CORPORATE
ALGERIA

Setting the scene

The North African nation is relaxing its legal framework to encourage foreign companies to invest in its economy

1 MINUTE READ

Algeria recently adopted a new investment law to attract foreign direct investments and stimulate growth. No specific sectors are closed to foreign investors.

Under the so-called 49/51 rule, foreign investors must find Algerian partner(s) to set up a joint venture that will carry the project. Foreign investors may be entrusted with the executive management of the company.

In addition, various contract-based mechanisms are in place to mitigate the effects of the minority in shareholders' assemblies. No flexibility is possible to increase the financial rights of the foreign investor.

The new legal framework for investment also provides for a generous investment incentive regime.

Africa is, for the first time, among the priorities of the G20 summit which was held in Hamburg in July 2017. Algeria is a perfect starting point for foreign investors considering an investment in Africa: large hydrocarbon reserves, political stability, and a strong desire to stimulate the private sector growth and attract foreign investment.

The Algerian government has made significant efforts to implement measures promoting the development of the private sector and attract more investment, through improvements to the regulatory, institutional and administrative environments. The north African country has recently revised its investment law to create a sound regulatory framework for investment and improve its attractiveness.

The reform of the legal framework for investments initiated in 2016 was carried out in three phases:

- At the beginning of 2016, the finance law for 2016 reproduced some provisions of Ordinance no. 01-03 regarding the development of investment dated August 20 2001, such as the so-called 49/51 rule, and modified some existing rules, including the relaxation of the law concerning the obligation to resort to local financing.
- During the summer 2016, Law no. 16-09 on the promotion of investment dated August 3 2016 (the Investment Law) repealed Ordinance 01-03, save for certain provisions. Certain of its principles, which were not applied in practice, disappeared (such as the requirement that foreign investments should generate a foreign currency surplus for the benefit of Algeria during the entire tenor of the relevant project).
- Implementing decrees were published in March 2017.

It is also worth noting that over 60% of total foreign direct investment positions in the Middle East and North Africa region originate from the European Union, Asia and North America. Gulf Cooperation Council countries are the second major source of investment in the region.

A few key aspects of the Algerian reform need to be discussed, with a view to better understanding the overall legal framework for investment and the regulatory reforms introduced to improve the business climate in Algeria.

Main entry regulations and approval procedures applicable to foreign investments and existing mitigation remedies

The Investment Law applies to both national and foreign investments in the economic activities of production of goods and services. No specific sectors are closed to foreign investors.

But a number of activities, goods and services are excluded from the scope of the investment incentives regime: these include import activities, retail and wholesale trade, or products like grey cement.

Interestingly, the Investment Law sets forth that foreign investments only need to be submitted to registration with the National Agency of Investment Development (Andi) when tax exemptions and other benefits are sought. Prior authorisation from the National Council for Investment (CNI) is no longer required although it remains mandatory to benefit from the investment incentives regime when the relevant investment is at least DZD5 billion ($45.3 million) or over.

The 49/51 rule is still viewed by certain potential investors as a disincentive to investment, especially where SMEs are involved

Prior to examining the changes to be expected when a company's shareholding is owned, in full or in part, by foreigners, it is useful to explore the basic way foreign investors usually structure their investments in Algeria.

Firstly, foreign investors must find one or more Algerian partners to set up a joint venture that will carry the project in question. The exercise by foreign investors of activities in the sectors of production of goods and services and imports can only be conducted through a company in which 51% of the share capital is held by one or several Algerian national resident(s) (the 49/51 rule).

There are, however, various means of overcoming the limitations of the 49/51 rule. In particular, a foreign investor may be entrusted with the executive management of the company, or hold a majority within its administration and management bodies. Various contract-based mechanisms are also in place to mitigate the effects of the minority in shareholders' assemblies.

The underlying idea of this flexibility is that the main purpose of the 49/51 rule was to limit the flow of dividends outside Algeria. For this reason, no flexibility is possible to increase the foreign investor's financial rights.

Foreign investors also enjoy great flexibility when choosing their investment vehicle. There are two main corporate forms available in Algeria to create a joint venture:

- a joint-stock company (*société par actions*) which may be managed either by a board of directors, headed by a chairman (single management), or by a management board and a supervisory board (dual management); or
- a limited liability company (*société à responsabilité limitée*).

In both cases, shareholders' liability is limited to their contribution to the share capital (except in very specific cases).

Practice shows that the single management joint-stock company is the most widely used corporate form to set up a joint venture in Algeria.

Additionally, with regard to the economic environment, where the public sector plays a key role, the major M&A transactions and partnerships in the Algerian market over the past 10 years were concluded with state-owned entities as Algerian partners.

Entering into a joint venture with a majority holding state-owned company would result in an economic state-owned company, the consequences of which when it comes to the liability of its executives should not be overlooked and be examined closely.

What is changing for companies with foreign ownership?

Foreign investors will have to pay particular attention to the transfer, either direct or indirect, of the shares they own in the Algerian joint venture as well as to the financing of such a company.

The first point to note is the Algerian state pre-emption right whereby the government benefits from a pre-emption right over any sale of shares by or to a foreign investor. However, the Investment Law remains silent on the way this right can be implemented and refers to further regulations that are still to be adopted.

Since 2009, when it was originally introduced in Algeria, the state pre-emption right has been exercised only once, in a very specific context, and the parties had the opportunity to discuss and agree on a price equal to the fair market value through an independent assessment.

Indirect transfers of shares might be subject to the Algerian state right to repurchase.

Its right to repurchase the shares of an Algerian company may be triggered when 10% or more of the shares of a foreign parent company (or ultimate shareholders), holding shares in the Algerian company, are sold outside of Algeria. This indirect sale of the Algerian company falls within the supervision of the Algerian state only when the relevant Algerian company benefited from advantages and incentives granted by Andi.

It's worth noting here that financing necessary for the completion of foreign investments shall be raised on the local financial market, except for the constitutive share capital and for the completion of strategic investment subject to case-by-case approval by the government. Shareholders' loans granted by foreign shareholders of an Algerian company are allowed under certain conditions.

Guarantees available to foreign investors

An important question that frequently arises is how the repatriation of investment proceeds operates under Algerian law, and how it is effectively implemented in practice.

The Investment Law expressly provides in favour of foreign investors for the transfer guarantee of dividends and investment proceeds, although these are now subject to eligibility thresholds (calculated on the basis of the foreign shareholding's share in the total cost of the investment).

As a reminder, the transfer guarantee is the right for any foreign investor to transfer in foreign currency the dividends and other revenues resulting from their investment (subject to certain conditions being met).

Practice shows that, in the vast majority of cases, foreign investors are able to transfer in foreign currencies the dividends and other revenues distributed by their Algerian subsidiary. This is however subject to a cumbersome administrative process with local banks, in particular for the first transfer.

The Investment Law also provides for traditional guarantees that are usually granted under bilateral investment treaties. Algeria has entered into bilateral treaties on investment protection with numerous countries including France, Germany, Switzerland, Italy and the UAE.

The Investment Law grants a certain number of guarantees to foreign investors, such as:

- *Fair and equitable compensation for expropriation*: investments carried out under the Investment Law may not, except in limited cases, be subject to requisition by administrative means, and the requisition and expropriation give rise to a fair and equitable compensation.
- *Fair and equitable treatment of foreign investments*: foreign natural and legal persons receive a fair and equitable treatment regarding the rights and obligations resulting from their investment.
- *Intangibility of the Investment Law*: the effects of revisions or repeals, likely to intervene in future, do not apply to investments performed under the Investment Law, unless expressly requested by the investor.
- *Dispute resolution*: the competence of the Algerian courts has been affirmed in the event of disputes between foreign investors and the Algerian state, except where bilateral or multilateral conventions or an agreement between the parties (including an arbitration clause) are in place.

Practice shows that the single management joint-stock company is the most widely used corporate form to set up joint ventures in Algeria

Finally, and although this is generally not considered good practice to attract foreign investors, because of the cost to the host state, the Investment Law provides for a generous investment incentive regime.

It provides for an incentive scheme organised around three levels of advantages: (i) advantages that are common to all eligible investments; (ii) additional advantages for privileged activities and/or employment-generating activities; and (iii) exceptional advantages for projects presenting a special interest for the national economy. There are specific tax incentive regimes regarding, notably, assembly activities or certain activities relating to specific industrial domains including iron, steel, and metallurgical activities or advanced technologies.

In terms of eligibility to the advantages, any investment registered with Andi and not included in the lists of activities excluded from all advantages (so-called negative lists) automatically benefits from the general advantages provided for by the Investment Law, except in specific cases.

Remaining challenges

Past practice suggests that a certain number of measures may be taken to clarify and ease the application of the Investment Law, such as:

- publishing all the texts implementing the Law to provide further clarity and visibility to potential investors; and
- the dissemination of investment guidelines which would facilitate the interpretation of the Law and other relevant regulations.

The 49/51 rule is still viewed by certain potential investors as a disincentive to investment, especially where small and medium enterprises (SMEs) are concerned. This is why possible progress could be to relax the rule by restricting its scope to strategic sectors and investments reaching a certain threshold, so as to exclude SMEs.

Contractual remedies to mitigate its effects might be easier to implement and to enforce by creating a new corporate vehicle such as the French simplified joint-stock company (*société par actions simplifiée*) whose organisation is freely defined by its shareholders.

It is interesting to note that the Algerian authorities demonstrated several times their will to promote the attractiveness of Algeria, in particular through the publication of the new Investment Law.

Needless to say, the improvement of the business climate does not only imply an improvement of the investment rules but also involves the development of other fields such as the promotion of fair and transparent competition.

In this sense, the Algerian Competition Council was reactivated in January 2013 following a freeze of its activities for almost 10 years. One of its main areas of work is the launch of a compliance programme to induce companies to voluntarily comply with the competition rules.

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