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LEGAL ALERT

THE NEW EU FRAMEWORK FOR THE SCREENING OF FOREIGN DIRECT INVESTMENT AND ITS IMPLICATIONS IN PORTUGAL

On 21 March 2019, Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019, which establishes the first comprehensive EU framework for the screening of foreign direct investments into the EU, was published in the Official Journal.

The framework enables EU Member States to scrutinize, prohibit and unwind, on the grounds of security and public order, investments by investors from non-EU countries in companies or assets of strategic importance and establishes a close and systematic information exchange and cooperation mechanism between Member States and the European Commission in relation to foreign direct investments and national review regimes.

The framework, proposed by the Commission in September 2017, is a response to growing concerns of several Member States, including Germany, France and Italy, about foreign investors, notably state-owned enterprises, taking over EU companies with key assets for strategic reasons, when EU investors often do not enjoy equivalent rights to invest in the country from which the foreign investment originates.

The EU Framework

The framework recognises the autonomy of Member States to protect (or not) their critical assets against foreign direct investment, in line with their national strategic interests. It enables but does not require Member States to maintain or adopt screening mechanisms, based on which they can scrutinize, prohibit and unwind foreign direct investments in companies or assets located in their respective territories on grounds of security and public order.

For those Member States that choose to maintain or adopt such mechanisms, the framework defines certain basic requirements that they must fulfil (in terms of, for example, transparency, legal certainty, non-discrimination, protection of confidential information, access to judicial review) and sets out indicative and non-exhaustive lists of investment-specific and investor-specific factors which may be considered in determining whether a foreign direct investment is likely to affect security or public order.

The investment-specific factors include, for example, effects on:

- critical infrastructure whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure;
- critical technologies and dual (civilian and military) use items, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies;
- supply of critical inputs, including energy or raw materials, as well as food security;
- access to sensitive information, including personal data, or the ability to control such information; or
- freedom and pluralism of the media.

The investor-specific factors include, for example, whether the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, notably through ownership structure or significant funding, whether the investor has already been involved in activities affecting security or public order in a Member State, or whether there is a serious risk that the investor engages in illegal or criminal activities.

The new regime also provides for rules on cooperation and exchange of information between the Member States and the Commission in the context of the mechanisms for analysing foreign investments operated by the Member States. It establishes the duty of a Member State to respond to potentially very detailed requests for information from other Member States and the Commission and to take due account of possible observations from other Member States and Commission opinions on

foreign investments within its territory, even if the operation at stake is not under review under the national law concerned. If the investment could affect projects or programs of the EU, such as Galileo, Horizon 2020, and the Trans-European Networks for Transport, Energy and Communications (or infrastructures financed by them), the Member State(s) concerned shall "take utmost account" of the Commission's opinion.

Even if an investigation has not been initiated by the Member State in which the foreign investment is located, the other Member States and the Commission have the right to submit observations and an opinion, respectively, within 15 months of the completion of the investment – causing, in particular, the Member State concerned to scrutinize the operation – which could have significant implications for the timetable of foreign investments in the EU.

Of practical importance will also be the obligation of Member States to report to the Commission each year aggregated information on the foreign direct investments in their territory and on the application of the national review mechanisms and cooperation procedures provided for in the Regulation. The national reports will be consolidated by the Commission in a report which will be made public and help to enhance transparency and legal certainty in the implementation of national foreign investment control regimes.

Beyond the abovementioned basic requirements, indicative criteria and procedural rules, the framework does not harmonise the existing national screening mechanisms, currently in force in 14 Member States, including Portugal, which may therefore differ significantly in terms of design and scope.

The screening of foreign direct investments in Portugal

Portugal has a mechanism for the screening of foreign investments since 2014. Decree-Law no. 138/2014, of 15 September 2014, establishes the regime for the safeguarding of strategic assets essential for national defense and security or for the provision of essential services in the energy, transport and telecommunications sectors.

Under this regime, the Portuguese government can scrutinize any transaction resulting directly or indirectly in the acquisition of (sole or joint) control, within the meaning of EU and Portuguese

competition law, by an investor from a country outside the EU and the EEA, over strategic assets in the energy, transport and telecommunications sectors, and prohibit the transaction if it puts at risk, in a real and sufficiently serious way, defense and national security and/or the security of supply of services which are fundamental for the national interest.

In order to do so, the Government must initiate an investigation, within 30 business days from the conclusion of the transaction or from the date it becomes publicly known, to evaluate the risk of the transaction to national security and to the security of supply. After the investigation is initiated, the Government may request from the acquirer all information it considers relevant. A decision must be adopted by the Government within 60 business days from receiving the complete information requested. If no decision is issued within that deadline, a non-opposition decision is deemed to have been tacitly adopted.

Should a prohibition decision be adopted by the Government, all contracts and legal acts and instruments pertaining to the transaction are null and void under Portuguese law (including the acts regarding the economic exploitation and the exercise of rights over the assets concerned or the entities which control them), and can be so declared, at any time, by a Portuguese court.

The acquirer may request the Government confirmation of non-opposition to a transaction, in order to provide the parties with legal certainty as to the non-enforcement of the Decree-Law no. 138/2014. If no response is given or no investigation is initiated within 30 working days of the request, confirmation is deemed to have been tacitly granted.

Decree-Law no. 138/2014 appears to be compatible with the requirements of the new EU framework in terms of substance, although it should be amended to provide for procedural rules on the exchange of information and collaboration with other Member States and the Commission, which in turn should entail adjustments in the time limits currently foreseen for the opening of investigations and the adoption of decisions.

On the other hand, it is possible that the national legislature will extend the scope of Decree-Law no. 138/2014 to other areas of economic activity, since the EU framework also expressly (and by way of example) refers to infrastructures in other sectors such as water, health, social media, data processing, storage, aerospace, defense, electoral or financial infrastructure and sensitive facilities.

Comment

The first comprehensive EU framework on the screening of foreign direct investment is likely to have significant practical implications. Even though it recognises the autonomy of Member States to protect (or not) their critical assets against foreign direct investment, in line with their national strategic interests, it may encourage Member States to set up national review mechanisms, to apply more regularly the mechanisms already in place in their national law and/or to intervene in relation to foreign investments in other Member States. According to the Commission, besides the 14 Member States, including Portugal, that already have national review mechanisms in place, several other Member States are in the process of adopting screening regimes.

The framework can therefore be expected to lead to an increase in regulatory scrutiny for foreign direct investment in strategically important sectors of the EU and, over time, to a convergence of national screening mechanisms, by way of indirect harmonisation (as happened in several other cases in the history of the EU). It is therefore undoubtedly an important piece of legislation, especially for foreign investors and for owners of potentially critical assets in the EU.

The new Regulation will enter into force on 10 April 2019 but will only apply from October 2020 (18 months after its entry into force). Member States therefore have one year and a half to adapt their domestic laws to the requirements of the new Regulation.

However, considering that Member States and the Commission may raise concerns about a foreign direct investment within 15 months of its implementation, it appears prudent for foreign investors contemplating investments in the EU to consider the potential risk that the operation might be scrutinized under national screening mechanisms, in particular if the investment is carried out in one of the sectors considered strategic by the Regulation.

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