

Privatizations: Legislative Proposal for the safeguard of fundamental strategic assets of defense and national security, energy, transport and communications

The Portuguese Government has submitted a legislative proposal to the Parliament aiming to set up a safeguard regime concerning fundamental strategic assets to ensure defense and national security as well as the security of provision of services in the fields of energy, transport and communications (the "Proposal").

The submission of the Proposal, which is accompanied by the respective decree-law, is also based on the Framework Law on Privatizations (*Lei Quadro das Privatizações*), which has attributed the Government - since 2011 - the responsibility of establishing a safeguard regime regarding national interest strategic assets, in compliance with national and EU legislation.

Below are the main aspects of the Proposal, which is yet to be approved by the Parliament and is therefore still subject to amendments.

I. The regime

- The Proposal aims to protect fundamental strategic assets for national interest sectors, such as main infrastructures and assets allocated to defense and national security, as well as to the provision of fundamental services in the fields of energy, transports and communications.
- In order to safeguard the mentioned strategic assets, the Council of Ministers may **oppose to transactions which may result, directly or indirectly, in the acquisition of direct or indirect control over strategic assets, by entities resident in countries outside the European Union or the Economic European Area**, in the event such transactions represent a **genuine serious risk** to defense and national security or to the security in the provision of services of
 - national interest, according to the following criteria: **(i)** physical security and integrity of the strategic assets; **(ii)** permanent availability and functionality of the strategic assets, as well as their ability to properly comply with the obligations attributed to those who control the assets, specially public service obligations; **(iii)** continuity, regularity and quality of the general interest services provided by those in control of strategic assets; **(iv)** preservation of confidentiality, whether imposed by law or public contract, of all data and information obtained by those in control of strategic assets while in the course of their activity, as well as of the necessary technological background to manage those assets.
 - For the purposes of the Proposal, **control** means the possibility of exercising, individually or jointly, a **decisive influence over a strategic asset**, as determined in the new competition regime, approved by Law 19/12, of May 8.
 - In addition, transactions may represent a **risk to defense and national security or to the security in the provision of fundamental services**, when:
 - i.** There is enough evidence of a connection between the acquiring

person and countries which do not recognize the fundamental principles of the democratic rule of law, represent a threat to the international community due to its alliances or engage with criminal or terrorist organizations or people connected to such organizations, taking account, where available, the official EU positions on the subject;

- ii. The acquiring person has, in the past, used a control position over other assets to seriously hinder the regular provision of essential public services in the country where the assets were located or neighboring countries;
- iii. The acquiring person does not ensure the principal allocation of the assets, as well as its reversion upon termination of the concession, when existent, namely considering the lack of contractual provisions to that effect;
- iv. Such transactions lead to changes in the strategic assets destination, when threatening the permanent availability and functionality of such assets to properly comply with the applicable obligations, particularly public service ones, according to the law.

II. Opposition procedure

- Pursuant to the Proposal, within **30 days of execution of a legal transaction** referring to an operation as described above, or **after the public knowledge of such transaction**, the competent member of the Government may, based on a duly reasoned decision, initiate a **procedure to evaluate the risk of such transaction** to defense and national security or to the security in the provision of services of national interest.
- Once such investigation is opened, the acquiring entity must submit the relevant information and documentation on the

transaction, after which the Council of Ministers may, within 60 days, **decide to oppose the transaction**, based on a duly reasoned decision and according to the applicable legal principles, particularly the principle of proportionality.

- In the event that an opposition is decided by the Council of Ministers, **all acts and legal transactions concerning the operation are null and ineffective**, including those related to the economic exploitation or the exercise of rights over the assets or the entities that control them.

III. Investor's defense

- The opposition by the Council of Ministers to the proposed transaction may be **challenged in the administrative courts**.
- In addition, the acquiring entity has the possibility to pre-address the competent member of the Government by **requesting confirmation that an opposition decision will not be issued**. When such confirmation is requested and the acquiring entity is not notified that an evaluation procedure has been initiated, **within 30 days of receipt of the request by the member of Government**, such confirmation is deemed to be granted.

Upon approval and official publication of the Law, the Government will have up to six months to approve the decree-law providing the safeguard regime concerning fundamental strategic assets to ensure defense and national security as well as the security of provision of services in the fields of energy, transport and communications.

This legislative proposal may have an impact on the privatization program announced for 2014 in the fields of transports (CARRIS and METRO, STCP – *Sociedade de Transportes Colectivos do Porto* and CP – *Comboios de Portugal*), water and waste sectors (AdP and EGF), among others.

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