

# The Brief

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## Mediterranean and the Orient

### Editorial

After having recently opened an office in Tunisia, Gide Loyrette Nouel has consolidated its presence in North Africa through a partnership agreement with the law firm Naciri & Associés, based in Casablanca and through the current opening of an office in Algiers.

The agreement with the law firm Naciri & Associés is the culmination of numerous years of collaboration between the two firms and bears witness to the confidence of Gide Loyrette Nouel in the policy of the Kingdom of Morocco towards increased openness to the outside world.

Over the last few years, the Moroccan Government has been implementing structural reforms designed to develop the private sector. One of the reasons such measures were necessary is the process of associating Morocco with the European Union. The measures have been combined with a deliberate pro direct foreign investment policy transformed into reality by the adoption of a plan aimed at improving the business environment and raising the standard of businesses.



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Major reforms have been successfully introduced in less than a decade (adoption of the new Commercial Code, the Companies Act, the Freedom of Prices and Competition Act, the Customs Code, the Industrial Property Act, the new Insurance Code, measures simplifying administrative procedures and formalities for investors, the mandatory health insurance system, etc.)...whereas others will be brought in shortly (a public service concession and franchise system, a law on public share purchase offers, a review and reworking of the banking legislation, etc.).

The new Labour Code, promulgated on 8 December 2003, and the plan to reform the Moudawana (the Moroccan Personal Status Code), are undoubtedly among the most significant advances in the Moroccan socio-legal environment over the last twenty years.

Morocco is still facing up to numerous challenges (a weakness caused by the country's dependence on agriculture, improving its education system, the struggle against poverty, reforming the justice system, etc.). However, if the excellent signs of the last few months are confirmed, and the country manages to shore up its budget deficit and accelerate its structural reforms, then perhaps Morocco will succeed in reactivating and stimulating long-lasting growth so that it can improve the standard of living of its population.

The Kingdom of Morocco has all the assets to help transform its ambitions into reality.

The opening of the Algiers office marks another important stage in the strategy of Gide Loyrette Nouel in the region of North Africa and of the Mediterranean basin.

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# ALGERIA

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## **BUSINESS LAW : new Investment Code**

Investments in Algeria are now governed by the Ordinance, No. 01-03 of 20 August 2001, for the development of investment ("**Investment Code**") which repeals and replaces the old Decree, No. 93-12, of 5 October 1993 on the promotion of investment. In its time, this decree brought about real economic change because it was directed at, and for the first time encouraged, private investment in Algeria.

### **Scope**

#### *Forms of investment*

The purpose of the Investment Code is to establish rules for domestic and foreign investments in the manufacture of goods and supply of services and for investments to obtain concessions and/or licences. Creating, enlarging, rehabilitating or reorganising an Algerian company, or acquiring an interest in its capital, with a view to manufacturing goods or supplying services fall within the scope of the Investment Code.

#### *No special rules for foreign investors*

The above clearly shows that it was not the Algerian legislature's intention to create separate legal rules for domestic and foreign investors. All sectors of the economy are open to both Algerian citizens and foreigners.

Foreign investors are freely entitled to invest in any business for the manufacture of goods or supply of services. In particular the following sectors are concerned: telecommunications, electricity generation and distribution, banking, mining and distribution of petroleum products.

Accordingly, foreign investors wishing to invest in creating or purchasing shares in an Algerian company, or purchasing assets in Algeria to manufacture goods or supply services do not need to make any prior application for a government authorisation or licence because they are foreign investors, as is still the case in many developing countries.

### **Simplified procedure**

The Investment Code provides for free investments subject to legislations and regulations as to controlled activities and respect of environment.

These investments are protected and guaranteed by laws and regulations in force.

If investors wish to profit from tax and customs incentives provided by the Investment Code, they will be required to declare their investments and apply to the National Investment Promotion Agency (the "**Agency**").

### **Incentives and guarantees provided by the Investment Code**

The Investment Code provides for two incentive schemes, the general scheme and the special scheme. The philosophy of the new legislation is more quality conscious than the old law. The more benefit an investment offers to the national economy the more substantial the incentives offered to the investor will be. However, the State Holdings Council, the body in charge of the economic reforms and privatisations, recently stated that there would be no more incentives for investments in the agri-food sector because this sector had already attracted too much investment.

An investor applying for incentives will almost always be given the benefit of the general incentive scheme. The special incentive scheme is restricted to certain investments.

#### *General scheme*

The general scheme only provides for incentives while the investment is in progress:

- reduced rate customs duty applies to imports of equipment;
- a VAT exemption on goods and services directly involved in realising the investment; and
- an exoneration of transfer duty on any real property assets purchased for valuable consideration.

#### *Special scheme*

The special scheme offers substantial incentives, such as tax and custom duty exemptions, for more substantial investments than those benefiting from the general scheme, together with an exoneration of all taxes and contributions for a period of ten years from the commencement of operations.

In addition to these tax incentives, the State may agree to pay for all or part of the infrastructure works required for the realisation of the investment.

However, the Investment Code stipulates that the special scheme will only apply where the investment is of particular importance to the national economy and, notably, it uses "clean" technologies likely to preserve environment or it is localised in a specific region. The list of eligible regions has still not been published. What is meant by investments of particular importance to the national economy will be defined by the National Investment Council (the "NIC"). If the NIC declares an investment to be of particular importance to the national economy, an investment agreement will be drawn up between the investor and the Agency, acting on behalf of the State.

#### *Guarantees*

The guarantees are as follows:

- investments made by contributing to capital in freely convertible foreign currency benefit from a transfer guarantee in relation to the capital invested and any resulting income earned. This guarantee also relates to the actual net proceeds of sale or liquidation, even where this amount is more than the capital invested;
- equitable treatment between domestic and foreign investors;
- unless the investor expressly requests it, no future amendments or repeals of the provisions of the Investment Code will apply to projects realised under the current legislation;
- any dispute between the Algerian government and a foreign investor may be referred to arbitration.

To date, Algeria has:

- acceded to the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards;
- ratified the Washington Convention on ICSID dispute settlement;
- ratified the convention creating the Multilateral Investment Guarantee Agency (MIGA).

## **BUSINESS LAW : new rules applicable to customs-free zones**

### **Summary of the rules**

Ordinance No. 03-02 of 19 July 2003 on customs-free zones repeals and replaces the old system governed by Executive Decree No. 94.320 of 17 October 1994. The first customs-free zone situated in Bellara in the Jijel Region was created by Executive Decree No. 97.106 of 5 April 1997. Customs-free zones are defined as demarcated areas within the customs territory, within the meaning of the Customs Code, where industrial, commercial and service activities are carried on.

In principal, customs-free zones are intended to promote exports which explains why, as a rule, all production realised in these zones must be exported abroad. Undoubtedly what is special about the Algerian system is that up to 50% of goods and service produced in these zones, in terms of turnover value, excluding taxes, may be sold off within the customs territory. In general, the proportion is not more than 20%. It could therefore be more beneficial for a European company to relocate manufacturing to a customs-free zone where its products may be sold off in Algeria and the rest of Africa. Such a relocation would mean a saving in manufacturing costs but also in logistical costs.

These zones are created by executive decree based on a proposal from the Minister of Commerce. One of the original features of the new rules is that a customs-free zone may be set up on land in which full right, title and interest is owned by a private law natural person or corporate entity. Under the old law, it was only possible to set up a customs-free zone on land belonging to the State or local authorities.

### **How do the rule operate**

Corporate entities, whether or not resident in Algeria, are entitled to invest in a customs-free zone. Investments may be made in convertible foreign currency or convertible dinners.

Investments made in these zones require no authorisation. Only a declaration of investment to the Agency is required.

Investments in customs-free zones are exonerated of all taxes, duties and deductions other than those set out below:

- duties and taxes on personal motor vehicles other than those connected with the business;
- payments and contributions to the legal social security system.

Movements of capital inside the zone and between the zone and the customs territory or outside national territory, are subject to Algerian exchange control regulations. Transactions within the zone will be exclusively in foreign currency.

Businesses operating inside customs-free zones benefit from the guarantees provided for under the Investment Code, under bilateral reciprocal investment protection treaties and under the dispute settlement procedures ratified by Algeria.

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### **AGENTS IN THE U.A.E. AND SAUDI ARABIA**

In Saudi Arabia and the United Arab Emirates, commercial agents and distributors are both included in the term "commercial agent". There is no distinction between them. The agency profession enjoys special protection, enforced by means of a monopoly for nationals in Saudi Arabia and an exclusivity obligation in the U.A.E., registration of the agreement and the imposition of certain constraints with regard to termination.

#### **Saudi Arabia**

##### **Trade monopoly and registration**

All trading activities in Saudi Arabia are strictly closed to foreigners. Foreign exporters who wish to create a trading structure for the distribution of their goods have no option other than to operate through a Saudi national or a company wholly-owned by Saudis. The Saudi agent selected by a foreign principal to distribute its goods has a legal duty to register his agency agreement with the Ministry of Commerce.

Failure to register may incur a fine. In practice, such a fine is rarely imposed. However, a non-registered agent will be prevented from bidding for public contracts. Unless the goods concerned are pharmaceuticals or veterinary products, neither the failure to register nor even a lack of an agency agreement will prevent a Saudi businessman

importing goods and selling them in Saudi Arabia (Saudi nationals also have a monopoly over imports). Such an agreement does not have to be registered for it to be valid.

##### **Exclusivity**

It is mandatory for agency agreements to be exclusive in the specific cases of pharmaceuticals or veterinary products. It is, however, possible to limit the exclusivity to a given territory, product range or even customer list. In all other cases, exclusivity is not a legal obligation although the Ministry of Commerce may, in practice and of its own accord, make registration conditional on some degree of exclusivity being granted under the agreement.

##### **Termination of an agreement and compensation**

Saudi law allows the parties considerable contractual freedom in terms of how they structure the principal/agent relationship. The only strict obligation is to include provisions concerning termination in their agreement: what happens when the agreement expires for a fixed term agreement or what happens at the end of the notice period for an unlimited-term agreement.

The parties are free to exclude compensation on termination or limit it to a fixed amount. If such a clause is not included in the agreement, the courts will generally award compensation and it is difficult to anticipate how much.

Incorporating a clause that limits compensation into the agreement obviously gives rise to a technical advantage when the time comes and an advantage before the court construing the agreement.

If the goods are likely to be incorporated into supplies and/or services for public contracts, it is essential (or if not, at least recommended) to incorporate into the agreement provisions governing the supply of spare parts .

If there is a dispute with a registered agent, no new agent will be entitled to register an agreement until the dispute has been brought to an end by a final judgement or negotiated settlement. The practical relevance of this restriction is limited to pharmaceuticals and veterinary products or other goods of interest to public sector customers because, in all other cases, a new Saudi agent may import goods into the country and sell them freely without registering his agreement.

##### **Disputes**

The Saudi courts do not recognise the validity of clauses attributing jurisdiction to foreign courts and systematically rule that they have jurisdiction to decide any dispute relating to commercial agency agreements performed in Saudi Arabia. As the concept of the conflict of laws is foreign to the Saudi legal system and a trading

monopoly for Saudi national is the rule, Saudi law will be systematically applied to any dispute, notwithstanding any clause agreeing to select a foreign law as the governing law of the agreement.

However, in 1994, Saudi Arabia did ratify the 1958 New York Convention. The Saudi courts will now recognise and accept an arbitration clause providing for international arbitration regardless of the law chosen by the parties to govern their agreement. The courts responsible for granting authority to enforce a foreign arbitration award will nevertheless strike from that award any provision that contravenes the rules of Saudi public policy, i.e. interest for delay in compliance which, as a rule, Saudi law deems to be usurious whatever the amount.

## The United Arab Emirates

### Exclusivity and territory

Unlike Saudi Arabia, it is possible to appoint a company to sell goods in the U.A.E. that is not wholly-owned by U.A.E. nationals. However, such companies do not enjoy the legal protection granted to commercial agents nor may they register their agreements.

Only nationals or companies wholly-owned by nationals may register their agreements (although registration is not mandatory) and benefit from the legal protection granted to commercial agents. This protection includes (i) an exclusive right to import, (ii) a right to commission on sales made by the foreign principal without going through the agent and (iii) a right to compensation on termination of the agreement or non-renewal when it expires.

Exclusivity is defined by geographical area and/or product range in a given sector. It gives the registered agent the right to prevent the goods being imported by anyone else until the registration is cancelled. This makes it possible to resist parallel imports effectively throughout the term of the agency agreement but also, in practical terms, compels the foreign principal to compensate the agent quickly at the end of his agreement so that it can be cancelled, avoiding any disruption to sales during any post-termination dispute.

### Termination and compensation

A decision to terminate or not to renew an agency agreement can only be justified by the agent's gross misconduct. The registration of a new agent is conditional on the cancellation of the prior registration and this registration may only be cancelled with the consent of the terminated agent or by court order finally resolving the dispute. During such a dispute, the terminated agent may apply for an injunction prohibiting the import of the goods that he handled into the territory.

The agent's right to claim compensation is unconditional and a rule of public policy. It may not be restricted or varied in advance under the agreement. The awards made to agents vary in general from one to four years gross profit (the agent's turnover from sales of the goods, less the purchase price paid to the foreign principal). In numerous cases, foreign principals have elected to pay the agent immediate and substantial compensation in settlement with the sole aim of avoiding any disruption to the sale of their goods in the territory.

### Contractual safeguards to mitigate agents' legal protection

Appointing more than one agent in the country, for example one per emirate or one for Abu Dhabi and one for Dubai and the so-called northern emirates, makes it possible to circumvent any import injunction obtained by one of the agents whose agreement has been terminated: a registered agent's right to import is limited to his contractual territory and cannot interfere with the right of other registered agents to import into neighbouring emirates. Such a structure ensures at least continuing availability of the goods although perhaps not uniformity of supply in the market.

Requiring the agent to achieve measurable objectives under the terms of the agreement (such as sale or inventory quotas, after sales service reaction times, market coverage or penetration objectives, customer satisfaction indices, a non-compete obligation, etc.) may limit financial exposure in terms of compensation and sometimes avoid it altogether in Dubai but not in Abu Dhabi.

### Disputes

The jurisdiction of the U.A.E. courts is a rule of public policy in disputes between a principal and its agent. Any clause to the contrary is deemed null, void and ineffective. This exclusive jurisdiction also applies to arbitration, including local, according to the case law of the Supreme Federal Court of Abu Dhabi and the Supreme Court of Dubai.

## Conclusion

The dominant position of nationals, backed by increased exclusivity or a legal monopoly which nationals will readily use in an attempt to impose their standard form agreements, makes it vital to enter into serious negotiations concerning the other contractual terms, particularly those that may limit the compensation payable at the end of the agreement (a limitation of liability, an assertion of the foreign principal's proprietary rights in the trademark and its registration and that the principal will be liable for the costs of defending such rights, a financial contribution to commercial promotions,

in short anything that will strengthen the argument that the success of the agent/distributor is due less to his talent and knowledge of the market than to the reputation of the product, the brand and the effort invested by the foreign principal ...). Such negotiations are perfectly normal and often provide a means for clarifying the scope of the parties' respective obligations from the very beginning of their relationship.

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### **EMPLOYMENT LAW : new labour code**

Act No. 65-99 creating the new labour code (the "**Labour Code**") was published in the Official Journal on 8 December 2003. This date is undoubtedly a red-letter day for employees' organisations, employers and the authorities.

It is provided that this legislation will come into force six months after its promulgation, i.e. 8 June 2004. Draft implementing regulations are currently under review.

This code has been eagerly awaited for nearly two decades. Its adoption was a constant stumbling block due to a lack of consensus between the parties involved in its drafting. A labour agreement, reached on 30 April 2003, between employers and trade unions finally put an end to these dissensions.

At this stage, it would be risky to venture an opinion on which of the trade unions or the employers got the better of the negotiations concerning the code because so many concessions were necessary on both sides to allow it to go forward and become law.

One of the merits of the Labour Code is that it codifies more than forty pieces of labour legislation, most of which were passed in the 1930s and 40s and were ill-adapted to the social and economic changes that have affected Morocco since then.

Not only does this codification make it easier to access and understand the legislation, clarifying drafting in a number of areas, but it will also undoubtedly contribute to increasing legal certainty which was the earnest desire of employers.

The Labour Code is divided into 7 books:

- the preliminary book defines the scope of the labour legislation, identifies the businesses and employees covered by the legislation and lists the categories of employees that fall outside its scope;
- book I governs individual employment contracts, "sub-business" contracts, collective bargaining, labour agreements and lay-offs for economic reasons;
- book II governs the terms and conditions of employment and salaries;
- book III deals with the matter of trade unions, employees' representatives, workers' councils and the role and rights of union representatives within companies;
- book IV establishes official status for public and private temporary work agencies;
- book V relates to control within the company; and
- book VI institutionalises the methods of resolving labour disputes through conciliation or arbitration.

The main innovations introduced by the Labour Code are set out below:

#### **Working hours**

The working week has been reduced from 48 hours to 44 in the industrial and service sectors, with a limit of 10 working hours per day.

The Labour Code does, however, allow for a degree of flexibility so that employers may, provided they comply with certain conditions:

- apportion working hours over the working year in accordance with the needs of the company, in the case of temporary difficulties;
- reduce working hours for a continuous or discontinuous period, not exceeding 60 days per year, in the case of temporary financial difficulties or by reason of exceptional circumstances, provided employees are guaranteed at least 50% of their salary.

#### **Probationary periods**

The probationary periods for **unlimited term contracts** are as follows:

- three months for managerial staff and assimilated jobs;
- one month for office staff;
- fifteen days for workers.

The probationary period can only be renewed once.

The probationary period for **fixed term contracts** may not exceed:

- one day per week for the number of weeks in the term of the contract, with a ceiling of two weeks for contracts for a term of less than six months;
- one month for contracts for a term exceeding six months.

### Use of fixed term contracts

The Labour Code restricts the use of fixed term contracts to the following situations:

- replacing one employee with another in the event of premature termination of an employment contract, provided termination is not as a result of a strike;
- a temporary increase in the company's activity;
- by companies whose activity is seasonal;
- on the creation of a company or a new service within a company on the launch of a new product;
- in exceptional circumstances, to be defined by regulation.

The term of fixed term contracts may not exceed one year and is renewable once.

### Temporary work

The Labour Code regulates the temporary work sector which, to date, had been developing without any clear legal framework.

Temporary staff may only be used in the following circumstances:

- replacing one employee with another in the event of premature termination of an employment contract, provided termination is not as a result of a strike;
- a temporary increase in the company's activity;
- for seasonal work;
- for work which, due to its nature, does not lend itself to engaging employees under unlimited term contracts.

The term of the temporary assignment will vary between three months and one year, renewable or non-renewable, according to the circumstances in which temporary assistance is required.

### Gross misconduct

Unlike the old law, the new legislation sets out a restrictive list of cases of gross misconduct justifying dismissal.

The Labour Code also provides for a list of cases of gross misconduct by the employer vis-à-vis employees.

### Compensation on dismissal

The amounts of compensation on dismissal have been doubled by the Labour Code.

A ceiling has been set for compensation for wrongful dismissal. The amount has been fixed at one and half months' salary per year of service to the company, with an overall maximum of 36 months. These limits have been set to restrict the interpretational margin of the courts, thus avoiding disparities in awards for comparable situations.

The new legislation has also brought in loss of employment compensation for employees laid-off individually or collectively for economic, technological or structural reasons.

### Procedure for dismissal

Individual employees may now only be dismissed following an interview between the employer and employee at which he or she may be accompanied and assisted.

### Workers' councils

Any company with more than 50 employees is now required to set up a workers' council. Such councils have a purely consultative role.

## **CAPITAL MARKETS : draft regulations governing takeover bids and public offers**

Government Bill No. 26-03 relating to takeover bids and public offers on the securities market (the "Act"), prepared by the Securities Rules and Ethics Council (the "SREC"), the authority that polices the Casablanca Stock Exchange (the "CSE") in collaboration with market professionals, is currently before Parliament. The current draft may be further amended during this reading.

This statute, so eagerly awaited by the market, will round off the series of stock exchange reforms that started almost a decade ago.

The previous legal void will be filled by regulations whose principal objective is to guarantee the transparency of the market by ensuring compliance with the principles of shareholder equality, market integrity, fair transaction practices and competition.

The Government is to draft detailed provisions to implement the terms of the Act on the basis of a proposal by the SREC. The Act will apply to all Moroccans or foreigners trading in the shares or securities of companies listed on the CSE.

Additional Bills amending other aspects of market regulations, aimed at strengthening the powers of the SREC, were tabled before Parliament at the same time as the draft legislation on takeover bids and public offers.

The Act's provisions on purchase offers and exchange offers, public buy-out offers and anti-takeover bid defences are briefly summarised below. The market price guarantee procedures on sale of a majority share block and compulsory withdrawal rules, contained in previous versions of the Bill have not been included in the Act.

### **Takeover bids and/or exchange offers**

The Act makes a distinction between voluntary purchase or exchange offers and compulsory takeover bids.

#### *Voluntary purchase or exchange offers*

A public offer is said to be voluntary where a natural person or corporate entity, acting alone or in concert, wishing to make its intention to purchase shares listed on the CSE known to the public, launches a purchase or exchange offer at his or its own initiative.

The public offer, which must be filed with the SREC for its appraisal, must include the following proposals and information:

- the aims and intentions of the offeror;
- the number and type of securities in the target company that it owns or may acquire at its sole initiative, together with the date and terms on which their acquisition has or can be realised;
- the price or exchange parity at which the offeror is offering to acquire the securities, the parameters and data used to set the price or exchange parity and the proposed terms of payment, delivery or exchange. The price or exchange parity must be set according to relevant and accepted valuation methods, on the basis of known, accurate, objective, meaningful and multiple criteria resulting in a fair and rightful estimate of the target company's value;
- the number of shares to which the public offer relates; and
- if relevant, the percentage of voting rights below which the offeror reserves the right to withdraw its offer.

#### *Compulsory takeover bids*

Subject to certain exceptions granted by the SREC, a compulsory takeover bid must be made where a natural person or corporate entity, acting alone or in concert, directly or indirectly acquires a defined percentage of the voting rights in a listed company.

This percentage, which may not be less than **one third** (1/3) of the voting rights in the target company (the "**Threshold**"), will be defined by regulation.

Nevertheless, the SREC may allow an exception to the duty to launch a compulsory public offer, even where the Threshold is crossed, if:

- the crossing of the Threshold does not alter the effective control of the target company, particularly in the case of a reduction in the share capital of the target company or a transfer of shares between companies in the same corporate group;
- the newly acquired voting rights, crossing the Threshold, are the result of:
  - a direct transfer, not involving any monetary or other consideration, between spouses or between direct ancestors or descendants in the first or second degree, or are acquired by means of succession or testamentary gift;
  - a merger or partial sale of business assets;
  - subscription for an increase in share capital in a company experiencing financial difficulties which may compromise its continued trading or subject to the insolvency procedures provided for under Act No. 15-95 creating the Commercial Code.

The proposed purchase or exchange offer must first be submitted for the prior approval of the Government and the SREC, and, according to the circumstances, the competition regulator for concentrations or the target company's supervisory authority if it is a credit institution or insurance company.

#### *General matters*

The offeror is required to prepare a prospectus, subject to approval by the SREC, which will be distributed to the public.

If the target company is in agreement with the offeror's aims and intentions, the target company and the offeror may prepare a joint prospectus. If the opposite is true, the target company may prepare its own separate prospectus to be filed with the SREC.

The Act provides that all takeover bids must offer the same price and performance conditions to all owners of the same class of shares targeted in the bid. Any agreement creating inequality between shareholders will be null and void and will render the public offer inadmissible.

### Public buy-out offers

A public buy-out offer is a special procedure allowing minority shareholders in a listed company to dispose of their equity interests.

It is **compulsory** to issue a buy-out offer where a natural person or corporate entity, alone or in concert, directly or indirectly, owns a defined percentage of the voting rights in a listed company.

This percentage, which may not be less than **90%** of the relevant voting rights, will be set by regulation.

A public buy-out offer **may also be imposed** by the SREC, at the request of minority shareholders, on any natural person or corporate entity which, alone or in concert, owns a percentage of the voting rights in a listed company, to be defined by regulation but no less than **65%** of the voting rights, if the said natural person or corporate entity calls a general meeting of the company to approve one of the following resolutions:

- substantial changes to the company's memorandum and articles of association;
- the merger of the company into another company;
- the sale or transfer of all or a substantial part of the company's assets to another company;
- the removal of the company's shares from the CSE listing;
- a resolution not to distribute dividends over several financial years;
- the transformation of a public limited company into a limited partnership with shares.

The features distinguishing public buy-out offers from other public offers are, firstly, the majority shareholder is not entitled to set a threshold below which it reserves the right to withdraw its offer and, secondly, the role played by the **independent valuer**, appointed by the offeror, following approval of the SREC, to produce a valuation of the company's shares.

### Anti-takeover bid defences

The Act lays down a number of rules governing the conduct of the target company's directors when a takeover bid or public exchange offer is launched. Apart from the principle of transparency, fairness in transactions and competition, it also provides that the competition likely to result from a public offer should function by means of the freedom to make offers and counteroffers.

The Act therefore contains prohibitions and limits to certain defence techniques against hostile takeover bids.

#### *Prohibited defences*

The anti-takeover bid defences prohibited by the Act are the following:

- any clause requiring the approval of a takeover bidder will be unenforceable;
- any agreements legislating sales of corporate rights to control whether or not a shareholder is entitled to offer his shares for sale in response to a public offer or to deny signatories the freedom to support a competing public offer, are null and void;
- any increase by the target company of its "auto-control" interests.

#### *Limits of certain defences*

Other anti-takeover defences are only lawful up to certain limits:

- the target company will only be entitled to proceed with a repurchase of its own shares if this buy-back was decided prior to the launch of the takeover bid and the resolution of the company in general meeting expressly authorised such a buy-back in the event of a public offer;
- any increase in the target company's share capital will generally be suspended during the period of the public offer unless the general meeting approving it expressly resolved, prior to the submission of the offer, to increase its share capital during such period and the increase has not been reserved.

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## ELECTRICAL POWER

NAPIC (North African Power Industry Convention) held a conference in Tunis on 3, 4 and 5 December 2003 in relation to the North African electrical power industry at which those financing and operating in the industry were able to identify, discuss and plan developments and improvements in the region.

Various subjects were broached during the conference:

- the Tunisian Electricity and Gas Company, the Mauritanian Universal Access Agency and the South African Energy Research Institute spoke about the technical aspects of the industry, in particular, the importance of mastering demand for energy so that the electricity companies can control increases in demand and optimise the use of their installations;
- the Algerian Energy Company, the European Commission Directorate General for Energy and Transport and the Spanish Electrical Industry Association dealt with the legal aspects, such as the need for opening up the markets of the North African countries and how to achieve this and the agreements between the North African countries and the European Union;
- the African Development Bank (Tunisia), BNP Paribas (France) and ABN Amro referred to the financial aspects, such as alternative financing opportunities as opposed to traditional financing for electricity projects and the attractive cost of some electricity generating techniques;
- finally, British Gas Tunisia, the General Electricity Company of Libya (GECOL), Ansaldo Trasmissione & Distribuzione S.p.A. (Italy) the Tunisian Electricity and Gas Company and the Carthage Power Company (Tunisia) spoke about the operational aspects of the electricity industry in North Africa, explaining future projects and how energy is currently generated in the region.

95% of Tunisia is now supplied with electrical power. Its market is undergoing a process of liberalisation and the private sector has been involved in generating power since 1996, breaking the Tunisian Electricity and Gas Company's production monopoly in this field. This trend is continuing because since the construction of the Radès 500 MW power station (a BOT project) by the Carthage Power Company from 1996-1999, a 27 MW IPP has been built in southern Tunisia by Caterpillar. Currently, an IPP with a power output similar to that of Radès is under discussion.

## COMPANY LAW: groups of companies

The Act No. 2001-117 of 6 September 2001 (the "Act") has completed the Tunisian Commercial Companies Code (the "CCC"), by introducing new provisions governing groups of companies (hereinafter the "Group").

Pursuant to section 461 paragraph 1 of the CCC, a group of companies exists when : *"a number of companies, enjoying independent legal entity and linked by common interests, are under the control of a parent company which has the power in fact and by law to control the other companies of the group so as to ensure a unity of decision"*.

### **Structure of the groups of companies**

Section 461 of the CCC defines the companies which are members of the Group as follows :

- the subsidiary is the company which more than 50% of its shares is held by another company;
- the parent company is the company controlling other companies whether in fact or by law. The parent company holds direct or indirect equity interest in the other companies members of the Group;
- the company under the control of another company is:
  - a company in which another company holds the majority of voting rights;
  - a company in which another company holds the majority of voting rights whether individually or by virtue of an agreement with other shareholders;
  - a company in which decisions are made in the general meeting under the influence of another company having voting rights in fact.

A company is deemed to be under the control of another company when the latter has 40% of voting rights, whether directly or indirectly and no other shareholder has a higher percentage of voting rights within the same company.

### **Equity participation structure**

Under section 465 of the CCC the equity participation structure may be as follows:

- a direct participation: the participation is direct when the parent company holds an equity in the share capital of each company member of the Group;
- an indirect participation: the participation is indirect when a company member of the Group holds an equity participation in the share capital of another company entitling the parent company to control the companies members of the Group;

– a cross participation: there is a cross participation when a company member of a Group holds an equity in the share capital of one or many other another companies which are holding an equity in the share capital of the first company.

Some participations are prohibited : two situations may be contemplated depending on whether all the companies are companies which capital is represented by shares or only one these companies is of this type:

– cross participation between companies which capital is represented by shares: cross participation shall not exceed 10%. In the event of a prohibited cross participation, companies must agree to ensure that the participation is in accordance with the law. If no agreement is reached, the company holding the lower percentage of participation should sell the shares so as to comply with the law;

– cross participation between a company which capital is represented by shares and another type of company: a company, other than a company which capital is represented by shares, is not entitled to hold shares of a company which capital is represented by shares if the latter holds more than 10% of the capital of the first company. If such event occurs, according to section 467 of the CCC, the purchasing company must notify the selling company within 15 days from the date of acquisition. This section also provides that the prohibited participation must be transferred within one year and that the involved shares are deprived of vote until they are transferred.

### **Transparency requirements**

The parent company must mention in the companies court's record all the affiliated companies and each of the affiliated companies must also mention the state of its membership of the Group. In the event the affiliated company no longer belongs to the Group, such fact should be specified in the companies court's record together with the new parent company. Any affiliated company must specify the state of its membership of the Group in the director's report.

The parent company must specify the state of a parent company in the court's companies record and if need be the end of such state.

In addition and as regards accounting, the parent company must prepare consolidated accounts as well as director's report of the Group.

The parent company must also make available to the shareholders, in the place of its head office, at least one month before the general meeting, the consolidated accounts, the director's report and the auditor's report.

The parent company must also advertise in a daily within one month from their approval the consolidated accounts.

Specific protection rules have been provided with respect to the control of contracts and financial transactions between the companies members of the Group.

In this respect, section 475 of the CCC provides that since two companies or more which are members of a Group of companies and have the same directors, contracts made between the parent company and one of the subsidiaries or between companies members of the same Group are submitted to specific control rules, pursuant to which these contracts should be approved by the general meeting of each involved company on the basis of a special auditor's report.

Nevertheless, specific control is not required in the event the contract relates to a common transaction made under normal terms and conditions.

Section 474 of the CCC also provides that financial transactions between companies members of the Group which have direct or indirect capital equity interest are valid, provided that one of these companies has control over the others by holding more than 50% share capital.

Pursuant to section 474 of the CCC, financial transactions are: borrowing and debt financing of any nature whatsoever and whatever their duration is.

This provision is an exception to the monopoly of the financial institutions provided by the Act n° 2001-65 of 10 July 2001, governing banking institutions.

Finally and as a measure of protection of the minority shareholders, section 477 of the CCC provides that the shareholders holding at least 10% equity interest in a company member of a Group are entitled to bring a claim before courts against the majority shareholders of the parent company in the event a decision has been taken against the company interests to the benefit of the majority and to the detriment of the minority's legitimate rights.

## **COMPETITION LAW**

The Competition and Pricing Act 1991, which has already been modified and supplemented, was amended yet again by Act No. 2003-74 of 11 November 2003 (the "Act"). The purpose of the Act is to provide additional protection for end consumers through a more detailed definition of price advertising, to establish increased control over compliance with the rules of free competition by creating and extending certain offences, increasing the powers of the authorities and democratising the judicial role of the Competition Council.

### **Changes to the rules on price advertising**

Although the previous system imposed a duty on all sellers to inform consumers about prices, there was no real definition of this duty. The new Act stipulates that the advertised price is the price in cash, inclusive of all taxes.

Price displays will now be regulated, as appropriate, for each business sector by order issued by the Minister of Commerce.

Also, consumer associations are no longer required to be licensed before they are entitled to apply to the Competition Council for a ruling or to file a complaint. They now only need to be legally established.

The Act has created new offences to regulate market rules and competition.

For example, the Act has created two new offences to supplement the offence of "selling at a loss" which was already outlawed under previous legislation. These are "offering for sale at a loss" and "advertising a sale at a loss".

Sale at a loss has been redefined as "the sale of any product, as it stands, at a price less than its effective purchase price". The effective purchase price is "the unit price stated on the invoice, less any trade discounts featured on the same invoice, plus any taxes and duties chargeable on the product on sale and, if appropriate, transport costs".

These offences are punishable by a fine of between 200 and 20,000 dinars.

"Tied" sales are also unlawful. This practice is now an offence punishable, in the same way as "refusal to sell" and "selling products of unknown origin", by a fine of between 50 and 5,000 dinars.

Finally, any practice likely to increase or decrease the price of goods or influence normal price levels, such as "possessing abnormal quantities of stock", "concluding commercial transactions by fraudulent means",

"speculation", "being in possession of goods outside the scope of a declared business", will now be punishable by a fine of between 50 and 5,000 dinars. The goods involved in committing the offence will also be confiscated.

### **Extension of the powers of the authorities**

Officers investigating offences are now entitled, in addition to their existing powers, to consult and obtain any documents and information that they require, without opposition on grounds of trade secrecy or privacy, from Government departments, public corporations and local authorities, pursuant to a written request from the Minister of Commerce, limited only by confidentiality and information protection rules expressed in special legislation.

If an offence has been committed likely to impact strongly on the minds of end consumers, such as "advertising a sale at a loss", the relevant authorities and, in this instance, the Minister of Commerce, may issue an interim protective order suspending the advertising for one month. Such action, that may be classified as an emergency measure, is a real "safety rail" which proves the strong desire of the Tunisian Government to modernise market rules.

### **Democratisation of the judicial role of the Competition Council**

All rulings and decisions of the Competition Council are now issued in "open court", granting the public easier access to legal information.

Before the Act came into force, Competition Council decisions could only be set aside on grounds of an error of law or procedure on appeal to the Administrative Court.

The new system allows a right of appeal to the Administrative Court against all Competition Council decisions and also provides that only decisions that are not endorsed with a writ of execution by the President of the Council, or, according to the circumstances, by one of the Vice-Presidents, will not be subject to appeal.

## **IN BRIEF**

### **Public Law: expropriation by reason of public utility**

The eagerly awaited reform of the legislation on expropriation by reason of public utility became effective on 14 April 2003. The main purpose of this reform was to increase protection of the right of ownership and to implement a legal framework ensuring that expropriation procedures operate in the shortest possible time and with the greatest possible efficiency.

For the first time, the Act expressly provides that expropriation is **an exceptional measure** which Government may only rely upon once it has exhausted all other mediation and amicable settlement procedures.

To protect owners, the Act allows them to consult a provisional expropriation plan before the expropriation becomes effective.

The Act further also provides for the creation of special regional commissions to rule on the value of expropriated property and, accordingly, the compensation payable to owners and the criteria for calculating compensation on expropriation have been modified to take into account utility and how attached the owner is to his property.

Compensation is payable in all cases to property owners. The Government can no longer claim that it is implementing urgent measures to avoid payment.

The reform also provides that all applications contesting expropriation fall within the jurisdiction of the judicial courts except those actions claiming that a Government authority has acted *ultra vires* which remain within the jurisdiction of the administrative courts.

### **Banking Law: widening the scope of banking business**

The Act of 1 April 2002 (the "Act") introduced a bancassurance<sup>1</sup> system allowing banks to sign insurance contracts in the name and on behalf of one or more insurance companies.

However, such a system could only operate once a master agreement, previously approved by the Minister of Finance, was signed by the insurance associations and the banks.

Such a master agreement was signed on 18 November 2003 by the Tunisian Association of Insurance Companies and the Bankers' Association. In effect, this agreement is the legal instrument which implements the provisions of the Act and the banks can now effectively begin selling insurance products.

So far, the banks are only entitled to sell life assurance, agricultural and export insurance policies but this is merely the first stage of the system.

### **Company Law: contracts relating to a business**

The Tunisian Commercial Code has been supplemented by Act No. 2003/31 of 28 April 2003, requiring more formal drafting for contracts relating to a business.

Henceforth, these contracts will only be valid if they are drafted by a practicing lawyer (who is not longer in articles or preliminary training) with the exception of contracts with the State, local authorities and public administrative institutions, together with releases of any security interests and contracts required by law to be evidenced in the form of a registered deed.

Moreover, the Act provides inserting in the contract the essential information.

The draftsman will be liable to the parties and to third parties.

It should be mentioned that the Act does not make any provision for contracts concerning a business signed prior to its effective date. This leads us to suppose that prior contracts do not need to be amended to bring them in line with the new legislation.

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<sup>1</sup> The distribution of "turnkey" insurance products by banks.

# TURKEY

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## **FOREIGN INVESTMENTS: new legislation, further relaxation of the rules**

Turkey has for a long time offered a stable and secure legal framework for foreign investments based on longstanding legislation: Act No. 6224 of 18 January 1954. However, these rules have not been liberalised further unlike the legislation of neighbouring countries. To rectify this disincentive, the Turkish Parliament passed a new Foreign Investments Act, No. 4875, on 5 June 2003.

The new Act reiterates the basic principles already in force under the old law (i.e. unrestricted repatriation of profits, non-discrimination, etc.) and simplifies the law significantly. The main innovation is that transactions that previously required the approval of the authorities (e.g. company incorporations, company acquisitions, changes in the ownership of share capital) now no longer require prior authorisation. Also, the US\$ 50,000 minimum investment for each foreign investor has been repealed.

In addition, contributions to capital in kind no longer require a valuation by the Directorate General for Foreign Investments (DGFI). Their value is assessed according to the general law (i.e. an asset value assessor appointed by the commercial court).

The following table offers a comparative summary of the new rules:

<b>Operation</b>	<b>Old law</b>	<b>New rules</b>
<b>Incorporation of Turkish companies by foreigners</b>	Authorisation by the DGFI in Ankara	Unrestricted (subject to the same conditions as companies with Turkish-owned capital)
<b>Opening representative offices</b>	Authorisation by the DGFI	No change
<b>Forms of corporate entity accessible to foreigners</b>	Limited companies - Sirketi / Public limited companies - Anonim Sirketi / Branches	No express restriction (public limited companies, limited partnerships, partnerships, ...)
<b>Obligation to have a Turkish business partner</b>	None (other than special cases)	No change
<b>Capital minimum</b>	US\$ 50,000	General law: - Ltd. - TRL 5 million Plc. - TRL 50 million
<b>Valuation of contributions to capital in kind by foreigners</b>	By experts appointed by the DGFI	Subject to the same conditions as Turkish nationals
<b>Change in the equity interest of a foreigner (i.e. on an increase in share capital)</b>	Authorisation by the DGFI	Unrestricted
<b>Sale of shares between a foreign shareholder and a Turkish national</b>	Authorisation by the DGFI + (theoretical) audit of the sale price	Unrestricted
<b>Sale of shares between foreigners</b>	Unrestricted with a duty to notify the DGFI "after the fact"	Unrestricted
<b>Repatriation of profits</b>	Unrestricted (subject to payment of corporate income tax)	No change
<b>Purchase of real property by Turkish corporate entities with foreign-owned capital</b>	Subject to the same conditions as nationals	No change
<b>Purchase of real property by non-citizens</b>	Subject to restrictions	No change
<b>Right to refer a dispute to arbitration</b>	No restrictions (even when it involves the State)	No change
<b>Entering into licensing, technical assistance and know-assignment agreements between a Turkish corporate entity and a foreign corporate entity</b>	Authorisation by the DGFI - audit for tax purposes (transfer pricing)	Unrestricted - rules concerning transfer pricing are still in force
<b>Duty to notify</b>	System of prior approval by the DGFI	Notification "after the fact" / to be defined by implementing government order

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