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Certain issues about foreign investment in dual-use technology in Spain

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The present memorandum (memo) sets out to discuss certain issues regarding foreign investment in dual-use technology in Spain. As this memo only contains general information, it should not be construed as advice or recommendation of any sort.

1. Introduction

Products that can be used for both, civilian and military or nuclear uses, are called dual-use products.

Spanish legislation requires that foreign investments in certain dual-use assets have to be authorized. Additionally, the export of dual-use assets may require obtaining a license or authorisation.

2. Restrictions on foreign investment

As a general rule, foreign investment in Spain is unrestricted. However, direct foreign investments in activities directly related to national defence are subject to prior authorization by the Council of Ministers.

The concept of "national defense-related activities" was interpreted by the Ministry of Economy and Competitiveness in its 5th resolution of 2014. It stated that national defense-related activities are those involving the manufacture or trade of the products contained in Annex I of the Royal Decree 679/2014, of August 1. Therefore, if a dual-use product is listed in Annex I, it is considered related to national defense and the corresponding FDI requires authorization.

Not all dual-use products are in Annex I of the Royal Decree. Article 2(3) differentiates between national defense and other dual-use products and technologies, whose complete listing is referenced in Annex I of the Council Regulation (EC) 428/2009, of May 5. As a consequence, products that are in the Annex of the Council Regulation, but not the Royal Decree, do not require governmental authorisation to invest.

If applicable, the procedure to apply for authorization is about six (6) months.

Failure to obtain authorisation is as a very serious infringement. A penalty from 30,000 euros to the total amount of the operation, as well as a public or private warning, can be imposed. Liability for this violation prescribes after 5 years of the realization of the investment.

3. export of dual-use assets regulation

The first step is to verify if what is intended to be exported is in Annex I of the Council Regulation. This applicable regulation identifies the following ten categories: (0) nuclear materials, facilities and equipment, (i) special materials and related equipment, (ii) materials processing, (iii) electronics, (iv) computers, (v) telecommunications and "information security", (vi) sensors and lasers, (vii) navigation and avionics, (viii) marine, and (ix) aerospace and propulsion.

To obtain the authorization or license required to be able to make transfers to or from foreign countries of dual-use material that are outside the European Union, companies must be registered with the Special Register of Operators of Foreign Trade (REOCE). Only residents in Spain can register.

Iran, Russia and North Korea are special cases. These countries are subject to an embargo. Some of the Council Regulation's products cannot be delivered to these destinations.

There are three kinds of licenses: (i) a single license to transfer goods and technologies of dual-use that allows one or several shipments of materials included to a certain recipient, within a one year period; (ii) a global license to transfer dual-use goods and technologies that allows an unlimited number of shipments of materials covered by the license, to one or more recipients and specified countries, if necessary, up to the maximum value authorized and within a period

of three (3) years, which may be renewed; and (iii) a general European authorization for some products when they are sent to the following countries: Australia, Canada, United States of America, Japan, Norway, New Zealand and Switzerland.

An end-user statement has to be attached to the license. Presentation of both documents can be done directly or by telematic means.