

GETTING THE
DEAL THROUGH 

Foreign Investment Review 2018

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This article was first published in January 2018
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Published by
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London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

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No photocopying without a CLA licence.
First published 2012
Seventh edition
ISBN 978-1-912377-41-1

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



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Preface

Foreign Investment Review 2018

Seventh edition

Getting the Deal Through is delighted to publish the seventh edition of *Foreign Investment Review*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on France and Indonesia.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Oliver Borgers of McCarthy Tétrault LLP, for his continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
January 2018

Uzbekistan

Nail Hassanov and Maxim Dogonkin

Kosta Legal

Law and policy

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

The general policy of the government with respect to foreign investment is aimed at promotion of the Uzbek economy and its integration into the world economic system by stimulation of inflow of foreign investments and efficient use of foreign resources, modern technologies, and managerial experience. Uzbek law does not discriminate against foreign investors in any manner and in accordance with the above policy, the government is in fact inclined to be more favourable to investors from abroad. Relevant investment programmes setting short-term goals of the investment policy are annually approved by the decree of the President of Uzbekistan.

With the election of the country's new President in 2016, the government has been taking many rapid steps to liberalise the rigid foreign investment policy to spur economic growth. The long-awaited reform in the area of foreign exchange controls is being implemented and the most pressing issue of practical inability to exchange the local currency for repatriation of profits has almost been resolved. The whole complex of laws directly or indirectly related to foreign investment is also being revised, with the most of the outdated restrictive provisions being finally repealed (eg, prohibition of export without prepayment). The new State Investment Committee acting as a one-stop shop has been established to entice foreign investors and the new Investment Code is under way that to streamline procedures for negotiating investment projects with the government and to define and introduce new concepts and mechanisms of investment within Uzbekistan (mutual funds, investment tax credits, investment subsidies, new types of governmental guarantees).

Although at a much faster pace, the new government has continued to use some traditional instruments of the previous administration, polishing up the regulation aimed at the protection of rights and interests of foreign investors, providing tax and customs benefits and privileges (depending on the type of activity and the amount of investment), establishing free economic zones and investment funds, and joining bilateral and multilateral international treaties. Several industries have been identified as a priority for development with consideration of the Uzbekistan's natural strengths and specialisation and the above-mentioned instruments are used to encourage foreign businesses to invest into these industries. Some of these include agriculture, textile production, cotton processing, oil and gas and chemistry. Considering the substantial lack of localised supply, the food industry and pharmaceuticals are also among the top priorities.

As regards the current mechanism of investment, it should be noted that Uzbek law does not provide the government with the right to question foreign investment transactions on national and public interest grounds. In practice, however, as the majority of 'strategic' objects, which are usually of interest to the foreign investor, are owned by the state, it is privatisation rules that will be applied. In particular cases, where privatisation rules are not applicable and where the government is dissatisfied with the transaction, it may occasionally reflect on the willingness of engaged governmental agencies to provide the necessary approvals.

In cases where the foreign investor seeks close cooperation with the government (a very common scenario owing to the degree of state involvement in the economy) special rules for examination of investment projects may be applied. Examination becomes mandatory under Uzbek law when:

- the foreign investor would like to implement a project relying on any financial support of the government (funds, guarantee, etc);
- the foreign investor wishes to request additional benefits and privileges;
- the foreign investor would like to establish cooperation with a state-controlled enterprise to implement a project worth more than US\$10 million;
- the foreign investor would like to implement a project for processing strategic resources (precious, ferrous and non-ferrous metals, hydrocarbons, coal and uranium) worth more than US\$10 million; and
- the foreign investor wishes to conclude a product-sharing agreement.

The examination has to be initiated by the relevant sector-specific regulator or the state-owned holding company overseeing the sector, which are also supposed to be the first point of contact for the foreign investor seeking the state support. The examination bodies include the State Investment Committee, the State Tax Committee, the Ministry of Finance, the Ministry of Economy and other state bodies depending on the nature of the investment project. The answers below do not cover the examination procedure in detail, being rather focused on more general cases, where state presence or support is limited or absent.

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

The following laws and by-laws regulate cross-border acquisitions and investment by foreign nationals into the country:

- Law No. 609-I on Foreign Investments;
- Law No. 611-I on Guarantees and Protective Measures of Foreign Investors' Rights;
- Law No. 719-I on Investment Activity;
- Law No. 110-I on Concessions;
- Law No. 312-II on Product Sharing Agreements;
- Law No. ZRU-319 on Competition;
- Law No. 425-XII on Destatisation and Privatisation;
- Regulation No. 110 on Development, Examination, and Approval of Documents for Investment Projects;
- Regulation No. 180 on the Order of Execution and Performance of Investment Agreement; and
- Regulation No. 285 on Measures to Increase the Responsibility for Timely and Qualitative Implementation of Investment Projects.

As noted above, Uzbek law does not define the concept of national interest and there is no special legislation attached to it. The above laws cover the review of foreign investments in general cases, cases of privatisation and cases where the government is involved in the investment project.

It is also to note that the new Investment Code that was mentioned above is expected to supersede the most of these laws and to become a single road map for a foreign investor interested in Uzbekistan. At this

stage, it is planned that the Code will be actually finalised and published by the end of 2017.

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?

The scope of application of these laws is the regulation of various relations arising in the sphere of foreign investment activity. They describe the concept of foreign investment by listing the ways in which a foreign entity may operate within the territory of Uzbekistan, outline guarantees and measures of protection of foreign investors' rights, and define legal relations under concession and product-sharing agreements.

- Foreign investors can make investments in Uzbek territory by:
- acquiring a participation interest in the charter fund and other property of legal entities established jointly with legal entities or citizens of Uzbekistan;
 - incorporating legal entities;
 - acquiring property, shares and other securities;
 - investing in intellectual property rights, including copyrights, patents, trademarks, utility models, industrial samples, company names, and know-how as well as business reputation (goodwill);
 - acquiring concessions including those for exploration, production, or use of natural resources;
 - acquiring property rights in trade and service facilities, residential property with adjacent land plots as well as ownership and use rights in respect of land (including leases) and natural resources; and
 - acquiring rights provided under product sharing agreements.

If the foreign investor invests in minority interests, it is also considered to be foreign investment by Uzbek law. If the foreign investor owns at least 30 per cent of shares or a participating interest in the charter fund of a company for 600 million som and above then the company acquires the status of a 'company with foreign investment' and becomes eligible for various preferences, tax and customs benefits.

Under the Law on Destatisation and Privatisation there are 31 types of state-owned companies that can be privatised, which may be carried out only upon the issuance of the relevant presidential resolution. The list includes, among others, the following enterprises and relates to both local and foreign investors:

- primary industries, including fuel and energy, oil and gas, mining, well drilling, machine building, cotton processing;
- pharmaceutical and medico-biological drug production industries;
- telecommunication enterprises, including television, radio-receiving and radio-broadcasting centres, and their engineering structures;
- enterprises engaged in engineering, maintenance, installation, setting of fire-fighting automatic equipment, security and fire alarm systems; and
- enterprises engaged in engineering, construction, maintenance, and operation of water-management and water-supply systems, rescue vessels, waterside structures and engineering oversight vessels.

The Law on Destatisation and Privatisation also lists the objects that cannot be privatised, including:

- land with mineral and water resources;
- air space;
- flora and fauna;
- cultural heritage sites;
- state budget funds;
- the Central Bank of Uzbekistan;
- enterprises that facilitate monetary circulation;
- military and security-related assets and enterprises;
- firearms and ammunition producers;
- nuclear research and development enterprises;
- some specialised producers of drugs and toxic chemicals;
- emergency response, civil protection and mobilisation facilities; and
- public roads and cemeteries.

Certain limitations apply to the investment of foreign entities in shares of companies operating in the telecommunications, finance, and insurance sectors.

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

By analogy with the definition of 'investor' set out in the Law on Investment Activity, a 'foreign investor' can be defined as a foreign entity carrying out investment of its own funds or attracting other investment resources into objects of investment facility.

There are four types of entities that can be qualified as a foreign investor in Uzbekistan. They include:

- foreign states and administrative or territorial bodies of foreign states;
- international organisations established in accordance with agreements or other treaties signed by states or ones being subject to international public law;
- legal entities, any other companies, organisations, or associations incorporated and acting in accordance with legal acts of foreign states; and
- foreign citizens and persons without citizenship who permanently live outside Uzbekistan.

The Law on Foreign Investments defines 'foreign investment' as all types of material and intangible values and rights to such values, including intellectual property rights and reinvestment, contributed by the foreign investor to legal entrepreneurial and non-entrepreneurial activity. Reinvestment is further defined as any income from the foreign investment earned in Uzbekistan and reinvested by foreign investors on Uzbek soil into legal entrepreneurial and non-entrepreneurial activity. It includes profit, interest, dividends, royalty, licence fees and agency fees, payments for technical assistance, maintenance and other forms of payments.

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?

There are no separate definitions of either an SOE or SWF set out in legislation. There is, however, a definition of foreign state financial organisations (FSFOs). FSFOs carry out financing or co-financing of investment projects in Uzbekistan. The definition of FSFOs thus covers SWFs. There is not much specific regulation for investments made by SOEs or SWFs, except for minor procedural differences in the above-mentioned examination procedure for FSFOs, including SWFs, as suggested.

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

The main authority that usually reviews all mergers and acquisitions irrespectively of their substantial content, but based on set competition law thresholds, is the State Committee for Assistance to Privatised Enterprises and Development of Competition (the Competition Committee). As stated above, Uzbek law does not generally provide for the procedure for review of transactions on national interests grounds, except in the case of privatisation or substantial government involvement. In such cases, it is the Cabinet of Ministers and the President who take national interests into consideration, while making the final decision on implementation of the project.

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

After reviewing documents and information submitted along with the clearance application, the Competition Committee makes its decision and has much discretion within the scope of its competence. Generally, while reviewing the Competition Committee relies only upon those economic and non-economic factors that relate directly to the relevant market competition environment.

On the other hand, when decisions on privatisation are taken or the investment project examination is carried out as described above, a wide variety of considerations may be taken into account, including national or public interest ones. All involved state bodies generally act

Update and trends

As briefly noted above, the most significant development include:

- Liberalisation of foreign exchange controls: legal entities and individuals, including foreign investors, may now freely purchase foreign currency from commercial banks to make payments under their foreign trade transactions as well as repatriate profits earned within the country. The requirement for mandatory exchange of 25 per cent of foreign currency proceeds has been abolished for all exporters.
- Liberalisation of control over foreign trade transactions: some prepayment and guarantee requirements are abolished. Less documentation is needed for the customs clearance and formalisation of the transaction.
- New law on foreign investment: there is an intention to systemise the legislation on foreign investment and to enact a new Investment Code, embracing provisions of the main laws on foreign investment that are currently in force.
- New regulatory body: the State Committee on Investments has been established as a one-stop shop and has been vested with some powers of the Ministry for Foreign Relations, Investments and Trade, the Ministry of Finance and state-owned company Uzbekexpertiza. Such powers include general coordination of investment policy, development of related regulation, accreditation of representative offices of foreign entities, review of import contacts and supervision over tender bidding within investment projects over US\$100,000.
- New free economic zones: the programme for development of four new free economic zones has been approved, providing for establishing zones in four regions of the country: Bukhara, Fergana, Khorezm and Samarkand. Comprehensive improvement of infrastructure and communications is intended along with provision with currency, customs and foreign exchange preferences.
- New privileges and preferences: a number of presidential decrees and resolutions of the Cabinet of Ministries have been passed reviving or introducing benefits for foreign investors. One such benefit is the right of manufacturing enterprises with foreign investment to apply the rates of taxes and other mandatory payments that were in force on the date of their state registration for five years from it. Some sectorial benefits include customs preferences for leather, pharmaceutical and textile manufacturers importing raw materials and equipment.
- Other changes: there are a significant number of changes under way, including revision of taxation laws, laws on the securities market, registration of land and property, customs procedures, licensing, banking and financial operations. It is important to note that the most of these changes are changes of the liberal nature aimed at the relaxation of the governmental controls, simplification of mandatory procedures and clarification of ambiguous restrictive provisions.

within their powers and their discretion is limited by specific tasks (fiscal policy, economic assessment, etc). When, however, the final decision is taken by the Cabinet of Ministers or the presidential administration, more discretion is exercised and additional factors may be considered, including national interest.

Procedure

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

Some specific thresholds trigger mandatory 'merger control' filing to the Competition Committee in accordance with the Law on Competition. The following thresholds are applied both to foreign and local companies:

- when an acquisition of a new interest or an increase in an existing participating interest or shares passes the following thresholds:
 - for joint stock companies – 35 per cent, 50 per cent and 75 per cent; and
 - for limited and additional liability companies – 50 per cent and 66 per cent;
- if any party to the transaction holds a dominant position (a 50 per cent or larger market share) in the relevant commodity or financial market;
- for companies participating in transaction and carrying out commodity market related activity: their aggregate book value of assets or net sales for the preceding year exceeds 100,000 times of the minimum monthly wage; or
- if the companies participating in the transaction and carrying out financial market-related activity have an aggregate book value of assets exceeding the threshold set out in legislation (ie, 1,800 billion som for banks, 100 billion som for insurance companies, 12 billion som for lease companies and 1.6 billion som for non-banking credit organisations).

Specific approvals may be necessary in particular industries. Thus, in the banking sector, the consent of the Central Bank is required if more than 20 per cent of the shares of a bank are bought by a company or affiliated companies.

When the government is involved, the examination of the investment project is triggered in cases given in question 1.

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

In order to obtain clearance for a merger or acquisition based on the threshold above and irrespective of the national interest element, a

filing has to be prepared and submitted to the Competition Committee, including the application and a set of required documents. After reviewing the filing, the Competition Committee issues the decision, which is then sent to the applicant. There is no filing fee.

In order to be awarded a concession or a product sharing agreement, the investor shall go through the bidding process and examination procedure described above. The project documents reviewed by all involved state agencies are in this case submitted by the responsible state body – a partner of the foreign investor – to the relevant department of the cabinet of ministers. There is no filing fee in this case either.

10 Which party is responsible for securing approval?

The foreign investor is responsible for securing the approval of the Competition Committee. In other cases described above, the involved state agency or state-owned company will share the responsibility with the investor.

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?

The review process related to mergers and acquisitions in general takes 10 working days from the date of receipt of the application with a full package of documents by the Competition Committee. If the Competition Committee has any reason to believe that the transaction will or may lead to restriction of competition, including through occurrence or strengthening of a dominant position on the commodity or financial market then the deadline for the application review may be extended, but not longer than for one month from the date of submission. Uzbek law does not provide for any exemptions or 'fast-track' options for such review process.

The term of examination of projects involving the government may vary significantly, depending on the complexity of the project and the number of involved state institutions. It is generally assumed that the procedure may take at least three months.

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?

The review must, in any case, be completed after receipt of the Competition Committee's approval and any other approvals as may be required in the case of government involvement. Failure to obtain the clearance prior to finalising the transaction, failure to execute orders of the Competition Committee, or provision of false or misleading information may lead to the imposition of fines on involved parties' executive

officers of up to 10 times of the minimum monthly wage. Moreover, the Competition Committee is entitled to make specific requests, including, where required, reversal of the merger or setting particular limits that must be adhered to.

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?

Uzbek law does not contain any specific provisions on obtaining formal or informal guidance on filing; however, the foreign investor may file an official request for clarification on applicable rules from the Competition Committee or other involved bodies. The state bodies are generally obliged to provide the response within 30 days of getting the request.

The Competition Committee does not usually expect pre-filing dialogue or meetings.

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?

Uzbek law does not provide for specific procedures for expediting clearance.

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?

If a closed transaction was not subject to clearance or review then there are no post-closing or retroactive powers of the Competition Committee or other bodies to review, challenge or unwind such transaction.

Substantive assessment

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?

With respect to the mergers and acquisitions clearance, the substantive test is whether the transaction will lead to restriction of competition, including through occurrence or strengthening of a dominant position on the commodity or financial market. There is, however, an exception to this test. Uzbek law allows the Competition Committee to approve transactions that may lead to restriction of competition if the parties to such a transaction can prove that the transaction will provide considerable tangible benefits for consumers.

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

Consultation and cooperation of Uzbek authorities with officials in other countries is not regulated in detail by Uzbek law. There is, however, a cooperation agreement signed by the national competition agencies of member states of the Commonwealth of Independent States – the Intergovernmental Treaty on the Implementation of a Coordinated

Competition Policy of 1993. Pursuant to the treaty, the agencies are expected to consult and cooperate when intergovernmental cases are considered. There is, however, not much evidence that such cooperation has developed.

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

Third parties are not involved in the review process of the Competition Committee.

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

If the clearance is obtained in accordance with the prescribed procedure then the authorities do not have the power to prohibit or otherwise interfere with the transaction.

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

The Competition Committee may issue conditional approval of a transaction even if such a transaction may lead to a negative effect on the competitive environment in Uzbekistan. In its decision, the Competition Committee lists conditions and requirements (together with deadlines for their implementation), which shall be complied with by the investor in case a preliminary approved transaction leads to the emergence or strengthening of a dominant position in the financial or commodity market or restriction of competition.

21 Can a negative decision be challenged?

Yes, a negative decision of the Competition Committee can be challenged in the economic court.

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

If documents submitted as part of the clearance application package contain confidential information, such confidential information cannot be withheld by the investor. The investor shall provide the Competition Committee with an exhaustive list of confidential information contained in the documents comprising the application package. Such confidential information shall be protected by the Competition Committee. Officials of the Competition Committee are liable for damages caused by the disclosure of confidential information.

Recent cases

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.

The cases when foreign investment transactions are reviewed by state authorities are not publicly disclosed or discussed. Grounds for relevant decisions in particular cases cannot, therefore, be objectively evaluated.

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