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FDI-Spain: rules and requirements other than (and cumulative to) Law 19/2003

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There is a lot of hype about the Spanish FDI regulations introduced by a number of Royal Decrees in 2020: fines of up to the value of the deal, non-controlling acquisition of shares can potentially trigger a filing, etc.

And yet, prior to 2020, Spain already had FDI provisions on the books.

These pre-2020 FDI rules in Spain could be found in Royal Decree 664/1999, of 23 April ("RD 644/1999") and an Order of 28 May 2001, establishing the procedures applicable to foreign investment declarations and their liquidation, as well as the procedures for the presentation of annual reports and authorisation files.

These provisions are still in force and they are cumulative to the recently established Spanish ex-ante screening mechanism, established by Law 19/2003, applicable only to certain foreign investments.

Fines for non-compliance can go as high as the value of the transaction. However, we are not aware of any actual fines having been imposed in the application of these provisions and, interestingly, neither are our contacts at the Spanish FDI authorities.

What Types of Transactions are Subject to this Regime?

1. Under Article 3 RD 644/1999, FDI information requirements do not apply only to M&A transactions, but to all of the following legal transactions, when performed by any non-resident (i.e., any individual or entity domiciled abroad, irrespective of its nationality, or a public entity of foreign sovereignty) :

- (i) Any kind of participation in a Spanish company, including (a) its incorporation; (b) the acquisition or subscription of its shares; and (c) the acquisition, by any means, of voting rights or rights to participate in its share capital (for example, by the acquisition of subscription rights or convertible securities).
- (ii) The setting up of branches in Spain or the increase in the capital of existing

branches.

(iii) The subscription and acquisition of negotiable securities representing loans issued by residents, such as bonds and debentures convertible or not convertible into shares, promissory notes and any other similar, regardless of the place of issue and purchase.

(iv) The participation in investment funds, registered with the Spanish National Securities Market Commission (Comisión Nacional del Mercado de Valores, "CNMV").

(v) The acquisition of real estate located in Spain (a) of an amount exceeding EUR 30,050,605; or (b) implemented with funds originating from tax havens identified in Royal Decree 1080/1991, of 5 July, irrespective of their amount.

(vi) The setting up, formalisation of or participation in joint ventures, foundations, economic interest groupings, cooperatives and communities of goods, when the total value corresponding to the participation of foreign investors (a) exceeds EUR 3,005,060.52; or (b) comes from tax havens, as indicated above.

Who Must Report the Investment?

2. As a general rule, the party obliged to report the foreign investment is the non-resident investor. In addition, when a Spanish public notary intervenes in the transaction, he or she also reports it to the Spanish FDI authorities.

3. Specific rules apply to investments in negotiable securities, voluntarily deposited securities and Spanish investment funds.

How Should the Investment be Declared?

A. 'Ex Post' Declaration

4. All foreign investments set out under Section I above in non-negotiable securities, as well as their liquidation, must be reported to the Foreign Investments Registry ("Registro de Inversiones Extranjeras") of the Ministry of Industry, Commerce and Tourism within a month of their implementation.

5. The way of doing it is through an electronic filing based on the specific forms passed by the Resolution of 27 July 2016, of the Directorate General for International Trade and Investment, which refers to the main aspects of the investment and the parties to it (for example, the parties' identification details, the amount of the investment, and the sector affected by the investment).

6. This filing leads to no review or authorisation. The information is only used for statistical purposes.

B. 'Ex Ante' Declaration

7. Apart from the aforementioned ex post declaration, the implementation and liquidation of foreign investments originating from tax heavens must also be reported to the Foreign Investments Registry prior to their implementation, except for:

(i) Investments in (a) negotiable securities, either publicly issued/offered or marketed in a secondary market; or (b) investment funds registered with the CNMV.

(ii) Investments that do not exceed 50% of the share capital of the Spanish company that is the subject of the investment.

8. This report is made through electronic notification forms similar and additional to those referred to under Section III.A above. The effective implementation or liquidation of a transaction subject to the 'ex ante' declaration requirements should also be reported 'ex post'.

9. Again, this 'ex ante' declaration is not equivalent to a request for prior authorisation and leads to no review or authorisation. Once the investment or its liquidation has been reported, the investor may proceed without having to wait for any reply from the Ministry of Industry, Commerce and Tourism. The purpose of such declaration is solely administrative, statistical or economic, in the service of promoting investment and monitoring functions of the Administration.

What are the Risks of Non-Compliance?

10. With regard to the infringement of FDI information requirements, RD 644/1999 refers to Law 40/1979, on the Legal Regime of Exchange Control, currently superseded by Law 19/2003, of 4 July 2003, on the legal regime of capital movements and foreign economic transactions and on certain measures for the prevention of money laundering.

11. Pursuant to Article 8 of the latter, failure to declare transactions covered by the rule may be subject to the following penalties, depending on the amount of the transaction:

(i) Transactions in excess of EUR 6 million: fines amounting to up to half of the economic value of the transaction, but not less than EUR 6,000, and a public or private warning.

(ii) Transactions up to EUR 6 million: fines amounting to up to a quarter of the economic value of the transaction, but not less than EUR 3,000, and a private warning.

12. Likewise, the lack of truthfulness or any omission or inaccuracy in the data of the declarations may be sanctioned in the same manner.

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