

International **Comparative** Legal Guides



Foreign Direct Investment Regimes **2020**

A practical cross-border insight into FDI screening regimes

First Edition

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ISBN 978-1-83918-010-1
ISSN 2633-3724

Published by

glg global legal group

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London SE1 3PL
United Kingdom
+44 207 367 0720
www.iclg.com

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Printed by

Stephens and George
Print Group

Cover Image

www.istockphoto.com

Strategic Partners



Foreign Direct Investment Regimes 2020

First Edition

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1 Foreign Investment Policy

1.1 What is the national policy with regard to the review of foreign investments (including transactions) on national security grounds?

There have been no such national policies enacted in Kosovo as yet.

The Law “On Foreign Investment” (Law no. 04/L-220) is the fundamental law that seeks to assure foreign investors that their investments will be protected and treated fairly and in accordance with the accepted international standards and practices.

1.2 Are there any particular strategic considerations that apply during foreign investment reviews?

The Law “On Strategic Investments” (Law no. 05/L-079) defines the criteria and the procedures for obtaining the status of strategic investment in the priority sectors of economic and social development (i.e. in the following sectors: (a) energy with infrastructure and mining; (b) transport and telecommunication; (c) tourism; (d) processing industry; (e) agriculture and food industry; (f) health; (g) industrial and technological parks; and (h) wastewater and waste management). Whether a particular investment can be defined as a strategic investment is assessed based on criteria such as whether it contributes to economic growth, employment and implementation of new technologies, whether it increases the competitive economic capabilities of Kosovo, whether it increases exports and whether it reduces the trade deficit, as well as its general impact on the improvement of welfare and living conditions for Kosovo citizens.

However, the said law does not provide for any policy with regard to the review of foreign investments (including transactions) on national security grounds.

1.3 Are there any current proposals to change the foreign investment review policy or the current laws?

We are not aware of any changes or new legislation related to foreign investment review policy.

2 Law and Scope of Application

2.1 What laws apply to the control of foreign investments (including transactions) on grounds of national security?

There are no such specific laws in Kosovo. Listed below is the generally applicable legislation which could apply to the control of foreign investments on national security grounds.

Foreign direct investment in Kosovo is primarily regulated by the Law “On Foreign Investment” (Law no. 04/L-220), which seeks to assure foreign investors that their investments will be protected and treated fairly and in accordance with the accepted international standards and practices. In this regard, said law stipulates that the Republic of Kosovo shall provide fair and equitable treatment to foreign investors and their investments in Kosovo, equal to any local investor and investments. The Republic of Kosovo shall also provide foreign investors and their investments with full and constant protection that shall not be less favourable than the treatment, protection and security that is required by generally accepted norms of international law.

It should be noted that, in 2014, the Kosovo Parliament adopted the Law “On Anti-dumping and Countervailing Measures” (04/L-240), which aims to set out the rules and procedures for imposing anti-dumping measures on imports that are subject to dumping and countervailing measures in order to protect local industry and national interests. Said law provides that the anti-dumping measures apply to dumped products whose import into and sale in Kosovo causes material damage. Under the law, ‘dumped’ products are products imported into Kosovo at lower export prices compared to similar products which are intended for consumption under normal market conditions in the exporting country. The countervailing measures apply to products which have benefited from government subsidies or subsidies from a public authority of the exporting country or the country of origin, where the import of such products causes or threatens to cause material damage to a local industry. The authority responsible for investigating dumping, subsidies and the damage caused thereby is the Ministry of Trade and Industry (MTI), supported by a commission comprising representatives of six ministries (including the MTI) and the Kosovo Customs Service. Once the investigation is complete, the MTI can issue either: (i) a decision imposing anti-dumping or countervailing measures; or (ii) a public notice on completion of the investigation without the imposition of measures. The final anti-dumping and countervailing measures cannot exceed the determined dumping or subsidy margin (i.e. the dumping or subsidy margin for imports from each country is equal to or higher than 2% *ad valorem* for dumping and equal to or higher than 1% *ad valorem* for subsidy investigations, and the volume of imports from each country is not negligible – 1% minimum share of the Kosovo market) and should be less than this margin if this would suffice to eliminate the damage caused to local industry.

In 2010, the Kosovo Parliament enacted the Law “On the Prevention of and Fight Against Cyber Crime” (Law no. 03/L-166), which provides for criminal offences related to the misuse of computer systems and computer data. Further, the Criminal Code (Law no. 06/L-074) provides for the criminal offence of intrusion into computer systems. Although the above-mentioned laws apply to criminal offences committed within the Kosovo territory, they shall exceptionally also apply to Kosovo citizens or foreigners who commit

a criminal offence outside the territory of the Republic of Kosovo if the criminal offence is also punishable in the country where the offence was committed. In the case of foreigners, these provisions shall apply if the foreigner is found in the territory of Kosovo or has been transferred to Kosovo. This principle shall not apply if the perpetrator has fully served a punishment imposed in another jurisdiction, has been acquitted by a final judgment and/or released from punishment or punishment has become statute-barred and in cases where criminal proceedings may only be initiated upon the request of the injured party and such a request has not been filed.

Further, in 2017, the Kosovo Parliament enacted the Law “On Strategic Investments” (Law no. 05/L-079), which aims to stimulate, attract and create conditions for the implementation of strategic investments in the Republic of Kosovo, as well as to establish administrative procedures and criteria for evaluation, selection, implementation and monitoring of strategic projects, as well as determining the procedures for granting the use of the property of the Republic of Kosovo for the purpose of implementation of strategic investment projects.

2.2 What kinds of foreign investments, foreign investors and transactions are caught? Is the acquisition of minority interests caught?

Subject to the Law “On Foreign Investments”, a business organisation established in Kosovo can be considered a foreign investment organisation if at least 10% of its capital amount is contributed directly or indirectly by a foreign investor. The other criterion for a business organisation to be considered foreign is the control over the organisation. Such control must be exercised by one or more foreign investors on the basis of a written contract, rights to exercise a majority of the organisation’s voting shares or similar ownership rights, or rights to appoint the majority of supervisory bodies.

However, there is no specific law provision addressing this question.

2.3 What are the sectors and activities that are particularly under scrutiny? Are there any sector-specific review mechanisms in place?

There are no such sectors or activities specified by law.

2.4 How are terms such as ‘foreign investor’ and ‘foreign investment’ specifically addressed in the law?

The Law “On Foreign Investments” defines a foreign investor as a foreign person that has made an investment in the Republic of Kosovo. The definition of foreign person includes foreign citizens and foreign legal persons as well as citizens of the Republic of Kosovo residing abroad (Diaspora).

Foreign investment is considered to be any asset owned or otherwise lawfully held by a foreign person in the Republic of Kosovo for the purpose of conducting lawful commercial activities, including but not limited to:

- i) movable and immovable property, including rights on such property such as mortgage, lien, pledge, lease or servitude;
- ii) intangible and intellectual property, including rights on such property, as well as goodwill, technical processes and knowledge;
- iii) cash, securities, commercial paper, guarantees, shares of stock or other types of ownership interests in the Republic of Kosovo or a foreign business organisation, bonds, debentures, other debt instruments;

- iv) claims or rights to money, goods, services, and performance under contract;
- v) concessions or licences conferred by law, administrative act, or contract; and
- vi) returns yielded by an investment in the Republic of Kosovo or an investment elsewhere.

2.5 Are there specific rules for certain foreign investors such as state-owned enterprises (SOEs)?

No, there are no such specific rules for state-owned enterprises.

2.6 Is there a local nexus requirement for an acquisition or investment to fall under the scope of the national security review? If so, what is the nature of such requirement (existence of subsidiaries, assets, etc.)?

There is no such requirement.

2.7 In cases where local presence is required to trigger the review, are indirect acquisitions of local subsidiaries and/or other assets also caught?

This is not applicable in Kosovo.

3 Jurisdiction and Procedure

3.1 What conditions must be met for the law to apply? Are there any monetary thresholds?

There are no such conditions provided by the law.

With regard to strategic investments, the Law “On Strategic Investments” provides for a minimum amount of investment for it to gain strategic investment status in a particular sector. Thus, in the energy, infrastructure, mining, transport, telecommunications, wastewater and waste management sectors, the minimum investment must be 30 million euros to be considered strategic. In the tourism and manufacturing sectors, the investment must be at least 20 million euros, while in the health, agriculture, food, industrial and technology parks sectors, at least 10 million euros.

3.2 Is the filing voluntary or mandatory? Are there any filing fees?

The law is silent in this regard.

When it comes to strategic investments, the investment entity that intends to develop a strategic investment project must submit a written request to the Kosovo Investment and Enterprise Support Agency (“KIESA”).

3.3 In the case of transactions, who is responsible for obtaining the necessary approval?

The law is silent in this regard.

3.4 Can foreign investors engage in advance consultations with the authorities and ask for formal or informal guidance on the application of the approval procedure?

The law is silent in this regard. However, in case of strategic investments, a foreign investor can engage in advance consultations with

the authorities, specifically with the Inter-ministerial Committee for Strategic Investments established by the Government and KIESA.

3.5 What type of information do investors have to provide as part of their filing?

The law is silent in this regard.

In the case of strategic investments, a request by an investment entity for obtaining the status of strategic investment should contain (i) an investment business plan, (ii) an investment financing plan, and (iii) a work programme for implementation of the strategic investment for the duration of contract, which should not be shorter than five years. Further, the Investor's request should contain elements which in particular should include: (a) investment locations; (b) the audit report for the investment entity for a certain period of time; (c) a detailed profile of the investment entity including filiations; (d) previous references of the investor's experience in similar projects; (e) a description of how the project will be financed; (f) written authorisation of the investment entity authorising the KIESA to make all verifications and checks of data presented in the dossier of the investment entity; (g) a financial statement and profit and loss accounts for the last three financial years. If the investment entity is established for the purpose of this investment, the above requirements shall apply for the parent company and the joint venture partner.

3.6 Are there sanctions for not filing (fines, criminal liability, unwinding of the transaction, etc.) and what is the current practice of the authorities?

The law is silent in this regard.

3.7 What is the timeframe of review in order to obtain approval? Are there any provisions expediting the clearance?

The law is silent in this regard.

3.8 Does the review need to be obtained prior to or after closing? In the former case, does the review have a suspensory effect on the closing of the transaction? Are there any penalties if the parties implement the transaction before approval is obtained?

The law is silent in this regard.

3.9 Can third parties be involved in the review process? If so, what are the requirements, and do they have any particular rights during the procedure?

The law is silent in this regard.

3.10 What publicity is given to the process and the final decision and how is commercial information, including business secrets, protected from disclosure?

The law is silent in this regard.

It should be noted that there is some general information that needs to be entered for each foreign investment in the Foreign Investment Register maintained by KIESA within the MTL. According to article 21 of the Law "On Foreign Investments", such

registry shall be public and shall be updated two times each year, by 30 June and 31 December. Subject to the Administrative Instruction no. 01/2015 "On the Form and Content of the Foreign Investment Register", the Foreign Investment Register should contain: (a) the name of the company; (b) the main activity; (c) a brief background of the company; (d) the main trademark (product); (e) the production capacity; (f) the number of employees; (g) the number of seasonal employees; (h) the exporting countries; (i) the cooperating institutions; (j) the vision of the company; (k) the name and surname of the owner; (l) the contact person; and (m) their address and telephone number.

Further, in the case of strategic investments, subject to article 12 of the Law "On Strategic Investments", the decision of the Government of the Republic of Kosovo approving the proposal of KIESA for granting the status of strategic investment to a project shall, in its content, include the following commercial information: (i) the title of the strategic investment project; (ii) the estimated amount of capital to be invested within a period of five years; (iii) the name of the interested investor and its partners; (iv) the type of investment project; (v) the site where the investment project will be developed; (vi) description of the property or facility in which the strategic investments will be made; and (vii) the rationale for declaring a project as an important strategic project for the Republic of Kosovo, including an explanation on how the proposed project meets the requirements established by law.

3.11 Are there any other administrative approvals required (cross-sector or sector-specific) for foreign investments?

The law is silent in this regard.

4 Substantive Assessment

4.1 Which authorities are responsible for conducting the review?

The law is silent in this regard.

The authorities responsible for conducting the review are foreseen by law only in the case of strategic investments. In this regard, subject to article 6 of the Law "On Strategic Investments", the authority responsible for evaluating, selecting, implementing and monitoring strategic investment projects is the Inter-ministerial Committee for Strategic Investments. Such committee consists of: the Minister of Trade and Industry; the Minister of Finance; the Minister of Environment and Spatial Planning; the Minister of Agriculture, Forestry and Rural Development; the Minister of Economic Development; one Minister from another non-majority community in Kosovo; the Mayor of the Municipality in which the strategic investment is implemented; the Minister of the Ministry in which a strategic investment is implemented; and a State Attorney.

4.2 What is the applicable test and who bears the burden of proof?

The law is silent in this regard.

4.3 What are the main evaluation criteria and are there any guidelines available?

The law is silent in this regard.

Kosovo's legislation (which includes the Law "On Strategic Investments" and Administrative Instruction no. 02/2018 "On

Means of Verification of Eligibility for Strategic Investor Status”) only provides criteria for determining the status of a strategic investment.

4.4 In their assessment, do the authorities also take into account activities of foreign (non-local) subsidiaries in their jurisdiction?

The law is silent in this regard.

4.5 How much discretion and what powers do the authorities have to approve or reject transactions on national security grounds?

The law is silent in this regard.

4.6 Can a decision be challenged or appealed, including by third parties? Is the relevant procedure administrative or judicial in character?

The law is silent in this regard.

4.7 Is it possible to address the authorities’ objections to a transaction by providing remedies, such as undertaking or other arrangements?

The Law on Foreign Investments has introduced the concept of tacit consent. This guarantees the right for foreign investors to undertake business activity of a certain type, without obtaining

approval from the competent body, if an approval or rejection of the application is not given within the timeframe contemplated by the legislation in force.

Further, the Law “On Foreign Investments” provides to foreign investors the right to require any investment disputes to be resolved through a procedure agreed upon between the foreign investor and the Republic of Kosovo. In the absence of such an agreed procedure, a foreign investor has the right to require that the dispute is resolved, either through litigation before a court of competent jurisdiction in the Republic of Kosovo or through local and international arbitration.

4.8 Are there any other relevant considerations? What is the recent enforcement practice of the authorities?

Pursuant to Article 10 of the Law “On Foreign Investments”, without prejudice to any other rights or remedies that a foreign investor may have, the foreign investor has the right to address the court or arbitration for compensation of damages incurred as a result of any act or omission attributable to the Republic of Kosovo, which is directed against the foreign investor and constitutes a violation of applicable law in Kosovo or general norms of international law.

We are not aware of any enforcement practice of authorities with regard to this law.



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