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CHANGES TO THE LAW APPLICABLE TO LIBERALISATION OF SOME DIRECT FOREIGN INVESTMENTS IN SPAIN

One consequence of the economic impact unleashed by the COVID-19 is that the Spanish government has deemed it necessary to urgently protect the control model applicable to foreign investments in Spanish companies, by implementing *ex ante* authorisation mechanisms in certain instances.

For the purpose, the Fourth Final Provision of Royal Decree-Law 8/2020, of 17 March, on extraordinary measures to deal with the economic and social impact of COVID-19, ("**RDL**") amends Law 19/2003, of 4 July, on the legal regime applicable to the movement of capital and financial transactions with foreign natural and legal persons ("**Law 19/2003**"). This provision has been put in place to amend Law 19/2003 and passes into law (i) a new Article 7 bis suspending some foreign direct investments in Spain, (ii) amending section 2 of Article 8 on offences now classified as very serious, and also (iii) amending section 2 of Article 12 establishing which jurisdictional bodies may bring and investigate sanction proceedings.

Given the importance, this legal Comment focuses on analysing the scope and consequences of the aforesaid new Article 7 bis.

As set out in the RDL Recital of Grounds, this new legal principle has been implemented to protect certain Spanish companies (irrespective of whether they are listed on the stock exchange) deemed especially important due to the corporate business they carry on and in the face of potential acquisition threats from foreign investors arising in response to the fall in the Spanish company equity value as a consequence of the economic impact we are witnessing from COVID-19.

The material effect of the aforementioned protection is that the liberalised regime applicable to foreign investments in Spanish companies trading in any of the following sectors is now suspended:

a) Critical infrastructures, both physical and virtual (including infrastructures for energy, transport, water, health, communications, media, data processing and/or storage, aerospace industry, defence industry, electoral or financial sectors and sensitive facilities). The suspension also applies to land and property serving a key purpose for use by such infrastructures, as described in Law 8/2011, of 28 April, on establishing measures to protect critical infrastructures.

b) Critical technologies and dual use products, as defined in Article 2, section 1, of Council Regulation (EC) 428/2009, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace technologies, defence technologies, energy storage, quantum and nuclear industries, and also nanotechnologies and biotechnologies.

c) The supply of essential consumables, especially energy, deemed to refer to those subject to Law 24/2013, of 26 December, Electricity Sector Act and Law 34/1998, of 7 October, Hydrocarbons Sector Act, as well as those related to raw materials and food safety.

d) Sectors with access to sensitive information, especially personal data, or able to monitor such data, pursuant to Organic Law 3/2018, of 5 December, on the Protection of Personal Data and Guaranteeing Digital Rights.

e) Media.

Additionally, the Government has reserved the right to suspend the liberalisation regime applicable to additional sectors not included on the list whenever these can affect public safety, public order and public health.

Therefore, all investment from natural or legal persons resident in third countries outside the European Union and the European Free Trade Association are now suspended and are subject to prior authorisation by the government in scenarios when the potential investor would, as a result, come to hold stock equal to or greater than 10% of company capital in a Spanish company operating in the abovementioned sectors. The same applies whenever, as a consequence of a company operation, legal act or juridical business the foreign investor would effectively become involved in managing or controlling the company concerned.

What needs to be addressed is whether or not the corporate business conducted by such a company subject to suspended liberalisation of foreign investment need necessarily comprise the main corporate activity. The government makes no such distinction and it is therefore feasible to assume that a company trading in any of the aforementioned business sectors is subject to the suspension of liberalisation, even if that business activity is not the main corporate activity.

There is no defined business turnover factor, and the suspension of liberalised foreign investment must therefore apply to small and medium enterprises, as well as start-ups, in addition to large companies listed on the stock exchange, whenever the business activities of those companies form part of the defined sectors.

All direct foreign investment in Spanish companies is also suspended in the following scenarios irrespective of the business sector:

a) If the foreign investor is directly or indirectly controlled by the government, including public bodies or armed forces of the third country. Criteria established in Article 42 Spanish Commercial Code apply for defining corporate control.

b) If the foreign investor has invested in or has holdings in business activities across sectors affecting security, public order and/or public health of another Member State, and especially those listed under section 2 of this article.

c) If the foreign investor is subject to administrative or judicial proceedings instigated in another Member State or in the country of origin, or in the third country, for criminal or unlawful activities.

All investment operations that are encompassed within any of the aforementioned categories, if carried out without seeking the compulsory prior authorisation, shall be deemed unenforceable and without juridical effect.

As a result, all legal acts, business, transactions and operations affected by these measures may still be carried out but only once the corresponding government authorisation has been obtained, and terms and conditions will apply. Decisions on authorisation lie with government bodies, subject to statutory procedures.

By default, if the maximum six-month period for a decision and/or for notification of authorisation elapses and no express resolution has been issued, the proposed operation is deemed tacitly unauthorised.

Investments made without seeking and obtaining prior authorisation are classed as very serious offences for the purposes of Law 19/2003 and sanctioned by a penalty of up to the entire financial content of the transaction (with an established minimum fine of 30,000 euros), together with a public or private reprimand.

Lastly, it is important to note that the suspension of foreign investment referred to in this article is not bound to the period the State of Emergency declared in order to deal with the COVID-19 health crisis remains in force; rather these provisions are ongoing until such a time as the Council of Ministers issues a Resolution lifting the suspension.