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The Rain in Christmassy Spain: Spain Extends the Applicability of its FDI Rules on EU Entities Until 2024

Pablo Figueroa, Julia M. Böhme (Pérez-Llorca, Spain) · Saturday, January 28th, 2023

Background

It has become usual in Spain's FDI system for reforms to be introduced by measures formally unrelated to FDI. The latest reform is no exception and Articles 61 and 62 of *Royal Decree Law 20/2022, of 27 December, addressing the economic and social consequences of the war in Ukraine, supporting the reconstruction of the Island of La Palma and as regards other situations of vulnerability* ("**RDL 20/2022")** brings the following two changes:

Extension of the Applicability of Spain's Screening Mechanism to EU / EFTA Residents Until 31 December 2024

As we reported here, Spain's Screening Mechanism applies also to EU / EFTA resident entities when the target company is listed in Spain or the value of the investment in Spain is more than €500 million. The Spanish FDI authorities are open to valuation methodologies which are consistent with market reality. The most frequently used is comparing sales in Spain with worldwide sales and applying that ratio to the global value of the deal.

The existing rules have been extended for two years this time, until 31 December 2024. Previous extensions were for one year. Spain's FDI Screening Mechanism will thus continue being applicable to buyers with EU / EFTA residents. It should be recalled that pursuant to Article 7(bis)(1)FDI Act, a UBO is any entity having a > 25% stake or EUMR-like control in the buyer. There can be more than two UBOs for these purposes.

Clarification that the Scope of the Rules now Includes Asset Deals (and not only Share Deals)

It is the consistent practice of the Spanish FDI authorities to subject asset deals (and not only acquisitions of shares in a corporation) to a filing obligation. The practice was arguably *contra legem* since the previous version of the Spanish FDI Act clearly subjected only acquisitions of shares in a Spanish corporation to review. This state of affairs has been corrected and the revised Article 7(bis)(1) of Spain's FDI Act now cryptically reads as follows:

"For the purposes of the provisions of this Article, foreign direct investments in Spain are considered to be all those as a result of which the investor comes to hold a stake equal to or greater than 10 per cent of the share capital of a Spanish company, and all others that, as a consequence of the corporate operation, act or legal business that is carried out, control of all ***or part of it*** *[of the corporation] is acquired, by application of the criteria established in article 7 of Law 15/2007, of July 3, on Defense of the Competition".*

Fortunately, a recital of RDL 20/2022 explains that the purpose of the reform is to "*clarify that said control [i.e., Spain's FDI screening mechanism] applies to investment operations in assets or areas of activity, without requiring that they have corporate form*".

Commentary

Pro-EU and pro-free trade that the authors of this post are, we are unimpressed by the extension of the rules on EU buyers. That said, the development is anything but surprising. The European Commission appears to have partially abdicated from its mission of fostering the Internal Market. Beyond the reform, Spain's FDI authorities appear to attach more importance recently to how sensitive a target is than to the sensitiveness of the buyers.

Unsurprisingly, the reform leaves some open questions including the following: what does it mean that investments in "*areas of activity*" are now in scope? Is this a new type of transaction subject to review (cumulative and different from acquisitions of shares or assets)? Are acquisitions of a 10% stake in sensitive assets in scope? As ever, we will only know as the practice of Spain's Ministry for Industry, Commerce and Tourism unfold.

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