

# BOGA & ASSOCIATES

LEGAL • TAX • ACCOUNTING

## Services at a Glance

### Albania, Kosovo

Deshmoret e 4 Shkurtit Str.

P.O Box 8264

Tirana, Albania

**Tel:** +355 42 251 050

**Fax:** +355 42 251 055

### Other offices:

Nene Tereza Str.

Entry 30, No. 5

Pristina, Kosovo

**Tel:** +381 38 223 152

**Fax:** +381 38 223 153

**Email:** [boga@bogalaw.com](mailto:boga@bogalaw.com)

**Web:** [www.bogalaw.com](http://www.bogalaw.com)

### Firm profile:

Boga & Associates, established in 1994, has emerged as one of the premier law firms in Albania, earning a reputation for providing the highest quality of legal, tax and accounting services to its clients. Boga & Associates also operates in Kosovo (Pristina) offering a full range of services. The firm maintains its quality through the skills and determination of a team of attorneys and other professionals with a wide range of skills and experience. The team's extensive foreign language capabilities help to ensure that its international clientele have easy access to the expanding Albanian and Kosovo business environment. Over the years the firm has advised on privatization transactions, concessions, real estate transactions, setting up businesses, credit facilities and custom and tax issues, all with a keen sensitivity to developments in the Albanian business environment.

### Areas of practice:

**LEGAL:** Commercial, Corporate, Mergers and Acquisitions, Banking and Finance, Competition, Employment, Construction, Telecommunication, Oil and Energy, Procurement, Environment, Real Estate, IP, Litigation, etc.

**TAX:** Tax Advice, Compliance, Audit, Litigation.

**ACCOUNTING:** Accounting, Bookkeeping and Payroll.

**Languages spoken:** Albanian, English, French, Italian, Greek.

# A full toolkit

Alketa Uruçi and Jonida Skendaj of Boga & Associates examine the options available to companies wishing to develop their business Albania

When entering a new market, most companies face the struggle of establishing their brand and service with respect to the existing operators. In this context, M&A procedures provide an efficient and successful method for quicker development and market expansion. This is also the case for international companies operating in Albania, many of which have chosen to merge with already established Albanian companies for the purpose of their prospective growth in the country.

There are various M&A legal instruments and procedures available to commercial companies operating or wishing to operate in the Albanian market.

## Mergers

The Albanian Company Law (9901/2008) provides for the rules to be observed in case of mergers in which are involved limited liability companies and joint-stock companies (provided they have been established and registered with the Commercial Register for conducting their activity for at least one year before the merger).

Company mergers are not a common form of acquisition in Albania given the long procedures for their realisation under the Company Law. Therefore, the most common form of acquisition is the share or stock purchase transaction.

Mergers may be implemented in the form of mergers by acquisition or mergers by formation of a new company.

Merger by acquisition is the transfer of total of assets and liabilities, in exchange for shares, from the acquired company to the acquiring company. The merger must obtain approval of the general assembly of shareholders of the concerned companies. In case of parent-subsidiary mergers, if the parent company holds at least 90% of the registered capital of the subsidiary (being a joint

-stock company), the fusion can be completed without approval of the general assembly of parent company, unless the shareholders of the parent company that own at least 5% of the registered capital or voting rights request the convocation of the general assembly for the approval of the fusion.

Before performing the merger, the legal representatives of the involved companies must prepare a draft written agreement, which regulates and governs the most essential aspects of the acquisition that is to take place. In addition, a detailed report must be prepared, describing the stages and any difficulties in assessment encountered during the process.

Independent experts should also assess the conditions of the draft agreement and compile a written report illustrating their findings. Upon approval of the merger and its registration with the National Registration Centre (NRC) the assets and liabilities of the acquired company are transferred to the acquiring company, and the shareholders of the acquired company become shareholders of the acquiring company. The acquired company ceases to exist and is cancelled (deregistered from the NRC), without having to go through a liquidation process.

As regards protection instruments of the creditors of the acquired company, under the Company Law these creditors may submit (within the time limits provided by the law) written evidence of their claims, for which the company has a duty to provide adequate guarantees. For such purpose, legal representatives of the merging company must assert in writing that the company assets will be managed separately until settlement of each creditor claim. In lack of such ascertainment, creditors may request the court to order the issuance of adequate guarantees or otherwise to annul the merger transaction.

Merger by creation of a new company is the transfer of all assets and liabilities of the merging companies, in exchange for shares in the new company. This newly-formed company is considered as the acquiring company and is subject to the Company Law provisions on formation of a new company.

“Company mergers are not a common form of acquisition in Albania”

The other provisions regulating the merger by acquisition are the same applicable to the merger by formation of a new company.

### Acquisitions

Different from mergers, acquisitions involve the purchase by a legal entity of another legal entity shares a business activity or part thereof. In the acquisition, there is no exchange of stock/shares or creation of a new company.

The Company Law does not regulate the transactions on share transfer, with a few exceptions as described below. For issues not governed by the Company Law, the Albanian Civil Code rules such transactions in compliance with its general provisions on transfer of property/rights.

The Company Law establishes that an acquisition of shares can be made (among other means such as donation, inheritance or contribution in the share capital) through a share purchase agreement, which must be obligatorily in written form.

In addition, observance of any pre-emption rights, eventually inserted in the bylaws of the concerned company or shareholders agreements, must be made.

Responding business transfer, the Company Law provides for a prior shareholders' assembly approval in case of proposed transfer of company's assets consisting of more than 5% of the company's share capital.

In acquisition of the business activity, all rights and liabilities of such activity are binding on the acquirer provided that the trade mark or the registered name of the business activity is also acquired by the acquirer. Any agreement on restriction or exclusion of such liability cannot be opposed to third parties, even if disclosed to the public upon filing with the Commercial Register, unless it is proved that the third party was aware of the agreement or, under evident circumstances, could not have been unaware of it.

In any case, the acquirer of stock and business assets may be protected by contractual warranties and representations of the seller, as well as contractual indemnities and penalties binding on the seller. Such warranties and representations are usually indicated in the agreement for acquisition of the business activity.

### Tax implications

As mentioned above, foreign purchaser may acquire an Albanian company (the target company) by purchasing either its business or its share capital.

“As a result of the acquisition of shares in a company, the purchaser might be liable for latent tax liabilities”

A foreign company acquiring the (Albanian) business of the target company for carrying on business in Albania will normally be regarded as having a permanent establishment in Albania and be taxable in Albania pursuant to Albanian fiscal legislation and any double taxation treaty entered into with the country of residence of the foreign company.

The foreign company may also purchase the assets by using an existing company in Albania or by establishing a new one.

Most tangible and intangible assets may be depreciated (except for land, securities and some other specific assets) (i) on a decline basis (buildings are depreciated at 5%/year, software at 25%/year, and all other assets at 20%/year); or (ii) on a straight line basis (trade marks and other intangibles are depreciated at 15%/year).

There are no immediate Albanian tax consequences for a foreign company when it acquires the stock of an Albanian company, under the Income Tax Law. The tax position of the acquired Albanian company remains unchanged, except for the carry-forward of losses (see below).

With regard to the tax liability of the purchaser toward the shares or business activity purchased, differences result because of the nature of the transaction and the impact of other applicable legislation.

As a result of the acquisition of shares in a company, the purchaser might be liable for latent tax liabilities affecting the company. Under the Tax Procedures Law, even a shareholder of a company where the legal form imposes limitation of its liability up to its contribution into the company might be liable for the tax obligations of the company.

The indemnities or warranties to the benefit of the buyer is a matter for negotiation between the parties, given that it is not possible to obtain assurances from tax authorities that a potential target company has no tax liabilities.

At the moment of disposal, any income resulting from a source in Albanian territory is taxable in Albania. Therefore, capital gains earned by a foreign company at the moment of disposal of the shares or business assets and liabilities will be subject to Albanian income tax (10%), except when double tax treaties providing otherwise are applicable.

If the acquisition of business assets is made by an Albanian acquiring company, the permanent establishment issue mentioned above will have no impact on the acquisition.



### About the author

Alketa Uruçi joined Boga & Associates in 1999 and is a partner of the firm. The focus of her practice covers broadly concession and energy, where she manages energy assignments on any regulatory, corporate and commercial aspects, including in international arbitration proceedings.

Her experience regularly includes tax advice to commercial companies, for corporate tax, VAT, employees' taxation matters, involvement in the management of several tax aspects of mergers and acquisitions transactions, tax planning and restructuring. She has performed a number of tax and legal due diligence assignments and managed legal consultancy to international clients. She also assisted foreign clients during international arbitration proceedings and is active as tax litigator in Albanian courts. Uruçi is fluent in English and Italian.

### Contact information

Alketa Uruçi

Boga & Associates

Deshmoret e 4 Shkurtit Street  
Green Park, Tower I

T: +355 4 225 1050

F: +355 4 225 1055

E: [auruci@bogalaw.com](mailto:auruci@bogalaw.com)

W: [www.bogalaw.com](http://www.bogalaw.com)

The only tax differences arise in terms of taxation of dividends distributed by the target company, implying that if stocks are purchased by the foreign acquiring company through a local company, dividends distributed by the target company to the local subsidiary of the foreign acquiring company are exempt from taxation (provided that both target company and local subsidiary are Albanian tax residents and subject to corporate income tax).

Under the Income Tax Law, net operating losses (which are strictly related to the taxpayer) do not survive if the direct or indirect ownership of the share capital or voting rights of the target company changes by more than 25% in number or value.

Under the VAT Law, both transactions (acquisition of shares and acquisition of business) are exempt from Albanian VAT (which stands at 20%).

The acquisition of shares benefits from such exemption because of the nature of the transaction, while the acquisition of business would benefit from the exemption after fulfilment of certain economic and legal requirements/conditions.

Business acquisition transactions are exempted from VAT if the transaction is considered as a "transfer of economic activity", which means a transaction where the taxable person transfers entirely or partially its activity to another person (being already or becoming a taxable person by continuing to conduct such activity) and when two economic and legal requirements/conditions are fulfilled.

The first is that the transferred activity must be economically autonomous/independent, that is, continue to be conducted independently after the transfer. Economic autonomy requires the existence of all conditions necessary for the realisation of the activity (such as the premises, raw materials, equipment, and so on). If the transfer consists of only one of these elements, the transfer will be considered as supply of goods and as such VAT-able.

The second condition (the legal requirement) consists of execution of a written agreement before a notary public and verification of the financial statements of the seller (especially the identification of the assets object of the transferred activity and income realised from the transfer) and of the purchaser.

The acquisition of business assets (transfer of

economic activity) will trigger application of national and local taxes depending on the nature of the assets acquired. If the assets constitute immovable properties, a tax for transfer of ownership title over the immovable properties will apply (such tax is applied at a rate of Lek2,000 (\$18.9) per square metre for commercial buildings located in the capital city; the tax is lower in other districts); furthermore, the tax is 2% of the sale price for all immovable properties other than buildings (including land).

The Government has proposed a draft law on VAT which will substitute the current VAT law. This draft law is prepared in line with EU VAT Directive and provides for some new rules regarding taxation of transfer of shares of companies owning real estate and transfer of business.

### Cross-border mergers

On December 2011 the Ministry of Economy, Trade and Energy introduced for discussion a draft law on cross-border mergers.

The purpose of the draft law is the establishment of terms, procedures and legal consequences of cross-border mergers between Albanian and European companies, as well as to provide adequate protection measures for creditors and employees of such companies.

The draft law refers to Directive 2005/56/EC on cross-border mergers of limited liability companies, but differently from the Directive it applies to both limited liability companies and joint-stock companies (but not to Albanian companies that carry out activity in the field of collective investment).

Cross-border mergers would be subject to regulatory approvals of the Albanian Competition Authority as well as of other Albanian regulatory bodies having regulatory powers under Albanian law.

The draft law has not been yet approved by the Albanian parliament.

### Public takeover

Law 10236/2010 provides for the takeover of companies with public offer. The law is applicable to public offers for the purpose of acquiring securities, accepted for trade in the Albanian security market,

issued by a public company that has its legal seat in Albania, as well as foreign public companies, with legal seat in and outside Albania, that are listed in the Albanian stock market. Offers related to securities issued by companies dealing with capital collective investment, as well as securities issued by the Bank of Albania, are not subject to this law.

Takeover of a public company is a process initiated by the party interested in obtaining control, and who makes the offer for obtaining control. Before publication of the offer, the interested party must obtain approval of the Financial Supervisory Authority (FSA) and thereafter publicise the offer through the NRC.

Under the law, control is defined as ownership of at least 30% of the shares in the company. If the envisaged control may result in a concentration under the Competition Law, clearance of the competition authority is needed to be obtained before publication of the offer.

On the contrary, if no control occurs due to acquisition of shares, the offering party must notify the FSA within 10 days, with no obligation to make an offer and request approval of the Financial Supervisory Authority.

Similar to the merger of companies, the administration body of the target company drafts and publishes in the NRC a document analysing the offer and its eventual consequences.

### Merger control

Pursuant to Albanian Competition Law, a concentration arises when a change in control, on a lasting basis, occurs as a result of: (i) a merger of two or more undertakings previously independent or parts of undertakings; (ii) acquisition of the direct or indirect control by one or more persons already controlling at least another undertaking, or by one or more undertakings, over one or more undertakings or part of these undertakings, by means of purchase of securities or assets, by contract or by any other legal means; or (iii) direct or indirect control over one or more undertakings or part of these undertakings.

Following the above, a concentration of undertakings must be notified to the Competition Authority for obtaining approval if in the last financial year before the concentration:



### About the author

Jonida Skendaj joined Boga & Associates in 2004. She is a specialised business lawyer and assists clients on any business law aspects, including corporate, employment, taxation of corporations, competition law implications, mergers and acquisitions and intellectual property. She is also involved with assistance of foreign investors in the energy field from the prospective of compliance with energy regulatory framework and concessions.

Skendaj graduated in Business Law (*Maitrise en Droit des Affaires*) at the University of Paris X Nanterre, Paris in 2002 and obtained a Masters in Business Law, focused on EU Competition Law (*Diplome d'Etudes Approfondies en Droit des Affaires*), in 2003 at the same institution. She is fluent in French, English and Italian.

### Contact information

**Jonida Skendaj**  
Boga & Associates

Deshmoret e 4 Shkurtit Street  
Green Park, Tower I

T: +355 4 225 1050

F: +355 4 225 1055

E: [jskendaj@bogalaw.com](mailto:jskendaj@bogalaw.com)

W: [www.bogalaw.com](http://www.bogalaw.com)

- the combined worldwide turnover of all participating undertakings is more than Leke7 billion (approximately €49.5 million) and the domestic turnover of at least one participating undertaking is more than Leke200 million; or
- the combined domestic turnover of all participating undertakings is more than Leke400 million and the domestic turnover of at least one participating undertaking is more than Leke200 million.

Turnover includes the income of the participating undertakings realised in the preceding financial year from the sale of products falling within the undertakings' ordinary activities, after deduction of taxes or fees directly related to the undertakings' turnover.

When the merger consists of the acquisition of parts of one or more undertakings, for calculation of the seller's turnover only the turnover corresponding to the parts which are the subject of the transaction will be taken into account.

When the participating undertaking is part of a group or is a financial or credit institution or an insurance company, the law provides another income base for the calculation of the turnover.

The notification should take place within 30 days from the conclusion of the agreement resulting in a concentration.

When the companies operate in a regulated sector, such as the banking and insurance sector, an approval will be needed before making effective the acquisition.

The Bank of Albania has the power to approve or decline any transfer or acquisition of shares of at least 10% of a bank's share capital or such a percentage that enables a shareholder to influence considerably in the management or policies of the bank; in the insurance sector, the FSA has the power to approve or decline any transfer or acquisition of shares of at least 10% of the share capital of an insurance company as well as any further participation up to or exceeding 20, 33 or 50% of the share capital.

As for the audiovisual broadcasting sector, an entity or person may not hold more than 40% of the share capital in a national radio-television company. Moreover, an entity or person holding shares in a national radio-television company is prohibited to acquire directly or indirectly shares of another national radio-television company.

**“The Bank of Albania has the power to approve or decline any transfer or acquisition of shares of at least 10% of a bank's share capital”**