

Foreign Investment Review

Contributing editor

Oliver Borgers



2018

GETTING THE
DEAL THROUGH

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Oliver Borgers
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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
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Jordan

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Law and policy

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

The basic premise of the laws governing investments in Jordan is that a foreign investor will be treated in the same way as local investors and will be allowed to invest without restrictions in all economic sectors; except in those sectors where there is national interest in placing restrictions on such foreign investment. Furthermore, Investment Law No. 30 of 2014 (the Investment Law) provides that there are no limitations on the percentage of ownership by foreign nationals in activities conducted in any of the Jordanian Free Zones or Special Economic Zones established pursuant to the Investment Law.

In practice, these restrictions are not (to date) enforced on companies listed on the Amman Stock Exchange.

Additionally, there are certain investments and development projects that are reserved for companies established by Arab sovereign funds and Arab and foreign investment corporations.

If an investment meets certain 'economic concentration' tests and thresholds, then competition clearance would also be necessary.

National security concerns are indirectly and unofficially handled during review of the incorporation application and supporting documentation of new companies and during the licensing process for certain activities.

Although the Central Bank of Jordan has the power by law to control foreign currency payments and exchanges, there are currently no restrictions except that the Central Bank controls the exchange rates of the Jordanian dinar against foreign currencies.

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 are the main bodies of law that regulate the approval and review of local and foreign investments in Jordan:

- Companies Law No. 22 of 1997 (the Companies Law);
- the Investment Law and Regulations issued pursuant to it, mainly the Regulation for Regulating Non-Jordanian Investment No. 77 of 2016 (NJIR) and Investment Window Regulation No. (32) of 2015 (the Investment Window Regulations);
- Competition Law No. 33 of 2004 (the Competition Law); and
- Jordan Investment Fund Law No. 16 of 2016 (the Investment Fund Law) including all regulations and instructions issued pursuant thereto.

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 Companies Law

Any foreign investor wishing to undertake any type of commercial activity in Jordan must register an entity pursuant to the Companies Law by submitting an application accompanied by identification documents and draft constitutional documents to the Companies Control Department at the Ministry of Industry and Trade (CCD). The CCD

has a dual role of acting as a companies registrar as well as a reviewer of the investment and registration process and, in this latter role, has significant power to allow or prevent the incorporation of, and investment in, Jordanian companies. The CCD is the main authority that checks whether:

- the investment violates any of the foreign ownership limits set by the NJIR;
- the investment has the necessary preliminary approvals by the relevant sector regulators; and
- the investor clears any national interest restrictions.

The Investment Law

The Investment Law provides for:

- the basic protections afforded to foreign investors in Jordan;
- regulating the benefits afforded to investments in certain geographical areas or industry sectors; and
- establishing a one-stop shop for the registration and licensing of investment activities.

The NJIR is drafted in a general manner to allow unlimited foreign investment in all economic activities without prejudicing national security, public policy, morality, and public health. The NJIR defines 'economic activities' as covering industrial, agricultural, tourism, media, craftsmanship and service activities (including information technology). There is no clear definition of public policy and morality under Jordanian laws. Therefore, jurists have determined that the main principle underpinning public policy and morality is public interest, whether such interest is political, economic, social, or moral or ethical in nature.

As set out in question 1, there are certain 'economic activity' sectors where restrictions apply. The restrictions apply in accordance with the following categories:

- projects in which foreign ownership is completely prohibited (such as bakeries of all types, security services, trading, importing and maintenance of firearms, ammunition and trading and importing fireworks);
- projects in which foreign ownership is limited to a maximum of 50 per cent (such as retail and wholesale including distribution, import and export services, engineering consultation and services, ship management services, and certain passenger and cargo transportation services); and
- projects in which foreign ownership is limited to a maximum of 49 per cent (sports clubs, maintenance of television and broadcasting equipment, and the purchase of land for the establishment of residential apartments).

These limits do not apply to economic activities conducted in the Free Zones and Special Economic Zones established pursuant to the Investment Law.

The legislator has used the word 'projects' when allowing or restricting foreign investments. This broad term is used to capture foreign investments not only in shares of companies registered in Jordan, but in joint ventures, unincorporated partnerships and consortia.

Despite the foregoing, foreign ownership restrictions do not apply to foreign companies that are 50 per cent owned by Jordanians unless such foreign companies are public shareholding companies or the

investment relates to projects where foreign ownership is completely prohibited. Additionally, Jordan has entered into a number of bilateral and multilateral treaties with various countries that offer nationals of such countries the same treatment offered to the nationals of Jordan and removes foreign ownership restriction on such nationals. Moreover, ownership in companies and projects beyond the percentages listed above is still permissible for certain economic activities if approved by the Council of Ministers, based on the recommendation of the Minister of Industry and Trade.

National security, public policy and morality

The NJIR restricts foreign investment whenever there is a national security, public policy or public morality concern. This is implemented during the registration of the relevant company or transfer of shares therein by the CCD. The CCD liaises with the Ministry of Interior and other security and government departments before issuing any registration certificate or allowing any share transfer based on a list of 'national interest' suspect nationalities or sectors. This is to determine whether the investor, investment or the project itself is or may be harmful to national security or is or may be in contravention of public policy and morality. It is difficult to clearly specify which sectors the government and other security departments exercise special scrutiny over given that such scrutiny is highly dependent on the sector and nationality of the investor and changes from time to time.

The Competition Law

Competition clearance pursuant to the Competition Law for certain investments may need to be procured for transactions (ie, acquisitions or investments) that satisfy the economic concentration tests. These clearances need to be procured from the Minister of Industry and Trade prior to concluding these transactions.

The CCD (or any relevant economic sector regulator) does not check on the satisfaction of any competition clearances at the time of approval of the share transfer or subscription of shares in Jordanian entities. Separate applications to obtain such clearances need to be made. The Competition Law grants the Minister of Industry and Trade the power to take any action necessary if no application has been made. Therefore, the Minister of Industry and Trade has the discretion to reverse the transaction.

Any activity resulting in full or partial transfer of ownership or beneficial interest in properties, rights, shares or obligations of one establishment to another in a way that enables such establishment to control, whether directly or indirectly, another establishment shall be considered an economic concentration. The approval of the Minister of Industry and Trade would be required to complete an economic concentration if:

- the economic concentration would affect competition (noting that there is no threshold and accordingly even minor effects could trigger the requirement); and
- the total market share of the entity or entities involved exceeds 40 per cent (noting that the requirement is that either entity or both entities together satisfy the threshold, as opposed to the threshold being exceeded as a result of an economic concentration).

The language used in the Competition Law is wide enough to cover investment in Jordanian entities whether directly or indirectly through the acquisition of any of its shareholders. Additionally, any acquisition or change of ownership in minority interests in the Jordanian entities that already enjoy a market share of 40 per cent may trigger the competition clearance approval requirement.

The Investment Fund Law

The Investment Fund Law established the Jordan Investment Fund. Rights of ownership, investment, development and operations of certain projects are exclusive to the Jordan Investment Fund. These include national railway projects and electricity connection projects with Saudi Arabia. The Jordan Investment Fund has reserved these projects for companies established by Arab sovereign funds and Arab and foreign investment corporations (see question 1).

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

Applicable laws do not use the term 'foreign investor', but rather use the terms 'investor', 'non-Jordanian investor' and 'foreign capital'. The Investment Law defines 'investor' as 'the natural person or legal entity that exercises an economic activity in Jordan in accordance with the provisions of the law'. The NJIR further defines the 'non-Jordanian investor' as 'the natural person who holds a non-Jordanian nationality or a legal entity who has been established and registered outside Jordan'. 'Foreign capital' is also defined in the Investment Law, and covers what non-Jordanians invest in Jordan in the form of cash, in-kind contributions or rights with financial value.

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?

In general, there are no special rules for investments made by foreign state-owned enterprises or sovereign wealth funds. However, there are certain projects that are reserved for companies established by Arab sovereign funds and Arab and foreign investment corporations (see question 1). The Investment Fund Law indicates that there are also special rules for the establishment, governance and regulation of such companies. These special rules should be set out in regulations to be issued pursuant to the law. To date, no such regulations have been issued.

There are no clear definitions of SOEs or SWFs within the laws and regulations of Jordan.

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

The CCD and, in the case of public companies, the Jordanian Securities Commission are the 'gatekeepers' for checking whether any merger or acquisition requires national interest clearance. The CCD and the Jordanian Securities Commission liaise with the relevant government department or security directorate to obtain the relevant clearance. These clearances are discretionary and heavily depend on the sector, nationality and identity of the investor.

For projects to be undertaken by companies established pursuant to the Investment Fund Law, a Higher Technical Committee was established and given the authority to grant permits, authorisations, and licences for the construction and operation of the projects to which said law applies. The Higher Technical Committee is also the body responsible for approving the incorporation of companies pursuant to the Investment Fund Law (and notifies the CCD of such approval for official incorporation therewith). In the event of any changes to the incorporation documents of the companies incorporated pursuant to the Investment Fund Law (including any changes as a result of a merger or acquisition), the said committee must be informed of same, so as to grant its approval and recommend acceptance of such changes to the CCD.

If competition clearance is required, the Competition Directorate and the Minister of Industry and Trade are required to examine, review and issue the requisite approval or reject the application (see question 3).

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

The relevant government department or security directorate have wide discretion in approving or rejecting transactions on national interest grounds.

Procedure

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

There are no particular thresholds that trigger a review or clearance. Any non-Jordanian entity or individual wishing to carry out business in Jordan should register with the CCD, whether by acquiring part or all of an existing Jordanian company or by incorporating a new one. Depending on the sector in which the relevant Jordanian company carries out its activities, there may be certain limitations on the investor's contemplated investment (see question 3).

An investor should submit the required documentation to the CCD for filing in the relevant company's folder. Such documents include the relevant share transfer forms and corporate documents and authorisations (for corporate investors) and personal identification documentation (for individual investors). If 'national interest' clearance is required, the CCD would liaise with the relevant government or security department to obtain such clearance, the department may request further information from the relevant investor.

As for competition clearances, the approval of the Minister of Industry and Trade may be required if the transaction is deemed an economic concentration that may affect competition in the Jordanian market or if the total market share of the entities involved exceeds 40 per cent. In such an event, submission of certain information or documentation to the Competition Directorate is required as part of the application for the approval.

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

Upon submitting an application for incorporating or investing in a Jordanian company, the CCD may, depending on the sector and the nationality of the investor, seek the approval of certain security departments (usually, the Ministry of Interior) as well as any other relevant regulatory body (for technical and other purposes). Typically, such approvals are sought simultaneously, whereby a letter is directly issued by the CCD to such authorities and completion of the registration procedure will be stalled pending receipt of the necessary approvals.

The parties are not required to fill out any particular standard forms other than those required for registration with the CCD. Certain authorities may, at their discretion, request additional information to be provided by the relevant investor.

With respect to obtaining a competition clearance, the investor and the target shall submit an application (in the form adopted by the Ministry of Industry and Trade) to the Competition Directorate within 30 days of the date of execution of the economic concentration agreement (ie, the share purchase agreement, merger agreement, etc), attaching thereto the necessary documentation or information.

The Competition Directorate has the right to request in writing any further information or documentation in connection with the economic concentration agreement and the parties involved. Such request must be made within 60 days of the date of submission of the application mentioned above. The Competition Directorate shall then be obliged to issue a notice confirming completion of submission of the information and documentation provided that such issuance shall not prejudice the Competition Directorate's right to request further information or exercise its supervisory authority. In the event that the information and documentation were complete at the time of submission of the application, the Competition Directorate must issue the notice confirming completion of submission of the information and documentation within 60 days of the date of the application.

The Competition Directorate shall, at the applicants' cost, announce the submitted application of the economic concentration in two local daily newspapers. The publication must describe the subject matter of the application and invite any person with interest to provide his or her opinion within 15 days of the date of publication. The Minister may, after consultation with the relevant authorities and parties, take any precautionary procedures until the issuance of a decision on the submitted application.

The Minister may, upon the recommendation of the Competition Directorate's manager, issue a reasoned decision on the submitted application within 100 days of the date of issuance of the notice for completion of submission. The Minister shall attach to his or her decision a report containing a summary of the economic concentration and its impact on the competition in the market, including the economic impact and the terms and conditions of the obligations assumed by the parties (if any). Such decision and summary shall be published in at least two daily local newspapers.

Other than the usual fees and stamp duties for the registration of companies or, as the case may be, the transfer of shares in companies, there are no specified national interest filing fees for any of the above clearances.

10 Which party is responsible for securing approval?

The investor submits the application to the CCD. Although any national interest approvals are coordinated internally between the relevant authorities, it is the investor's responsibility to provide the required documentation or information and to follow up with such authorities.

Both the investor and target may be required to secure competition approval.

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?

Approvals sought from authorities other than security departments are typically provided within five to seven business days.

Approvals from security departments are procured on a case-by-case basis and certain factors such as the nationality of the investor, and any of its related parties could trigger different levels of scrutiny and timelines.

There are no exemptions or expedited 'fast-track' options. However, in practice, the investor, or its authorised representative, may directly follow up with the relevant authorities in order to inquire on the status of the process and push for the quick issuance of the approvals.

The Competition Law provides that a formal application to the Competition Directorate can take up to 160 days before the Minister of Industry and Trade issues a decision approving a transaction for competition purposes.

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?

Given that registration can only take place before the CCD, the transaction cannot be closed prior to the procurement of the approval letters.

As for the competition clearance, the approval of the Minister of Industry and Trade should be obtained prior to completing the transaction. However, if the parties implement the transaction before the clearance is obtained, the Minister may take any procedures he or she deems appropriate (which may include reversing the transaction) with respect to any economic concentration where no application has been submitted or if it violates the provisions of the Competition Law. Each party may, also, be required to pay a fine of no less than 10,000 and not more than 50,000 dinar.

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?

Some public officials may give informal guidance on the review process via pre-filing dialogues or meetings. However, such guidance may not be entirely accurate. Certain authorities refuse to give any form of guidance prior to filing an official application.

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?

There are no such specialists.

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?

None, other than the powers granted to the Minister of Industry and Trade to take any action necessary if his or her approval is not sought prior to closing a transaction in contravention of the Competition Law.

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?

There is no clear substantive test for the review on the basis of national security or interest generally. However, for the purposes of competition clearance approvals (if required), the entity wishing to conclude the

economic concentration transaction should apply to the Competition Directorate and provide, inter alia, sufficient evidence that:

- the transaction will not negatively affect competition in Jordan; or
- the transaction's positive economic benefits outweigh its negative effect on competition.

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

We are not privy to this information.

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

We are not privy to this information.

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

The authorities have the power to reject a transaction.

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

We are not privy to this information with respect to national security. However, with respect to competition clearance approvals (if required), the Minister of Industry and Trade has the discretion to approve an economic concentration transaction subject to certain conditions. By implication, this means that it is possible for the authorities to accept an undertaking in this respect.

21 Can a negative decision be challenged?

Depending on the type of decision and the reasons for rejections, final administrative decisions may be challenged before the Administrative Court.

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

There are no clear confidentiality and data protection laws in Jordan but certain laws refer to the requirement to keep certain information confidential. A personal data protection law draft has been issued and is currently in discussion in the Lower House of Parliament. According to the Investment Window Regulation all representatives of official bodies are obliged to maintain confidentiality of the following documents: information related to the type of technology utilised in a certain economic activity and its management, the budget and financing of economic activities, private agreements related to economic activities, any and all information related to the investor and accompanying shareholders, and any information labelled confidential by the investor in writing .

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.

We are unaware of any recent cases where transactions were rejected. If transactions are rejected, information is not typically disclosed to the public.



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