Kluwer Competition Law Blog

Foreign Direct Investment in Spain – National Defence

Pablo Figueroa, Julia M. Böhme (Pérez-Llorca, Spain) · Wednesday, March 5th, 2025

With the much-debated reforms to Act 19/2003 of 4 July, *on capital movements* ("**Act 19/2003**"), the Spanish foreign direct investment ("**FDI**") regime has been expanded over the past few years. However, FDI screening in relation to defense investments predates Act 19/2003 (and the recent FDI hype more broadly), and was regulated in Royal Decree 664/1999 of 23 April, *on foreign investments* ("**RD 664/1999**"). On 1 September 2023 Royal Decree 571/2023 of 4 July, *on foreign investments* (the "**Implementing Regulation**") replaced RD 664/199 maintaining the suspension of the general liberalization regime for investments in "*activities directly related to national defense*". Both regimes, *i.e.*, general FDI screening and for investments in defense activities, might apply concurrently to investments in defense in Spain.

Below, we will consider the most important questions regarding the Spanish rules on FDI in relation to national defense.

What is considered to be an "activity directly related to national defense" subject to review?

Whereas Article 11 RD 664/1999 merely referred to the "*production of or trade in arms, ammunition, explosives and war materials*", Article 18(1) Implementing Regulation provides some more detail. Under the current legal regime, authorization is required for all activities "*directly related to national defense, such as those affecting the industrial capabilities and areas of knowledge necessary to provide the equipment, systems and services that will provide the Armed Forces with the necessary military capabilities, as well as those related to the production (understood as the design and manufacture), maintenance or trade of defense material in general*."

Precedents as such are not publicly available. Sometimes, the Council of Ministers publishes a short statement that an investment has been authorized. The level of detail provided in these statements differ. Often it is not stated whether the authorization is subject to conditions, reasons for the decision or further details regarding the investment and the target company. In addition, Spain's defense authorities are remarkably opaque discussing them[i]. However, in our experience:

- For a target company to be caught by the screening mechanism it must be involved in the development or manufacture of any product that may be used for defense purposes. Thus, it is not relevant whether said company is a contractor of the Spanish Armed Forces, but rather whether it is able to become one on account of its business activities.

- In order to assess whether any given company's business is considered to be defense-relevant, from Spain's defense authority's standpoint, there are some useful criteria, including:

1. The target company is regulated by Royal Decree 679/2014, of 1 August, *on the Regulation for the control of foreign trade of defense material, other material and dual-use products and technologies*.
2. The target company holds any level of security clearance.

- Subcontractors are also caught by the screening mechanism. This could be the case for a provider of any input to a direct contractor of Spain's defense authorities.

Investments which were authorized by the Council of Ministers include the following:

- The EUR 11 billion investment of Raytheon Systems Limited, a British company, in Raytheon Microelectronics España SA in 2014. Raytheon Spain engages in activities related to national defense. The Spanish target manufactures guidance systems, microelectronic devices, electronic cards, sub-assemblies and electronic equipment which are used in products for national defense (for further information, see here and here).
- In 2019 US private equity firm Rhone Capital via Prill Holdings SARL, an investment company registered in Luxembourg, acquired 45% of the Spanish Maxamcorp Holding and its subsidiaries, including Expal. The Council of Ministers authorized the investment of EUR 265 million (for further information, see here and here) as well as an increase in shareholding to 71% two years later in 2021 (for further information, see here and here). Maxamcorp is one of the largest manufacturers of explosives globally. Expal is a producer of weapons, electronic weapon systems, and munition for over 60 countries.
- In 2021, the Council of Ministers authorized the investment of the Indian Tech Mahindra Limited in Tech Mahindra Spain, S.L. allowing the "*commercialization of defense materials and dual use items, and the performance of activities related to defense in the technology sector in Spain*" (for further information, see here). The acquired company is engaged in providing services and consulting in regard to information technology.

It should be noted that activities related to manufacture, trade or distribution of arms, ammunition, pyrotechnic articles and explosives for civilian use are excluded from this definition and are subject to the (different) FDI filing procedure before the Ministry of Economy, Trade and Enterprise (Article 19 Implementing Regulation).

Who authorizes FDI regarding national defense activities?

In contrast to other sectors, FDI in defense activities must be notified to the Sub-directorate for the Management and Internationalization of the Defense Industry ("*Subdirección General de Gestión e Internacionalización de la Industria de Defensa*", in Spanish) – within the newly formed General Directorate for Strategy and Innovation of the Defense Industry ("*Dirección General de Estrategia e Innovación de la Industria de Defensa*", in Spanish) at the Ministry of Defense – in accordance with Article 18 Implementing Regulation and Royal Decree 896/2024 of 10 September.

The approval of the investment corresponds to the Council of Ministers on a proposal from the Minister of Defense, and after hearing the Foreign Investment Board ("*Junta de Inversiones*

Exteriores", in Spanish) – an inter-ministerial collegiate body – which has reporting duties, particularly in FDI authorization proceedings.

The Foreign Investment Board is made up of the following members: (i) the Director General of International Trade and Investment, as Chairman, currently Alicia Rocío Varela Donoso, an economist; (ii) a representative of each of the Ministerial Departments as well as the National Intelligence Agency (in Spanish, "*Centro Nacional de Inteligencia*"); and (iii) the head of the Sub-directorate General for Foreign Investment, as Secretary, currently Marta Font, another economist with a background in the cabinet of the last two Ministers for Economy.

Which foreign investments are subject to the defense screening mechanism?

Investments which result in the acquisition of at least 5% of the share capital or allow the investor to directly or indirectly form part of the management body are subject to the screening mechanism (Article 18(1) Implementing Regulation).

If between 5% and 10% of the share capital is acquired, the investor must notify the General Directorate for Strategy and Innovation of the Defense Industry, and for International Trade and Investment at the Ministry for Economy, Trade, and Enterprise.

However, Article 18(2)(b) Implementing Regulation mentions the possibility that if the notification is accompanied by "*a document in which the investor reliably undertakes in a public deed not to use, exercise or assign their voting rights to third parties, or to form part of any of the listed company's administrative body*" no authorization is required. This public deed has to be accompanied by, amongst other things, a detailed summary of the transaction and a document certifying that the transaction has been carried out. Once the validity of the information and documentation has been confirmed, the administrative proceedings will be declared finalized with an official acknowledgment of receipt of the notification made by the foreign investor. The Spanish FDI authorities can require the investor to provide additional information if necessary, *i.e.*, it is fair to say that some kind of minimum review will take place.

Who is considered to be non-resident in Spain?

According to Article 2 Act 19/2003, the following persons are considered to be non-resident in Spain:

(i) Natural persons habitually residing in foreign territory, except for Spanish diplomats abroad and Spanish personnel rendering services in Spanish embassies and consulates or in international organizations abroad;

(ii) Foreign diplomats accredited to the Spanish Government and foreign personnel rendering services in foreign embassies and consulates or in international organizations in Spain;

(iii) Legal entities with registered offices outside of Spain;

(iv) Subsidiaries and permanent establishments abroad belonging to natural or legal persons

resident in Spain; and

(v) Others that are determined by regulation in analogous cases.

EU investors fall within the definition of foreign investors and are subject to the mechanism.

The Spanish legislation has not been challenged before the European Courts in this regard. However, in line with Article 65(1)(b) of the Treaty on the Functioning of the European Union and the European Court of Justice's decision in Church of Scientology (see Judgement of the CJ in Case C-54/99 *Eglise de Scientology* here), Member States may "*take measures which are justified on grounds of public policy or public security*" restricting the EU protected right to free movement of capital. The Spanish judiciary is relatively pro-EU and has applied the direct effect of the Free Movement Provisions of the Treaty on several occasions. More particularly, for instance, Articles 63 and 65 of the Treaty have been invoked in many disputes regarding tax discrimination. In this regard, the ruling of the Supreme Court of 20 October 2021, appeal number 5921/2018, serves as a paradigm of the above.

Indeed, in the words of the Court: "*(…) following the consolidated case law of the ECJ, investment funds, in general UCITS, both resident and non-resident, must receive the same tax treatment. When this is not the case, and Article 63 of the TFEU is violated, without the exceptions of Article 65 TFEU, they are entitled to request the refund of the withholding tax on dividends received. Since it involves a violation of the principle of free movement of capital, this can also be extended to investment funds resident in third countries, non-members of the EU and the EEA*" (our translation).

Are there any provisions for the investment made by a party resident in Spain that moves their residency outside of the country?

When a person or legal entity that is resident in Spain becomes a non-resident, any investments they hold in Spain will be considered foreign investments (Article 24 Implementing Regulation).

Likewise, when a person or legal entity that is non-resident in Spain becomes a resident, any investments they hold in Spain will stop being considered foreign investments.

Who is responsible for filing a screening request? Which party bears the risk?

In line with Article 10 Implementing Regulation, the filing must be submitted by the investor who is non-resident in Spain, and who, consequently, bears the risk.

What is the process for filing a screening request? Is there a particular deadline?

The filing must be submitted to the competent authority at the Spanish Ministry of Defense for authorization before closing the transaction. The Ministry requests information, including the composition of the investor's management bodies, information on shareholders who hold more than 5% of the shares, the annual financial statements, and the structure of the group.

A decision is issued by the Council of Ministers within a legal deadline of three months. However, the authority can stop the clock by issuing requests for information. Until there is an authorization, the transaction cannot be closed.

If there is any change to the conditions authorized by the Council of Ministers, the General Directorate for Strategy and Innovation of the Defense Industry must be notified. Substantial changes require a new authorization and must be submitted through the formal process, *i.e.*, they will require authorization by the Council of Ministers. If the General Directorate for Strategy and Innovation of the Defense Industry, after consulting the Foreign Investment Board, considers that the modifications are of little relevance in terms of public health, safety and order, no new authorization is needed (Article 11(1)(f) and (g) Implementing Regulation).

In addition, there is the so-called "consultation" which allows the investor to formally ask whether the transaction is subject to the screening mechanism, *e.g.*, in cases where it is not clear whether the target is involved in activities directly related to national defense. A consultation is decided at the level of the Ministry after consulting the Foreign Investment Board with a formal deadline of 30 working days, *i.e.*, approximately six weeks. Again, the authority can stop the clock by issuing requests for information. The outcome of the consultation is (i) either the transaction requires authorization, *i.e.*, is subject to a formal review process before the Council of Ministers or (ii) the transaction does not require authorization.

Can the review process result in conditions being imposed on a transaction?

Yes, there are three possible outcomes of the review process before the Council of Ministers:

(i) The transaction is authorized as proposed by the parties;

(ii) The transaction is subject to conditions which need to be implemented; or

(iii) The transaction is blocked and cannot be executed.

How do parties submit a filing? Is there a fee?

The filing is to be submitted to the competent Directorate General with the Spanish Ministry of Defense. There is no filing fee, but the parties must submit an authorization request, including detailed descriptions of the target's defense activities, general basic information about the investor and the Spanish target, and the form for the EU cooperation mechanism ("*Notification form (B)*"). The Spanish Ministry is obliged to submit the latter to the European Commission. The Ministry requires certain documentation and information regarding the Spanish target, the foreign investor, and the investment itself ab initio but reserves the right to ask for any additional information which may be needed during the review. This information includes, for example:

(i) A description of the target's main activity, and its activities related to defense;

(ii) The composition of the investor's management bodies; and

(iii) Investment objectives, plans, and means to achieve them.

In addition, documents presented to the Ministry for Defense need to be in Spanish and notarized. Translations need to be certified by an authorized translator (see, unfortunately in Spanish only, here).

Can transactions be concluded before screening process is finished? If not, are any sanctions imposed for doing so?

In transactions subject to the screening process, the transaction cannot be executed until authorization has been obtained. If the transaction is carried out without the required prior authorization, it will be considered non-valid and will not have any legal effect (Art. 8(2)(b) Act 19/2003).

Furthermore, closing a transaction without filing a screening request or without waiting for the authorization, as well as untruthfulness in the process, is punishable by: (i) a fine of up to the economic value of the transaction, with a minimum of EUR 30,000; and (ii) a public or private reprimand.

What happens if the parties fail to comply with the conditions imposed?

If the parties do not comply with the conditions imposed by the Council of Ministers, the investor is subject to the sanctions described in Section 10 above. In addition, failure to comply with the conditions means that the transaction will be null and void as it is deemed unauthorized.

How are sanctions set out?

In order to determine the value of the applicable sanction, Article 10 Act 19/2003 refers to the following criteria:

(i) Nature and magnitude of the infringer;

(ii) Degree of responsibility and intention of the infringer;

(iii) Time elapsed between the infraction and the attempt to correct it on the interested party's own initiative;

(iv) Financial standing of the infringer;

(v) Past conduct of the infringer, regarding capital movements and foreign investment, for which any final sanctions imposed in the last five years will be considered.

As a matter of fact, there is one decision from the Spanish Supreme Court of 4 March 2013 (See here) in which the Court reduced a fine of EUR 1 million for gun jumping under the defense regime to EUR 250,000. The ruling of the court attached importance to the following factors: (i) lack of a previous record for similar acts; (ii) the subsequent communication of its operations, already completed, to other bodies of the State Administration, within a short period of time; and

(iii) the estimate of the economic capacity carried out by the Ministry of Economy and Finance.

What is the procedure for filing an ex-post declaration? Is there a particular deadline?

In addition to the ex-ante screening mechanism described above, every foreign investment needs to be declared within one month of the transaction's closing to the Ministry of Economy, Trade and Enterprise. This ex-post declaration is merely for statistical purposes, and needs to be made for every foreign investment in a Spanish company (for further information, see here). The investor is responsible for making this statistical fling. Additionally, if a Spanish notary has been involved in the transaction, be it due to a legal obligation or by agreement of the parties, the notary will make this declaration (Article 5(3)(b) Implementing Regulation).

The Spanish authorities have not always been consistent but tend to require these filings only in the case of direct acquisitions.

Are sanctions imposed if an ex-post declaration is not filed? Are there sanctions for late filing?

The sanctions, administrative in nature, are the same as under Spain's horizontally applicable FDI rules. Articles 8 and 9 Act 19/2003 establish sanctions for failure to submit the statistical filing, as well as for untruthfulness, omission, or inaccuracy in the declaration, and for late submission.

Failure to declare transactions exceeding EUR 6,000,000 or, alternatively, untruthfulness, omission or inaccuracy in the data provided for transactions exceeding said amount, is considered a serious offense and is punishable by: (i) a fine of up to half of the value of the transaction, with a minimum of EUR 6,000; and (ii) a public or private reprimand.

Failure to declare transactions under EUR 6,000,000 or, alternatively, untruthfulness, omission or inaccuracy in the data of a declaration that does not exceed such amount, is punishable by: (i) a fine of up to one quarter of the value of the transaction, with a minimum of EUR 3,000; and (ii) a private reprimand.

Finally, late submission of the declaration, without prior action by the Administration, is punishable by: (i) a fine between EUR 150 and EUR 300, when the delay does not exceed six months; (ii) a fine between EUR 300 and EUR 600, when the delay exceeds six months.

Spanish law provides no criminal sanctions for breaches of these rules.

We are not aware of any case in which the Spanish FDI Authorities have imposed such fines for the failure to submit a statistical filing.

What is the statute of limitations?

In line with Article 11 Act 19/2003, the following infringements are subject to a statute of limitations of five years:

(i) Closing a transaction without submitting an ex-ante screening request;

(ii) Closing a transaction before obtaining authorization from competent authorities; and

(iii) Untruthfulness in the presented ex-ante filing.

The statute of limitations is three years for:

(i) Failure to submit a statistical filing for transactions exceeding EUR 6,000,000; and

(ii) Untruthfulness, omission or inaccuracy in the data provided in the statistical filing for transactions exceeding EUR 6,000,000.

The following infringements are subject to a statute of limitations of one year:

(i) Failure to submit a statistical filing for transactions under EUR 6,000,000;

(ii) Untruthfulness, omission, or inaccuracy in the data of an ex-post declaration filed for transactions under EUR 6,000,000; and

(iii) Late submission of a statistical filing, when there has been no prior action or request by competent authorities.

[i] Spain's defence authorities do not issue any report regarding investments in the defence sector. There are no statistics, general information about the parties or any kind of guidance regarding the filing obligation.

This entry was posted on Wednesday, March 5th, 2025 at 10:00 am and is filed under Foreign direct investment, Regulation, Spain
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.