Publication of the long-awaited royal decree on foreign investment implementing Law 19/2003

July 2023

The new regulations, which enter into force on September 1, provide greater clarity and legal certainty to the rules governing foreign investments.

Royal Decree 571/2023, of July 4, 2023, on foreign investment was published in the Official State Gazette on July 5, 2023 and will enter into force on September 1, 2023.

This royal decree updates the current legislation in certain aspects and attempts to provide greater clarity on the rules governing the suspension of the regime for deregulation of direct foreign investments introduced as a result of the COVID-19 pandemic and provided for in article 7 bis of Law 19/2003, of July 4, 2003, on the legal regime for movements of capital and cross-border economic transactions.

Among other aspects, it provides greater detail on the transposition into Spanish law of the essential rules and principles established in Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 and it repeals the now obsolete Royal Decree 664/1999, of April 23, 1999.

Some of the most notable aspects of Royal Decree 571/2023 are as follows:

Declarations of foreign investment

In relation to the obligations to declare foreign investments for statistical purposes:

A. New scope in terms of the Spanish investments abroad and foreign investments in Spain for which a subsequent declaration must be submitted to the Investments Register of the Ministry of Industry, Trade and Tourism.

   While it is true that the royal decree generally attempts to limit the investments which must be declared, by removing the requirement to declare minority investments of less than 10% of the share capital or voting rights of the entity receiving the investment, it has included additional scenarios not previously contemplated in Royal Decree 664/1999. Briefly, these new scenarios include:

   i. The acquisition of shares in collective investment undertakings and closed-end type collective investment undertakings, provided that the investor is going to acquire, or is entitled to acquire, a holding equal to or greater than 10% of the net assets or share capital of the undertaking;

   ii. Intragroup financing via deposits, credit facilities, loans, transferable securities or any other debt instrument, where the amount in question exceeds 1,000,000 euros and the repayment period is longer than one calendar year; and

   iii. The reinvestment of profits, provided that it is carried out by an investor that owns a holding equal to or greater than 10% of the share capital of the company in question.

Furthermore, in certain cases, Royal Decree 571/2023 raises the minimum investment thresholds so that the obligation to declare is only required if the investments exceed either 1,000,000 euros (e.g., for investments by nonresidents in Spain in joint ventures, silent investment agreements, EIGs or tenancies in common) or 500,000 euros (in the case of real estate investments by nonresidents).

B. The royal decree creates additional obligations for managers of collective investment undertakings (both of the closed-end and open-end type), entrusting them with the duty to make declarations that, until now, were the responsibility of the investor. Royal Decree 571/2023 also provides greater detail on notaries' obligations: if a nonresident holder of an investment delivers all the data required to declare an investment to the notary attesting a transaction, the holder will be relieved of the obligation to declare the investment and it is the notary who must submit such information to the General Council of Notaries which, in turn, will submit it to the Investments Register.

C. Royal Decree 571/2023 has also taken the opportunity to update the rules on prior declarations: (i) by referring to investments targeted at or originating from non-cooperative jurisdictions regulated under Order HFP/115/2023, of February 9, 2023, determining the countries and territories, as well as the harmful tax regimes, which are considered non-cooperative jurisdictions; and (ii) establishing, as a general rule, that the only investments subject to declaration are those in which the holding reached exceeds 10% in the entity in question or, in the case of real estate, if the investment exceeds 500,000 euros (for investments in Spain) or 300,000 euros (for investments abroad by Spanish residents).

Chapter II and Chapter III clarify (as the transitional provisions do) that their provisions must be subsequently implemented by the relevant ministerial orders and circulars which will replace those issued under Royal Decree 664/1999 in due course. Accordingly, we will have to wait and see whether the declaration procedure has been simplified in practice, as Royal Decree 571/2023 seems to intend.

Suspension of the general deregulation regime for certain foreign investments

This was probably the most eagerly awaited aspect of Royal Decree 571/2023 given its potential to clarify the numerous doubts raised by the wording of article 7 bis of Law 19/2003.

The royal decree has not clarified all the interpretation doubts, but it does seem to have fleshed out a number of aspects, established certain exemptions and modified certain aspects that, in practice, will add greater legal certainty to foreign investments or, at least, greater clarity.

The key features of the royal decree in this regard are as follows:

A. It establishes a single general framework for all scopes of suspension of the general deregulation regime (which was previously fragmented, given that Royal Decree 664/1999 preceded article 7 bis of Law 19/2003).

B. Royal Decree 571/2023 configures and gives full legal effect to the voluntary clarification requests that the team at the Directorate-General of International Trade and Investment of the Ministry of Industry, Trade and Tourism had been responding to since article 7 bis came into force. In this regard:

i. It establishes a maximum period of 30 business days to respond to clarification requests. The period will start running the day after the request is submitted and will suspend the possibility of applying for authorization until the decision is notified. If this period ends without an express decision, the interested party may submit an application for authorization of the investment transaction;

ii. Decisions on clarification requests will be binding on the authorities vis-à-vis the requesting party; and

iii. As must be the case for any information provided in an administrative procedure (see article 13 of Law 39/2015), any proceedings concerning clarification requests will be confidential.

C. As for the rules on authorization, certain aspects have been clarified and fleshed out, namely:

i. Where two or more foreign investment transactions take place within a two-year period between the same buyers and sellers, such transactions will be regarded as a single transaction performed on the date of the last transaction.

ii. In the case of investments undertaken with the agreement of two or more investors for the purpose of exerting joint control over the subject-matter of the investment, a single application for prior authorization from all the investors will be required.

iii. Any change in the terms of an investment authorized in accordance with the preceding paragraphs must be notified to the government body that processed the application in question. Where this change *materially* alters the conditions of the investment, the investment will once again be subject to the prior administrative authorization procedure. If there is any doubt regarding whether a change is material, the party concerned may resort to the prior clarification request procedure, unless the competent directorates-general consider, following a report by the Foreign Investment Board, that the changes are negligible in terms of their impact on health, security and public policy.

D. Article 7 and article 7 bis of Law 19/2003 do not expressly establish anything more than the possibility of an investment being authorized or rejected, but Royal Decree 571/2023 expressly stipulates that administrative decisions may consist of:

i. Unconditional authorizations;

ii. Refusal of authorization;

iii. Authorizations subject to conditions imposed by the body issuing the decision or to commitments submitted by the investor and accepted by the body issuing the decision; or

iv. Dismissal due to withdrawal by the investor or on the ground that the transaction is not subject to any regime governing the suspension of deregulation of foreign investments.

E. Regarding the specific regime governing the suspension of deregulation of certain direct foreign investments in Spain on the terms set out in article 7 bis of Law 19/2003, the most noteworthy changes are as follows:

i. The period for deciding on applications for authorization is shortened from 6 to 3 months, although the period may be suspended due to additional requests for information.

ii. A general provision is included to stipulate that the regime governing the deregulation of direct foreign investments in Spain is not suspended where the investment transaction has no or little impact on the legal interests protected by article 7 bis of Law 19/2003. This provision is positive given that it refers to the possibility of assessing whether or not an investment affects the legally protected interest. However, it shifts responsibility for making the assessment back onto the investor given that it does not establish any threshold.

iii. The royal decree expressly establishes that the following will not be considered direct investments within the meaning of article 7 bis.1 of Law 19/2003 capable of undergoing screening:

   a. Internal restructuring in a corporate group.

   b. Increases in a holding by a shareholder that already has a holding above 10% and which do not give rise to changes in control.

iv. With regard to indirect investments undertaken by residents of countries outside the European Union (EU) and the European Free Trade Association (EFTA) through an entity resident in such countries, the royal decree clarifies that beneficial ownership of such investments shall be deemed to correspond to residents of countries outside the EU and the EFTA where such residents, individually, or in a concerted manner, ultimately own or control, directly or indirectly, a holding above 25% in the capital or the voting rights of the intermediate entity, or where, by other means, they exert direct or indirect control over such entity.

v. Royal Decree 571/2023 includes certain clarifications in articles 15 and 16 regarding the material grounds (by reason of the subject-matter of the investment) and the personal grounds (by reason of the investor) that make a direct foreign investment subject to authorization. These clarifications, while they are useful and it is clear that an effort has been made to specify the scope of application in greater detail, will have to be interpreted by the ministerial teams in order to be able to conclude whether they offer greater legal certainty in practice.

vi. Article 17 of the royal decree has established certain express exemptions in a number of areas that are significant:

   a. In the energy sector, regardless of the amount, direct foreign investments in which the investor does not fall within the personal scope of article 7 bis.3 of Law 19/2003 are exempt from authorization provided that the following conditions are met:

      - The companies or assets acquired do not pursue regulated activities (as specified in Royal Decree 571/2023);

      - As a result of the transaction, the company does not become a dominant operator in the relevant sectors;

      - Where the foreign investment involves acquiring electricity generation assets whose share of installed capacity by technology is less than 5%. For these purposes, Royal Decree 571/2023 establishes the specific criteria for calculating market share; and

      - Where the foreign investment entails acquiring companies engaged in electricity retailing, if the number of customers of the acquired company is fewer than 20,000.

b. In all other cases included within the material scope of article 7 bis.2 of Law 19/2013, foreign investments in which the revenues of the acquired companies do not exceed 5,000,000 euros in the last accounting period closed will be exempt from prior authorization, provided that their technologies have not been developed under programs and projects of particular interest for Spain. However, direct foreign investments will always be subject to authorization:

   - Where they are made in electronic communications operators in which any of the following circumstances are present:

     1. They are holders of concessions to use the radio spectrum, in frequency bands harmonized in accordance with EU legislation; or

     2. They are holders of enabling instruments for the use of orbit-spectrum resources within the scope of Spanish sovereignty; or

     3. They have been classified as operators with significant market power in a relevant market in the electronic communications sector.

   - Where they are operations relating to exploration and exploitation of mineral deposits of strategic raw materials.

c. The following are also exempt from the obligation to secure prior authorization:

   - Investments whereby real estate is acquired that is not used in any critical infrastructure or that is not indispensable and non-replaceable for providing essential services.

   - Transitory investments, i.e., with a short term (hours or days) in which the investor does not acquire the capacity to influence the management of the acquired company because the investor is a placement agent or underwriter of share issues and of secondary public offerings or initial public offerings. It will be the end investors that require authorization, as applicable.

In short, Royal Decree 571/2023 is a much anticipated piece of legislation that tries to add more clarity and legal certainty to the rules on foreign investments; going forward, it will be necessary to see how its provisions are applied by the competent authorities.

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