

# Kluwer Competition Law Blog

## Spain Approves its FDI Implementing Regulation: Key Takeaways

Pablo Figueroa (Pérez-Llorca, Spain) · Friday, July 7th, 2023

Three years after the introduction of Spain's FDI General Screening Mechanism (in 2020), Spain has finally approved its FDI Implementing Regulation (for the entire text, unfortunately only available in Spanish, please click [here](#)).

Although many of the rules now in force could be found in drafts made available by the Ministry for Industry, Commerce and Tourism (“**MICT**”) and were applied in practice by the Spanish FDI authorities, the approval of this instrument is a much-needed milestone, bringing legal certainty to an area of law arguably bereft of it.

The regulation enters into force on 1 September 2023. After skimming through the text, these are the main rules which will be in force from that date:

1. Timings are reduced. The period for a formal authorization is reduced from six to three months. The explicit provision of a deadline of 30 working days (approximately six weeks) for consultations. Before the entry into force of the IR, it typically took six to nine weeks for the Ministry for Industry, Commerce and Tourism (“**MICT**”) to decide on a consultation. It remains to be seen whether the MICT has the resources to deliver on these obligations. Spanish public law allows the authority to stop the clock.
2. An exemption from notification is introduced, with many caveats, for certain foreign companies in which the turnover of the acquired companies in the last closed accounting year did not exceed €5 million.
3. A legal basis is provided for the existing consultation mechanism. Moreover, the consultation mechanism is extended to transactions being reviewed by Spain's Ministry of Defense (“**MoD**”). Before the entry into force of the IR, it was not entirely impossible, but perhaps less common, to seek guidance on jurisdiction before the MoD.
4. The duration of authorizations is expressly foreseen. Unless otherwise indicated, authorizations will be valid for six months. This period can be extended by another six months.
5. The IR adds helpful detail on the interpretation of the different grounds which can make a target sensitive. For example:
  - Critical infrastructures are understood to be those so qualified in application of Law 8/2011, of April 28, which establishes measures for the protection of critical infrastructures, and that, consequently, appear listed as such in the National Catalog of Strategic This catalog is secret, however.
  - Critical and dual-use technologies will be understood to include those defined in

Article 2(1) of *Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items*,<sup>[1]</sup> including telecommunications, artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies, as well as nano technologies and

- Key technologies for industrial leadership and capacity building comprise the enabling technologies essential for the future referred to in Council Decision (EU) 2021/764 of 10 May 2021 *establishing the Specific Programme implementing Horizon Europe – the Framework Programme for Research and Innovation, and repealing Decision 2013/743/EU*.<sup>[2]</sup> These technologies include advanced materials and nanotechnology, photonics, microelectronics and nano electronics, life science technologies, advanced manufacturing and transformation systems, artificial intelligence, digital security and
- Technologies developed under programs and projects of particular interest to Spain include “*those involving a substantial amount or percentage of funding from the budget of the European Union or Spain*”. Among others, those receiving funding from the instruments set out in the Annex ‘*List of projects or programs of Union Interest*’ referred to in Article 8(3) of *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*.<sup>[3]</sup>
- Fundamental inputs will be understood to be “*those which are indispensable and not substitutable for the provision of essential services relating to the maintenance of basic social functions, health, safety, social and economic well-being of citizens, or the effective functioning of State institutions and public administrations, the disruption and failure of which, loss or destruction would have a significant impact*”. In our experience, substitutability ends up being crucial in the analysis of the Spanish authorities, thereby bringing considerations not dissimilar from those of classic antitrust matters.

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[1] OJ L 206, 11.6.2021, p. 1–461.

[2] OJ L 167I, 12.5.2021, p. 1–80.

[3] OJ L 79I, 21.3.2019, p. 1–14.

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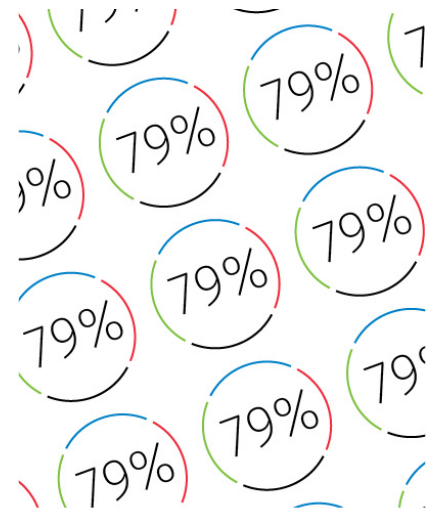
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