

COVID-19 crisis inspires global tightening of Foreign Investment Screening

South Africa

South Africa continues to remain one of the more open jurisdictions in respect of their regulation of Foreign Direct Investment (FDI). The principal law governing FDI in South Africa is the *Protection of Investment Act, 2015 (Act)*, which does not compel a review of inbound foreign investment, irrespective of the nature of the investment proposed, and merely grants South Africa the power to regulate FDI in the public interest. While this Act protects the interest of foreign investors by affording them the same rights as local investors, and obviating the South African government from entering into bilateral investment treaties individually with its trading partners, the Act may in the future prove challenging to the country's investment potential if, amongst other things, the Constitution is amended to allow for expropriation without compensation as a redress measure to promote previously disadvantaged persons. That is, however, an ongoing debate and, at present, the Constitution jealously guards property rights.

The South African Reserve Bank (**SARB**), which is responsible for protecting the value of South Africa's currency, has relaxed exchange controls over the last few years with the intention of decreasing the administrative burden for businesses. Where foreign investors subscribe for shares in a South African company, it is a requirement for the share certificates to be endorsed 'non-resident' by an Authorized Dealer (generally one of the large commercial banks in South Africa). This allows for any dividends declared in such shares to be freely repatriated from South Africa. Where the foreign investor advances a loan to a South African company, it is necessary to obtain exchange control approval in the form of a loan reference number which is allocated to the loan. Once approval has been obtained, any interest or capital repayments on the loan may be freely remitted from South Africa.

A new process for reviewing national security issues arising from FDI will be introduced as part of the merger control regime under the Competition Act. While the Competition Amendment Act was signed into law in February 2019, the provisions relating to the new process have yet been implemented and there is currently no indication as to a possible commencement date. The process will involve the review by a presidentially appointed committee as to whether a merger, involving a 'foreign acquiring firm', would pose substantial public interest implications for a particular industrial sector. The list of national security interests, including the markets, industries, goods or services, sectors or regions in which such mergers must be notified will be published. It is anticipated that

the list will be relatively wide due to the broad factors that will be used in identifying national security interests (e.g. the supply of critical goods or services to citizens, or the supply of goods or services to government, services essential to the health, safety, security or economic well-being of citizens and the effective functioning of government, SA's economic and social stability). Although the procedural aspects (including timetable) of the process have yet been published, the FDI review will necessitate a simultaneous notification to the Competition Commission and the committee. In addition, an adverse decision by the committee usurps the power from the competition authorities to adopt any decision.

On March 27, 2020, Moody's Investors Service (**Moody's**) downgraded South Africa's long-term foreign and local currency debt ratings from Baa3 to Ba1 with a negative outlook, essentially downgrading South Africa's credit rating to one notch below investment grade or "junk status." This downgrade, according to Moody's, was attributable to the country having "structurally very weak growth and constrained capacity to stimulate the economy" as well as an "inexorable rise in government debt over the medium term." Given the downgrade and the spread of COVID-19, South Africa's economy has suffered a major downturn.

With FDI being an essential part of the stabilization and growth of South Africa's economy, the current challenges faced by the country's government are significant. Drastic measures have been announced in order to mitigate the crisis, including

SARB advising the country's banks to refrain from dividend payouts and implementing a freeze on the payment bonuses to executives. SARB also cut the country's interest rate by an unprecedented 2 percent, from 6.25 percent to 4.25 percent, since the commencement of the national lockdown on March 27, 2020. The government established a "solidarity fund" to support small business during the outbreak in response to the pandemic. That initiative seeks to show citizens as well as its foreign investors that measures are being put in place to address concerns.

Although FDI screening has not yet been officially addressed by the South African government, the existing legislative framework and policies in this regard remain unaltered in the face of

COVID-19. It follows from the combined impact of the pandemic and the sovereign downgrade, that the development of the restrictions with regards to FDI screening in South Africa (based mainly on public considerations) will need to be approached cautiously and critically, with the attempt to encourage FDI into South Africa and attract much needed foreign investment. With the weakening of the South African Rand, foreign investors may find South Africa an attractive option if purchasing local assets or businesses.

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