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Client Alert

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Algeria: A new set of laws in Algeria to attract foreign investors

In brief

Current global geopolitical changes have opened up new prospects for Algeria. On the one hand, Algeria is being courted by Europe and redoubling its efforts to increase its energy offering to reap record profit amid high gas prices. On the other hand, additional gas revenues offer opportunities for Algeria to develop the local industry in order to reduce its dependence on imports and fossil energy in the long term, and create jobs and technological partnerships. But can Algeria effectively create a competitive and business-friendly climate to attract foreign investors?

To restore the confidence of existing investors and attract new business in the country, a number of legal reforms have been launched. Investors have been promised tax incentives, legislative stability, transparency, guarantees for the transfer of funds and less bureaucracy. The Algerian government hopes that the new legislative framework will convince foreign investors to invest in Algeria.

Key legislative changes and sticking points are highlighted below.

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In depth

Removal of the 51/49% rule

The removal of the 51/49% rule (which required majority shareholding by Algerian national residents) by the Supplemental Finance Law for 2020, as amended ("**LFC 2020**"), brought new opportunities for foreign investors. However, certain activities in strategic sectors (pharmaceutical industry, energy and mining and transportation according to Executive Decree No. 21-145 of April 17, 2021), as well as the activity of importation of products and merchandise for resale "as is" (regardless of the sector) and activities in the defense sector continue to be subject to the 51/49% rule.

The LFC 2020 also repealed the pre-emption right of the Algerian state in case of transfer of shares or quotas by or to foreign investors, and the right of repurchase of the state in case of indirect transfer of more than 10% of an Algerian company having benefited from investment incentives. However, the same LFC 2020 introduced a prior authorization in case of transfer by a foreign shareholder of securities in a company, with an activity in the production of goods or services in one of the strategic sectors, to another foreign investor.

New Investment Law

To accompany the easing of the 51/49% rule, Algeria adopted new Investment Law No. 22-18 on 24 July 2022 (the "**Law**") replacing the prior 2016 investment law. The implementing regulations have recently been published in the Official Journal of 18 September 2022. The key features of the Law as implemented are summarized below. For the purpose of this article, we will focus on foreign investment.

- The Law applies to investments in economic activities of goods and services by individuals or legal entities, national or foreign, resident or non-resident.
- The Law states the principle of freedom to invest, transparency and equality in the processing of the applications.

- The newly created Algerian Agency for the Promotion of Investment ("**AAPI**") has been entrusted with an information, facilitation, promotion, assistance, incentives management and investment follow-up mission. It will do so through one-stop-windows at national and local levels. Any foreign investment (i.e. any investment whose share capital is owned in whole or in part by foreign individuals or legal entities) will be handled by the one-stop-window for major projects and foreign investment in Algiers.
- Investments declared or registered under the prior law will be managed by the AAPI pursuant to the prior laws and regulations. However, the former National Agency for Investment Development ("**ANDI**") will continue to operate in lieu of the AAPI during a transition period, which has not been defined by the regulations.
- The AAPI will host under the same roof representatives of the tax administration, customs administration, the national center of the commercial registry, the town planning services, bodies responsible for investment land, environmental services, labor and employment and the social security administration (CNAS and CASNOS). If needed, representatives of other administrations will be involved.
- Investment incentives are available during the realization and operation phases of the investment.
- The first step will be to register an eligible investment in person on behalf of the investing entity or through the digital platform of the AAPI prior to its realization. To this effect, the investor will need to submit:
  - an application form specifying the type of investment: i.e. creation, extension, structuring or delocalization. Structuring investments are those that meet the following criteria: at least 500 jobs and 10 billion (approximately USD 71 million) investment. The state may bear, in whole or in part, the cost of bringing utilities and roads up to the boundary of the perimeter of the structuring investment project.
  - a list of the goods and services which are directly used in the realization of the investment, using the form provided to that effect.
- Investment are classified in three categories:
  - the sector regime - investments in mining and quarrying, agriculture, aquaculture and fisheries, industry, food processing, pharmaceuticals and petrochemicals, services and tourism, new and renewable energies, and knowledge economy and information and communication technologies.
  - the zone regime - investment located in communes of wilayas of the Highlands, the South and the Deep South, which present a specific interest for the state and have potential natural resources to be developed.
  - the structuring investment regime - investments with a high potential for creating wealth and jobs, likely to increase the attractiveness of the territory and create a ripple effect on economic activity for sustainable development.
- A number of activities, goods and services have been designated as non-eligible for investment incentives except when the project is a structuring investment. These include in particular:
  - a long list of activities not eligible for the advantages of the zone regime
  - listed activities not eligible for the advantages of the sector regime
  - activities carried out under a tax regime other than the real tax regime
  - activities not subject to registration in the trade register
  - activities which by virtue of particular legislations are outside the scope of the Law or which otherwise benefit from tax benefits
  - goods which are not fixed assets, unless otherwise provided
  - listed fixed-assets
  - used goods, unless they are part of the in-kind contributions in the context of delocalization operation.
- During the realization phase, investments subject to the zone or sector regimes (in addition to any advantages provided for by ordinary law) and the structuring investment regime, may benefit from the following exemptions:
  - customs duties for imported goods directly involved in the realization of the investment

  - VAT for goods and services imported or acquired locally, directly involved in the realization of the investment
  - transfer duty and land registration tax for all real estate acquisitions made in the context of the relevant investment
  - registration fees payable for company incorporations and capital increases
  - registration duties, land registration tax and the state fee for concessions of built and unbuilt real estate intended for the implementation of investment projects
  - real estate tax on properties included in the scope of the investment for a period of ten (10) years of the date of acquisition.
- In order to benefit from the guarantee of transfer of the investment and its revenues, at least 25% of the investment will need to come from the foreign investor's own funds.
- Upon submittal of the duly completed forms and the payment of a processing fee of DZD 400,000 (approximately USD 2,840), the AAPI issues a certificate of registration of the eligible investment, which specifies the duration of the realization phase of the investment.
- It is possible to later modify the certificate, but any change of activity can only be modified during the realization phase of the investment and will trigger the restitution of the incentives granted for equipment used solely for the purpose of the initial activity.
- The transfer of the goods and services which benefited from the incentives requires the prior authorization of the AAPI if the goods have not been amortized. In such case, the incentives received must be reimbursed in proportion to the remaining amortization period. The transfer of the investment whose goods and services benefited from the incentives require the prior approval of the AAPI and a commitment from the transferee to comply with all of the obligations of the transferor.
- Investments subject to the sector regime must be completed within three years. The realization phase for investments under the zone or structuring investment regimes is five years. The initial duration of the realization phase can be extended by 12-month and, exceptionally, by an additional 12-month period if the investment indicates a sufficient progress rate and the investor has not started the partial operation of the project.
- Upon partial or total completion of the realization phase, the investor will file with the AAPI a request for issuance of a report on the start of operations. The report will confirm that the investor has a registered project and is compliant with its commitment to acquire goods and services to begin the operation of the investment. This report is required for all registered investments which requested the benefit of the incentives and will allow the AAPI to determine the incentives to be granted during the operation phase.
- Advantages available to qualifying investments during the operations phase are as follows:
  - exemption from corporate income tax (IBS)
  - exemption from the tax on professional activity (TAP).

  The duration of the advantage is three to five years for the sector regime and five to ten years for the zone or structuring investment regimes.
- Transparency requirements mean that incentives for the operation phase are now granted pursuant to a published evaluation grid, with defined objective criteria and weighting coefficients which vary depending on the investment regime. The evaluation criteria consists of:
  - the size of the investment
  - the amount of equity
  - the number of jobs created
  - the integration rate (ratio of the amount of goods and services of local origin).

  In addition, for investments belonging to the zone regime, the location of the project is the most important factor.

  For the "sector regime" and structuring investments, the technological contribution is a key criteria. The impact on the environment is also taken into account when reviewing structuring investments.

- Once the report of total entry in operation has been issued, the investor may register a new investment, as an extension of production capacity or the rehabilitation of existing investments, which have themselves already benefited from advantages.
- The Law sets up a specific judicial mechanism to protect investments. First, the withdrawal or the refusal to grant incentives and the refusal to issue the relevant decision or documents can be appealed in front of the newly created National High Commission of Appeals related to investments (*Haute commission nationale des recours liés à l'investissement*) following an unsuccessful claim in front of AAPI. The Commission comprises 10 minsters and is chaired by the Prime Minister. If the investor is not satisfied with the decision of the Commission, the investor may bring a legal claim in front of the competent jurisdictions.

While the Law and its implementing regulations have the merit of clarifying the investment incentive regime, there remains, in our view, a number of sticking points:

From an organizational and practical standpoint:

- The one-stop-window needs to be set up as a collaborative space where representatives from the various agencies actually work with each other to assist investors so that the AAPI is a real improvement from ANDI.
- The Law states that the AAPI must ensure that all procedures are dematerialized and all formalities can be completed online and that its platform is interconnected with those of the agencies or administration in charge of the act of investing. Unlike existing digital government platforms, the AAPI platform, as well as other agencies' digital platforms, will need to be readily accessible to foreign investors, with forms available in several languages, in particular English, and international payment capability.

From a company creation standpoint, more should be done to simplify the process:

- While the process to obtain incentives has been streamlined, the company creation process in itself will remain painfully slow unless real changes are made. The CNRC will be present at the one-stop-window but the separate Algerian notarization or bank account opening processes cannot be avoided and often delay projects.
- AAPI should effectively put in place a fast-track process to obtain the necessary licenses for regulated activities.

From an investment funding standpoint:

- The Law requires investors to put down at least 25% of the total value of the investment if they wish to obtain the guarantee of repatriation of their capital and investment revenues.
- While such guarantee is stated in the law, in practice, the transfer process (whether for proceeds on disposal, termination or liquidation of the company or for dividends and related revenues) can be a time-consuming and uncertain process, in particular for companies in the service sector.
- The Law does not address the issue of external funding. The Bank of Algeria reminded the banks and financial establishments on March 6, 2022 that, under the provisions of Article 108 of Law No. 19-14 of December 11, 2019 on the Finance Law for 2020, only strategic and structuring projects for the national economy are eligible for external financing from international financial development institutions, and this after the opinion of the competent authorities. The limited funding options to finance foreign investment projects beyond the investor's initial contribution in share capital will, in our view, complicate the implementation of the law and put off a number of potential foreign investors.

Law on Free Zones

Algeria also recently adopted Law No. 22-15 of 20 July 2022 which sets forth the rules applicable to free zones with the hope to attract, in particular, start-ups and exporting foreign entities.

Free zones are open to industrial and/or commercial activities and/or services and to residents and non-resident entities. They are created by executive decree taken on the proposal of the minister in charge of trade and/or the ministers concerned, which determines their geographical location, their delimitation, their surface and their consistency. The executive decree also determines its operation, its purpose and, where appropriate, the activities which may be carried out within their boundaries.

The operator in charge of the management of the free zone is subject to the legislation and regulations in the fields of customs, foreign exchange, environment, employment and social security.

However, the activities carried out in the free zone are exempt from all fiscal, para-fiscal and customs duties, taxes and levies, with the exception of (i) duties and taxes relating to private motor vehicles, with the exception of vehicles and motor vehicles linked to the operation; and (ii) contributions and payments to the Algerian social security system.

At the same time, the law includes mechanisms to keep permanent control over the flow of capital and foreign currency pursuant to Algeria's strict foreign exchange control rules, and limits the flow of goods into the Algerian territory to 20% of turnover. Operators located in a free zone may freely transfer goods acquired abroad or in Algeria among themselves.

For the recruitment of foreign personnel in the trade zone, the operator of the trade zone is used as an intermediary between the employer and the relevant service of the labor department. Foreign employees and their families are subject to the usual formalities for the stay of foreigners in Algeria. Free zone employer and employees, whether foreign or Algerian, may freely agree on the terms of their employment relationship. However, the obligation to contribute to social security and comply with social security law remains with respect to Algerian employees. Foreigners who choose to be affiliated to a foreign social security system, pursuant to a social security agreement concluded with Algeria, must provide a certificate evidencing such coverage to the competent social security office.

According to the free zone law, operators operating in the free zone benefit from the guarantees set forth in the treaties ratified by Algeria on reciprocal protection and guarantee of investments and on dispute settlement, as well as the legislation in force.

Amendment to the Commercial Code

The Commercial Code has been recently amended (Law 22-09 of 5 May 2022) to introduce the simplified joint stock company or SAS as a new corporate investment vehicle. The capital of the SAS is divided into shares and the company is created by partners who bear the losses up to their contributions.

Like its French counterpart, the SAS is characterized by the fact that it is instituted without the obligation of a minimum of partners or capital and that the terms and conditions of its organization and operation are established in its articles of association. The contributions can be in cash or in kind. If they invest in the capital of a SAS, investors receive equity securities issued by the company. They then participate in general meetings. Investors base their main remuneration on the capital gain they make when they sell their shares. Contributions in kind are authorized but are not included in the capital. They are made in exchange for non-transferable shares entitling them to a share in the profits, net assets and losses. The SAS cannot make a public offering or list its shares on the stock exchange. The SpA will need to be used for that purpose.

Unlike its French counterpart, the Algerian SAS is limited to "start-ups" and will, therefore, have a limited interest for foreign investors. Start-ups are defined as companies which have received a start-up certification from the national committee chaired by the minister in charge of start-ups or his representative. The certification is reserved to companies meeting the criteria set forth in Executive Decree No. 20-254 of 15 September 2020.

Start-ups have their own tax exemption regime (exemption from the tax on professional activities (TAP), tax on global revenue (IRG), corporate income tax (IBS), single flat rate tax (IFU) for a four year period with a possible one year extension. They are also exempt from VAT on equipment acquired for the realization of the investment project).

AfCFTA

The African Continental Free Trade Area agreement (AfCFTA), which aims to create a single market for goods and services in order to deepen the economic integration of Africa, entered into force on July 1, 2022 in Algeria. The implementation of AfCFTA could boost exportations of foreign multinationals based in Algeria.

Legislation in preparation

Additional reforms are in preparation to render the Algerian market more attractive to foreign investors. They include a draft public private partnership (PPP) law, which has been prepared by the government to implement Article 37 Law No. 18-15 concerning the finance laws, which expressly provides for the possibility that the state will use PPPs to finance, in full or in part, public investment projects. The new PPP law will serve as the backbone for the financing of a range of projects, in particular, large structuring projects such as photovoltaic plants, electric power plants, ports, highways, public transportation, agriculture, etc. but also, for instance, smaller projects with a specific educational, cultural or environmental purpose. The new law will regulate both public private partnerships and public service delegations (which were previously part the code of public tenders).

In addition to defining allowable project types, the PPP law and its implementing regulations will address issues such as project evaluation on the basis of feasibility studies, land concession awards, external financing, the deductibility of interest and other financial costs for loans contracted outside of Algeria, and the guarantee of transfer of the invested capital.

Conclusion

The new Investment law and other recent legislative initiatives are attractive on paper but their practical implementation may prove more arduous. In particular, it remains to be seen how the current obstacles concerning the transfer guarantee, the red tape for company formation, access to industrial land and external financing will be resolved to ease the investment process and attract foreign investors.

With thanks to Lamine Tabet - Partner at Cabinet Tabet - for his comments.

Celine was ranked by Chambers Global 2022 as one of the best foreign experts (corporate/ commercial) for Algeria - (Céline Van Zeebroeck, Global | Chambers Profiles)

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