

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
INVESTMENT COMMITTEE**

**Investment policy related to national security**

**Notification by Portugal**

On 27 June 2019, Portugal notified the OECD of an investment policy related to national security pursuant to its obligations under the Codes of Liberalisation and the National Treatment instrument. This document reproduces the notification.

[investment@oecd.org](mailto:investment@oecd.org).

**JT03449925**

## *Investment policy related to National Security Notification by Portugal*

### 1. Background

Law 50/2011, of the 13<sup>th</sup> of September, amended the Framework Law on Privatisations, adopted by Law 11/90, of the 5<sup>th</sup> of April, and instructed the Government to establish an exceptional regime to safeguard strategic assets in sectors deemed to be fundamental for the national interest, in strict observance of domestic and European Union law. On the 24<sup>th</sup> of February 2014, by means of Law 9/2014, the Portuguese Parliament granted the Government the power to legislate on a regime intended to safeguard the strategic assets that are deemed essential to ensure defence and national security, as well as Portugal's security of supply for services deemed to be fundamental to the national interest, in the areas of energy, transport, and communications, by instituting a review on operations relating to such assets. On the 15<sup>th</sup> of September 2014, the Portuguese Government adopted Decree-Law 138/2014, empowering in order to block operations on strategic assets that may jeopardize national security and defence or the provision of services fundamental to the national interest.

Unofficial translations of the Law 9/2014 and the Decree-Law 138/2014 are available in annexes to this document.

In order to avoid the serious disruption that even a short disturbance in the regular functioning of strategic assets can have towards defence and national security, Portugal's security of supply for services deemed to be fundamental to the national interest, national economic activity, as well as in the life of the population in general, this legislation intends to preserve the fundamental interest of public safety and security, which is the State's duty at all times. Therefore, and without prejudice to any powers that are already granted to the State under the law applicable to specific sectors, public interest dictates that it should also have an additional instrument that allows it to react swiftly to any operation that may threaten the availability of strategic assets or the supply of services in the areas of energy, transport, and telecommunications.

### 2. Scope

The procedure applies to assets deemed to be strategic to national security and defence, and it also specifically includes assets related to the provision of essential services in the areas of energy, transport and communications.

A screening procedure can be triggered regarding any operation where, concomitantly:

- Direct or indirect control is acquired independently of the legal form;
- In a direct or indirect fashion;
- By natural or legal person or persons from countries outside the European Union or the European Economic Area;
- Over strategic assets, defined as: 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;

- If these may put into question, in a real and sufficiently serious manner, either:
  - National security and defence;
  - The country's supply of services deemed to be fundamental for the national interest.

### 3. Main features

A real and serious threat is defined by a closed list of four criteria: security and integrity of assets; availability and operability of the assets; continuity, regularity and quality of services of general interest; preservation of the confidentiality of data collected in the exercise of the activity.

There is also a non-exhaustive list of situations which may pose a real and serious threat: investor relations with a country that does not recognize the rule of law; the investor does not guarantee the regular provision of the public service; the operation changes the purpose or the availability of the strategic asset.

The procedure is *ex post* and can be triggered within 30 days of the conclusion of the relevant operation, or of the moment when it becomes public knowledge (whichever happens last). The acquirer is then called to present all relevant information, after which the Government has 60 days to emit an opposing decision. In the absence of a pronouncement, the Government is presumed not to oppose the operation.

The acquirer also has the option of voluntarily requesting confirmation that the operation in question will not be opposed. If within 30 days they are not notified that a screening procedure has been triggered, the confirmation shall be considered to have been granted.

The procedure is *ad hoc*, in the sense that no permanent entity or body has been created to carry out FDI screening. In addition to the member of the Government who oversees the strategic asset targeted in the operation, Government members responsible for foreign affairs, national defence and internal security shall be involved in the assessment.

The final decision (to block the operation) is taken by the Government, meeting in the Council of Ministers, following a proposal of the member of the Government responsible.

Other relevant features function as investor guarantees: respect for the principle of proportionality; the possibility of judicial review (Government decision can be challenged before the Administrative Courts).

#### 4. Proposed amendment to the entry in the list of measures reported for transparency under the National Treatment instrument

Portugal proposes to include a new entry under item A. of the list of measures reported for transparency under the National Treatment instrument as follows:

**“A. Measures Reported for Transparency at the Level of National Government**

***I. Measures based on public order and essential security considerations***

*a. Investment by established foreign-controlled enterprises*

Within 30 days of its conclusion or from the day that it becomes of public knowledge, the Portuguese Government has the right to trigger a screening procedure in the case of a legal transaction when:

- Direct or indirect control is acquired independently of the legal form;
- In a direct or indirect way;
- By natural or legal person or persons from countries outside the European Union or the European Economic Area;
- Over strategic assets, defined as: 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;
- If these may put into question, in a real and sufficiently serious manner, either:
  - National security and defence;
  - The country’s supply of services deemed to be fundamental for the national interest.

The investor has the possibility to request the Government to analyse the operation in order to obtain confirmation that a decision of opposition will not be taken.

*Authority: Decree-Law 138/2014 instituting, in use of legislative authorization granted by Law 9/2014, the safeguard regime for strategic assets deemed essential to ensure the national security and defence and the Country’s supply in services deemed to be fundamental for the national interest, in the areas of energy, transport, and communications.”*

## Annex A. Law 9/2014

([Diário da República 38/2014, Series I of 2014-02-24](#), unofficial translation)

### Summary

Authorises the Government to legislate on the safeguard regime for essential strategic assets, in order to ensure national security and defence, as well as the country's security of supply regarding services that are fundamental for the national interest, in the areas of energy, transport, and communications, by establishing a procedure for reviewing operations in relation to such assets.

### Law 9/2014 of 24<sup>th</sup> of February

The Parliament of the Portuguese Republic decrees, in accordance with paragraph d) of article 161 of the Constitution of the Portuguese Republic, as follows:

#### Article 1 – Object

The Government is granted the authorization to legislate on the safeguard regime for essential strategic assets, in order to ensure national security and defence, as well as the country's security of supply regarding services that are fundamental for the national interest, in the areas of energy, transport, and communications, by establishing a procedure for reviewing operations in relation to such assets.

#### Article 2 – Intention

The authorization foreseen in the previous article is granted towards ensuring national security and defence, as well as the country's security of supply regarding services that are fundamental for the national interest, as fundamental interests of public safety, in observance of national law, European Union law, and of the European Economic Area.

#### Article 3 – Scope

The legislation to be adopted within the terms of the legislative authorization granted by this law shall:

- a) Define as strategic assets, for effects of the safeguard regime, the main infrastructures and assets which are assigned to defence and national security as well as the supply of services that are fundamental for the national interest, in the areas of energy, transport, and communications;
- b) Grant to the Council of Ministers, after having been informed and 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, in accordance with the objective criteria defined by law, to oppose the acquisition by persons of countries outside the European Union and the European Economic Area of direct or indirect control of strategic assets, to the extent that such transactions or acquisition may put into question the defence and national security, or the security of supply of services that are fundamental for the national interest;
- c) Institute a review procedure for the mentioned operations, to be led by the member of the Government responsible for the area where the strategic asset is integrated, namely regarding the deadlines and criteria for a decision, as well as foreseeing the need to notify the opening of the aforementioned procedure to the members of the Government responsible by the areas of foreign affairs, national defence and domestic security, and institute duties of support and reporting for any public entities whose cooperation is deemed necessary by the first member of the Government, all while ensuring the protection of personal data, classified data, or data relative to defence and national security;
- d) Determine that, once a decision to oppose is adopted, in accordance with paragraph b), any acts or legal actions relative to the operation in question are deemed null and void, including those regarding the economic operation or the exercise of rights over the assets or over their controlling entities.

**Article 4 – Duration**

This legislative authorization has the duration of six months.

Adopted on the 17th January 2014.

The President-in-Office of the Parliament of the Portuguese Republic, Guilherme Silva.

Promulgated on the 17th February 2014.

For publication.

The President of the Republic, Aníbal Cavaco Silva.

Government referendum on the 18th February 2014.

The Prime-Minister, Pedro Passos Coelho.

## Annex B. Decree-Law 138/2014, of the 15th of September

(unofficial translation)

**Published in:** [Diário da República 177/2014](#), Series I of 2014-09-15

**Entity:** Ministry of the Economy

**Official version:**

### Summary

Establishes, using the legislative authorization granted by Law 9/2014, of the 24<sup>th</sup> of February, the safeguard regime for essential strategic assets, in order to ensure national security and defence, as well as the country's security of supply regarding services that are fundamental for the national interest, in the areas of energy, transport, and communications.

### Text

#### Decree-Law 138/2014, of the 15<sup>th</sup> of September

Law 50/2011, of the 13<sup>th</sup> of September, which amended for a second time the Portuguese framework for Privatisations, adopted by Law 11/90, of the 5<sup>th</sup> 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 24<sup>th</sup> 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 24<sup>th</sup> 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 8<sup>th</sup> 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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