



## QUESTIONS AND ANSWERS REGARDING THE SUSPENSION OF THE LIBERALIZATION REGIME IN CERTAIN FOREIGN DIRECT INVESTMENTS IN SPAIN AS A CONSEQUENCE OF COVID-19

17<sup>th</sup> April 2020

The introduction of new Article 7 to *Ley 19/2003*, of 4<sup>th</sup> July, by *Real Decreto-ley 8/2020*, of 17<sup>th</sup> March, on urgent extraordinary measures to face the economic and social impact of COVID-19 and by *Real Decreto-ley 11/2020*, of 31<sup>st</sup> March, on urgent complementary measures on the social and economic fields to face COVID-19, establishes the suspension of certain foreign direct investments in Spain (hereinafter, the “**Suspension**”). Such Suspension, unless prior administrative authorization is granted, is set up in order to avoid the threat of transactions to acquire Spanish companies, carried out by foreign investors, taking advantage of the decrease in value of those companies due to the impact of the global crisis triggered by COVID-19.

### 1. **Who are subject to the Suspension?**

- a. Foreign investors, taking into consideration the following:
  - (i) Residents of countries outside the European Union and the European Free Trade Association and;
  - (ii) Residents of European Union or European Free Trade Association countries, whose actual ownership is held by residents of countries outside the European Union and the European Free Trade Association.

It shall be understood that such actual ownership exists where the latter directly or indirectly owns or controls more than 25% of the investor’s share capital or voting rights, or, where they otherwise, has direct or indirect control over the investor.

- b. Foreign investors controlled directly or indirectly by the government, including public bodies or the armed forces, of a third country. The criteria set out in Article 42 of the Spanish Commercial Code shall be applied to determine the existence of such control.
  - c. Foreign investors who have invested or participated in activities in sectors concerning security, public order and public health in another Member State, and, in particular, those listed in paragraph 3 below.
  - d. Foreign investors against who there are proceedings, whether administrative or judicial, for criminal or illegal activities in another Member State, in the host State or in a third State.
- ### 2. **In what cases does the Suspension apply?**
- a. When the foreign investor makes any investment by virtue of which he holds a stake equal to or greater than ten percent (10%) of the share capital of a Spanish company, or o
  - b. When, as a result of the corporate transaction, act or legal business, there is an effective participation in the management or control of that company.

### 3. In what sectors does the Suspension apply?

- a. **Critical infrastructures**, whether physical or virtual (including energy, transport, water, healthcare, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure, and sensitive facilities), as well as land and buildings which are critical to the use of such infrastructure. These include those referred to in *Ley 8/2011*, of 28<sup>th</sup> April, which establishes measures for the protection of critical infrastructures.
- b. **Critical technologies and dual-use items** (the latter being items, including software and technology, which can be used for both civil and military purposes and including all goods which can be used either for non-explosive uses or to assist in the manufacture of nuclear weapons or other nuclear explosive devices) including artificial intelligence, robotics, semi-conductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies, as well as nanotechnologies and biotechnologies.
- c. **Supply of essential inputs**, in particular energy, including those regulated by *Ley 24/2013*, of 26<sup>th</sup> December, on the Electric Sector, and in *ley 34/1998*, of 7<sup>th</sup> October, on the hydrocarbons sector, or those referred to raw materials and food safety.
- d. **Sectors with access to confidential information**, in particular personal data, or with the capacity to control such information, in accordance with *Ley Orgánica 3/2018*, of 5<sup>th</sup> December, on Protection of Personal Data and the Guarantee of Digital Rights.
- e. **Media**.
- f. Any other sector when it may affect public security, public order and public health.

The wording in the regulation is so broad and vague, for example on data protection, that for some sectors prior consulting with the supervisor would be advisable in case of doubt.

### 4. Which is the standard procedure for requesting authorization for foreign investment?

Upon approval of *Proyecto de Real Decreto* on Foreign Investments (whose urgent administrative procedure was approved by an agreement of the Board of Ministers on 24<sup>th</sup> March), the procedure for requesting authorization to carry out the foreign investment must be carried out in accordance with the provisions of Article 11 of the Order, dated 28<sup>th</sup> May 2001, which establishes the procedures applicable to foreign investment statements and

their settlement, as well as the procedures for the submission of annual reports and authorization files, by means of a **written document addressed to the General Director of Trade and Investment** which must be submitted with the following documents:

- a. A certificate issued by the relevant body of the company in which the investment is made, containing a faithful transcription of its corporate purpose.
- b. A brief explanatory report on the economic-financial and asset situation of the company in which the investment is made.
- c. A detailed description of the investment transaction to be carried out and information regarding the investor:
  - (i) In the event of investors that are legal entities, the holding in their share capital that exceed five (5) percent shall be indicated, as well as the annual accounts and management report, the structure of their management bodies and the structure of the group to which they may belong;
  - (ii) In the event of natural persons, information on their career and professional activity, as well as their asset situation.

### 5. What is the deadline for resolution of the request for authorization of the foreign investment?

The request for authorization must be resolved and notified within six (6) months from its reception in the General Directorate of Trade and Investment.

### 6. What happens with the transactions that were already in progress when the new Article 7bis of Ley 19/2003 came into force?

On a temporary basis, they shall be governed by the **simplified procedure**, which consists in the submission of the application for authorization to the person in charge of the General Directorate for International Trade and Investment. To this end, it will apply *ex officio* the simplified procedure, provided for in Article 96 *Ley 39/2015*, of 1<sup>st</sup> October, of *Procedimiento Administrativo Común de las Administraciones Públicas*.

### 7. What are the requirements for the application for authorization of foreign investment under the simplified procedure?

- a. Proof, by any legally valid means, of the existence of an agreement between the parties or a binding offer in which the price was fixed, already determined, or determinable, that the foreign investment **was in progress** prior to the entry into force of *Real Decreto-ley 8/2020*, of 17<sup>th</sup> of March, on extraordinary urgent measures to face the economic and social impact of COVID-19, or
- b. That the amount of the foreign investment is equal to or greater than one million euros (€1,000,000) and less than five million euros (€5,000,000), until

<sup>1</sup> Under the provisions of the Third Additional Provision of *Real Decreto 463/2020*, of 14<sup>th</sup> March, declaring the Alarm State for the management of the health crisis situation triggered by COVID-19, the administrative

deadlines are suspended until such *Real Decreto* is no longer in force or, if applicable, any extensions thereto.

the regulations of Article 7bis come into force.

**8. What is the deadline for deciding on the applications for authorization under the simplified procedure?**

Thirty (30) days from the day after the interested party is notified of the agreement of processing under the simplified procedure.

**9. What happens if the application for authorization is not settled within the legal deadline?**

If the legal deadline elapses and there was no express decision, the transaction **shall be deemed not to have been authorized.**<sup>2</sup>

**10. Are there transactions exempt from authorization?**

Yes, investment transactions for an amount of less than one million euros (€ 1,000,000) are exempt from prior authorization.

**11. What are the consequences of carrying out investment transactions subject to Suspension, without the prior required authorization?**

Investment transactions carried out without the prior required authorization:

1. It will have no validity or legal effect until it is legalized, in accordance with the provisions of Article 6 of *Ley 19/2003*;
2. It shall represent a very serious breach;
3. It shall result in the simultaneous imposition of the following penalties:
  - a. A fine, which may be up to the amount of the economic content of

the transaction, but no less than € 30,000 and;

- b. Public or private fine.

**12. Which is the competent body for opening and processing of penalty proceeding regarding a foreign direct investment in Spain?**

The body appointed by the person in charge of the General Directorate for International Trade and Investment.

**13. Which is the competent body to issue sanctions for very serious breaches?**

Sanctions for very serious breaches will be issued by the Board of Ministries, prior proposal of the Ministry of Economic Affairs and Digital Transformation.



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<sup>2</sup> However, it could be argued that the administrative silence was in

conformity, in accordance with the provision of Article 24.1 of *Ley 39/2015*.

