

PANORAMIC

**FOREIGN INVESTMENT
REVIEW**

Portugal



LEXOLOGY

Foreign Investment Review

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LAW AND POLICY

Policies and practices

What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

Portugal has traditionally welcomed foreign investment. This has been the case especially during and after the global financial and sovereign debt crises, with significant non-EU (for example, Chinese and Angolan) investments in key players in the energy, telecoms, banking, insurance and healthcare sectors.

National policies specifically targeting foreign investment on grounds of national interest are confined at present to the foreign investment screening regime introduced in 2014 by Decree-Law 138/2014 (FISR). Legal provisions limiting the share capital that could be held by foreign entities and associated special governance rights to shares held by the Portuguese state (golden shares), further to the re-privatisation of companies that had been nationalised after the Carnation Revolution of 1974 (eg, in the telecoms and energy sectors), were abolished in 2003 and 2011, following judgments of the European Court of Justice that considered these rules to violate EU principles on the free movement of capital and freedom of establishment.

The FISR, which has not seen any significant enforcement action so far, empowers the Portuguese government to review acquisitions by foreign investors of control over strategic assets in specific sectors – the main infrastructures and assets related to defence and national security or the supply of essential services in the areas of energy, transport or communications – and to block them if they are liable to seriously threaten national defence and security or the supply of services fundamental to the national interest.

The FISR was adopted in 2014, at a time when the European Commission, in the context of relative geopolitical harmony, globalisation and free trade, was very critical of national investment screening regimes (against the background of the EU principle of free movement of capital) and intervened in and intensely scrutinised the legislative process, which explains some of the limitations of the FISR.

In recent years, further to the drastic change in the geopolitical context that has occurred in the meantime, the Commission has made a policy U-turn and started encouraging the introduction and harmonisation of foreign investment screening regimes at the EU and member state level. This culminated in the adoption of the existing EU foreign investment screening framework in 2019 (Regulation (EU) 2019/452), which, while not requiring member states to establish screening regimes, defines certain minimum procedural requirements for voluntarily created mechanisms (non-discrimination, confidentiality, data protection and judicial review) and establishes a cooperation mechanism for information exchange and consultation between member states and the Commission.

The Commission's increasingly tougher stance towards foreign investment resulted in a legislative proposal in January 2024 for a new screening regulation to substitute the existing framework. If implemented, this regulation will require a significant revision and extension of the FISR and take foreign investment screening in Portugal to another level.

There are no other national policies specifically targeting foreign investment on grounds of national interest but only national and EU policies to scrutinise and regulate investments

by foreign and non-foreign entities alike or on grounds other than the national interest (eg, merger control, foreign subsidy control, sectoral regulation and international sanctions).

Law stated - 9 December 2024

Main laws

What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals and investors on the basis of the national interest?

The only national law regulating foreign investments into Portugal is Decree-Law 138/2014 (which introduced FISR), which was adopted by the Portuguese government further to a parliamentary authorisation granted by Law 9/2014.

The FISR must be interpreted and applied in line with EU law, including primary (constitutional) law (such as the principle on the free movement of capital) and secondary law (notably the EU foreign direct investment screening framework (Regulation (EU) 2019/452)), as amended from time to time.

Article 3(4) of the FISR determines that any prohibition of foreign investment under the FISR must comply with obligations assumed by Portugal under international (eg, WTO) law.

Law stated - 9 December 2024

Scope of application

Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

The FISR empowers the Portuguese government to review 'acquisitions of control' by 'third-country persons' over 'strategic assets' and to block them if they are liable to seriously threaten defence and national security or the supply of services fundamental to the national interest.

'Strategic assets' are defined in the FISR as the main infrastructures and assets related to defence and national security or to the supply of essential services in the areas of energy, transport or communications, which are, therefore, the only sectors covered by the scope of the FISR.

The acquisition of a minority interest in a company controlling a strategic asset is only caught if the minority interest confers control of the company (and, indirectly, of the strategic asset) to the foreign investor (for example, through the governance rights awarded to the foreign investor in a shareholders' agreement).

Law stated - 9 December 2024

Definitions

How is a foreign investor or foreign investment defined in the applicable law?

The FISR applies to foreign investments defined as transactions involving acquisitions of control of strategic assets by third-country persons.

Control

Under the FISR, 'control' is defined as the possibility of exercising decisive influence over the strategic asset, as per article 36(3) of Law No. 19/2012, the Portuguese Competition Law (PCL), which largely corresponds to article 3(2) of the EU Merger Regulation (Regulation (EC) 139/2004) and is interpreted by the Portuguese Competition Authority in line with the Jurisdictional Notice and decisional practice of the European Commission.

Pursuant to article 36(3) PCL, control is inferred from all relevant circumstances, should be on a lasting basis and can result, in particular, from (1) the acquisition of all or part of the share capital; (2) the acquisition of ownership rights or the rights to use or exploit all or part of the assets of an undertaking; or (3) the acquisition of rights or conclusion of contracts that confer decisive influence on the composition, voting or decisions of the organs of an undertaking, including, generally, commercial strategy decisions on the budget, the business plan and, possibly, depending on the market concerned, other aspects such as investments, technology and key employees.

The FISR covers both acquisitions of sole control and acquisitions of joint control over a strategic asset, meaning that, post-transaction, the foreign investor has the power to adopt strategic decisions by itself (sole control), or the foreign investor and at least one other shareholder each have the power to block the adoption of such decisions and, therefore, need to come to a common understanding (joint control).

Strategic assets

The FISR does not contain a list of assets considered to be strategic and generally defines 'strategic assets' as 'the main infrastructures and assets related either to defence and national security or to the supply of essential services in the area of energy, transport or communications'. Therefore, the FISR does not apply to any infrastructures or assets in these areas but only to the main infrastructures or assets, which, if in the energy, transport or communications sectors, must relate to the supply of essential services. However, given the generic nature of the definition, the absence of a list of assets considered strategic in the FISR and the absence of decisional practice or other guidance in this regard, there is some uncertainty as to which assets are covered by the FISR. Although other national rules on related concepts (such as 'critical infrastructure' in Decree-Law 20/2022 or 'essential public services' in Law 23/96, as amended), including energy, transport and communication sectors, may help clarify which specific assets can be considered strategic, the government likely disposes of a margin of discretion in this regard.

The FISR covers 'operations resulting, directly or indirectly, in an acquisition of control, direct or indirect'. This includes both cases where control is acquired directly over the strategic asset itself (eg, a physical infrastructure) and cases in which control over a strategic asset is

acquired indirectly, via an acquisition of control over the legal person controlling the assets (which are likely to be the most common).

Foreign investors

The FISR defines the investors covered by the regime ('third-country persons') as a 'natural or legal person whose residence, registered office or principal place of business is not within the European Union or the European Economic Area'.

The FISR applies to 'acquisitions of direct and indirect control of strategic assets by one or more persons from a country outside the European Union and the European Economic Area' (article 3(1)). This means that the FISR may apply both to the direct acquisition by a foreign investor of a strategic asset or of the legal person controlling the asset, as well as to cases where such control is acquired indirectly, such as when the direct acquirer is a non-foreign entity but is ultimately controlled by a foreign entity.

Law stated - 9 December 2024

Special rules for SOEs and SWFs

Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

The FISR does not provide for special rules for investments made by SOEs or SWFs, nor does it contain any definitions of these terms.

Law stated - 9 December 2024

Relevant authorities

Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

Under the FISR, the member of the Portuguese government responsible for the area in which the strategic asset (to be) acquired is integrated is (exclusively) competent to initiate a review of the acquisition (on their own motion or following a voluntary non-opposition confirmation request submitted by the acquirer or acquirers), conduct the review, resolve not to propose to the Council of Ministers the adoption of an opposition decision (in which case, following expiry of the applicable waiting period, a non-opposition decision is deemed to have been adopted) or resolve to make such a proposal. **The full Council of Ministers can only take an opposition decision** following the competent minister's proposal to this effect.

Law stated - 9 December 2024

Relevant authorities

Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

The Portuguese government can only block foreign investments on national interest grounds under the FISR and only when it concludes that the acquisition is liable to pose a real and sufficiently serious threat to national defence and security or the supply of services fundamental to the national interest. The FISR specifies the criteria that should be taken into account in this assessment, which are based on the case law of the European Court of Justice. The FISR also emphasises, in the introductory recitals, the exceptional nature of the circumstances that may justify an opposition decision. The FISR, therefore, somewhat limits the margin of discretion that the government usually enjoys in defence, security and security of supply issues.

Law stated - 9 December 2024

PROCEDURE

Jurisdictional thresholds

What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

The Portuguese foreign investment screening regime (Decree-Law 138/2014 (FISR)) applies only when a transaction involves (1) the acquisition of control, (2) by a foreign investor (3) of a strategic asset, without there being any other jurisdictional thresholds in this regard.

There is no obligation under the FISR for transaction parties to notify a foreign investment (no filing obligation) and no obligation to suspend its implementation (closing) until a clearance decision is obtained (no standstill obligation). The acquirer may, nevertheless, submit a voluntary filing to the government to obtain confirmation that it will not oppose the transaction.

Law stated - 9 December 2024

National interest clearance

What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees? Is filing mandatory?

The FISR does not establish a notification or standstill obligation. The member of the Portuguese government responsible for the area in which the strategic asset (to be) acquired is integrated (the responsible minister) can initiate a review either on their own motion (ex officio) or following a voluntary filing by the acquirer or acquirers.

Ex officio review

The responsible minister may initiate the review by way of a reasoned decision notified to the acquirer or acquirers within 30 business days of the date of conclusion of the legal acts

and transactions related to the foreign investment or the date on which they become known to the general public (whichever is later). If no review is initiated within this deadline, the government ceases to have jurisdiction to scrutinise the transaction under the FISR.

In response to the notification of the decision to initiate the review, the acquirers must provide the responsible minister with the relevant information and documents about the investment. The responsible minister must immediately notify the initiation of any review to the ministers of foreign affairs, national defence and internal security. The government can only oppose the foreign investment by way of a reasoned decision notified to the acquirer or acquirers within 60 business days of the provision by the acquirer or acquirers of the relevant information and documents, and only following a proposal to this effect by the responsible minister. Otherwise, a non-opposition decision is deemed to have been taken.

Voluntary filing

The acquirer or acquirers may submit to the responsible minister a request for confirmation that no opposition decision will be adopted. The request is purely voluntary, should contain a description of the terms of the investment, and at present is not subject to the payment of any filing fee. If the responsible minister does not initiate a review by way of a reasoned decision notified to the acquirer or acquirers within 30 business days of the receipt of the request, the non-opposition confirmation is deemed to have been given. Any review initiated following a non-opposition confirmation request is governed by the same rules as the ex officio review.

Although the FISR allows responsible ministers to define, by way of ordinance, the information and documents that the acquirer or acquirers must submit in the case of ex officio reviews or in non-opposition confirmation requests, no such ordinance has been adopted so far.

Law stated - 9 December 2024

National interest clearance

Which party is responsible for securing approval?

The FISR does not contain a mandatory notification or standstill obligation. The non-opposition confirmation request, which is voluntary, should be submitted by the person or persons acquiring control over the strategic asset. If an ex officio review is initiated, the acquirer or acquirers are also responsible for providing the competent member of the Portuguese government with relevant information and documents about foreign investment.

Law stated - 9 December 2024

Review process

How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

The FISR determines:

- a deadline of 30 business days for the preliminary review (during which the competent minister may notify the acquirer or acquirers of any decision to initiate a formal review), starting to run, in the case of an ex officio review, on the date of conclusion of the legal acts and transactions related to the foreign investment or the date on which they become known to the general public (whichever is later) or, in the case of a voluntary filing, on the date on which the transaction is voluntarily filed by the acquirer or acquirers; and
- a subsequent deadline of 60 business days for the formal review to be completed, starting to run on the date on which the acquirer or acquirers have provided the competent minister with the 'relevant information and documents about the investment' requested by the minister when it initiated the formal review. Any subsequent requests for additional information may also stop the clock under general administrative law rules.

Factors influencing the duration of the review procedure are the degree of any substantive concerns raised by the investment, the choice between a voluntary filing and a possible-ex officio review, and the date of submission and completeness of the information and documents provided by the acquirer or acquirers to the competent minister.

The FISR does not provide for any exemptions, expedited or fast-track options.

Law stated - 9 December 2024

Review process

Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

As there is no notification or standstill obligation, there are no penalties if the foreign investment is implemented before a clearance (or non-opposition) decision is obtained. The parties should, nevertheless, consider that if the government initiates an ex officio review and issues a prohibition decision, all legal acts and instruments governing the transaction will be null and void.

Law stated - 9 December 2024

Involvement of authorities

Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

The FISR does not provide for the possibility of obtaining formal guidance before a filing is made. Even though the FISR does not indicate anything in this regard, informal meetings can always be sought; however, there is no general expectation or obligation on the part of addressees to engage in any such meetings.

Law stated - 9 December 2024

Involvement of authorities

When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

As in the case of other administrative law proceedings, external expert support can be made use of to support the review both prior to and after filing as well as during a review procedure. While there are no specific informal procedures to facilitate or expedite clearance, informal meetings can always be sought to this end; however, there is no obligation on the part of addressees to engage in any such meetings.

Law stated - 9 December 2024

Involvement of authorities

What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to pre-merger review?

The review under the FISR can concern foreign investments that have already been implemented, as there is no notification or standstill obligation (ie, there are no foreign investments subject to pre-closing review) and the transaction may only become public knowledge (the typical triggering event for the running of the review deadlines, if no voluntary filing is made beforehand) well after its implementation. The enforcement powers under the FISR do not distinguish whether the transaction has been implemented. Accordingly, the parties should publish a sufficiently detailed press release about the transaction immediately after signing the relevant instruments, to ensure that the 30-day deadline for the government ex officio review effectively starts to run.

Law stated - 9 December 2024

SUBSTANTIVE ASSESSMENT

Substantive test

What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

Articles 3(1) and 4(5) of the Portuguese foreign investment screening regime (Decree-Law 138/2014 (FISR)) empower the Portuguese government to block foreign investments that 'are liable to threaten, in a real and sufficiently serious way', defence and national security or the security of supply with services fundamental to the national interest.

Article 3(2) FISR provides an exhaustive list of the criteria for ascertaining the existence of a 'real and sufficiently serious threat', namely:

- the physical security and integrity of strategic assets;
-

the permanent availability and operability of the strategic assets and the capacity of the controlled entity to fulfil their obligations, in particular public service obligations, by the entity that controls the strategic asset;

- the continuity, regularity and quality of the services of general interest provided by the persons controlling the strategic assets; and
- the preservation of confidentiality of the information by the persons controlling the strategic assets.

The Decree-Law also specifies the situations where national defence and security of supply may be threatened. This standard is met where:

- there are serious and objective indicators of links between the acquiring party and third countries that do not respect the fundamental principles of democracy and the rule of law; or that threaten the international community due to links to criminal or terrorist entities (taking into account the official position issued by EU bodies);
- if the acquiring party (1) has in the past used its controlling position over other assets to create serious difficulties in the regular provision of essential public services in the assets' country or neighbouring countries; or (2) if the acquiring party does not guarantee the primary use of the assets, notably if there is a lack of contractual provisions for that effect; or
- the transaction results in a change of use of the assets and threatens the permanent availability and operability of the assets for the timely fulfilment of the applicable public service obligations.

A decision opposing a transaction under the FISR must be duly reasoned and comply with all applicable legal principles, in particular the principle of proportionality. In any event, since the government has not yet issued any prohibition decision under the FISR, it remains to be seen how the above provisions will be interpreted in practice.

Law stated - 9 December 2024

Substantive test

To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

The Portuguese government is bound by all the provisions on consultation of national authorities of member states and the Commission established by the EU foreign investment screening framework (Regulation (EU) 2019/452). This Regulation also establishes that member states and the Commission may cooperate with the responsible authorities of third (non-EU) countries on issues relating to the screening of foreign direct investments on grounds of security and public order. However, the FISR does not provide specifically for cooperation with other member states and the tight deadlines established in the FISR are not easily compatible with the periods provided in EU Regulation 2019/452 (an amendment of the FISR to this effect was expected, but up to present has not materialised). The FISR does provide that the responsible government member may require from other administrative entities all information and documents diligence that it deems necessary.

Law stated - 9 December 2024

Other relevant parties**What other parties may become involved in the review process? What rights and standing do complainants have?**

The FISR does not provide for standing or any other procedural rights for parties other than the acquirer or acquirers, including complainants, but general rules of administrative law apply. This means that third parties may provide members of the Portuguese government with information or documentation on foreign investment that they may or may not consider in decisions taken under the FISR. In principle, third parties are also afforded the general rights provided in the Code of Administrative Procedure, notably to be informed of the status of the file and to consult a non-confidential version of the file. However, voluntary filings and the opening of ex officio reviews under the FISR are not published, and the government may also strongly enforce the applicable rules on confidentiality and secrecy, which may limit in practice the possibility of third parties actively intervening in the proceedings.

Law stated - 9 December 2024

Prohibition and objections to transaction**What powers do the authorities have to prohibit or otherwise interfere with a transaction?**

Under the FISR, the Portuguese government can adopt a decision opposing a foreign investment if the substantive criteria in article 3 of the FISR are met. If a prohibition decision is issued, all transactions and legal acts related to the investment are automatically null and void, including those related to the economic exploitation or the exercise of rights over the strategic asset or assets concerned or over the legal person or persons controlling the asset or assets.

Law stated - 9 December 2024

Prohibition and objections to transaction**Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings or agreeing to other mitigation arrangements?**

While the FISR does not expressly provide for the possibility of remedying substantive concerns, it does not preclude the government from considering and accepting undertakings submitted by the parties, nor from suggesting to the parties certain arrangements that could avoid a prohibition decision, either in the context of an ex officio investigation or further to a voluntary filing (which could be withdrawn and resubmitted with remedies, for example). However, given the absence of precedents and guidance, this is an open question.

Law stated - 9 December 2024

Challenge and appeal

Can a negative decision be challenged or appealed?

Under the FISR, a decision by the Council of Ministers opposing a foreign investment can be appealed to the Administrative Courts.

Law stated - 9 December 2024

Confidential information

What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

The FISR does not have specific provisions on confidential information, except concerning information exchanged between administrative authorities at the request of the responsible member of government, which must safeguard personal data, as well as classified or defence and security information. However, as the review under the FISR is an administrative procedure, the administrative law rules on confidentiality apply, including those limiting third parties' access to documents that reveal industrial or business secrets or imposing professional secrecy upon public officials, among others. Confidential information is also specifically addressed in the EU foreign investment screening framework (Regulation (EU) 2019/452), which establishes that confidential information, including commercially sensitive information made available to the member state, must be protected.

Law stated - 9 December 2024

RECENT CASES

Relevant recent case law

Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

No decision opposing a foreign investment pursuant to the Portuguese foreign investment screening regime (Decree-Law 138/2014 (FISR)) has been made public so far. Moreover, while some voluntary filings seem to have been made, they appear to have merely resulted in the expiry of the waiting period without any noteworthy enforcement action having been taken.

Law stated - 9 December 2024

UPDATE AND TRENDS

Key developments of the past year

Are there any developments, emerging trends or hot topics in foreign investment review regulation in your jurisdiction? Are there any current proposed changes in the law or policy that will have an impact on foreign investment and national interest review?

There are no national developments and no proposed changes to Portuguese national law or policy that will impact this review.

However, the new Regulation proposed by the Commission in January 2024 to replace the EU foreign direct investment screening framework (Regulation (EU) 2019/452), currently pending before the EU legislature, if approved, will significantly impact the Portuguese foreign investment screening regime (FISR). The proposed changes would require a profound revision or substitution of the FISR, and, among other things (1) introduce mandatory prior filing and standstill obligations, at the minimum for transactions when the target companies participate in certain EU programmes of Union interest or are active in strategic sectors (such as military equipment, semiconductors, artificial intelligence and critical medicines); (2) extend the review deadlines, including the possibility of review by the national authority up to 15 months after the transactions' completion, in cases not subject to a mandatory filing; (3) broaden the national security and public order interests relevant when analysing foreign investments; (4) publish an annual report on the enforcement of the FISR to increase transparency; and (5) implement into the FISR significantly enhanced cooperation mechanisms between the Portuguese authorities, the Commission and the other member states.

Law stated - 9 December 2024