

# Overview: Limitations on Foreign Direct Investment in Portugal

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## **The regime for analysing investment from outside the EU and EEA in Portugal - Decree-Law 138/2014 of 15 September**

Portugal is one of 22 out of 27 Member States that have adopted legislation allowing the screening of investments by entities from outside the European Union or the European Economic Area in certain pre-defined areas.

This assessment is regulated by Decree-Law 138/2014, of 15 September, which establishes a system for safeguarding and protecting assets considered to be strategic, with the aim of ensuring that investments from outside the European Union and the European Economic Area do not compromise interests that are fundamental to public security.

Specifically, Decree-Law 138/2014 of 15 September allows the Council of Ministers, on a proposal from the member of the Government responsible for the area in which the strategic asset in question is integrated, to oppose investments (i) by entities from outside the European Union and the European Economic Area or legal persons controlled by them (ii) which result, directly or indirectly, in the acquisition of the control (iii) of strategic assets that (iv) jeopardise, in a real and sufficiently serious manner, national defence and security or the safety of the country's supply of services that are fundamental to the national interest.

The law states that strategic assets are deemed as "*the main infrastructures and assets allocated to national defence and security or to the provision of essential services in the areas of energy, transport and communications*".

In this Decree-Law we find examples of situations in which the legislator believes there is a greater likelihood of strategic assets being involved, such as:

- Situations in which there are serious indications, based on objective elements, of the existence of links between the acquirer and third countries that do not recognise or respect the fundamental principles of the democratic rule of law; or
- Scenarios in which the acquirer has, in the past, used the position of control held over other assets to create serious difficulties for the regular provision of essential public services in the country in which they were located or in neighbouring countries.

### **What is the procedure and possible consequences?**

The government minister responsible for the area in which the strategic asset in question is integrated who considers that a particular investment should be assessed in the light of the

criteria of this law must, within 30 days of the transaction being concluded or the date on which it becomes public knowledge, initiate a procedure to assess the risks of the operation.

As part of the assessment procedure, the relevant Minister may request from the investor all the information and documents it deems relevant, informing the Ministers responsible for Foreign Affairs, National Defence and Homeland Security drawing their attention to the investment at stake.

Once this analysis has been completed, the Council of Ministers may decide, within 60 days of the submission of the requested information and documents, to oppose the operation. This decision must be substantiated on the basis of the risks identified for national strategic assets. If the operation is not objected to within this period, the investment is deemed to have been tacitly approved.

In the event of opposition, the legal acts and transactions of the transaction become null and void, including those relating to the economic operation or exercise of rights over the assets or the entities that control them. This means that the effects are retroactive, implying the restitution of everything that was handed over between the relevant involved parties or, if this is not possible, the payment or reimbursement of the corresponding amount(s).

This procedure can be more time-consuming if the Portuguese authorities, under Regulation (EU) 2019/452, which will be dealt with below, request the intervention of other Member States or the European Commission, namely by requesting information regarding the investor or investments made by the same entity in another Member State.

### **How can investors protect themselves?**

Investors can have recourse to two protection mechanisms in this regard:

- (i) they can request confirmation that a particular transaction does not give rise to problems under the law; or
- i) They can challenge the decision to oppose the investment (after the same is carried out or following a prior opposition decision as per i) hereabove) before the administrative courts if they consider that the conditions laid down in the law have not been met or that it does not raise concerns about strategic assets.

### **What is the connection between Decree-Law 138/2014 and Regulation (EU) 2019/452?**

Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishes for the first time a common framework for the control of direct investments from third countries or from outside the EEA in the European Union, with the aim of protecting security and public order. On the one hand, the Regulation defines a set of common criteria that Member States can adopt when assessing investments from third countries, allowing them to verify potential risks associated with strategic sectors such as energy, transport, critical technologies and infrastructure. As such, the Regulation provides for sectors that are not currently covered by Portuguese legislation.

On the other hand, it also introduces a mechanism for co-operation between Member States and the European Commission, which includes the sharing of information and the possibility of the Commission issuing opinions on investments which, in the Commission's view, could affect common interests of the Union. Although the Commission does not have the power to condition or prohibit a given investment, Member States must take the "utmost account of the opinion received from the Commission" when taking a final decision on authorizing or restricting the investment. Thus, the competence to authorize or restrict an investment lies solely with the Member States.

After the entry into force of this law, the European Commission proposed a new regulation on the review of foreign investments from outside the EU and the EEA in the EU. The new Regulation would repeal the current Regulation (EU) 2019/452 and would significantly strengthen the harmonization of foreign investment screening in the EU, under three fundamental vectors: (i) requiring, not just suggesting, that all Member States have a screening mechanism (to date, only 22 of the 27 Member States do); (ii) identifying the areas in which all Member States must screen foreign investments from outside the European Union; and (iii) harmonizing other key elements of national screening mechanisms. This new Regulation has not yet been approved.

## Conclusions

So far, there are no known decisions taken under Decree-Law 138/2014, despite the fact that investment from outside the EU or the EEA in sectors considered strategic that could be considered under is public and notorious.

Decree-Law 138/2014 has remained unchanged since its publication and entry into force. Given the evolution of global dynamics and the European Commission's proposals in this area, it is foreseeable that this regime will be reviewed in the short/medium term. A possible update could

involve changing the sectors considered fundamental and standardizing key concepts, promoting greater alignment with other Member States and greater effectiveness in controlling strategic investments.

It would also be a good opportunity to clarify certain aspects regarding the interpretation and application of the 2014 Decree-Law, namely the differentiation between the ownership of assets and the provision of services in the relevant sectors, the clarification of the criteria for defining the deadline for government intervention, including the moment when it becomes aware of investment operations in strategic sectors, and the process of liaising between the state and investors, as well as the other parties (selling entities and targets of the operation). In fact, considering that the decision to block investments will have an exceptional scope given its retroactive effect, cancelling investments made, it is important to delimit this public intervention in the economy more strictly.



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