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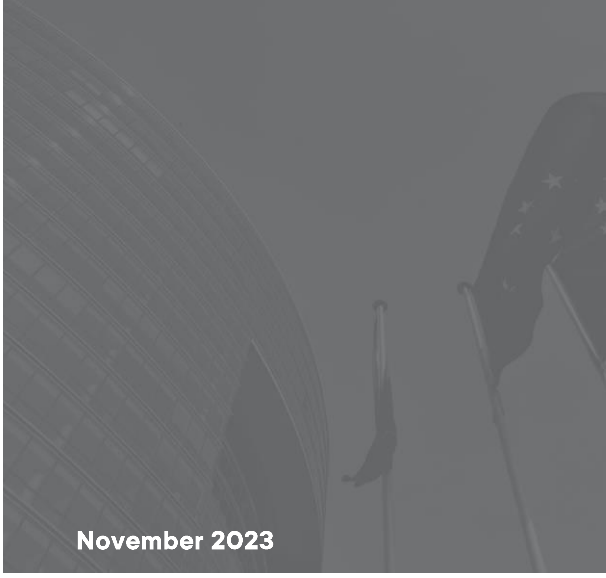

Update

European and Competition Law

Revision of the Foreign Direct Investment Regulation and Annual Report

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The European Commission is completing its assessment of the framework for the screening of Foreign Direct Investment ("**FDI**") - **Regulation (EU) 2019/452** - and has announced that will propose a revised Regulation before the end of 2023.

Likewise, and despite the current political turmoil, it is expected that in 2024 a legislative process to update the Portuguese regime may begin, to better ensure the safeguarding of key strategic assets (**Decree-Law 138/2014 of 15 September**).

Last October, the European Commission published its **Annual Report on the screening of FDIs into Union ("Report")** for 2022.

Although the global FDI displayed a year-on-year decrease of -14.3% in 2022 compared to 2021, the Report documents a growth in FDI in Portugal, with a 30.6% increase in the number of foreign acquisitions.

The very significant decrease in FDI in 2022, both globally (-14.3%) and in the European Union (- 280 billion euros!), contrasts with the growing importance of the screening of FDI in the EU. Initiatives to adopt or update existing FDI screening mechanisms are underway in 17 of the 27 Member States, and only 7 have nothing to report, while at the same time there has been a significant increase in the number of FDI cases formally analysed by the Member States.

Every year, foreign investment in the European Union, and specifically in Portugal, becomes increasingly scrutinised. **Investors and companies should pay attention to the following aspects**:

1. Since 11 October 2020, the aforementioned **Regulation (EU) 2019/452** has been applicable, establishing the first system for the screening of FDI at EU level;

2. **FDI** means an investment by a foreign investor (i.e. from outside the EU) aiming to establish direct links between the foreign investor and the undertaking to which the capital is made available in order to carry on an economic activity in a Member state, including investments which enable effective participation in the management or control of a company in question;

3. A **foreign investor**, on the other hand, is a natural person or undertaking of a third country (i.e. non-EU country), intending to make or having made a FDI;

4. The Regulation establishes: **1)** the possibility for Member States to have mechanisms for the screening of FDIs; **2)** factors that can be taken into account by Member States or the European Commission to determine whether an FDI is likely to affect security or public order; **3)** mechanisms for cooperation between Member States and the European Commission; **4)** the possibility for the European Commission to issue opinions and for Member States to issue observations on these investments;

5. The Regulation does not harmonise the national systems of screening of FDIs. Therefore, nothing prevents a Member State from deciding to have (or not) a national screening mechanism or to analyse (or not) a particular FDI;

6. The regulation in force in Portugal since 2014 establishes a system for the safeguarding of strategic assets that are essential to guarantee the national defence and security and the country's supply of services that are fundamental to the national interest, in the areas of energy, transport and communications (**Decree-Law 138/2014**);

7. When the country's national defence and security is at stake, the Portuguese government may oppose to any transaction which directly or indirectly results in the acquisition of control by a person from a country outside the EU (and the European Economic Area) over strategic assets in the energy, transport and communications sectors.

8. If an objection decision is adopted, all legal acts and transactions relating to the operation in question are null and void;

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9. The acquirer, in order to obtain some legal certainty, may request confirmation from the government that it will not oppose to the operation in which he is taking part. However, such notification is optional.

As documented in the Report, in 2022 and, even earlier, in 2021, only 1% of the transactions were blocked by Member States. The figures confirm that the European Union remains open to FDI and that Member States only do not authorise transactions that pose a very serious threat to their security and public order.

In the interests of transparency, it would be commendable for Portugal to submit an annual report to the European Commission that includes information on FDI in Portugal. By not doing so, it is in breach of EU law.

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