Investment Law

Since the 2009 Complementary Finance Law (2009 CFL), Algerian foreign investment regulations provide:

- The limitation of foreign ownership to 49% in any investment. Foreign investors are obliged to create joint ventures in which Algerian partners hold the majority stake;
- The requirement that any foreign investment generate a positive foreign currency balance in Algeria's favour throughout its realisation, the idea being that only the projects for which the inflows of foreign currency exceed the outflows may be authorised to distribute dividends (it being provided that this obligation is expected to be abrogated in the new Investment Code to be adopted in 2016).

Retroactivity Of The Rule

The obligation for foreign investors to invest in partnerships with one or several Algerian shareholders, who must hold at least 51% of the share capital, was introduced by the 2009 CFL. While this obligation was clearly applicable to investments realised after the publication of the 2009 CFL, there were doubts as to its application to investments realised before then.

In practical terms, the question was whether companies incorporated before the 2009 CFL and fully owned by foreign shareholders had to bring themselves into compliance with the new 51:49 rule when modifying their trade register or upon a change in their capital ownership.

Clarification

This issue was clarified by the publication of the 2010 CFL (as subsequently modified, notably by the Finance Law of 2012). Pursuant to its Article 45, "Any modification of the trade register leads to the prior bringing into compliance of the company with the rules governing capital ownership." However, the following modifications are not subject to this obligation (which may be abrogated in 2016):

- Modifying the share capital (increase or decrease) without entailing a change in the proportions of allocation of the share capital as specified above;
- The transfer or exchange between former and new directors of guaranteed shares provided by Article 619 of the Commercial Code, provided that the value of those shares does not exceed 1% of the company's share capital;
- Either removing an activity or else adding a connected activity;
- Modifying an activity further to the modification of the activities' nomenclature;
- Appointing the director or the company's managers; and
- Changing the registered office. The National Business Registry (Centre National du Registre du Commerce, CNRC) has not issued a clear definition of connected activities. Yet on the basis of informal meetings held at the CNRC, it seems that connected activities are activities belonging to the same economic class or sector.

Pre-Emption Right Of The Algerian State

Undefined any sale of a stake in an Algerian company by or to a foreign shareholder requires, subject to nullity of the sale, the prior delivery of a certificate from the Ministry of Investment after deliberation by the State Shareholdings Council attesting to the waiver by the government of its pre-emption right.

However, the regulatory texts necessary for the implementation of the government's pre-emption right (pertaining notably to the form to be used by the notary to file the application for the delivery of such waiver certificates, the price at which the government could exercise its pre-emption right, etc) have not yet been enacted.

According to Article 57 of the Finance Law of 2014, the absence of an answer from the competent services at the Ministry of Investment within three months of the notary filing the application for the waiver certificate shall be deemed a waiver of the government's pre-emption right except when the transaction: (i) exceeds an amount defined by an order from the Ministry of Investment and (ii) concerns shares of a company carrying out any of the activities defined in an order.

The above order has not yet been enacted by the Ministry of Investment. Hence, there is uncertainty as regards the effect of receiving no reply from the Ministry of Investment following three months and whether this can be considered a waiver of the pre-emption right. In case of the exercise of the Algerian state's pre-emption right, the price at which it would be exercised is to be fixed through an expert valuation.

The modalities of such valuation are to be specified by a forthcoming regulation (as to the conditions for the performance of such expertise). It should be noted that, even when expressly waiving its right of pre-emption, the state retains the right to pre-empt for one year from the date of the tax registration of the transfer deed in the case of the price being insufficient. In such a case, the state could only buy the shares from the acquirer by paying the price paid by the latter, plus 10% (Article 38 quinquies of the Tax Procedures Code).

Repurchase Rights

The state has the right to purchase shares of an Algerian company in the event of a total or partial sale of its foreign parent company's shares. According to Article 47 of the 2010 CFL, any transfer of shares in a foreign firm holding shares in an Algerian company which has benefitted from advantages at the time of its establishment is subject to "governmental consultation", and gives rise to a "right to repurchase" by the government. This provision refers to a situation in which the shares of the parent company holding a stake in an Algerian company are sold. The shares of the underlying Algerian company are not the object of the transaction.

It should be highlighted that this "right to repurchase" by the state is limited to the shares of Algerian firms which have benefitted from advantages – which in the absence of further specifications, may include tax and Customs exemptions, or the granting of a land concession,

etc, by the current investment agency, the National Agency for Investment Development (Agence Nationale de Développement de l'Investissement, ANDI), or by the former investment agency, the Investment Promotion Agency.

The repurchase price shall be determined on the basis of an expert valuation in the same way as the state pre-emption right.

Undefined Consequences

Article 47 of the 2010 CFL does not specify any penalty for conducting transactions involving stakes in an Algerian firm's parent company that occur without any prior consultation with the government.

In this respect, the timeframe and process for "prior consultation with the Algerian government" are not indicated within the body of the law. It is worth noting that this obligation seems difficult to apply with respect to companies that have shares that are listed on the stock exchange.

Local Financing

According to Article 4 bis in paragraph seven of Ordinance No. 01-03 (resulting from the 2009 CFL), the financing that is necessary for the realisation of foreign investments shall be raised on the local financial market, except: (i) for the constitutive share capital or (ii) in particular circumstances. This obligation is expected to be abrogated in the new Investment Code.

Shareholders' loans granted by foreign partners of an Algerian company are possible on the condition that no remuneration is paid to the shareholder in this respect and to the extent the funds do not remain available to the company for more than three years. After three years, the balance of the shareholders' loans would have to be capitalised in the share capital of the company.

Shareholders

Article 48 of the 2010 CFL creates an obligation for foreign entities holding shares in companies set up in Algeria to annually provide a list of their shareholders which is certified by the body overseeing the trade register in their country of residence. Like Article 47 of the 2010 CFL, this provision does not contain any indication as to the penalty in the case of non-compliance. It is also silent as to the identity of the authority to which such notification should be made and the implementation modalities of such an obligation to listed companies. This provision appears as a means to ensure the enforcement of Article 47 of the 2010 CFL and to allow the authorities to carry out *ex post facto* checks of compliance with the obligations therein. However, this obligation is expected to be abrogated in the new Investment Code to be adopted in 2016.

Reinvestment

Article 142 of the Direct Tax Code, as modified by Article 5 of the Finance Law of 2014, provides that a company benefitting from exemptions or reductions granted during the exploitation period as a result of the ANDI regime must reinvest in Algeria the "part of profit that corresponds to these exemptions or reductions" within four years of the end of the fiscal year during which the favourable regime is applied.

This reinvestment may intervene: (i) either as per each fiscal year; or (ii) as per several consecutive fiscal years. In this case, the four-year period starts from the end of the first fiscal year. In the case of non-compliance, the company shall not only be made to repay the taxes from which it was exempted in application of the ANDI regime but also pay a penalty amounting to 30% of said taxes. Article 57 of the 2009 CFL, as modified by the Finance Law of 2013, also provides that foreign operators having a partnership with national companies are exempted from the reinvestment obligation when the advantages awarded to them have been reflected into the price of the final goods and services produced.

The companies concerned shall, to benefit from the dividends transfer, support their request with a certificate stating the amounts and the periods for the realisation of the said profit. However, this obligation is expected to be abrogated in 2016.

Representative Offices

The ministerial order defining the new regime applicable to the representative offices (*bureaux de liaison*) of foreign companies in Algeria was released in December 2015. There was a lot of expectation around this text, which aims to clarify the conditions under which representative offices can open and operate in Algeria. It confirms the temporary and the non-commercial nature of these representation structures of foreign companies, which are prohibited from performing any economic activities. The opening of a representative office remains subject to approval from the Ministry of Commerce, which has imposed stricter conditions:

- Payment of a registration duty of AD1.5m (€13,800), which was formerly AD100,000 (€920);
- Increase in the amount of blocked deposit during the existence of the liaison office from \$20,000 to \$30,000;
- Opening of a CEDAC bank account in the name of the liaison office, credited with at least \$5000. Approval is granted for two years by the Ministry of Commerce and is renewable. The order also specifies that no approval other than that delivered by the Ministry of Commerce can be granted to a representative office. Finally, consulting and Customs declarant companies are expressly excluded from the possibility of creating a representative office.

Public Procurement Contracts

A new Public Procurement Code (PPC) has been instituted by Presidential Decree No. 15-247 of September 16, 2015, which repealed the former PPC (Presidential Decree No.10-236 dated October 7, 2010 as modified). The new PPC came into force on December 21, 2015. As was

already the case under Decree No. 10-236, all procurement contracts entered into by state-owned companies are exempted from public procurement regulations.

According to Article 9 of Decree No. 15-247: “State-owned companies are not subject to the public procurement procedures”. However, state-owned companies are “required to draw up and to obtain the implementation, by their corporate bodies, of public procurement procedures, according to their specificities, complying with the principles of freedom of access to public sector contracts, equality of treatment of applicants and transparency of procedures”.

As a result, companies remain subject to the key principles of public procurement regulations as defined by Article 5 of Decree No. 15-247. As a consequence:

- State-owned companies are not subject to specific provisions of the PPC for their procurement contracts;
- State-owned companies shall, however, inevitably define and draw up their own public procurement regulations, with due regard to the general principles governing the regulation of public procurement contracts, namely transparency of procedures, equality of treatment of applicants and freedom of access to public sector contracts.
- Compliance with these principles by stateowned companies will be ensured by the joint external control of all state-owned companies, namely control by statutory auditors, the Court of Accounts and the General Inspectorate of Finance. Within this framework, state-owned companies are now free to define their own procurement regulations.

Preferential Margin Of Algerian Products & Services

The new PPC confirms the former provisions that were intended to favour Algerian bidders. Thus, Article 83 of Decree No. 15-247 provides for a preferential margin of 25% for products of Algerian origin and/or for enterprises organised under Algerian law in which resident nationals hold the majority of share capital.

The application modalities of this preference margin shall be stated in a ministerial order issued by the Ministry of Finance. Pursuant to Article 218 of Decree No.15-247, the implementing regulations of former PPC provisions that are included in the new PPC remain in force pending the publication of the implementing regulations of the new PPC. As a consequence, application modalities of this preferential margin – which applies at the financial offers valuation stage – continue to be governed by the order dated March 28, 2011, which stipulated the following:

- Relating to supply procurements, the 25% preference margin is granted to locally manufactured products upon receipt of a certificate of Algerian origin; and
- Relating to the procurements of services, the preference margin is granted to enterprises under Algerian law as well as to mixed groups (i.e. comprising both Algerian and foreign members) up to the limit of the part owned by the Algerian enterprise in the group.

International Tenders

According to Article 84 of the PPC, within the framework of international invitations to tender, the foreign tenderer can be obliged, within the framework of its response to the invitation to tender, to make a commitment to invest in Algeria.

For contracts submitted to the obligation of investment of the foreign tenderer, under the provisions of Article 84 paragraph one of Decree No. 15-247, the investment obligation does not apply to all international invitations to tender. Rather it applies only to those related to projects listed by a decision of the relevant authority. At this date, such investment obligation remains specified by an order issued by the Ministry of Finance and the Ministry of Industrial Development and Investment Promotion dated November 27, 2013, published in the *Journal Officiel* on April 9, 2014, laying down the modalities of application of the investment commitment for foreign tenderers.

Pursuant to this order, when a project is subject to the investment obligation, by decision of the competent authorities, the investment commitment provision shall be provided in the form of an invitation to tender. Thus, if the specifications of an invitation to tender do not expressly require a commitment, the foreign tenderer would not be subject to the obligation to invest. To date, no decision on this matter has been made by the relevant authorities, and there is still uncertainty regarding invitations to tender.

In this context, one could argue that in the absence of any decision by the relevant authority with regards to projects subject to the investment obligation, a foreign tenderer should not be obliged to undertake an investment commitment. It should be noted that contracts directly awarded (without call for tender) may not be subject to these provisions (Article 84 § 5 of Decree No. 15-247). Finally, this obligation seems to apply only to the foreign tenderer, and not to any Algerian tenderers that are held by foreign capital.

Investment In Partnership

Regarding the nature of the partnership, Decree No. 15-247 provides no definition. Nevertheless, the above order dated November 27, 2013 provides that such a partnership shall be implemented in accordance with the applicable laws and regulations.

Therefore, under the provisions that are of interest to foreign investors in Algeria – and in particular those relating to the 2009 and 2010 CFL – it could be argued that the notion of partnership targeted by these provisions should cover the creation of a joint venture between the foreign tenderer and one or more Algerian resident investors.

A simple conclusion of agreements with Algerian subcontractors thus cannot be deemed sufficient to meet the obligations included under these provisions. The above order has also specified that the call for tender file could provide a non-limited list of companies with which the foreign tenderer is likely to implement a partnership. Indeed, the foreign tenderer could communicate the name of the chosen Algerian partner after the notification of the public procurement contract.

Pursuant to Article 7 of the above order, the competent authorities could exempt from the investment commitment the foreign tenderer who has already realised an investment or has already committed to realising such an investment in accordance with the legal requirements.

Terms Of Investment

The investment commitment of the tenderer must be included in their offer and respect a strict model, as determined by the above order dated November 27, 2013.

Penalties For Non-Compliance

Non-compliance by the foreign tenderer with their investment obligation through a partnership is strictly penalised (Article 84 § 10 of Decree No. 15-247). Thus, if the successful tenderer does not realise its investment, or does not respect the timeline and the methodology set out by the call for tenders, the following penalties could be incurred:

- An application of penalties for delay after unsuccessful formal notice by the contracting service;
- Possibility of unilateral termination of the public procurement to the exclusive fault of the co-contracting party after agreement by the authorities; and/or
- Registration of the failing operator on the list of the economic operators forbidden to tender for procurement contracts.

Competition Law

The National Competition Council (Conseil National de la Concurrence, CNC) was officially set up in January 2013 and is an independent administrative authority intended – in accordance with Ordinance No. 03-03 dated July 19, 2003 – to observe, rule and sanction trade practices and the functioning of the Algerian market. Indeed, the CNC has elaborated its own general doctrine with regards to competition and market matters. It seems that the CNC currently cooperates with the French, Italian and German competition authorities in continuation of a cooperation programme financed by the European Commission, known as the Support Programme for the Association Agreement between Algeria and the EU. This programme, which lasted from January 2011 to December 2012, involved the future members of the CNC as the leader and principal partner, as well as its European partners. In this particular context, the CNC may be inspired by European competition regulations.

In other words, the CNC may establish a similar case law and accordingly suggest draft legislation to align Algerian law with European competition law. Until now, there has been no draft legislation that relates to the competition pending before parliament. However, the CNC is contemplating publishing rules that would clarify some of the procedural issues. The establishment of the CNC may therefore allow the government to strengthen its role as a strategic regulator. It is also worth noting that the government and the CNC both have regulatory powers in competition and market matters.