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by

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Abstract

The Portuguese screening mechanism is enshrined in Decree-law no. 138/2014, of 15 September, which was approved amidst the 2010 financial crisis. It covers business operations whereby third-country investors acquire control over strategic assets, which are likely to embody a real and sufficiently serious threat to defence, national security, or security of supply of public sectors. The note revisits the main features of the screening mechanism, placing a special focus on interagency review. It explores the process of information gathering in the course of the screening, which is conducted by the competent member of Government. It also delves into the way the latter interacts with other administrative bodies, such as independent regulatory agencies, and the potential conflicts engendered by such agencies' independence. As the note confirms, the mechanism has not been used so far, which explains the absence of administrative guidelines for its application.

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1. Overview

As explained in the Country Note, Portugal's screening mechanism is regulated by Decree-Law no. 138/2014, of 15 September. The reporters are not aware of any case in which said legislation has been formally applied.

2. Competences in the FDI Screening Procedure

The competent member of government is given discretion to trigger the administrative screening procedure, as described in the following. The procedure shall be triggered until 30 days after the conclusion of the transaction or after the investment falling under the screening mechanism became of public knowledge (if the latter is subsequent).[1]

The screening decision falls in the competence of the Council of Ministers, the Government's collegial body. Yet, the screening procedure is conducted by the competent member of government, in other words, by the member of government who is responsible for the strategic asset at stake. Under the Portuguese Constitution, the Government has exclusive competence to define its own organization and functioning.[2] Therefore, the competent member of Government varies according to each Government's own ruling. Besides, once triggered, the screening procedure is communicated to the competent members of government in the areas of foreign affairs, defence, and interior.[3]

The investor should provide the competent member of government all the information and documents with relevance to the transaction.[4] Under article 4, §4 of Decree-law no. 138/2014, the member of the Government may issue a ministerial regulation ("Portaria") determining the

[1] See article 4, §1 of Decree-Law no. 138/2014.
[2] See article 198, §2 of the Portuguese Constitution.
[3] See article 4, §3 of Decree-Law no. 138/2014.
[4] See article 4, §2 of Decree-law no. 138/2014.

documents and the information to be provided by the investor. Since the screening procedure has never been triggered, the Reporters struggle to anticipate the regulation's content.

The whole file is then presented to the Council of Ministers, which discusses and decides in no more than 60 days after the delivery of the requested documentation.[5] It is not clear, though, since the legislation has endured any changes since inception, how this timeframe should apply in case the European Commission, or the Member States decide to issue opinions or comments about the transaction under article 6 of Regulation (EU) 2019/452 (FDI Screening Regulation). Following article 3, §3 FDI Screening Regulation, the screening mechanisms shall allow Member States "to take into account" such comments and opinions.

Therefore, one solution would be to define that the blocking decision shall be issued no later than 60 days following the receipt of the Member States' comments or the Commission's opinion; or, alternatively, to allow the competent minister the power to extend the deadline of assessment in case said opinions or comments are provided.[6]

If the Council of Ministers decides to "veto" or "block" the transaction, the whole operation will be considered null and void. If no decision is adopted by the Council of Ministers during those 60 days, the transaction is confirmed. The law does not require the publication of the screening administrative decision on the Republic's Official Journal.[7]

3. Request for information from other public entities

The competent member of Government may at any time request information about the strategic assets at stake to any administrative entities, as well as to urge them to carry out any inquiries or inspections deemed necessary to perform the screening.[8]

The screening mechanism is targeted at safeguarding a triad of public interests – defence, national security, and security of supply – in three different areas – energy, transports and communications. These sectors are within the scope of the European Union's competences. To secure harmonization, the European Union has established common rules through regulations and directives, which include the creation of regulatory authorities exhibiting shared levels of vertical and horizontal independence.

[5] See article 4, §5 of Decree-Law no. 138/2014.
[6] In subsidiary application of article 128, §1 of the Code on Administrative Procedure.
[7] See article 158, §1 of the Code on Administrative Procedure.
[8] See article 6 of Decree-Law no. 138/2014.

Under EU and domestic law, these sectoral regulatory authorities are allowed to request information to the companies that are under their supervision, including information about security policies.[9] What is more, the communications regulatory authority ("Anacom") should cooperate with other national authorities in all matters related to national security or cyberspace security.[10] As to the certification of third countries' transmission system operators,[11] the energy regulator is under the obligation to inform the competent member of government about the certification procedure, the opinion issued by the European Commission and any other relevant information.

This goes by saying that, both under EU and domestic law, regulatory authorities have the powers to gather important information about the investors established or willing to be established in each sector. Furthermore, they also have the duty to share information with EU regulatory bodies and national authorities.

Still, it is not farfetched that article 6 of Decree-Law no. 138/2014, under which the member of Government can request information and other administrative action to any administrative entities, including to independent regulatory authorities, may occasionally conflict with the latter's independence *vis-a-vis* the government. Indeed, following article 45 of Law no. 67/2013, of 28 August, creating a Framework Law on the Independent regulatory agencies (revised in 2020), the agencies act independently while exercising their functions and are not subjected to supervision or governmental control. The competent members of government cannot issue orders, recommendations or directives as to the way the regulatory authority exercises its regulatory activity nor as to the priorities of its administrative action.[12]

Regulatory agencies are, notwithstanding, under the obligation to cooperate with domestic and other European Union and international authorities whenever such cooperation is necessary or convenient to the prosecution of their missions.[13] A careful reading of article 6 of Decree-Law no. 138/2014 may suggest, however, that regulatory agencies are not under the obligation to provide all the information requested by the competent member of government, as the

[9] See, e.g. articles 63, §4, 170 and 171 of Law no. 16/2022, of 26 August, on electronic communications; and article 271 of Decree-Law no. 15/2022, of 14 January, on the organization and functioning of the electricity sector.
[10] See article 58 of the Law on electronic communications.
[11] See articles 229 and 230 of Decree-law no. 15/2022, of 14 January.
[12] See article 45, §2 of the Framework Law on the Independent regulatory agencies.
[13] See article 11 of the Framework Law and, for instance, Regulation no. 2018/1971, which establishes the Body of European Regulators for Electronic Communications, or Regulation no. 526/2013, concerning the European Union Agency for Network and Information Security.

provision solely states that they should take “the necessary measures to cooperate effectively with the government”. Arguably, it provides them with some leeway to carry out a discretionary assessment as to which information should be granted, *at least* when security of supply is at stake.

4. Informal working procedures

The reporters are not aware of any informal working procedures significantly influencing the outcome of the review.

Annex 1: Relevant laws, ordinances, regulatory guidelines

Decree-law no. 138/2014, of 15 September (on investment screening)

Decree-Law no. 15/2022, of 14 January (on the organization and functioning of the electricity sector)

Law no. 16/2022, of 26 August (Law on electronic communications)

Law no. 67/2013, of 28 August, as amended by Law no. 75-B/2020, of 31 December (creating a Framework Law on the Independent regulatory agencies)

Annex 3: Relevant literature

Coroado, S. (2020) Does formal independence of regulators change? Evidence from Portuguese agencies, Governance 33: 61-77.

Gonçalves, P. Direito Administrativo (2019) Almedina, Coimbra.

Rosado da Fonseca, M. (2021) O mecanismo português de análise dos investimentos diretos estrangeiros: Dos antecedentes da sua criação às perspetivas de modificação em 2022 – Parte I, Revista de Concorrência e Regulação 48: 81-128.

Tavares da Silva S., Vicente M. (2020) Arbitragem dos negócios internacionais e integridade. Reflexos na arbitragem de investimento em energia, Revista Internacional de Arbitragem e Conciliação 14: 9-33.

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