

Legal update

Venezuela issues new Constitutional Law for Foreign Productive Investments

January 2018

Corporate, M&A and securities

The National Constituent Assembly recently issued the Constitutional Law for Foreign Productive Investment (the New Law).¹ Although the New Law repeals the Decree with Rank, Value and Force of Law for Foreign Investment (the LFI),² the New Law, in general terms, preserves similarities with the LFI in terms of its structure and content. Among the main differences enshrined in the New Law, when compared to the LFI, we note the following:

Purpose

The New Law continues to set forth the principles, policies and procedures on foreign productive investment production of goods and services and it considers foreign investment as a matter of public interest; however, it adds as purposes of the New Law: (i) to promote foreign productive investment; (ii) to ensure that such investment generates technology transfer, added value chains, diversification of the productive matrix, substitution of imports and promotion of exports; (iii) to guarantee that foreign productive investment is made in compliance with national independence and sovereignty, territorial integrity, human rights, comprehensive environmental protection and preservation of life; (iv) to generate decent, fair and productive work; (v) to increase and improve access to foreign financing, foreign currency or access to new markets; and (vi) to attract foreign productive investment that generates foreign currency in non-traditional sectors.

The New Law stipulates that if special laws were to regulate foreign investment in specific sectors of the economy, including hydrocarbons, mining, telecommunications and social media matters, such special legislation shall apply with preference to the New Law.

Subjects of application

The New Law regulates the subjects of application in a similar manner as the LFI with regard to legal entities, but in the case of individuals, the New Law clarifies that those subject to its application are national individuals accredited as foreign residents or domiciled abroad and foreign individuals who reside abroad and invest in Venezuela, as well as foreign individuals who reside in the country and carry out foreign investment.

Jurisdiction

The New Law continues to indicate that foreign investment shall be subject to the jurisdiction of Venezuelan courts and that Venezuela may participate and use other dispute resolution mechanisms constituted within Latin American and Caribbean integration frameworks, but it adds that the Republic may also participate in other dispute resolution mechanisms within the framework of other integration arrangements, and that access to such mechanisms will be conditional on exhaustion of domestic judicial remedies and prior agreement.

Definitions

The New Law includes amendments in the definition of relevant terms, including:

- To clarify in the definition of "Investment" that the same includes, in addition to the resources lawfully obtained and intended for the production of goods and services that incorporate raw materials or intermediate products, those which also incorporate final products;
- To include the definition of "National Investor with Foreign investment" (individuals accredited as residents abroad for more than three years or national legal entity that carries out an investment with resources or contributions from abroad. For this purpose, financial resources or material located abroad must have been acquired at least three years in advance);
- To include the definition of "Preferential Investment" (foreign investment carried out in sectors that the National Executive defines as preferential for economic and social development of the nation, which will obtain more favorable benefits and incentives with regard to other sectors of the economy under the New Law and the guidelines issued by the National Executive); and
- To distinguish two types of investment in the definition of "Foreign investment":
 - "Direct Foreign Investment," consisting of tangible or financial resources destined to the equity of entities receiving foreign investment in the national territory to generate value added to the production process in which it is inserted, and which represent a participation equal to or exceeding 10% of the share capital; and
 - "Portfolio Foreign Investment," or acquisition of stocks or share participations in all kinds of companies that represent a level of participation lower than 10% of the company's equity.

Relevant entities

The ministry of people's power with competence in foreign investment matters is designated as the ruling entity for compliance of the purpose of the New Law. Such entity will be responsible, among other things, for approving and registering foreign investments and technology transfer contracts, as well as requests for transfer abroad of tangible and intangible capital assets, provided that they compromise strategic assets or affect competition through the concentration of monopoly power. The New Law acknowledges that certain powers of this ruling entity shall be exercised concurrently with other ministries.

Amendments or new incorporations related to the treatment of foreign productive investment

Rights granted to foreign investors under the New Law and other applicable rules are effective from the time the foreign investment registration is granted. Among the amendments of the New Law related to the treatment of foreign productive investment we highlight the following:

- The constituent value of foreign investment is evidenced by the Registry of Foreign Investment and must be represented by assets that are located in the country in their entirety (as opposed to 75%), and such constituent value will be subject to an expert assessment in order to validate the value of the assets (equipment, supplies, goods and tangible assets required for commencement of the production process), to be reviewed by the ruling entity.
- To be registered, the investment must be for a minimum amount, at the current official exchange rate, of 800,000 euros, 6,500,000 renminbi or its equivalent in another foreign currency (instead of US\$ 1,000,000); however, a lower amount of no less than 10% may be accepted as foreign investment to promote small and medium-scale industry, and other productive organizational forms.
- Foreign investors may resort to domestic financing for the establishment of their investments, which may not exceed 15% of the total amount of the investment. However, such financing shall be excluded when determining the value of foreign investment, reinvestment and capital increases.

- The minimum permanence period of foreign investment has been reduced from five years to two years. After expiration of such term, and upon payment of the relevant taxes and liabilities, foreign investors may remit abroad funds for the originally invested, registered and updated capital.
- The remittance of earnings and/or dividends abroad originating from a foreign investment in freely convertible foreign currency may be for 100% (as opposed to 80%), provided that the investment's purpose has been fulfilled; however, in cases of force majeure or extraordinary economic situations, the National Executive may reduce this percentage between 60% and 80%.
- In case of partial remittance of dividends, the difference may be accrued with other earnings obtained for up to a maximum of three fiscal years with the exception of those dividends that were not remitted abroad for reasons of force majeure or extraordinary economic situations declared by the National Executive. On the other hand, in the event of liquidation of a company, the New Law states that the entire amount of the foreign investment may be remitted abroad (instead of 85%), provided that it is duly justified and filed with the ruling entity for all relevant purposes.
- Those companies whose earnings comprise more than 70% from payments of mining exports and traditional exports shall have the obligation to pay taxes in foreign currency.
- Among the conditions set forth by the New Law for foreign investments, it is added that (i) companies, as well as their attorneys-in-fact or executives, in their condition as representatives of the same or using relationships generated accordingly, may not contribute through donations, contributions, income and/or logistic facilities with public or private institutions, non-governmental organizations, associations or individuals without the consent of the competent authority or entity; and (ii) may not directly or indirectly participate in the national political debate or directly or indirectly contribute to the formation of opinion on matters of public interest in media.

It is important to indicate that foreign investment still needs to comply with a series of general conditions, including contributing to the production of domestic goods and services to cover domestic demand and increase non-traditional exports and several notices and reporting conditions.

Favourable conditions for investment

Foreign investment may be subject to favorable conditions, specific or general conditions, benefits or incentives of promotion and encouragement according to the country's productive economic development interests, which will be granted to foreign investment that has previously agreed in a foreign investment contract to comply with several objectives, including: (i) exports of non-traditional goods and services; (ii) technology transfer with companies; (iii) development of productive and supply relations; (iv) substantial amount of investment; (v) substitution of imports; and (vi) integration with the socio-economic system. These conditions will be progressive on the basis of the fulfillment of established objectives and may take different forms, such as tax deductions, tariff or tax exemptions, special credit conditions, purchase of production by entities of the public sector, preferential access to goods or raw materials that are controlled by the state, or tax bonuses, among others.

Obligation of responsible business conduct

The New Law incorporates an obligation for foreign companies to maintain responsible business conduct, and therefore they may not assume any conduct that interferes, interrupts or hinders their own production process or those of related companies for political reasons, nor adhere to production stoppages or boycotts that contribute or seek to contribute to the destabilization of the democracy and its institutions.

Investment contract

The New Law incorporates the investment contract as a mandatory requirement to be executed between the investor or foreign company with the state, grand national enterprises, national private, public or mixed companies, individuals residing abroad and foreign individuals residing in the country. These contracts must contain specifications according to the characteristics of the investment, such as parties to the contract, object and value of the investment, area of the country in which the investment is intended, and duration of the contract, among others. The execution of this contract will not be necessary in cases where a public contract of international association is in force or if the amount of an investment is below the general minimum required amount, or in cases of purchase of real estate, reinvestment of earnings or capital increases.

Penalties

The New Law includes a new regime of sanctions, which calculation will be based on a percentage of the foreign investment as opposed to tax units. The New Law indicates that a penalty of up to 2% of the total investment amount shall apply to subjects of application of the New Law for breaches of foreign investment duties, taking into account the severity of the damage caused and the amount of the investment.

Concurrency in the breach of two or more duties by foreign investments increases by 1 percentage point the corresponding penalty. Similarly, recidivism in any case produces the application of a new penalty increased by 3 percentage points with respect to the initial penalty. Payment of the penalty shall be performed in the currency denomination of the investment.

Controls

For purposes of complying with the legislation against organized crime and financing of terrorism, the New Law reiterates that the ruling entity shall establish internal policies, regulations, mechanisms and procedures for the prevention, control, detection, monitoring and audit of operations aimed at capital flight and money laundering, and incorporates references to the application of transfer pricing on operations relating to foreign trade, or debt with parent companies or technological transfer contracts or other accounting mechanisms for evading tax payment in Venezuela.

Transition

The New Law does not include details regarding the applicable regime to investments made and registered before the relevant entities prior to the entry into force of the New Law, but it sets forth a term of 90 days for the adaptation of the structure and operation of authorities and entities to comply with the provisions of the New Law. Likewise, authorities and entities of the state with concurrent competence in matters of foreign investment must adapt their rules and procedures to the New Law within a term of 120 days following its entry into force.

Lastly, the New Law stipulates that its regulations shall be issued by the National Executive within 90 days.

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Footnotes

¹ Published in the Official Gazette, No. 41.310 dated December 29, 2017.

² Published in the Official Gazette Special Issue No. 6.152 dated November 18, 2014.

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