Legal Update

Ethiopia Passed New Investment Law

Introduction

The Ethiopian Government has made commendable efforts, through legislative and procedural reforms, to improve the investment climate of the country and thereby attracting more foreign direct investment. In line with market-oriented economic policy, the investment regime has been liberalised through a series of Government legislation. Since 1992, the investment law has been revised four times to ensure the participation of more foreign investments in various sectors of the economy. The latest law is promulgated in January 2020.

After the appointment of the current Prime Minister (Abiy Ahmed) in April 2018, the Ethiopian Government has taken a fresh road to economic reform, starting by privatising fully owned government enterprises and boosting the private sector. As the role of FDI in the private sector being a key component to a nation's economy, it was held by the government that amending the existing investment law (Proclamation No. 769 of 2012 as amended in 2014) is a vital step to the reform. As a result the New Investment Proclamation (the Investment Proclamation) was approved on 30 January 2020 by the House of Peoples Representatives. However, the Investment Proclamation is not yet published in the official legal gazette of Ethiopia, the Federal Negarit Gazette.

Major Amendments to the 2020 Investment Proclamation and Draft Investment Regulations

Opening of reserved/restricted sectors to foreign investment

One of the major changes the Investment Proclamation has brought is the restoration of the "negative listing" of investment areas that are open to foreign investors enabling foreign investors to enjoy a greater opportunity with regards to the areas that they can invest in. The negative listing approach employs the opening of all economic sectors to FDI except those that are expressly reserved/restricted by law. This approach aspires to cope with the ever-changing technological evolutions and pace of business in a globalised economic sphere. This approach is a reversal of the 2012 Investment Proclamation and Regulations which adopted the “positive listing” method that was restrictive by design. Under this method, all investment activities open for FDI were positively listed and foreigners could not directly invest in areas not specifically appearing on the list. This has now changed into a negative listing whereby foreigners can invest in all areas of investment except those explicitly reserved.

As part of the negative listing approach, the Investment Proclamation provides three categories of investment areas. These are areas exclusively reserved for joint investment with government, areas exclusively reserved for domestic investors and areas exclusively reserved for joint investment with domestic investors. All other sectors not reserved in the aforementioned sectors will be open for foreign investment.
The Investment Proclamation avoided a category of sectors that will exclusively be held by the government and introduces a new category of sectors in which joint investment with domestic investors will be mandatory. Some of the areas of investment which were exclusively reserved for Ethiopian nationals under the previous laws are likely to be opened for foreign investments with the condition that foreign investors undertake these investments in joint venture with the government and/or domestic investors.

Even if it has not yet been made final and approved by the Council of Ministers, the Draft Investment Regulations (the Draft Investment Regulations) to implement the Investment Proclamation has provided the details of the sectors eligible for the above categories. The Draft Investment Regulations divides sectors allowed for foreign investors in context of joint investments into to two depending on minimum percentage of local content (indigenisation) requirement. These are:

Areas of investment in which foreign investor(s) can own up to a maximum of 75% of share capital

A foreign investor jointly investing with a domestic investor (Ethiopian nationals or companies wholly owned by Ethiopian nationals) in the following areas can own up to a maximum of 75% of share capital of a joint venture company. These areas are:

- forwarding and shipping agency services;
- domestic air transport services; and
- inland public transport having a capacity of more than 45 seats and freight transport services having a capacity of more than 32 tones.

Areas of investment in which foreign investor(s) can own up to a maximum of 49% of share capital

A foreign investor jointly investing with a domestic investor (Ethiopian nationals or companies wholly owned by Ethiopian nationals) in the following areas can own up to a maximum of 49% of share capital of a joint venture company. These areas are:

- advertisement and promotion works;
- audiovisual services, motion picture and video recording, and production and distribution services;
- accounting and auditing services;
- mass media services;
- making indigenous traditional medicines; and
- Grade 2 construction services.

Furthermore, investment in the transmission and distribution of electricity energy through the national grid system, previously reserved for the government, is now open for joint venture investment with the government.

On the other hand, investment areas, including banking and insurance, that were exclusively reserved for Ethiopian nationals in the previous laws are now open to any person falling within the definition of domestic investor, including foreign nationals of Ethiopian origin. Investment areas that are exclusively reserved for domestic investors include banking, insurance and micro-credit and saving services, retail trade (excluding retail of own manufactured products produced in Ethiopia), import trade (excluding liquefied petroleum gas and bitumen) and few other selected areas of investment that are enclosed into the list with a view to protect domestic investors and small and medium enterprises.

New work permit rules and investment visa

The Investment Proclamation preserves the former rule that any investor may employ duly qualified expatriate experts required for the operation of its business and there will be no restrictions regarding top management positions. However, it further explains what “top management” constitutes. Top management includes chief executive officer, chief financial officer and chief operations officer. Moreover, the Investment Proclamation allows the spouse of an investor or a foreign worker the right to be employed and obtain a work permit in Ethiopia which was not addressed under the 2012 Investment

Proclamation. The Investment Proclamation further provides that the Ethiopian Investment Commission or a delegated investment organ may facilitate the processing of visa applications of foreigners and their dependent family members coming to Ethiopia in relation to investment.

Establishment of the Federal Government and Regional State Administrations Investment Council

This is a council chaired by the Prime Minister. The Investment Proclamation established this Council in order to simplify investment and facilitate a synchronised investment system between the Federal government and regional State administration. The Council among other things prevent and resolve limitations to the provision of investment services including the allocation of land by regional state investment administration bodies.

Approval of brownfield investments by the Investment Commission

The 2012 Investment Proclamation requires that a foreign investor seeking to buy an existing enterprise in order to operate it in its current state or to buy shares of an existing enterprise shall obtain prior approval from the Ministry of Trade and Industry. However, the Investment Proclamation changed this and now the approval of brownfield investments is transferred from the Ministry of Trade and Industry to the Ethiopian Investment Commission.

Grievance handling rules

The Investment Proclamation included elaborate grievance handling rules and time efficient resolution of investment disputes. It went to the extent of introducing an arrangement where an investor may file a complaint to the Ethiopian Investment Commission against any decision of federal executive bodies' decision where it considerably affects its investment.

On the other hand, regulations in relation to minimum investment capital (which ranges from a minimum of USD50,000 to a maximum of USD200,000 per project), repatriation of dividend and profits, access to external loan, the right to open foreign currency account, registration of technology transfer agreement and export-oriented non-equity based foreign enterprise collaboration agreement, one stop services, investment guarantee and protection and ownership of immovable property in the 2012 Investment Proclamation are all maintained in the Investment Proclamation.

Conclusion

The amendment of the 2012 Investment Proclamation is a part of Ethiopian Government's bid to reform the economy. In its Preamble, the Investment Proclamation provides that it is aimed at producing an economic framework that fast tracks the global competitiveness of the national economy, increases export performance and generates more and better employment opportunities. In the Draft Investment Regulations which is expected to be approved by the Council of Ministers, the Ethiopian Government has taken significant steps in opening up investment areas for foreign participation.

Under the Draft Investment Regulations, anything that is not expressly reserved for domestic investors is presumed by implication as open for foreign investment. This is a major change from the 2012 Investment Proclamation, which used to provide that anything that is not expressly open for foreign investment is by implication reserved for domestic investors.

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