

GOVERNMENT DECREE No. 4/2019

of 29 May

**APPROVES THE 1st AMENDMENT TO GOVERNMENT DECREE No. 2/2018, OF
FEBRUARY 21, WHICH APPROVED THE REGULATIONS OF
PRIVATE INVESTMENT PROCEDURES**

Through Law no. 15/2017, of August 23, a new legal framework was approved for private investment in the Democratic Republic of Timor-Leste, which repealed Law no. 14/2011, of 28 September.

The legal regime inaugurated by the aforementioned legal diploma introduced a set of quite significant changes, in relation to the previous legal framework, namely in terms of the eligibility of private investments that can effectively benefit from a set of State incentives, namely of a fiscal nature.

However it happens that, despite being published on August 23, 2017, Law No. 15/2017, of August 23, only came into force on January 1, 2018, without, however, being included in that statutory instrument any rules that would transiently regulate, namely, the admission, processing and decision of the processes for issuing investor certificates, provided for in Law No. 14/2011, of 28 September, which is meanwhile no longer provided for in new private investment law.

Bearing in mind that between the date of publication and the date of entry into force of Law No. 15/2017, of 23 August, the submission, processing and acceptance of requests for the issuance of investor certificates continued to be legally permissible, the Specialized Agency for Investment, which by virtue of Decree-Law No. 45/2015, of December 30, is the Investment and Export Promotion Agency of Timor-Leste, IP [Public Institute], known as TradeInvest Timor-Leste, continued to receive and process requests for the issuance of investor certificates, as provided for in Law No. 14/2011, of 28 September.

However, it was found that, at the date of entry into force of Law No. 15/2017, of 23 August, several administrative proceedings relating to requests for the issuance of investor certificates were pending decision, whose issuance ceased to be foreseen in the new law.

Recognizing the need to decide on the administrative processes related to requests for the issuance of investor certificates that were still pending after the entry into force of Law No. 15/2017, of August 23, Government Decree No. 2/2018, of February 21, which approved the regulation of private investment procedures, provided for in paragraphs 2 and 3 of its article 28, the respective application to all pending investor certificate pending decision on December 31, 2017, unless they had already obtained a favorable opinion by the Private Investment and Export Evaluation Committee (CAIPE) up to this date, in which case Law no. 14/2011, of 28 September, as well as the Rules of Procedure, approved by Government Decree No. 6/2005 of 27 July would be applicable.

The administrative option reflected in paragraphs 2 and 3 of article 28, of Government Decree No. 2/2018, of February 21, seems somewhat incomprehensible given the nature of the said rules, which are of an administrative nature and having, for that reason, that they are in conformity with the general principles of administrative activity, to which the Council of Ministers, in the exercise of the administrative function of the State is bound, under the provisions of paragraph 3, of article 2 of Decree-Law No. 32/2008, of 27 August.

Among the general principles of administrative activity that should be considered, in the present case, the principles of equality and trust, enshrined, respectively, in Article 3 (1) and Article 6 (2), all of which Decree-Law No. 32/2008, of 27 August, is of particular relevance.

The principle of equality, as enshrined both in the Constitution of the Republic and in paragraph 1, of Article 3 of Decree-Law No. 32/2008, of 27 August, has two aspects, namely: the positive side and the negative side. Now, as far as the first is concerned, the principle of equality requires that equal situations deserve equal treatment and requires that legally or materially different situations be treated differently.

From reading the rules in paragraphs 2 and 3 of article 28 of Government Decree no. 2/2018, of February 21, it is impossible to understand how they conform to the principle of equality, since they determine that administrative processes for the issuance of investor certificates, entered and instructed, but not yet decided, during the term of Law No. 14/2011, of September 28, will be decided according to different legal regimes, depending on whether they have been able to obtain (or not), until December 31, 2017, the favorable opinion provided by the Private Investment and Export Evaluation Committee (CAIPE) to investment authorization requests.

Although Law No. 14/2011, of September 28, does not make the issuance of investor certificates conditional on the prior opinion of any other body, establishing only that the issuance of such certificates is the responsibility of the Specialized Agency for Investment, the continued application of Government Decree No. 6/2005, of 27 July, namely Article 12 (1), associated the positive opinion of the Private Investment and Export Evaluation Committee (CAIPE) to carry out an external investment and to issue an investor certificate.

This resulted from the fact that CAIPE's opinion, regarding requests for authorization of foreign investment, is mandatory and binding for the Government body with competence to render a decision on them, in fact, providing for the formation of tacit authorization or of tacit rejection of requests, depending on the meaning of the report-opinion produced, if an express decision was not issued on them, within a maximum period of five days from the date of presentation of the said opinion.

According to the rules approved by Government Decree No. 6/2005, of July 27, applied during the term of Law No. 14/2011, of September 28, the issuance of an investor certificate is associated with the granting of an investment authorization, provided by the Government, based on the favorable opinion of CAIPE, which should meet, for this purpose, within a maximum period of ten days, counted from the date of submission, to TradeInvest Timor-Leste, of the request for internal investment authorization, when convened by its President.

Notwithstanding the existence of deadlines established in administrative regulations for the processing of requests for authorization of foreign investment and for the issuance of investor certificates, the provisions of paragraphs 2 and 3 of article 28 of Government Decree no. 2/2018, of February 21, provided only as the sole criterion for the application of Law No. 14/2011, of September 28, the existence or not of a CAIPE opinion dated before December 31, 2017, without taking care to guard against situations in which the said opinion was not issued for reasons attributable to the public administration, namely the inertia of its bodies to convene the CAIPE meeting.

In accordance with the legal framework relating to the authorization to carry out foreign investment, private individuals had the legitimate expectation to see their requests for authorization for foreign investment assessed by CAIPE within a maximum period of ten days from the respective presentation and if the requirements of laws and regulations in force are met.

Disregarding the situations in which applications for investment authorization were submitted during 2017, but CAIPE's opinions on them were not given for reasons attributable to public administration services, with prejudice to the interests of private individuals cannot fail to break the principle of trust.

On the other hand, the formulation of paragraphs 2 and 3 of article 28 of Government Decree No. 2/2018, of February 21, also did not safeguard the situations in which the Executive has already given its

authorization to carry out foreign investment, namely in the form of a legal diploma, without the need for a prior, mandatory and binding opinion from CAIPE, the issuance of an investor certificate did not succeed in obtaining its issuance before January 1, 2018.

Therefore, the Government's intervention in order to unblock the administrative impasse generated by the lack of transitional rules in Law No. 15/2017, of 23 August, administrative activity and the legally protected rights and interests of individuals.

Thus,

The Government decrees, under the terms of article 50 of Law no. 15/2017, of 23 August, to be enforced as a regulation, the following:

Article 1

Purpose

This legal diploma approves the first amendment to Government Decree No. 2/2018, of February 21.

Article 2

Amendment

Article 28 of Government Decree no. 2/2018, of 21 February, which approves the Private Investment Procedures Regulation, is replaced by the following:

"Article 28

Entry into force

1. (...).
2. The administrative processes related to requests for authorization for foreign investment or for issuing an investor certificate submitted during the term of Law no. 14/2011, of 28 September and still pending, are decided by the Coordinating Minister for Economic Affairs according to this same Law, except for those that have not been the subject of a CAIPES report, for reasons attributable to the investor.
3. The Executive Director of TradeInvest Timor-Leste submits to the Coordinating Minister for Economic Affairs, the administrative processes, duly informed, related to requests for authorization for foreign investment or for issuing an investor certificate referred to in the previous number. ”

Article 3

Entry into force

This Government Decree enters into force on the day following its publication.

Approved by the Council of Ministers on March 5, 2019.

Be it published.

The Prime Minister,

Taur Matan Ruak

The Coordinating Minister for Economic Affairs, acting

Agio Pereira