

Portugal

Decree-Law 138/2014, of 15 September (2014)

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Summary

Text of the document

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Establishes the safeguard regime for essential strategic assets to ensure national defence and security and the security of the country's supply in services that are fundamental to the national interest, in the areas of energy, transport and communications, as fundamental public security interests.

Text of the document

Decree-Law 138/2014 of 15 September

Law 50/2011, of 13 September, which made the second amendment to the Framework Law on Privatisations, approved by Law 11/90, of 5 April, instructed the Government to establish the extraordinary regime for the safeguarding of strategic assets in sectors that are fundamental to the national interest, in compliance with national law and European Union law.

On the other hand, Law 9/2014, of 24 February, granted legislative authorization to the Government to, in accordance with the object, meaning and extent defined therein, establish the aforementioned regime for safeguarding strategic assets for defence and national security and for the security of the country's supply of fundamental services for the national interest.

Indeed, any difficulty, even momentary, that has the effect of threatening national defence and security or the security of the country's supply of services that are fundamental to the national interest is likely to cause serious disruption, not only in defence and security and in national economic activity, but in the life of the population in general, so that their protection constitutes a fundamental interest of public security that the State must at all times preserve.

Without prejudice to the powers that the State already has under the law applicable to the sector concerned, the public interest requires that the State should be able to have at its disposal an additional instrument to react quickly and effectively to any operation affecting the availability of key strategic infrastructures or assets allocated to defence and national security or the provision of essential energy services, transport and communications.

This Decree-Law thus establishes, in compliance with the fundamental duties of the State and in compliance with national and European Union law, a regime for safeguarding strategic assets essential for the guarantee of public security.

In this context, the legal regime established by this Decree-Law confers on 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, the power to, in exceptional circumstances and by means of a reasoned decision, oppose the conclusion of legal transactions that result, directly or indirectly, in the acquisition of control, directly or indirectly, on strategic infrastructures or assets by natural or legal persons from third countries to the European Union and the European Economic Area, to the extent that such business endangers the defence and national security or the security of the country's supply of services that are fundamental to the national interest.

It is therefore appropriate to provide that the member of the Government responsible for the area in which the strategic asset in question is part may, by means of a reasoned decision, initiate a procedure for the assessment of operations that result, directly or indirectly, in the acquisition of control, directly or indirectly, over strategic infrastructures or assets by natural or legal persons from countries third to the European Union and the European Economic Area, within 30 days after the conclusion of the legal transactions relating to such transactions or after the date from which such transactions become

generally known, if any, with a view to assessing the risk they pose to defence and national security or to the security of the country's supply of services that are fundamental to the national interest. In such an eventuality, the acquirers must send to the member of the Government responsible for the area in which the strategic asset in question is integrated the information and documents relating to the operation, after which the Council of Ministers, on the proposal of that member of the Government, has a period of 60 days to exercise its power of opposition, under penalty of forming a tacit decision of non-opposition.

In this way, the public interest of defence and national security and the security and continuity at all times of essential services to life in society are safeguarded, without the opposition regime representing State interference in the management and exploitation of the assets in question.

In order to provide legal certainty to persons subject to the regime of this Decree-Law, the concept of de facto or legal review defined by the rules of national law and European Union law on competition matters and broadly defined by the case-law of the Courts of the European Union and by the practice of the competent authorities is adopted, both at European and national level.

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

To this end, the objective, transparent and non-discriminatory criteria to be taken into account by the Government in the analysis of the real and serious nature of the threat that a given operation that results, directly or indirectly, in the acquisition of control, directly or indirectly, over strategic infrastructures or assets by natural or legal persons from third countries to the European Union and the European Economic Area is likely to pose to national defence and security or to the provision of essential services. On the other hand, although it is not possible, given the need to safeguard the public interest, to exhaustively identify all the hypothetical situations in which this security may be threatened, in any case the main situations in which such an operation may jeopardise, in a real and sufficiently serious manner, the defence and national security or the security of the country's supply of services fundamental to the national interest are listed.

It is also provided that any decision of opposition is subject to judicial review by the administrative courts, which is effective, insofar as the provision in this Decree-Law of objective and transparent decision criteria allows the competent courts to indicate, taking into account in particular the grounds of the decision, compliance with the provisions of this Decree-Law and with the other applicable rules and principles of national and European law, in particular the principle of proportionality.

In order to ensure the safeguarding of national defence and security and the security of the country's supply of services that are fundamental to the national interest, in the event that an opposition decision is adopted by the Council of Ministers, all legal transactions carried out within the scope of an operation are null and ineffective, and this penalty is an inherent aspect of the business itself.

In order to allow the acquirers to have a prior assessment of the compatibility of the operations carried out or planned with the regime of this law, they are given the power to request the member of the Government responsible for the area in which the strategic asset in question is integrated, by means of a request describing the terms of the operation, confirmation that the Government will not oppose it, and such confirmation shall be deemed to have been granted if an evaluation procedure is not initiated within 30 days of receipt of the said request.

Like this:

Using the legislative authorisation conferred by Law 9/2014, of 24 February, and pursuant to Article 198(1)(a) and (b) of the Constitution, the Government hereby decrees the following:

Article 1 Object

This decree-law establishes the safeguard regime for essential strategic assets to ensure national defence and security and the security of the country's supply in services that are fundamental to the national interest, in the areas of energy, transport and communications, as fundamental interests of public security.

Article 2 Definitions

For the purposes of the provisions of this Decree-Law, the following definitions shall apply:

- (a) "strategic assets" means the main infrastructures and assets allocated to defence and national security or to the provision of essential services in the areas of energy, transport and communications;
- (b) "Control" means the possibility of exercising a decisive influence over the strategic asset, pursuant to paragraph 3 of article 36 of Law 19/2012 of 8 May 2012;
- (c) "person from a country outside the European Union and the European Economic Area" means any natural or legal person whose domicile, registered office or principal and effective seat of administration

is not located in a Member State of the European Union or of the European Economic Area.

Article 3 Safeguarding strategic assets

1 - 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, may oppose, pursuant to the following article, the carrying out of operations which result, directly or indirectly, in the acquisition of control, directly or indirectly, by a person or persons from third countries to the European Union and the European Economic Area, on strategic assets, regardless of their legal form, in cases where it is determined that they may jeopardize, in a real and sufficiently serious manner, the defence and national security or the security of the country's supply of services that are fundamental to the national interest, under the terms of this Decree-Law.

2 - The real and sufficiently serious nature of a threat to national defence and security or to the security of the country's supply of services fundamental to the national interest referred to in the preceding paragraph shall be assessed taking into account exclusively the following criteria:

- (a) the physical security and integrity of strategic assets;
- b) The permanent availability and operability of strategic assets, as well as their capacity for the timely fulfilment of obligations, in particular public service, incumbent on the persons who control them, under the terms of the law;
- (c) the continuity, regularity and quality of the services of general interest provided by the persons controlling the strategic assets;
- d) The preservation of confidentiality, imposed by law or public contract, of the data and information obtained in the exercise of its activity by the persons controlling the strategic assets and of the technological heritage necessary for the management of the strategic assets.

3 - Operations which result, directly or indirectly, in the acquisition of control, direct or indirect, by a person or persons from countries third to the European Union are liable to jeopardise the defence and national security or the security of the country's supply of services that are fundamental to the national interest, pursuant to paragraph 1. when:

- (a) there are serious indications, based on objective evidence, of links between the acquiring person and third countries which do not recognise or respect the fundamental principles of the democratic rule of law, which pose a risk to the international community as a result of the nature of their alliances, or which have relations with criminal or terrorist organisations or persons associated with such organisations; having regard to the official positions of the European Union on these matters, if any;
- (b) the acquiring person:

- (i) has, in the past, used the controlling position held over other assets to create serious difficulties in the regular provision of essential public services in the country in which they were located or in neighbouring countries;

- (ii) does not ensure the principal allocation of the assets, as well as their reversal at the end of the corresponding concessions, where they exist, in particular in view of the absence of appropriate contractual provisions for that purpose;

- c) The operations in question result in a change in the destination of strategic assets, when they threaten the permanent availability and operability of the assets for the timely fulfilment of the applicable obligations, in particular those of public service, under the terms of the law.

4 - The procedure for opposing the operations referred to in paragraph 1 shall respect the rules and obligations internationally binding on the State Portuguese, contained in international conventions or in acts, agreements and decisions of the World Trade Organisation.

Article 4 Opposition procedure

1 - Within 30 days of the conclusion of legal transactions relating to an operation which results, directly or indirectly, in the acquisition of control, directly or indirectly, by a person or persons from countries other than the European Union and the European Economic Area, over strategic assets, regardless of their legal form, or from the date on which such transactions become generally known, if this is subsequent, the member of the Government responsible for the area in which the strategic asset in question is integrated may initiate an assessment procedure, by means of a reasoned decision, in order to assess the risk of such operation to the defence and national security or to the security of the country's supply of services that are fundamental to the national interest.

2 - Where an appraisal is opened, pursuant to the preceding paragraph, the acquiring person or persons shall submit to the member of the Government responsible for the area in which the strategic asset in question is included the relevant information and documents on the operation.

3 - The opening of the evaluation, pursuant to this article, shall be immediately notified to the members of the Government responsible for the areas of foreign affairs, national defence and internal security.

4 - The member of the Government responsible for the area in which the strategic asset in question is integrated may establish, by ordinance, the information and documents referred to in paragraph 2 and the terms under which they are presented.

5 - Until the end of a period of 60 days from the complete delivery of the information and documents

5 - Until the end of a period of 60 days from the complete delivery of the information and documents referred to in paragraph 2, 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, may decide to oppose the operation, by means of a reasoned decision, pursuant to paragraph 1 of the preceding article, in accordance with the criteria set out in paragraph 2 of that Article, and in compliance with the applicable legal rules and principles, in particular the principle of proportionality.

6 - Failure to take a decision within the period referred to in the preceding paragraph shall be deemed to be a decision of non-opposition.

7 - Where an opposition decision is adopted pursuant to paragraph 5, all legal acts and transactions relating to the operation in question shall be null and void, including those relating to the economic exploitation or exercise of rights over the assets or over the entities controlling them.

8 - The decision of the Council of Ministers referred to in paragraph 5 may be challenged, pursuant to the Code of Procedure in the Administrative Courts.

Article 5 Confirmation Requirement

1 - The acquiring person or persons may request the member of the Government responsible for the area in which the strategic asset in question is integrated, by means of a request describing the terms of the operation, to confirm that a decision to oppose the transaction will not be adopted, such confirmation being deemed to be granted if, within 30 days of receipt of the request, the commencement of an assessment under the terms and for the purposes provided for in paragraph 1 of the preceding article is not notified to the purchasers.

2 - The member of the Government responsible for the area in which the strategic asset in question is integrated may establish, by ordinance, the information to be included in the application referred to in the preceding paragraph and the terms under which it is submitted.

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 bodies to provide information or to take any steps it deems necessary for the exercise of the powers provided for in this Decree-Law.

2 - Administrative bodies 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 herein, namely through the exchange of necessary information and the carrying out of checks, inspections and investigations, where duly requested, ensuring the protection of personal, classified or defence and national security data to which they have access, under the terms of the law.

Article 7 Final disposition

The provisions of the previous articles shall not prejudice the exercise of the grantor's powers under existing concession contracts, the respective concession bases or the diplomas that approve them, or of regulatory bodies or other public entities under the terms of legal or regulatory provisions that relate to the strategic assets covered by the regime established in this Decree-Law.

Seen and approved by the Council of Ministers on July 31, 2014. - Pedro Passos Coelho - Paulo Sacadura Cabral Portas

- Hélder Manuel Gomes dos Reis - Rui Manuel Parente Chancerelle de Machete - José Pedro Correia de Aguiar-Branco

- Miguel Bento Martins Costa Macedo e Silva - António Manuel Coelho da Costa Moura - Luís Maria de Barros Serra Marques Guedes - Luís Miguel Poiães Pessoa Maduro - António de Magalhães Pires de Lima - Jorge Manuel Lopes Moreira da Silva - José Diogo Santiago de Albuquerque - Paulo José de Ribeiro Moita de Macedo - Nuno Paulo de Sousa Arrobas Crato - Luís Pedro Russo da Mota Soares.

Promulgated on September 10, 2014.

The President of the Republic, Aníbal Cavaco Silva.

Endorsed on 11 September 2014.

The Prime Minister, Pedro Passos Coelho.