

ETHIOPIA'S NEW INVESTMENT FRAMEWORK – THE REGULATION

Ethiopia's new investment framework has been further updated with a detailed implementation regulation (the "**Investment Regulation**" or the "**Regulation**"), published on September 2, 2020, in the Negarit Gazette. It follows the launch of the new investment proclamation (the "**new investment law**" or "**IP**") earlier in 2020.¹

The Regulation, unlike in previous rounds of investment laws, is broad in scope and covers a number of issues previously treated at primary law level. Therefore, appraising the full potential impact of Ethiopia's new foreign investment framework requires an assessment of the Regulation, which is the subject of this briefing, prepared by **Anthony Giustini** and **Nadezhda Varbanova** (from Clifford Chance)² and **Tadesse Kiros** and **Habtamu Hailemeskel** (from Tadesse Kiros Law Office, Ethiopia).

FOREIGN INVESTMENT PURSUANT TO THE NEW FRAMEWORK: ELIGIBLE AREAS OF INVESTMENT

The new investment law defines a foreign investment as the expenditure of capital by a foreign investor for the purpose of establishing a new enterprise, or to acquire, expand or upgrade an existing one, in any eligible area of investment.

As we reported in our April 2020 briefing on the subject of Ethiopia's new investment law, the IP opens up the Ethiopian economy to further private sector investment. With respect to foreign investors in particular, the new investment law takes a more liberal approach compared to the previous law, by specifying that all sectors are open to foreign investors subject to certain restrictions/reservations to be specified by the Regulation (which may be revised by the Ethiopian Investment Board (the "**EIB**") on an ongoing basis).

Key issues

- Negative list for the areas of investment where 100% foreign capital is restricted or prohibited
- Procedural aspects in relation to investment permits and the acquisition or transfer of projects
- Further clarity on national content requirements
- Details on the scope and procedure for provision of one-stop services
- Certain investor-related matters expected to be dealt with in subsequent regulation or guidelines

¹ For an overview of certain aspects of the new law as may be relevant to foreign companies, please see our briefing "Ethiopia's New Investment Law – What does it mean for foreign investors?" from April 2020.

² With contribution from Francesco Pastro, a former intern at Clifford Chance Europe LLP.

In line with the new law, the Regulation now provides for a "negative" list comprising the following three investment areas which are reserved for (i) joint investment with the Government of Ethiopia (the "**Government**" and/or "**GOE**"), (ii) joint investment with domestic investors and (iii) domestic investors only (see list in Exhibit 1). All sectors and activities not mentioned in the list (other than the prospecting, exploration and development of minerals and petroleum, which are the subject of specific mining and petroleum legislation) are open to foreign investors.

Joint investment with GOE

In a departure from the approach under the prior investment regime, there are now no areas of investment reserved solely for the Government. Thus, the IP ends GOE monopolies by eliminating a category of investment that was previously only open to GOE. All the areas that were previously under GOE monopoly³, with the exception of telecom services, are now reserved for **joint investment with the Government**.

Telecom services, in particular, are now open to foreign investment⁴. The state-owned Ethio Telecom is slated for partial privatisation by which a 40% stake is going to be transferred to foreign investors. In addition, the Ethiopian Telecommunications Authority, a Government organ established in 2019 to regulate the telecommunications sector, has started the process of liberalisation by advertising a call for expression of interest to which investors have already started responding. The licensing of two new telecom service providers through the liberalisation process, as well as the partial privatisation of Ethio Telecom, are planned to be completed possibly in the first quarter of 2021.

Joint investment with domestic investors

A new category open to **foreign and domestic joint investments** has been created – first at the level of primary law, the IP, and second, with detail developed in the Regulation. The new category includes, among others, investment areas which were previously reserved for domestic investors, such as domestic air transport services, advertising, promotion and forwarding and shipping agency services – a further sign of transition towards a more open economic model.

For areas where joint foreign and domestic investment is required, foreign investors' shareholding is limited to a forty-nine per cent. ceiling.

³ GOE monopoly areas under the previous regime were: (i) import/export and transmission/distribution of electrical power through the national grid system, (ii) manufacturing of weapons/ammunition/explosives, (iii) international air transport services and (iv) postal services (with the exception of courier services).

⁴ There appears, however, to be some inconsistency in this regard. Although the telecom sector is said to have been fully opened to foreign investment, and there is nothing in the new law that warrants contrary interpretation, the GOE has recently announced that the provision of tower infrastructure will remain a Government monopoly with the exception that telecom operators may be allowed to build their own towers. Although doing so would require amending the negative list, if this becomes a reality, it would, essentially, mean that the business of constructing and leasing telecom towers will likely remain a Government monopoly, potentially giving the Government advantage over new entrants, given the potential cost of entry.

Investment reserved for domestic players

Finally, the new legal framework stipulates the areas reserved for domestic investors, and thus inaccessible to foreign capital. However, compared to the past, such list is now shorter.

Thus, overall, the approach to determining the areas open for foreign investment and the nature of sectors and activities included in the negative list of the Regulation are an important step forward for private-sector led growth of the Ethiopian economy.

What Foreign Investors Should Expect: The Requirements

In line with the layout of the previous investment law, the IP sets out regulatory and capital requirements for foreign investment. In addition, the new investment law firms up national content requirements in respect of employment and puts an emphasis on environmental and social responsibility⁵.

The Regulation develops the procedural aspects in relation to the application, issuance, suspension and cancellation of investment permits and provides further detail on the acquisition and transfer of projects as well as on national content requirements, each of which is briefly reviewed below.

Investment Permit

Application

As anticipated in the new investment law, the procedure and the required supporting documentation to apply for and obtain an investment permit are set out in the Regulation. The delegation of the procedural and documentary details to the Regulation is a novel approach and allows more operational flexibility compared to the regime under the previous law.

The application process under the Regulation varies according to whether the investor is domestic or foreign, and a special application is provided for the expansion or upgrading of an investment, which we briefly discuss below.

The process is administered by the appropriate investment organ, defined as the Ethiopian Investment Commission ("**EIC**"), a Federal Government body carrying out functions delegated under the IP, or the relevant regional state administration body authorised to issue investment permits or administer investments. The authorities tasked with the issuance (and ongoing administration) of investment permits under the IP are the EIC and, for certain sectors, the Ethiopian Civil Aviation Authority (for air transportation services), the Ethiopian Energy Authority (for the generation and transmission of electric power) and the Ethiopian Communications Authority (for the provision of communication services), as representatives of the EIC.

- (a) **Domestic investors** must fill out and submit a form to the appropriate investment organ and submit evidence of identity and/or constitutional documents depending on whether they apply as sole proprietors, business organisations, enterprises established by a public-private partnership or cooperatives.

⁵ For details in this respect please see our briefing "Ethiopia's New Investment Law – What does it mean for foreign investors?" from April 2020.

- (b) **Foreign investors** are subject to similar requirements as regards the documentation to be provided, with the caveat that the EIC may request, at its discretion, evidence of the investor's financial position or profile. Also, from a formality perspective, documents originating outside Ethiopia are required to be authenticated by the relevant foreign bodies and by the Ethiopian embassy / consular office in the originating country before they are sent to Ethiopia. These documents are then also required to be authenticated by the Ministry of Foreign Affairs and the Documents Authentication and Registration Agency.
- (c) Applications for the **expansion/upgrading of an existing investment** require the submission of a valid business licence of the existing enterprise and an expansion or upgrading project feasibility study.

Issuance

After review, the appropriate investment organ is required to issue either (i) the requested investment permit upon approval of an application, or (ii) within three working days following the date of application, a motivated decision to reject the permit, which is subject to appeal as we outlined in our April 2020 briefing ("*Grievance handling*"). The new Regulation introduces a clearer timeframe for the issuance of the decision.

Suspension

Upon determination of a suspension ground (as set out in Article 13/1 of the new investment law)⁶, the appropriate investment organ is required to notify the investor in writing, who is, in turn, expected to respond or take the necessary corrective measures within sixty working days.

Failure to do so may entail the suspension of the permit for a period of one year. Based on the IP, if, during such period, the investor does not take the required corrective measures, the appropriate investment organ may revoke the permit.

Revocation (cancellation)⁷

Before the revocation of a permit under Article 13/3 of the new investment law⁸, an investor would receive from the appropriate investment organ a written notice stating the grounds of the impending revocation and would need

⁶ Unlike the previous law, the new investment law gives an exhaustive list of the grounds for suspension of investment permits. These grounds are premised on some action or inaction of the investor and fall into the following six categories: (i) defective reporting on project implementation; (ii) fraud or dishonesty committed in the permitting process; (iii) use of the permit other than for the stipulated objective; (iv) failure without cause to get the permit renewed; (v) failure to complete project implementation within two years of issuance of the investment permit or of the agreed time and it is believed that the project will be abandoned; and/or (vi) breach of law.

⁷ The Regulation uses the terms "cancellation" and "revocation" interchangeably.

⁸ The grounds for revocation of investment permits are also exhaustively regulated in the IP, and are, similarly to the grounds for suspension, premised on some action or inaction of the investor in any of the following four categories: (i) failure to commence or complete project implementation within two years of being issued the permit or within the timeframe agreed with the authorities, respectively, unless the authorities are of the view that the delay is prompted by sufficient cause (this flexibility, which may help prevent revocation of an investment licence, is a significant relaxation of the regulatory regime in comparison with the previous law, which provided for the revocation of the investment permit without any precondition if the investor failed to commence implementation of the project within two years); (ii) failure to rectify in a timely manner the issue that caused a suspension; (iii) abandonment of the investment; or (iv) misuse or illegal transfer of any investment incentives.

to reply within fifteen working days. A delayed or unacceptable response may entail the revocation of the permit.

Acquisition and transfer of projects

In further development of the principles in the new investment law, the Regulation provides administrative detail on the acquisition of existing enterprises and the transfer of projects under implementation. Aspects thereof which are relevant to foreign investors are reviewed below.

Acquisition of existing enterprise

The EIC is responsible for assessing the applications relating to the acquisition of the assets or shares in an existing enterprise. Following the receipt of a hard copy or online application, the EIC would ascertain that (i) the enterprise operates in an area open to foreign investors, and (ii) the minimum capital and other requirements (under the new investment law, the Commercial Registration and Business Licencing Proclamation and other applicable laws⁹) are met. In addition, foreign investors are to obtain a clearance from the Ministry of Trade and Industry and the Ministry of Revenues¹⁰.

The new Regulation sets a timeframe of three working days following the date of application within which the EIC is to notify a motivated denial of the request. If the application is approved, the share transfer shall be registered and, if a business licence has previously been issued, such licence will be replaced.

Transfer to another investor of a project under development

The new Regulation amends the framework for the transfer to another investor of a project under development and for which a business licence has not been issued. The Regulation does not define what constitutes a "project". As we commented before, the reference to "project" in this context is most likely in the sense of a project to make an "investment" as defined under the IP.

In addition to submitting an application for the approval of the transfer of the project, a copy of a renewed investment permit and a copy of the sale agreement registered with a notary, the investor is also required to provide proof that the land required for the project is transferred to the buyer (assuming that the transferor had already received land)¹¹. If the application is accepted, the relevant investment organ approves the project transfer; if it finds an issue, it rejects the application and has three working days to notify the relevant parties. Although the Regulation does not specify the consequences of missing such time limit, the absence of response from the relevant investment organ does not amount to a "silent approval".

⁹ For example, merger approval from the Trade Competition and Consumers' Protection Authority.

¹⁰ It is not, however, clear why the Ministry of Trade is still involved given that the role it played under the previous law (which consisted of ascertaining whether the area of investment is open to foreigners, whether minimum capital as well as other business registration and licensing-related requirements have been met) is now entrusted to the EIC.

¹¹ However, complying with this requirement could be challenging because an investor needs to first obtain an investment permit in order to get land. Furthermore, the wisdom of requiring the investor to obtain land even before the transfer is approved is unclear and could also involve unnecessary cost in the event the application for transfer gets rejected.

National content: training, knowledge transfer and employment

The new Regulation clarifies the framework in which investors are required to comply with Article 22 of the IP providing that an investor employing foreigners in permanent positions is to replace them with Ethiopian nationals by providing the necessary training. The Regulation requires the submission to the EIC of a description and schedule of such training within three months of the issuance of the business licence, specifying (i) the identity and field of the foreign worker, (ii) the identity and address of the Ethiopian trainee, (iii) the type and duration of the training and, if need be, (iv) an explanation as to the failure to acquire skills and/or to do so in the set timeframe. A quarterly implementation report of the training programme is also required.

Investment Facilitation

One-stop services

The new investment law requires the EIC to provide one-stop services to investors, including by coordinating the daily activity of the relevant agencies in this regard. Similarly, the regional states investment authorities are required to provide a one-stop type service. In contrast to the previous law, the IP does not contain any detail as to the nature of the one-stop services or the manner in which they would be provided. Instead, such detail is set out in the Regulation.

In contrast to the former investment framework, the scope of one-stop services by the EIC is not limited to applications or requests made before the issuance of a business licence. Previously, the one-stop service was extended to investors who are still in the project implementation phase or who have not yet been issued with a business license. All matters related to renewal and processing of permits (including work permits) were handled by different government offices. Under the new framework, one-stop services from the EIC include the following matters:

- (a) registration and amendments of corporate documents and of foreign direct capital;
- (b) registration, amendment, replacement and cancellation of trade names and business names;
- (c) registration in the commercial register and issuance, amendment, replacement and cancellation of commercial registration certificates;
- (d) issuance, renewal¹², suspension, replacement and revocation of business licences;
- (e) issuance, renewal, suspension, replacement and cancellation of expat work permits; and
- (f) handling of requests for investment incentives and for transfer of construction materials, capital goods, spare parts, and vehicles from one investor having duty-free rights to another investor having the same rights in accordance with the relevant law.

In addition, the relevant Government agencies are required to set up desks and provide the following services at the EIC's one-stop shop:

- (a) issuance of tax identification numbers;

¹² The Ministry of Trade and Industry is mandated with the renewal of business licences.

- (b) residence and construction permits;
- (c) approval of environmental impact assessment studies; and
- (d) issuance of certificates.

While services such as issuing commercial registration certificates, work permits, taxpayer registration certificates (TIN Certificates) and registration of trade names have been available at the EIC's one-stop shop under the previous law, the other services listed above are new and are expected to be available soon. Moreover, the Commission is entitled to provide additional one-stop services beyond the scope of those identified above.

Furthermore, appropriate investment organs are required to provide support as regards requests to obtain land, credit services from the state-owned Development Bank of Ethiopia (if applicable), water, electrical power, and telecom services, as well as visa and residence permits for investors and their foreign employees. For the implementation of this arrangement, the relevant organs of the Federal Government and the Regional State Administrations are expected to create investment help desks which should reduce the delays for the application and processing of the investors' requests. The help desks established at the EIC have general processing powers, while those at other relevant organs have a supportive and facilitative role.

Procedure

Upon processing of the applications for such services, the EIC is required to notify its approval or rejection to the investor, and to act as a liaison with the relevant Government executive organs.

Dwelling

The new investment law (Article 18/2) provides that a foreign investor/national treated as a domestic investor may be allowed to own one dwelling house subject to the condition of a minimum investment of USD 10 million.

Outstanding Issues

The EIC is mandated under Article 12 of the IP to issue a directive on the conditions for the transfer of an investment project under development. This directive is yet to be issued.

As per Article 22/7 and 22/8 of the IP, the EIC, together with the Ministry of Trade and Industry and the Ministry of Labour and Social Affairs, is expected to prepare and implement a working guideline relating to:

- (a) ascertaining the necessity and professional pertinence of expat employees;
- (b) the execution of training programmes involving Ethiopians that replace expats;
- (c) mechanisms for establishing whether suitable local work force having the required expertise is available;
- (d) procedures governing the issuance, refusal and cancellation of work permits for reasons related to matters under (a)-(c) above; and
- (e) regulating the duty of investors to design and provide training programmes and to ensure the transfer of skills and knowledge to substitute Ethiopian workers.

Finally, a detailed account of the investment incentives as per Article 17 of the new investment law is awaited in a further regulation as it is not covered by the present Regulation. In the interim, the investment incentives set out in the former regulations appear to apply.

Exhibit 1
Investment Areas – Negative List

Investment areas reserved for joint investment with Government of Ethiopia

An investor may invest in any of the following investment areas only jointly with the Government:

1. manufacturing of weapons, ammunition and explosives used as weapons or to make weapons;
2. international air transport services;
3. import and export of electrical energy;
4. Bus Rapid Transit; and
5. postal services excluding courier services.

Investment areas reserved for joint investment by domestic and foreign investors

Any foreign investor may invest in the following areas jointly with a domestic investor:

1. freight forwarding and shipping agency services;
2. domestic air transport services;
3. cross-country public transport services using buses with a seat capacity of more than 45 passengers;
4. urban mass transport service with larger carrying capacity;
5. advertisement and promotion services;
6. audio-visual services, motion picture and video-recording, and production and distribution services; and
7. accounting and auditing services.

Investment areas reserved for domestic investors

The following investment areas are exclusively reserved for domestic investors:

1. subject to applicable laws, banking, insurance, microfinance businesses, excluding capital goods finance business;
2. transmission and distribution of electrical energy through integrated national grid system;
3. primary and middle level health services;
4. translation and secretarial services;
5. wholesale trade, excluding wholesale of petroleum, petroleum products, wholesale of own products produced in Ethiopia and electronic commerce;
6. retail trade, excluding retail, as provided under appropriate law, of own

- manufactured products produced in Ethiopia and electronic commerce;
7. import trade, excluding liquefied petroleum gas and bitumen;
 8. export trade of raw coffee, chat, oil seeds, pulses, hides and skins, products of natural forest, chicken, minerals and livestock including pack animals bought on the market;
 9. construction and drilling services below Grade I;
 10. hotel, lodges, resorts and motels, guesthouse and pension services, excluding those that are star-designated;
 11. tearoom, coffee shops, bars, nightclubs, restaurants and catering services excluding star-designated national cuisine restaurant service;
 12. travel agency, trade auxiliary services and travel ticketing sale;
 13. operating lease of equipment, machineries and vehicles, excluding industry-specific heavy equipment, machineries and specialized vehicles;
 14. tour operation;
 15. tour operator business excluding Grade 1 tour operation;
 16. transport services, excluding railway transport; cable-car transport; cold-chain transport; freight transport having a capacity of more than 25 tonnes and transport services reserved for joint investment with the government or domestic investors;
 17. making indigenous traditional medicines;
 18. bakery products and pastries for domestic market;
 19. grinding mills;
 20. barber shops, beauty salons, smithery and tailoring work except by garment factories;
 21. maintenance and repair services, including aircraft maintenance, repair and overhaul (MRO), but excluding repair and maintenance of heavy industry machineries and medical equipment;

22. aircraft ground handling and other related services;
23. saw milling, timber-making and assembling of semi-finished wood products;
24. media services;
25. customs clearance services;
26. brick and block manufacturing;
27. quarrying;
28. lottery and sports betting;
29. laundry services, excluding those provided on industrial scale;
30. security services;
31. brokerage services;
32. attorney and legal consultancy services;
and
33. private employment agency services, excluding such services for the employment of seafarers and other similar professionals that require high expertise and international experience and network.

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