CELIS Issue Note

on

Procedural Safeguards

Portugal, 2026

by

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24 March 2026

Abstract

This Issue Note examines the procedural safeguards applicable to the screening of foreign direct investments in Portugal, with a focus on transactions involving the acquisition of control over strategic national assets by non-EU or non-EEA entities under Decree-Law No. 138/2014. The Portuguese legal framework ensures that these screening procedures adhere strictly to national constitutional guarantees and European Union standards, including those set out in the Charter of Fundamental Rights.

Key procedural rights discussed include the right of access to administrative files and transparency, which grants universal access to documents. This is supported by urgent judicial mechanisms and independent oversight by the Commission for Access to Administrative Documents. The report also emphasises the right to be heard, ensuring that interested parties can participate in the process and present their arguments before a final administrative decision is made. Furthermore, any administrative decision opposing an investment must be thoroughly reasoned both legally and factually to permit effective judicial review.

Additional safeguards include the right to an impartial decision within a reasonable timeframe of 60 days — where administrative silence equates to non-opposition — as well as guarantees of equal treatment and state civil liability. Finally, the authors acknowledge the ongoing challenges associated with conducting judicial reviews of complex, highly technical and politically sensitive screening decisions.

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To cite this report: Suzana Tavares da Silva and Marta Vicente, CELIS Issue Note on Procedural Safeguards, Portugal, 2026, 24 March 2026

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1. Introduction

In screening procedures for transactions that result, directly or indirectly, in the acquisition of direct or indirect control by a person or persons from countries outside the European Union and the European Economic Area over strategic national assets, Portuguese entities may assess (for possible opposition) the conclusion of such legal transactions in accordance with the provisions of Article 4 of Decree-Law No. 138/2014 of 15 September.

To this end, the member of the Government responsible for the area in which the strategic asset in question is located shall, within thirty days of the conclusion of the legal transactions or from the date on which such transactions become public knowledge (whichever is later), initiate a procedure to assess the risk that such transactions pose to defence, national security or security of supply of public sectors. This decision must be justified. The respective justification is a legal requirement for its validity under the terms of Articles 152 and 163 of the Administrative Procedure Code (approved by Decree-Law No. 4/2015 of January 7) (CPA), which implement in the legal system the constitutional provision of Article 268(3) of the Constitution of the Portuguese Republic of 1976 (CRP).

During this screening process, all guarantees of due process provided for in Portuguese law, as well as those in line with European Union law, apply.

2. Right of Access to the File and Procedural Transparency

In Portugal, the principle of open administration applies, which is a dimension of the principle of transparency. Article 268(2) of the CRP guarantees the right of access to administrative files and records, leaving it to the legislator to define the matters that should be considered covered by special regimes and confidentiality, such as internal and external security, criminal investigation, and personal privacy.

It is then up to the legal regime governing access to administrative and environmental information and the reuse of administrative documents [Law No. 26/2016 of 22 August] to flesh out the main concepts, such as those of administrative document (Article 3(1)(a), which

includes any content, or part of that content, that is in the possession or held on behalf of the bodies and entities identified by law, which obviously includes the administrative entities responsible for screening procedures. This access covers administrative information, regardless of the medium on which it is stored, i.e., it covers written, visual, audio, electronic, or other material forms.

Access to administrative information is universal, i.e., everyone, without having to state any interest, has the right to access administrative documents, which includes the rights of consultation, reproduction, and information about their existence and content (Article 5). This access, as we have already pointed out, may be restricted or denied when it could jeopardize fundamental interests of the State (Article 6(1)). More relevant than the denial of access, which will be very rare in the context of a screening procedure, is the possibility of deferring access to information to a later date, either until the decision is made, the case is closed, or one year after it was prepared, whichever comes first (Article 6(3)). Access by third parties (persons outside the procedure) may also be restricted where commercial or industrial secrets or information about the internal life of a company are invoked. In this case, access to information is only guaranteed if the third party has written authorization from the company to which it wishes to access the information or, which is the most common situation, if it can demonstrate that it has a direct, personal, legitimate, and constitutionally protected interest that is sufficiently relevant and after weighing, in accordance with the principle of proportionality, all the fundamental rights at stake and the principle of open administration, which justifies access to the information.

In Portugal, there is an urgent procedural means to ensure the effectiveness of this right of access to information and administrative documents—the summons to provide information, consult files, or issue certificates (Articles 104 to 108 Law No. 15/2002 of 22 February, Code of Procedure in Administrative Courts —CPTA). This is a quick and simple procedural measure that can be used by applicants for access to administrative information when it is refused by the administrative body.

Requests for information and documents are directed towards the administrative body that holds the information to which access is sought, which is the body responsible for the screening procedure (the Council of Ministers, as it is the body responsible for deciding the procedure according to Article 4(8) of Decree-Law No. 138/2014) and possibly also the competent

member of Government (Article 4(1) of Decree-Law No. 138/2014), since he or she may have more information about the strategic asset itself.

In the event of an unlawful refusal to grant access to information, the court may not only order the administrative body to provide the information requested, but also impose financial penalties (Article 108 of the CPTA).

Finally, it should also be noted that there is an administrative channel to ensure access to administrative information. In fact, in the event of refusal of access, the person interested in the information may also lodge a complaint with the Commission for Access to Administrative Documents (CADA). The CADA is an independent administrative body that operates within the Assembly of the Republic (the Parliament) and is responsible for ensuring compliance with the legal regime governing access to administrative information and documents (Article 28 of Law No. 26/2016). This body may impose administrative penalties on administrative services that violate the principle of open administration and unlawfully refuse to ensure the right to administrative information.

Portugal does not have a specific legal regime on the principle of transparency, but it results expressly from the principles governing administrative activity, in accordance with Articles 3 to 19 of the Administrative Procedure Code (CPA). In particular, whereas Article 17 replicates the constitutional provisions and Law No. 26/2016 on access to administrative files and records, Article 11 enshrines the principle of cooperation with private individuals, according to which public administration bodies must act in close cooperation with private individuals, by providing them with the information and explanations they require, supporting and encouraging their initiatives, and receiving their suggestions and information.

Concerning the right of access to administrative information and documents, the standard of protection guaranteed by national law is equivalent to that enshrined in Articles 41(2)(b) and 42 of the Charter of Fundamental Rights of the European Union.

3. Right to be Heard

In Portugal, the right to be heard is a vital part of the administrative procedure, based on the principle of participation (Article 12 of the CPA). This principle requires public administration to ensure that individuals, as well as associations aiming to protect their interests, can participate in decision-making processes that affect them, mainly through hearings. In Portugal, the right to be heard is an essential dimension of administrative procedure, anchored in the principle of

participation (Article 12 of the CPA), according to which public administration bodies must ensure the participation of individuals, as well as associations whose purpose is to defend their interests, in the formation of decisions that concern them, namely through the respective hearing.

In fact, Article 121 of the CPA ensures that interested parties have the right to be heard in the proceedings before the final decision is taken and must be informed, in particular, of the likely outcome. This means that it is not enough to hear the interested party; this hearing corresponds to a material dimension of a procedural adversarial process, i.e., a duty on the part of the administrative entity responsible for the decision to take note of the arguments presented by the interested party and to consider them when issuing the final decision. This is why the hearing must be preceded by a communication on the likely outcome of the decision, and the interested party must be given the opportunity, at this stage of the procedure, to comment on essential aspects of the decision and to request additional measures and submit documents (Article 121(2) of the CPA). Furthermore, if the administrative authority subsequently considers that it should change the direction of the decision, a new preliminary hearing shall be held (Article 121(4) of the CPA).

The law allows the hearing to be waived in expressly stated cases—e.g., if it is not feasible given the number of interested parties or the urgency of the decision, or if it cannot result in a different decision because it is, in theory, a purely binding decision—but the decision not to hold a preliminary hearing must be justified.

The importance that national law attaches to the preliminary hearing is also evident in the fact that it provides for the annulment, under Article 163(1) of the CPA, of administrative decisions taken in proceedings that have not complied with this stage, without the reason for the waiver being expressly stated in accordance with Article 124 of the CPA.

About the right to participate in proceedings and the right to be heard, we can also conclude that the Portuguese legislation complies with the standards imposed by European law, specifically the "right to good administration," which includes the "right of every person to be heard before any individual measure affecting them adversely is taken" (Article 41(2)(a) of the Charter of Fundamental Rights of the European Union - CFREU).

4. Right to a Reasoned Decision

The Portuguese legislator of administrative procedure is particularly demanding with regard to the reasoning behind administrative acts. This is, once again, a requirement that has constitutional roots to a certain extent, as Article 268(3) of the CRP ensures that administrative acts and decisions must be expressly and accessibly reasoned when they affect legally protected rights or interests.

Thus, in the case of acts that are "potentially more aggressive" to the substantive legal positions of those administered (subjective rights), the reasoning is expressly required by law and constitutes a mandatory mention of the act (Article 151(1)(d) of the CPA), as happens to be the opposition to a legal operation following a screening procedure. In fact, Article 4(5) of Decree-Law No. 138/2014 requires a decision to oppose an operation to be justified, i.e., the Council of Ministers must state the reasons why it concludes that the transaction is likely to embody a real and sufficiently serious threat to defence, national security, or security of supply of public sectors, according to the criteria set out in Article 2(2). Namely: physical security and integrity of strategic assets; availability and operationality of strategic assets, as well as their ability to perform public service obligations; continuity, quality, and availability of services of general interest; preservation of confidentiality (imposed by law or by public contract) of information and data secured by the persons who control the strategic assets and the technological knowledge required to its management.

The decision must also explain, in light of those criteria, to what extent it is concluded that, according to the applicable legal rules and principles, in particular the principle of proportionality, the solution must be to oppose the legal transaction in question, i.e., to oppose the legal transaction that the economic operators intended to carry out.

For the reasoning to be considered correct from a legal point of view, it must set out, albeit succinctly, the factual and legal reasons for the conclusion reached (Article 153 of the CPA). It should be noted that the legislator sanctions the lack, insufficiency, and inconsistency of the reasoning of acts with the annulment of the decision (Article 163 of the CPA).

This does not exclude or prohibit the competent authority—in this case, the Council of Ministers—from relying on elements brought to the proceedings and produced by other entities to take this decision. This is, in fact, a reasonable solution given the technical and extra-legal issues that may underlie the decision-making process. In this case, the opinions supporting

the decision must include the respective grounds, either by direct and express reference or by transcription. Access to the latter must be provided to the parties.

It is always important to remember that the right to a statement of reasons is the right of the addressee of the decision to know the decision and the reasons that led to its adoption so that they can challenge it effectively in the event of an appeal. And the extent to which the act is substantiated, often questioned in court, is also the extent to which it is understood, both by those who challenge it and by those who decide on that challenge.

This is also the meaning and scope of the duty to state reasons for administrative decisions under Article 41(2)(c) of the CFREU.

5. Other Procedural Safeguards

Within the scope of the procedure governing the screening of economic operations falling within the scope of the regime for safeguarding assets essential to the Portuguese State, the other dimensions of due process enshrined in the CFREU also apply.

This is the case with the right to impartial treatment, which stems not only from the principle of impartiality enshrined in the CPA (Article 9), which requires that all and only relevant interests be objectively weighed in the decision-making process, but also from a set of organizational and functional guarantees that govern the decision, ensuring confidence in it. These guarantees take the form of a wide range of impediments and grounds for recusal and suspicion (Articles 69 to 76 of the CPA), which may be raised ex officio or at the request of the interested party.

This is also the case with the guarantee of a decision within a reasonable time, since, in accordance with the provisions of Article 4(5) and (6) of Decree-Law No. 138/2014, the Council of Ministers has 60 days from the date of receipt of all the information and documents requested in relation to the operation to issue an express decision opposing the economic operation in question. Failure to decide within the aforementioned 60-day period shall be deemed a decision not to oppose. In other words, this is a case where silence has a positive value. This also means that the silence to which the value of a decision not to oppose is attributed constitutes, in the legal sphere of the investor, the "right" to carry out the intended legal transaction, and the latter can only be withdrawn under the terms that regulate the withdrawal of subjective property rights, i.e., by annulment in compliance with Article 168 of

the CPA, basically when the transaction is illegal and the withdrawal occurs within five years after the production of those effects. Although it is unnecessary, since we are in a situation where the law expressly attributes positive value to administrative silence or inaction, the possibility cannot be entirely ruled out that the party interested in the transaction may seek to "force" the issuance of an express decision of non-opposition through the use of administrative action to compel the issuance of the act due (Articles 66 to 71 of the CPTA), with the judicial decision being limited to ordering the Council of Ministers to issue the express decision without any interference as to its content, thus respecting the principle of separation of powers (Article 71(3) of the CPTA).

Closely related to the previous issue is the guarantee of equal treatment. Although, as we have just said, the court cannot replace the Administration in assessing the risk that the economic operation in question poses to the interests that Decree-Law No. 138/2014 aims to safeguard, it is also incorrect to state that the decision to oppose is based exclusively on criteria of expediency that cannot be scrutinized by the judiciary. Firstly, there is always intense scrutiny of the external legality of the decision, starting with verification of due process. However, scrutiny may also focus on substantive aspects. For instance, if it is proven that discriminatory treatment has occurred (i.e. if equal situations have been treated differently without a reasonable basis for such a difference), this may constitute grounds for annulment. The same applies to cases involving gross violations of administrative self-binding or the protection of legitimate expectations (e.g. if administrative information has induced legitimate expectations). It is not a question of obtaining a different solution from that provided for in Decree-Law No. 138/2014, but rather of ensuring that the power of opposition provided for in that legal instrument is exercised in accordance with the law and the material principles governing the action of a State subject to the law (first and foremost, that of reasonableness).

Finally, the principle of civil liability of the State (approved in Portugal by Law No. 67/2007 of December 31) also applies in this area. This means that the State is liable for damages arising from illegal acts that may be committed in the context of the procedure regulated by Decree-Law No. 138/2014.

6. Final notes

Although not strictly a procedural guarantee, it should be noted that one of the greatest difficulties currently facing administrative litigation is precisely that of reviewing technical and highly complex decisions.

As explained above, the Portuguese legal system complies with all the guarantees imposed by the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, including access to the courts to review the legality, in the broad sense, of decisions adopted in the context of investment screening procedures. However, the main difficulty in ensuring the effectiveness of this control lies in its legal nature, which is partly political (and to that extent completely excluded from judicial review, since it is not an administrative decision) and partly technical. It is on this second point—that is, the extent to which the decision is based on extra-legal considerations because it belongs to other fields of knowledge (e.g., statistics, economics, security, engineering, telecommunications, energy, etc.)—that the manner of judicial review of these acts is now being questioned. The responses are varied, with some systems choosing to internalize this knowledge and others remaining faithful to the tradition of the court being sovereign in the way it obtains the extra-legal knowledge it considers necessary for the formation of its decision, with particular emphasis on the use of expert evidence. Perhaps this second model needs some refinement to strengthen the reliability and authority of judicial decisions.

A second and final note concerns institutional authority, that is, the need to ensure that political decisions on economic matters, especially when they oppose intended economic operations, are based on clear and objective grounds. To this end, one must never forget the authority of political power that emerges from democratic legitimacy, complemented by institutional authority, as a rule shielded by criteria of transparency and scrutiny of the persons who make up the entities (administrative or independent) responsible for preparing the decision. These criteria, combined with the aforementioned transparency, ensure the integrity and the institutional legitimacy of the decision.

Annex 1: Relevant Laws, Ordinances, Regulatory Guidelines

Charter of Fundamental Rights of the European Union (CFREU)

Portuguese Constitution 1976

Law No. 67/2007 December 31

Decree-Law No. 138/2014 September 15

Decree-Law No. 4/2015 January 7

Law No. 26/2016 August 22

Law No. 15/2002 February 22

Annex 2: Relevant Administrative and Court Cases

None.

Annex 3: Relevant literature

Freitas, T. O Regulamento (UE) 2019/452 sobre investimentos diretos estrangeiros (I): traços gerais do regime em vigor (2024), available at https://blogcejure.pt/2024/08/07/o-regulamento-ue-2019-452-sobre-investimentos-diretos-estrangeiros-i-tracos-gerais-do-regime-em-vigor/ (access on 1 March 2026).

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