVE A LIMITED DURATION?

In principle, according to RDL 8/2020, this measure was to be in force indefinitely, although the Government was entitled to cancel the regime by means of a mere resolution.

However, RDL 11/2020 has removed both the rule establishing the indefinite validity of the measure and the Government's power to cancel it, by means of a resolution.

This raises a reasonable doubt regarding the validity of this measures, because measures that are not given a specific term of duration, will have a limited duration ending 30 days after termination of the state of emergency, albeit extendable by means of another royal decree-law, according to the transitional regime of both RDL 8/2020 and RDL 11/2020.

This interpretation would also be justified by the Preamble of RDL 8/2020, which recognised that as the reason that has led the Government to establish this regime is linked to the fall of value of Spanish companies as a result of the COVID-19 crisis, it would be logical to think that it is a temporary, extraordinary rule.

However, RDL 11/2020 has envisaged the regulatory implementation of this regime in some respects, as well as some transitional rules of application, which would make it possible to consider that the intention of the rule is to maintain an indefinite validity, because neither the regulatory implementation nor the transitional rules would be necessary if the envisaged duration of the same was limited to 30 days following termination of the state of emergency. If this is the Government's intention, it would appear to be at odds with the justification for the rule included both in RDL 8/2020 and RDL 11/2020.

3. WHAT IS FOREIGN DIRECT INVESTMENT?

For the specific purposes of these new measures, this means investment by residents of countries outside the European Union and the EFTA, when the investor comes to hold a stake equal to or greater than 10 per cent of the share capital of the Spanish company, or when as a result of the corporate operation, act or legal transaction it gains effective participation in the management or control of said company.

In this regard, it should be specified that:

- It only applies to investments in companies and not to other operations such as asset purchases, although this last scenario could be debatable.
- In our opinion, if by means of any kind of agreement or concerted transaction with third parties, the possibility to effectively participate in the management or control of the company were acquired, jointly, this regime would apply, even if the foreign investor does not reach 10% of the capital of the company.
- Authorisation is also required for indirect investments that allow the investor to acquire control of 10% of share capital or effective participation in the management or control of the company, even if the investor is acting via a company resident within the European Union or the EFTA. To that end, RDL 11/2020 has specified that this indirect ownership exists when investors situated outside the European Union or the EFTA ultimately possess or control, directly or indirectly, a percentage in excess of 25% of the capital or voting rights of the investor, or when they otherwise

exercise direct or indirect control over the investor. Therefore, the investment made by a company established in the European Union or an EFTA country, more than 25% of whose capital or voting rights is directly or indirectly owned by a foreign investor, will also be subject to this authorisation regime, even if that foreign investor does not control the company making the investment. Moreover, the structure and residence of the management of the investment funds must be analysed in order to conclude what financial investors qualify as foreign investors for the purposes of the rule.

4. DOES IT AFFECT FOREIGN DIRECT INVESTMENT IN ANY ACTIVITY?

No. Although RDL 8/2020 considerably increases the scenarios in which authorisation for foreign direct investment is necessary, it applies only to investment in companies that operate in the strategic sectors defined (which correspond largely to those envisaged in Regulation 2019/452), or also to investment in other sectors, when in the case of the investor there is a series of objective circumstances that makes it necessary to obtain prior authorisation (also matching those envisaged in Regulation 2019/452).

The Government reserves the possibility to extend this regime to other sectors, when public security, public order or public health may be affected.

5. WHAT SECTORS ARE CONSIDERED STRATEGIC AND REQUIRE ADMINISTRATIVE AUTHORISATION?

- Critical infrastructures, whether physical or virtual (including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructures and sensitive facilities), as well as land and properties that are key for the use of such infrastructures, understood as those contemplated in Act 8/2011, of 28 April, which establishes measures for the protection of critical infrastructures.
- Critical technology and dual use products as defined in article 2, section 1, of Council Regulation (EC) number 428/2009, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technology, as well as nanotechnology and biotechnology.
- Supply of essential produce, energy in particular, understood as that which is regulated in the Act 24/2013, of 26 December on Electricity Sector, and Act 34/1998, of 7 October, on the Hydrocarbons Sector, or those referring to raw materials, as well as food safety.
- Sectors with access to sensitive information, personal data in particular, or with the ability to control such information, in accordance with Organic Act 3/2018, of 5 December, on Personal Data Protection.
- Communications media.

As you can see, the list of sectors is indeed lengthy.

In our opinion, they should be activities performed in strategic sectors in Spain.

6. IS AUTHORISATION REQUIRED WHEN THE COMPANY'S PARTICIPATION IN THESE SECTORS IS MINIMAL?

Yes, the rule does not establish a distinction, even if it may seem disproportionate on some occasions.

7. WHAT OTHER FOREIGN DIRECT INVESTMENT REQUIRES ADMINISTRATIVE AUTHORISATION?

Those in which any of the following scenarios arise:

- if the foreign investor is directly or indirectly controlled by the government, including the public bodies or armed forces, of a third country (outside the European Union or the European Free Trade Association -Norway, Iceland, Switzerland or Liechtenstein-), with article 42 of the Commercial Code applying for the purposes of determining the existence of such control.
- if the foreign investor has made investments or participated in activities in sectors that affect security, public order and public health in another Member State, strategic sectors in particular.

  In our opinion, will be difficult to determine in some cases whether the activity of the investor in other activities in another Member State affect security, public order and public health, unless it is in one of the strategic sectors.

- if administrative or judicial proceedings have been brought against the foreign investor in another Member State or in the State of origin or in a third State due to the commission of criminal or unlawful activities.

8. ARE THERE ANY EXEMPTIONS TO THE REQUIREMENT TO OBTAIN AUTHORISATION FOR FOREIGN INVESTMENTS?

Investment operations for less than one million euros are exempt, unless the Government passes implementing legislation.

9. DOES IT AFFECT OPERATIONS ALREADY IN PROGRESS?

Yes, although it envisages a simplified procedure when it is possible to accredit the existence of an agreement between the parties or a binding offer in which the price has been set or is, or can be, determined, prior to 18 March 2020.

10. WHAT EFFECT DO INVESTMENT OPERATIONS PERFORMED WITHOUT AUTHORISATION HAVE?

Investment operations carried out without the mandatory authorisation will be null and void, devoid of any legal effect, unless they are legalised by obtaining the corresponding authorisation, notwithstanding any sanctions that may apply.

11. SHOULD THIS AUTHORISATION BE OBTAINED PRIOR TO THE AUTHORISATION FOR A POTENTIAL TAKEOVER BID BY THE CNMV?

Yes, because this authorisation must be subject to the regime envisaged in article 26.2 of Royal Decree 1066/2007, of 27 July, on the regime for takeover bids for securities.

12. HOW LONG DOES THE ADMINISTRATION HAVE TO DECIDE ON THE AUTHORISATION?

Once the application for authorisation is submitted, it is for the Government to grant or refuse it, within a term of six months. A failure to issue a decision by the end of that term will be deemed a refusal.

However, for operations in progress when RDL 8/2020 entered into force (18 March 2020), as well as for those operations whose investment amount is equal to or greater than one million euros, and less than five million euros, a simplified procedure is envisaged, which is not decided by the Government but by the Directorate General for International Trade and Foreign Investment, within a maximum term of 30 business days. The five million euro investment threshold is set provisionally, in the absence of regulatory implementation by the Government.

13. DO THESE RULES REPLACE OTHER FOREIGN INVESTMENT CONTROL REGIMES?

No, under no circumstances. It will be necessary to comply with the additional foreign investment control regimes in certain scenarios, such as in relation to investment in activities directly related to National Defence, or regarding the acquisition of holdings in energy companies, among others.

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