

Portugal

Decree-Law no. 138/2014, of the 15th September (2014)

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Decree-Law no. 138/2014, of the 15th September

Law 50/2011, of the 13th of September, which amended for a second time the Portuguese framework for Privatisations, adopted by Law 11/90, of the 5th of April, instructed the Government to establish an exceptional regime for the safeguard of strategic assets in sectors deemed to be fundamental for the national interest, in observance of national law and European Union law

Additionally, Law 9/2014, of the 24th of February, granted the Government the legislative authorisation to, in accordance with the defined object, intention, and scope, institute the aforementioned regime safeguarding the assets which are deemed strategic for defence and national security, and for the Country's security of supply as regards services which are fundamental for the national interest.

In effect, any difficulty, even if it is momentary, which threatens the defence and national security or the security of supply of the Country as regards services which are fundamental to the national interest may cause grave disturbance, not just to the defence and national security and to the national economic activity, but also to the life of the population in general, which is why its protection is a fundamental public security interest, which the State must preserve at all times.

Without prejudice to the powers which the State already possesses under the law applicable to the sector in question, public interest justifies that the State possesses an additional instrument to react swiftly and effectively to any operation which may affect the availability of the main infrastructures or strategic assets assigned to defence and national security or the supply of essential services in the areas of energy, transport, and communications.

This decree-law thus institutes, fulfilling the fundamental duties of the State and in accordance with national and European Union law, a safeguard regime for strategic assets in order to ensure public safety.

In this framework, the legal regime instituted by this decree-law grants to the Council of Ministers, following a proposal of the member of the Government responsible for the area where the strategic asset is integrated, the power, in exceptional circumstances and by means of a duly justified decision, to oppose any legal transactions which result, directly or indirectly, in the acquisition of direct or indirect control over infrastructures or strategic assets by natural or legal persons of countries outside the European Union and the European Economic Area, to the extent that such transactions may put into question the defence and national security, or the Country's security of supply of services that are fundamental for the national interest.

It is, therefore, necessary to provide that the member of the Government responsible for the area in which the strategic asset in question is integrated may, by means of a duly justified decision, initiate a procedure for reviewing the operations that result, directly or indirectly, in the acquisition of direct or indirect control, direct or indirectly, of infrastructures or strategic assets by natural or legal persons from countries outside the European Union and the European Economic Area, within 30 days after the conclusion of the legal transaction relating to such operations or after the date on which such transactions become public knowledge, should it occur afterwards, in order to assess the risk they pose to defence and national security or to the security of the Country's supply of services essential to the national interest. In that case, the acquirers must supply to the member of the Government responsible for the area in which the strategic asset in question is integrated the information and documents related to the operation, after which the Council of Ministers, following a proposal of that member of the Government, has 60 days to exercise its opposition, otherwise a tacit decision of non-opposition will be considered to have been taken.

In this way, the public interest of defence and national security, as well as the security and continuity of essential services for life in society are safeguarded, without the opposition regime representing interference by the State in the management and operation of the assets in question.

In order to provide legal certainty to those persons subject to the provisions of this decree-law, the concept of de facto or de jure control is adopted as defined by the rules of national and European Union competition law, and widely developed by the jurisprudence of the courts of the European Union and the practice of the competent authorities at both European and national level.

It should also be clarified that any opposition decision is taken in strict compliance with the applicable rules and principles of national law and European law, in particular the principle of proportionality, on the basis of appropriate factual and legal grounds. In particular, it is expressly provided that defence and national security and the security of the Country's supply of services essential to the national interest are safeguarded by this law as fundamental interests of public safety, which is why the Government can only exercise its power of opposition in the event of a real and sufficiently serious threat.

For this purpose, this decree-law exhaustively defines objective, transparent and non-discriminatory criteria to be considered by the Government in the analysis of the nature of the threat that a given operation which results, directly or indirectly, in the acquisition of direct or indirect control over infrastructures or strategic assets by natural or legal persons from countries outside the European Union and the European Economic Area likely pose on national defence or security or on the regular supply of essential services. Although it is not possible to fully identify all the hypothetical situations in which this security may be threatened, given the need to safeguard the public interest, the main situations in which such a transaction may impair defence and national security or the security of the Country's supply of services essential to the national interest, in a real and sufficiently serious way, are also exemplified

It is also stipulated that any opposing decision may be subject to judicial review. The legal definition of objective and transparent decision criteria allows the administrative courts to uphold an effective judicial review, taking particularly into account the reasoning for the decision, the compliance with the provisions of this decree-law and with other rules and principles of applicable national and European law, notably the principle of proportionality.

In order to ensure the safeguard of defence and national security and security of supply of the Country in services essential to the national interest, should an opposition decision be adopted by the Council of Ministers, all legal transactions carried out under the relevant operation are null and ineffective, with this legal consequence being considered a risk inherent to the business itself.

With a view to enabling investors to previously assess whether the operations carried out or designed are compatible with this law, they are afforded the possibility to request the member of the Government responsible for the area in which the strategic asset in question is integrated, through a request describing the terms of the operation, confirmation that the Government will not oppose it. A decision of non-opposition shall be deemed to exist if a review procedure has not been initiated within 30 days of receipt of the request.

Hence:

Using the legislative authorization granted by Law 9/2014, of the 24th of February, and in accordance with article 198, paragraphs 1, a) and b) of the Constitution of the Portuguese Republic. The Government decrees the following:

Article 1 – Object

This decree-law institutes the safeguard regime for strategic assets essential for ensuring defence and national security, and the Country's security of supply of services fundamental for the national interest, in the areas of energy, transports, and communications, as fundamental interests in public safety.

Article 2 – Definitions

For the purposes of this decree-law, the following definitions apply:

- a) "Strategic assets", are the main infrastructures and assets assigned to defence and national security or to the supply of essential services in the areas of energy, transports, and communications.
- b) "Control", is the possibility to exert a determining influence over the strategic asset, in accordance with article 36, paragraph 3, of Law 19/2012 of the 8th of May;
- c) "Person of a country outside the European Union and the European Economic Area", is any natural or legal person whose domicile, statutory seat, or operational headquarters is not located either in a Member State of the European Union or of the European Economic Area.

Article 3 – Safeguard of strategic assets

1 – The Council of Ministers, following a proposal of the member of the Government responsible for the area where the strategic asset is integrated, may oppose, in accordance with article 4, operations from where it results, directly or indirectly, the acquisition of control, direct or indirect, by a person or persons of a country outside the European Union and of the European Economic Area, over strategic assets, independently of the respective legal form, should it be determined that these may put into question, in a real and sufficiently serious way, defence and national security, or the Country's security of supply of services fundamental for the national interest as defined by this decree-law.

2 – The real and sufficiently serious nature of the threat to defence and national security or to the Country's security of supply of services fundamental for the national interest referenced in paragraph 1 shall be based solely on the following criteria:

- a) Physical security and integrity of the strategic assets;
- b) The permanent availability and operability of the strategic assets, as well as their ability for promptly fulfilling obligations, in particular as regards public service obligations, which befall upon the people who control them, in accordance with the law;
- c) The continuity, regularity, and quality of the services of general interest provided by the people who control the strategic assets;
- d) The preservation of the confidentiality, imposed by law or public contract, of the data and information obtained in the exercise of their activity by the people controlling the strategic assets as well as the technologic resources needed for the management of the strategic assets;

3 – Any operations from which results, directly or indirectly, the acquisition of direct or indirect control by a person or persons from countries outside the European Union are deemed susceptible to put into question the defence and national security or the security of the Country's supply of services fundamental for the national interest, in accordance with paragraph 1, if:

- a) There is serious evidence, based in objective elements, of the existence of connections between the acquiring person and third countries which do not recognize or respect the fundamental principles of democracy and the rule of law, which represent a risk for the international community as a result of the nature of their alliances or which maintain relations with criminal or terrorist organizations, or with people linked with such organizations, taking into account existing official positions of the European Union on these matters;
- b) The acquirer:
 - i) Has, in the past, used the position of control held over other assets to create serious difficulties to the regular supply of essential public services in the country where these were located, or in neighbouring countries;
 - ii) Does not ensure the main assignment of the assets, as well as its reversal in accordance with the relevant concession contracts, if they exist, namely taking into account the inexistence of contractual provisions suitable for that effect;

c) The relevant operations result in the changing of the purpose of the strategic assets, should this threaten the permanent availability and operability of the assets for the prompt fulfilment of the applicable obligations, in particular public service obligations, in accordance with the law;

4 – The procedure of opposing the operations mentioned in paragraph 1 shall be taken in accordance with rules and obligations under the World Trade Organization or any other international agreement which bind the Portuguese Republic internationally

Article 4 – Procedure for opposition

1 – Within 30 days counting from the conclusion of the transactions relating to an operation that results, directly or indirectly, in the acquisition of control, direct or indirect, by a person or persons from countries outside the European Union and the European Economic Area, over strategic assets, independently of the respective legal form, or counting from the date when such transactions become of public knowledge, should it occur afterwards, the member of the Government responsible the area in which the strategic asset is integrated may trigger an review procedure, by means of a duly justified decision, so as to review the risk of the operation for defence and national security or for the security of the Country's supply in services deemed fundamental for the national interest.

2 – Should a review procedure be triggered, in accordance with the previous paragraph, the acquiring person or persons should present the member of the Government responsible for the area where the strategic asset is integrated with the relevant information and documents regarding the operation.

3 – The triggering of the procedure under this article is immediately notified to the members of the Government responsible for the areas of foreign affairs, national defence, and domestic security

4 – The member of the Government responsible for the area where the strategic asset is integrated may establish, by decree, the information and document to which paragraph 2 refers, as well as the way in which they are to be presented.

5 – Within 60 days counting from the receipt of all the required information and documents to which paragraph 2 refers, the Council of Ministers, following the proposal of the member of the Government responsible for the area in which the strategic asset is integrated, may decide to oppose the operation, by means of a duly justified decision, in accordance with paragraph 1 and 2 of the previous article, and in accordance with applicable rules and legal principles, in particular the principle of proportionality.

6 – The absence of a decision within the deadline mentioned in the previous paragraph should be interpreted as a decision of non-opposition.

7 – Should a decision to oppose be adopted in accordance with paragraph 5, all acts and legal transactions referring to the operation in question are deemed to be null and void, including those concerning the economic operation or the exercise of rights over the assets or over their controlling entities

8 – The decision of the Council of Ministers mentioned in paragraph 5 is challengeable, in accordance with the Code of Procedure of the Administrative Courts.

Article 5 – Request for confirmation

1 – The acquiring person or persons may ask the member of the Government responsible for the area where the strategic asset is integrated, by means of a request where the terms of the operation are described, a confirmation that a decision of opposition will not be adopted. This confirmation shall be considered to be granted if, within 30 days from the receipt of the request, the acquirers are not notified of the triggering of a review procedure, in accordance with paragraph 1 of article 4.

2 – The member of the Government responsible for the area where the strategic asset is integrated may establish, by decree, the information to be presented in the request to which paragraph 1 refers, as well as the way in which they are to be presented.

Article 6 – Cooperation of administrative entities

1 - The member of the Government responsible for the area in which the strategic asset is integrated may at any time request any administrative entity to provide information or to perform any action it deems necessary for the exercise of the powers provided for in this Decree-Law.

2 – The aforementioned administrative entities shall take the necessary measures to cooperate effectively with the member of the Government responsible for the area in which the strategic asset in question is integrated in the exercise of the powers provided for in this Decree-Law, namely through the exchange of necessary information and the implementation of validations, inspections and reviews, when this is requested in a justified way, ensuring the protection of personal data, classified data or data within the scope of national defence and security to which they have access, in accordance with the law.

Article 7 – Final provision

The provisions of the preceding articles shall not affect the exercise of the powers of the grantor under the existing concession agreements, their bases for concession or the legislation approving them, or of regulatory entities or other public entities pursuant to legal or regulatory provisions that concern the strategic assets covered by the regime established in this Decree-Law

Adopted in the Council of Ministers of 31st of July 2014

Promulgated on the 10th de September 2014

For publication.

The President of the Republic, Aníbal Cavaco Silva

Government referendum on the 18th February 2014.

The Prime-Minister, Pedro Passos Coelho.

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