Armenia

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LAW AND POLICY

Policies and practices

1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

The government's policy towards foreign investors is very open: no pre-authorisation mechanisms in general are in place and there are no limitations with regards to the origin of the investor. Any person can establish a company without local representatives engaged. No local holding (except for some rare exceptions) or local director is required. Plus, no minimum charter capital requirements are in place and, in general, the incorporation process is simplified.

The principle incorporated in legal acts is that the legal regime governing foreign investments and the methods of their implementation in Armenia cannot be less favourable than the regime applied for local companies. Plus, to encourage foreign investments in the most significant fields of social and economic development, additional privileges for such investments may be established in a manner provided by the legislation of Armenia.

Moreover, current legislation makes it possible for foreign investors to choose the legislation applicable to its investment within five years from the day when the investment was made. Continuing the protection mechanism available for the investors, the possibility to apply to international tribunals due to the Armenia's membership to international bilateral and multilateral conventions (eg, ICSID) should be mentioned.

The main instrument to control currency relations is the Law on Currency Control and Currency Regulation, which allows the transactions between residents and non-residents to be both in local and foreign currency with the exceptions of contributions to statutory funds and share capital of legal entities which should be made in local currency.

Main laws

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals and investors on the basis of the national interest?

There is no particular legal act and legal procedure for assessing whether any type of foreign acquisition or investment may cause any threat to national interests. Thus, much depends on the sector as there are sectors where the applicable legislation requires the checking of the acquisition transaction or any types of investment considering some national interest issues as well. The following are the main legal acts that will regulate the relations arising during acquisitions and investments by foreign nationals and investors including the consideration of national interests:

- The Law on Foreign Investments is the main legal act in the sphere of foreign investments that defines foreign investor and investment and regulates the relations between foreign investors and the state.
- The Law on State Registration of Legal Entities, State Record-Registration of Separated Subdivisions and Institutions of Legal Persons and Individual Entrepreneurs will apply in the process of registration of legal entities if there are not other laws that regulate relations concerning a special type of legal entity. If a foreign entity becomes participant in an LLC, for instance, this law will be applicable when registering the change.
- The Law on Protection of Commercial Competition regulates relations arising in the sphere of commercial competition starting from defining the prohibited actions till the sanctions for conducting prohibited activities.
- The Tax Code is the main legal act defining the existing tax types, regulating tax regimes and such like.
- Also, there are series of sectoral laws where there are references into more specific issues regulating, inter alia, the acquisition and investment relations in that field. These include the Law on Energy, the Law on TV and Radio, the Code on Subsoil and the Law on Electronic Communications.

Scope of application

3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

Existing settings offer two main modes of implementation: either a new company is created or the shares of an existing local company are acquired where, along with different steps, legal due diligence is conducted.

The Law on Foreign Investments gives a broad definition for foreign investments (see question 4) that actually makes it possible for any type of activity and transaction fall under that definition provided that given criteria are met. Thus, the Law on Foreign Investments does not envisage any specific limitations to transactions of acquisition of shares and assets. However, provided that in a given case, the foreign entity fails to prove, for instance, existence of the objective to gain profit, the entity will not qualify as a foreign investor and will not be entitled to claim the rights stipulated in that law.

The Law on State Registration of Legal Entities, State Record-Registration of Separated Subdivisions and Institutions of Legal Persons and Individual Entrepreneurs applies only to cases where the investments are made through incorporation, mergers or acquisitions and its application will be made together with laws that regulate relations concerning special types of companies. In practice, two types of entities are incorporated for conducting commercial activity: LLCs

and JSCs, and the logic in both laws is that the minority shareholders are protected.However, the protection mechanisms are still subject to improvement.

The Law on Protection of Commercial Competition must be considered prior to concluding the transaction: in particular, the law gives certain grounds based on which concentration occurs as a result of the transaction. Mergers, acquisitions, acquisitions of assets, shares and finally any transaction that may have direct or indirect impact on the other person conducting commercial activity may be qualified as concentration, provided that certain grounds determined under the said law exist.

The Tax Code is the source to consider for any kind of tax issues. It prescribes the principles of the tax system of Armenia, the concepts of tax and fee, the types thereof, the scope of taxpayers, tax rates, the procedure and terms of tax calculation, payment, and, in cases prescribed by the Code, levying tax liabilities, as well as defining the principles of tax benefits, among others.

Also, in certain legal acts, we may come across narrower definitions or certain restrictions. For instance, at the time of establishing TV and radio companies or after that, the amount of foreign capital should not be equal to or exceed the amount of the capital that provides the result of the decisions. However, this is a rare regulation and there are not many restrictions applicable, particularly for foreign investments. Another example is the Land Code. This stipulates a limitation concerning the right to land, where, in particular, the right of non-citizens is restricted. The presumption is that non-citizens may not receive property title on the land with the exception provided by law. However, this rule will not prevent acquisition by a local entity with foreign participants receiving the title.

Definitions

4 How is a foreign investor or foreign investment defined in the applicable law?

Foreign investor shall mean any foreign state, foreign legal entity, foreign citizen, stateless person, citizen of Armenia permanently residing out of the territory of Armenia, as well as any international organisation that engages, in accordance with the legislation of the country of its location, in investment in Armenia.

Foreign investment shall mean any type of property, including financial resources and intellectual values, which is being directly invested by a foreign investor in commercial and other activities implemented in Armenia to gain profit (revenue) or to achieve any other beneficial result.

Special rules for SOEs and SWFs

5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

In the legislation, there is no special definition for SOEs or SWFs. However, the current regulations foresee no restrictions to have a legal entity with full foreign state participation or a to create a fund that would correspond to sovereign wealth funds as they are accepted in other jurisdictions.

Relevant authorities

6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

There is no special national interest screening mechanism in Armenia, thus there is not an authority that reviews mergers or acquisitions on national interest grounds. The general rule is the review of the transaction in terms of lawfulness and compliance with legislation. Accordingly, in the process of allowing or rejecting mergers or acquisitions such grounds may be considered only by those bodies that are authorised by force of a sectorial law. Pursuant to the Law on Foreign Investments, implementation of the establishment forms of foreign investments may be prohibited or limited only in a manner provided by legislation of Armenia. Relevant regulations that control the foreign participation may be found in particular laws. For Instance, the share of foreign capital upon or after the establishment of television and radio companies shall not be equal to or greater than 50 per cent of the shares required for the decision-making of the broadcasting organisation. Larger shares may be provided by international treaties. This provision will be applied by the commission of TV and radio in the process of licensing television and radio companies.

The role of the tax authorities should be emphasised, as no matter where the activity is carried out, the tax authorities can exercise some control – both at the initial stage when the company is registered as a taxpayer or during its ongoing tax audits.

Other competent authorities are the Public Services Regulatory Commission (PSRC) in the sphere of public services such as post, electricity, water supply and such like; the Ministry of Environment in the sphere of subsoil; and the Central Bank in the sphere of mergers or acquisitions in the financial sphere, among others.

National interest

7 Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

There is an open and liberal approach towards foreign investors adopted both in legislation and in the practice of authorities. The constitutional principle allows the state and self-government bodies to perform only such actions for which they are authorised under the Constitution or other laws. More direct regulation of discretion is determined in the law on fundamentals of administrative action and administrative proceedings, according to which any authority exercising discretionary power shall be guided by the need of protection of human and citizen's rights and freedoms enshrined in the Constitution, by principles of their equal rights, proportionality of carrying out administrative action and prohibition of arbitrariness, as well as to pursue other goals envisaged by law.

In some areas, the authorities will not have much discretion and are directly bound to take certain protective actions and misconduct of which may result in criminal liability. This applies mainly to the sphere of terrorism financing and money laundering where the applicable law determines the transactions are subject to mandatory notification: non-cash transactions exceeding 20 million drams and cash transactions exceeding 5 million drams.

PROCEDURE

Jurisdictional thresholds

8 What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

The investment's definition in the Law on Foreign Investments includes any type of investment not prohibited in the territory of Armenia (see question 4) and where no special procedure for getting the title of investor or investment is foreseen. However, there may be a procedure in certain sectors through which authorities may give their consent to an investment project, get the official title of foreign investor and seek some privileges. For instance, there is a procedure where investment projects in the energy sector are accorded with authorities with the aim of including in the future those investments in the calculation of tariffs

of the licensed entity. Within the meaning of this procedure, investments should be made to add or replace assets useful and used for licensing activities and should be aimed at solving one of the problems specified such as increase of production capacity, improving the service provision quality, increasing the level of security and reliability, among others.

For some types of investment projects, their approval will lead to other legal advantages, such as being donated land from government or local self-governmental bodies as land may be provided for social or charitable or investment projects approved by the government of Armenia. The relevant government decision and the donation agreement should set out the purpose and conditions of the land use.

National interest clearance

9 | What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees? Is filing mandatory?

There is no special procedure for assessing the rejection on grounds on national interests. Thus, no special filing is required. However, the absence of such regulation by law should not be viewed as a legislation gap or flaw, but rather an approach designed to make the investment environment more attractive

Securing approval

10 | Which party is responsible for securing approval?

Not relevant.

Review process

11 | How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

Not relevant.

Clearance penalties

12 | Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

Not relevant.

Involvement of authorities

13 | Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

Neither the general regulatory legal acts nor the sectorial laws provide a requirement to obtain guidance from authorities. Though, in practice, it appears to be possible to have preliminary discussions with some state bodies, in most cases, investors get acquainted with the existing legislation, its application practice by their own means, especially in cooperation with private law consulting companies that conduct a due diligence in the respective sphere.

Facilitating clearance

14 | When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

No special procedures are in place for clearance. Consequently, procedures for support for the review of a transaction are not determined, investors mainly cooperate with private law form to acquire the necessary information. As a general support tool to investors, the government has implemented the forum of Business Armenia (www.businessarmenia.am), which aims to promote cooperation between public authorities and entrepreneurs (PPP), implements joint projects, supports foreign investments and provides post-investment services.

Post-closing powers

15 | What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to pre-merger review?

As discussed herein, there are a number of cases when a pre-closing approval from relevant authorities is necessary. The authorities within their competences are entitled to check whether the relevant requirements have been duly complied with and, subsequently, apply relevant tools in order to eliminate the consequences of unlawful conduct.

To take a step back, there are a number of instances where the legislation envisages pre-closing requirements (both generally acceptable to all kinds of transactions and sector-specific requirements).

Such requirements are defined under the Law on Protection of Commercial Competition. Particularly, prior to concluding a transaction, the parties shall evaluate whether their transaction constitutes a 'concentration' in the meaning of the said law. If grounds for concentration are available, relevant application shall be filed with the State Commission of Economic Competition and the transaction shall be concluded only after the consent of this authority has been obtained.

In the meantime, when these requirements have not been complied with, the State Commission of Economic Competition may impose a fine for the conduct of prohibited concentration, which will be 10 per cent of the revenue of the entity for the year preceding the unlawful conduct. If the entity has carried out its activities for a period less than 12 months, the amount of the penalty shall be in the amount of up to 10 per cent of the proceeds for the preceding period. If the entities have failed to declare the concentration, the applicable penalty may be up to 5 million drams.

Subsequently, as indicated above, there are sector-specific pre-closing requirements.

The Subsoil Code envisages limitations to the transfer of subsoil use rights. Particularly, an application to the relevant authority shall be made in order to receive consent to finalise the transaction. If these requirements have not been complied with, the relevant authorities may seek declaration of the unlawful transaction as null and void in judicial manner.

Furthermore, such pre-closing limitations are determined in the energy sector as well. The Law on Energy envisages that prior to conclusion of the transaction, which deems alienation or pledge of the shares of licensed entity, the prior consent of the PSRC shall be obtained. Failure to comply with this requirement, or the requirements set forth by the PSRC, may result in the imposition of penalties. Moreover, the PSRC may seek declaration of the unlawful transaction as null and void in judicial manner.

The Law on Electronic Communications also determines certain pre-closing limitations. The law obliges the person who wishes to provide public electronic communications services, with the exception

of services that require the possession and operation of an electronic communications network, to notify the regulator in writing of the activity.

Where, after notice and hearing, the regulator finds that a legal person licensee has failed to comply with any of the provisions of the law, the regulator shall be authorised to order the breeching licensee to pay a penalty of at least 2 million drams, but not more than 4 million drams. Where the regulator finds that such violation has been committed with the licensee's knowledge or intentionally, or where the violation has been committed more than once within one year, it may order the offending licensee to pay an additional fine or penalty of 4 million drams.

SUBSTANTIVE ASSESSMENT

Substantive test

16 | What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

No substantive general test for clearance is in place. A sectorial test is implemented in the Law on Combating Money Laundering and Terrorism Financing, where defined suspicious transactions and transactions subject to mandatory notification and reporting entities (defined by law) are obliged to review the transactions, and qualify them as suspicions, if it suspects or has reasonable grounds to suspect that the property involved in the transaction or business relationship has been obtained in an unlawful way or is related to terrorism, terrorist acts, terrorist or terrorist organisations or individual terrorists or those financing terrorism or has been used or intended to be used for terrorism or terrorist organisations or individual terrorists by those financing terrorism.

Consulting other countries

17 | To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

The boundaries of consultation and cooperation with foreign states is regulated through international bilateral and multilateral conventions and much will depend on both the sector and the certain state.

Taking the example of the Commission for the Protection of the Economic Competition, it has legal possibility to cooperate with state bodies and non-governmental organisations of Armenia and those of foreign states, as well as with international organisations, sign with them memoranda on matters falling within its competence, other agreements on cooperation, involve, where appropriate, specialists and experts from said bodies and organisations in the activities conducted by the Commission, provided that the heads of these bodies and organisations have given their consent in writing.

International cooperation is directly referred in the Law on Combating Money Laundering and Terrorism Financing, where the state, upon its own initiative or in case of request, the authorised body shall, based on the principle of reciprocity, exchange information (including the information constituting secrecy as prescribed by law) with foreign financial intelligence units, which ensure adequate confidentiality of information under the obligations deriving from bilateral agreements or from membership in international structures, and shall use such information only for the purposes of combating money laundering and terrorism financing

Other relevant parties

18 | What other parties may become involved in the review process? What rights and standing do complainants have?

As a principle, all governmental agencies and authorities cooperate in exercising their competencies and they may apply to each other to get the required information for their final decision with exceptions where such transfer of information is prohibited or may be accessible only for certain state authorities in certain procedures, for example, the case with commercial or banking secrets.

As for integration of consumers, they may apply to the state agencies to make complaints and initiate a review or another administrative procedure. In certain circumstances where the complaint appears to satisfy the requirements to initiate an administrative procedure, the complainants will have broad range of rights such as to be heard, to have access to the materials of the case, among others.

Prohibition and objections to transaction

19 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Where a transaction is subject to preliminary consent from a state authority, the latter may cease the registration of the rights arising from that transaction bringing reasoning on the legal regulations that would be eventually violated when authorising the transaction. The law on administrative offences gives a non-exhaustive list of administrative penalties, such as warning, fine and deprivation of a right, among others. Special instruments may be found in sectorial legislation. For instance, the Commission for the Protection of the Economic Competition may prohibit the concentration and if the concentration, subject to declaration, is made without applying for its approval, it may result in imposition of fine equal to US$10,000.

Mitigating arrangements

20 | Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings or agreeing to other mitigation arrangements?

The concept of settlement agreements is not in place in Armenia and there is no similar procedure allowing private companies to bargain the applicability of a regulation. However, most laws in force are flexible enough and allow the finding of a solution in a given situation, including with the assistance of specialists.

Challenge and appeal

21 | Can a negative decision be challenged or appealed?

In relations with state authorities, private entities may be protected from their unlawful activities though administrative or judicial appeal mechanisms. From 2005, the Law on Fundamentals of Administrative Action and Administrative Proceedings is in force regulating, inter alia, the appeal procedure. Moreover, as discussed in question 1, the adhesion to international conventions gives the possibility to have the dispute with state adjudicated in international tribunals.

Confidential information

22 | What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

Laws in force protect different types of confidential information (personal data, banking secrets, etc) and determine punitive measures for breach of such requirements in both general regulation and

sectorial legal acts. For instance, the Commission for the Protection of the Economic Competition, its members and its employees have the duty to keep commercial, bank or official information, which has been obtained while exercising powers, secret. They shouldn't divulge or otherwise disseminate, or use for personal mercenary purposes, any secret or official information obtained during the performance of their official duties. And damages caused to an economic entity shall be compensated from the budget funds of Armenia, in the manner prescribed by the legislation. Moreover, in certain circumstances prescribed by law, the unlawful publication or usage otherwise of banking, insurance and commercial secret may result in criminal liability as well.

However, the current practice of administrative authorities regarding the protection of confidential information may not be qualified as satisfactory and is subject to improvement.

RECENT CASES

Relevant recent case law

23 Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

Case No. 1

Factual circumstances

The case dates back to 2011-2012. One of the largest mining companies in Armenia was prosecuted for having cut numerous trees and shrubs while conducting an exploration permit for the mine site. The preliminary investigation body argued that despite the permission to search, the company did not have a logging permit and caused significant damage to the state and the community. Our company defended the case. The case study revealed that prior to the search warrant, the company was obliged to reforest for possible logging as a result of the search, and submitted a forest reclamation plan, which presumed to plant at least 10 times more trees than was possible during the search. The presented plan was approved by the Minister of Nature Protection in accordance with the law. The fact was that the company in all cases had no formal permit for logging.

Application of law

The assistance to the company relied on the Law on Fundamentals of Administrative Action and Administrative Proceedings, in particular the third paragraph of article 9 which provides: 'If the permissions granted by the administrative authorities in terms of content include other permits, they shall also be deemed to be granted'. Guided by our objections to this rule, we demonstrated that the minister approved the plan for reforestation for the purpose of possible logging during the course of the investigation, which, in essence, means the existence of a permit for logging. In the meantime, the exploration permit was granted after taking into account the company's commitment to the reforestation programme. As a result, this criminal case was terminated though application of the Law on Fundamentals of Administrative Action and Administrative Proceedings.

Case No. 2

Factual circumstances

The case dates back to 2015. Our client was a major extractor. The Ministry of Energy and Natural Resources, as a supervisory authority, conducted an inspection and recorded a violation of the conditions of use of the entrails in the inspection act. The alleged infringement consisted of extracting from other areas not determined in the Mining Act and contract without amending the mine operating licence. However, the company earlier requested to amend the former mining permit, Mining Act and contract, which the administrative body, the Ministry of Energy and Natural Resources, has not made a decision on.

The above facts and a copy of the application sent to the ministry were presented to the inspection body in an attempt to prove that the company had all necessary permits and that the amendments had been made by force of law. The inspection body didn't change its position and didn't consider the company's lawful claims.

Application of law

The company filed a complaint on behalf of the minister, as a superior body, with our primary focus on article 48 (a) of the Law on Fundamentals of Administrative Action and Administrative Proceedings, which stipulates:

> *In case of failure to adopt an administrative act by the administrative body competent to adopt such act within the time limit envisaged by law as a result of administrative proceedings initiated on the basis of application: . . . (a) the administrative act shall be deemed adopted and the applicant may commence the exercise of the relevant right.*

An administrative proceeding was initiated on the basis of this complaint and, by his order, the minister abolished the Inspection Act and the liabilities imposed on the company.

UPDATE AND TRENDS

Key developments of the past year

24 Are there any developments, emerging trends or hot topics in foreign investment review regulation in your jurisdiction? Are there any current proposed changes in the law or policy that will have an impact on foreign investment and national interest review?

No amendments to the main law on foreign investments are currently under discussion; nor is the adoption of a national review process proposed. However, on 30 May 2019, the Armenia Business Environment Improvement Action Plan for 2019 entered into force by a governmental decree. The Action Plan focuses on improvements in such spheres of legislation as incorporation of entities, construction permits, registration of property, tax issues and the energy sector, among others. For instance, aimed at the protection of minority shareholders, two main actions are envisaged:

- expanding the scope of corporate governance regulation, developing mechanisms for introducing corporate governance regulation in companies with dominant position; and
- a study of the squeeze-out mechanism and presentation of relevant draft legal acts regulation.

Case No. 3

In 2012-2014, within the scope of administrative case VD/8987/05/12, our firm represented a company operating in the mining industry. The case is noteworthy from the point of view of foreign investment, as the dispute concerned privileges established by tax legislation for a resident with foreign investment.

The tax commission of the State Revenue Committee under the Government of the Republic of Armenia conducted an inspection in the company and issued an administrative act, which, inter alia, obliged the company to pay additional withholding (corporate income tax) tax, in particular, stating that the company, operating at a loss, did not pay to the state budget the minimum amount of income tax in 2009.

The protection of the company was based on the Law on Withholding Tax in force at that time, as well as the Law on Fundamentals of Administrative Action and Administrative Proceedings.

The Law on Withholding Tax provided for a rule that if the total value of actual investment made by a foreign investor in a statutory capital of a resident (other than banks and credit organisations) after 1 January 1998 amounts to at least 500 million drams and the specified amount of investment a statutory resident capital expired (in this case) in 2007, then the amount of resident withholding tax is deducted to 100 per cent for 2008-2009. Hence the company had no obligation to pay the state budget the minimum amount of withholding tax for 2009. It is noteworthy that this circumstance had already been confirmed in another court judgment.

Based on the above, reference was also made to the Law on Fundamentals of Administrative Action and Administrative Proceedings, according to which the administrative body shall ensure comprehensive, complete and objective consideration of factual circumstances revealing all circumstances of the case, including those in favour of the participants of the proceedings, and those provisions of that law, by virtue of which the administrative act, issued based on the violation of the law, including the misinterpretation or misapplication of the law, does not lead to legal consequences.

As a result of the application of the above-discussed legislative regulations, the court issued a judgment in favour of the foreign investments. And although the court ruling was appealed to the Court of Appeal, it was not overturned and remained in force.

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