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COMMERCIAL

INTRODUCTION OF NEW RULES ON LATE PAYMENT IN COMMERCIAL TRANSACTIONS, ALBANIA



Ilir Limaj

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Introduction

On April 24 2014 Parliament passed the Law on Late Payments for Contractual and Commercial Obligations (48/2014), which is partially aligned with the EU Directive on Combating Late Payment in Commercial Transactions (2011/7/EC) and will enter into force upon publication in the Official Gazette, 15 days after promulgation by the president.

Until now, late payments have been regulated by the Civil Code based on the principle of contractual freedom. The new law sets out the rules for the calculation of legal interest for late payments in commercial transactions involving the supply of goods and services between commercial undertakings and public authorities, in order to ensure the proper functioning of the internal market by encouraging competitiveness of commercial undertakings, and particularly small and medium-sized enterprises.

Article 2 of the law provides that the law shall not apply to obligations or payments that:

- are subject to bankruptcy procedures initiated against the debtor (including the procedure of debt restructuring);
- derive from transactions with consumers;
- consist of interest or other payments made for securities; or
- constitute damage relief for torts, including indemnities payable from life and non-life insurance companies.

In commercial transactions where the debtor is an undertaking or a public authority, the creditor is entitled to payment of interest from the next day of the due date, without giving notice of delay to the debtor, if:

- the creditor has fulfilled all of its obligations under the law and contract; and
- the creditor has not been paid, except where the delay is not the debtor’s fault.

Payment terms

If the payment term is not set out in the contract, the creditor shall be entitled to interest from the expiry of the following terms:

- 30 calendar days following receipt of the invoice by the debtor;
- where the receipt date of the invoice is unclear, 30 calendar days after receiving the goods or services;
- where the debtor receives the invoice before the receipt of goods or services, 30 calendar days after receipt of the goods or services; or
- where an acceptance or verification procedure to ascertain that the goods or services conform with the contract is provided for by law or the contract, and the debtor receives the invoice earlier than or on the date when such acceptance or verification takes place, 30 calendar days after that date.

While the directive provides that the payment period set out in the contract may not exceed 60 calendar days, under Law 48/2014 the parties may agree on a longer payment period, provided that it is not to the detriment of the creditor.

The payment periods are also applicable to commercial transactions between undertakings and public authorities. However, the creditor shall be entitled to claim late interest after a total of 60 days, comprising 30 days' delay by the Treasury Department and 30 days' payment delay by the public authority.

Interest and compensation for recovery costs

Article 5 of the law provides for the following interest:

“The rate for late payments in Leke will be fixed in reference to the REPO (Repurchase Agreement) and reverse REPO (Reverse Repurchase Agreement) interest rates as approved by the Bank of Albania by adding eight percentage points; while, for Euro currency by referring to the interest rate of main refinancing operations approved by the Central European Bank by adding eight percentage points. For the first semester of the year concerned shall be the rate in force on 1 January of that year, while for the second semester of the year concerned shall be the rate in force on 1 July of that year.”

In addition, the new law provides for the payment of expenses in case of delayed payments by the debtor. Thus, the creditor is entitled to claim not only the payment of interest, but also the expenses incurred due to such delay, including legal fees paid by the creditor to enforce the debtor's obligations. Moreover, the debtor must pay the creditor Lek 5,000 as compensation for its recovery costs.

Unfair contract terms

The law prohibits the abuse of contractual freedom. Thus, where a contractual term or practice relates to the payment period, the late payment interest rate or compensation for recovery costs, and is either not justified by the terms granted to the debtor or designed to give the debtor an additional advantage, it may be regarded as abusive and unenforceable. In such cases the creditor can claim for the damage incurred.

Enforcement of monetary obligations

Under Law 48/2014, financial obligations are considered to be an “executive title” in the sense of the Civil Procedure Code and are enforced by the Bailiff's Office, provided that the creditor has delivered the goods or performed the services in accordance with the contract and the law, and the debt is undisputed.

Comment

Businesses entering into commercial contracts after Law 48/2014 has entered into force should pay particular attention to the payment periods and rates of interest set down in the contract. Although commercial parties may still negotiate payment periods of longer than 60 days, it is possible that in the event of a dispute, this may not be considered a fair remedy for late payment and will be unenforceable.

CIVIL CODE AMENDMENTS IMPROVE AGENCY AGREEMENTS, ALBANIA



Elona Xhepa

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On April 18 2013 Parliament approved amendments to the Civil Code (Law 7850/1994) which introduced, among other things, new provisions on agency agreements. The amendments to the Civil Code entered into force on September 1 2013.

The approved amendments and additions have resulted in more specific and detailed provisions on:

- the remuneration of agents;
- the freedom to contract between the principal and the agent;
- the damages relief due to the agent in case of termination of the relationship with the principal; and
- the warranty agreement made between the agent and the principal guaranteeing that the client will make payments.

Pursuant to Article 953 of the code, in cases where the parties have not agreed on the agent’s remuneration, the latter has the right to receive remuneration equal to that received by other agents operating in the same place. Article 953 provides that if no such customary practice is in place, the remuneration will be determined by considering all aspects of the contract and according to the number and value of the actions performed. This amendment is intended to protect the legal position of the agent, as it specifies the conditions regarding the determination of remuneration. It thus completes the previous provisions of the law, which did not set down such conditions.

Another amendment relates to the former Article 956(2), now Article 954 of the Civil Code. It concerns the agent’s right of remuneration when a contract is concluded directly between the principal and the client in the geographic area where the agent has the exclusive right of operation.

Pursuant to the former Article 956(2), the agent’s remuneration was not obligatory, but was rather subject to the parties’ will when concluding the contract. After the amendment, every time that a contract is concluded directly between the principal and the client within the agent’s operating area, the agent will have the right to remuneration and any contrary agreement of the parties is held invalid.

Further, Article 961 of the Civil Code was amended. This article now provides that the agent may conclude a warranty agreement with the principal to guarantee the client’s ability to pay the price of the goods that it has bought. Such agreement shall be in writing and may extend only to explicitly determined contracts for which the agent is operating. This amendment is designed to better regulate the relationship between the agent and the client.

CONVENING GENERAL MEETINGS OF SHAREHOLDERS, ALBANIA



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Ened Topi

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Despite recent reforms to the Company Law (9901/2008), which regulates commercial companies, some aspects of the law still need to be developed by doctrine and jurisprudence. According to the Company Law, in limited liability companies a general meeting of shareholders is convened by the administrator or, in specific cases as indicated by the law, it may be convened by the shareholders.

In order to protect minority shareholders' rights, the Company Law provides that shareholders holding at least 5% of the total voting rights (or less if indicated in the bylaws) may, on written request to the administrator, ask that the general meeting be convened or that specific issues be included in the next meeting's agenda. Refusal of the request by the administrator entitles the shareholders to convene the general meeting and discuss the proposed agenda. In addition, failure of the administrator to accommodate the minority shareholders' request within 15 days entitles them to file suit with the court for breach of fiduciary duties, and to ask the company to acquire their participation in the share capital.

The Company Law contains no provisions regarding the situation where the administrator can no longer perform his or her duties, in particular due to death or disability. Given that the mechanism for convening the general meeting pertains exclusively to the administrator, failure or refusal by the latter to convene the meeting causes an 'administrative gap' that might affect the company's business activity, given that no new administrator may be appointed for as long as the meeting of shareholders does not take place.

In these circumstances, in the absence of an interpretation by the Albanian courts, in order to resolve the impasse created, the adoption of the mechanisms provided by the Company Law becomes necessary. As a first option, reference should be made to the mechanism in Article 83(2) of the Company Law, which provides that resolutions of the shareholders' meeting are valid even if the procedures for convening the meeting are not observed, provided that all shareholders agree to adopt the resolutions despite the irregularity.

Although notification of the shareholders' meeting is part of the duties of the administrator, the shareholders can move forward by meeting and agreeing on the adoption of the resolution to appoint a new administrator. In practice, this action will present no difficulties, given that in Albania limited liability companies do not usually have numerous shareholders.

The other option is that minority shareholders (ie, 5% or less) can act as if their request to convene the meeting was refused by the administrator, and go ahead with convening the meeting and adopting resolutions on the appointment of a new administrator. Hypothetically this strategy could be challenged before the courts by any interested party, given that in order to proceed with convening the meeting by minority shareholders, the administrator's refusal is required.

The procedure for convening the shareholders' meeting remains unclear if not all of the shareholders agree to meet and to resolve on the appointment of a new administrator. If the administrator fails to convene the meeting within 15 days of their request, the shareholders can file a lawsuit for breach of fiduciary duties pertaining to the administrator and revocation of its powers.

REORGANIZATION OF MANAGEMENT STRUCTURE AND SHAREHOLDERS' MEETINGS, ALBANIA



Alketa Uruci



Jonida Skendaj

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Introduction

Companies that were established before the entry into force of the Law on Entrepreneurs and Commercial Companies(1) on May 21 2008 are running out of time to harmonise their internal organisation with the new provisions of the said law.

With less than two months to go until the compliance deadline, companies should ensure that they are well informed of the various changes to the law on corporate structures and have implemented any restructuring correctly. The penalty for failure is extreme, with non-compliant companies facing dissolution.

This update briefly outlines the main rules under the law as they affect shareholders' meetings and the management organisation of a limited liability company or joint stock company.

Shareholders' meetings

Representation of shareholders

The administrators of a limited liability company and administrators and members of the administrative council and supervisory board of a joint stock company may not represent a shareholder in the shareholders' meeting.

Notifications

Shareholders' meetings of a limited liability company must be convened no less than seven days before the date of the meeting; in a joint stock company, the minimum notification period is 21 days. A shareholders' meeting in either form of company must be convened whenever the company proposes to dispose of its assets or to purchase - within two years of its registration - the assets of one of its shareholders, if such assets represent more than 5% of the company's assets as shown in the most recent audited financial statements.

Quorum and majority

In both forms of company, resolutions requiring a simple majority (ie, a majority of participating shareholders' votes), are validly passed if those present or represented at the meeting (in terms of voting shares) account for more than 30% of the share capital. For qualified majority resolutions, which require three-quarters of the votes of the participating shareholders, the required percentage is 50%.

Categories of resolutions subject to qualified majority

Unlike the previous commercial company legislation, the law requires that resolutions on the distribution of profits be passed by a qualified majority. The other categories of resolution that require such a majority remain unchanged from previous legislation.

Resolutions passed by a sole shareholder

If the limited liability company or joint stock company is owned by a sole shareholder, all resolutions passed by the sole shareholder must be registered in the resolutions book. Otherwise, the resolutions are invalid.

Management bodies

Two options for management of joint stock companies

A joint stock company may choose whether to be managed by an administrative council (whereby the council retains both managerial and supervisory duties – the so-called ‘monist’ system) or by a supervisory board and one or more administrators (whereby the administrators manage the company and the supervisory board supervises the administrators - the so-called ‘dualist’ system). Once the choice is made, the shareholders’ meeting should be convened in order to amend the bylaws to indicate the chosen management model. The bylaws must also indicate whether administrators under a dualist system are appointed by the shareholders’ meeting or the supervisory board.

Companies should note the powers that the law confers on the administrative council and administrators of a joint stock company, who are appointed by the council to run the company’s day-to-day activities. The powers of the administrative council may not be delegated to the administrators. Similarly, under the dualist management system, the law sets out the powers and responsibilities that are to be granted to the administrators and supervisory board in a joint stock company.

Term of mandate

Administrators and members of the administrative council and the supervisory board of a joint stock company are appointed for a renewable period of no more than three years. The maximum term of an administrator’s mandate in a limited liability company is five years, but this is also renewable.

Avoidance of conflict of interest

The law sets out provisions on the avoidance of conflict of interest in respect of individuals who may be appointed as members of the management body of a commercial company. In a limited liability company, administrators of a parent company may not be appointed administrators of its subsidiaries, and vice versa. The same rule applies to the members of the administrative council and administrators of a joint stock company (under either managerial model). Appointments contrary to these rules are invalid. In addition, the law indicates that administrators of companies which are part of the same group of companies may not be appointed as members of the supervisory board of a joint stock company under a dualist management system.

Furthermore, shareholders and administrators of a limited liability company and administrators and members of the administrative council of a joint stock company may not hold managerial office or be employed in commercial companies that undertake the same activity, or engage as entrepreneurs in the same activity. If the shareholders wish to avoid this restriction, they must amend the company’s bylaws to provide that the restriction is subject to exceptions on a case-by-case basis (to be decided by the shareholders at the time of the administrator’s appointment). If the shareholders wish to prevent administrators from competing with the company after their term of office has expired, they must include an appropriate prohibition in the bylaws.

Unlike the previous legislation, the law does not require that one-third of members of a joint stock company’s supervisory body be elected by the employees - this remains possible, but only if the shareholders choose this option in the company bylaws.

THE E-COMMERCE LAW: A BRIEFING, ALBANIA



Sabina Lalaj

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On May 11 2009 the Albanian Parliament approved the E-commerce Law (10128/2009), which establishes the rules governing:

- e-commerce activity and information society services;
- the protection of parties to such transactions;
- data privacy of consumers and of parties to such transactions;
- the free movement of information services; and
- the responsibilities of service providers.

The definition of 'information society services' set out in the law includes services provided at a distance by electronic means, on the request of the recipient, against compensation. The law further defines 'commercial communications' as any means of communication designed to promote, directly or indirectly, the image of an entrepreneur or a commercial company, non-profit organization or other person engaged in commercial or industrial activity. The law categorizes as 'e-commerce' activities conducted by the subjects of the law upon receipt of electronic documents for the trade of goods and/or services.

The law applies to all services offered electronically to natural or legal persons, excluding:

- the services of a notary public or similar relating to the execution of public authority;
- the representation of third parties before the courts or other authorities;
- activities subject to payment for participation in bets, lotteries, electronic games, games of chance and casinos; and
- legal relationships arising from fiscal activity, the protection of personal data or agreements governed by the Competition Law.

The conduct of e-commerce is based on principles such as:

- contractual freedom;
- free will and equal treatment of the parties; and
- free movement of goods and services in the territory of Albania.

Within this context, the parties to an electronic transaction cannot impose limitations on purchases or on the fulfilment of rights and obligations of natural or legal persons, other than those provided for by law.

The E-commerce Law provides that information society services may be provided by all natural or legal persons registered with the National Registration Centre, without any need for a special authorization or licence. The service provider should provide the authorities and service recipients with certain minimum information, including:

- its commercial name;
- the address of its legal seat;
- its website and email address; and
- company registration data.

This information, and details of the goods or services offered, should be provided in a clear and precise manner that may be easily understood by the wider public.

The service provider should ensure that commercial communications include, at a minimum:

- a clear indication of the commercial nature of the communication;
- sufficient information to identify the subject on whose behalf the communication is being sent;
- clear instructions on the terms and conditions of any benefits offered in the communications; and
- clear instructions for participation in competitions or promotional games, where these are permitted by law.

When delivering unsolicited commercial communications, the service provider must also respect the will of recipients that do not wish to receive such communications. A service provider that sends such communications to third parties which have indicated that they do not wish to receive them will be held responsible for any damage caused.

Contracts entered into electronically shall be considered as validly executed under the E-commerce Law if they comply with the requirements of the Civil Code and of the Law on the Protection of Consumers (9002/2008). This law does not apply to:

- contracts that create or erase rights to immovable property;
- contracts that require by law the participation of the court, public authorities or public service professionals;
- contracts governed by the Family Code;
- actions governed by the chapter of the Civil Code regulating issues of testamentary inheritance; and
- financial or insurance services contracts.

The Authority of Electronic and Postal Communication is responsible for supervising compliance with the E-commerce Law; while the protection of consumers is safeguarded by the Commission for the Protection of Consumers and other bodies as designated in the Law on the Protection of Consumers.

The E-commerce Law sets out the penalties applicable in case of breach of its provisions. The fines that may be imposed by the supervising authorities vary up to Lek 200,000.

Should any disputes arise in relation to the conduct of e-commerce activities, the law gives priority to arbitration. Where an arbitration clause was not included in the agreement entered into between the parties, the district courts will have jurisdiction to hear the dispute.

UNLISTED JOINT STOCK COMPANIES TO IMPLEMENT CORPORATE GOVERNANCE CODE, ALBANIA



Ilir Limaj

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With the assistance of international experts from the International Finance Corporation, the government has drafted the Corporate Governance Code for unlisted joint stock companies. The code incorporates the Organisation for Economic Cooperation and Development (OECD) definitions and principles on corporate governance, setting down the structure under which a company’s objectives are set and the means of attaining those objectives and monitoring performance are determined. The code is not legally binding; rather, it is considered to be guidance for unlisted companies in Albania, aiming to provide a best-practice framework above the minimum legal requirements and to assist Albanian companies in developing a sound governance framework.

Good corporate governance is particularly important to the shareholders of unlisted companies. In most cases such shareholders have limited ability to sell their ownership stakes and are therefore committed to staying with the company for the medium to long term. This increases their dependence on good governance. The code comprises 14 relevant principles for all unlisted joint stock companies in Albania, construed primarily under the Law on Entrepreneurs and Companies.

The first four principles focus on the importance of establishing the corporate governance framework, board of directors’ structure and organisation. Under these principles, for a well-established corporate governance framework the company’s constitutional documents (eg, charter and bylaws) should clearly define the powers and role of the board of directors, which should be guided by the company’s best interests. The board should:

- monitor and evaluate management performance;
- set strategic goals and take the necessary measures to meet them; and
- ensure that the company complies with its charter as well as the relevant legal, regulatory and governance requirements.

Moreover, the board should meet regularly enough to discharge its duties, and should be supplied in a timely manner with appropriate information. Thus, the basis for sound corporate governance is found in the company’s constitutional documents, where the organisation and its method of functioning must be clearly stated.

The other main principles are those regarding remuneration and oversight. Under these principles, the levels of remuneration should be sufficient to attract, retain and motivate executive and non-managing directors of the quality required to run the company successfully. Remuneration, particularly for directors, should be approved by the shareholders. The directors are responsible for risk oversight and business success, and should maintain a sound system of internal controls (eg, by developing a basic risk register) to safeguard the company’s interests and the shareholders’ investment. Another principle regulates the governance of family-controlled companies. The establishment of family governance mechanisms is necessary to promote coordination and mutual understanding among family members, as well as to organise the relationship between family business governance and corporate governance. In addition to the proper establishment of the organisation and governance framework, it is essential that there is a clear distinction in governance status between family governance institutions and formal governance structures.

The last five principles are relevant only to large or more complex unlisted joint stock companies. One of these principles refers to the division of responsibilities at the head of the company, which should consist of a clear distinction between the running of the board and the running of the company business (ie, the roles of chairman and chief executive officer should be filled by different people). Moreover, it is vital that no single person or small group of

individuals dominates the board's decision-making process. Well-established enterprises should have a majority of non-managing and independent directors on their boards. Another principle states the importance of the establishment of board committees in order to allow a more effective discharge of its duties. The most commonly required committees in large enterprises are the nomination committee, the remuneration committee, the compliance committee and the audit committee. In order to establish a well-organised, successful company, there should be an independent and clear distinction of powers and a check-and-balance system between the company's governing bodies.

The OECD principles adapted into the code provide a best-practice reference for unlisted companies that aim to conduct themselves efficiently to achieve their business objectives. An effective governance framework defines roles, responsibilities and an agreed distribution of power across shareholders, the board, management and other stakeholders. Particularly in smaller companies, it is important to recognise that the company is not an extension of the owner's personal property. Many unlisted enterprises are owned and controlled by single individuals or families.

In this context, good corporate governance is primarily concerned not with the relationship between boards and external shareholders (as in listed companies), or with compliance with formal rules and regulations. Rather, it is about establishing a framework of company processes and attitudes that add value to the business, and help to build its reputation and ensure its long-term success.

AMENDMENTS TO THE COMMERCIAL LAW, ALBANIA



Ened Topi

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The first quarter of 2012 saw an intensive debate on the need to review and amend the Commercial Law (9901), dated April 14 2008. The debate, organised by the Ministry of Economy, Trade and Energy, gathered together different stakeholders and experts, both local and foreign.

This update examines two of the 33 proposed amendments contained in the final draft of amendments to the Commercial Law.

Share capital

The first amendment concerns the share capital of a limited liability company – the most commonly used legal form of company in Albania. According to the proposed amendment, the share capital of a limited liability company must be divided between the shareholders in a number of shares equal to the number of shareholders, and each shareholder shall own only one share of the company, representing part of the share capital in proportion to the value of its contribution.

This amendment is welcome as it aims to prevent any misinterpretation of the provisions of the law. In actuality, it makes little difference, given that the definition of ‘share capital’ is in fact broader than the existing formulation. According to the background documents circulated among participants, the aim of the amendment is to clarify the term ‘share capital’. Pursuant to Article 68(2) of the Commercial Law, each shareholder owns its share in the company in proportion to its contribution to the share capital. The article further provides that the share capital of the company is divided proportionally into shares between the shareholders.

Confusion will most likely arise due to the structure of other articles of the Commercial Law - especially Article 88, which determines voting rights (also to be reformulated according to the proposed draft). Article 88(1) establishes that “unless otherwise provided in the bylaws, each share entitles to one vote”. The formulation of the paragraph gives rise to misinterpretation, by which a single shareholder of a company might own more than one share depending on its contribution to the share capital.

Company dissolution

The second amendment relates to Article 99, on the dissolution of a limited liability company. Article 99(1)(c) is intended to read:

“(1) The limited liability company shall dissolve: c) if its object becomes unachievable due to continued failure of functioning of company bodies, or for other grounds that make the continuation of the activity absolutely impossible”. The dissolution of a company in this case is effected by decision of the shareholders’ assembly; if the assembly fails to take appropriate measures, an interested party may address the court.

No specific provision is contained in the Commercial Law regulating this issue. To date, in order to overcome the issue, one must seek application of Article 99(d), which provides that a company shall be dissolved by way of court decision.

NEW NATIONAL LICENSING CENTRE



Renata Leka

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The National Licensing Centre is a new public entity with its head office in Tirana. It was established by the Council of Ministers’ Decision on the Creation of the National Licensing Centre (1697/2008). The decision entered into force in January 2009.

The centre operates under the supervision of the minister of economy, trade and energy and financed by the state budget.

The centre will support the Ministry of Economy, Trade and Energy in the process of preparing the normative and institutional framework for the issue and management of professional licences and permits, through the ‘one-stop’ system.

The prime minister shall approve the governing structure of the centre upon the minister’s proposal. The minister shall appoint the person who shall be liable for the administration and representation of the centre to third parties, provided that all requirements of the Law on Public Officer Status (8549/1999) are met. The provisions of the law shall apply to all officers of the centre.

The initial recruitment of staff will be organized by the supporting bodies of the ministry. Until professional staff have been recruited, financial, accounting and procurement services will be performed by the ministry.

INTELLECTUAL PROPERTY

AMENDED LAW ON INDUSTRIAL PROPERTY SEEMS TO FAVOUR TRADEMARKS OVER TRADE NAMES, ALBANIA



Renata Leka

“This article first appeared on WTR Daily, part of World Trademark Review, in (October/2014). For further information, please go to www.worldtrademarkreview.com.”

On July 10 2014 Law 55/2014, which amends Law No 9947 of July 7 2008 on Industrial Property, entered into force. This update deals in particular with the relation between earlier rights, such as trade names, and trademarks. With the latest amendments to the law, it seems that the legislature has offered certain advantages to registered trademarks over trade names: a new criterion concerning the territorial coverage of trade names has now been added as a requisite for ensuring their protection.

Trade names constitute earlier rights by default, and this concept has been recognised by the Albanian legislature in several pieces of domestic legislation, including the Law on Industrial Property.

Based on the new provisions of the Law on Industrial Property, owners of registered trademarks cannot prevent third parties from using, in commercial activities, an earlier right which extends over a specific territory, on the conditions that such earlier right is recognised by the Albanian legislation and within that specific territory.

Pursuant to the provisions of the Law on Industrial Property, a trademark cannot be registered - or, if registered, shall be liable to be declared invalid - where it infringes earlier rights such as trade names, on the condition that:

- the trade name, or a substantial part of it, is identical or similar to the trademark applied for; and
- the owner of the trade name produces or offers goods or services that are identical or similar to those covered by the trademark at issue.

In addition to these conditions, the legislature now seems to have added another limitation, which is the territorial criterion mentioned above - that is, the trade name should be known within a given territory in order to benefit from the provisions of the law. Therefore, the legislature has drawn a clear line with regard to the degree of protection afforded to registered trademarks and that afforded to trade names.

In short, a trade name owner, by virtue of the earlier use of its trade name, will be entitled to continue carrying out commercial activities under that trade name, and the owner of a later registered trademark cannot oppose such use for the territory at issue.

However, it is understood from the latest amendments to the law that only trade name owners that meet the criteria set out above and that use their trade names in the entire territory of Albania are eligible to oppose the registration of a trademark - or, if the trademark is registered, to request its invalidation before the court.

Owners of trade names that do not enjoy ‘nationwide coverage’ might face counterclaims from trademark owners on the grounds that the trade name is not widely known by consumers due to the limited territory covered by the goods/services. This is further supported by the argument that a trademark application or a registered trademark already possesses the distinctive character required by the law.

Although it appears from reading the law that owners of trade names with ‘nationwide coverage’ are in a safer position compared to other trade name owners, this interpretation is yet to be tested in practice by the competent authorities, such as the General Directorate of Patents and Trademarks, and by the Albanian courts.

DRAFT AMENDMENT TO TRADEMARK LEGISLATION INTRODUCED, KOSOVO



Renata Leka

“This article first appeared on WTR Daily, part of World Trademark Review, in (month/year). For further information, please go to www.worldtrademarkreview.com.”

The Industrial Property Office in the Ministry of Trade and Industry of Kosovo has prepared a draft law to amend Law No 04/L-026 on Trademarks.

With these amendments, the government of Kosovo seeks to harmonise the protection of industrial property in Kosovo with the relevant directives of the European Union, as part of the legislative reform required by the negotiations for the Stabilisation and Association Agreement between the European Union and Kosovo.

The amendments consist in the simplification of the trademark registration procedure and seek to ensure that the protection of registered trademarks is made easier and better.

The draft law has gone through the public consultation process and suggestions from the public are being considered internally by the Ministry of Trade and Industry. Once the Ministry of European Integration has confirmed that the amendments are in line with the relevant EU directives, it is expected that the draft law will be examined by parliament committees and then formally presented to Parliament.

The draft law is part of the government’s Legislative Programme for 2014.

AMENDMENTS TO LAW ON INDUSTRIAL PROPERTY ENTER INTO FORCE, ALBANIA



Renata Leka

“This article first appeared on WTR Daily, part of World Trademark Review, in (month/year). For further information, please go to www.worldtrademarkreview.com.”

On July 10 2014 Law 55/2014, which amends Law No 9947 of July 7 2008 on Industrial Property, entered into force. The changes covered almost all IP rights covered by the law, such as patents, industrial designs and trademarks.

With regard to trademarks, the changes pertain to, among other things, collective and certification trademarks and the substantive examination rules applicable to absolute grounds for refusal. This update will address the changes regarding certification and collective trademarks, as these changes have introduced significant novelties into Albanian law.

Pursuant to the changes stipulated by Law 55/2014, the Albanian legislature introduced for the first time the so-called ‘certification trademarks’ into the Albanian system. As of July 10 2014, applicants will be able to apply for and register certification trademarks. Pursuant to the law, certification trademarks serve to identify goods and services that are certified by the trademark owner with regard to, among other things, their origin, quality, material, method of preparing the goods or method of offering the services.

For registration purposes, along with the documents needed for the registration of ‘regular’ trademarks, an applicant should file the regulation setting out the rules for the use of the certification trademark with the General Directorate of Patents and Trademarks (GDPT, the authority responsible for the registration of trademarks, among other things, in the Republic of Albania). Such regulation should contain the characteristics of the goods/services that are certified, the testing procedures, the control measures and the sanctions applicable by the owner.

The other novelty introduced by the Albanian legislature is that, from now and on, the law provides more detailed procedures for the registration of collective trademarks. Prior to these changes, the Law on Industrial Property provided only a definition of ‘collective trademarks’, without determining the procedures for their registration.

Following the amendments, a collective trademark is defined as a trademark which serves to distinguish the goods and services of members of an association or other entity; the rights attached to such a trademark are not transferable.

For registration purposes, an applicant must also file with the GDPT the regulation determining the terms of use of the collective trademark. The regulation should provide the terms and conditions of the membership in the association/entity and, if possible, the terms of use of the collective trademark and the relevant sanctions. The regulation determining the use of a collective trademark is considered to be a crucial element by the legislature given that, in its absence, applications for registration will be rejected by the GDPT. Applications will also be rejected if the regulation contains provisions violating public order and moral principles.

The owner of a collective trademark is obliged to file all amendments and supplements to the regulation with the GDPT; such amendments and supplements will enter into force with the publication of the collective trademark in the register of trademarks.

CUSTOMS MEASURES ON PROTECTION OF IP RIGHTS, KOSOVO



Mirjeta Emini

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In a bid to strengthen the protection of IP rights in Kosovo, Parliament has approved the Law on Customs Measures for Protection of IP Rights (Law 03/L-170, December 29 2009) and its administrative regulation, which set out the procedures and measures that Customs must undertake when goods are suspected of infringing or found to infringe IP rights.

The legislation further outlines the rights and obligations of the rights holder in cases when goods are found to infringe IP rights. The rights holder may apply in writing to request that Customs begin the procedure for IP rights protection. The application for action must be submitted together with a declaration of liability and proof that the rights holder holds the right in the goods. Customs will process the application and notify the applicant in writing of its decision within 30 working days of receipt of the application for action. However, Customs may reject the application for action if it does not contain the mandatory information and documentation. Under the new law, an applicant may appeal Customs' decision within 30 days.

Once the application for action is completed, Customs must state the period in which the action will take place. This period must not exceed one year from the date of acceptance of the application. At least 15 days before expiry of this period – subject to the prior discharge of any debt owed by the rights holder – the latter may request an extension. Customs must immediately send any decision granting an application or an extension to all its offices. The rights holder must notify Customs if its rights will expire. If the rights holder does not notify Customs, it will be subject to offence provisions.

Customs can detain goods or suspend the release of goods:

- when it has substantial reason to suspect that the goods in question infringe an IP right, even before an application is filed. In such cases it should notify the rights holder, which can submit an application for action within three working days. If no application is filed, the goods will be released or the period for detention will be stopped if all customs procedures are completed; and
- after receiving the decision granting the application for action filed by the rights holder.

The new law gives Customs the right to authorise a simplified procedure for the destruction of goods suspected of infringing an IP right with the written consent of the declarant, holder or owner of the infringing goods. The destruction is carried out at the expense and under the responsibility of the rights holder. In such case there is no need to determine whether an IP right has actually been infringed.

The new law requires a rights holder which suspects that its IP rights have been infringed to notify Customs within 10 business days if it wishes to initiate court proceedings. If court proceedings are initiated, the period of suspension of the release of goods or detention is extended until the court reaches a decision concerning the infringing goods.

If the court finds that the goods have infringed an IP right, the goods will not be:

- allowed to enter into the customs territory of Kosovo;
- released for free circulation;
- removed from the customs territory of Kosovo;
- exported;
- re-exported;
- placed under a suspension procedure; or
- placed in a free zone or free warehouse.

If the rights holder infringes IP rights, it will be subject to penalties determined by the legislation.

In practice, taxpayers have rarely used the law to protect their IP rights. Thus, the infringement of IP rights is still a problem in Kosovo.

TRADE MARKS 2014, ALBANIA



Renata Leka



Ened Topi

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1 Relevant Authorities and Legislation

1.1 What is the relevant Albanian trade mark authority?

The relevant trademark authority is the General Directorate of Patents and Trademarks (“GDPT”).

1.2 What is the relevant Albanian trade mark legislation?

The main applicable legislation is the following:

- Law no. 9947, dated 07.07.2008 “On industrial property” and its sub-legal acts (“Law on Industrial Property”).
- Law no. 7850, dated 29.07.1994 “The Civil Code of the Republic of Albania”, as amended.
- Law no. 8116, dated 29.03.1996 “The Civil Procedure Code of the Republic of Albania”, as amended.
- Law no. 7895, dated 27.01.1995 “The Criminal Code of the Republic of Albania”, as amended.
- Law no. 7905, dated 21.03.1995 “The Criminal Procedure Code of the Republic of Albania”, as amended.
- Law no. 8449, dated 27.01.1999 “The Customs Code of the Republic of Albania”, as amended.
- Council of Ministers Decision no. 205, dated 13.04.1999 “On implementing provisions of the Customs Code”, as amended.
- Law no. 10433, dated 16.06.2011 “On Inspection in the Republic of Albania”.

The following international laws also apply:

- World Intellectual Property Organization Madrid Convention.
- Paris Convention for the Protection of Industrial Property.
- Madrid Agreement on the System for the International Registration of Marks.
- Madrid Protocol related to the System for the International Registration of Marks.

- Nice Agreement concerning the International Classification of Goods and Services for the Purposes of Registration of Marks.

2 Application for a Trade Mark

2.1 What can be registered as a trade mark?

Every sign or combination of signs presented graphically that serves to distinguish the goods or services of a natural/legal person from those of another, is eligible to constitute a trademark. To this end, the following signs can be registered: a) words, including personal names, letters, numbers, abbreviations;

- b) figurative signs, including drawings;
- c) two- or three-dimensional forms, forms of goods and/or their packaging;
- d) combinations of colours or shades, as well as colours per se; and
- e) every combination of the above mentioned signs.

2.2 What cannot be registered as a trade mark?

Signs that are not likely to be represented graphically are not registered. The GDPT (ex officio action) will not register a trademark based on absolute grounds for refusal and on relative grounds for refusal following opposition to the publication of the trademark by interested parties. In case of registration of the trademark, the same can be challenged before the court sustaining the above mentioned grounds.

2.3 What information is needed to register a trade mark?

The following documents should be filed with the GDPT:

- a) application form FM1;
- b) specification of the name and address of the applicant;
- c) extract from the Commercial Register (or similar

document) where the natural/legal person is registered;

- d) the list of goods and services according to classification of the Nice Agreement;
- e) 8 (eight) samples for each trademark to be registered measuring 8cm x 8cm;
- f) special Power of Attorney granting powers to the trademark attorney for the filing of the request with the GDPT;
- g) the specification of the trademark details to be registered (word, device, colours);
- h) priority declaration, if applicable; and
- i) evidence of payment of the official fee.

2.4 What is the general procedure for trade mark registration?

Following the filing of an application as indicated in question 2.3 above, the GDPT will examine the application from a formal point of view within three months (if documents indicated in question 2.3 above have been duly filed). Provided that the application is duly filed, the formal examination is followed by the publication of the application with the Bulletin of the GDPT. The application will be published for a period of three months with the Bulletin in order for interested parties to oppose the trademark intended to be registered. With the elapsing of the said term, the GDPT performs a thorough examination of the application (eligibility as per questions 2.1 and 2.2 above) and provides for the registration with the Register of Trademarks kept by the GDPT and publication with the Bulletin.

2.5 How can a trade mark be adequately graphically represented?

According to the Decision Council of Ministers no. 1706, dated 29.12.2008 "On the approval of the regulation for registration of trademarks", the depiction format should measure 8cm x 8cm.

2.6 How are goods and services described?

Goods and services are described in line with the latest version of the international classification set forth by the Nice Agreement.

2.7 What territories (including dependents, colonies, etc.) are or can be covered by an Albanian trade mark?

The trademark will receive protection in the Republic of Albania and if required (by way of direct registration/extension) also internationally following the rules of the Madrid Agreement and its Protocol.

2.8 Who can own an Albanian trade mark?

Either foreign or domestically-based natural/legal persons may own a trademark.

2.9 Can a trade mark acquire distinctive character through use?

A sign may acquire distinctive character through use (before the application date) and, as such, may be eligible for registration as a trademark.

2.10 How long on average does registration take?

Starting from the application date, provided that the application is duly filed with the GDPT and no opposition is filed during the publication period, the whole process would take approximately nine months.

2.11 What is the average cost of obtaining an Albanian trade mark?

The official fees applicable for registering trademarks are set out in the Decision of Council of Ministers no. 883, dated 13.05.2009 "On the approval of fees for registration of Industrial Property objects" as amended. Based on its provisions, the official applicable fees are as follows:

- Application fee for one trademark in one class is ALL 5,000 or approx. EUR 35.
- Application fee for any additional class is ALL 2,500 or approx. EUR 18.
- Registration fee is ALL 6,500 or approx. EUR 45 (regardless of the classes). For searches and eventual extracts, the fee applicable is ALL 500 each or approx. EUR 3.50.

2.12 Is there more than one route to obtaining a registration in Albania?

The trademark receives protection by filing a request for registration with the GDPT (national registration), and internationally following the rules of the Madrid Agreement and its Protocol, by way of direct registration or extension request.

2.13 Is a Power of Attorney needed?

Yes, if the applicant appoints a trademark attorney. Foreign entities are required to engage locally-based trademark attorneys for filing of the request for registration.

2.14 How is priority claimed?

An application for registration may contain a declaration claiming priority if it is equivalent to an earlier and regular national application, pursuant to:

- a) the national legislation of a member state of the Paris Convention; and
- b) the national legislation of a member of the World Trade Organization.

The application will benefit from priority from the date of the first application in the country of origin, provided that the application is filed with the GDPT within six

months from the filing date of the first application. The applicant, in order to benefit from the priority, should indicate in the application, the date, place and number of the first application and provide the GDPT within three months from the submitting of the request with a copy of the first application translated into the Albanian language.

Priority rights from international expositions/fairs are also recognisable in Albania. To this end, applicants participating in recognised expositions in the Republic of Albania or of another country being a member of the Paris Convention, within six months may apply for the registration of the trademark claiming as priority date the exhibition date. The application for registration is accompanied by a certificate issued by the respective authorities of the member state of the Paris Convention and a document showing the kind of exposition/fair, the place where it was organised, the opening/closure date and the first day of the exhibition of the goods and/or services indicated in the application for registration of the trademark.

2.15 Does Albania recognise Collective or Certification marks?

Yes, collective trademarks are recognised by Albanian law. Certification trademarks are not recognised in Albania.

3 Absolute Grounds for Refusal

3.1 What are the absolute grounds for refusal of registration?

The sign has to be graphically represented and should have a distinctive character; otherwise it will not be registered. The sign cannot be registered as a trademark if it consists:

- a) exclusively of elements or indicators that may serve in the market to indicate the kind, quality, quantity, purpose, value, geographical origin or time of production of the goods or the performance of the services, or other characteristics of the goods or services;
- b) exclusively of elements or indicators that have become customary in daily language or have become customary in the course of trade;
- c) of shapes or lines imposed by the very nature of the goods or services and/or forms or lines essential to achieve a technical result;
- d) of shapes that give a fundamental value to the goods;
- e) of elements that affect public interests or are in conflict with public moral and order;
- f) of elements tending to disorient the public, principally so far as concerns the nature, quality or geographical origin of the goods and/or services that they aim to distinguish;
- g) of geographical indications, for wines or alcoholic beverages, that do not originate from the place indicated by the geographical indication in question, even if the true origin of the good has

been indicated or the geographical indications have been translated and are accompanied by such expressions as: “kind”; “type”; “style”; “imitation”; or similar;

- h) of names, portraits, personal pseudonyms of figures well known by the public in the Republic of Albania, if they are not authorised by the person or his/her descendant; or
- i) of elements conflicting with article 6bis of the Paris Convention.

Or if it consists of:

- names of countries (complete or abbreviated);
- state emblems, medals, honours of distinction;
- official seals and signs approved by the country;
- the emblems of recognised international organisations or their abbreviations;
- religious symbols; or
- national flags.

3.2 What are the ways to overcome an absolute grounds objection?

The gaining of a distinctive character before the date of application for registration of the trademark will make the sign eligible for receiving protection through registration.

3.3 What is the right of appeal from a decision of refusal of registration from the Intellectual Property Office?

The decision of the GDPT on the refusal of the registration of the trademark may be appealed by the applicant in front of the Board of Appeal. The Board of Appeal is a body structured and organized under the GDPT.

3.4 What is the route of appeal?

The applicant is entitled to appeal with the Board of Appeal within two months from the date of receipt of GDPT's notification on the refusal of the application for registration of the trademark by submitting the following documents:

- a) application form FM10 of the appeal signed by the applicant or its representative;
- b) document evidencing the payment of the official fee; and
- c) Special Power of Attorney.

The Board of Appeal shall examine the request on the appeal within three months from the filing date and shall notify in writing the applicant of its decision. During the examination, the Board of Appeal may ask the applicant to provide additional documents within one month from the date of notification. The decision of the Board of Appeal may be challenged in front of the First Instance Court of Tirana within 30 days from the notification date.

4 Relative Grounds for Refusal

4.1 What are the relative grounds for refusal of registration?

According to the provisions of the Law on Industrial Property, the trademark shall not be registered or, if registered, shall be held invalid:

- a) if it is identical with an earlier trademark, and the goods or services for which the trademark is applied for or is registered are identical with the goods or services for which the earlier trademark is protected;
- b) if it is identical with, or similar to, an earlier trademark which is protected for identical or similar goods or services, and if, because of the identity or similarity, a likelihood of confusion by the public exists, which includes the likelihood of association with the earlier trademark; or
- c) if it is identical with, or similar to, an earlier trademark, even when it is about to be, or has been, registered for goods or services which are not similar to those for which the earlier trademark is registered, where the earlier trademark has a reputation in the Republic of Albania, and the use or registration, without due cause, takes unfair advantage of, or damages, the distinctive nature or the good name of the earlier trademark.

Additionally, the trademark cannot be registered, or, if registered, shall be held invalid if it infringes other prior rights that have been obtained such as:

- a) the right of a trade name, save that this name or the fundamental part of it shall be identical or similar to the trademark intended to be registered, and the owner of the trade name produces or provides, respectively, goods or services that are identical or similar to those of the trademark that is intended for registration;
- b) the right of a person whose name, surname or external appearance is identical or similar to the trademark intended to be registered;
- c) industrial property rights, including the names of protected varieties of plants and/or animals and geographical indications; or
- d) copyright in a work or piece of work, on the condition that it is identical or similar to the trademark intended for registration.

4.2 Are there ways to overcome a relative grounds objection?

The applicant should reach an agreement on the co-existence of the trademarks with the right holder. 4.3 What is the right of appeal from a decision of refusal of registration from the Intellectual Property Office? Same conditions as per question 3.3.

4.4 What is the route of appeal?

Same conditions as per question 3.4.

5 Opposition

5.1 On what grounds can a trade mark be opposed?

During the publication period with the Bulletin of the GDPT, the interested parties may challenge the registration of the trademark on the basis of the relative grounds for refusal.

5.2 Who can oppose the registration of an Albanian trade mark?

Every natural/legal person whose earlier rights as per question 4.1 are prejudiced by the trademark intended for registration has the right to oppose the registration.

5.3 What is the procedure for opposition?

The opposition is filed with the Board of Appeal of the GDPT within three months from the publication date of the trademark. Provided that the opposition request is duly filed (otherwise it will be considered as not filed), the Board of Appeal shall award its decision within three months from the filing date.

The decision of the Board of Appeal can be challenged in front of the court within 30 days from the notification date.

6 Registration

6.1 What happens when a trade mark is granted registration?

The owner of a registered trademark has the exclusive right of use of the trademark.

The owner of the trademark is entitled to impede any third party from using, in the course of trade, without its authorisation:

- a) a sign that is the same for goods or services as those covered by its trademark;
- b) a sign that is identical or similar to the trademark or, because of the goods or services being identical or similar for which the sign is used, with the goods or services covered by the registered trademark, where the former may cause a likelihood of confusion to the public where the possibility of association of the sign with the trademark is concerned; and
- c) the same or similar sign for goods or services even when they are either not identical or similar to those for which the trademark is registered, in case the trademark has a reputation in the Republic of Albania and from the use of the sign, without due cause, an unfair benefit is created or the distinctive nature or good name of the trademark is harmed.

4 Relative Grounds for Refusal

4.1 What are the relative grounds for refusal of registration?

According to the provisions of the Law on Industrial Property, the trademark shall not be registered or, if registered, shall be held invalid:

- a) if it is identical with an earlier trademark, and the goods or services for which the trademark is applied for or is registered are identical with the goods or services for which the earlier trademark is protected;
- b) if it is identical with, or similar to, an earlier trademark which is protected for identical or similar goods or services, and if, because of the identity or similarity, a likelihood of confusion by the public exists, which includes the likelihood of association with the earlier trademark; or
- c) if it is identical with, or similar to, an earlier trademark, even when it is about to be, or has been, registered for goods or services which are not similar to those for which the earlier trademark is registered, where the earlier trademark has a reputation in the Republic of Albania, and the use or registration, without due cause, takes unfair advantage of, or damages, the distinctive nature or the good name of the earlier trademark.

Additionally, the trademark cannot be registered, or, if registered, shall be held invalid if it infringes other prior rights that have been obtained such as:

- a) the right of a trade name, save that this name or the fundamental part of it shall be identical or similar to the trademark intended to be registered, and the owner of the trade name produces or provides, respectively, goods or services that are identical or similar to those of the trademark that is intended for registration;
- b) the right of a person whose name, surname or external appearance is identical or similar to the trademark intended to be registered;
- c) industrial property rights, including the names of protected varieties of plants and/or animals and geographical indications; or
- d) copyright in a work or piece of work, on the condition that it is identical or similar to the trademark intended for registration.

4.2 Are there ways to overcome a relative grounds objection?

The applicant should reach an agreement on the co-existence of the trademarks with the right holder. 4.3 What is the right of appeal from a decision of refusal of registration from the Intellectual Property Office? Same conditions as per question 3.3.

4.4 What is the route of appeal?

Same conditions as per question 3.4.

5 Opposition

5.1 On what grounds can a trade mark be opposed?

During the publication period with the Bulletin of the GDPT, the interested parties may challenge the registration of the trademark on the basis of the relative grounds for refusal.

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Every natural/legal person whose earlier rights as per question 4.1 are prejudiced by the trademark intended for registration has the right to oppose the registration.

5.3 What is the procedure for opposition?

The opposition is filed with the Board of Appeal of the GDPT within three months from the publication date of the trademark. Provided that the opposition request is duly filed (otherwise it will be considered as not filed), the Board of Appeal shall award its decision within three months from the filing date.

The decision of the Board of Appeal can be challenged in front of the court within 30 days from the notification date.

6 Registration

6.1 What happens when a trade mark is granted registration?

The owner of a registered trademark has the exclusive right of use of the trademark.

The owner of the trademark is entitled to impede any third party from using, in the course of trade, without its authorisation:

- a) a sign that is the same for goods or services as those covered by its trademark;
- b) a sign that is identical or similar to the trademark or, because of the goods or services being identical or similar for which the sign is used, with the goods or services covered by the registered trademark, where the former may cause a likelihood of confusion to the public where the possibility of association of the sign with the trademark is concerned; and
- c) the same or similar sign for goods or services even when they are either not identical or similar to those for which the trademark is registered, in case the trademark has a reputation in the Republic of Albania and from the use of the sign, without due cause, an unfair benefit is created or the distinctive nature or good name of the trademark is harmed.

Based on the above, the following are also prohibited: putting the sign onto goods or their packaging; putting goods into the market and offering them for sale by using this sign, or creating stockpiles for these purposes; offering of services by using this sign; importing or exporting goods by using this sign; and using the sign in business and in advertisements.

6.2 From which date following application do an applicant's trade mark rights commence?

The trademark enjoys protection starting from the filing date.

6.3 What is the term of a trade mark?

The term of protection is 10 years, which is renewable.

6.4 How is a trade mark renewed?

The trademark can be renewed perpetually, upon filing a request for renewal six months before expiry or six months after the elapsing of the protection term, upon payment of a fine.

7 Registrable Transactions

7.1 Can an individual register the assignment of a trade mark?

Natural/legal persons can transfer all or part of their rights on the trademark through written agreement to be registered with the GDPT.

7.2 Are there different types of assignment?

All permitted transactions on transfer of rights under the Albanian Civil Code apply.

7.3 Can an individual register the licensing of a trade mark?

Natural/legal persons can enter into licensee agreements on an exclusive or non-exclusive basis.

7.4 Are there different types of licence?

The licence agreement might be entered into for exclusive or nonexclusive basis.

7.5 Can a trade mark licensee sue for infringement?

The consent of the right owner is required unless in the licence agreement it is provided for the contrary. Under the licence agreement of an exclusive basis, the licensee can file a lawsuit without the consent of the owner in case the latter, being duly notified by the licensee, fails to take appropriate actions.

7.6 Are quality control clauses necessary in a licence?

Yes, the licence agreement may provide for such a clause.

7.7 Can an individual register a security interest under a trade mark?

Security interest over trademarks can be obtained by entering into a pledge contract based on the provisions of the Albanian Civil Code. No registration is needed for the creation of the security interest over the trademark. Instead, the delivery of the trademark certificate to the creditor is required for the completion of the transaction.

7.8 Are there different types of security interest?

Trademarks are granted as security interest based on pledge contract as per the provisions of the Albanian Civil Code.

8 Revocation

8.1 What are the grounds for revocation of a trade mark?

The registration of a trademark is revoked when:

- a) its owner has not used the trademark for an uninterrupted period of five years;
- b) as a consequence of acts or inactivity of the owner, the trademark has become an ordinary name in the market; or
- c) as a consequence of the use made by the owner or with its consent for the goods or services for which the same is registered, the trademark disorients the public, principally about the nature equality or geographical origin of the goods or services.

8.2 What is the procedure for revocation of a trade mark?

Interested third parties requesting the revocation of a trademark may address the First Instance Court of Tirana. The decision is appealable in front of the Appeal Court of Tirana and afterwards (if applicable) in front of the Supreme Court.

8.3 Who can commence revocation proceedings?

A lawsuit may be filed by the interested parties.

8.4 What grounds of defence can be raised to a revocation action?

In first place, the revocation cannot be claimed adducing the five year period of non use, in case during the interval between expiry of the five year period and the filing of the application or of the claim, genuine use

of the trademark has been started or resumed. Additionally, the revocation of the trademark cannot be claimed when:

- a) it has been used by a licensee or another person when this is permitted by the owner, or by any person who has the authority to use a collective trademark;
- b) it has been used in a form which differs only in elements that do not alter the distinctive character of the trademark;
- c) it has been affixed to goods or to the packaging thereof in the Republic of Albania solely for export purposes; and
- d) it has been used for publicity and business correspondence.

8.5 What is the route of appeal from a decision of revocation?

The interested parties may file an appeal with the Appeal Court of Tirana.

9 Invalidity

9.1 What are the grounds for invalidity of a trade mark?

The invalidity is declared where absolute/relative grounds of refusal exist.

9.2 What is the procedure for invalidation of a trade mark?

A lawsuit may be filed by the interested party with the First Instance Court of Tirana.

9.3 Who can commence invalidation proceedings?

The invalidation proceeding can be initiated by interested parties.

9.4 What grounds of defence can be raised to an invalidation action?

In case the trademark in interim has achieved distinctive character, the same is not invalid but the priority date shall be shifted in order to coincide with such date. Invalidation of the trademark cannot be claimed based on grounds that infringe the rights of an earlier trademark, in case the latter has not been used for a period of five years.

9.5 What is the route of appeal from a decision of invalidity?

The decision of the court is appealed before the Appeal Court of Tirana.

10 Trade Mark Enforcement

10.1 How and before what tribunals can a trade mark be enforced against an infringer?

There are no specialised courts in Albania dealing with IPR infringements. The interested parties should address their claim to the Commercial Section of the First Instance Court of Tirana.

10.2 What are the pre trial procedural stages and how long does it generally take for proceedings to reach trial from commencement?

With the preparatory acts, the court asks the plaintiff to complete the lawsuit with elements required by the law, if necessary, and sets out the date for the preliminary hearing in order to convene the defendant or third parties who may provide their arguments and submit their evidences. The first hearing shall take place within 15 days at the latest.

10.3 Are (i) preliminary and (ii) final injunctions available and if so on what basis in each case?

With preliminary injunctions the court may:

- a) impede imminent infringements or infringements that have started;
- b) prohibit the entry of the goods into civil circulation;
- c) order the preservation of relevant evidence in respect of the alleged infringement, subject to the protection of confidential information;
- d) seize, take out of circulation or take under control, for the period of the proceedings, the items that constitute infringement or the means used for the production of the items that constitute infringement; or
- e) order, in the case of an infringement committed on a commercial scale and if the injured party demonstrates circumstances likely to endanger the recovery of damages, the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of bank accounts and other assets.

With a final decision the court orders:

- a) prohibition of further acts that constitute infringement of the rights;
- b) removal of the items that constitute infringement from civil circulation, or in case it is not possible, their destruction;
- c) removal of means used exclusively or almost exclusively for the creation of the infringing goods or, in case it is not possible, their destruction; and
- d) publication of the final decision of the court in the public media at the expense of the infringer as prescribed by the court.

10.4 Can a party be compelled to provide disclosure of relevant documents or materials to its adversary and if so how?

During the civil proceedings, the court may order that information on the origin and distribution network of the infringing goods or services be provided by the infringer and/or any other person who is:

- a) found in possession of the infringing goods on a commercial scale;
- b) found to be using the infringing services on a commercial scale;
- c) found to be providing on a commercial scale services used in infringing activities; or
- d) indicated by the person referred to in points “a”, “b” or “c” above as being involved in the production, manufacture or distribution of the goods or the provision of the services.

The information as per above cannot be obtained in case:

- a) on the basis of the information available, the court has reason to assume that the right to information is misused;
- b) providing the requested information would force the alleged infringer to admit its own participation or that of its close relatives in the infringement of the trademark; or
- c) disclosure of the information cannot be requested pursuant to provisions protecting the confidentiality of information sources or the processing of personal data.

10.5 Are submissions or evidence presented in writing or orally and is there any potential for cross examination of witnesses?

The evidence is submitted in writing. Yes, cross examination of witnesses is possible.

10.6 Can infringement proceedings be stayed pending resolution of validity in another court or the Intellectual Property Office?

The court may suspend the civil proceeding where the case cannot be solved before another case (criminal, civil or administrative) is solved.

10.7 After what period is a claim for trade mark infringement time-barred?

The lawsuit should be filed within three years from the date the plaintiff becomes aware of the infringement and the identity of the infringer.

10.8 Are there criminal liabilities for trade mark infringement?

Pursuant to paragraph c) of article 149/a of the Albanian Criminal Code, the intentional manufacturing, possession for commercial purposes, selling, offering

to sell, supplying, exporting or importing of goods or services covered by a trademark without the consent of the trademark owner constitutes criminal contravention punishable with a fine or by imprisonment up to one year.

10.9 If so, who can pursue a criminal prosecution?

The Public Prosecutor can pursue a criminal prosecution.

10.10 What, if any, are the provisions for unauthorised threats of trade mark infringement?

This is not applicable.

11 Defences to Infringement

11.1 What grounds of defence can be raised by way of non infringement to a claim of trade mark infringement?

Basically, the defendant should demonstrate that its trademark does not fall under the so called relative grounds for refusal.

11.2 What grounds of defence can be raised in addition to non infringement?

The defendant can argue that the plaintiff did not use the trademark for a period of five consecutive years or that it has accepted usage of the alleged infringing trademark without taking any action for a period of five consecutive years.

12 Relief

12.1 What remedies are available for trade mark infringement?

Damage relief consisting of the damage suffered plus loss of profit is available. Also the moral damages, if claimed, are liquidated if deemed necessary by the court.

12.2 Are costs recoverable from the losing party and if so what proportion of the actual expense can be recovered?

Yes, the costs of the civil proceedings are attached to the losing party.

13 Appeal

13.1 What is the right of appeal from a first instance judgment and is it only on a point of law?

The decision of the First Instance Court of Tirana is appealable in front of the Appeal Court of Tirana.

13.2 In what circumstances can new evidence be added at the appeal stage?

The Appeal Court of Tirana decides whether to accept new evidence or not.

14 Border Control Measures

14.1 What is the mechanism for seizing or preventing the importation of infringing goods or services and if so how quickly are such measures resolved?

Customs authorities, on an ex officio basis or through an ex parte request, provide for actions to prevent the import/export of the alleged infringing goods. To this end, the right holder (owner, licensee) should file a request with the authorities. Following examination of the request, customs authorities will award protection for up to one year. With the creation of the customs watch, the customs will seize and, where the case will provide the right holder with the faculty to, destroy the infringing goods (with the agreement of the holder of the goods).

15 Other Related Rights

15.1 To what extent are unregistered trade mark rights enforceable in Albania?

This is not applicable.

15.2 To what extent does a company name offer protection from use by a third party?

In the course of application for registration with the Commercial Register, natural/legal persons cannot register a name which is identical or similar to an earlier registered company name.

15.3 Are there any other rights that confer IP protection, for instance book title and film title rights?

The abovementioned rights are covered by copyright law.

16 Domain Names

16.1 Who can own a domain name?

Natural/legal persons locally incorporated and individuals can own a domain name.

16.2 How is a domain name registered?

Parties should file an application request with the Authority on Electronic and Postal Communication.

16.3 What protection does a domain name afford per se?

Once the domain name is registered, no other can file a request for registering identical domain names.

17 Current Developments

17.1 What have been the significant developments in relation to trade marks in the last year?

Law no. 9947 dated 07.07.2008 "On Industrial Property" has been further amended. Based on such provisions, the monitoring and surveillance of the internal market will be carried out by an ad hoc inspectorate. It should be noted that the ad hoc inspectorate has not been established yet.

17.2 Are there any significant developments expected in the next year?

We are not aware of any developments.

17.3 Are there any general practice or enforcement trends that have become apparent in Albania over the last year or so?

No, there are not.

NEW LAW ON PERSONAL DATA PROTECTION COMES INTO FORCE IN KOSOVO



Ened Topi

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On April 29 2010 Parliament passed the new Law on Personal Data Protection (03/L-172), which entered into force on June 15 2010.

The purpose of the law is to set out the rights, responsibilities, principles and measures concerning the protection of personal data. Impartiality and legitimacy of data processing, which should not harm the dignity of the data subject, are considered the binding principles of the law.

For the legitimate processing of personal data, the law requires the fulfilment of certain conditions, such as the consent of the data subject, the controller/processor’s legal obligation or the fact that the processing is necessary for the vital interests of the data subject.

These requirements become more stringent where the data to be processed or stored is sensitive. According to the law, ‘sensitive data’ is data that reveals the data subject’s racial or ethnic origin, political or philosophical opinions, religious beliefs, membership of labour unions, health status or sexuality.

In exercising their activities, data controllers and processors should provide for appropriate measures in order to guarantee and secure their respective activities. In addition, the law requires mandatory notification of the competent authority (ie, at least 20 days in advance) for any intended new filing system or any new categories of personal data to be processed. Failure to take appropriate measures or to inform the competent authority will lead to fines of up to €10,000.

The law confers several rights on the data subject, including (i) the right to access processed or stored data, and (ii) the right to add, correct, block, destroy, erase, object to or delete data that is incomplete, inaccurate or outdated, or that is stored or processed contrary to the law.

Restrictions to these rights apply for national and public reasons, important economic or financial national interests or the prevention, investigation and prosecution of criminal offences.

The State Agency on the Protection of Personal Data has been established to guarantee the legitimacy of personal data processing. The agency operates as an independent authority, directly accountable to Parliament. The agency’s executives (the chief state supervisor and four members) are directly appointed and discharged by Parliament.

The agency’s remit includes:

- conducting inspections;
- overseeing subjects that process and store personal data;
- advising public and private entities on matters concerning personal data; and
- informing the public on developments and promoting the rights related to personal data protection.

The law also obliges both the legislative and executive branches of government to consult the agency on initiatives in the legislative/administrative field of its competence, and empowers the agency to address the Constitutional Court on the constitutional validity of laws.

The law contains special provisions on the transfer of personal data to other countries and/or international organisations. According to the law, a foreign entity must offer adequate levels of protection of personal data. This is subject to an agency decision based on the criteria set out in the law. For such purpose, the agency will publish a list of countries and international organisations that fulfil these criteria.

The law provides for a wide range of fines applicable to infringers. These are based on the gravity of the violation and vary from €200 up to €10,000.

ANTI-COUNTERFEITING 2009, ALBANIA



Renata Leka

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Legal framework

The following national laws apply in Albania:

- Law 9947 on Industrial Property (July 7 2008);
- Law 9902 on Consumer Protection (January 17 2008);
- Law 9595 on the Central Technical Inspectorate (July 27 2006);
- Law 8388 on Protection of Topographies of Integrated Circuits (May 13 1999);
- the Civil Code (Law 7850, July 29 1994, as amended);
- the Civil Procedure Code (Law 8116, March 29 1996, as amended);
- the Customs Code (Law 8449, January 27 1999, as amended);
- Council of Ministers Decision 205 on implementing provisions of the Customs Code (April 13 1999); and
- Council of Ministers Decision 547 on changes to Decision 205 (May 1 2008).

The following international laws also apply:

- the World Intellectual Property Organization Madrid Convention;
- the Paris Convention for the Protection of Industrial Property;
- the Madrid Agreement on the System for the International Registration of Marks;
- the Madrid Protocol related to the System for the International Registration of Marks;
- the Patent Cooperation Treaty;
- the Agreement between the Government of Albania and the European Patent Organization on Cooperation regarding Patents;
- the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of Registration of Marks;
- the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure;
- the Geneva Act on the Hague Convention for the Registration of Industrial Designs and related rules;
- the Hague Act on the Hague Convention for the Registration of Industrial Designs;
- the Convention establishing the Customs and Cooperation Council; and
- the Nairobi Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences.

Border measures

The most recent amendment to the law relating to border measures (Council of Ministers Decision 547, May 2008, amending Council of Ministers Decision 205, April 1999) brought Albanian legislation closer to EU legislation in regard to actions to be taken by the Albanian Customs Authority.

Decision 547, May 2008, introduced into national law the definitions of ‘counterfeit goods’, ‘pirated goods’ and ‘rights holder’ set out in Council Regulation 1383/2003 on customs action against goods suspected of infringing certain IP rights. Under this decision Customs can undertake ex officio actions by suspending the release of goods or seizing

them where it has sufficient “Pursuant to the Law on Industrial Property, in addition to filing a lawsuit, the rights holder is entitled to ask the court for preliminary measures in order to stop the infringement or imminent infringement of its IP rights” grounds to suspect that such goods infringe an IP right, even prior to the submission of a request to do so by the rights holder or the approval of such a request by Customs.

The procedure is as follows:

- Notification – Customs should immediately notify the rights holder and the holder or owner of the goods as to the measures taken (ie, the suspension of release or seizure of the goods), who should then, within three working days of receipt of the notification, file an application for action with the General Customs Directorate (GCD).
- Application – the application for action must contain information and a declaration as provided by the regulation. If the application does not contain the necessary information, the GCD will refuse it and it may be resubmitted only once the required documentation is complete.
- Examination – the application for action is examined by the GCD within 30 working days of receipt. Once the application for action has been accepted, the GCD determines the period during which Customs will take action. This cannot exceed a period of one year from acceptance. However, before the expiry of this period the rights holder can request an extension, provided that it has paid all the necessary fees and costs.
- Acceptance of application – the GCD’s decision to accept the application is forwarded by the GCD or the rights holder to the relevant customs office.
- Customs action – the customs office, after consulting the applicant where necessary, certifies that the suspected goods correspond to those described in the GCD’s decision and suspends their release or seizes them. Customs then notifies the GCD, the rights holder and holder or owner of the goods as to the measures taken. Samples may also be retained and, upon written request of the rights holder, may be given to the latter for examination purposes. The rights holder is responsible for the relevant examination expenses.

Decision 547, May 2008, also introduced the ‘simplified procedure’ in line with the provisions of Council Regulation 1383/2003, to be used with the rights holder’s agreement. This procedure enables Customs to destroy goods suspected of infringing an IP right and handed over to Customs for destruction, without the need to determine whether an IP right has actually been infringed.

Within 10 days of the application for action being accepted by the GCD, the rights holder notifies the GCD in writing that the suspected goods infringe an IP right and provides the relevant customs office with a written declaration from the holder or owner of the goods that it agrees to the destruction of the goods.

If, within 10 days of receipt of the notification of suspension or detention of the goods, Customs has not been notified by the rights holder that infringement proceedings have been initiated or has not received a declaration or agreement calling for the simplified procedure, it can release the goods, subject to completion of all customs formalities.

The new Law on Industrial Property, passed by Parliament in 2008, offers the rights holder another option to protect its IP rights against infringing goods. The rights holder can file with the supervisory market authority a request empowering that authority to remove the infringing goods from the market, except in cases where the importer or trader possesses original documentation regarding those goods.

Civil proceedings in relation to this action must be initiated by the rights holder within 20 working days of the date on which the rights holder is notified of the action taken by the supervisory market authority. Failure to observe this term results in release of the goods into free circulation.

Criminal prosecution

The Albanian criminal law sets out no specific provisions classifying trademark infringement as a criminal offence. If the counterfeit products are smuggled, the trade in such products constitutes a criminal offence under the Penal Code.

In addition, the Penal Code recognizes as criminal offences:

- the falsification of stamps, seals and documents (Article 190); and
- the illegal manufacturing of products and goods (Article 288/a).

As the Penal Code does not expressly consider trademark infringement to be a criminal offence, it is advisable to file a lawsuit with the civil court asking for preliminary measures and the destruction of the counterfeit goods, as well as damages.

Civil enforcement

As there are no specialized IP courts in Albania, the commercial sections of the first instance courts are competent to examine trademark infringement cases.

Under Albanian legislation the rights holder is protected against infringement of its IP rights by:

- the Civil Code (Articles 638 to 639 on unfair competition);
- the Customs Code; and
- the Law on Industrial Property.

The Civil Code contains only a few provisions dealing with unfair competition. Under Article 638, the following are considered to be acts of unfair competition:

- the use of a name or trademark that might lead to confusion in respect of a name or distinctive trademark used by another party;
- the reproduction of a competitor's product; or
- the commission of an act that might lead to confusion with regard to a competitor's products and/or activities.

When a court rules that an act of unfair competition has occurred, it will order the cessation of that act and determine the measures necessary to counter its consequences.

The Law on Industrial Property provides the rights holder, as the sole legitimate owner of the trademark, with more efficient legal weapons against infringers. Pursuant to the Law on Industrial Property, in addition to filing a lawsuit, the rights holder is entitled to ask the court for preliminary measures in order to stop the infringement or imminent infringement of its IP rights. However, the rights holder must initiate civil proceedings within 15 days from the date on which the preliminary measures are granted by the court.

The owner of a registered mark, authorized user of a collective mark or a licensee filing an IP rights infringement claim with the court can request the following actions:

- a prohibition against further infringing actions;
- the recall from circulation of infringing goods, or their destruction if recall is not possible;
- the seizure of equipment used in the manufacture of the infringing goods; and
- publication of the court decision in the media at the infringer's expense.

A lawsuit for IP rights infringement should be filed within three years of the rights holder becoming aware of the infringement and the infringer.

The rights holder may also ask the court for preliminary measures in case of existing or imminent harm to its IP rights. The action should be supported by evidence regarding such infringement. The court can issue the following preliminary measures:

- prevention of the actual or imminent infringement;
- prevention of the entry into free circulation of the suspected infringing goods;
- protection of key evidence, provided that confidential data in accordance with the relevant legislation is protected;
- seizure or recall from circulation of the suspected infringing goods or the seizure of the facilities used to produce them; and
- seizure of immovable and movable property owned by the suspected infringer, including bank accounts and other assets, in order to ensure damages can be recovered.

The court can order preliminary measures even without hearing the alleged infringer's case as it could delay the process, thus causing irreparable damage to the rights holder or resulting in the destruction of evidence. When requesting the preliminary measures the rights holder should submit a guarantee or equivalent insurance against any damage caused to the other party. The rights holder must then file a lawsuit within 15 days of the court ordering preliminary measures.

Furthermore, the Law on Industrial Property has introduced the possibility of the court awarding moral damages in cases where the court has found there to be an IP rights infringement. In awarding moral damages, the court considers the following:

- the income obtained by the defendant from the unauthorized use of the trademark;
- the rights holder's lost income;

- reasonable expenses incurred by the rights holder in order to avoid or reduce damage, identify the infringer and calculate the damages;
- reasonable expenses incurred by the rights holder in trying to resolve the situation out of court; and
- court fees and relevant expenses.

However, as no legal provisions determine the methodology for calculating moral damages it is carried out on a case-by- case basis.

Anti-counterfeiting online

The Law on Consumer Protection recognizes online sales contracts in Albania and sets down general and specific obligations regarding online trading. According to this law, at the time of delivery of the goods the consumer must be provided with written confirmation of:

- the terms and procedures for the exercise of rights and any withdrawal from the contract;
- a geographical contact address;
- the guarantees and services available for the post-sale period; and
- details of how to terminate the contract in case it is made for an unlimited duration or for a period exceeding one year.

Article 17 of the law provides that the unauthorized use of a trademark is an unfair commercial practice. The provision applies equally to commercial activity through online contracts.

Pursuant to Article 56 of the law, unless otherwise agreed between the parties the consumer is entitled to address its claims to the following authorities:

- the public authority for market supervision;
- consumer associations;
- the people's advocate;
- the courts;
- arbitration tribunals; and
- any other body entitled to resolve out-of- court disputes (to be set out in decisions of the Council of Ministers).

Preventive measures/strategies

It is vital to involve local lawyers in issues of product recall, as well as when coordinating with public authorities regarding the monitoring of market activity in order to identify counterfeit goods in circulation.

In addition, licence agreements should be put in place in order to avoid the circulation of counterfeit goods on the market.

Further, close collaboration with the relevant authorities through government partnerships, lobbying, memoranda of understanding and continuous training, particularly for customs officers, is advisable to ensure improved protection of IP rights.

BANKING AND FINANCE

PROJECT FINANCE 2015, ALBANIA



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1 Overview

1.1 What are the main trends/significant developments in the project finance market in Albania?

The activity of project finance in Albania is considered an important additional means of support and development for private-sector entrepreneurship. By ensuring project finance is provided to the eligible prospective investors, the delivering institutions assist in evaluating, structuring and implementing their projects in Albania and in providing loans and equity investments, including financing from other sources.

Over the years, Albanian project finance implementation has been an area delivered not only to private companies; there have also been engagements from different lending institutions (banking and non-banking, or in joint collaboration) concerning policy dialogue with the Albanian government, with the potential to invest in key public sector projects, along with the implementation of numerous donor-funded projects in the country.

1.2 What are the most significant project financings that have taken place in Albania in recent years?

In Albania, project finance activity has seen continuous developments in terms of the amount invested and the variety of sectors covered in the financing process. Key sectors on which project finance support has been applied include:

- a. Government institution projects.
- b. Financial institutions.
- c. The energy, mining and oil & gas sectors.
- d. Infrastructure.
- e. Corporate, small-medium production enterprises.
- f. Natural resources.
- g. Commercial construction (i.e. infrastructure).
- h. Residential construction (i.e. real estate).
- i. Sectors which have comparative advantages such as light manufacturing, fishing and tourism.

The European Bank for Reconstruction and Development (EBRD) is one of the largest investors in the private sector in Albania. Its main areas of focus are supporting the financial sector and small-medium production enterprises, improving infrastructure, and developing natural resources. The Bank is also engaged in policy dialogue with the Albanian government, with the potential to invest in key public sector projects, along with the implementation of numerous donor-funded projects in the country.

The Bank signed a total of 12 projects in Albania in 2012, totaling €69 million, 70% of which were in the private sector.

In the transport sector, the EBRD provided additional financing of €7.5 million for the completion of the new road between the cities of Levan and Vlore in south-western Albania. The road was open to the public in July 2012 and has significantly improved accessibility in the Albanian Riviera.

The EBRD continued to support private sector investment in renewable energy through the Western Balkans Sustainable Energy Direct Funding Facility (WeBSEDF). In 2012 the Bank extended a €6 million loan to finance the construction of the Ternove hydropower plant in north-east Albania and a €5.2 million loan for the construction of the Verbe-Selce hydropower plant near the city of Korçe in south-east Albania. With a combined generation capacity of 13.3 MW, these utilities will generate up to 66.2 GWh of electricity per year, and help offset over 45,000 tonnes of CO₂ annually.

In 2012, the Bank continued to support the Albanian financial sector by providing long-term funding to micro-credit institutions aiming at increasing the role of non-bank financial institutions, supporting their lending to SMEs and improving corporate governance and credit management procedures. The Bank committed a €5 million small and medium-sized enterprises credit line to Veneto Banca, €1.3 million credit line to NOA, €1.1 million credit line to Fondi Besa and €1 million credit line to Credins Leasing.

In the natural resources sector the EBRD extended the second tranche of €19.2 million to Bankers Petroleum to

support the remediation and redevelopment of the Patos-Marina oilfield, the largest in Albania. In the construction materials sector the Bank provided additional equity support of €4.4 million to Antea Cement Factory, a greenfield cement plant built two years ago with capacity to produce 1.5 million tons of cement annually and located about 30km north of Tirana.

Source: <http://www.ebrd.com/downloads/research/factsheets/albania.pdf>.

2 Security

2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Albanian law permits the creation of security interest over almost all assets and rights held by project companies.

Securities over movable property are governed by Law no. 8537 dated 18.10.1999 "On Securing Charges". The security agreement must contain a description of the collateral in accordance with the definitions provided by the law, which may not necessarily be an itemised description of the asset. In any case, it is advisable that the security agreement ensures an adequate description of the collateral in order to avoid any disputes in the event of enforcement.

Pledge is governed and regulated by the Albanian Civil Code. The pledge agreement must contain a description of the pledged asset.

Securities granted over immovable property are subject to a mortgage agreement, which should contain a description of the collateral, and are registered with the immovable properties registry kept by the local Real Estate Registration Office where the property is located.

2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Security can be taken either over immovable property (i.e. land, buildings and fixtures) or over movable property (i.e. machinery and equipment). According to Civil Code provisions, the mortgage (security taken over immovable assets, usufruct or emphyteusis rights) can be taken/given over present or future immovable assets and present and/or future fixtures related thereto, as well as easement rights over immovable property. It is established upon an agreement (mortgage agreement) made in writing in the form of a notary deed, and is perfected upon registration of the mortgage agreement with the immovable properties registry kept by the local Real Estate Registration Office. The Civil Code provisions imply the necessity to describe the security in the security deed (i.e. mortgage agreement), even when taking/granting mortgages over future assets.

Securing charges are a non-possessory security and are given/taken only over movable assets (i.e. machinery and equipment), for securing either a present or a future debt. The securing charge is created by written agreement and perfected through registration with the securing charges registry.

The pledge is a possessory security and is only given/taken over movable assets/debtor's rights for securing either a present or a future debt. In addition, a requirement for the creation of the pledge is the possession of the asset/title by the creditor or by any third party agreed mutually between the parties. There is no specific register where the pledge is registered, with the exception of the pledge over shares which is perfected upon registration with the Company Shares' Ledger and the Commercial Register.

2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

In light of the changes that affected the Law on Securing Charges during 2013, based on which intangible assets may no longer be subject to securing charges, security over receivables may be granted/taken only under the form of pledge.

The pledge is governed and regulated by the Albanian Civil Code. The latter does not contain any specific provisions that regulate the granting of security over receivables.

2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Security over cash deposits is governed and regulated by the Law on Payment Systems. The cash deposit may be granted/taken as security subject to a financial collateral agreement.

The security created by means of the financial collateral agreement serves the purpose of securing repayment of all kinds of obligation – either present or future ones, existing, conditional or eventual ones that the collateral provider or any other third party has contracted by the collateral taker or its legal representative.

The parties to the financial collateral agreement must be legal entities, which means that natural persons may not grant/take security over cash deposits subject to financial collateral agreement. Considering that the law has recently entered into force, it is to be noted that, as yet, there is no consolidated practice regarding its implementation.

2.5 Can security be taken over shares in companies incorporated in Albania? Are the shares in certificated form? Briefly, what is the procedure?

Security over shares is permitted under the Albanian law and it may be acquired by means of a pledge over shares agreement. The agreement must contain a description of the pledge. The pledge over shares is

perfected upon its registration with the Company Share Ledger. In addition, the pledge over shares agreement is also filed with the Commercial Register.

Currently, in Albania, the securities law requires that the shares of joint stock companies are dematerialised. No shares certificates can be traded. Instead, the company can issue a certificate confirming the shareholding, but this is not a saleable instrument. Transfers of shares should be recorded with the Company Share Ledger.

2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

The law does not require notarisation of the securing charge agreement or pledge agreement. However, in practice the security documents are drawn up by the Notary Public and the notarisation fee varies from ALL 1,500 (approx. EUR 11) to ALL 4,000 (approx. EUR 29), depending to the amount of repayment which is guaranteed by means of the security agreement.

The stamp duty is ALL 200 (approx. EUR 1). The fee for the registration with the securing charges registry is ALL 1,400 (approx. EUR 10).

The notarisation fee for mortgage agreements varies from ALL 2,000 (approx. EUR 12) to ALL 15,000 (approx. EUR 107). The stamp duty is ALL 200 (approx. EUR 1). VAT (currently at the rate of 20%) applies to notarisation fees.

The fees applicable for registration with the Real Estate Registration Office of mortgage agreements entered into for securing repayment of loans granted by banks or other financial institutions, vary from ALL 8,000 (approx. EUR 56) to ALL 25,150 (approx. EUR 181), depending to the amount of the loan.

2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Registration with the securing charges registry is completed within 48 hours of the application date. The same time requires the registration of the share pledge agreement with the Commercial Register.

Registration with the Real Estate Registration Office is completed within 7 (seven) days. However, in practice such registration may be longer.

2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground) etc.?

In general, no regulatory consents are required for the creation of securities. However, in the case of implementation of concession agreements, the approval of the Contracting Authority is required for the purpose of creating security over the assets of the project company party to the concession agreement.

3 Security Trustee

3.1 Regardless of whether Albania recognises the concept of a “trust”, will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?

The concept of “security trustee” has recently been introduced into Albanian legislation through the Law on Payment Systems, and concerns financial collateral only. However, the “security trustee”, subject to the Law on Payment Systems, is appointed to act on behalf of one lender. The law is silent regarding the appointment of the security trustee by more than one lender.

The enforcement of the pledge is performed by the lender/pledgee in line with the procedure described by the Albanian Civil Code, which provides for the involvement of the court.

The enforcement of securing charges over movables and mortgages is performed by the bailiff office.

3.2 If a security trust is not recognised in Albania, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Please see question 3.1 above.

4 Enforcement of Security

4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?

The enforcement of the pledge is done by the lender/pledgee without the involvement of the bailiff office. Before proceeding with the sale of the pledge, the lender, through the court, solicits the borrower to fulfil its obligation, informing it that in the absence of such fulfilment, it will proceed with the sale of the pledge. In case the borrower does not oppose such request within a term of 5 (five) days, the lender may go ahead with the sale of the pledge in a public auction or, in case the good subject to pledge has a market price, sell it with the market price through an entity/person authorised for such transactions. The lender/pledgee must notify the pledgor, in case the pledgor is a different party from the borrower.

As regards security over movable property in the form of securing charges, the security agreement by law constitutes an executive title and is enforced by the bailiff

upon a court decision. The lender, upon taking possession of the collateral, may proceed either with a private or public sale auction or restricted bid procedures, provided that the “arm’s length” principle is observed.

The lender/chargee may proceed with the enforcement, provided that the chargor and any other successive lender/chargee in terms of ranking are notified in writing at least 10 days before the sale takes place.

Notification by the chargee is not required if the chargee deems that (i) occurrence of the notification would significantly diminish the value of the collateral, (ii) expenses related to its storage are excessive in proportion to its value, (iii) in the event of default by the chargor, any other person to be notified of the enforcement expressly waives such rights, or (iv) the court considers that the notification is not necessary. When the enforcement involves securities over immovable properties, notification of the debtor (10 days in advance) is mandatory in order to permit the debtor to voluntarily execute the obligation. In case of failure of the debtor to voluntarily execute the obligation, the bailiff officer proceeds with the enforcement, which should be organised in the form of a public auction.

4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?

No specific restrictions apply to foreign investors.

5 Bankruptcy and Restructuring Proceedings

5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?

Subject to the Insolvency Law, secured lenders are entitled to enforce their rights in accordance with the applicable legislation on secured transactions, out of insolvency proceedings but subject in any case to the restrictions provided by the Insolvency Law. In this context secured lenders would be entitled to enforce their rights out of insolvency proceeding when the collateral value is equal or lower with respect to the value of the claim advanced by the secured lender. In addition, subject to article 28 of the Law on Payment Systems, notwithstanding the opening of an insolvency proceeding affecting either the collateral giver or the collateral taker, the latter would be entitled, in case an enforcement event arises, subject to the terms of the financial collateral agreement, to immediately proceed with the enforcement of the financial collateral as agreed in the financial collateral agreement, without prior notification and/or involvement of the court, a public authority or any other third party. However, as already mentioned in question 2.4 above, the law was introduced recently and the applicability of the said clause within the framework of an insolvency proceeding has yet to be tested.

However, in insolvency proceedings, chargees or lessors may not raise claims for rent or financial lease

payments pertaining to a period of 12 months prior to the opening of the insolvency proceedings, or any other claims on damages relief, which are due because of the termination of the said lease by the insolvency trustee.

5.2 Are there any preference periods, clawback rights or other preferential creditors’ rights (e.g. tax debts, employees’ claims) with respect to the security?

Subject to the Albanian Civil Code, claims have preference according to the following order: (a) credits deriving from secured financial transactions by securing charges for the purchase price of a particular asset; (b) credits deriving from salaries related to labour or service relationships and nurture obligations, but not for more than 12 months; (c) credits of social insurance deriving from the non-payment of contributions, together with penalties for delayed payment, as well as credits of employees for damages deriving from the non-payment by employers of the above contributions; (d) credits for funeral and medical expenses; (e) credits of authors and their heirs for compensations deriving from the total or partial transfer of their rights in intellectual property, due for the past two years; (f) credits of the State deriving from obligations against the budget and credits of the Social Insurance Institute for compulsory insurance established by law; (g) credits, deriving from financial transactions, secured by a securing charge according to criteria provided by law; (h) credits deriving from salaries related to labour or service relationships and nurture obligations, over the limit set out in (b) above; (i) the commission of the intermediation deriving from the contract of the agency, due in the last year of the service; (j) credits secured with a pledge or mortgage that do not create securing charges, according to law, equal to the value of things given in a pledge or mortgage; (k) claims for expenses related to judicial proceedings incurred to secure the property and expenses for executions, in the common interest of creditors, from the sale of things; (l) claims deriving from bank loans (which are not included in (g) above) and claims arising from voluntary insurance; and (m) claims for supplies of seeds, fertilisers and pesticides, or of irrigation waters, as well as claims for cultivation and harvest work on the crops to whose production claims have been used.

However, subject to the Albanian Labour Code, in case of insolvency, obligations of the employer towards employees up to the amount of 5 (five) minimum salaries (the minimum salary is determined by the Council of Ministers) have preference with respect to any other secured obligation. The priority obligations towards employees are not suspended due to opening of the insolvency procedure.

As for clawback rights, our insolvency legislation is silent in this respect.

5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Pursuant to the Insolvency Law, the property of (i) the State and its bodies, (ii) the strategic sectors, and (iii) the local government and its bodies, is excluded from the insolvency proceedings.

Instead, insolvency proceedings applicable to banks and other financing institutions are governed by specific law.

5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

Except as indicated in point 5.1 above with regard to financial collateral, there are no out-of-court proceedings available for the creditor to seize assets in an enforcement procedure. However, it is important to mention the fact that the implementation of the new law has not yet been tested.

5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

The Albanian Insolvency Law provides for the possibility of the project company being insolvent and/or the insolvency trustee drafting a reorganisation plan and submitting it to the competent section of the court dealing with insolvency proceedings. The purpose of the reorganisation plan is to avoid liquidation of the project company's assets and to enhance the chances for the project company's creditors to get their credits repaid.

5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in Albania?

Subject to the provisions of Company Law, the company administrators and members of the Board of Directors who, by their actions or omissions, ensure to themselves or third parties an illicit benefit, or by willful misconduct cause a loss to third parties' property, shall be personally liable toward third parties or public authorities when, inter alia, once they are aware, or under the circumstances should have been aware, of the company's capital insufficiency to pay its debts and subject to the powers granted to them, they fail to take the necessary steps to ensure that the company, depending to the circumstances, ceases the running of its activity or the undertaking of further obligations towards third parties or public authorities. The liability is extended up to the amount of the outstanding obligations of the company arising after acquiring information on the situation herein indicated.

In addition, subject to article 98/4 of the Company Law, the administrators shall be obliged to compensate the company for the damages incurred, if he/she/they carry out, contrary to the Commercial Law, the following transactions:

- (i) return contributions to shareholders;
- (ii) pay interest or dividends to shareholders;

- (iii) distribute the company's assets;
- (iv) allow the company to continue exercising its business activity when, subject to its financial situation, it is foreseeable that it would be unable to pay its debts; or
- (v) grant loans.

6 Foreign Investment and Ownership Restrictions

6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

There are no restrictions on foreign ownership of a project company.

6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

Albania is party to several bilateral investment treaties, and no restrictions apply to foreign investors.

6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

The Constitution of the Republic of Albania provides that the expropriation of private property or restrictions on exercising the ownership right, are permitted only when considered necessary or appropriate to the public interest, and are subject to adequate and fair compensation of the expropriated owner.

The Law on Foreign Investments governs, inter alia, the nationalisation and expropriation of companies owned by foreign investors. The law determines that foreign investments will not be subject to expropriation or nationalisation either directly or indirectly and will not be subject to any similar measure, except for legitimate public interest purposes when required by law. Expropriation or nationalisation will not be discriminatory and will be compensated immediately, in an appropriate and effective manner, and in compliance with the procedures indicated by the law.

The existing Law on Foreign Investments was amended by Law no. 10316, dated 16.09.2010, which introduces the concept of 'special State protection'. Such protection is granted to foreign investors on a case-by-case basis, upon the arising of a dispute between the foreign investor and private party claiming title over the immovable property where the project is or will be constructed/developed. Such instrument is available until the end of 2014 and to our knowledge there are no initiatives being undertaken by the legislative body to extend such term.

7 Government Approvals/Restrictions

7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

The government, through the relevant ministries in charge of the specific sector as well as local government units as applicable, have the authority to supervise and manage the award of projects.

7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

There are no specific requirements related to the filing of project documents in order for them to be valid and enforceable. Subject to the security package available to the project, they should be registered respectively with the Securing Charges Register, the Company Share Ledger and Commercial Register and the Real Estate Register, depending on the type of security involved (i.e. movable or immovable property; tangible or intangible).

7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

Under Law no. 7980, dated 27.07.1995 "On Acquisition of Plots", foreigners can acquire a plot in Albania only if the value invested for construction on such plot exceeds three times the value of that plot.

Natural resources are the exclusive property of the Albanian State. They may only be granted for temporary use to private entities with consideration to the fact that the best interest of the Albanian community will always prevail.

Activities involving natural resources are subject to licences issued by the Ministry of Energy and Industry and Council of Ministers. The applicable legislation on the construction and operation of pipelines provides that the permit for construction and operation of pipelines is granted to companies that are established and registered with the Albanian Commercial Register, in the form of a joint stock company.

Law no. 10304 dated 15.07.2010 "On mining sector in Republic of Albania" provides that any legal entity, either domestic or foreign, may be granted a mining permit for prospecting, exploration or exploitation of minerals (not including crude oil and gas) in a certain area, provided that requirements set forth by the applicable legislation are met.

The activities related to the exploration and production of hydrocarbons in Albania are governed and regulated by Law no. 7746 dated 28.07.1993 "On hydrocarbons", as amended. According to the said law, the conducting of such activity is subject to the Hydrocarbons

Agreement, to be entered into between the Ministry of Energy and Industry and the interested entity being either domestic or foreign.

7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

Any permit holder conducting extraction/exploitation activity of natural resources are subject to payment of royalties in favour of the Albanian State. Royalties are calculated in percentages based on the value of the natural resource sold or used. The rate of the royalties applicable varies depending on the type of natural resources involved. The royalties are determined by the legislation on national taxes and paid to the tax authorities, or the customs administration in case of export.

No other taxes are applicable, such as for the export of natural resources and others.

7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

Albanian legislation does not contain any restrictions on foreign exchange operations.

The Law on Hydrocarbons provides that in case the hydrocarbons activity is performed by a foreign investor, the Hydrocarbons Agreement contains appropriate provisions related to the fiscal regime's stability. It may provide, inter alia, for the right of the foreign investor to maintain foreign bank accounts and to exchange foreign currency into local currency, according to preferential exchange rates, for the purposes of fulfilling its obligations arising from the hydrocarbon activity.

7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

There are no restrictions on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions. Apart from the bank wire fee, there are no other controls or fees applicable.

7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

There are no restrictions imposed by Albanian legislation in this respect. The Law on Hydrocarbons explicitly allows foreign investors the right to establish and maintain offshore accounts for the purpose of payments of goods, services and staff engaged in the conduct of hydrocarbons activity, as per the Hydrocarbons Agreement.

7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in Albania or abroad?

There are no restrictions on the transfer of dividends from the project company to its parent company, whether incorporated in Albania or abroad.

7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?

Environmental issues in Albania are governed by:

- (i) Law no. 10431 dated 09.06.2011 “On environmental protection”.
- (ii) Law no. 10440 dated 07.07.2011 “On environmental impact assessment”. Subject to the aforementioned law, the competent authority to ensure the proper execution and supervise compliance with the said legislation is the Ministry of Environment, along with the National Environmental Agency.
- (iii) Law no. 10448 dated 14.07.2011 “On environmental permits”.

Health and safety issues are mainly dealt with by Law no. 10237 dated 18.02.2010 “On health and safety in the working premises” and related sublegal Acts. The governmental agency empowered to supervise the proper execution and compliance with the said law is the National Labour Inspectorate.

Any entity operating in Albania should ensure compliance with these laws.

7.10 Is there any specific legal/statutory framework for procurement by project companies?

As a general rule, public procurement law does not apply to private entities, unless: (i) the majority of the voting shares into the share capital are owned by the State; or (ii) it is administered by the State or the State controls/appoints more than half of the administration/supervising body.

However, subject to the provisions of the Concessions and PPPs Law, the subcontracting by the project company of public works or services with a value exceeding ALL 700,000,000 (seven hundred million Albanian Lek), VAT excluded, shall be subject to public procurement procedures.

8 Foreign Insurance

8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

Law no. 52/2014 “On Insurance and Reinsurance in the Republic of Albania”, recently adopted by the Albanian Parliament with the aim of transposing into domestic law provisions of EU legislation in the insurance and reinsurance sector, prohibits direct insurance provided by foreign insurance companies for risks related to persons, assets or liabilities seated within the Albanian territory, with the exception of insurance of risks related to air and sea transport, reinsurance of foreign investments, insurance of persons residing outside Albanian territory, or other cases or when an international agreement adopted by the Republic of Albania provides otherwise.

In addition, the law includes permits for the conducting of insurance activity in the Republic of Albania by companies from EU Member States through the establishment of a branch or the direct supply of services. However, all provisions that relate to companies of Member States shall enter into force after Albania becomes a Member State of the EU. Until then, provisions applicable to foreign insurance companies shall apply to insurance companies of EU Member States as well.

8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

Albanian legislation does not contain any restrictions or prohibitions in this respect.

9 Foreign Employee Restrictions

9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

There are no restrictions on the employment of foreign workers by a project company. Subject to the Law on Foreigners, all foreigners engaged in employment in Albania must obtain a working and residency permit.

10 Equipment Import Restrictions

10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

There are no specific restrictions, controls, fees or taxes on importing project equipment or equipment used by construction contractors. Unless a free trade agreement provides otherwise, equipment may be subject to customs duties from 2% to 10% of the customs value. Generally, VAT is payable upon importation.

However, equipment and machinery used by construction contractors may be imported under a temporary regime. Under the said regime, no taxes are payable provided that the equipment will be returned within a year. Such period may be extended by another 12 months.

10.2 If so, what import duties are payable and are exceptions available?

From January 1st 2015, the import of machinery and equipment used for the implementation of investment contracts with a value equal to or higher than ALL 50,000,000 (fifty million Lek) are VAT-exempt on import.

11 Force Majeure

11.1 Are force majeure exclusions available and enforceable?

Force majeure exclusions are enforceable under Albanian legislation.

12 Corrupt Practices

12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

The applicable civil legislation aims to prevent situations that might lead to any conflict between public and private interests of public officers vested with decision-making powers in the framework of their public activity.

The said area is governed by: Law no. 9361 dated 07.04.2005 “On prevention of conflict of interest in the exercise of public office”, as amended; Law no. 9131 dated 08.09.2003 “On Ethics’ Rules in the Public Administration”, as amended; and secondary legislation enacted in virtue of the above laws. Upon Law no. 8635 dated 06.07.2000, the Republic of Albanian has ratified the Civil Convention “On Anti-Bribery”.

The Law “On prevention of conflict of interest in the exercise of public office”, as amended, provides that any breach of the obligations of the public officer subject to the said law, constitutes a civil offence and shall be subject to a fine as indicated in the said law.

Corruptive practices are punishable under Albanian Criminal Law as well. Such actions are subject to imprisonment from 3 (three) months up to 5 (five) years.

Additionally, fines apply ranging from ALL 200,000 (two hundred thousand Lek) up to ALL 3,000,000 (three million Lek) (approx. EUR 1,500 up to EUR 21,000).

13 Applicable Law

13.1 What law typically governs project agreements?

Subject to the Concessions and PPPs Law, concessions agreements are governed by Albanian law.

13.2 What law typically governs financing agreements?

Financing agreements are generally governed by Albanian legislation. However, by way of contract the parties may choose the foreign law as governing law.

13.3 What matters are typically governed by domestic law?

Albanian security agreements are generally governed by Albanian law.

14 Jurisdiction and Waiver of Immunity

14.1 Is a party’s submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

According to the Albanian Civil Procedure Code, when at least one of the parties is not Albanian, the parties may agree to submit disputes for resolution before a court of foreign jurisdiction.

Albanian legislation is silent on waiver of immunity.

15 International Arbitration

15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

In case of contractual provisions providing for an international arbitration (i.e. the parties have their habitual place of residence in different Contracting States, as per the Geneva Convention as of 21.04.1961 “European Convention on International Commercial Arbitration”), the foreign arbitral tribunal award is subject to recognition by the competent Appeal Court (i.e. exequatur), under provisions of the Albanian Civil Procedures Code and New York Convention on Recognition and Enforcement of the International Arbitral Awards, of June 1958. Such award is enforced by the bailiff office.

15.2 Is Albania a contracting state to the New York Convention or other prominent dispute resolution conventions?

The Republic of Albania is a party to the “New York Convention” (Law no. 8688, dated 09.11.2000 “On ratification of the New York Convention on Recognition and Enforcement of the International Arbitral Awards, dated 10.06.1958”). Albania has also adhered to the European Convention on International Commercial Arbitration of April 1961 (Law no. 8687, dated 09.11.2000 “On ratification of the Geneva Convention” dated 21.04.1961 “European Convention on International Commercial Arbitration”).

15.3 Are any types of disputes not arbitrable under local law?

The local law provides that any patrimonial claims or actions deriving from patrimonial relationships are arbitrable disputes.

15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

Albanian law is silent pertaining to the obligation to submit disputes to domestic arbitration.

16 Change of Law / Political Risk

16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

To the best of our knowledge, there has been no call for political risk protection so far.

17 Tax

17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

According to the Albanian Law on Income Tax, a withholding tax at the rate of 10% should be withheld from the gross interest (unless a Double Tax Treaty provides otherwise), paid on loans from foreign lenders or domestic persons not registered with the tax authorities. There is a draft amendment, not yet passed in the Parliament, which aims to increase the interest rate to 15%. The proceeds of a claim under a guarantee or the proceeds of enforcing security would be subject to withholding tax if they consist of interest amounts.

17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors?

What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration? Albanian tax legislation does not provide for any preferential incentive to foreign investors or creditors.

On the other hand, no taxes apply to foreign investments, loans or other security documents, either for purposes of effectiveness or registration, other than the tariffs mentioned above.

18 Other Matters

18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in Albania?

Albania is a country in continuous development and Albanian legislation is continuing to adapt and harmonise its legislation to bring it in line with the *acquis communautaire*. No additional major shake-up is expected, however, and in today's more stable environment most of the necessary legislative framework for investors is already in place. Further amendment is necessary, though, to finalise this process.

18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.

Issuance of bonds and other capital market instruments is mainly regulated by Law no. 9879 dated 21.02.2008 "On Securities" and Law no. 9901 dated 14.04.2008 "On Entrepreneurs and Commercial Companies", as amended.

The law sets out the types of securities applicable in Albania, relationships created upon emission thereof, etc. The Law on Securities determines the entities entitled to issue securities and registration duties pertaining to them, as well as terms and procedures for the trade and transfer of securities. The term 'securities' includes shares, bonds emitted either by commercial companies or local government authorities, treasury bills and bonds emitted by the Albanian State, securities emitted by the Bank of Albania, shares and quotas of investment funds, as well as other financial instruments similar to shares and bonds and considered as such by the Albanian Financial Supervisory Authority (i.e. the regulatory authority designated by law for the supervision and monitoring of the securities market). Securities may be equity instruments, debt instruments and shares or quotas of investment or pension funds.

Companies emitting securities must register them with the authorised registrars, in accordance with the terms and procedures approved by the Financial Supervisory Authority. The registrars are organised and established in accordance with the Law on Securities and are authorised to carry out of their activity by the Financial Supervisory Authority.

Companies aiming to undertake an emission of securities should prepare, publish and deliver to the potential investors a prospectus (containing the features set forth by the Law on Securities). Publicly listed companies are subject to several additional requirements, mostly connected with the prospectus features.

19 Islamic Finance

19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in Albania.

These instruments are not customary for the Albanian financing sector. On the other hand there are no specific provisions in Albanian legislation that would prevent the use of the mentioned instruments in a project financing in Albania.

As for Albania, which is entering into a gradual economic stabilisation and integration, policymakers are now faced with the challenge of finding an enduring solution to ensure the stability of financial systems. Islamic finance has now become an upcoming and

important opportunity in shaping the future of the global financial system and reinforcing ethical and moral values that are inherent in Islamic finance principles and fundamental towards promoting the stability of the global financial system.

19.2 In what circumstances may Shari'ah law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of Shari'ah or the conflict of Shari'ah and local law relevant to the finance sector?

There are no mandatory provisions that would prevent the parties from choosing a foreign law as the governing law of their contractual rights and obligations, even in cases when both parties are Albanian residents. Anyhow, in theory either the parties or the cause of action of the agreement should have a close connection with the parties' choice of governing law.

In case of eventual disputes between two domestic parties, the selection of Shari'ah principles as the governing law of the agreement, might present difficulties in being accepted as such by the court. On the basis of Western doctrinal studies, the Shari'ah principles do not fit into any of the applicable Western systems (i.e. civil law and/or common law), because they are not limited/applicable to any specific territory or State structure, nor are they valid for all residents of each State. In this context, the Albanian courts might not accept application of a non-national system of law such as the Shari'ah principles.

We are not aware of any case law with regard to the applicability of Shari'ah law in Albania. Hence to the best of our knowledge the applicability, acceptance and/or enforcement by Albanian courts of Shari'ah law principles have not been tested in front of the Albanian courts.

19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in Albania? If so, what steps could be taken to mitigate this risk?

Subject to general principles on contracts as set out by the Albanian Civil Code, a contract is valid if the requirements indicated under the Albanian Civil Code are met. The application of interests in a loan agreement is customary and allowed under Albanian law and its inclusion in a loan agreement would not affect its validity and/or enforceability.

PROJECT FINANCE 2015, KOSOVO



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1 Overview

1.1 What are the main trends/significant developments in the project finance market in Kosovo?

Being an emerging market, Kosovo is experiencing significant growth in foreign direct investments and project financing. Kosovo offers an attractive environment for project financing since many of the important public services are in the process of being privatised, and the need for new investors for financing is increasing. The privatisation of the energy distributor was successfully completed.

Lately, the Ministry of Economy and Development has announced the deadline for submission of bids for the construction of the thermal power plant “Kosova e Re”, which will have the net electricity capacity of 2x300 MW. The Kosovan Government and the company Bechtel Enka have signed a EUR 600 million contract for the construction of the Prishtine-Hani i Elezit highway (bordering Macedonia).

1.2 What are the most significant project financings that have taken place in Kosovo in recent years?

Several financing projects have been successfully completed in Kosovo. The privatisation of former socially owned enterprises (SOE) through the sale of assets or shares is generally supported by project financing. One of the largest financing projects that we can name is the privatisation of Ferronikeli, the largest private investment in the heavy industry in Kosovo, with over EUR 60 million of investments at the time of writing.

2 Security

2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Kosovan law permits the creation of security interests over almost all assets and rights held by project companies, including mortgages over real property, pledges over movables or rights (i.e. any movable property with monetary value and any right which can be transferred legally such as movable property, receivables, cash flows, shares or quotas, bank accounts, contractual rights, concessions and licences). Mortgages can be established over immovable property, including land, buildings and fixtures.

The security agreement when using immovable property as collateral differs from the security agreements having movable property or rights as collateral. The security agreement should provide a clear description of the collateral.

Upon execution by the parties, the pledge agreements over movable property or rights are registration through online application with the Pledge Registry Sector of the Kosovo Business Registration Agency, whereas mortgage agreements are filed with the Cadastral Agency of the area where the property is located.

2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Pursuant to the Law on Property and other Real Rights (Law no. 03/L-154), security can be taken over immovable property (i.e. land, buildings or fixtures) and movable property (i.e. machinery and equipment). Movable property can be granted as a pledge and the pledge is subject to registration for public notice purposes. The moment of registration determines the ranking of the pledge in relation to third party rights/claims over said property.

Mortgages can be registered over immovable property. The mortgage agreement executed by the parties is filed for registration with the Cadastral Agency of the area where the property is located and the moment of registration determines the ranking of the security in relation to third party rights/claims over said property.

2.3 Can security be taken over receivables where the chargor is free to collect in the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

The pledge over receivables is allowed under the Law on Property and other Real Rights.

The pledgor and the pledgee execute a pledge of receivables agreement that is registered with the Pledge Registry. The pledgor is entitled to continue collecting the receivables until an event of default occurs. In such case, the pledgee notifies the debtors in writing and is entitled to execute its rights, as provided under the pledge of receivables agreement.

2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Security can be taken over cash deposited in bank accounts. The parties execute a pledge agreement and register such pledge with the Pledge Registry.

2.5 Can security be taken over shares in companies incorporated in Kosovo? Are the shares in certificated form? Briefly, what is the procedure?

Kosovan legislation provides for the taking of security over shares. Currently in Kosovo, there are no certificated shares; however, the original business excerpt of the Kosovo Business Registration Agency is sufficient. If shares or quotas are being pledged based on a pledge agreement, the pledge would be perfected by registration with the Pledge Registry.

2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

The Notary Fees are determined by Administrative Instruction no. 02/2012 "On Provisional Notary Fees" (hereinafter "the Administrative Instruction").

According to the Administrative Instruction, the notary fees are determined based on the value of the transaction to be executed by the parties. For transactions related to the transfer of property, the general value of property that is the subject of the transaction is considered as the basis for determining the notary fee.

For notary acts related to transactions having a value lower than EUR 100,000.00, the following fees are applicable: (i) EUR 20 for transactions having a value from EUR 0.01 to 2,500; (ii) EUR 30 for transactions having a value from 2,501 to 5,000; (iii) EUR 50 for transactions having a value from 5,001 to 20,000; (iv) EUR 80 for transactions having a value from 20,001 to 60,000; and (v) EUR 120 for transactions having a value from 60,001 to 100,000.

For the transactions exceeding the amount of EUR 100,000.00, the fee will increase by EUR 20 for every EUR 20,000.00, but it cannot exceed a total fee amount of EUR 1,000.

In case the transaction value cannot be determined, the fee will be imposed according to the time spent by the notary on preparing the documents. The hourly fee applicable to legal entities is EUR 40.

Furthermore, the notary is entitled to compensation in accordance with time spent for the issuance of various permits, approvals, extracts or certificates from public registers.

Fees of the Pledge Registry are based on Administrative Instruction no. 09/2013 "On defining procedures for registration pledge, fees and other services provided by pledge sector". Below are the respective fees for registration:

- basic fee – EUR 3;
- for each year – EUR 1;
- one Pledgee – EUR 0.10;
- one Pledgor – EUR 0.50;
- one serial number property – EUR 0.50;
- other property per each group of 1-100 characters – EUR 0.30; and
- confirmation of registration – EUR 0.40.

In addition, fees are determined for amendments of registration, for the searches on the online Pledge Registry, and for issuing Pledge Registry certificates, etc.

Regarding the registration of mortgage, fees are determined based on Administrative Instruction no. 08/2014 "On fees for services for registering the immovable property rights from Municipal Cadastral Offices", according to the value of the loan as defined in the mortgage agreement, as follows:

- i. for loans up to EUR 10,000, the fee amount is EUR 10;
- ii. for loans from EUR 10,000 to EUR 30,000, the amount is EUR 20;
- iii. for loans from EUR 30,000 to EUR 50,000, the amount is EUR 30;
- iv. for loans from EUR 50,000 to EUR 100,000, the amount is EUR 80; and
- v. for loans that exceed EUR 100,000, for every additional EUR 100,000 the amount is EUR 30, but the overall amount cannot exceed EUR 400.

2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The perfection of a mortgage takes about one business week, while the perfection of pledges takes no more than one working day. The tariffs payable for the perfection of pledges are not significant, while the tariffs for filing with the cadastre office depend on the value of the secured debt. For the fee amounts, please refer to question 2.6 above.

2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground) etc.?

In general, no regulatory consents are required for the creation of securities, excluding cases when the consent is required by the relevant legal instrument (i.e. concession or privatisation agreement), where the approval of the State contracting authority is required for creating securities over the assets of the private entity that is party to the concession or privatisation agreement.

3 Security Trustee

3.1 Regardless of whether Kosovo recognises the concept of a “trust”, will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?

The concept of security trustee and/or agent is not widely recognised by Kosovan legislation. In the case of a loan made by a bank operating in Kosovo to a private party secured by a mortgage over an immovable property, the parties may agree when signing the mortgage contract (and such agreement should be clearly stated in the mortgage contract) that the enforcement of the mortgage through the sale of collateral can be made out-of-court through a security trustee/agent. For the sake of clarity, this type of agreement may take place only if the mortgagor is a business entity and the immovable property, when the mortgage is perfected, is used for conducting business activity. It is uncommon to encounter this kind of arrangement in other cases or for other types of securities.

3.2 If a security trust is not recognised in Kosovo, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Please see question 3.1 above.

4 Enforcement of Security

4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy /liquidator), or (b) (in respect of regulated assets) regulatory consents?

In most cases, the law requires that the collateral be sold at a public auction. In addition, the enforcement can be suspended in certain cases by a court decision. The regulatory consents could be required only in rare cases, depending on whether the sale of the collateral is subject to regulatory consent.

4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?

No specific restrictions apply to foreign investors.

5 Bankruptcy and Restructuring Proceedings

5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?

Subject to Law no. 2003/4 “On liquidation and reorganisation of legal persons in bankruptcy” (the “Bankruptcy Law”), as amended, the beneficiary of a registered mortgage of immovable property or perfected pledge of movable property is entitled to adequate protection of its secured interest in the bankruptcy estate in order to maintain the condition and value of such property as it was on the date when the bankruptcy proceeding commenced.

Further, the law foresees that in case the property subject to a registered mortgage or perfected pledge is not adequately protected, the secured creditor may submit a written request to the court for a substitute adequate protection.

Based on the request, the court shall issue a ruling on the request for adequate protection no later than twenty days after its submission. During this period, the moratorium placed on the bankruptcy estate, suspending all actions against the bankruptcy estate by the creditors, shall cease to the extent necessary for the creditor to exercise its rights over the secured property.

5.2 Are there any preference periods, clawback rights or other preferential creditors’ rights (e.g., tax debts, employees’ claims) with respect to the security?

Under the Bankruptcy Law the following ranking applies to the repayment of obligations:

- (a) secured claims, subtracting reasonable costs for the sale of goods;
- (b) priority claims, including: (i) court expenses; (ii) administrator’s expenses; (iii) administrator’s remuneration; (iv) administrative expenses required for the maintenance and protection of the estate, including expenses due to the continued operation of the debtor after the petition submission date; (v) reorganisation expenses; (vi) reorganisation financing and credit in case of reorganisation

- failure; (vii) payments and expenses for personnel during the time of case administration; and (viii) creditors' committee expenses;
- (c) claims for unpaid pre-petition employees' wages (limited to two months' salary or wages per person);
 - (d) unpaid tax obligations until the moment of the opening of bankruptcy procedures;
 - (e) unsecured claims, including wage claims not subject to higher priority treatment; and
 - (f) claims of the debtor's owners shareholders, founders, participants or partners.

5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

According to the Bankruptcy Law, individual businesses, insurance companies, financial institutions, pension providers, and enterprises in public and social ownership that are not yet transformed into legal entities are excluded from bankruptcy proceedings.

5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

The law does not foresee any available alternatives to court proceedings for a creditor to seize the assets of the project company in an enforcement.

However, it is important to mention that only a few bankruptcy cases are filed in court due to lack of experience in dealing with the bankruptcy process in Kosovo.

5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cram down of dissenting creditors?

The Kosovo Bankruptcy Law defines the conditions and procedures for the liquidation or reorganisation of legal persons in bankruptcy and determines the rights and duties of the parties participating or affected by such proceedings. The law provides for the possibility of the project company being insolvent and/or the insolvency trustee to draft a reorganisation plan and submit it to the competent section of the court dealing with insolvency proceedings. The purpose of the reorganisation plan is to avoid liquidation of the project company's assets and to enhance the chances for the project company's creditors to get their credits repaid.

5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in Kosovo?

The Kosovo Law on Business Organisation stipulates no specific liabilities in such a case. However, it stipulates duties of the directors such as the duty to act (i) in good faith, (ii) in the reasonable belief that he/she is

acting with proper authority and in the company's best interests, and (iii) with due and diligent care and attention to his/her responsibilities. The directors of a company who vote for or assent to any prohibited distribution shall be jointly and severally liable to the company for the amount of the distribution.

6 Foreign Investment and Ownership Restrictions

6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

No restrictions or control fees apply to foreign investors. Subject to Law no. 04/L-220 "On Foreign Investment", Kosovo guarantees fair and equal treatment to foreign investors and their investments in Kosovo.

6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

Kosovo has already signed various bilateral investment treaties; however, as mentioned above, there are no restrictions for foreign investors.

6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

Under the Constitution of the Republic of Kosovo, the expropriation of private property is permitted only when it is necessary or appropriate in order to achieve a public purpose or the promotion of the public interest and is followed by the provision of immediate and adequate compensation to the expropriated owner. Currently, expropriation in Kosovo is governed by Law no. 03/L-139 "On Expropriation of Immovable Property", as amended.

According to article 7 of the Law on Foreign Investments, the foreign investment shall not be subject to any form of expropriation or nationalisation directly or indirectly or any other equivalent measure, except in cases where there is a special public interest established by law, which will result in a non-discriminatory, immediate, adequate and effective compensation in accordance with legal procedures. The Law on Foreign Investment sets forth the procedure and the manner of compensation.

7 Government Approvals/Restrictions

7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

The Government, through the ministry in charge of the specific sector or committees created with the participation of representatives of several ministries involved in the project, manages the award of projects.

7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

No specific requirements exist related to the filing of project documents in order for them to be valid and enforceable. Depending on the security package of the project, the pledge agreements and the mortgage agreements should be registered.

7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

In Kosovo, natural resources are not privately held unless the State has actually given such natural resource for private ownership. Consequently, the right to exploit natural resources is a sovereign right, and a title vested in the State. The Government periodically licenses specifically identified natural resources for private exploitation upon payment of prescribed royalties. Private enterprises have been granted rights to explore for minerals in several places.

Foreign investors enjoy equal treatment with the local investors in the licensing process.

7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

The extraction/exploitation of natural resources is subject to licensing by the State and payment of the respective royalty.

Kosovan legislation does not impose any restrictions on exporting natural resources. The payable taxes are defined by the Ministry of Finance and include customs duties and other taxes applicable for all exported products.

7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

Kosovo has a free market for foreign exchange operations. There are no restrictions for a company to transfer funds from Kosovo to international banks.

7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

There are no restrictions on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions in Kosovo. Beside the bank transfer fee, there are no other controls or fees.

7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

The law is silent in this regard; however, in practice the project companies maintain such accounts.

7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in Kosovo or abroad?

Subject to the Kosovo Law on Business Organisations, the dividend should be paid based on the shareholders' decision; however, no restrictions are foreseen in this regard.

In relation to the tax legislation, pursuant to Law no. 03/L-162 "On Corporate Income Tax", as amended, the dividends received by resident and non-resident taxpayers are exempted from corporate income tax.

7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?

Law no. 03/L-043 "On Integrated Prevention Pollution Control", Law no. 03/L-214 "On Environmental Impact Assessment", and Law no. 03/L-025 "On Environmental Protection" set out the criteria to be met while realising a project which has an environmental impact. Subject to these laws, the companies cannot operate without obtaining the environment permit issued from the Ministry of Environment and Spatial Planning. Also, all constructed facilities, installations and machinery that have been subject to an environmental impact assessment cannot commence operations without an environmental permit from the Ministry of Environment and Spatial Planning.

Regarding health and safety, according to Decision no. 81/06, dated 07.03.2006 of the Executive Agency of the Kosovo Labour Inspectorate and Law no. 04-L-161 "On Safety and Health at Work", the companies operating in Kosovo are obliged to obtain work consent. The request for obtaining this consent is filed with the Executive Agency of the Kosovo Labour Inspectorate.

7.10 Is there any specific legal/statutory framework for procurement by project companies?

Procurement in Kosovo is governed by Law no. 04/L-042 "On Public Procurement of Kosovo", as amended. In general, the procurement law is not applicable to private companies, unless the private company is operating on the basis of a special or exclusive right, or carrying out a procurement activity on behalf of or for the benefit of a public authority, public service operator or public undertaking.

8 Foreign Insurance

- 8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

As a general rule, foreign insurance companies cannot operate or issue insurance policies directly in Kosovo, unless the insurance company is licensed by the Central Bank of Kosovo.

- 8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

We do not identify any restrictions in Kosovan law.

9 Foreign Employee Restrictions

- 9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

The employment of foreigners in Kosovo is governed by Law no. 04/L-219 "On Foreigners", which provides that a foreigner may work in the Republic of Kosovo on the basis of a residence and work permit, or on the basis of a certificate for employment notification pursuant to the conditions set forth by the said Law. There are also categories of foreigners who are exempted from such requirements.

The Law on Foreigners also provides that the Government of the Republic of Kosovo shall adopt a decision which shall set out an annual quota of employment of foreigners at the latest by 31st October for the upcoming year, for new and extension of issued permits.

10 Equipment Import Restrictions

- 10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

Imports in Kosovo are governed by Law no. 04/L-048 "On Foreign Trade" and Code no. 03/L-109 "On Customs and Excise Code of Kosovo", as amended. The customs duties and other taxes are imposed by the Ministry of Finance.

Importing project equipment requires an import declaration and the payment of the corresponding customs duties (including VAT). As a general rule, the import of goods or equipment does not require prior authorisation.

However, some goods or equipment can only be imported upon satisfaction of special requirements, depending on the applicable import regime (i.e. gas and hydrocarbons, and products subject to environmental requirements).

The import of certain equipment is exempt from VAT. The list of exempted equipment is updated periodically by the Government; however the list is not extensive, since in principle almost all imported equipment is subject to these taxes.

- 10.2 If so, what import duties are payable and are exceptions available?

The import of equipment to Kosovo is subject to payment of (i) customs duties at a rate of 10% of the product value, and (ii) value added tax (VAT) at a rate of 16%.

As regards to the exceptions, please refer to question 10.1 above.

11 Force Majeure

- 11.1 Are force majeure exclusions available and enforceable?

Kosovan legislation recognises force majeure exclusions.

12 Corrupt Practices

- 12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

Corruption practices are sanctioned by the Penal Code (Law no. 04-L-082) and Law for Penal Responsibility of the Legal Persons for Penal Violation (Law no. 04/L-030). Under the Penal Code, offering bribes to public officers for obtaining benefits is subject to fines and imprisonment, from three months to three years. Other corrupt practices that constitute a criminal offence also include abusing an official position or authority, misusing official information, conflict of interest, misappropriation in office, fraud in office, unauthorised use of property, accepting bribes, trading in influence, issuing unlawful judicial decisions, disclosing official secrets, unlawful collection and disbursement, unlawful appropriation of property during a search or execution of a court decision and failure to report or falsely reporting property, revenue/income, gifts, other material benefits or financial obligations. Minimum and maximum punishments for these offences range from imposing fines and/or imprisonment from six months to 12 years.

13 Applicable Law

- 13.1 What law typically governs project agreements?

Irrespective of Kosovan conflict-of-laws rules, project agreements and financing agreements may be governed by their corresponding choice of law clauses, which may be either Kosovo or foreign laws.

While Kosovan law generally allows the parties to choose the applicable law, project agreements are usually subject to Kosovan law, because for infrastructure development, contracts usually contain a number of regulatory and local issues, and interface with permits and concessions and the substantial performance of the contracts in Kosovo plays a major role.

On the other hand, pursuant to Kosovo's conflict-of-laws rule (*lex rei sitae*), real estate property rights cannot be subject to a choice of law other than the law of the property's location. Therefore, real estate property and rights shall always be governed by Kosovan laws.

13.2 What law typically governs financing agreements?

Kosovan law generally allows the parties to choose the applicable law. As to the documents of the financing package, loan agreements are usually subject to the laws chosen by the investors/lenders, whereas security documents (mortgages, share pledges) are subject to Kosovan law.

13.3 What matters are typically governed by domestic law?

Real estate rights, mortgages and pledges are governed by Kosovan law.

14 Jurisdiction and Waiver of Immunity

14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

Subject to Kosovan legislation, the submission to a foreign jurisdiction is effective and enforceable under Kosovan law.

However, the submission to a foreign jurisdiction is legally binding when the subject matter of the contract is not subject to the exclusive jurisdiction of Kosovan courts (i.e. real estate rights, natural resources).

15 International Arbitration

15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

Kosovan legislation is silent regarding the obligation to submit the disputes to international arbitration. On the other hand, the law regulates the recognition of the international arbitral awards by local courts in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

15.2 Is Kosovo a contracting state to the New York Convention or other prominent dispute resolution conventions?

Though Kosovo is not yet a party to the New York and/or ICSID Convention, Kosovo recognises arbitration awards and arbitration agreements, in accordance with the said Convention.

15.3 Are any types of disputes not arbitrable under local law?

The general principle is that any dispute that can be decided by a civil court, involving private rights, can be referred to arbitration. Although the law does not specifically provide for this, in practice, disputes that cannot be resolved through arbitration include disputes over immovable property, disputes in labour relationships, family law and inheritance disputes, antitrust and insolvency.

15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

Kosovan legislation is silent regarding an obligation to submit the disputes to domestic arbitration.

16 Change of Law / Political Risk

16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

To the best of our knowledge, there have been no calls for political risk protection so far.

17 Tax

17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

The withholding tax on loan interest is at a rate of 10% of the gross payment amount.

17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Kosovan legislation does not provide for preferential incentives to foreign investors or creditors. No taxes apply to foreign investments, loans or other security documents, other than the registration tariffs mentioned above.

18 Other Matters

18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in Kosovo?

The newest state in Europe has been gifted with enviable human and natural resources, from minerals to fertile agricultural land, from a young and dynamic labour force to a favourable central location in the region.

The combination of these assets create an overwhelming potential for investors and will certainly contribute to the growth of the Kosovan economy.

18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.

Securities trading or offering in Kosovo is not specifically regulated.

Pursuant to Kosovo Law no. 02/L-123 “On Business Organisations”, as amended, the joint stock companies may create and issue securities other than shares of stock, including (i) bonds, (ii) securities that are convertible into shares of stock, and (iii) options to acquire shares of stock. No securities that are convertible into shares of stock and no options to acquire shares of stock may be issued unless the authorised number of the concerned shares of stock, as specified in the company’s charter, is sufficient to cover both (i) the future issuance of the concerned shares of stock, (ii) the future issuance of any shares of stock that are issued on other convertible securities and options already issued, and (iii) all other shares of stock already issued.

19 Islamic Finance

19.1 Explain how Istina’a, Ijarah, Wakala and Murabaha instruments might be used in the structuring of an Islamic project financing in Kosovo?

Law no. 04/L-093 “On Banks, Microfinance Institutions and Non Bank Financial Institutions” stipulates that banks are authorised to engage in Islamic finance or Islamic banking (defined as a type of bank, including a department or division of a non-Islamic bank that undertakes the business of banking according to Shari’ah principles) subject to the licensing and consent of the Central Bank of Kosovo and to conditions and regulations provided by the Central Bank of Kosovo. Accordingly, such instruments might be used within the mentioned limits.

19.2 In what circumstances may Shari’ah law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of Shari’ah or the conflict of Shari’ah and local law relevant to the finance sector?

When referring to disputes with international element, the Law no. 03/L-006 “On Contested Procedure”, as amended, provides that the local court is competent to settle a dispute when its competence is expressly determined by law or international contract.

In theory, either the parties or the cause of action of the agreement should have a close connection with the choice of the governing law by the parties.

In case of an eventual dispute between two domestic parties, the selection of Shari’ah principles as the governing law of the Agreement, might present difficulties in being accepted as such by the court. According to Western doctrine studies, the principles of Shari’ah do not fit into any of the applicable Western systems (i.e. civil law and/or common law), because they are not limited/applicable to any specific territory or state structure, nor are they valid for all residents of each state. In this context, the Kosovo courts might not accept the application of a non-national system of law such as the principles of Shari’ah.

We are not aware of any case law with regard to the applicability of Shari’ah law in Kosovo. Hence, to the best of our knowledge the applicability, acceptance and/or enforcement by Kosovan courts of Shari’ah law principles has not been tested before Kosovan courts.

19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in Kosovo? If so, what steps could be taken to mitigate this risk?

Subject to general principles on contract as set out by Law no. 04/L-077 “On Obligational Relationships”, a contract is valid if the requirements indicated under the said law are met.

The application of interest in a loan agreement is customary and allowed under Kosovan law, and its inclusion in a loan agreement would not affect its validity and/or enforceability.

FAQ-ISLAMIC FINANCE IN ALBANIA



Renata Leka

“This article appeared first on IsFin - the Islamic Finance website.”

Since years, Islamic Finance is experiencing an increasing popularity far outside the Muslim World’s frontiers. The growing importance of Islamic Finance in the global financial system is considered as an up coming opportunity directly linked with the business community worldwide. Through the interview with Ms. Renata Leka on behalf of Boga & Associates, we are pleased to present their views on the current and future development of Islamic finance in Albania. Ms. Renata Leka is Partner at Boga & Associates, which she joined in 1998. Ms. Leka’s practice is focused on corporate, advising numerous foreign investors in acquisitions and implementation of corporate governance structures, general business law matters, project finance, intellectual property, employment, procurement and concession law. Ms. Leka is continually ranked as “Top Tier Lawyer” on “Financial and Corporate”, by IFLR 1000 and “Leading Individual” in “Intellectual Property Law” by Chambers Europe (Chambers and Partners).

1. Q: Islamic finance is one of the fastest and growing sectors in international financial system. For many, the meaning of “Islamic Finance is unclear; Ms. Leka what exactly is all about?

1. A: (RL) In this last decade, Islamic Finance has evolved to become a complete and competitive form of financial intermediation that serves both Muslim and non-Muslims consumers and businesses counting its presence in more than 75 countries and total assets currently estimated to exceed US\$ 1 trillion. More and more countries around the world seek to further develop Islamic finance within their jurisdictions, and Albania is one of the testimonials as recent emerging country where this occurrence is starting to be structured and further developed.

2. Q: Ms. Leka during years of experience, you and all professionals of Boga & Associates in Albania and Kosovo, have already built a reputation as a leading firm with extensive industry experience providing constantly full range of services. Effectively and efficiently involved in most important projects of Albania and the region, can you help us to describe how does the Islamic Finance work and how does it affect the financial system?

1. A: (RL) Yes. Currently the financial system is more and more experiencing changes as a consequence of Islamic principles. The development of the Islamic financial system is guided by Shariah principles that form the very foundation which contributes to its overall stability and resilience. Shariah embodies Islamic law with rules and regulations derived from the Quran and Sunnah (e.g. making money from money, such as charging interest, is usury and therefore not permitted, investment in companies involved with alcohol, gambling, tobacco and pornography is strictly off limits etc). The fundamental value propositions embedded in Islamic finance are universal and subscribe to the values of ethical finance and socially responsible investment. I would like here to emphasize that, the experience of Islamic Finance indicates that the application of Shariah need not to lead to extremism, rejection of Western values, or the empowerment of social groups.

3. Q: Since December 2011, Boga & Associates became the sole member for both Albania and Kosovo jurisdictions of the Islamic Finance Lawyers (IsFin) -“The world’s leading network of Islamic Finance Law specialists”. This can be perceived as a further step done by the firm directly linked with the upgrade in legal, tax and accounting spheres of expertise.

Being at the forefront as initiator to the important process of Islamic finance system, can you explain us which is your point of view regarding the advantages which can be benefiting from the Islamic Finance industry?

3. A: (RL) The unprecedented economic confusion of the past years has in many ways created a significant ‘coming of age’ opportunity for the Islamic finance industry. As the global financial crisis has worsened and economies

around the world have suffered from its catastrophic effects, it is envisaged a renewed focus on Islamic finance more specifically on the inherent advantages of a conservative, asset-backed banking model. While the Islamic finance industry has been in the spotlight for many years now, the fundamental strengths and intrinsic benefits of the Islamic banking model are now becoming widely acknowledged and accepted.

As for Albania, which is entering into a gradual economic stabilization and integration, policymakers are now faced with the challenge to find an enduring solution to ensure the stability of financial systems. Islamic finance has now become an upcoming and important opportunity in shaping the future of the global financial system and reinforcing ethical and moral values that are inherent in Islamic finance principles and fundamental towards promoting the stability of the global financial system.

I am pleased to acknowledge that Boga & Associates is the law firm of choice for clients who recognize the value of comprehensive representation, and we remain committed to positively contributing to their businesses and thereby if there would be the situation, continuing the growth and substantive development of Islamic finance.

FINANCIAL

PUBLIC TAKEOVER REGIME EXPLAINED, ALBANIA



Renata Leka

“This article was originally edited by, and first published on, www.internationallawoffice.com - the Official Online Media Partner to the IBA, an International Online Media Partner to the ACC and the European Online Media Partner to the ECLA. Register for a free subscription at www.internationallawoffice.com/subscribe.cfm.”

Public takeovers in Albania are regulated by Law 10236/2010. The law applies to publicly declared offers to obtain ownership of securities issued by a public company in exchange for cash or other considerations. It lays out rules relating to the conditions and procedures for taking control of public joint stock companies eligible to participate in a public takeover. The law provides no restrictions with respect to the nationality of such companies. Hence, not only Albanian companies, but also foreign companies, are eligible to participate in a public takeover, as long as they are listed and admitted to trade on Albania’s organised securities market. However, offers relating to securities issued by companies dealing with the collective investment of capital, as well as securities issued by the Bank of Albania, are exempt from the law’s scope of application.

The takeover of a public company is initiated by a third party interested in owning securities in the target. The offeror can be either a natural or legal person. Pursuant to the law, the offer to take control of the target is addressed to all shareholders and for all shares. Control is granted through ownership of 30% or more of the voting rights in the target. This position of control does not affect the other security holders, whose protection is guaranteed. Nevertheless, when an offer that would result in a situation of control triggers the obligation to notify the Financial Supervisory Authority (FSA), the FSA’s prior approval of the offer and the offer document is required. The offer document provides essential information with respect to the offer - in particular, whether the offeror already holds securities in the target. On approval, the offer and the offer document are made public through the National Registration Centre. The timeframe for the target to approve the offer is between three and 10 weeks from publication of the offer document.

In the event that an offeror (solely or together with other persons) acquires securities in a target that, when combined with previously owned securities, results in control over the target, it is obliged to make an offer to the owners of the remaining securities. However, if this acquisition of shares does not amount to control of the target, then the offeror need not make an offer and is obliged only to notify the FSA within 10 days.

If the offeror obtains control of at least 90% of the capital and the voting rights of the company, then within three months from termination of the term provided for the offer’s approval, it must request that the remaining shareholders sell their shares, on condition that such an intention was mentioned in the offer document. In the same scenario, the remaining shareholders have the right to request the purchase of their shares.

Finally, the law can be applied in an international dimension – for example, when the joint stock company is registered in Albania and operates in a stock market abroad or the vice versa. In the latter case, although registered abroad, if the company is listed on the stock market in Albania (with some exceptions) most procedural provisions of the law remain applicable. The law also attributes an important role to the rights of employees with respect to their protection and their inclusion in the decision-making process.

NEW LAW GOVERNING ACCOUNTING AND FINANCIAL REPORTING REQUIREMENTS, ALBANIA



Mirjeta Emini

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Since September 10 2011, accounting, financial reporting requirements, audit requirements, qualifications for professional accountants, licensing of individual auditors and audit firms have been governed by the new Law on Accounting, Financial Reporting and Audits (04/L-014).

The new law has also established the Financial Reporting Council – a body that is similar to the Board on Standards for Financial Reporting.

Preparing financial statements

Under the new law, international financial reporting standards, as issued by the International Accounting and Assurance Standards Board (IAASB) and approved by the Financial Reporting Council, are mandatory for large, medium and small-sized entities when preparing general purpose financial statements. These standards do not apply to micro-enterprises, although other accounting and reporting rules (as issued by the council) will apply.

Consolidated financial statements should be prepared in accordance with EU Directive 78/660/EEC.

The new law defines the time limit for the retention of accounting documents:

- Payrolls should be preserved permanently;
- Financial statements and supporting documents must be retained for up to 10 years; and
- Supporting accounting evidence should be stored for a minimum of six years.

Accounting records are to be maintained in the official languages of Kosovo and using the euro in terms of currency. Large and medium-sized companies may keep accounting records in English, provided that financial statements are also translated into Kosovo’s official languages.

The new law requires companies to verify at least once a year the existence and evaluation of assets, liabilities and capital through conducting an inventory of these items supported by proper evidence. Company management is responsible for ensuring that financial statements are fair and truthful.

A company’s general financial statements must be filed with the council (a copy must be submitted to the Ministry of Trade and Industry) by no later than April 30 of the following year. Consolidated financial statements should be filed with the council (a copy must be submitted to the ministry) by no later than June 30 of the following year. Failure to adhere to these deadlines will be subject to a penalty varying from €5,000 to €25,000.

Auditing financial statements

Statutory audits should be conducted in accordance with the International Standards of Auditing and related guidelines of the IAASB. Financial statements of large companies must be audited by auditing firms, while those of medium-sized companies may be audited by auditing firms or individual auditors. Small businesses need not have their statutory financial statements audited.

Failure to submit audited financial statements and maintain accounting logs within the deadlines prescribed by the new law will be subject to a penalty varying from €5,000 to €10,000.

Penalties will also be imposed if a company fails to comply with the required accounting and auditing standards.

MERGERS & ACQUISITIONS 2014, KOSOVO



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Delvina Nallbani

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

The regulatory regime regarding M&A activities in Kosovo comprises the provisions of the following laws:

- i. Law no. 02/L-123 “On Business Organizations”, published in the Official Gazette no. 39/2008, on 1.10.2008, as amended with the law no. 04/L-006 “On amending and supplementing the law no. 02/L-123 on Business Organizations” published on 22.07.2011 in the Official Gazette no. 06/2011 (“Company Law”);
- ii. Law no. 04/L-220 “On Foreign Investment”, published in the Official Gazette no. 01/2014, on 24.01.2014 (“Foreign Investment Law”);
- iii. Law no. 03/L-229 “On Protection of Competition”, published in the Official Gazette no. 88/2010, on 25.11.2010 (“Competition Law”);
- iv. Law no. 04/L-077 “On Obligational Relationship”, published in the Official Gazette no. 16/2012, on 19.06.2012 (“Law on Obligations”);
- v. Law no. 04/L-034 “On Kosovo Privatization Agency”, published in the Official Gazette no. 19/2011, on 21.09.2011 (“Privatization Law”); and
- vi. Law no. 03/L-212 “On Labour” published in the Official Gazette no. 90/2010 on 01.12.2010 (“Labour Law”).

1.2 Are there different rules for different types of company?

The Company Law applies to all M&A transactions in general. For transactions involving joint stock companies the Company Law defines specific rules to be followed.

The Privatization Law applies to acquisitions and reorganisations of socially-owned companies.

Currently there are no stock exchange listed companies in the country. Kosovo is working on creating a stock

exchange market, which would offer an opportunity for investors who want to invest in shares of various companies.

1.3 Are there special rules for foreign buyers?

Pursuant to the Foreign Investment Law, Kosovo guarantees fair and equal treatment to foreign investors and their investments in Kosovo.

The Company Law provides basic requirements in case one or more foreign legal persons and one or more Kosovo limited liability companies merge provided that each Kosovo company complies with the provisions of the Company Law with respect to the merger, and each foreign legal person complies with the applicable provisions of the jurisdiction under which it is organised.

1.4 Are there any special sector-related rules?

The Company Law is applicable to mergers in all sectors. However, acquisitions within regulated sectors (e.g. banking, leasing, insurance, media, telecommunications) are governed by special rules. Usually, a permit from, or notification to, the relevant regulator is required in case of either an acquisition of shares in the regulated companies, or an acquisition of a shareholding by regulated companies. For instance, in the banking sector, the specific thresholds for acquisition are prescribed, when prior approval of the Central Bank of Kosovo is required.

1.5 What are the principal sources of liability?

Subject to Company Law, the person signing documents that are filed with the KBRA shall be responsible for the accuracy of the information set forth therein.

General contractual liability rules apply to foreign investors, as well as to local owners. Further, in case the transaction raises competition issues and parties to the transaction do not follow procedures for obtaining clearance the Competition Law provides sanctions in an amount of up to 10% of the total income of the company in the preceding year.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

In addition to the direct acquisition of shares and assets of the companies, the Company law provides for the following alternative acquisition mechanisms:

“Merger” meaning a transaction in which a company (the “merging company”) transfers all of its assets and liabilities to another company (the “acquiring company”). The acquiring company may be an existing company or a new company that has been established for the purpose of acquiring such assets and liabilities.

In such a transaction (i) the merging company is dissolved, (ii) only the acquiring company survives the transaction, and (iii) the shareholders of the merging company surrender their shares in the merging company and receive in exchange shares or other ownership interests in the acquiring company and/or a cash payment.

“Demerger” meaning a transaction where a company transfers (other than in liquidation) to two or more business organisations all of its assets and liabilities in exchange for the allocation to its shareholders of (i) shares or other ownership interests in the business organisations receiving such assets and liabilities, and (ii) an optional cash payment that shall not, in any case, exceed 10% of the nominal value of the shares or other ownership interests allocated under item (i).

2.2 What advisers do the parties need?

In typical M&A transactions, the parties usually engage local legal, financial and tax advisers. High-profile investments, which sometimes entail regulatory changes, may involve investment banking support, additional political advisory support, or a PR consultant.

2.3 How long does it take?

The procedure involves preparing and executing documents under 2.11. After these documents are completed, the KBRA shall register the transaction within three calendar days following the application date. In case the transaction involves sectors mentioned under question 1.4, the timing will depend on the time it takes to obtain those approvals from the respective regulatory authorities.

As regards the timing of clearance process by the Competition Authority the provisions of the Competition Law provide for a simplified review process by the authority when it appears that the notified transaction would not give rise to any competition concerns. Such review is to be completed within thirty days from the day when the notification file is complete.

In case the Competition Authority assesses that the concentration may significantly affect competition on the relevant market (i.e. in case of creation or strengthening of a dominant position), the authority shall perform within sixty days from the date when the notification file is complete, an in depth assessment of the concentration.

2.4 What are the main hurdles?

As mentioned above, main hurdles may involve obtaining prior necessary approvals from regulatory authorities and merger clearance from the Competition Authority (given the amount of documents that need to be submitted).

2.5 How much flexibility is there over deal terms and price?

The Company Law provides no restrictions in this regard. The price and other deal terms are subject to negotiations between parties involved. Tax effects should be taken into consideration by the parties involved in the transaction whilst setting the price.

2.6 What differences are there between offering cash and other consideration?

There is no special difference stipulated in the relevant regulations. It depends on the terms and conditions of the Share Purchase Agreement.

2.7 Do the same terms have to be offered to all shareholders?

Yes, all the shareholders should be offered the same terms and same information.

2.8 Are there obligations to purchase other classes of target securities?

Kosovo Company Law does not provide any obligation in this regard.

2.9 Are there any limits on agreeing terms with employees?

In general there is no obligation to consult the terms with employees. However, Labour Law provides that in statutory changes of a company, the next employer shall take over all obligations and responsibilities of the employment relationship from the previous employer that are applicable on the day of the change of the employer, in compliance with the Collective Contract and employment contract. Also, the previous employer is obliged to inform, in writing, all employees of the transfer of obligations and responsibilities to the next employer. If the employee refuses the transfer of the employment contract or does not declare his acceptance within five days from the day the announcement of transfer of obligations was received, the previous employer may terminate the employment contract to the employee.

2.10 What role do employees, pension trustees and other stakeholders play?

The role of employees in M&A transactions varies depending on their rights under the applicable collective bargaining agreements.

Also the employees may have an important position if an Employee Share Ownership Program (“ESOP”) being a programme adopted by the shareholders to encourage employees to acquire shares of the joint stock company, is applicable. The ESOP may allow participants to subscribe for shares at a discounted rate or in consideration for their work or engagement. An ESOP may also grant options to participants with respect to shares to be issued in the future by the joint stock company.

2.11 What documentation is needed?

In order to register a straightforward share purchase transaction with the Kosovo Business Registration Agency (KBRA), the following documents should be deposited:

- i. resolution of the relevant competent bodies of the seller and purchaser and amendment of target bylaws;
- ii. share purchase agreement; and
- iii. other necessary documents if it concerns a regulated sector.

Structures involving mergers or de-mergers require different, and in certain aspects, more complex, documentation (e.g. merger/demerger plan; opinion by a licensed auditor; report of the board of directors; notification of the merger in local newspapers; annual financial statements of all the participating companies; copy of the proposed new charter and bylaws). Further documents are necessary for merger clearance or sector specific regulatory approvals.

2.12 Are there any special disclosure requirements?

In case of mergers a notification shall be published at least sixty days in advance, twice within a week in at least one newspaper of wide circulation in Kosovo in order to notify persons, including creditors whose claims predate the merger of the proposed merger. This publication may be carried out by any participating company on behalf of the others.

2.13 What are the key costs?

Key costs may include the costs of registration of the transaction with KBRA (EUR 20) and if applicable, the costs of the clearance process with the Competition Authority (a filing fee of EUR 100 and a fee of EUR 3,000 for obtaining the clearance), costs of preparing reports and opinion of the experts, notification costs, etc.

2.14 What consents are needed?

The main consents/approvals that may be necessary are as follows:

- Transactions in regulated industries may require the approval or consent by the relevant industry regulator, depending on the circumstances.
- Merger clearance must be obtained if the thresholds prescribed by the Competition Law are met.

2.15 What levels of approval or acceptance are needed?

Levels of approval or acceptance may include the approval from the competent corporate bodies of the parties involved in the transaction. Under the Kosovo Law it is the assembly of shareholders that approves transactions involving merger or demerger of companies.

2.16 When does cash consideration need to be committed and available?

In private transactions, the parties are generally free to agree on the terms of settlement of the consideration.

3 Friendly or Hostile

3.1 Is there a choice?

The Company Law does not distinguish the manner of acquisition. Considering that there is no stock market, the hostile acquisition is not a known practice in Kosovo.

Under the Company Law the authority to approve transactions such as mergers and acquisitions is vested to the meeting of shareholders.

3.2 Are there rules about an approach to the target?

The bidders approach directly the shareholders of the target as far as transactions of such mergers and acquisitions are concerned.

3.3 How relevant is the target board?

Subject to the Company Law, the role of the target board is to prepare opinions and give recommendations to shareholders on a possible merger. The decision on a transfer or merger remains with the assembly of the shareholders.

The cooperation of the board members is particularly important in administrative aspects of transaction implementation, especially with:

- the due diligence process, where management obstruction may in practice obstruct the deal;
- the takeover bid process, when negative management opinion may influence the planned transaction; and
- shareholders’ meeting preparation – as a result, in cases where relevant company bylaws are non-existent or not detailed enough, the management may obstruct the convocation of the necessary shareholders’ meeting.

3.4 Does the choice affect process?

No it does not.

4 Information

4.1 What information is available to a buyer?

All relevant information about the target company (i.e. shareholders and their participation, address, current standing, registration number, registered address, directors) is available through the online business registry (www.arbk.org).

Financial statements of the target may be obtained by the Tax Authorities. For information not publicly available, the co-operation of the target company's management board is necessary.

4.2 Is negotiation confidential and is access restricted?

This is not specifically regulated in Kosovo corporate legislation. Thus, confidentiality of the negotiations depends on agreement of the parties.

4.3 When is an announcement required and what will become public?

In some sectors that require additional approval (see question 1.4) prior to filing the registration with KBRA, and in case of mergers the announcement will be made in a local newspaper and become public before the registration with the KBRA. In all other transactions, the transaction will become public upon completing the registration with KBRA.

4.4 What if the information is wrong or changes?

The Company Law provides that the competent court may nullify a merger if it determines that the shareholders decision on a merger was invalid because it was based on material misrepresentations (provided that the complaint is filed with the court no later than six months after the registration date of the merger).

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

This is not applicable in Kosovo.

5.2 Can derivatives be bought outside the offer process?

This is not applicable in Kosovo.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

This is not applicable in Kosovo.

5.4 What are the limitations and consequences?

This is not applicable in Kosovo.

6 Deal Protection

6.1 Are break fees available?

Break fees are not prohibited under the Company Law. The parties can agree to apply break fees in their sale and purchase agreements. In practice however provisions on break fees are uncommon.

6.2 Can the target agree not to shop the company or its assets?

There are no restrictions provided by the Company Law and the shareholders of the target company can resolve not to shop the company or its assets.

6.3 Can the target agree to issue shares or sell assets?

Subject to the Company Law, the shareholders of the target company may resolve to issue shares and to sell assets.

6.4 What commitments are available to tie up a deal?

The Company Law provides no restrictions on commitments that the shareholders of the target may undertake to tie up a deal. However, the provisions of the target bylaws regarding pre-emption and any other relevant rights of the shareholders of the target should be complied with.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

The invocation of deal conditions is not addressed by the Company Law.

7.2 What control does the bidder have over the target during the process?

The control of the bidder over the target depends on the contractual terms executed between the parties.

7.3 When does control pass to the bidder?

Control passes to the bidder after the transaction is finalised and after the transfer of shares is registered with KBRA.

7.4 How can the bidder get 100% control?

The bidder can get 100 % control over the target by acquiring 100 % of the shares.

8 Target Defences

8.1 Does the board of the target have to publicise discussions?

There are no such requirements pursuant to the Company Law.

8.2 What can the target do to resist change of control?

The Company Law does not provide specific provisions.

8.3 Is it a fair fight?

As the hostile takeover is not a known practice, the target company shareholders are under no obligation to sell the shares other than voluntarily. In such regard, it is a fair fight.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

Major influences on the success of an acquisition primarily depend on the target company (its shareholders) and the offered price of the shares. Although the employees generally do not decide over the acquisition, their attitude towards the bidder may affect the transaction. Also, obtaining other approvals from regulatory authorities may affect the process.

9.2 What happens if it fails?

Parties can agree the consequences of the failed transaction in the sale and purchase agreement. The Law on Obligations provides liability of a party that has negotiated without the intent of concluding a contract for any damage caused during negotiations. Also, a party that negotiated with the intent of concluding a contract but abandons the intent without justifiable grounds thus inflicting damage on the other party shall also be liable for such damage.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in Kosovo.

There are no new laws and/or regulations beside the one mentioned above.

CHOOSING THE RIGHT TRANSFER PRICING METHOD, KOSOVO



Andi Pacani

“This article was originally edited by, and first published on, www.internationallawoffice.com - the Official Online Media Partner to the IBA, an International Online Media Partner to the ACC and the European Online Media Partner to the ECLA. Register for a free subscription at www.internationallawoffice.com/subscribe.cfm.”

When related persons are transacting with each other, they must take into consideration Article 27 of the Corporate Income Tax Law, which deals with transfer pricing. The price applied by them will be examined by the tax authorities; therefore, in order to avoid reassessments and penalties, the legal requirements must be fulfilled.

The transfer price (ie, the price applied by related persons) should be compared with the market value. Article 27.3 of the law provides that “the open market value shall be determined under the comparable uncontrolled price method and, when this is not possible, the resale price method or the cost-plus method or any other method as defined by sub-legal act may be used”.

Naturally, difficulties arise when implementing these methods in practice, especially in a recently developed legal environment, such as that of Kosovo.

In contrast to the ‘best method’ approach of the Organisation for Economic Cooperation and Development (OECD) and the United States, Kosovan legislation requires the taxpayer to determine the method according to a predetermined hierarchy. Specifically, the taxpayer should first assess if the comparable uncontrolled price can be used. If it cannot, the open market value should be determined by using the resale price method (which is more appropriate for entities engaged in the distribution sector) or the cost plus method (which is more appropriate for manufacturers). When a taxpayer has grounds to believe that neither of these methods can be used, tax authorities may allow use of the profit split method and then the transactional net margin method. Short descriptions of each method are given in the relevant Tax Administration Law Instruction, but this is not exhaustive.

The use of each of the above methods must be documented; unfortunately, the documentation required to show that a method produces an arm’s-length result is not specified.

These uncertainties, as well as the low number of transfer pricing cases handled by the tax authorities and the lack of consistency with OECD guidelines, have led to general confusion for taxpayers.

COMPETITION

MERGER CONTROL 2015, ALBANIA



Sokol Elmazaj



Jonida Skendaj

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The Albanian Competition Authority (“ACA”) is responsible for applying the merger control legislation in Albania. The ACA is an independent administrative entity composed of: (i) the Competition Secretariat (the investigation body); and (ii) the Competition Commission (decision-making body).

1.2 What is the merger legislation?

Mergers in the Republic of Albania are mainly governed by:

- (i) law no. 9901, dated 14.04.2008, “On Entrepreneurs and Commercial Companies”, as amended;
- (ii) law no. 9121, dated 28.07.2003, “On Protection of Competition” (“Competition Law”), as amended; and
- (iii) instructions and regulations issued by the ACA.

1.3 Is there any other relevant legislation for foreign mergers?

Besides the legislation mentioned in question 1.2 above, which is also applicable to foreign mergers, mergers between Albanian and European companies are also governed by law no. 110/2012, dated 15.11.2012 “On Cross-border Mergers”. Said law provides for the conditions, procedures and legal effects of a cross-border merger as well as protective measures for employees and creditors of such companies.

1.4 Is there any other relevant legislation for mergers in particular sectors?

Beside the Competition Law, other legislation applies to mergers in particular sectors such as:

- (i) the audiovisual broadcasting sector: where an entity or person may not hold more than 40% of the share capital in a national audiovisual company.

An entity or person holding shares in a national audiovisual company may not hold more than 20% of the share capital in another national audiovisual company. An entity or person that holds shares in local or regional audiovisual companies may not hold more than 40% of the share capital in another local or regional audiovisual company. Any change in the ownership, or matters related to it, is subject to prior written approval by the Audiovisual Media Authority.

- (ii) the banking sector: where the Central Bank of Albania has the power to approve or decline any transfer 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 a bank;
- (iii) the insurance sector: where the Authority of Financial Supervision is the regulatory body having the power to approve or decline any transfer of 10% or more of the shares with voting rights held in a company engaged in insurance and/or reinsurance activity as well as any transfer which affects less than 10% of the said shares but confers a control over the management of the insurance company. In addition, companies shall be subject to approval from the Authority of Financial Supervision for any further participation that reaches or exceeds 20, 30, 50 or 75% of the voting rights or the share capital of the insurance company; and
- (iv) the telecommunication sector: where changes related to the licensee may be subject to notification to, or approval by, the Authority of Electronic and Postal Communication.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, how is the concept of “control” defined?

A concentration shall be deemed to arise where a change of control on a lasting basis results from:

- (a) the merger of two or more independent undertakings or parts of undertakings;

- (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of shares or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings; or
- (c) direct or indirect control over one or more undertakings or part of the latter.

Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular, by:

- (a) ownership or the right to use all or part of the assets of an undertaking; and
- (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

2.2 Can the acquisition of a minority shareholding amount to a “merger”?

The above said definition of “control” is wide and no minimum percentages/amounts of control are provided by the law. It can also include acquisitions of a minority shareholding if they confer the possibility of exercising decisive influence on the undertaking.

2.3 Are joint ventures subject to merger control?

According to the Competition Legislation, the establishment of joint ventures shall constitute concentration (merger – and subject to merger control) if it does not have, as object or effect, the coordination of competitive activities between two or more independent undertakings.

Pursuant to the Instruction of the ACA on merger control, the creation of a joint venture as the entity exercising all the functions of an autonomous economic entity shall constitute a concentration.

2.4 What are the jurisdictional thresholds for application of merger control?

The merger control applies to mergers when all of the following turnover thresholds are met:

- (a) the combined worldwide turnover of all participating undertakings is more than Leke 7 billion (approximately EUR 51 million) and the domestic turnover of at least one participating undertaking is more than Leke 200 million (approximately EUR 1.45 million); or
- (b) the combined domestic turnover of all participating undertakings is more than Leke 400 million (approximately EUR 2.9 million) and the domestic turnover of at least one participating undertaking is more than Leke 200 million (approximately EUR 1.45 million).

In general, the aggregate 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. Whilst, in cases of mergers of credit or financial institutions, the turnover is the income resulting in annual or consolidated accounts deriving from interests, shares, bonds, equity interests, commissions, net profit from financial operations and other income, after deduction of taxes. For insurance undertakings, the turnover is the gross income of subscribed premiums which include all received and collected amounts as per insurance contracts, as well as reinsurances premiums, after the deduction of taxes.

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 shall be taken into account.

Specifically, when the participating undertaking is part of a group, its aggregate turnover is calculated by adding together the respective turnover of the members of the group (i.e. (i) the participating undertaking, (ii) its subsidiaries where the participating undertaking holds directly or indirectly more than half of the share capital or voting rights, or has the power to appoint more than half of the members of the supervisory board, the administrative board or other legal bodies representing the subsidiary, or has the right to manage the subsidiaries’ affairs, (iii) its parent undertakings having the above said rights or powers, and (iv) the subsidiaries of its parent undertakings – those undertakings in which two or more undertakings as referred to under (i) to (iv) herein have jointly the rights or powers listed in (ii) herein). In cases where the participating undertaking is part of a group, the Competition Law excludes from the calculation of the turnover, the sale of products performed between undertakings that are part of the group.

2.5 Does merger control apply in the absence of a substantive overlap?

The merger control applies also in the absence of a substantive overlap.

2.6 In what circumstances is it likely that transactions between parties outside Albania (“foreign-to-foreign” transactions) would be caught by your merger control legislation?

The Albanian Competition Law applies to “foreign to foreign” transactions carried out from undertakings whose activity has an impact/influence in the Albanian market. However, the concept of “impact/influence” has not been further defined from the Albanian competition regulatory framework. In practice, although the undertakings participating in the merger may not have any local physical presence (branch, subsidiary or assets), but are present in Albania indirectly (imports/ sales through distributorship agreements), the ACA considered so far the merger subject to its control provided that the notification thresholds are met.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

We do not identify any provision that may override the operation of the thresholds.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

The Competition Law does not provide for any general principle specific to the identification of the constitution of transaction in case it takes place in various stages. However, when establishing the rules on calculation of turnover in case of mergers consisting of acquisition of parts of undertakings, the Competition Law provides that the series of these transactions performed between the same parties within a two-year period are assessed as a single transaction. In order to define the two-year period, reference is made to the last transaction date. Pursuant to the Instruction of the ACA on merger control, two or more transactions constitute a single concentration if they are unitary in nature. It should therefore be determined whether the result leads to conferring to one or more undertakings, or direct or indirect economic control over the activities of one or more other undertakings.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

When the notification thresholds are met, the mergers must be notified to the ACA within 30 days after the conclusion of the merger agreement, the acquisition of a controlling interest or the announcement of the public offer.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

The Competition Law provides for an exception from the obtaining of the ACA clearance when the financial institutions, and credit or insurance companies, acquire shares in other undertakings for the purpose of reselling, provided that they do not exercise voting rights related to the acquired shares and that the resale occurs within one year from the acquisition.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

Failure to notify the merger is considered an infringement to the Competition Law and is subject to fines imposed by the ACA of up to 1% of the total

turnover of the preceding financial year of each of the undertakings subject to the notification requirement. In determining the amount of the fine, both the gravity and the duration of the infringement should be considered. When it is possible to calculate or estimate objectively the illegal profits of undertakings acquired infringing the Competition Law, such a profit constitutes the minimal amount of the fine.

There are two cases where the ACA has imposed fines on a foreign undertaking acquiring a shareholding in an Albanian undertaking for failure to notify the merger within the required deadline.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

It is not possible to carve out local completion of a merger to avoid delaying global completion.

3.5 At what stage in the transaction timetable can the notification be filed?

The Competition Law provides that the merger should be notified within 30 days from the signature of the merger agreement, of the control acquisition or from the announcement of the public offer.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

The Competition Law defines the procedure for assessment of mergers from the ACA into: (i) preliminary proceedings; and (ii) in-depth proceedings.

During the preliminary proceedings, the ACA shall examine the notification in order to find whether the transaction “reveals any sign that it would restrict the competition”, especially through creating or strengthening of a dominant position. When pursuing the in-depth proceedings, the ACA must assess whether the transaction significantly restricts the said competition.

During the preliminary phase, the ACA shall decide whether: (i) to initiate an in-depth procedure; or (ii) to give clearance of the merger, within two months after the confirmation of notification receipt (i.e. the period of two months shall begin on the working day following the confirmation of the ACA on the notification receipt or, if the information to be supplied with the notification is incomplete, on the day following the receipt of the complete information).

This period is extended by two weeks (“Extension Period”) in case the said signs are revealed, but the ACA has granted a conditional clearance and if the concerned undertakings, no later than one month after notification, commit themselves to take measures to eliminate the restriction of competition.

In case an in-depth proceeding is initiated, the ACA shall have three months, starting from the commencement of the proceeding, to declare by means of a decision if the merger (transaction) is prohibited, fully cleared or cleared with conditions and obligations.

In the event of a “clearance with conditions and obligations”, the period of three months shall be extended by up to two months, if the participating undertakings, no later than two months from the date of commencement of the in-depth procedure, commit themselves to take measures to eliminate the restriction of competition.

If the ACA does not decide within the set deadlines (either for the preliminary phase or the in-depth phase), the Competition Law provides for the “silent-is-consent” rule, unless the ACA extends or suspends the above-mentioned time limits.

The timeframe is suspended when:

- a. The in-depth procedure is hindered by the participating undertakings.
- b. Information required by the ACA from one of the notifying undertakings or other interested parties has not been provided or is incomplete within the term assigned by the ACA.
- c. One of the notifying undertakings or involved parties has refused to give the information required by the ACA or to cooperate with the ACA for obtaining the said information, whenever considered necessary by the ACA.
- d. The notifying undertakings have failed to inform the ACA on the change of facts contained in the Notification Form.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

The Competition Law provides for a prohibition on giving effect to the merger before filing the notification or obtaining clearance from the ACA, or before satisfaction of the conditions under which the clearance is granted.

However, the ACA may decide derogation from the said prohibition when important reasons exist, in particular, to prevent serious and non-repairable damages to a participating undertaking or to a third party and taking into account the threat to competition implied by the merger.

Legal and contractual transactions undertaken before the clearance is obtained shall be of no effect. Completion of the merger before clearance of the ACA constitutes infringement of the law and therefore is subject to a fine up to 10% of the total turnover of the preceding financial year, if the merger has, as effects, the restriction of the competition.

Further, if a merger is prohibited after completion, or if a merger has been carried out although prohibited, or without entirely fulfilling the conditions attached to the clearance decision, the ACA may impose the participating undertakings to take the necessary steps to restore the former situation, i.e. the conditions of effective competition, in particular by separating the undertakings merged or rescinding the participations or acquired assets. The ACA may require the participating undertakings to propose measures within a set deadline, aiming to re-establish effective competition.

3.8 Where notification is required, is there a prescribed format?

The notification is filed through filling in a standard format called “Form of Notification of Mergers”. The form should be filled in in the Albanian language, or if in the original language, a notarised translation into the Albanian language should be submitted also. The form is to be filed with the ACA in two original or notarised copies along with the necessary documentation.

The notification shall indicate the form of the merger and the following information regarding any participating undertaking:

- (i) the name and place of business or registered seat of the undertakings;
- (ii) the type of business of the undertakings;
- (iii) the turnover in the domestic market and worldwide of the undertakings;
- (iv) the market shares of the undertaking, including the methods for their calculation or estimation;
- (v) in case of an acquisition of share capital, the size of the interest acquired by any undertaking and of the total interest held in this undertaking; and
- (vi) the name of the person authorised to represent the undertaking during the merger assessment procedures.

Filings have to be supported with documents related to the merger and identification of the undertakings, such as a copy of the merger agreement or public offer, approval of the merger from the managing bodies of the undertakings, financial statements and balance sheets of the last financial year of the undertakings and documents identifying the registration of the undertakings with the National Chamber of Commerce or Commercial Register. In case these documents are in a foreign language, they should be notarised and legalised (when applicable) and should be submitted accompanied with the Albanian translation (duly notarised). The notification should contain a descriptive list of documents attached, as well as the respective number of pages.

In order to avoid delays in the merger assessment proceedings, pre-notification meetings with the ACA officers may be organised and a written request for consultation may be submitted for consulting the relevant information to be filled in in the notification form and supporting documents. If the merger will not be realised, the participating parties should inform the ACA accordingly.

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

The Competition Law and Instruction of the ACA “On the Form of Notification of Mergers and Possibility of a Simplified Notification” provides for a short form of merger notification when it appears sufficient to the ACA for assessing whether the merger would give rise to competition issues (and upon decision of the Secretariat). The notification of the merger will be made through the same standard form, but it will not be necessary to fill in some of the sections.

3.10 Who is responsible for making the notification and are there any filing fees?

The notification of the merger should be made by:

- (i) undertakings being party to the merger jointly, in the case of a merger, or those undertakings acquiring the control, in the case of an acquisition of the control;
- (ii) the undertaking offering to acquire the other undertaking in case of a public offer acquisition; or
- (iii) in case of establishment of a joint venture, undertakings that have the control of the joint venture.

Undertakings that acquire control and have an annual turnover range of Leke 200 million – 1 billion in the internal market must pay a notification filing fee amounting to Leke 7,500 (approximately EUR 53).

Undertakings that acquire control and have an annual turnover of more than Leke 1 billion in the internal market must pay a notification filing fee amounting to Leke 15,000 (approximately EUR 122). The payment statement of this fee should be submitted to the ACA at the moment of filing the notification.

3.11 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

There is no impact of rules governing a public offer for a listed business on the merger control clearance process.

3.12 Will the notification be published?

The notification will be published on the official website of the ACA in the form of a short piece of information on the transaction. The publication contains data of participating undertakings, place of origin, the form of concentration, involved sectors of economy and the invitation from the Competition Authority to interested parties to express comments and deadlines for expressing such comments.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The substantive test used from the ACA in its assessment of the merger is the significant restriction of the competition in the market or a part of it, especially as a result of the creation or strengthening of the single or collective dominant position.

Specifically, during the preliminary proceeding, the ACA shall examine the notification in order to find whether the transaction/merger “reveals signs that it would significantly restrict the competition in the market or a part of it, especially as a result of the creation or strengthening of the dominant position”. Whilst in the in-depth proceedings, the ACA must assess whether the transaction/merger significantly restricts the said competition.

It should be mentioned that the mergers significantly restricting the competition over the market are prohibited, except when an undertaking seriously risks a failure and there is no less anti-competitive alternative than the merger, if (i) this undertaking is in such a situation that without the merger it would exit the market in the near future, and (ii) there are no serious prospects of re-organising the activity of the same undertaking.

4.2 To what extent are efficiency considerations taken into account?

The Commission, in assessing mergers, may take into account economic efficiency that can be derived from the merger, if the economic efficiency:

- contributes to the welfare of consumers or at least neutralises the possible negative effects that could cause the merger;
- is or will be the result of this merger and there are no alternative ways which are less anti-competitive for its creation than the given concentration; and
- is verifiable.

4.3 Are non-competition issues taken into account in assessing the merger?

When an undertaking seriously risks failure and there is no less anti-competitive alternative than the merger, the ACA may decide to approve the merger if (i) this undertaking is in such a situation that without the merger it would exit the market in the near future, and (ii) there are no serious prospects of re-organising the activity of the same undertaking.

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

The ACA is required to publish the commencement of the merger control, notifications and decisions in the Official Bulletin of the ACA (and on the website of the ACA). The Regulation of the ACA “On Implementation of Merger Procedures” provides that interested third parties (e.g. consumers, suppliers, or competitors of the participating undertakings) have the right to be heard on the merger and can present their views and comments.

4.5 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

The ACA may impose to the notifying undertakings fines not exceeding 1% of the total turnover of the preceding financial year, in case they refuse to provide information or the said information is incomplete or misleading.

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

According to the Regulation of the ACA “On Implementation of Merger Procedures”, the notifying parties or their representatives should clearly determine in a separate document the information they consider as containing business secrets. Under the current Instruction of the ACA “On the Form of Notification of Mergers and Possibility of a Simplified Notification”, the parties should also submit the reasons why this information must not be divulged or published. In the case of mergers or joint acquisitions, or in other cases where the notification is completed by more than one of the parties, business secrets may be submitted under separate cover, and referred to in the notification as an annex. All such annexes must be included in the submission in order for a notification to be considered as complete.

Further, the Competition Law provides that the members of the ACA Commission and all the ACA Secretariat employees, or the other persons authorised by the ACA Commission to apply this Law, shall be subject to professional secrecy during and after the termination of their duty. Secretariat publications shall not contain information constituting commercial secrets.

The information contained in the publication of the notification is limited.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

The regulatory process ends upon the decision of the ACA (which is an administrative act) either to: give clearance of the merger (by imposing or not conditions and obligations); or prohibit the merger. The decision of the ACA is published in the Official Bulletin of the ACA (and the ACA website).

5.2 Where competition problems are identified, is it possible to negotiate “remedies” which are acceptable to the parties?

Where competition issues are identified, it is possible to negotiate remedies with the ACA, since the Competition Law requires the ACA to give the opportunity to the undertakings to participate in the process of determining the remedies (conditions and obligations of the clearance).

The remedies proposed or decided may have a behavioural or structural nature, such as sale of parts of undertakings, or of any kind of participation in the activity of the undertaking, termination of contractual relationship, obligation to act or not to act in a certain way or any other remedy enabling the elimination of anti-competitive effects of the merger.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

There are no cases of remedies imposed on foreign-to-foreign mergers.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

During the preliminary phase, undertakings/remedies should be presented to the ACA no later than one month after the receipt of the notification and no later than two months after the initiation of the in-depth phase. In case of submission of remedies during the preliminary phase, the timeframe for adopting a decision from the ACA is extended by two weeks; when proposed during the in-depth phase, the period of three months shall be extended by up to two months. An original copy of the remedies should be filed with the ACA. Any confidential information or document should be clearly indicated and another non-confidential version should be submitted within the term defined by the ACA.

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

There is no standard approach. However, the Competition Law provides for a non-exhaustive list of the eventual remedies (see question 5.2).

5.6 Can the parties complete the merger before the remedies have been complied with?

The parties may not complete the merger before the remedies have been complied except when the ACA has granted derogation from this prohibition.

5.7 How are any negotiated remedies enforced?

In case of failure to comply with the remedies negotiated, the ACA may apply the following sanctions: imposing fines; and revoking the decision authorising the merger.

Fines are considered an executive title and can be executed by the bailiff service in pursuance with the provisions of the Civil Procedure Code.

5.8 Will a clearance decision cover ancillary restrictions?

The restrictions directly related and necessary to the implementation of the merger will be covered by the decision clearing the merger if they are mentioned in the notification.

5.9 Can a decision on merger clearance be appealed?

The decisions taken from the ACA are considered administrative acts and subject to appeal lodged with the Administrative Court of Tirana. In case the challenged decision of the ACA consists of the clearance of a merger, the appeal does not suspend the effects of the clearance.

5.10 What is the time limit for any appeal?

The appeal must be filed within 30 days from the notification of the decision.

5.11 Is there a time limit for enforcement of merger control legislation?

The time limits as mentioned in question 3.6 apply when the merger is notified by the concerned undertaking. On the other hand, although the Competition Law entitles the ACA to begin upon its own initiative, the procedures for assessment of the merger in case the merger is completed without notification, there are no specific provisions limiting the time for the ACA to undertake such procedure.

6 Miscellaneous

6.1 To what extent does the merger authority in Albania liaise with those in other jurisdictions?

The Competition Law provides for communication and exchange of information between the ACA and foreign competition authorities when bilateral or multilateral agreements have been entered into for such purpose. Such exchange of information is based on the principle of reciprocity and compliance of the foreign authority, with trade secrecy rules having the same guaranties as in Albania.

Furthermore, based on the principle of reciprocity, the ACA may conduct investigations upon the request of the foreign competition authority, except when such investigation and/or provision of information or documents requested from the foreign competition

authority are in detriment to the Republic of Albania sovereignty, security, essential economic interests or public order.

6.2 Are there any proposals for reform of the merger control regime in Albania?

Currently, there are no proposals for reforms of the merger control regime in Albania.

6.3 Please identify the date as at which your answers are up to date.

Our answers are up to date as of September 2014.

MERGER CONTROL 2015, KOSOVO



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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The Kosovo Competition Authority ("CA") is a legal person with public authority, independent in performing its duties set out in Law no. 03/L-229 "On the Protection of Competition" amended with Law no. 04/L-226 "On amending and supplementing the Law no. 03/L-229 on protection of competition" (hereinafter referred to as the "Competition Law") and Law no. 04/L-024 "On state aid".

CA is accountable to the Assembly of the Republic of Kosovo. The work of the CA is managed by the Commission for the Protection of Competition, which is composed of five members, one of which is the President of the Commission.

The members are Kosovan citizens selected upon approval by the Assembly of the Republic of Kosovo for a five-year term.

The Kosovo Competition Commission has the responsibility and authority to enforce the law and promote competition among entrepreneurs and protect consumers in Kosovo.

1.2 What is the merger legislation?

Mergers in the Republic of Kosovo are governed by the Competition Law. In addition, during 2012, the Government of Kosovo approved several administrative acts for the implementation of the Competition Law, such as:

- Administrative Instruction no. 04/2012 "On the form and content of legitimacy".
- Administrative Instruction no. 05/2012 "On criteria and terms for determining agreements of minor importance".
- Administrative Instruction no. 06/2012 "On forms for submitting requests and criteria for determining the concentration of enterprises".
- Administrative Instruction no. 07/2012 "On criteria to reduce or release administrative measures".

1.3 Is there any other relevant legislation for foreign mergers?

Kosovo legislation does not provide specific guidelines that would exempt foreign mergers. The merger control rules apply to foreign mergers when the jurisdictional thresholds are met (see question 2.6 below).

1.4 Is there any other relevant legislation for mergers in particular sectors?

The Competition Law does not provide for different thresholds for specific sectors. In addition to Competition Law provisions that are applicable to all undertakings, mergers in some sectors are conditioned by prior notifications or approvals, (i.e. mergers in the banking and insurance sector, energy sector, or telecommunication sector). When such mergers are to take place, notification or approvals should be made to or obtained by the relevant authorities, such as the Central Bank of Kosovo, the Energy Regulatory Office, or the Regulatory Authority of Electronic and Postal Communications.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, how is the concept of "control" defined?

Pursuant to the provisions of the Competition Law, the types of transaction that are caught by merger control legislation are those that result in a concentration of enterprises. A concentration is created by establishing control through: (i) the merger of two or more independent enterprises or parts of these enterprises; and (ii) the acquisition of direct or indirect control, or influence over the activities of one or more enterprises or parts of enterprises by: (a) taking over the majority of shares or a part of them; (b) taking over the majority of voting rights; or (c) in any other way envisioned by the laws in force and other regulations.

Control is defined as the acquisition of rights, contracts or other acts through which one or more enterprises, either

individually or together, taking into consideration all legal and factual circumstances, acquire the ability to achieve decisive influence over the activities of an enterprise.

2.2 Can the acquisition of a minority shareholding amount to a “merger”?

In order to amount to a merger, the acquisition of a minority shareholding should result in the acquisition of direct or indirect control over the target. An undertaking is deemed to have control over the target when it can exercise decisive influence over the target’s activities. In case the acquired minority shareholding does not grant any control over the target, it would not amount to a “merger” and no filing would be required.

2.3 Are joint ventures subject to merger control?

Joint ventures are subject to merger control in so far as they result from the merger of one or more independent enterprises and function as an independent economic subject.

2.4 What are the jurisdictional thresholds for application of merger control?

A concentration of enterprises is subject to the clearance and approval of the CA if the following jurisdictional thresholds are met:

- i. the aggregate income of all the participating undertakings in the international market exceeds twenty (20) million Euros, based on financial reports of the financial year preceding the year of the concentration, and if at least one of the participating undertakings is located in the Republic of Kosovo; and
- ii. the general income in the Kosovo domestic market of at least two (2) of the participating undertakings, exceeds three (3) million Euros based on financial reports preceding the year of the concentration.

The Competition Law does not clearly specify the methodology for calculating the turnover of the participating undertakings for purposes of this jurisdictional threshold. It only provides that income from the sale of goods or services made between undertakings that are part of a group are not taken into consideration in the calculation of the total annual turnover. If, at the time of the notification, the financial statement for the preceding year is not available, the relevant turnover will be the one achieved in the year for which the last financial statement has been prepared.

Article 66 of the Competition Law provides that the law shall be implemented in pursuance to the Directives of the EU on competition. It may be assumed that the CA will refer to the EU laws if Kosovo Competition Law lacks clarity.

2.5 Does merger control apply in the absence of a substantive overlap?

The Competition Law does not provide whether merger control applies also in the absence of a substantive overlap. However it may be inferred that, provided the jurisdictional thresholds are met, participants must notify the CA – even when the merger appears to not raise any competition concerns.

2.6 In what circumstances is it likely that transactions between parties outside Kosovo (“foreign-to-foreign” transactions) would be caught by your merger control legislation?

Foreign-to-foreign mergers become subject to Kosovo merger control rules when the jurisdictional thresholds are met and when such acts have an impact in Kosovo. A transaction, besides meeting the thresholds, also needs to have an effect in Kosovo in order to trigger a filing obligation.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

See question 1.4 above.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

The provisions of the Competition Law imply that the notification obligation is triggered at the moment of the acquisition of the shares that allows the acquirer to exercise decisive influence over the target’s business activities, thus when the acquirer has established control over the target.

Furthermore, pursuant to the provisions of the Competition Law, two or more agreements (concentrations) between the same undertakings carried out within a period of two years will be deemed as one concentration, when meeting the threshold criteria.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

The notification of a merger is compulsory where the jurisdictional thresholds are met. The Competition Law and the relevant administrative instructions specify that the notification must be filed with the CA after the parties have entered into an agreement and once they make the prospective transaction public. However, the filing must be made prior to the implementation of the transaction. The parties may also submit a merger notification before concluding a contract by submitting with the notification a signed letter of intent.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

- (i) purchase of the shares of an enterprise by financial institutions, loan and insurance institutions, resale, for as long as they do not practice the right to vote for the shares they own and under the condition that their resale takes place within twelve months from the purchase;
- (ii) purchase of shares or parts of shares as a result of enterprise internal restructuring and related to joint-control takeover, merging, and transfer of property; or
- (iii) when the control over the enterprise is transferred to the bankruptcy manager or the liquidator in compliance with the provisions of laws in force.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

Failure to follow the merger notification requirements or entering incorrect or false information in the concentration assessment procedure submitted to the CA, shall result in a fine amounting to 2% of the total annual turnover calculated from the last financial statements that have been prepared.

If an implemented concentration adversely affects competition on the market and creates or strengthens a dominant position, it could be subject to a fine of up to 10% of the total annual turnover calculated from the last financial statements that have been prepared. In addition, the CA may take measures to reverse the implemented concentration.

In addition, for the above-mentioned violations, the person responsible for the company shall be subject to fines in the amount of one thousand (1000) to three thousand (3000) Euros.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

The Competition Law and the administrative instructions issued for its implementation do not provide for the carving out of local completion.

3.5 At what stage in the transaction timetable can the notification be filed?

The notification is filed with the CA for assessment upon concluding a contract which results in acquiring control over an enterprise or part of enterprise and after public disclosure of the transaction, but prior to its implementation.

The participants of a merger may submit a notification on the objective of the concentration prior to signing the contract and prior to announcing the concentration publicly, if they respectively certify that there are real expectations that the agreement will be entered into or that the public announcement of the concentration will take place.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

Upon receiving notification of a potential concentration, the CA commences the process of merger control. The CA has thirty days to render a decision clearing the merger or not clearing the merger based on the documents filed by the applicant. The CA issues a certificate of completeness to confirm that a notification has been properly submitted.

The issuance of the certificate triggers a thirty-day deadline, within which the CA may issue a conclusion to initiate further investigation proceedings when it finds that the proposed concentration may adversely affect competition on the market, or create or strengthen an existing dominant position. If no decision is issued within the thirty-day deadline, the concentration will be deemed cleared and the applicant is entitled to request written confirmation of the clearance from the CA.

If the CA issues a decision calling for further investigation proceedings, it may enter into such proceedings for an additional ninety-day period. Upon conclusion of the investigation the CA will issue a decision on whether to: (i) approve the concentration; (ii) approve the concentration with conditions and obligations; or (iii) prohibit the concentration.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

A concentration of enterprises which may significantly damage competition, especially when such concentration results in strengthening a current dominant position or creating a new dominant position, should be notified and cleared with the CA.

If a concentration which adversely affects competition on the market, or creates or strengthens a dominant position, is implemented without clearance, the undertaking could be subject to a fine of up to 10% of the total annual turnover calculated from the last financial statements that have been prepared, whereas the person responsible for the undertaking shall be fined in the amount of one thousand (1000) to three thousand (3000) Euros. In addition, the CA may take measures to reverse the implemented concentration.

3.8 Where notification is required, is there a prescribed format?

The CA has not yet published a standard notification form. However, the required information that should be included in the notification form is set out in the administrative instruction no. 06/2012. Specifically, the notification should contain the following information:

- signature or name, and location and type of activity of the applicant;
- signature or name, and location and type of activity of all parties to the concentration;

- name and authority of the agent or representative who submits the application as a representative of the applicant;
 - name, address, telephone number, fax number and email address of the person that the applicant has appointed as the person responsible for contact and cooperation with the CA, if this person is different from the person who submitted the request;
 - detailed description of the legal form of the concentration;
 - legal basis for the concentration (document name, business number, address or name of the parties in legal concrete works, place and date of the legal affairs) such as: (i) the concentration agreement; (ii) the attachment agreement or relevant decision of the enterprise body; (iii) the agreement on acquiring shares or parts of the company; (iv) the management agreement; (v) the profit transfer agreement; (vi) the decision to amend the status, social arrangements or any other act by which a participant gives a decisive influence; (vii) the agreement on lease property through which any of participants is given decisive influence; (viii) public offerings; or (ix) agreement for joint investment;
 - annual financial statement for the previous year and other reports in which the financial condition of the participants who submitted the request is clearly shown;
 - total annual operating revenues of the participants to the concentration, after deduction of VAT and other taxes directly related to trade and discounts submitted separately for each of the concentration participants in (i) the international market, and (ii) the Kosovan market;
 - relevant markets in which the parties to the concentration operate and the enterprises under their control or companies that control them, and an evaluation of their market shares before and after the implementation of the concentration;
 - listing and evaluation of market shares, profit, and the main competitors of the participants in the concentration agreement in the relevant market;
 - structure of the holders of shares or parts of the company which acquires control or dominant influence before and after implementation of the concentration (expressed as a percentage);
 - list of other enterprises in the relevant market in which the parties to the concentration individually or together have 10% or more of the capital shares or 10% or more of the voting rights with a brief description of the main activities of the enterprises;
 - list of all the enterprises in the relevant market in which members of the board of directors or supervisory board members of either party to the concentration are also members of the management board or supervisory board, with a brief description of the important activities of those enterprises;
 - references to other authorities competent to examine the concentration outside the territory of Kosovo where the parties have introduced a request for consideration of the concentration or aim to introduce such a request;
 - detailed descriptions of the structure of distribution and sales of retail products or services in the relevant market;
 - description of the investments and research conducted or intended to be realised in the development of the concentration agreement by each participant (form and type of investment or research, their importance in the production, supply of goods and/or services in the relevant market, the amount of funds that were invested, or that will be invested);
 - legal and economic reasons for the concentration agreement;
 - description and a detailed explanation of the expected benefits that will arise from the implementation of the concentration in terms of the consumers' interests, particularly:
 - i. reduction in the price of products and/or services;
 - ii. increase in product quality and/or services;
 - iii. introduction of innovations (inventions); and
 - iv. growth and expansion of opportunities for the product selection and/or services to consumers;
 - signature of the person responsible for the accuracy of the data in the request; and
 - location and date of delivery.
- Besides the above-listed information, the CA may require additional data if it is considered necessary for the assessment of the concentration.
-
- 3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?
-
- A merger notification can be submitted in a "short form" when:
- the participants to the concentration are not active in the same geographic and product market and when there is no horizontal agreement between them;
 - the participants do not operate on markets which affect each other and there is no vertical agreement between them;
 - the participants to the concentration operate in the same relevant market but their joint market share does not exceed 15%, or if the participants operate on markets which affect each other but their market shares do not exceed 25%; and
 - in case of a transfer from joint to sole control, or when two or more undertakings, which do not have significant activities in Kosovo, take control of a joint venture, or when such activities are not foreseen within a reasonable time period.
- Please see question 3.6 above for further details on the timeframe process.

The informal way in which the clearance timetable can be sped up is by submitting all the required documents on time.

3.10 Who is responsible for making the notification and are there any filing fees?

Whenever an enterprise takes over control or gains a decisive influence over another enterprise or part of another enterprise, the notification of the concentration is made by the enterprise that takes over control. In other cases, all the participants of concentration submit the notification in accordance with their joint agreement.

Pursuant to the administrative instruction no. 06/2012, a fee of one hundred (100) Euros applies to the notification filing and a fee of three thousand (3,000) Euros applies for obtaining clearance for the concentration.

3.11 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

The Competition Law does not provide for any specific regulation for the treatment of mergers in cases of listed businesses. In these cases, the general rules are applicable.

3.12 Will the notification be published?

Upon receiving a merger notification, the CA publishes on its website a public notice for all interested parties. The notice contains the type of activities performed by the participants in Kosovo, the effects of the concentration on the market and an invitation to all the parties that have specific knowledge of the relevant market to provide their comments, positions and opinions concerning the possible effects the concentration may have on their activities. The submitted notification will not be published; however, the decision taken by the CA on the concentration will be published.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The substantive test against which a merger will be assessed from the CA is the considerable restriction of the competition in the market.

Upon its assessment on whether to allow the concentration, the CA shall confirm (i) its effect on the market competition and possible obstacles to entering the market (especially when the concentration creates a new dominant position or strengthens an existing dominant position), (ii) the structure of the relevant market and any existing or possible future competitors, (iii) the structure and selection of the market offer and

demand, (iv) the position, market participation and economic and financial power of the enterprise in the relevant market, and (v) the level of competitive capability of the participants in the concentration, etc.

4.2 To what extent are efficiency considerations taken into account?

The CA may take into consideration economic efficiency if the concentration results in the:

- reduction of production or distribution costs, improvement of efficiency, improvement of products or production processes, encouragement of research for the development and dissemination of technical or professional knowledge, rational exploitation of resources or encouragement of the development of small and medium enterprises;
- more direct participation of consumers or users in these advantages; and
- no significant limitations to competition.

4.3 Are non-competition issues taken into account in assessing the merger?

The Competition Law is silent in this regard and there is no practice to indicate whether the CA would take into account non-competition issues when assessing a merger.

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

Upon receiving the notification on the intention to execute a concentration, the CA publishes on its website a public notice for all interested third parties to submit their written remarks on the opinions for the execution of the concentration, so that the gathered information provides a better assessment of the situation in the relevant market. The deadline for the submission of such remarks is fifteen days after the publication of the notice.

4.5 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

Following the request of the CA, the competent court may grant to the CA various powers relating to the process of gathering the documents once an investigative procedure has been initiated.

Such powers consist of: (i) entering and performing inspections on all business premises, open depots and means of transportation at the residence of the enterprises against which the procedure is being carried out, as well as at any other address where the enterprise operates; (ii) checking company books and other documents related to the operation of the enterprise; and (iii) obtaining and/or copying company books and other documents or excerpts from company books and other documents, in electronic form or otherwise, etc.

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

During an unannounced inspection, letters, notes and other forms of communications which are considered secret information are excluded from the documentation which is being inspected.

Moreover, the employees of the CA are obliged to keep trade secrets even after five years from the termination of the employment contract with the Competition Authority.

When assessing whether certain information presents a trade secret, the CA shall take into consideration:

(i) possession of such information outside of the enterprise; (ii) measures taken by the enterprise itself to protect the confidentiality of such information, in particular, the clause on the prohibition of non-competitiveness or on prohibition of publication of information included in employment contracts and the like; and (iii) the value of such information to the enterprise and its competitors.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

The CA may make the decision to: (i) approve the concentration; (ii) approve the concentration with conditions and obligations; or (iii) prohibit the concentration.

5.2 Where competition problems are identified, is it possible to negotiate “remedies” which are acceptable to the parties?

Concentrations presenting certain competition problems may be cleared in accordance with certain conditions. In such cases, the CA notifies the enterprise that has submitted the notification, no later than thirty days from the date of receiving the notification, and proposes the appropriate measures for monitoring the business, and/or structural measures and conditions that should eliminate the negative effects of the concentration.

The appropriate remedies may be submitted pre-emptively by the enterprise that has submitted the notification, or they may be included in the notification on the objective for execution of concentration. If the CA does not accept or only partially accepts the remedies proposed by the participants to the concentration, it is authorised to specify other measures including but not limited to the monitoring of activities.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

Foreign-to-foreign mergers are examined by the CA when the criteria provided in the Competition Law are met. However, there are no guidelines which would

exempt certain foreign mergers or provide remedies in such a case.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

See question 5.2 above.

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

The Competition Law does not have any provisions regarding divestment remedies and the practice is yet to be developed.

5.6 Can the parties complete the merger before the remedies have been complied with?

The parties may not complete the merger before the remedies have been complied with. The CA may allow the execution of specific actions when deemed necessary. However, this practice remains to be tested.

5.7 How are any negotiated remedies enforced?

The law is silent on this specific point. However, the general punitive measures and fines that relate to the implementation of a concentration that has not received clearance would apply.

5.8 Will a clearance decision cover ancillary restrictions?

The Competition Law does not have any provisions specifying ancillary restrictions. Nevertheless, restrictions that are directly related and necessary to the implementation of the merger will be covered by the decision clearing the merger if they are mentioned in the notification.

5.9 Can a decision on merger clearance be appealed?

A decision of the CA may not be appealed, but an administrative conflict may be initiated by filing a lawsuit at the competent Court for administrative matters in Kosovo.

5.10 What is the time limit for any appeal?

The party may initiate an administrative conflict within a period of thirty days from the issuance of the decision by the CA.

5.11 Is there a time limit for enforcement of merger control legislation?

The CA cannot initiate a fining procedure or determine fines after the five-year period from the date of the breach of the Competition Law.

The statute of limitations starts from the date when the enterprise has received in a regular manner the final court decision, or from the day of reception of the binding decision made by the CA, if the party did not submit an appeal against that decision.

The above-mentioned statute of limitations is discontinued by any action undertaken from the competent bodies applying punitive measures. After each discontinuation, the statute of limitation starts running again, but the procedure of applying punitive measure cannot be extended beyond a total period of ten years.

6 Miscellaneous

6.1 To what extent does the merger authority in Kosovo liaise with those in other jurisdictions?

The Law on the Protection of Competition stipulates that its implementation should be in conformity with European Union Directives on competition.

The CA has signed a memorandum of cooperation with the competition authorities of Albania and Macedonia and there is a willingness to cooperate with other countries in this regard.

Furthermore, the CA is a member of the International Competition Network.

6.2 Are there any proposals for reform of the merger control regime in Kosovo?

The Competition Law has been amended recently. The secondary legislation for the implementation of the law is yet incomplete.

6.3 Please identify the date as at which your answers are up to date.

Our answers are up to date as of September 2014.

ENFORCEMENT OF COMPETITION 2009, ALBANIA



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1 National Competition Bodies

- 1.1 Which authorities are charged with enforcing competition laws in Albania? If more than one, please describe the division of responsibilities between the different authorities.

Law 9121 dated 28.07.2003 “On protection of competition” (“Law on Competition” or the “Law”) governs market competition matters in Albania. The enforcement of competition law in Albania is competence of the Albanian Competition Authority (the “Competition Authority” or the “Authority”) which operates as an independent public authority. The Authority consists of the ‘Competition Commission’ which is the ‘decision-making body’ and the ‘Secretariat’ with ‘technical and investigation’ duties.

The Authority is entitled to survey the market conditions, apply the competition rules and issue further secondary regulations for purposes of implementation of the Law. The Authority evaluates and authorises or prohibits transactions which give rise to concentrations between undertakings in relation to the possible creation or strengthening of a dominant position in the market. The Authority surveys market operators already having a dominant position in the market in order to avoid any possible abuses by such operators. In addition it grants exemptions for prohibited horizontal and/or vertical agreements. The Authority issues recommendations to public institutions in relation to matters dealing with competition issues as well as opinions, evaluations and proposals on draft laws which would affect any competition issues.

- 1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

The Albanian Competition Authority is the only body responsible for the enforcement of competition laws in all sectors. There are no concurrent competition enforcement bodies in Albania.

- 1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in Albania?

The Authority supervises and undertakes economic evaluations of different market structures in order to identify any anticompetitive conducts since in their early stage. The Authority undertakes sector-based studies, by performing periodic collection and assessment of information. This enables the Authority to obtain a general view of the competitive conditions of different market sectors. To this end the Authority may evaluate if there are any reasonable grounds that would lead to the launch of sector-based investigation procedures (Competition Authority, “The Annual Report 2008 and Main Goals for 2009”, III.2.4, pp.11).

The Authority may initiate general investigations in a specific sector of the economy, ex officio and/or upon proposal of the Parliament and/or by initiative of any sector-based regulatory institutions. The investigations may be launched provided that there are indications, likewise inflexibility of the prices that would limit or distort competition in the market (article 41).

The Authority upon its own initiative, or request of interested enterprises or third parties’ claims, may undertake a ‘preliminary investigation procedure’. Should the Authority believe that there are reasonable grounds that would lead to limitation or distortion of the competition, it may launch the ‘in-depth investigation procedure’ (articles 42 and 43).

2 Substantive Competition Law Provisions

- 2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

The Authority may issue secondary rules (regulations and guidelines) for the implementation of the Law. The Law provides for the prohibition of all the agreements between undertakings or association of undertakings which obstruct, limit or distort the free competition

in the market (article 4) as well as every abuse of the dominant position of the undertakings in the market (article 9).

The undertakings engaged in concentrations by acquisitions of control or merger transactions, should submit a notification to the Authority provided that they meet the threshold requirements foreseen by the Law. The Authority will check the market share of the undertaking to the concentration in order to assess possible creation or strength of a dominant position in the market.

If the Authority, after performing its own evaluations observes that there are obstacles, limitation or distortion of the free competition in the market (article 4) as well as there is an abuse of the dominant position of the undertakings in the market (article 9), the Authority may open investigation procedures on specific conducts of the market operators.

2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

There are no provisions that would apply to specific sectors only. The Law sets out the general provisions on competition issues that may arise in relation to any kind of sector.

3 Initiation of Investigations

3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

According to the “Regulation on the application of the procedures for concentration of enterprises” (“The Regulation on Concentrations”) it is possible for every undertaking to formally approach the Authority by informing it on the intention to enter in an agreement or transaction and to ask its formal opinion whether the agreement or transaction may constitute a concentration subject to notification procedures under the Law (article 6 of the Regulation).

Anyhow, in practice it is possible for any interested party to ask the officers of the Authority some guidance or advice aiming to facilitate the self-assessment of the party in relation to possible competition issues which may arise by any transaction, agreement or conduct. This approach is informal and the guidance or advice is not binding.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

The Law provides that interested third parties may submit a complaint to the Authority asking for the opening of a preliminary investigation procedure (article 42).

Furthermore the “Regulation on the functioning of the Competition Authority” as amended, provides for the

possibility for any interested party to submit to the Authority oral or written claims either by courier or email. The anonymous claims are registered and evaluated as well. The Authority will evaluate if the issue, object of the claim, is under its competence.

Within 15 days from the receipt of the claim, the Authority notifies the claiming party on the relevant ongoing administrative proceeding. After the conclusion of the procedure, the Authority notifies the claiming party on the results of the administrative proceeding (article 26/1- 3 of the Regulation).

The parties may submit their claims either by their own initiative or upon invitation of the Authority anytime the later announces the filing of a notification procedure (article 52).

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

There are no official statistics on the proportion of the investigations initiated as a result of the third party complaint or by Authority's own initiative.

Pursuant to the “The Annual Report for 2008 and Main Goals for 2009” the most important objectives for the next coming years will be the further awareness of the entrepreneurs, stakeholders and of the consumers on the importance of the competition protection rules as well as they participation in the process of implementation of these rules (Competition Authority, “The Annual Report for 2008 and Main Goals for 2009”, Para. VI, pp.28).

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

The investigation proceeding consists of a preliminary investigation phase initiated by the Authority or by request of interested enterprises or claim of third parties. After the preliminary investigation phase, if there are indications of infringements, an in- depth investigation proceeding will follow. The decision to open an in-depth proceeding is published in the Official Bulletin of the Authority by giving to third parties the possibility to intervene. In case the Authority observes any infringement of the Law the Authority issues a decision on the immediate ceasing of these infringements by the parties and may impose respective fines. In addition, the Authority may demand to the parties to take the appropriate measures of the case including structural measures. The Law does not provide any time line for the investigation procedures

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

Each party under investigation or any other third party who is in possession of information in relation to the specific case is obliged to provide this information each time it is requested by the Authority. If necessary, the Authority may request the information by issuing a decision in this respect. According to the Law, central or local public administration bodies or other public institutions should cooperate and provide the Authority with the useful information (articles 33 and 34).

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

The officers of the Secretariat should be authorised in writing by the Commission in order to perform inspections. They are entitled to enter the undertaking premises, access the transport vehicles and the area of the place of business of the parties under investigation, may consult the hard or soft copies of the books, registers and documents relevant to the activity, may collect or copy books, registers or documents, may seal any business premises, books, registers of the activity, no longer than 72 hours, if required, and may ask representatives or employees of the party under inspection about any explanations on facts and documents (article 36). Extension of the above mentioned period is subject to court decision and may not exceed 6 months.

Inspection of places other than those related to the activity (domicile; other premises similar to the domicile) is done upon authorisation granted by the competent Court (article 37).

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

The Law provides for the possibility of the parties under investigation to intervene in a hearing before the Authority makes a decision (article 39).

The Authority may invite other third parties or experts engaged for the specific case (article 15 of the "Regulation on the functioning of the Competition Authority", as amended).

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

When entering business or domestic premises with a proper authorisation released in accordance with the Law provisions, the officers may collect and confiscate every object considered as a useful evidence for any matter relevant to the investigation. The seizure may

not last more than 72 hours. Extension of such period is done upon court decision for a period not exceeding 6 months. The party involved should be promptly notified in any case (article 38).

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

As explained above, the Authority may seize every object considered as a useful evidence for any matter relevant to the investigation.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

The Authority has the powers foreseen by articles 36, 37, 38 and 39 of the Law as explained in questions 4.3 - 4.6.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response.

The Law provides for the possibility of the parties under investigation to intervene in a hearing before the Authority takes a decision (article 39).

4.9 How are the rights of the defence respected throughout the investigation?

The Authority should notify to the party under investigation the opening of the 'in-depth investigation proceeding'. The party has the right to intervene in a hearing before the Authority takes a decision (article 39).

In case of seizure of evidences during inspections, the interested party has the right of appeal in front of the Court.

4.10 What rights do complainants have during an investigation?

The Authority shall within 24 hours from the delivery of the request or claim by the interested parties, assign it to the relevant department with the Authority for processing. The complainants shall be informed on whether the matter is taken forward within 15 days from the day the complaint was submitted to the Authority. In conclusion of the administrative proceedings of the claim or request, the Authority notifies the claiming or requesting party on the results.

The Authority may invite other third parties or experts engaged for the specific case to participate in the hearings (article 15 of the "Regulation on the functioning of the Competition Authority", as amended).

Further, civil actions may be initiated in front of District Court of Tirana by any party affected by anti-competitive conduct of other parties. These actions may be initiated independently to a proceeding commenced by the Authority.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

The Authority may invite other third parties or experts engaged for the specific case to participate in the hearings (article 15 of the “Regulation on the functioning of the Competition Authority”, as amended).

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

The Competition Commission, upon its initiative or further to a request of an interested party, may at any time of the investigation procedure, adopt interim measures. Such measures should be justified by an emergency, risk of serious and irreparable harm to the competition and eventual infringements to article 4 (“Prohibition of restrictive agreements”) and article 9 (“Abuse of dominant Position”) of the Law.

The interim measures would consist of ordering the concerned undertaking to enter into or terminate specific contractual relationships, give licenses, or to act or omit from acting in a certain way. The decision of adoption of interim measures is taken for a specific time and may be postponed if necessary.

In case of infringement to concentration rules (e.g. realisation of the concentration before clearance), the Commission may adopt interim measures for non restriction of the effective competition.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority’s ability to bring enforcement proceedings and/or impose sanctions?

The Law does not indicate any time limit which would restrict the Competition Authority’s ability to commence investigations in case of eventual infringements to article 4 and article 9 of the Law or to commencement of investigations related to the concentrations control (in lack of a notification of the concentration from the parties).

As regards the sanctions, the Law provides for a time limit only for fines imposed to individuals, who by wilful misconduct or negligence conduct or cooperate to actions mentioned in article 74/1 and 75/1 of the Law.

Concretely, the fines are subject to a prescription period of 3 years for infringements mentioned in article 74/1 of the Law and 5 years for those indicated in article 75/2 of the Law.

7 Co-operation

7.1 Does the competition authority in Albania belong to a supra-national competition network? If so, please provide details.

Albanian Competition Authority is member of the International Competition Network (ICN) and also has cooperation relationships with the Organization for Economic Cooperation and Development (OECD), Technical Assistance Information Exchange Unit (TAIEX) and homologue competition authorities in Europe, USA, etc.

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

Membership of the International Competition Network enables the Albanian Competition Authority to participate in different activities organised from ICN covering competition matters. The purpose of such cooperation and membership relates to the exchange of experiences with the competition authorities of other countries and also to the preparation and integration of competition standards and regulations.

Furthermore, the Competition Authority may, under a bilateral or multilateral agreement, communicate information or documents it holds or receives, to relevant structure of the Commission of European Communities or to authorities of other States exercising similar functions, subject to reciprocity and on the conditions that the competent foreign authority is subject to trade secrecy rules with the same guaranties as in Albania. Also, it may conduct investigation upon request of foreign authorities exercising similar functions and under reciprocity condition.

Where Competition Authority and competition authorities of other States, which have reached a bilateral or multilateral agreement between them, have received a complaint or are acting on their own initiative under the Competition Law against the same infringement, the fact that one authority is dealing with the case may constitute a sufficient ground for the other authorities to suspend the proceedings or reject the complaint.

8 Leniency

8.1 Does the competition authority in Albania operate a leniency programme? If so, please provide details.

Fines and leniency is governed by the Law and Regulation “On Fines and Leniency” as approved by the Authority.

According to this Regulation the Competition Commission will grant to an undertaking immunity from any fine, which would otherwise have been imposed if:

(a) the undertaking is the first to submit evidence which in the Commission's view may enable it to adopt a decision, in case of infringement of article 4 and article 9 of the Law; or (b) the undertaking is the first to submit evidence which in the Authority's view may enable it to find an infringement of article 4 of the Law (Section A, article 9 of the said Regulation).

Immunity pursuant to the above letter (a) will only be granted on the condition that the Commission did not have, at the time of the submission, sufficient evidence to adopt a decision to carry out an investigation in case of infringements of article 4 and article 9 of the Law. Immunity pursuant to letter (b) will only be granted if the

Commission did not have, at the time of the submission, sufficient evidence to find an infringement of article 4 of the competition law and that no undertaking has been granted conditional immunity from fines under the above letter (a) in connection with the alleged cartel. Furthermore, an undertaking will qualify for immunity if (i) cooperates fully, on a continuous basis and expeditiously throughout the Authority's administrative procedure and provides the Authority with all evidence that comes into its possession or is available to it relating to the suspected infringement; (ii) discontinues from its involvement in the suspected infringement no later than the time at which it submits evidence under the abovementioned letter (a) and (b), as appropriate and (iii) did not take steps to persuade other undertakings to participate in the infringement.

Any undertaking may submit a request in writing to the Authority to benefit from immunity to fines. Undertakings that do not meet the conditions under Section A of the Regulation, may be eligible to benefit from a reduction of any fine that would otherwise have been imposed in case of infringement of article 4 of the Law. In such case, it must provide to the Authority evidence of the suspected infringement which represents significant added value to evidences already in the Authority's possession and must discontinue its involvement in the suspected infringement no later than the time at which it submits the evidence (Section B of the Regulation).

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

Where Commission finds out that an infringement to article 4 and article 9 of the Law exists (prohibited agreements and abuse of dominant position respectively), its final decision may consist of: (i) termination of the infringement (such as cancellation of the prohibited agreement or bring to an end the abusive practise); and (ii) fines. Additionally, the Commission may impose to the concerned undertakings any remedies such as those of a structural nature (which are decided in case measures to act or omit from acting in a specified way are not efficient).

In case of infringements to article 10 and article

14 of the Competition Law (obligation to notify the concentration and realise the concentration if and after cleared), the Commission's decision will be to bring to an end the realisation of the concentration, state the invalidity of the concentration and impose fines.

The Commission decisions taken for the abovementioned infringements shall be published in the Authority's Official Bulletin.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

The Law provides for fines for non serious infringements (e.g. supply of incorrect, incomplete or misleading information; incomplete form of the required books or other business records; refuse to answer to a question or give an incorrect, incomplete or misleading answer, etc.) and fines for serious infringements (e.g. infringement to article 4 - prohibited agreement, article 9 - abuse with dominant position, article 14 - realisation of a concentration without notification, or clearance or before clearance). In the first case, the Commission, by a decision, imposes on undertakings fines up to 1% of the total turnover of the preceding business year, while in case of serious infringements the Commission may impose fines on undertakings from 2% to 10% of the total turnover of the preceding business year of each of the undertakings participating in the infringement. In fixing the amount of the fine, it should be considered both the gravity and the duration of the infringement. In assessing the gravity of the infringement, it must be taken into account nature, actual impact on the market, where this can be measured, of the infringement and the size of the relevant geographic market.

The Authority may also, upon its decision, impose on undertakings periodic penalty payments not exceeding 5% of the average daily turnover of the preceding business year, which is calculated from the date the decision has been taken (e.g. to put an end to an infringement of article 4 and 9; to comply with a decision ordering interim measures; to comply with a commitment made binding; etc.).

The Commission may impose fines to individuals in case of competition infringements, which amount up to ALL 5 million (approx. EUR 38,000).

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

The Commission imposes on undertakings fines amounting up to 1% of the total turnover of the proceeding business year in case such undertakings refuse to answer to a question during an inspection procedure and, also, in case of providing incorrect, incomplete and misleading answers or impede such inspection.

Generally, refusal to cooperate or attempt to obstruct the Competition Authority in carrying out its investigations is considered as aggravating

circumstance which implies an increase of the basic amount of the fine imposed for other infringements (e.g. infringement to article 4 and article 9). The Law provides for other aggravating circumstances such as repeated infringement of the same type by the same undertaking(s); role of leader, or instigator of the infringement; retaliatory measures against other undertakings with a view to enforcing practices which constitute an infringement; need to increase the penalty in order to exceed the amount of gains improperly made as a result of the infringement when it is objectively possible to estimate that amount, etc.

10 Commitments

10.1 Is the competition authority in Albania empowered to accept commitments from the parties in the event of a suspected competition law infringement?

The Competition Authority is empowered to accept commitments from the undertakings during the preliminary and in-depth procedures in case of concentration of undertakings. The concerned undertakings may propose and present commitments (ex. taking measures in order to eliminate signs of creating or strengthening the dominant position) to the Authority no later than one month from the date of notification receipt in case of preliminary procedures, and two months in case of in-depth procedures.

10.2 In what circumstances can such commitments be accepted by the competition authority?

The Competition Authority is not bound from the proposal of commitments; their acceptance is in the discretion of the Authority.

10.3 What impact do such commitments have on the investigation?

Where the undertakings concerned propose commitments, the Competition Commission may, by a decision, make those commitments binding on the undertakings. The Competition Commission may revoke or amend its decisions, or re-open the investigation procedure when: (i) one or some of the facts that has served as a basis of taking the decision has changed; (ii) the parties contravene to a commitment indicated in the decision; and (iii) the decision is based on incorrect information or was obtained by means of deceit.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

According to the Law, appeals against decisions of the Competition Authority can be made nearby the District Court of Tirana, within 30 days from notification of the decision. In order for the appeal to be accepted, the act of the Competition Authority should have the nature of an administrative act. The subject of the appeals can be either final decisions or decisions taken during an investigation procedure from the Competition Authority.

During the investigation procedures, appeals can be made against decisions such as adoption of interim measures or seizure carried out from the officers of the Competition Authority. To be noted that the appeal against the decision of the Competition Authority on clearance of the concentration and interim measures does not suspend, per se, the enforcement of these decisions. Nevertheless, Tirana District Court may decide to suspend in whole or part these decisions. Under a recent decision of Tirana Appeal Court the appeal against the Competition Authority decision to open an investigation procedure was refused based on the argument that such decision is not an administrative act.

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

As mentioned in question 11.1 above, appeals against a final decision of the Competition Authority can be made nearby the Court of Tirana District, within 30 days from the notification of the decision, and afterwards nearby Court of Appeal and Supreme Court.

To be noted that the appeal against the decision of the Competition Authority on clearance of the concentration and interim measures does not suspend, per se, the enforcement of these decisions. Nevertheless, Tirana District Court may decide to suspend in whole or part these decisions.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

Please refer to question 4.3 above.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

The Law does not indicate any input that the Competition Authority may have in a judiciary process where a person has filed a lawsuit as a consequence of

damages resulting from infringement made by another person to article 4 or article 9 of the Law. Such lawsuit may be filed although a procedure has been initiated from the Competition Authority.

On the other hand, when the defendant begins a procedure with the Competition Authority seeking the exemption of an agreement from the prohibition of article 4 of the Law, the court should decide to suspend the court proceedings until the Authority adopts its decision.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

A person impeded in its activity, by a prohibited agreement or by an abusive dominant position, may initiate an action in court (with Tirana District Court) and request (a) elimination or prevention of the competition restricting practice, which risks to be carried out or is carried out in violation with article 4 or article 9 of the Law and (b) damages relief, in accordance with the relevant provisions of the Albanian Civil Code.

In order to ensure elimination or prevention of competition impediments, Tirana District Court may decide (i) the nullity of contracts (in whole or in part), with a retroactive effect; (ii) order the undertaking which is at the origin of the impediment, to enter into contractual relationship with the impeded undertaking, under the common commercial conditions.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

To the best of our knowledge, there is no final Albanian court decision ruling on claims for damages or other remedies arising out from Competition Law infringements.

14 Miscellaneous

14.1 Is anti-competitive conduct outside Albania covered by the national competition rules?

The Law applies to all undertakings and associations of undertakings, which directly or indirectly may have an influence in the Albanian market and that conduct activities in the territory of the Republic of Albania or abroad when the consequences of these activities are reflected in the domestic market.

14.2 Please set out the approach adopted by the national competition authority and national courts in Albania in relation to legal professional privilege.

To the best of our knowledge, the legal professional privilege matter has not been raised from the

Competition Authority so far and is not subject to a consolidated judiciary practice.

Pursuant to the Administrative Procedures Code, the investigated undertakings may refuse to cooperate with the Competition Authority in case such cooperation will cause an infringement to the professional secrecy, such as the legal professional privilege. Additionally, under the Law on Legal Profession in Albania, the lawyers/attorneys are not allowed to disclose information received from the person they represent or defend or from documents received and made available from the latest in the context of its professional assignment/services.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to Albania in relation to matters not covered by the above questions.

The targets of the Competition Authority for the year 2009 may be summarised as follows: (i) increment of professionalism and expertise of the technical staff of the Competition Authority; (ii) increase of public acknowledgment on benefits deriving from a healthy competition in the market; (iii) growth of advocacy and culture of competition; and (iv) cooperation with all market players, public institutions and consumer protection bodies. Additionally, the Competition Authority has recently proposed amendments to the current Law aiming to harmonise the Albanian competition legislation with the *acquis communautaire*. The draft amendments have been forwarded to groups of interests for their views and comments.

International Law Office: Competition Authority Implements Law Provisions on Restrictive Agreements

COMPETITION AUTHORITY IMPLEMENTS LAW PROVISIONS ON RESTRICTIVE AGREEMENTS, ALBANIA



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The Competition Authority is a public independent authority established under Law on Competition Protection (9121/2003).

Its remit covers:

- protection of market competition;
- assessment of restrictive agreements and mergers; and
- assessment of abuse of a dominant position.

It fulfils this through the Competition Secretariat (investigative body) and the Competition Commission (decision-making body).

The law aims to harmonize the national legislative framework with EU law, and from the moment the law was enacted particular attention was given to the role of the Competition Authority in the implementation process.

So far, the authority’s activities have consisted of examining several mergers, investigating one case of abuse of a dominant position and one of restrictive agreement in the insurance sector. It has lately pursued investigations into agreements whose object or effect was to prevent, distort or restrict market competition. In two recent decisions,⁽¹⁾ the Competition Commission decided to prohibit agreements on the grounds that the object of those agreements was to fix sale prices and other trade conditions by distorting market competition. In both cases the Competition Authority investigated horizontal agreements under the provisions of Article 4.1(a) of Law 9121/2003.

Article 4 of Law 9121/2003 prohibits agreements whose object or effect is to prevent, restrict or distort competition. Such agreements are defined as:

- agreements of any kind between undertakings, with or without compelling force;
- decisions or recommendations of undertakings’ associates, or concerted practices between those operating at the same level; and
- horizontal agreements or vertical agreements in the market.

The first paragraph of Article 4 establishes a non-exhaustive category of restrictive agreement, by listing as such those that:

- directly or indirectly fix purchase or sale prices, or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or supply sources;
- apply dissimilar conditions to equivalent transactions with other commercial parties, thereby placing those parties at a competitive disadvantage; and
- restrict the conclusion or acceptance of contracts by other parties through supplementary obligations which, by their nature or commercial use, have no connection with the scope of such contracts.

Restrictive agreements which do not meet the exemption criteria are invalid.

Exemptions from the prohibition of restrictive horizontal, vertical and licence agreements (ie, licence and assignment of industrial property rights) may be granted by the Competition Authority upon notification by the interested parties.

According to Law 9121/2003, horizontal and vertical agreements are exempted only on the Competition

Commission's decision. Law 9121/2003 allows for the exemption of such agreements on the basis of their economic efficiency,(2) without providing, however, for the de minimis rule.

Exemption of a licence agreement is effective only if the Competition Authority decides not to challenge it within three months of receipt of the notification.

Apart from prohibiting the agreement, the authority may decide to impose on the participating undertakings: (i) fines of between 2% and 10% of the total turnover of the preceding financial year; or (ii) periodic daily fines of no more than 5% of the average daily turnover of the preceding financial year.

Endnotes

- (1) Dated September 24 2007 and October 1 2007.
- (2) The conditions for horizontal agreement exemptions are similar to those provided in Article 81.3 of the EC Treaty; with regard to vertical agreements, the exemption provision closely follows Article 4(b) of EU Regulation 790/99 on the application of Article 81.3 to vertical agreements and concerted practices.

ENERGY

MINING 2014, ALBANIA



Alketa Uruci



Ilir Limaj

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Mining industry

1 What is the nature and importance of the mining industry in your country?

The mining industry of Albania has served for the past 50 years as a supporting pillar of industrial growth and economic connections, building on underlying chrome resources that, before 1990, made it the world’s third-largest producer of chrome ore, together with nickel, iron and copper. Since 1990 considerable parts of the mining sector’s activities appear to have become commercially unviable, or at best marginal.

In recent years, the Albanian government has given top priority to this sector, considering it to be a core industry able to stimulate Albania’s economic development. To this end, the government has undertaken several reforms such as privatisation, adoption of a legal framework for licensing mining activities, enacting policies for foreign investors consisting of incentives regarding the transfer of capital and special fiscal treatment aiming to restart production and bring the sector back to its economic potential. Therefore, mineral exploration, exploitation and processing now constitute a key component of the Albanian economy, owing to a traditional mining industry that has been a solid foundation of the country’s economic sector, generating substantial revenues.

Such change in course of action is expressed by the increased number of investments in both small and large-scale mines, as well as increased output and employment, and the higher capacities of downstream processing of minerals. Up to this date, more than 752 mining permits have been issued in the mining sector by the Ministry of Economy, Trade and Energy (as per the website of the National Agency for Natural Resources). Of these, 673 were exploitation permits. The figures of exploitation permits for certain key minerals are:

- 211 permits for chrome ore;
- 231 permits for limestone;
- 32 permits for clay;

- 34 permits for iron-nickel and nickel-silicate;
- 43 permits for tabulated limestone; and
- 30 permits for massive and flaggy sandstone.

The rest of the exploitation licences belong to over 10 different kinds of minerals and rocks. As part of the implementation and harmonisation of Albanian legislation with the *acquis communautaire*, the Albanian parliament has adopted law No. 10,304, dated 15 July 2010 (the Mining Sector Law), which abrogated the old Mining Law (No. 7,796, dated 17 February 1994). The Mining Sector Law, which entered into force as of 27 August 2010, reflects the provisions of EU Directive 2006/21 of 16 March 2006 on management of waste from extractive industries.

2 What are the target minerals?

The largest share of minerals produced in Albania is as follows:

- chrome ore;
- copper; and
- iron-nickel and nickel-silicate.

3 Which regions are most active?

Chrome ore

There are three main regions where chrome ore is located:

- the north-eastern region (Tropoja and Kukës ultrabasic massifs);
- the central region (Bulqiza and Lura ultrabasic massif); and
- the south-eastern region (Shebenik-Pogradec ultrabasic massif).

Copper

Copper deposits are located in six districts: Korça, Mirdita, Puka, Shkodra, Kukes and Has regions.

Based on the geologic conditions, their morphology, genetic and mineralogical components, three main types of copper deposits are distinguished:

- plutonic type, quartz-sulphur – this type includes deposits located in Nikoliq 1, 2, Golaj, Krume, Gdheshte, Thirre, Shemri, Eastern Tuç, Kurbnesh, Kabash, Kçire and Turec regions;
- volcanogenic type includes deposits such as Perlat, Munelle, Lak Rroshi, Tuç, Paluce, Qaf Bari, Gurth 1, 2, 3, Spaç, Kaçinar, Derven, Rehove, Geshtenja Shore, Thick Dushk, etc; and
- volcanogenic-sedimentary type includes deposits such as Gegjan, Porave, Palaj, Karma and Rubik.

Iron-nickel and nickel-silicate

Iron-nickel and nickel-silicate deposits are mainly located in:

- the north-east region (Kukes): Trull Surroi, Mamez, Nome;
- the east central region (Librazhd-Pogradec): Perrenjas, Skorske, Xixillas, Bushtrice, Gur i Kuq, Cervenake, Guri i Pergjegjur, Hudenisht and Gradisht;
- the west central region includes deposits in Liqeni i Kuq, Xhumage, Debrove; and
- the south-east region (Devoll): Bitincke, Kapshtice, Strane, Kokogllave, etc.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

Albania is a civil law legal system.

5 How is the mining industry regulated?

From a historical point of view, all activities in the mining industry were conducted under the supervision of the Albanian state (centralised system).

The relationship between the Albanian state (represented by the Ministry of Energy and Industry (MEI)) and the entities involved in mining activities is governed by the Mining Sector Law.

Furthermore, the Mining Sector Law allows the stipulation of 'incentive agreements' if the mining activity consists of the exploitation of minerals of the group of metallic and non-metallic minerals, cobbles and bitumen, group of construction minerals or group of radioactive minerals in a certain area. This agreement is entered into between the holders of the exploitation permit and the MEI provided that the mining activity is considered as having a particular public interest for the area where such activity will be implemented. This

agreement is subject to approval by the Council of Ministers and the Albanian parliament.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws?

The principal law governing all mining activities (including under - ground and underwater activities) performed within the territory of Albania is the Mining Sector Law, which aims to encourage the mining activity in the Republic of Albania through ensuring transparency and fair competition in the sector; maximal growth of public benefit coming from the mining activity, and protection of environment and public health from mining and mining waste hazard. Specifically, this law gives the classification of minerals, types of permits and the terms and conditions that apply to each type of mineral permit.

The procedure and the terms for obtaining the mineral permit are defined in the Licensing Law (Law No. 10,081, dated 23 February 2009). In principle, a request for obtaining a mineral permit (or notifying any relevant changes to the existing permits) is subject to filing and notification to the National Licensing Centre (NLC). This entity conducts a preliminary examination of the documents filed and afterwards forwards the file to the MEI, which adopts or issues the final decision.

The National Agency for Natural Resources (NANR) has as a scope the development and supervision of the rational exploitation of natural resources based on government policies, and the monitoring of their post-exploitation in the mining sector. The NANR has, inter alia, the following tasks and responsibilities:

- consults, suggests to and cooperates with the relevant government bodies for the development of policies in the area of mining, and implements such policies;
- negotiates mining agreements and monitors the implementation of their development plans;
- supervises mining and post-mining activities, and monitors the exploited areas, mining risks and termination of mining activities; and
- exclusively manages primary data related to mining and post-mining activities.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

The Mining Sector Law classifies the types of minerals in groups. In addition, mining permits are issued under consideration of the group of mineral specified in the application or request. Specifically, mineral reserves are divided into:

- metallic minerals, non-metallic minerals, coal and bitumen;
- construction minerals;
- precious stones and semi-precious stones; and
- radioactive minerals.

The Albanian government has approved the decision of the Council of Ministers No. 479, dated 29 June 2011, of the new Mining Strategy of the Republic of Albania for the years 2010 to 2025, through which it undertakes to adopt the UN Framework for Fossil Energy and Minerals for the classification of all minerals, aiming to create an instrument that allows the classification of reserves and resources of raw minerals on the basis of uniformity with the international criteria based on a market economy. The Albanian government is making efforts to attract international mining companies that comply with accepted good practice when implementing mining activities. In general, these companies are listed on international stock exchanges, and tend to use uniform rules for handling resources and reserves calculations and use recognised reporting codes (for example, CIM or JORC).

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

According to the Mining Sector Law the minerals in natural form, located in Albania, and on the underwater surface, sea floor, under - sea floor, or under the territorial sea, determined under principles of international law and international agreements ratified by the Republic of Albania belong to the state and are public property. The rights to exploit mineral resources can be granted to private domestic or foreign persons upon the grant of mining permits, which are awarded in compliance with the procedures provided by the Mining Sector Law. The mining right is a distinct and independent right from the ownership right over the land surface. The holder of the mining permit has the legal right of mining servitude (mandatory) over the property in the area approved upon the mining permit. However, the terms of usage of the servitude should be regulated through a contract compiled in accordance with the provisions of the Albanian Civil Code.

9 What information and data is publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

The NANR and the Albanian Geological Survey (the AGS) are empowered to draw up the maps of mining activities for research, exploration, exploitation activities and to maintain the relevant database regarding such maps. Furthermore, the AGS maintains the archive of existing geological reports and the evaluation of reserves for groups of minerals as per their classification of the old Mining Law (No. 7,796, dated 17 February

1994). The AGS also prepares relevant geological and geophysical surveys for different regions and mineral types. Private parties that intend to conduct activities of research and planning for the mining sector should be equipped with the relevant licence from the NLC. Foreign entities engaged in activities of research and planning for the mining sector in their country of origin are required to perform the equivalence of their professional licence issued by the relevant and competent authorities in their country of origin. Currently the electronic database regarding mining activities which is published on the Albanian authorities' websites appears to have functionality problems and has not been updated.

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

Under the Mining Sector Law, Albanian or foreign legal entities may acquire the right to research, explore, exploit or perform activities that consist of the combination of all indicated activities, depending on the mineral group. Specifically, for minerals of the metallic minerals, non-metallic minerals, coal and bitumen group; the construction minerals group; and the radioactive minerals group a separate and distinct permit is issued for each of the following activities: research- exploration and exploitation. For the precious and semi-precious stones group, mining rights may be granted which include all activities (namely, research- exploration and exploitation).

The holder of a research exploration permit has a preferential right to obtain an exploitation permit, which (right) should be exercised during the term of the research-exploration permit or within 60 days after its expiry provided that the holder of the research and exploration permit has met its financial obligation for the research exploration permit.

Mining rights subject to a bid procedure (namely, if the mining area is listed as the 'bid area' in the Annual Mineral Plan, which is approved by the MEI) is granted to the winning bidder. Such mining rights may be granted to Albanian or foreign legal entities either in accordance with the Public Procurement Law (Law No. 9,643, dated 20 November 2006) or under the legal requirements of the Concession Law (Law No. 125/2013). For the mining areas that are classified as 'opened areas', the permit is granted on a first-come, first-served basis.

The holder of the mining rights has to comply with the general obligations applicable to any type of mining permit and the specific obligations pertaining to the relevant type of permit. Specifically, the holder of mining rights shall provide a financial guarantee, which may serve to guarantee the rehabilitation of the environment, the realisation of the minimal work programme under the research, exploration or research and exploration permit and the realisation of the investment obligations

under the exploitation permit. The other obligations are related to royalty tax, preparation of the rehabilitation plan and the management of mining residues, site security measures, prevention of contamination, confidentiality, submission of the relevant reports on investments, etc.

11 What is the regime for the renewal and transfer of mineral licences?

Pursuant to the Mining Sector Law an exploration permit for the group of metallic minerals, non-metallic minerals, cobbles and bitumen is valid for a period of three years. This term may be extended only once more, upon request of the permit holder. Such extension is valid only for one year. The extension will be approved only if the permit holder proves the possibility of discovering a mineral object. On the other hand the exploitation permit for the above-mentioned group is valid for a period of 25 years, with the possibility of extension only once, for a 10-year period. However, if upon request of the permit holder an investment plan is presented and the plan is deemed in the economic and social interest of the community of the respective area, the exploitation permit may be given or extended for a total validity period of 99 years; such decision is approved by the Albanian parliament.

Concerning precious stones and semi-precious stones, their exploitation permit may not be granted for more than 25 years, with a possibility of a further 10-year extension period.

With respect to the transferring of a mining right or permit, only such rights that are obtained under the Mining Law may be transferred. Mining rights which are granted under a competition procedure and those for which a facilitating agreement has been effectuated are not transferable.

Concerning the transfer procedures, the Mining Sector Law provides that the transfer is effectuated upon approval from the Minister responsible for the mining sector. Based on the Law, such approval is to be given within 60 calendar days from the submission of the request for transfer. Upon approval, the transfer is registered at the National Register of Licences and Permits. Constructions and installations in support of the main operations are considered as facilitating activities and are transferred along with the mining right or permit.

12 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

The Mining Sector Law does not provide for any restrictions on foreigners acquiring mining rights. It should be noted that during recent years the Albanian government has been adopting policies to attract foreign investors to invest in the Albanian mining sector. In practice, foreign investors have entered into joint ventures with local companies, basically for reasons related to business planning and implementation, aiming to use the knowledge and experience of the local companies to overcome the challenges and problems that they have to face when conducting mining activities in Albania.

13 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

Mining rights are protected by the rule of law in Albania. To simplify the relevant litigation procedures and execution of court decisions, subject to administrative disputes between both individuals and juridical persons and public bodies, the Albanian parliament has recently approved the Law on the Organisation and Functioning of Administrative Courts and Judgment of Administrative Disputes (No. 49/2012), which entered into force on 4 November 2013 with the establishment of administrative courts, and therefore all administrative disputes are expected to be settled in a faster and more efficient way.

Additionally, if the permit is granted within the framework of the Public Procurement Law or the Concession Law, disqualified bidders may file administrative appeals with the Albanian Public Procurement Commission. The decision of the Public Procurement Commission constitutes a final administrative decision. Afterwards, the claimant may file its claim (should the claimant not be satisfied by the decision) with the administrative court, within 45 days from receipt of the notification of the decision of Public Procurement Commission.

The Republic of Albania has ratified the Convention on the Recognition and Enforcement of Foreign Arbitration Awards (New York, 1958) and consequently foreign arbitration awards are enforceable in Albania.

14 What surface rights may private parties acquire? How are these rights acquired?

The holder of the permit enjoys the right of servitude pertaining to the area indicated in the permit. The right of servitude imposes on the owner of the land the obligation to allow the holder of the permit to use the land, and perform all relevant activities or supporting works in pursuance with the type of the permit. The right of servitude may be also granted for purposes of having access into the mining site.

When the mining area is privately owned, the parties shall enter into a servitude agreement. The term of the said agreement is linked to the duration of the relevant type of mining permit. Should the owner of the land and the permit holder not strike an agreement within 30 days from the request of the latter addressed to the owner, the permit holder may approach the court, which will decide in such regard.

15 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

The participation of government or state agencies in mining projects is not explicitly regulated.

16 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

There are no provisions in the law dealing specifically with expropriation of licences. The Mining Law only mentions revocation of the licence due to any breach by the licence holder, consequently no compensation is provided for.

However, from a general point of view, pursuant to the Law on Foreign Investment (No. 7,764, dated 2 November 1993), foreign investments shall not be subject of expropriation in any direct or indirect way, or any other measure with an equivalent effect, with the exception of those cases when such expropriation is in the interest of the public good as defined by law. In such a scenario immediate compensation will follow, equal to the real market value of the expropriated investment.

17 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

According to the Law on Protected Areas (No. 8,906, dated 6 June 2002) important or threatened parts of the territory are declared as protected under the following categories:

- Category I – strict natural reserve/scientific reserve (mining activities not allowed);
- Category II – national parks (mining activities not allowed);
- Category III – natural monuments (mining activities not allowed);
- Category IV – managed natural reserves (mining activities not allowed);
- Category V – protected landscape (several activities permitted if provided with environmental permit); and
- Category VI – protected areas of managed resource (several activities permitted if provided with environmental permit).

A list and the relevant map of the protected areas is published on the website of the Ministry of Environment.

Duties, royalties and taxes

18 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

Each permit holder shall pay the mining rent (royalty tax) to the Albanian state, levied on the minerals sold, under consideration of the type of the mining permit.

Beginning with the entry into force of the new amendments to the Law on National Taxes (No. 9,975, dated 28 July 2008), the royalty tax shall be fixed as a percentage of the sale price of minerals. The tax rate depends on the type of minerals, but in any case it does not exceed 10 per cent; in the case of metallic minerals the tax rate varies between 4 per cent and 10 per cent (depending on the specific metallic mineral), while for non-metallic minerals it is 4 per cent. Semi-precious stones and precious stones are taxed at 10 per cent of the sale price. Previously, the Law on National Taxes provided for a minimum and maximum rate of royalty

tax for each mineral and the Council of Ministers was authorised to determine the specific rate applicable. In addition, the mining activity is subject to taxation in accordance with Albanian tax legislation (namely, VAT, profit tax, etc).

19 What tax advantages and incentives are available to private parties carrying on mining activities?

Incentives may be granted based on an 'incentive agreement' (see question 5). The Mining Sector Law does not specifically refer to the kind of incentives to be granted to the private investors or entities engaged in the mining sector. Under the old Mining Law, incentives were granted to attract foreign investors to export-oriented activities and consisted mainly of tax exemptions.

20 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

There is neither any tax stabilisation legislation nor are there any tax stabilisation agreements in force.

21 Is the government entitled to a carried interest, or a free carried interest in mining projects?

There are no explicit regulations entitling the government to a carried interest with respect to mining projects. Pursuant to the Mining Sector Law, however, the holder of a mining permit for metallic minerals, non-metallic minerals, coal and bitumen must spend a specific amount of money for every square kilometre as declared in the mining permit. If this amount is not spent, any remaining part shall be transferred to the state budget.

22 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

No. There are no transfer taxes or capital gains imposed regarding the transfer of licences.

23 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

The Mining Sector Law does not provide for any distinction between domestic and foreign parties.

Business structures

24 What are the principal business structures used by private parties carrying on mining activities?

Considering that the Mining Sector Law does not provide for specific rules related to the business organisation form of entities applying for obtaining mining rights, each entity may decide to carry out the business activities in pursuance with the options provided for in

the Commercial Companies Law (Law No. 9,901, dated 14 April 2008), either by establishing a local company (a limited liability company or a joint-stock company are the most commonly used forms) or branches. In any case, it is advisable that reference be made to the bid documents (for mining rights under a 'bid area') in order to verify any requirements in such regard.

25 Is there a requirement that a local entity be a party to the transaction?

No, there is no requirement that a local entity be a party to the transaction.

26 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

The Republic of Albania has entered into many bilateral investment and double taxation treaties; it is, however, not possible to determine whether foreign entities commonly use any particular treaty to structure their mining operations in Albania.

Financing

27 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

The principal financing sources are self-financing, through either local or foreign financial institutions. To the best of our knowledge, financing of mining activities does not take place through the Albanian public securities market.

28 Please describe the regime for taking security over mining interests.

It would be possible to place a pledge on a mining licence, however in practice the enforcement of the pledge over the licence (implying a transfer of the licence to the pledgee or a third party) would be subject to approval by the Ministry provided that under the Mining Sector Law, the said transfer is permissible.

Restrictions

29 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

The Mining Sector Law does not specifically address issues related to importation of machinery or equipment necessary for conducting mining activities. Import of equipment and machinery necessary for implementing the mining activity is not subject to any authorisation or permit. For the majority of imported equipment and machineries there are no customs duties.

VAT (currently at a 20 per cent rate) is payable on equipment and machinery imported for investment purposes, but the Law on VAT (No. 7,928, dated 27 April 1995) provides facilities in this regard. Pursuant to the VAT Law the import of machinery and equipments, for the purpose of performing an investment contract with a value of 50 million leks, is exempted from VAT. Furthermore, when the conditions for benefiting the VAT exemption are not met, the VAT Law provides also for a deferral scheme for equipment and machinery that are imported for the purpose of the economic activity of the taxable person. Accordingly, the payment of VAT is deferred for up to 12 months from the import of machinery and equipment. The deferral period can exceed 12 months upon approval of the Minister of Finance when the investment period (namely, the period between importation of machinery and commencement date of supplies of goods or services) will be longer than 12 months. Additionally, upon request of the person concerned, the unpaid VAT resulting from the above-mentioned scheme may be compensated with reimbursable VAT incurred from the same project.

30 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

There are no provisions imposing quotas, restrictions or limitations related to the processing, export or sale of metallic minerals.

31 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

Income deriving from the export or sale of metallic minerals is not subject to any restriction or limitation under Albanian legislation. Profits resulting from mining activities may be repatriated, after taxation. There is no foreign currency exchange control applicable in Albania.

Environment

32 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The principal environmental law having an impact on mining activities is the Law on Environmental Protection (Law No. 10,431, dated 9 June 2011), the Law on Environment Permits (Law No. 10,448, dated 14 July 2011) and the Law on Environmental Impact Assessment (Law No. 10,440, dated 7 July 2011). Based on the above-mentioned laws, the National Agency of the Environment (formerly the Agency of the Environment and Forestry) acts as the central authority and, along with the regional agencies, is in charge of monitoring and adopting measures for the protection of the environment, as well as assessing the impact on the environment of plans and projects submitted from public or private entities and granting of relevant permits. Apart from the said authorities, the Environment Inspectorate is the entity in charge of controlling the

status of the environment as well as the implementation of the law, being at the same time entitled to impose sanctions if the law is infringed.

33 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

The environmental review and permitting process involves the Ministry of Environment as well as the regional environmental agencies. Certain projects in the mining sector having a considerable environmental impact might be subject to an in-depth report on environmental impact assessment (and a requirement to obtain an environmental permit in pursuance of the Law on Environmental Impact Assessment). The said law provides no fixed terms for the assessment procedure. The duration of such procedure depends on the volume of the study for the environmental impact of the project. Those mining activities that do not fall under the in-depth environmental impact assessment are subject to the environmental authorisation or consent issued by the local government (municipalities or communes).

34 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

Pursuant to the Mining Sector Law, abandoned mines might be subject to closure or conservation.

The process of closure and monitoring of abandoned mines depends on the status of the administrators of these mines. If the mines were previously administered by the Albanian state, the closure and monitoring is subject to approval by the Council of Ministers, upon a proposal of the MEI. The plan on closure and monitoring is prepared by a specialist approved by the MEI. Closure and monitoring of mines previously administered by private legal entities, however, is subject to approval by the MEI. In such case, closure and monitoring is performed based on the closing and monitoring plan submitted in the permit application.

Abandoned mines might fall under the conservation regime, if there is a failure to implement the closure and monitoring plan.

The MEI is entitled to call or withdraw the financial guarantee in the following circumstances: waiver by the holder of the permit from the mining rights, or termination of the activity before expiration of the permit term based on a decision of the MEI. The amount of this annual guarantee varies according to the term of the permit, business plan, etc.

Health & safety, and labour issues

35 What are the principal health and safety, and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Republic of Albania has ratified the ILO Convention C176, concerning safety and health in mines. The domestic labour legislation in Albania is mainly governed by the Law on the Labour Code (No. 7,961, dated 12 July 1995) as amended. The Labour Code provides for basic principles that should be complied with in order to ensure health and safety in workplaces. More specific rules and requirements for the improvement of health protection and safety at work have been established by the Law on Health and Safety at Work (No. 10,237, dated 18 February 2010), which was drafted in accordance with EU recommendations provided by the Framework

Update and trends

The government is focused on the promotion of incentive policies in order to increase the development of the extracting industries and the benefits of the local community. Recently, the Minister of Energy and Industry declared that during 2014 the government will amend the mining legislation and promote these incentive policies. He considers that the reinforcement of transparency in the extracting industry will bring new investments that will be supported by government through competitive processes. The Ministry of Energy and Industry foresees the creation of an electronic register which will reflect all the data of the concessions, the mining licences or permits at every stage of the implementations process. The creation of this electronic register aims to increase the trust of local and foreign investors in this industry.

Directive of the European Commission 89/391/EEC as well as the Law on Work Safety in Mining Activity (No. 8,741, dated 15 February 2001). Regulatory competences on the legal framework of labour in Albania are granted to the Ministry of Social Welfare and Youth. The entity engaged with the enforcement and monitoring of the aforementioned legal acts is the State Work Inspectorate.

Furthermore, each entity involved in the mining industry shall comply with the requirements of the Decision of the Council of Ministers No. 1109, dated 30 July 2008 on Insurance of the Employees Engaged in the Mining Sector Regarding Accidents at Work, as well as the secondary legislation issued in pursuance of said decision. Accordingly, each entity shall insure its employees with an Albanian insurance company against accidents at work.

The National Agency for Natural Resources and the Department for Inspection and Recovery of Mines are the authorities engaged in performing periodical technical controls on the safe operation of mines.

36 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

The Mining Sector Law does not impose any limitation or restriction with regard to the personnel engaged in mining activities; rather the Law on Foreigners (No. 108/2013, dated 28 March 2013) governs this matter.

According to the Law on Foreigners, foreign personnel engaged in projects implemented in Albania must obtain a work permit, which is granted under consideration of the developments and needs of the Albanian employment market (namely, assessment of whether an unemployed Albanian citizen might have been engaged in the relevant function or position). EU citizens, citizens of the Schengen Area and the USA, lawfully staying in Albania, are exempted from this obligation and are not required to obtain a work permit; however, they are required to obtain a Certificate of Employment Declaration.

accountability in the Albanian extractive industry sector and thus will make it easier for the Albanian government to estimate its economic contribution.

Currently, negotiations for a cooperation agreement in the mining sector between Albania and Kosovo are under way.

Social and community issues

37 What are the principal community engagement or CSR (corporate social responsibility) laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

As of December 2011, the Business Advisory Council (an advisory body of the Council of Ministers for economic policy development and improvement of the relevant legal framework) approved the Internal Code of Conduct for Companies in Albania. This code represents a supporting and guiding document for companies, assisting them to develop an internal management framework. It consists of a model that companies are free to adopt in accordance with their needs.

38 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

There is no legislation concerning this matter in this jurisdiction.

39 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

There are no international treaties, conventions or protocols relating to CSR issues applicable in Albania.

Foreign investment

40 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

There are no foreign ownership restrictions in Albania relevant to the mining industry. International treaties

41 What international treaties apply to the mining industry or an investment in the mining industry?

Albania is a candidate country of the Extractive Industries Transparency Initiative (EITI), an initiative that aims to strengthen governance by improving transparency and accountability in the extractive sector. Implementation of EITI would improve transparency and

GAS REGULATION 2014, ALBANIA



Renata Leka



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Description of domestic sector

- 1 Describe the domestic natural gas sector, including the natural gas production, liquefied natural gas (LNG) storage, pipeline transportation, distribution, commodity sales and trading segments and retail sales and usage**

The law governing the gas sector in Albania was introduced in 2008. Law No. 9946, dated 30 June 2008, On the Natural Gas Sector in Albania as amended (the Gas Law) regulates in general terms activities related to the gas sector, including transmission, distribution, trade, storage, supply and intake, as well as the construction and operation of natural gas infrastructures. Exploration and production of natural gas is not subject to the Gas Law, but is governed by Law No. 7746, dated 28 July 1993, on Hydrocarbons, as amended (the Law on Hydrocarbons). Few licences have been issued in the natural gas sector to date, and currently there is no natural gas infra-structure effectively operating in Albania.

Albania is part of the corridor involved in the Trans Adriatic Pipeline project. To this end, the Albanian parliament ratified the host government agreement entered into with the project investor for the development of the project through Law No. 116/2013 'On the ratification of the Host Government Agreement between the Republic of Albania acting through the Council of Ministers and Trans Adriatic Pipeline AG in connection with the Trans Adriatic Pipeline project (TAP Project) and the agreement between the Republic of Albania, represented by the Council of Ministers and Trans Adriatic Pipeline AG in connection with the Trans Adriatic Pipeline Project (TAP Project)' (Law No. 116/2013).

In addition, to date, the Albanian Energy Regulatory Entity (ERE) has issued two licences concerning the natural gas sector, respectively on the transmission and distribution of natural gas.

- 2 What percentage of the country's energy needs is met directly or indirectly with natural gas and LNG? What percentage of the country's natural gas needs is met through domestic production and imported production?**

There are no LNG or natural gas facilities currently operating in Albania.

Government policy

- 3 What is the government's policy for the domestic natural gas sector and which bodies set it?**

The Ministry of Energy and Industry (MEI) supervises the energy sector and is vested with powers to define the policies applying to the development of the gas sector. To define the policies in the gas sector, MEI may seek advice from other public authorities competent for the gas sector, which in this case include ERE, stakeholders of the gas sector, social partners.

The main purpose of the policies should be to ensure safe and consistent development of the gas sector. In particular, they should address at least one of the following issues:

- implementation of the energy goals and policies in the gas sector in conformity with the requirements set forth in the Energy Community Treaty;
- promotion of investments in the gas sector, including any exemptions from taxes;
- precautionary measures with regard to environmental protection;
- ensuring the safe and consistent development of gas infrastructure networks and facilities;
- harmonisation with the EU standards and regulations applicable to the gas sector, and ensuring the interaction of the Albanian gas system with neighbouring and European systems; and

- implementation of programmes regarding customers' safeguards in cooperation with other public authorities.

There is no specific regulation in Albania with regard to conventional or unconventional sectors.

Regulation of natural gas production

4 What is the ownership and organisational structure for production of natural gas (other than LNG)? How does the government derive value from natural gas production?

The Law on Hydrocarbons entitles any entity to conduct activities related to the exploration and production of natural gas, subject to the terms and conditions of the hydrocarbon agreement entered into with MEI.

Given that any hydrocarbons underlying Albanian territory are the exclusive property of the state, any entity engaged in the exploration and production of natural gas should pay royalties to the state subject to the applicable tax legislation in force. Hydrocarbon agreements establish the product-sharing principle, which means that after covering the costs by means of the natural gas produced subject to the agreement, the outstanding part will be divided between the state and the investor based on a formula determined in the hydro-carbon agreement.

5 Describe the statutory and regulatory framework and any relevant authorisations applicable to natural gas exploration and production.

Natural gas exploration and production is governed by the Law on Hydrocarbons. The entity authorised in a hydrocarbon agreement may operate within the borders of the area (namely, contract area) indicated in the agreement. The authority empowered to authorise the drilling and production activities is MEI, which exercises its powers through the National Agency of Natural Resources. The latter is vested with the power to monitor drilling and production activities in the hydrocarbon sector. It represents MEI for the purposes of entering into hydrocarbon agreements with entities aiming to operate in the natural gas exploration and production sector.

Subject to the terms and conditions of the hydrocarbon agreement, the contractor may be granted:

- exclusive rights to undertake explorations within the contract area for a period not exceeding five years. If the contractor provides evidence to MEI that there are specific circumstances requiring an extension of the term, the contractor may be granted an extension not exceeding an overall term of seven years;
- exclusive rights to develop and produce the hydrocarbon resources underlying the contract area for a period not exceeding 25 years in accordance with the development plan approved by MEI, as well as the right to renew such right to the extent provided under the hydrocarbon agreement; and

- the right to construct, place and operate relevant infrastructures subject to the requirements regarding third-party access, observation of the terms applicable under any treaty to which Albania adheres, and interconnection of such infrastructures with those of other countries.

In addition, the hydrocarbon agreement outlines the property rights pertaining to the contractor over part of the hydrocarbons produced in a given part of the contract area; and the right of the contractor to trade or export hydrocarbons produced pursuant to the terms of the hydrocarbon agreement, subject to commitments contained under the hydrocarbon agreement regarding supply of the local market or when there are supply necessities due to any emergency situation. Further, the hydrocarbon agreement governs and regulates other areas, such as the fiscal regime applicable to the contractor and recognises the right of the contractor (if a foreign investor) to transfer funds abroad, etc.

ERE is an independent public legal entity with a registered office in Tirana, and is vested by law with the power to determine regulatory policies governing activity related to natural gas, such as transmission, distribution, supply, trade of natural gas, operation of natural gas storage facilities and operation of LNG facilities.

ERE is empowered (but not limited to) to define the tariffs applicable with regard to activities related to the natural gas area, to supervise supply safety, to handle issues related to consumer protection, to regulate cases of refusal from gas operators of third-party access to natural gas facilities, govern obligations related to public services, define the stages of market aperture, define requirements to be met to obtain the status of qualified customer and define the general terms of supply, including establishment of transparent general contractual terms, etc.

In addition, ERE:

- authorises the granting, transfer or alteration of licence terms;
- approves the rules drafted by the transmission system operator (TSO) with regard to the balancing of the natural gas transmission system;
- approves investment plans submitted by licensees in the natural gas sector;
- defines the minimum requirements for the TSO with regard to maintenance, operation and development of the transmission system, including the interconnection capacities;
- handles confidentiality issues pertaining to natural gas companies and other actors operating in the natural gas sector;
- defines the rules and procedures for the settlement of disputes arising between natural gas companies; and
- defines the minimum standards with regard to service quality, especially with regard to the time available for transmission and distribution operators to carry out connections with the network and relevant repairs.

ERE's decisions on any sanction imposed on licensed entities or with regard to the outcome of any dispute resolution between entities operating in the gas

sector, or between the latter and customers, may be challenged in front of the Albanian courts pursuant to the Code of Administrative Procedures.

There is no specific regulation in Albania with regard to conventional or unconventional sectors.

Regulation of natural gas pipeline transportation and storage

6 Describe in general the ownership of natural gas pipeline transportation, and storage infrastructure.

So far, there is no gas pipeline infrastructure in Albania. The Gas Law is relatively new and in a continuous process of completion and development aiming to create a favourable climate for investment in this area.

7 Describe the statutory and regulatory framework and any relevant authorisations applicable to the construction, ownership, operation and interconnection of natural gas transportation pipelines, and storage.

The current legal framework applicable to the construction and operation of natural gas pipeline facilities in Albania consists of the Gas Law and Decision of the Council of Ministers No. 713, dated 25 August 2010, On Defining the Rules on the Terms and Conditions for the Granting of Permits to Construct and Operate the Pipeline and Infrastructure of Natural Gas Systems.

The construction and operation of natural gas pipeline infrastructure for the transmission and distribution of natural gas, natural gas storage facilities, direct lines and interconnection lines with neighbouring systems is subject to a special permit approved upon a decision of the Council of Ministers.

The special permit is granted for a period of 30 years and renewable upon agreement of the parties. In addition to the special permit, construction permits applicable in the urban planning legislation must be obtained for the construction of natural gas pipelines.

8 How does a company obtain the land rights to construct a natural gas transportation or storage facility?

Companies operating in the natural gas sector, for purposes of carrying out their activity, are entitled to address one of the following options: easement rights, temporary use of the land and expropriation.

9 How is access to the natural gas transportation system and storage facilities arranged? How are tolls and tariffs established?

The TSO is obliged to ensure non-discriminatory access to the transmission system to any third party. Terms and conditions as well as applicable tariffs for third-party access are published by the TSO. Third-party access may be refused where there is lack of capacity, when the access could have negative effects on the fulfilment of the public service obligation, or when such access would cause serious financial difficulties for take or

pay contracts that were valid prior to submission of the request for access by the third party.

The balancing tariffs and balancing rules are defined by the TSO and approved by ERE.

Subject to the economic conditions, the TSO should ensure adequate capacities to satisfy the natural gas transmission needs within a given geographical area. The natural gas transmission service should be offered by the TSO in accordance with the terms set forth in the licence granted by ERE for such purpose. In addition, the TSO should ensure the balancing of the natural gas system subject to the balancing rules approved by ERE.

As far as storage facilities are concerned, third-party access is permitted when technical and economic needs so require to ensure an efficient supply system for customers. Access to the storage facilities for natural gas companies and qualified customers is subject to payment of tariffs published by the TSO and satisfaction of the terms and conditions for their use.

ERE determines the requirements and priorities for storage facilities access based on non-discriminatory, objective and fair conditions.

10 Can customers, other natural gas suppliers or an authority require a pipeline or storage facilities owner or operator to expand its facilities to accommodate new customers? If so, who bears the costs of interconnection or expansion?

Expansion of interconnection capacities may be undertaken by the TSO subject to policies and instructions of the government and in fulfilment of the obligations deriving from the Energy Community Treaty.

11 Describe any statutory and regulatory requirements applicable to the processing of natural gas to extract liquids and to prepare it for pipeline transportation.

The law is silent in this regard.

12 Describe the contractual regime for transportation and storage.

The framework for the contractual regime for transportation and storage is still under development.

Regulation of natural gas distribution

13 Describe in general the ownership of natural gas distribution networks.

See question 6.

14 Describe the statutory and regulatory structure and authorisations required to operate a distribution network. To what extent are gas distribution utilities subject to public service obligations?

The operation of a distribution network is regulated by the Gas Law and is subject to licensing by ERE. The latter determines the rules and procedures applicable for the licensing of companies aiming to operate in any natural gas sector activities, including the distribution of natural gas. The Gas Law qualifies the activities of natural gas distribution and transmission as activities of public interest.

Activities related to transmission, distribution and supply of natural gas to all tariff customers are classified by the Gas Law as public service obligations. Licensed companies operating in the natural gas sector have, inter alia, public service obligations related to:

- safety supply;
- quality and supply fees;
- use of domestic resources of natural gas;
- energy efficiency;
- environmental protection and climate change; and
- protection of health, life and property.

Public service obligations are clearly defined, non-discriminatory, transparent and easily accessible.

15 How is access to the natural gas distribution grid organised? Describe any regulation of the prices for distribution services. In which circumstances can a rate or term of service be changed?

Third-party access should be ensured by the distribution system operator (DSO) unless there is a lack of capacity and technical requirements are met. Third-party access may be refused by the DSO for the same reasons indicated in question 9.

16 May the regulator require a distributor to expand its system to accommodate new customers? May the regulator require the distributor to limit service to existing customers so that new customers can be served?

It is a general principle that the operation of the distribution system should be based on non-discriminatory treatment of customers. Accordingly, restriction of the service to existing customers would not mirror the above principle.

17 Describe the contractual regime in relation to natural gas distribution.

As already mentioned, the DSO should operate based on objective, transparent and non-discriminatory conditions. Contractual terms established by the DSO should be approved by ERE. So far, given the lack of a gas infrastructure, no such contracts have been concluded.

Regulation of natural gas sales and trading

18 What is the ownership and organisational structure for the supply and trading of natural gas?

Natural gas supply and trade is regulated by the Gas Law and is subject to licensing by ERE.

Subject to the Gas Law, the supply of all tariff customers is carried out by the public supplier. Public supply of natural gas is an obligation imposed by the Gas Law on the DSO for all customers in the geographical area covered by the licence issued to the DSO by ERE. Qualified customers subject to the Gas Law have the right to choose their qualified supplier licensed for such purpose by ERE.

19 To what extent are natural gas supply and trading activities subject to government oversight?

As already mentioned, the tariffs applicable by the operators in natural gas system infrastructures shall be determined upon prior approval of ERE. The calculation modalities regarding tariffs applicable in the natural gas sector must be performed on a non-discriminatory and transparent basis, and should also take into consideration the costs incurred as well as the need for investment returns.

In addition, the Council of Ministers exercises its control to ensure the supply of natural gas to protected customers. For such purpose, it approves the rules for the safety of the supply system, defining the requirements and modalities of calculation of the quantities of natural gas needed to ensure a safe and continuous supply with natural gas; the decrease programme regarding quantities supplied to certain categories of customers when facing a crisis; and the contents of the report of the supplier on natural gas supply security.

20 How are physical and financial trades of natural gas typically completed?

Currently, there are no agreements that would apply to the trade of natural gas. However, it is the obligation of ERE to determine terms and conditions of such agreements.

21 Must wholesale and retail buyers of natural gas purchase a bundled product from a single provider? If not, describe the range of services and products that customers can procure from competing providers.

Qualified customers (namely, not tariff customers) are entitled to choose their service provider. Subject to the Gas Law, competing activities include the wholesale and retail sale of natural gas between

Update and trends

The selection of the Trans Adriatic Pipeline project by the Shah Deniz Consortium as European export pipeline implies a significant development for the Albanian natural gas sector, given that the Albanian territory is part of the corridor of interest for the Pipeline route.

Within this framework, the Albanian parliament ratified the host government agreement with the project investor through Law No. 116/2013, outlining all the terms and conditions as well as the mutual covenants of the parties applicable on the Albanian part of the Pipeline project (see also question 1).

In addition, the Albanian parliament approved Law No. 06/2013 on Certain Changes to the Gas Law on 14 February 2013. The changes mainly affected article 14 of the existing Law, which formerly provided that the licence for transmission, distribution and supply of tariff customers with natural gas is granted by ERE for a certain territory on an exclusive basis. The changes introduced an exemption to this rule in the event that the territory covered by the relevant permit constitutes the selected route for gas transmission, distribution or natural gas supply of tariff customers' infrastructures, which are granted the status of national and strategic interest projects by the Council of Ministers.

In addition, the provision outlines the requirements to be satisfied by the candidate operators for the purposes of obtaining said permits. The requirements mainly consist of efficiency and financial balance that the aspirant operator should ensure, as well as warranties that the entailed activity shall be conducted in compliance with the rights and liabilities arising in virtue thereof.

suppliers and qualified customers, with tariffs based on demand and offering proportion.

Subject to the Gas Law, customers are granted the status of qualified customer if they satisfy one of the following requirements:

- they are end customers annually spending a quantity of natural gas that exceeds the thresholds determined by ERE;
- they are plants using natural gas for power production; or
- they are plants using natural gas for the production of combined electric and thermo power.

In any case, customers meeting the requirements set forth above may opt to hold the status of tariff customers and continue to be supplied with natural gas by the public supplier (namely, the DSO).

In defining the natural gas quantities for the purpose of classification as a qualified customer, ERE takes into consideration the technology and capacities of the natural gas system and obligations undertaken by Albania in light of international agreements and treaties.

Regulation of LNG

22 What is the ownership and organisational structure for LNG, including liquefaction and export facilities and receiving and regasification facilities?

At present, no LNG facilities are established in Albania.

23 Describe the regulatory framework and any relevant authorisations required to build and operate LNG facilities.

The establishment of LNG facilities is subject to obtaining a special permit from the Council of Ministers. Operation of the facilities is subject to receiving a licence from ERE. The operator of the LNG facilities should ensure:

- the operation, maintenance and safe, efficient and continuous development of the LNG facilities;
- the approval of the use of the facilities for third parties;
- the connection of the LNG facility with the transmission system in accordance with the system technical rules and facility use guidelines;
- the installation of a metering system for the gas circulating from the system, as well as for the quality requirements of the gas;
- the discharge and re-gasification of the LNG is carried out in compliance with the executed agreements;
- non-discriminatory and equal access to the LNG facilities in compliance with the provisions of the law and the general terms of natural gas supply;
- the preparation of a five-year programme on the development of the facility, which is submitted for approval to ERE;
- the TSO has the necessary information to ensure the efficient development and functioning of the interconnected systems;
- the market participants have the necessary information with regard to the volume, the closing date of the operation and the expected capacity decrease of the facilities; and
- the protection of confidential information gathered during the carrying out of its business activities.

24 Describe any regulation of the prices and terms of service in the LNG sector.

There are no special rules concerning prices and terms of service in the LNG sector.

Mergers and competition

25 Which government body may prevent or punish anti-competitive or manipulative practices in the natural gas sector?

ERE is empowered to define the appropriate mechanisms in order to avoid any abuse of dominant position, as well as to define the mechanisms aiming to avoid any other manipulative practice in the gas market. Punishment of anti-competitive behaviour pertains to the Albanian Competition Authority (the ACA).

26 What substantive standards does that government body apply to determine whether conduct is anti-competitive or manipulative?

Pursuant to Albanian antitrust legislation, there are requirements and thresholds that apply to define whether certain behaviours or practices followed by a given operator are considered anti-competitive.

27 What authority does the government body have to preclude or remedy anti-competitive or manipulative practices?

The ACA is empowered to undertake investigations and perform the appropriate examinations to establish whether there is an anti-competitive behaviour adopted by an entity operating in the natural gas sector. Where the ACA observes that anti-competitive behaviour is adopted by any operator, it is empowered to invite the operator to cease such behaviour and apply the relevant sanctions as provided under the applicable legislation.

28 Does any government body have authority to approve or disapprove mergers or other changes in control over businesses in the sector or acquisition of production, transportation or distribution assets?

ERE's board of commissioners, in its Decision No. 9 of 11 February 2011, approved the Regulation on rules and procedures on licensing, modification and transfer, revocation and renewal of the licenses in the natural gas sector (the Regulation).

Subject to the Regulation, licences granted pursuant to the Gas Law and the Regulation can be neither partially nor totally transferred to any third party without the prior approval of ERE.

Further, any partial or total transfer of assets related to the activities subject to licence shall also be subject to prior approval by ERE and application of a new licence. Mergers and acquisitions are otherwise subject to Albanian competition regulation.

29 In the purchase of a regulated gas utility, are there any restrictions on the inclusion of the purchase cost in the price of services?

There are no specific provisions in this regard.

30 Are there any restrictions on the acquisition of shares in gas utilities? Do any corporate governance regulations or rules regarding the transfer of assets apply to gas utilities?

The current gas legislation does not contain any provisions regarding restrictions on the acquisition of shares in gas utilities.

As far as the transfer of assets is concerned, the Regulation explicitly provides that any transfer of assets by any company operating in the gas sector should obtain the prior approval of ERE. In addition, the transferee should file with ERE a new licence application in the form required under the Regulation, as well as any proposal for changes or replacements of the technical documentation and a declaration containing

all facts and figures regarding the reasons leading to such transfer. The Regulation provides that the transfer shall be governed by the Regulation on Procedures for Transfer of Assets by Licensees.

The transferee should meet the following requirements:

- it should have adequate technical and financial capacity to fulfil the obligations pertaining to the transferor subject to the licence;
- it should acknowledge and undertake all terms and conditions of the licence subject to transfer, including financial and performance guarantees; and
- it should be a registered entity in order to conduct business activity in Albania.

International

31 Are there any special requirements or limitations on foreign companies acquiring interests in any part of the natural gas sector?

There are no restrictions on foreign companies acquiring interest in part of the natural gas sector.

32 To what extent is regulatory policy affected by treaties or other multinational agreements?

In the framework of harmonisation of the internal legislation with the *acquis communautaire* in light of the Association and Stabilisation Agreement, Albania is strongly committed to ensuring domestic legislation mirrors the EU directives and regulations.

In addition, Albania is involved in international activities in a number of different forums, including the European Energy Charter and the OECD.

33 What rules apply to cross-border sales or deliveries of natural gas?

There are no specific rules applying to cross-border sales or deliveries of natural gas.

Transactions between affiliates

34 What restrictions exist on transactions between a natural gas utility and its affiliates?

The Gas Law is silent on this issue.

35 Who enforces the affiliate restrictions and what are the sanctions for non-compliance?

Not applicable.

EMPLOYMENT

SECONDMENTS: RIGHTS AND OBLIGATIONS, ALBANIA



Emirjon Marku

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The EU Temporary Agency Work Directive (2008/104/EC) applies to workers who are in an employment relationship with a temporary work agency and who are assigned to a company to work temporarily under its supervision and direction.

Albania is bringing its legislation into line with EU law, but has not yet introduced into national labour legislation specific regulations dealing with temporary agency work, as per the directive. Although new draft amendments to the Labour Code explicitly incorporate temporary agency work, such amendments have been caught up in bureaucracy on their way to Parliament.

Albanian law provides for the existence of private employment agencies (ie, recruitment firms), granting them an intermediary role in the labour market (as per Government Decision 708/2003 on the Licensing and Functioning of Private Employment Agencies), but their remit comprises placing an employee with a potential employer for a fixed or indefinite period. Therefore, they differ from temporary work agencies, which employ and manage the contingent workforce in order to assign members temporarily to a company.

Notwithstanding this, the Labour Code provides for the secondment of an employee to another employer. It provides that the seconding employer may put an employee at the disposal of the host employer under a secondment agreement, after having obtained the employee’s consent. The seconding employer must ensure that the host employer provides to the secondee the same working conditions as apply to its own employees performing the same category of work.

Further, the host employer owes the secondee the same duties regarding health protection, safety and hygiene as it owes its own employees. Thus, the host employer must ensure that the secondee has similar working conditions and treatment to those employees who are already performing the same work for it.

If the seconding employer does not fulfil its obligations towards the secondee, both employers shall be held jointly liable towards the secondee. Although the secondment provisions of the Labour Code and the EU directive appear to provide for the procurement of the same service, they have some basic differences.

Under the Labour Code, the employee is employed not to be temporarily assigned to another employer to work under its supervision and direction (Article 3.1 (c) of the directive), but rather to perform a specific job for the seconding employer (under an employment contract for a limited or unlimited duration). On the other hand, under the Labour Code the parties to the secondment agreement have the same state: they are both employers (ie, undertakings) and thus neither of them qualifies as a temporary work agency under Article 3.1(c) of the directive.

Moreover, the Labour Code does not set down an information obligation in case of vacant positions at the host employer, and does not provide that the prevention of conclusion of an employment contract between the secondee and the host employer after the secondment may be declared null and void (under Articles 6.1 and 6.2 of the directive).

EMPLOYMENT & LABOUR LAW 2013, ALBANIA



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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The legal framework on employment matters in Albania is mainly composed by (i) the Albanian Constitution, (ii) Conventions governing employment matters as ratified by the Republic of Albania, (iii) Law no. 7961, dated 12.07.1995 "The Labour Code of the Republic of Albania" as amended ("ALC"), (iv) Law no. 8549, dated 11.11.1999 "On the Status of Civil Officers" ("Law on Status of Civil Officers"), (v) Law no. 10237, dated 18.02.2010 "On Security and Health at Work", (vi) Law no. 9634, dated 30.10.2006 "On Labour Inspection and State Labour Inspectorate", (vii) Law no. 7703, dated 11.05.1993 "On Social Insurance in the Republic of Albania" as amended, (viii) Law no. 7870, dated 13.10.1994 "On Health Insurance in the Republic of Albania" as amended (on 25.03.2013 it is expected the entry into force of Law no. 10383, dated 24.02.2011 "On Obligatory Health Care Insurance in the Republic of Albania" which will repeal the existing law), (ix) Law no. 10221, dated 04.02.2010, "On Protection from Discrimination", (x) Law no. 9970, dated 24.07.2008, "On Gender Equality", (xi) Law no. 9959, dated 17.07.2008 "On Foreigners", etc.

Additionally, the case law (i.e. Uniform Decisions of the Joint Sessions of the High Court) also constitutes an important source of the Albanian employment legal framework.

1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

There are employees working in the public sector (i.e. civil officers) and employees working in the private sector. The work in the public sector is mainly regulated by the Law on the Status of Civil Officers; work in the private sector is, however, regulated by the provisions of the ALC. Subject to Article 1.3 of the Law on the Status of Civil Officers, for issues not expressly regulated by the said Law, the ALC provisions shall apply.

Furthermore the ALC recognises different employment contract regimes, namely:

- (i) full-time and part-time employment contracts;
- (ii) limited- and unlimited-duration employment contracts;
- (iii) individual and collective employment contracts;
- (iv) home-based employment contracts;
- (v) commercial agent contracts; and
- (vi) apprenticeship contracts.

1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

Subject to Article 21.1 of the ALC the employment contract may be concluded either verbally or in writing. If verbally concluded, the employer must, within a period of 30 days from the date of its entry into force, sign an agreement with the employee. In case of non-compliance, the employer may be subject of fines up to 30 times the value of the minimum monthly salary.

1.4 Are any terms implied into contracts of employment?

Imperative provisions set out by the ALC, shall apply although not expressly stated in the employment contract. These provisions mainly relate to rights arising in virtue of the employment relationship, such as the right to compensation in case of prohibition of competition after termination of employment, annual vacation, non discrimination, prohibition of forced employment, prohibition of any form of control over the employee's personal effects, safety in the working premises, etc.

In addition, there are obligations to which the employee is bound although not stated in the employment contract, such as the obligations to obedience, due diligence and care and loyalty, liability for damages caused to the employer, etc.

1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

The employer shall observe, inter alia ; the minimum age of the employee (i.e., 18 years; the employment of persons between 16 and 18 years of age is permitted provided that they are not engaged in hard work and the daily working schedule does not exceed six hours per day), the non-discrimination obligation, the obligation to health protection and safety in the workplace (i.e., medical examination), the minimum salary as set out by the relevant decision of the Council of Ministers, the payment of social contributions, etc.

1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Subject to the ALC the collective bargaining agreement contains, inter alia, provisions on employment conditions, on content and termination of the individual employment contracts and on relationships between the contracting parties. It shall not contain less favourable provisions for the employee than the applicable legislation.

The collective bargaining occurs usually at company level.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

Freedom of association is guaranteed by the Albanian Constitution (Art. 50).

The ALC sets out the relevant provisions regarding the establishment and rights of the independent trade unions and professional organisations (whether of employees or employers), focused on protection of the economic, professional and social rights and interests of their members.

The trade union acquires legal personality 60 days after the filing of bylaws with the First Instance Court of Tirana (i.e. Art. 178). The employers' professional organisations should have at least five founding members, while those of employees must have at least

20 founding members (Art. 177.1).

2.2 What rights do trade unions have?

The trade unions are entitled to represent their members in negotiations with the employers on concluding collective bargaining agreements, as well as in negotiations regarding the change of terms and conditions of the existing collective employment contracts.

The trade unions are further entitled to protect the interests of their members before the courts, in order

to oblige the employer to observe the provisions of the employment law, collective employment contract or individual employment contracts.

They may be organised in organisations of a larger level such as federations (composed of at least two trade unions) and confederations (composed of at least two federations), and may become members of international professional organisations.

Furthermore, subject to Article 197/1 of the ALC, the strikes may be organised only by trade unions.

2.3 Are there any rules governing a trade union's right to take industrial action?

The trade union's right to strike is also guaranteed by virtue of the constitutional law and specifically regulated by the ALC.

Subject to Articles 197 – 197/1 of the ALC only trade unions have the right to strike. In practice, such industrial action is used as ultima ratio by trade unions to enforce the solving of their economic and social requirements.

According to Article 197/3 of the ALC the strike is lawful if it is organised by a legally founded trade union and it aims either the conclusion of a collective employment contract or (if it already exists) the fulfilment of those requirements deriving from the employment relationship, not set forth in the collective contract.

Additionally, the ALC confers protection to striking employees during the strike period (including, without limitation, the prohibition not to dismiss or replace the participants in the strike with new employees, etc.) – Art. 197/2.

Civil officers are not entitled to strike (Art. 19 (f) of the Law on the Status of Civil Officers).

2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

The ALC is silent in relation to the requirements of work councils' establishment, as other jurisdictions do (i.e., German Betriebsrat).

However, subject to Article 21 of law no. 9901, dated 14.04.2008 "On Entrepreneurs and Commercial Companies", as amended, the Employees' Council may appoint employees' representatives at board level of the joint stock company, if agreed between it and the company's legal representative. Nevertheless, there are no further provisions dealing with such an issue.

On the other hand, law no. 10237, dated 18.02.2010 "On Safety and Health at Work" provides for the existence of the Council of Safety and Health at Work, which represents the employees solely in relation to health and security issues at the workplace.

2.5 In what circumstances will a works council have co- determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

This is not applicable.

2.6 How do the rights of trade unions and works councils interact?

This is not applicable.

2.7 Are employees entitled to representation at board level?

Please see our answer to question 2.4 above.

3 Discrimination

3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Albanian legislation prohibits any form of discrimination against employees.

To this effect, protection against discrimination is guaranteed by the Albanian Constitution (Art. 18), ratified international conventions, the ALC, Law no. 10221, dated 04.02.2010, "On Protection from Discrimination", Law no. 9970, dated 24.07.2008, "On Gender Equality", the acts of the Commissioner for Protection from Discrimination, etc.

3.2 What types of discrimination are unlawful and in what circumstances?

Subject to the ALC any form of discrimination, irrespective of the circumstances (i.e., pre-hire and post-hire), based on, inter alia , race, colour, gender, age, civil status, religion, political beliefs, nationality, social origin, mental or physical disabilities, pregnancy, etc., is unlawful and therefore prohibited.

3.3 Are there any defences to a discrimination claim?

If the employee claims before a court to be the subject of his/her employer's discriminatory action (i.e., dismissal), the latter shall provide evidence showing that such action does not have a discriminatory basis.

3.4 How do employees enforce their discrimination rights?

Can employers settle claims before or after they are initiated? The employees may file a lawsuit before the competent court. The claims may be settled before and after being initiated.

3.5 What remedies are available to employees in successful discrimination claims?

The termination of the employment contract based on discrimination features, as indicated in question 3.2 above, is considered as termination without reasonable grounds (Art. 146.3 of the ALC). In such case the employee is entitled to an indemnification up to one year's salary plus the salary that he/she should have received during the notice period.

Accordingly, civil servants must be returned to the same work position, if stated in a final court decision.

3.6 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

Albanian legislation provides the same protection from discrimination for any type of employee.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Subject to Albanian legislation female employees are entitled to:

- 365 days of maternity leave – in case of one child (including 35 days before and 42 days after childbirth); and
- 390 days of maternity leave – in case of more than one child (including 60 days before and 42 days after childbirth).

4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

During maternity leave female employees benefit from payments from the Albanian Social Security Institute, consisting of:

- 80 per cent of the average of the estimable daily salary of the last calendar year, for the period before birth and the period of 150 calendar days after birth; and
- 50 per cent of the average of the estimable daily salary of the last calendar year, for the remaining period.

It is to be noted that the employee must have contributed to the social contribution scheme for at least 12 months in order to receive the maternity payments as above.

Moreover, the termination of the employment contract during the period the woman benefits from childbirth or adoption allowances from the social securities, is invalid. If the contract termination has been notified before commencement of the protection period (i.e., 35 days prior to and 42 days after childbirth), the notice term (if not expired) will be suspended during such period (Art. 107 of the ALC).

4.3 What rights does a woman have upon her return to work from maternity leave?

A woman returning from maternity leave must be assigned to the same work position. She cannot be obliged: (i) to carry out hard or dangerous work which may jeopardise her health and/or child's health; (ii) to start work before 05:00 a.m. in the summer (06:00 a.m. in the winter) and to continue to work after 20:00; and (iii) to work during the night. She is also entitled to paid work breaks during the day, not less than 20 minutes for every three hours of ongoing work.

Female employees are entitled to paid and/or unpaid leave (as better described in question 4.5 below) in relation to indispensable parental care. If the employer terminates the employment after maternity leave, it is obliged to provide evidence that such termination did not occur due to childbirth.

4.4 Do fathers have the right to take paternity leave?

The ALC is silent in this regard. Currently, only employees working in the public sector are entitled to three days of paid paternity leave.

However, with the draft-amendment to the ALC expected to be adopted by the Albanian parliament, fathers have the right to three days of paid parental leave.

4.5 Are there any other parental leave rights that employers have to observe?

Subject to Article 132.1 of the ALC the employee shall benefit: (i) up to 12 days of paid leave per year, due to mandatory care for children in custody; (ii) up to 15 days of paid leave, in case of illness of children up to three years of age, provided that the illness is supported by a medical certificate; and (iii) up to 30 days of unpaid leave if parental care is needed.

4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependants?

As already mentioned in question 4.3 above, the ALC entitles female employees returning from maternity leave to work flexibly (i.e., they should not carry out hard work or work during night hours, are entitled to several work breaks during working hours, etc.).

5 Business Sales

5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

According to Article 138.1 of the ALC, in case of business transfer (i.e., sale) all rights and obligations deriving from valid employment contracts with the employees, in effect until the moment of transfer, shall be transferred to the transferee (i.e., buyer).

5.2 What employee rights transfer on a business sale?

How does a business sale affect collective agreements? As mentioned in question 5.1 above, the business sale does not affect the validity of the employment contracts in place at the moment the transfer occurs. Therefore, all rights and obligations arising in virtue of the employment contracts currently in place shall pass to the transferee.

The ALC does not explicitly regulate the impact of the business sale on collective employment agreements. Nevertheless, as far as the individual employment contracts are grounded on valid collective employment agreements, the latter will be also transferred to the transferee.

5.3 Are there any information and consultation rights on a business sale?

How long does the process typically take and what are the sanctions for failing to inform and consult? The transferor (i.e., previous employer) and the transferee (i.e., buyer) are obliged to inform the employees (in the absence of trade unions) on the business transfer, at least 30 days before its occurrence. Simultaneously, they must carry out consultations with the employees regarding the measures affecting them due to such transfer.

The employer, who terminates an employment contract to the detriment of the employee without observing the foregoing procedures, is obliged to indemnify the latter with up to six monthly salaries plus the salary he/she should have received during the notice period.

5.4 Can employees be dismissed in connection with a business sale?

The dismissal of the employee due to business transfer – except when occurring for economic, technological or structural reasons – is invalid.

5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

Both the transferor and transferee are obliged to observe the obligations deriving from the employment contract until the end of the contractual notice period or the term set out in the employment contract.

6 Termination of Employment

6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

The employer willing to terminate an employment contract (whether for limited or unlimited duration) during the probationary period, must serve a notice period of five days to the employee.

Additionally, the ALC provides for the following notice periods in relation to employment contracts with unlimited duration:

- two weeks, during the first six months of the employment;
- one month, during the first year of employment;
- two months, for two up to five years of employment; and
- three months for more than five years of employment.

The foregoing terms may be amended by the parties by mutual agreement in the individual or collective employment agreement. In any case, the notice period shall not be less than two weeks, for up to six months of employment and less than one month, for more than six months of employment.

6.2 Can employers require employees to serve a period of “garden leave” during their notice period when the employee remains employed but does not have to attend for work?

Subject to the ALC the employment relationship terminates at the expiry of the notice period (Art. 141). Upon instruction of the employer, the employer may either exercise his/her work until the end of the notice period or leave the premises starting the day as mentioned in the notice period.

6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

The employer is obliged to comply with the termination procedure (see question 6.6 below) and the notice period (see question 6.1 above) as provided under the ALC. The employee cannot be dismissed for unreasonable grounds, as per Article 146 of the ALC (i.e., discrimination motives, motives related to membership or not in trade union activities, etc.).

The employee shall be deemed as dismissed when the employer terminates the employment contract (whether with immediate effect or at the end of the notice period). No third party consent is required in case of dismissal. Exemption is made in case of termination of the employment relationship with employee(s) being representative(s) of an employee’s trade union. In such case the consent of the relevant trade union is required.

Otherwise the termination shall be held invalid (Art. 181.4 of the ALC) unless it occurs due to violation by the employee of the law, the individual employment contract, the collective employment contract or the employer proves that the termination is necessary for business activity purposes.

6.4 Are there any categories of employees who enjoy special protection against dismissal?

The ALC prohibits the termination of the employment for employees:

- carrying out the military service;

- benefiting allowances for temporary disability from the employer or Albanian Social Security Institute, for a period of time of up to one year; and
- being on a vacation granted by the employer.

6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

The employer may terminate the employment contract in compliance with the relevant provisions of such contract. Additionally, Article 153 of the ALC entitles either party to terminate the employment contract with immediate effect for reasonable causes, which consist of those serious circumstances that according to the good faith principle do not allow the continuation of the employment relationship (i.e., breaches of the obligations to duty care at work (Art. 24) and loyalty (Art. 26)). Nevertheless, the court will decide, if a termination cause is grounded or not.

Dismissal for economic, technologic and structural reasons is also allowed (Art. 138.3 of the ALC). In case of termination of the employment relationship the employee is entitled to (i) the salary for the duration of the notice period, (ii) the compensation for the accrued annual leave and (iii) the seniority bonus, if the employment relationship lasted at least three years. Subject to article 145.2 of the ALC the seniority bonus consists of at least 15 days’ salary over each year of employment and is calculated over the salary existing at the moment of termination of the employment relationship. In case of variable salary, the seniority bonus will be calculated over the average salary of the previous year and will be indexed.

6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

The employer must serve a prior written notification to the employee, informing the latter about its intention to terminate the employment relationship and also invite it in a meeting to discuss about the termination reasons. The notification must be delivered at least 72 hours before the meeting takes place. Should the employer decide to continue with the termination procedure, the decision for termination of the employment must be notified to the employee, in writing, not earlier than 48 hours after the meeting and not later than one week from it.

6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

If dismissed, the employee may pursue legal actions before the competent court, challenging the dismissal for procedural breaches and/or material breaches. Failure to comply with the termination procedure the employee must be indemnified with, inter alia, two monthly salaries. In case of termination of the

employment without reasonable cause, the employee must be indemnified with up to one year salary, the salary that the employee should have received during the notice period plus, the accrued annual leave, and the relevant seniority bonus (if applicable).

In case of immediate termination of the employment without justifiable cause, the employee is entitled to the salary he/she should have received during the notice period or until the end of the employment contract (in case of contracts with limited duration), an indemnification not exceeding one year salary plus the relevant seniority bonus (if applicable). The same rule shall apply for breaches of the notice period.

6.8 Can employers settle claims before or after they are initiated?

Claims may be settled both before and after being initiated.

6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

According to Article 148.1 of the ALC, the following is considered collective dismissal: the termination of the employment on the employer's initiative for reasons not related to the employees, provided that the number of dismissed employees (within 90 days) is at least: 10 for companies having up to 100 employees; 15 for companies with more than 100 and up to 200 employees; 20 for companies with more than 200 and up to 300 employees; and 30 for companies having more than 300 employees.

The employer intending to apply mass dismissals is obliged to provide written notice to the recognised employees' representative organisation. In its absence, the employer must notify the employees by placing visible notifications at the workplace (Art. 148.2).

Such notification should contain, inter alia, the reasons for such action, the number of employees to be dismissed, and the time-frame during which the dismissals shall occur. It is also obliged to notify in writing the Ministry of Labour and Social Affairs ("MLSA").

Afterwards, the employer must attend consultations with employees' representatives within 20 days from the notice date, attempting to achieve an agreement on mass dismissals. Subsequently, it must inform the MLSA on their result. If no agreement has been achieved during such consultations, the MLSA will assist the parties to conclude an agreement, within the foregoing period (Art. 148.3 – 148.4).

Finally, at the end of the foregoing period the employer must deliver notice to the employees planned to be dismissed, in compliance with the notice terms indicated in question 6.1 above.

6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

The employees may challenge the dismissals before the courts.

The employees dismissed in violation of the foregoing procedures must be indemnified with up to six monthly salaries, plus the salary they should have received during the relevant notice period, or the amount of indemnification due in case of breach thereof.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Pursuant to the ALC the employee is not allowed to be engaged during the employment period in any work paid by any third parties and/or to disclose employer's manufacturing and business secrets (Art. 26).

The ALC provides also for the conclusion of an anti-competition agreement covering the post-employment period (Art. 28). Accordingly, the employee undertakes, upon termination of the employment contract, not to compete with the employer and especially not to establish a competitive enterprise, work for, or be interested in it.

7.2 When are restrictive covenants enforceable and for what period?

The employee is not allowed to work for third parties, if such work may harm or compete with the employer. Such covenants are valid during the entire employment period.

The anti-competition agreement concerning the post-employment period must be in writing and is enforceable only if: (i) the employee is at least 18 years old; (ii) the employment enables him/her to have knowledge of the employer's manufacturing or business secrets and if their use may seriously harm the latter; and (iii) the employee will receive a remuneration of not less than 75 per cent of the salary he/she would have received if continuing to work for the employer. The agreement is valid only for one year.

7.3 Do employees have to be provided with financial compensation in return for covenants?

Please see our answer to question 7.2 above.

7.4 How are restrictive covenants enforced?

The covenants are enforceable before the courts. In case of breaches, the employee must indemnify the employer for the damage caused.

8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

Subject to Article 7.1 of the ALC, disputes arising in virtue of employment relationships shall be settled by the First Instance Court of the defendant's location. Employment-related disputes may also be settled by the First Instance Court of (i) the location where the employee usually performs its work, or (ii) the location where the employer's seat is situated (when the employee performs its work in different locations) (Art. 7.2).

Generally the trial for work-related disputes is held before a single judge. Exception is made for disputes involving a value which exceeds ALL 20 million (approximately EUR 142,857) which, upon request of one of the parties during the preliminary hearing, will be examined by a college composed of three judges.

8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

The employment-related complaints are ruled by the Albanian Civil Procedure Code ("ACPC"). The ACPC does not provide for any special procedure with regard to employment-related complaints, which may differ from those applicable for normal civil complaints. Subject to Article 25 of the ACPC courts should previously try to reconcile the parties.

8.3 How long do employment-related complaints typically take to be decided?

Usually, it may take approximately six months.

8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

First instance court decisions may be challenged before the competent court of appeal (composed by three judges). Such decision may take approximately one year.

EMPLOYMENT & LABOUR LAW 2013, KOSOVO



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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The main law governing the employment area in Kosovo is the Law no. 03-L-212 “On Labour” (hereinafter the “Labour Law”), which was published on 1 December 2010 in the Official Gazette no. 90 and entered into force on 15 December 2010.

1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

Pursuant to the Labour Law in Kosovo the following categories of employees shall enjoy special protection: women; persons under the age of eighteen (18); and persons with disabilities. However, all employees are entitled to have the protection of their rights in compliance with the Labour Law.

1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

According to the Labour Law, an employment contract has to be concluded in written form.

1.4 Are any terms implied into contracts of employment?

The Labour Law determines the following minimum terms that should be implied into the employment contracts:

- data on the employer (designation, residence and business register number);
- data on the employee (name, surname, qualification and dwelling);
- designation, nature and the form of labour and/or services as well as the job description;

- the place of work or a statement that work is performed at various locations;
- working hours and working schedule;
- the date of commencement of work;
- the duration of the employment contract;
- the basic salary and any other allowance or income;
- the vacations period;
- termination of employment relationship; and
- other data that the employer and employee deem important for the regulation of the employment relationship.

1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

Besides the minimum terms that employers have to take into consideration when drafting an employment contract (please refer to question 1.4 above), there are additional terms and conditions that are set down by the Labour Law, such as; the probation period cannot last more than six (6) months, the practical work of an intern with high qualifications (university and/or post-graduate diploma) should not last more than one (1) year, the working week includes forty (40) working hours, overtime shall not exceed eight (8) working hours per week, the employee is entitled to at least four (4) weeks of annual leave within a calendar year, it is forbidden to conclude an employment contract with a person under the age of fifteen (15), etc.

The Labour Law obliges the employer to report the employee at the Kosovo Tax Administration (the “KTA”) and the Kosovo Trust Agency (the institution that administrates the obligatory pension schemes).

1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

The Labour Law recognises the term of collective agreement, which is an agreement between employers' and employees' organisations regulating the rights, duties and responsibilities deriving from employment relationships on the basis of the agreement reached. The collective agreement may be entered into at state level, branch level or enterprise level. The collective agreement can not include provisions that limit the rights of the employees or that are less favourable than those provided under the Labour Law.

Usually the bargaining takes place at company level.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

The Labour Law stipulates that freedom of association and action without undue interference from any other organisation or public body is guaranteed for both employees and employers.

The rights and freedoms of trade union organisations in Kosovo is regulated by the Law no. 04/L-011 "For Organising Trade Unions in Kosovo" (hereinafter the "Trade Union Law").

The Trade Union Law sets the criteria based on which is defined the right of trade union's representation: (i) registration of trade union with the competent authority within the Ministry of Labour and Social Welfare; and (ii) number of registered members with membership cards and payment slips.

2.2 What rights do trade unions have?

Pursuant to the Trade Union Law, a trade union has the right to enjoy all the rights of a legal person in accordance with the legal provisions: to acquire the right of representation in respect of collective contracts and agreements with employers within the authority of social dialogue; the right to manage its resources for the protection of the rights of employers; as well as the right to identify the wealth and property.

2.3 Are there any rules governing a trade union's right to take industrial action?

The Trade Union Law determines the right to strike as an elementary right of the employees and trade unions which is guaranteed by the Law no. 03/L-200 "On Strikes", as amended (hereinafter the "Strikes Law").

According to the Strikes Law, in order to be considered legal, the strike should be organised by a trade union that has the role of a legal person and is registered in the Ministry of Labour and Social Welfare.

2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

Employers are not required to set up works councils.

2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

Following the answer given to question 2.4 above, such circumstances are not determined.

2.6 How do the rights of trade unions and works councils interact?

The law is silent with respect to the interaction between these two bodies.

2.7 Are employees entitled to representation at board level?

The law is silent in this regard. However; this may be regulated between the parties.

3 Discrimination

3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

The Labour Law provides protection from any discrimination including exclusion or preference made on the basis of race, colour, sex, religion, age, family status, political opinion, national extraction or social origin, language or trade union membership which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation capacity building.

3.2 What types of discrimination are unlawful and in what circumstances?

When a specific job could be performed by a person with disabilities, the direct or indirect discrimination of such persons during employment, promotion and capacity building process, is prohibited.

Moreover, in case of hiring new employees, the employer is obliged to create equal opportunities and criteria to both male and female applicants, without any gender discrimination.

3.3 Are there any defences to a discrimination claim?

Discrimination claims are regulated by the Anti-Discrimination Law (Law no. 2004/3).

Any claim of discrimination under the above-mentioned law shall be decided or adjudicated in accordance with the applicable law by administrative bodies and courts of competent jurisdiction, which have jurisdiction over the concrete issue covered by the claim.

3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Employees may enforce their discrimination rights by initiating claims before the competent bodies of the company or institution where they work. Based on the Labour Law, the employer has to decide on the claim within fifteen days (15) days from the day when the request was submitted.

In cases where the employee is not satisfied with the employer's decision, he/she can file a claim before the competent court within thirty (30) days.

3.5 What remedies are available to employees in successful discrimination claims?

According to the Anti-Discrimination Law, compensation exists for both pecuniary and non-pecuniary damages suffered by victims of violations. Such compensation may include restitution of all rights and other remedies, provided within the applicable law which the competent body deems appropriate.

3.6 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

An employee working part-time is entitled to all the rights deriving from the employment relationship on the same basis as a full-time employee.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Female employees are entitled to twelve (12) months of maternity leave to be taken upon a medical certificate forty-five (45) days before giving birth or, if consented by the woman, twenty-eight (28) days before the expected childbirth. The first six (6) months of maternity leave are compensated with seventy per cent (70%) of the salary payable by the employer, the consecutive three (3) months are compensated with fifty per cent (50%) of the salary payable by the Government of Kosovo and the last three (3) months are not subject to monetary compensation.

4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

Besides the right on the paid annual leave that we have described under question 4.1 above, a female employee does not have any other financial benefits.

4.3 What rights does a woman have upon her return to work from maternity leave?

A female employee during pregnancy, maternity leave or with a child up to three (3) years of age cannot be reassigned to other posts without her consent.

In case a born child necessarily requires special care due to poor health conditions or a child with permanent disabilities, one of the parents will be able to work part-time, after the expiry of the maternity leave, until the child becomes two (2) years old.

Moreover, pregnant and breastfeeding women shall be prohibited from labour that is classified as harmful for the health of the mother or the child (e.g., work during night shifts).

4.4 Do fathers have the right to take paternity leave?

Paternity leave consists of two (2) days' paid leave at the birth or upon adoption of the child and two (2) weeks' unpaid leave after the birth or upon adoption of the child, at any time before the child reaches the age of three (3).

Notwithstanding the above, the Labour Law foresees that in case of sickness, abandoning of the child and/or death of the mother, all maternity rights may be exercised by the father.

4.5 Are there any other parental leave rights that employers have to observe?

Except the cases when one of the parents is entitled to work part-time when a born child requires special care (please refer to the answer given to question 4.3 above), the Labour Law also foresees the case when a female employee gives birth to a dead infant or if the child dies before the expiry of maternity leave.

In such case, the woman is entitled to maternity leave at the doctor's recommendation, until the recovery from birth and the psychological condition caused with the loss of the infant for no less than forty-five (45) days, during which period she shall be entitled to all entitlements under the maternity leave.

4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependants?

Parents are entitled to a part-time job in the cases described under question 4.3 above. However, the dispositions of the Labour Law do not foresee any other flexibility for employees if they have responsibility for caring for dependants.

5 Business Sales

5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

The Labour Law stipulates that in case of a business sale employees do transfer to the new employer (i.e., the buyer).

The new employer shall take over all obligations and responsibilities of the employment relationship

that are applicable on the day of the business sale, in compliance with the collective and employment agreement.

5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

As described under question 5.1 above, all obligations and responsibilities of the employment relationship shall be transferred to the new employer.

5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

The previous employer (i.e., the seller) is obliged to inform all employees of the transfer of obligations and responsibilities to the next employer (i.e., the buyer). Such information must be given in written form.

The seller has an additional obligation to inform properly and entirely the buyer of the rights and obligations that will be transferred from the collective and employment agreement.

5.4 Can employees be dismissed in connection with a business sale?

The employee may be dismissed, if he/she refuses the transfer of the employment contract or does not declare within five (5) days from the day the announcement is given by the previous employer (i.e., the seller).

5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

The new employer is obliged to take over all obligations and responsibilities deriving from the employment relationship that was subject to the business transfer. However, the Labour Law does not stipulate any restriction as it concerns any change of the terms and conditions as long as those changes are in compliance with the Labour Law provisions.

6 Termination of Employment

6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

According to the Labour Law the notice of termination of the employment has to be given to employees. The notice period is determined by the terms of the employment contract (i.e., indefinite period or fixed-term).

In case of the indefinite term the notice period shall be as follows: (i) from six (6) months to two (2) years of employment, the notice given should be thirty (30)

calendar days; (ii) from two (2) to ten (10) years of employment: forty-five (45) calendar days; and (iii) over ten (10) years of employment: sixty (60) calendar days.

Meanwhile, the employer who does not intend to renew a fixed-term contract must inform the employee at least thirty (30) days before the expiry of the contract.

6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

The employer may deny the employee access to the premises of the enterprises during the period of notification, namely prior to terminating the employment contract.

6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

As foreseen by the Labour Law, employees enjoy protection of their rights including their right against dismissal. Besides the court, there is another public institution that provides support for employees on exercising their rights. An employee may submit an appeal to the Labour Inspectorate at any time for issues falling under the competencies of this institution. Moreover, employment disputes may also be resolved through mediation.

Consent from a third party is not required before dismissal.

6.4 Are there any categories of employees who enjoy special protection against dismissal?

There are categories that enjoy special protection against dismissal. Pursuant to the Labour Law, during pregnancy, maternity leave and absence from work due to special care for the child, the employer shall not terminate the contract, except in cases of collective dismissals as described under question 6.9 below.

6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

An employer may terminate the employment contract of an employee, when: (i) such termination is justified for economic, technical or organisational reasons; (ii) the employee is no longer able to perform the job; (iii) it is impracticable for the employer to transfer the employee to another place; (iv) the employee is guilty of repeating misconduct or breach of obligations; and (v) the employee's performance remains dissatisfactory in spite of the written warning.

As concerns business-related reasons, the employer is entitled to collective dismissals when a business transfer is taking place.

The employer is obliged to execute the salary and other allowances up to the day of termination of the employment relationship. In case of collective dismissal, the employer is obliged to provide the severance payment to the employees with indefinite period employment contracts at the following scale: from two (2) to four (4) years of service, one (1) month's salary; from five (5) to nine (9) years of service, two (2) months' salary; from ten (10) to nineteen (19) years of service, three (3) months' salary; from twenty (20) to twenty-nine (29) years of service, six (6) months' salary; and from thirty (30) years of service or more, seven (7) months' salary.

6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

An employer is obliged by the Labour Law to follow certain procedures when it comes to individual dismissals. Some of the procedures as stipulated by the law are described below:

- (i) An employer shall notify the employee about his/her dismissal immediately after the event which leads to this decision or as soon as the employer has become aware of it.
- (ii) The employer has to issue a written notification to the employee, explaining the unsatisfactory performance and giving him/her a specified period of time within which they must improve their performance.
- (iii) The employer must give a statement stipulating that the failure to improve the performance shall result in dismissal from work without any other written notice.
- (iv) The employer should hold a meeting with the employee to explain termination of an employment contract.
- (v) The decision to terminate an employment contract shall be issued in writing and shall include the grounds for the dismissal.

6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

If the claim is being initiated before the court and the decision is given in favour of the employee, the court shall order the employer to do one of the following, depending on the claim:

- (i) to pay the employee compensation, additional to any allowance and other amounts to which the employee may be entitled under the Labour Law, the employment contract, a collective agreement or the employer's internal act, in such amount as the court considers just and equitable, but which shall not be less than twice the value of any severance payment to which the employee was entitled at the time of dismissal; or

- (ii) in cases where the dismissal is deemed unlawful under the reasons of discrimination, the court may reinstate the employee in his or her previous employment and orders compensation of all salaries and other benefits lost during the time of unlawful dismissal from work.

6.8 Can employers settle claims before or after they are initiated?

Employees may initiate claims before the competent bodies of the company or institution where they work. As described under question 3.4 above, the employer has to decide on the claim within fifteen days (15) days from the day when the request was submitted. In case when the employee is not satisfied with the employer's decision, he/she can file a claim before the competent court within thirty (30) days.

6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

The Labour Law determines that where dismissals include at least ten per cent (10%) of the employees but not less than twenty (20) employees are discharged within a six-month (6) period, it shall be considered as collective dismissal.

In such cases the employer has the obligation (i) to notify its employees and, where applicable, the employees' trade union(s) one (1) month in advance in writing of the changes planned and their implications, (ii) to notify in writing the Employment Office (the "EO") about the termination of the employment, so the EO can be able to provide assistance on finding new jobs for the dismissed employees, and (iii) to provide the severance payment to the employees with indefinite period employment contracts at the scales described under question 6.5 above.

In case when, within a period of one (1) year from the termination of the employment contracts of employees, the employer will decide to hire persons with the same qualifications or training, the employer shall not hire other persons before offering to hire the employees whose contracts have been terminated.

6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

Pursuant to the Labour Law, the employees may enforce their rights through the courts. If the court finds that the employer's cancellation of the employment contract is unlawful, it shall order the employer to pay the employee compensation, additional to any allowance and other amounts to which the employee may be entitled, in such amount as the court considers just and equitable, but which shall not be less than twice the value of any severance payment to which the employee was entitled at the time of dismissal.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

The law on the protection of personal data and the relevant laws on intellectual property rights determine some of the most common and recognised covenants in Kosovo. However, additional covenants may be imposed by the employer (e.g., nondisclosure and noncompetition agreement).

7.2 When are restrictive covenants enforceable and for what period?

The restrictive covenants are usually enforceable during and/or after termination of the employment contract.

7.3 Do employees have to be provided with financial compensation in return for covenants?

The law is silent with regard to financial compensation in return for covenants. However, such compensation remains an optional choice to be settled between the parties.

7.4 How are restrictive covenants enforced?

Restrictive covenants are enforced in accordance with the laws of Kosovo and any disputes unsettled amicably between the parties shall be subject to jurisdiction of the competent court.

8 Court Practice and Procedure

8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

Currently, the justice system in Kosovo is going through a transitional process of restructuring of courts. This process started from January 2013 as stipulated by the Law no. 03/L-199 "On Courts".

Pursuant to the above-mentioned law, the Basic Courts, as the first instance courts, are competent to decide on employment-related complaints. All cases before the Basic Court shall be heard by one (1) professional judge.

8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

The dispositions of Law no. 03/L-006 "On Contested Procedures", as amended, will be applied as it regards to the procedure of employment related complaints. Conciliation is not mandatory in order to proceed with a complaint.

8.3 How long do employment-related complaints typically take to be decided?

Due to the restructuring process and the load of work that the courts are currently facing, the complaints may take quite a long time to be decided.

8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

The appeal against a first instance decision is possible at the second instance court (i.e., the Court of Appeals). The Court of Appeals is competent to review all appeals from decisions of the Basic Courts and the decision usually takes less time compared to the first instance court.

ALBANIAN LABOR CODE IS ENHANCED BY NEW HEALTH AND SAFETY LAW



Renata Leka



Besa Tauzi (Velaj)

In February 2010 a new law (no. 10237 “On health and safety in working premises”) came into force. This Law intends to better integrate the actual legal environment in relation to security and safety conditions of employees in the working premises. The law stipulates that employers must abide by the mandatory security and safety standards in every working area. Employers must eliminate risk factors and provide training, information and consultation services for their employees.

The Albanian Labor Code (Law no. 7961 dated 12.07.1995 “The Labor Code in Republic of Albania” as amended) is mostly focused and oriented to provide extensive protection to employees in the framework of the employment relationship. It provides for, but is not limited to, the rights and obligations of employer and employees and key features that the employment contract should contain, for the formalities to be observed in the framework of the employment relationship and for the working conditions to be provided to the employee.

The section on working hours and overtime occupies a relevant part of the Albanian Labor Code, so as the section on employment relationship termination which provides for the types of employment relationship recognised by the Albanian Labor Code and procedures to be observed in case of termination of the employment relationship. It is to be noted that not much space is given to the Collective Agreements though some articles provide for its requirements and other issues of termination.

The Albanian Labor code, as well as the employment legislation and practice in Albania are in continuous development. Despite this, the informality of employment relationships remains a constant pressing issue. There are cases where the employment relationship is not governed by an employment contract between parties, explained Renata Leka and Besa Tauzi, partner and assistant manager at Boga & Associates. “This causes avoidance of responsibilities for the employer and privation for the employee from the rights recognised by the Albanian Labor Code. Further, in the ambit of the recent introduction of the new provisions on health and safety in working premise, there are cases where technical conditions for health safety in the working premises, especially for those areas of business where considered as “risky” i.e. manufacturing, construction activities, etc. as provided under the Albanian Labor Code still need adequate improvements”. However, the new law is expected to provide for a better environment in terms of safety in the working premises.

The employment law team at Boga & Associates advises on all areas of employment law.

“Our firm is mostly engaged in providing legal advice to local and international companies being in the position of employer and in dispute resolutions deriving from employment relationships. When advising our clients or when we are asked to draft the employment contract governing the employment relationship we are strongly committed to ensure full compliance with the labor law by the employer and remind the later compliance with all rights, guarantees and technical conditions required by the Albanian Labor Code to be complied with,” commented Ms Leka and Ms Tauzi.

TERMINATION OF UNLIMITED DURATION EMPLOYMENT CONTRACTS, ALBANIA



Renata Leka

Published at www.meritas.org, European Employment Law Insights.

The most common problems currently facing employers in Albania relate to termination of individual employment contracts entered into for an unlimited duration. Although the country's Labor Code (law no. 7961, 12 July 1995) sets out clear provisions regarding the procedures, timing and grounds for termination of such contracts, it is essential for employers to strictly follow provisions regarding the relevant procedure and subsequent notification periods.

For additional guidance, employers can look to the judgment of the Albanian Supreme Court in *Kloboshtica vs. Italian Institute of Foreign Trade* (decision no.19, nr reg. 12/5, 15 November 2007). The court ruled that compliance with the procedure and notification period entitles the employer to terminate the employment contract for unlimited duration without adducing any grounds to its decision. An exception however, is cases where the termination is based on abusive grounds such as nationality, social conditions, religious belief, race, color, age, familiar obligations, political views, pregnancy, civil status, social status or sex of the employee (the 'negative list' cited in the Labor Code). Termination by the employer based on the exercise by the employee of a constitutional right that does not violate any obligations deriving from the employment contract or on grounds relating to an employee's membership, or non-membership of a trade union established in accordance with the law, or due to participation in a union activity in accordance with the law, will also be held invalid and may lead the court to award the employee damage relief of up to one year's salary.

Any employer intending to terminate a contract for unlimited duration should ensure they provide written notice, to be delivered to the employee at least 72 hours before the explanatory meeting is due to take place. They must also provide written notice on termination, delivered to the employee not before 48 hours has elapsed following the meeting, and up to one week after the meeting. The termination shall be effective with the elapse of the notice period (which based on duration of employment may vary from one to three months).

Non compliance with the procedure and notification period term opens the employer up to payment of two months salary (in case of non compliance with the procedure); payment of a month's salary to the employee for the notice period; and eventual payment of the accrued leave and seniority bonus.

To avoid eventual legal consequences, employers should: set out clear provisions regarding the termination procedure and term of notification for termination in the employment contract; avoid the application of grounds for terminations that would fall under the 'negative list' and that might be considered as abusive; respect the obligatory procedure of termination and notification terms provided by the Labor Code; and maintain copies of the notification in writing delivered to the employee, as well as copies of the confirmation and evidence that the employee received the notification, plus minutes of the meeting, which must be signed by both parties.

LITIGATION

LITIGATION AND DISPUTE RESOLUTION 2014, ALBANIA



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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Albania got? Are there any rules that govern civil procedure in Albania?

The legal system of Albania is based on the continental judicial system and the courts are led by the law. Civil procedure in Albania is governed by the Civil Procedure Code (hereinafter referred to as the CPC), approved with law no.7850, dated 29.07.1994, amended by law no.8536, dated 18.10.1999, law no.8781, dated 03.05.2001, law no.17/2012 and law no.121/2013.

1.2 How is the civil court system in Albania structured? What are the various levels of appeal and are there any specialist courts?

According to the law no.9877, dated 18.2.2008 “On Organization of the judicial system in the Republic of Albania”, the civil court system is organised in the following structures:

- (i) District Court;
- (ii) Appeal Court; and
- (iii) Supreme Court.

There are 2 levels of appeal: (i) Courts of Appeal; and (ii) the Supreme Court.

The first instance of the Albanian court is organised in specialised sections for allocation of the particular cases according to the subject of the claim, such as: (i) section for civil disputes; (ii) section for family disputes; and (iii) section for commercial disputes.

With the law no. 49/2012 “On Organization and Functioning of the Administrative Courts and Adjudication of the Administrative Disputes”, the specialised courts for adjudication of administrative disputes are established.

Administrative courts are organised as: (i) Administrative Courts of First Instance; (ii) the Administrative Court of Appeal; and (iii) the Administrative College of Supreme Court.

1.3 What are the main stages in civil proceedings in Albania? What is their underlying timeframe?

The main stages in civil proceedings in the District Court are: (i) filing of the lawsuit with the court; (ii) notification of the lawsuit to the defendant and other parties; (iii) preliminary hearing (i.e. exchange of evidences between the parties); (iv) judicial hearings and examination; (v) last conclusions; and (vi) final decision. Based on our judiciary practice, the preliminary hearing can take place within 1.5 months from the filing of the lawsuit with the court by the plaintiff. The duration of the proceedings in the First Instance Court may last approximately 6-12 months, while a hearing of the appeal before the Court of Appeal takes place within 6-12 months from the filing date. In the Supreme Court the cases may be examined within 3-4 years.

1.4 What is Albania’s local judiciary’s approach to exclusive jurisdiction clauses?

The jurisdiction of Albanian courts is regulated by article 37 of the CPC, which provides that the jurisdiction of Albanian courts cannot be transferred to a foreign jurisdiction by agreement of the parties, except when the legal proceeding is related to an obligation among foreign parties, or among an Albanian and a foreign party (physical person or legal entity), when such exemptions have been stipulated in the agreement.

The exclusive jurisdiction of Albanian courts is also regulated by the law no. 10428, dated 02.06.2011 “On Private International Law”, which provides for several cases when the Albanian courts have exclusive jurisdiction.

1.5 What are the costs of civil court proceedings in Albania? Who bears these costs?

The costs of civil proceedings in Albania are: (i) the judicial tax, expenses for the acts to be carried out (i.e. notification); (ii) the costs for the acts of expertise; and (iii) the lawyers' fees and other necessary expenses occurred during the trial (i.e. expenses for witnesses, different examinations).

The judicial tax is calculated according to the value of the claim. For claims with value up to ALL 100,000, the judicial tax is ALL 3,000, whilst for claims with a value exceeding the amount of ALL 100,000, the judicial tax is 1% of the value of the claim. Such tax is paid by the plaintiff upon filing the claim.

The CPC provides for the obligation of the unsuccessful party to pay the legal costs.

Despite the above, in cases where the claim is partially accepted or when the court finds justified reasons, it may decide for the costs to be paid by the unsuccessful party in proportion with the accepted claim, or that each party should pay its own costs.

1.6 Are there any particular rules about funding litigation in Albania? Are contingency fee/ conditional fee arrangements permissible? What are the rules pertaining to security for costs?

There are no particular rules about funding litigation in Albania. Under the CPC, any person that has a legal, actual and direct interest may file a lawsuit with the court.

The law does not provide specific regulation on the contingency or conditional fee, but permits the lawyer and the client to define the fee in mutual agreement.

Under the provisions of the law no. 9109, dated 17.07.2003, "On the Attorney profession in the Republic of Albania", the remuneration for the service rendered by lawyers is defined:

- (i) in agreement between the client and the lawyer;
- (ii) by the court and the prosecutor's office when the lawyer is nominated ex officio; and
- (iii) by law.

The Albanian legislation does not provide any concrete regulation regarding security costs.

1.7 Are there any constraints to assigning a claim or cause of action in Albania? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

The Albanian legislation does not provide for such a procedure.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

It is not obligatory for the pre-action procedures to be followed by the parties. Under the Civil Code

(article 463), such procedures are mandatory when the obligation of the parties derives from a contract without a predefined term. In such case, before starting the court proceedings, the parties undertake all the necessary actions to resolve the dispute out of court.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The Albanian Civil Code provides various limitation terms according to the types of claims.

The limitation term to file claims deriving from the payment of contractual penalty clauses is 6 months; 1 year for claims deriving from consignment contracts; 6 months for claims deriving from transport contracts of either goods or travellers by railway, vehicles or airplanes; 2 years for claims for the payment of compensations from insurance and reinsurance contracts; 3 years for claims for payment deriving from rent contracts (i.e. apartments, shops and other immovable property); 3 years for claims for payment arising out of contractual duty and the claims for the return of unjust profit.

The Civil Code also provides a general limitation term of 10 years for claims, the limitation terms of which are not provided differently by the law. The limitation terms or any other provision defined in the Civil Code cannot be changed upon agreement of the parties.

The limitation term for claims regarding administrative issues is 45 days from the date of the announcement of the decision of the higher administrative organ which has considered the complaint at an administrative level. Under the Civil Code the limitation term starts from the day when the subject acquires the right to file the claim. The right of a claim that is not exercised within the limitation term defined by law extinguishes and cannot be exercised to any further extent in front of the court.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Albania? What various means of service are there? What is the deemed date of service? How is service effected outside Albania? Is there a preferred method of service of foreign proceedings in Albania?

Under the CPC, the legal proceedings of the case in court start with the submission of the lawsuit by the plaintiff or by his legal representative.

The court should notify the parties the date of the preliminary hearing. The notification is made by the court officer or through the mail service. The court should also provide the defendant and the third parties (if any) with the lawsuit and the evidences submitted by the plaintiff.

The notification of the acts to a foreign state is made upon ordered letter through the Ministry of Justice, which sends such acts to the respective country.

3.2 Are any pre-action interim remedies available in Albania? How do you apply for them? What are the main criteria for obtaining these?

According to article 202 of the CPC, the plaintiff may apply for pre-action interim remedies when there are reasons to doubt that the execution of the decision shall become impossible or difficult.

The court may issue the pre-action interim remedy when:

- a. the lawsuit is based on evidence in writing; and
- b. the plaintiff gives guarantees at the amount and type set by the court for the potential damage that might be caused to the defendant by the injunction measures.

The pre-action interim remedies consist of:

- a. seizure of the debtor's assets; and
- b. other appropriate measures taken by the court, including the suspension of execution.

3.3 What are the main elements of the claimant's pleadings?

Under article 154 of the CPC, the lawsuit should be written in Albanian and must indicate: the competent court; the personal data of the plaintiff, the defendant and their representatives, if there are any; the electronic addresses of the plaintiff and his representative; the cause of action of the lawsuit; the value of the lawsuit when the subject is measurable; the legal base of the lawsuit; the indication of the facts and circumstances, documents and other evidences; the requirements of the plaintiff; and a list of witnesses the plaintiff requires to summon to the court.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Article 185 of the CPC provides that the plaintiff, during the judicial proceedings, has the right to add, reduce or amend the cause of action of the claim without changing its legal base.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

The main elements of defence are the counterarguments and the counterclaim. The defendant has the right to file a counterclaim when it has a related subject with the claim or when compensation can be made between the claim and the counterclaim. The counterclaim can be filed at any time prior to the conclusion of the judicial examination.

4.2 What is the time limit within which the statement of defence has to be served?

The civil proceedings in Albania are adversarial and, based on such a principle, the CPC provides that the defendant may perform his defence throughout the civil proceeding.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on liability by bringing an action against a third party?

Under article 184 of the CPC, when it emerges during the trial that the lawsuit is brought against a defendant to whom it must not have been brought, on the request of the interested party the court may allow the replacement of the defendant by the person against whom the lawsuit should have been brought. For such replacement the court must first receive the approval of both parties and of the person who comes in the place of the defendant.

4.4 What happens if the defendant does not defend the claim?

Under the CPC it is provided that the court resolves the dispute in conformity with the mandatory legal provisions and makes an accurate determination of the facts and actions related to the dispute, without being bound to any determination proposed by the parties. Even when the defendant does not defend the claim or does not take part in the proceedings, the court has the duty to perform a complete and accurate judicial examination and to base its decision only on facts submitted during the legal proceedings.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant has the right to dispute the jurisdiction of the court.

The court, also at any stage of the proceedings, can verify, whether the case falls under judicial or administrative jurisdiction. Decisions regarding jurisdiction issues can be appealed directly to the Supreme Court.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Under the CPC, anyone may intervene in a judicial process taking place among other persons by filing a claim with the court against either both parties or one of them, when he claims partially or totally the right, subject of the dispute. According to article 189 of the CPC, such an action is defined as the main intervention.

The right of a third party to intervene in a legal proceeding when it has interest in supporting one of the litigant

parties is defined as the secondary intervention. Such person joins the party during the proceeding to assist it.

Under the CPC (article 192) the parties may call into the proceedings a third person they believe to have a common case with, or from whom they may request a guarantee or compensation related to the conclusion of the case. Third persons are also summoned by the court if they should be present in a proceeding of interest to them.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

It is possible to consolidate two sets of proceedings when they have connected subjects (article 57 of the CPC).

5.3 Do you have split trials/bifurcation of proceedings?

According to article 159 of the CPC, the plaintiff may present multiple claims in a lawsuit.

The court may decide to consider the claims separately if it decides their joint consideration may cause difficulties in the proceedings.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Albania? How are cases allocated?

Under the CPC the first level of the Albanian court is organised in specialised sections, where cases are allocated according to the subject of the claim. According to article 320 of CPC, the sections are divided as follows:

- (i) section for civil disputes;
- (ii) section for family disputes; and
- (iii) section for commercial disputes.

Regarding the administrative disputes, please refer to Part I, question 1.2 above.

6.2 Do the courts in Albania have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The court rules for all requests of the parties without exceeding the limits of the claim, conducting a fair, independent and impartial trial within a reasonable time frame, and bases its decision upon the evidence presented during the hearings.

During the proceedings, the court, upon request of the parties, may rule on the following interim applications:

- interim injunction;
- amendment of the subject or a change of the legal base of the claim;
- orders for specific disclosure;
- sanctions for the parties that do not comply with the procedure rules;
- unification of claims;
- bifurcation of the case; and
- suspension of the trial process.

Regarding the cost consequences, please refer to Part I, question 1.5 above.

6.3 What sanctions are the courts in Albania empowered to impose on a party that disobeys the court's orders or directions?

The court may impose fines up to ALL 30,000 to parties that disobey the court orders or directions.

6.4 Do the courts in Albania have the power to strike out part of a statement of case? If so, in what circumstances?

The court has the power to strike out the whole or part of a statement of case of its own motion when the claim is not based in law and is not supported by evidence, or the parties are not legitimated to file the claim, or the claim has been filed beyond the legal terms.

6.5 Can the civil courts in Albania enter summary judgment?

The definition of the summary judgment is not regulated in the CPC. The Albanian civil courts are obliged to carry out a complete judicial examination and follow all the proceeding phases before giving a final decision.

6.6 Do the courts in Albania have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Under the CPC the Albanian court has the power to decide to stay the proceeding when:

- the case cannot be solved prior to the termination of another administrative, criminal or civil case;
- the stay of the proceeding is requested by both parties;
- one of the parties dies or the juridical person terminates its activity;
- one of the parties does not possess or has lost the juridical capacity to act and it is necessary to appoint a legal representative for this party; and
- it is required by law.

The court may discontinue the proceedings when:

- none of the parties has requested within six months the recommencement of the suspended

proceeding, when such suspension was decided by the court upon their request;

- the plaintiff withdraws from the case; and
- it is required by law.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Albania? Are there any classes of documents that do not require disclosure?

Under the CPC, the documents should be disclosed by the parties to each other and to the court during proceedings.

The parties should disclose only evidences relevant to the dispute. They are not required to disclose evidence supporting facts widely or officially known.

7.2 What are the rules on privilege in civil proceedings in Albania?

Under article 235 of the CPC, the representatives of the parties cannot be summoned to testify on information they have received in their capacity as representatives. Also, the spouses, children, parents, grandparents, or cousins of the parties until the second line, are included in the category of privilege. They cannot be summoned as witnesses in a civil proceeding, with the exception of cases when their testimony is necessary for the case resolution. The above-mentioned persons cannot be punished in case they refuse to testify. The CPC does not provide specific rules for the disclosure of the documents classified as privileged. However, article 173 of the CPC defines the cases when the hearings are conducted without the presence of the public, such as: when related to the safety of the classified information of national security; when required by the interest of underage persons or the private life of the parties and other persons involved in the process; when involving commercial secrets or industrial patents, of which publication might damage interests protected by law; and the cases when the court reasons that the publication of certain information might prejudice the interest of justice.

7.3 What are the rules in Albania with respect to disclosure by third parties?

The court, upon request of the interested party, may order a third party to submit documents when deemed as necessary. The court may also officially request the public administration authorities to provide the documentation kept on their files or information upon such documentation, if necessary for the proceeding.

7.4 What is the court's role in disclosure in civil proceedings in Albania?

The court supports the disclosure process in a civil proceeding.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Albania?

Under the CPC, the evidence disclosed in a proceeding may be used for this proceeding and for no other purposes. However, in cases when disclosure of evidence has taken place in a public hearing, there are no restrictions for the publication of such evidence.

8 Evidence

8.1 What are the basic rules of evidence in Albania?

Under the CPC (article 213), the parties are permitted to prove the facts they claim during the adjudication process by presenting to the court only evidences related and necessary for the case.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

The evidences should be submitted in accordance with the provisions and principles of the CPC.

Constitute evidence the confessions of the parties; witness testimony; documents; and opinion of experts. The court appoints one or more experts when, for the identification or clarification of facts related to the dispute, a certain expertise in science, technical issues or art is required.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

The proof of fact through a witness is widely accepted by the court, with the exception of the cases when the proof is specifically required through the documents.

The court may summon witnesses upon request of the parties. The witnesses are questioned in the hearing, in the presence of the parties and their representatives.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

Under the CPC, the court appoints the duties to the expert, after taking the parties' opinion. The expert provides a written report. The court and the parties may address questions to the experts regarding the expert's report.

The expert bases his report on the evidences submitted by the parties. However, the expert can also request additional documents and perform verifications, as necessary for the preparation of the report. The expert cannot give legal opinion on the case. The report of the expert is not binding but is assessed by the court in conjunction with the other evidences.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in Albania?

The court plays a supportive role during the disclosure process. The court issues orders for disclosure of evidence by the parties or third persons, if necessary.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Albania empowered to issue and in what circumstances?

The court issues orders, non-final decisions and the final decision. The orders are taken by the court in order to insure that the judgment is carried out in compliance with the provisions of the CPC.

Upon the non-final decisions, the court terminates the adjudication process without solving the merits of the case.

Upon the final decision the court thoroughly resolves the case.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The Albanian courts are entitled to rule on the damages, interests and costs of the litigation through their decisions.

9.3 How can a domestic/foreign judgment be enforced?

Under the CPC a domestic judgment can be enforced by the bailiff, upon request of the interested party. A foreign judgment can be enforced in Albania after being recognised by the competent Court of Appeal, in accordance with the provisions of the CPC.

9.4 What are the rules of appeal against a judgment of a civil court of Albania?

The final decisions of the First Instance Court can be appealed by the parties to the Appeal Court, within 15 days.

The Appeal Court's decisions can be appealed to the Supreme Court within 30 days.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Albania? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

In Albania disputes can also be resolved by arbitration or mediation.

Parties may agree to resolve any potential disputes by arbitration.

Mediation is also applicable in resolving all civil, commercial and family disputes.

Mediation is applicable in cases when it is requested and accepted by the parties, prior or after the dispute has arisen, when it is obligatory by law, and in cases when it is required by the court.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Arbitration proceeding in Albania is governed by the CPC.

Mediation is regulated by law no.10385, dated 24.02.2011 "On disputes resolution through mediation".

1.3 Are there any areas of law in Albania that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Criminal law does not provide for any of the above alternative dispute resolution methods.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Albania in this context?

Under the CPC provisions, the court invites the parties to solve the dispute through mediation. The court may issue interim measures provided by the law (pre or post the constitution of an arbitral tribunal) until the tribunal award is not final.

The court declares lack of jurisdiction/competence if the parties have agreed to arbitration.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Albania in this context?

Under the CPC, the arbitral awards are final and enforceable, except in cases where the law provides for the right of appeal against such awards with the Appeal Court (article 434 of the CPC).

According to the Mediation Law, the settlement agreements reached through mediation are binding for the parties and enforceable in the same manner as arbitration awards. The law does not provide for any sanctions if the parties refuse to mediate. The parties can freely decide to solve the dispute through mediation.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Albania?

The CPC does not provide for consolidated institutions for dispute resolution through arbitration. The arbiters are appointed ad hoc by the parties pursuant to the provisions of the CPC.

On the other hand, the Mediation Law provides for the establishment of the National Chamber of Mediators and the Chambers of Mediators as consolidated institutions for performing the mediation process. The mediators are licensed and registered at the Register of Mediators with the Ministry of Justice. The parties can appoint the mediators for resolution of their dispute from the Register of Mediators.

2.2 Do any of the mentioned alternative dispute resolution mechanisms provide binding and enforceable solutions?

Please refer to Part II, question 1.5 above.

3 Trends & Developments

3.1 Are there any trends in the use of the different alternative dispute resolution methods?

Dispute resolution through arbitration proceedings or mediation is not a commonly used method in Albania. For dispute resolution, the parties usually address the courts.

However, being that the use of mediation results in savings in cost and time, in promoting communication between the parties by offering a wide variety of settlement options and assuring confidentiality, this dispute resolution method is increasing in consideration.

3.2 Please provide, in no more than 300 words, a summary of any current issues or proceedings affecting the use of those alternative dispute resolution methods in Albania.

Considering that dispute resolution through arbitration or mediation is not widely practiced in Albania, there are no current issues or proceedings that have affected the use of such dispute resolution methods.

AMENDMENT TO THE CIVIL PROCEDURE CODE, ALBANIA



Gerhard Velaj

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Background

Part 4 of the Civil Procedure Code (8116/1996) provides the framework for the execution process. The execution process involves the issuance of an enforcement order by the court, which is implemented by the bailiff officer at the request of the creditor or the attorney.

Delays and discrepancies in the execution process have been identified and attributed to the work conducted by the Bailiff's Office. The Ministry of Justice has thus proposed to amend the code in order to make the entire process more efficient, while conforming to the procedural requirements.

Main Amendments

Time limits for the issuance of interim injunctions by the court and appeals against the bailiff's actions will be implemented to avoid delays in the execution process.

The amended Article 202 of the code introduces a five-day time limit for the issuance of interim injunctions. This amendment aims to:

- accelerate the interim injunction procedure;
- prevent the property at issue from being altered; and
- achieve a full and proper execution of the court decision.

The amended Article 610 of the code introduces a 20-day time limit within which the court must process appeals against the bailiff's actions. The amended Article 515 provides for a three-day time limit (from the day of the request) for the execution of the enforcement title. Article 564 of the code introduces a 15-day time limit within which the bailiff officer must perform the valuation of the property.

Debtors' addresses

The inability to obtain full and proper addresses for debtors is a major obstacle for bailiff officers seeking to enforce execution procedures. In order to avoid such situations, the amended Article 522 of the code states that if the address of the debtor is unknown (even after notice has been given), the bailiff officer must serve notice to the court. If the debtor cannot be traced and the court decides to end the case, a copy of the relevant decision must be displayed on the court's premises and at the debtor's previous address. If the debtor cannot be found within 30 days of the decision, an execution procedure will be initiated.

Third auction

Another amendment is the introduction of a third auction in the property sale process. Article 577 of the code provides that if the property fails to sell at the first auction, the bailiff officer has the right to put the property up for auction a second time at 50% of the price. If the property fails to sell at the second auction, the property is transferred to the creditor. However, the amendment will introduce a third auction: if the creditor refuses to take possession, the

property will be put up for auction at 30% of the initial price within three months of the second auction. One drawback is that the price of the property may be higher at the third auction than at the second auction. The draft law will also introduce a third auction for the sale of movable properties (Article 557 of the code). There is no initial price for the sale of movable properties, which may compromise the usefulness of the two previous auctions as potential buyers may buy the property at the third auction at a lower price.

Debtor's property

Section 553 of the code will be amended by abolishing the provisions on the procedure for the resale of movable property in retail shops. Article 602 of the code, which concerns the possession of immovable property by the bailiff officer, will also be amended. The amendment provides that the bailiff officer may demand that possession of the immovable property be transferred to the creditor if the debtor fails to leave the property within a time limit set by the bailiff officer. Article 602, Paragraph 2 establishes the procedure for removing and storing the debtor's movable property. However, the provision does not specify which type of property it refers to (ie, the movable property situated inside the immovable property transferred to the creditor). Therefore, in order to leave no room for interpretation, it would be necessary to include a definition of 'movable property' in Paragraph 2.

Refusal to execute an enforcement title

Article 609(1) has been incorporated into Article 609, which provides that the bailiff officer may refuse to execute an enforcement title. Pursuant to Article 609(d), the bailiff officer may refuse to enforce the executive title if new legal facts obstructing the execution procedure are introduced. Arguably, the facts should be assessed by the court, not by the bailiff officer. Otherwise, Article 609(1)(d) runs the risk of contradicting Article 609, which establishes the cases where (i) the debtor may seek a declaration that the executive title is invalid due to the introduction of new facts, or (ii) the court must rule on the facts.

Comment

These amendments, as well other amendments to the mandatory obligations under the executive title, will help to overcome the obstacles encountered by judicial practice.

REGULATORY

CRIMINAL LIABILITY FOR LEGAL ENTITIES, ALBANIA



Ened Topi

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Albania introduced criminal liability for legal entities through the adoption of the Law on the Criminal Liability of Legal Entities (9754/2007). Under the law, legal entities can be held criminally responsible for the conduct of individuals who act on their behalf and to their benefit.

Criminal liability

The law applies to both national and foreign legal persons (eg, joint stock and limited liability companies, non-profit organizations) and, with a few exceptions, to local governmental bodies, public legal entities, political parties and labour unions.

Offence

A legal entity can be held responsible for a criminal offence committed in its name or for its benefit:

- by its managing body or representatives;
- by a person who is under the authority of the person who runs, represents and administers the legal entity; or
- due to a lack of control or surveillance by the person that runs, represents and administers the legal entity.

According to the law, any individual who, under Albanian legislation and the bylaws of the legal entity, represents, runs, administers or controls the activity and the managing bodies of such entity is considered to be a managing body or a representative of the legal entity.

Penalties

Two types of penalty are imposed on legal entities: principal penalties and supplementary penalties, which are applicable to the offender in addition to the principal penalties. The principal penalties consist of pecuniary fines or compulsory dissolution of the legal entity, while the supplementary penalties may lead to, for example:

- the cessation of one or more of the offending company's activities;
- its temporary receivership;
- a prohibition on participating in public procurement procedures; and/or
- publication of the court decision.

The pecuniary fines range from Lek 300,000 to Lek 50 million, but are not applicable to local government bodies, political parties, unions or public legal persons.

The court can order the compulsory dissolution of the offender where:

- the legal entity was founded for the purpose of committing the criminal offence;
- the legal entity has devoted a significant proportion of its activities to commit the criminal offence;
- the criminal offence has severe consequences; or
- the legal entity is a recidivist.

Comment

Although the law has been in force for nearly three years, it is hard to apply and so far little progress has been made in punishing criminal offences committed by legal entities. This should probably be ascribed to that part of the Albanian judiciary system which remains loyal to the maxim “*societas delinquere non potest*” (“companies cannot be criminals”) and a certain lack of expertise in this particular branch of criminal law.

ANTI-MONEY LAUNDERING FORUM, ALBANIA



Renata Leka

"This article appeared first at IBA Anti-Money Laundering Forum".

Last updated: 08/04/2014

CENTRAL AUTHORITY FOR REPORTING

The General Directorate for the Prevention of Money Laundering (Drejtoria e Përgjithshme e Parandalimit të Pastrimit të Parave (DPPPP)) operates as the Albanian National Financial Intelligence Unit (FIU). It is the national centre for collecting, analysing and distributing information relating to potential money laundering activities.

OTHER ANTI-MONEY LAUNDERING REGULATOR(S)

- Bank of Albania;
- Ministry of Finance;
- Ministry of Justice;
- Financial Supervisory Authority;
- Competent Ministries for supervising the entities under their supervision as provided under the OPMLTF;
- Albanian Bar Association.

All the abovementioned authorities are entitled pursuant to the OPMLTF to supervise their subjects' compliance with the relevant AML. Should any doubts arise, they should lodge a report with the responsible authority (i.e. DPPPP).

- Economic Crimes and Corruption Joint Investigative Unit;
- Albanian National Intelligence Service;
- Serious Crime Prosecution Office;
- Agency for the Administration of the Sequestration and Confiscation of Assets;
- National Committee on Coordinating the Fight against Money Laundering, which designates the national policy on the prevention of money laundering and financing of terrorism.

ARE LAWYERS COVERED BY ANTI-MONEY LAUNDERING LEGISLATION?

Under article 3 of Law on the Prevention of Money Laundering and Terrorism Financing (OPMLTF, see below), lawyers have been specifically included as 'subjects' required to adhere to AML. This also includes notaries, as well as any other legal representatives.

LIST THE LAWS REGARDING ANTI-MONEY LAUNDERING, INDICATING WHICH LAWS ARE APPLICABLE TO LAWYERS.

- Criminal Code of the Republic of Albania, 1995;
- Criminal Procedure Code of the Republic of Albania, 1995;
- Law No.8610, 2000, "On the Prevention of Money Laundering" amendment with Law no. 9084, 2003 "For some additional and amendment in law no. 8610, 2000, on the Prevention of Money Laundering" (OPML). Repealed;

- Law No.9917, “On the Prevention of Money Laundering and Terrorism Financing”, 2008 (OPMLTF), amended with law no. 10391, dated 03.03.2011 and Law no. 66/2012, dated 07.06.2012;
- Law No.9258. 2004 “On Measures for the Suppression of Terrorism Financing”; repealed by
- Law no. 157/2013 “On Measures against terrorism Financing”.

ARE VISITING LAWYERS SUBJECT TO LOCAL LAWS REGARDING ANTI-MONEY LAUNDERING, AND, IF SO, TO WHAT EXTENT?

Visiting lawyers are obliged under the AML to report a suspicious transaction if the transaction, or the proposed transaction, is performed within the territory of Albania.

The threshold of a “suspicious transaction” is defined below in the section on suspicious transactions.

LIST ANY MONEY LAUNDERING GUIDANCE FOR LAWYERS (FOR EXAMPLE, LAW SOCIETY OR BAR ASSOCIATION GUIDELINES) CURRENTLY IN PLACE.

Instruction no. 29, dated 31.12.2012 “on the modalities and procedures of reporting of independent non-financial professions”. This guideline has been approved by the Ministry of Finance under the OPMLTF.

IS THE LAW SOCIETY/BAR ASSOCIATION INVOLVED IN SUPERVISING OR ENFORCING COMPLIANCE WITH ANTI-MONEY LAUNDERING REGULATIONS?

The National Chamber of Advocates and the Ministry of Justice supervise AML compliance over lawyers and other legal professionals.

DESCRIBE CLIENT DUE DILIGENCE REQUIREMENTS, INCLUDING WHEN IT MUST BE UNDERTAKEN BY LAWYERS.

Under Article 4 OPMLTF, lawyers are required to identify and verify the identity of clients and any beneficial owners through original documents in all the following circumstances:

1. Before establishing a business relationship;
2. Whenever the client requests to perform transaction in an amount equal or exceeding ALL 100,000 or the relevant value in foreign currency .If the amount of the transaction is unknown at the time of execution, identification must be made as soon as the amount known exceeds the limit;
3. When there are doubts about the identification data previously collected;
4. In all cases when there is sufficient doubt for money laundering or terrorism financing.

Under article 16 OPMLTF, lawyers are also required to keep and store documentation about the client and any beneficial owner for 5 years, or longer if the Reporting Authority so requests, from the date of termination of the business relationship or from the date of the execution of the transaction.

DOES YOUR COUNTRY FOLLOW A RISK-BASED APPROACH TO CLIENT DUE DILIGENCE BY LAWYERS?

A risk-based approach has now been introduced with the enactment of OPMLTF in 2008.

ARE THERE ENHANCED DUE DILIGENCE MEASURES FOR CERTAIN TYPES OF CLIENTS, FOR EXAMPLE, POLITICALLY EXPOSED PERSONS?

Enhanced due diligence requires:

1. Physical presence of clients and their representatives before establishing a business relationship with the client or executing transactions on their behalf
2. In relation to Politically Exposed Persons (as defined in article 2/10 OPMLTF):
 - i) Preparation and implementation of effective risk management systems for defining whether and existing or the beneficiary party is a politically exposed person;
 - ii) Obtaining approval from higher instances of management before establishing a business relationship or continuing a relationship when the client or the beneficiary party becomes later a politically exposed person;
 - iii) Taking the reasonable measures to understand the source of the property and funds of the clients and beneficiary party identified as politically exposed persons;

- iv) Performing an increased and continuous monitoring of the business relationship with the political exposed parties.
3. In relation to non-profit organisations:
- i) Gathering sufficient information about them, in order to completely; understand the sources of their finances, the nature of the activity and their method of administration and management;
 - ii) Verifying the client's reputation by using public information or other means;
 - iii) Obtaining approval from higher instances of management before establishing a business relationship;
 - iv) Performing extended monitoring of the business relationship.
4. Other categories of transaction requiring extended monitoring
- i) Transactions with non-resident clients, and specially when the transaction is carried out without the presence of the client;
 - ii) Transactions with clients residing or carrying out their activity in countries that do not comply, or comply partially with the international standard against money laundering and financing of terrorism;
 - iii) Transactions with clients organised as trusts.

ARE THERE SIMPLIFIED DUE DILIGENCE MEASURES FOR CERTAIN TYPES OF CLIENTS, FOR EXAMPLE, LISTED COMPANIES?

Reporting to the Competent Authority is not required for:

- Interbank transactions, excepts the ones performed on behalf of their customers;
- Transactions between AML covered subjects and the Bank of Albania;
- Transactions performed on behalf of public institutions and entities.

ARE LAWYERS PERMITTED TO RELY ON THIRD PARTY DUE DILIGENCE? IF YES, PLEASE DESCRIBE.

Lawyers are not permitted to rely on third party due diligence as they are obliged to identify their clients personally (Article 4&5 OPMLTF).

Furthermore, they are required by Article 7 OPMLTF to have the physical presence of clients and their representatives before establishing a business relationship with the client or executing transactions on their behalf. Therefore, a third party due diligence would not be considered in compliance with the above mentioned law provisions and in general with the purpose of OPMLTF.

WHEN IS A LAWYER UNDER AN OBLIGATION TO REPORT SUSPICIOUS TRANSACTIONS?

Under article 12 OPMLTF, lawyers are to report within 72 hours, whenever they suspect that the property is proceed of a criminal offence or is intended to be used for the financing of terrorism;

When the lawyer suspects that a proposed transaction may be related to money laundering or terrorism financing. The lawyer should then request instructions as to whether it should execute the transaction or not.

Under article 12 OPMLTF, lawyers are also obliged to make a report within the time limits set by the law for:

- All cash transactions equal or greater than 1,000,000 Lek or equivalent; executed as a single transaction or as a series of linked transactions within 24 hours.

DOES ATTORNEY/CLIENT PRIVILEGE AND/OR DUTIES OF CONFIDENTIALITY PROVIDE A DEFENCE OR PARTIAL/TOTAL EXCEPTION TO THE REQUIREMENT TO REPORT SUSPICIOUS TRANSACTIONS?

Article 14 OPMLTF states that obligated subjects, including lawyers, are able to breach professional secrecy rules in order to carry out their AML responsibilities.

However, article 25(2) OPMLTF states that lawyers are exempted from reporting when the data is obtained by the person they are defending or their representative, or from documents provided by the client in the course of the defending function.

DOES LOCAL LAW PROVIDE ANY CRIMINAL AND/OR CIVIL INDEMNITY TO A LAWYER WHO HAS REPORTED A SUSPICIOUS TRANSACTION?

Article 14 OPMLTF provides an indemnity against civil or criminal liability for lawyers who have followed their AML duties by filing a report, if they have acted in good faith.

ONCE A SUSPICIOUS TRANSACTION REPORT HAS BEEN FILED, IS A LAWYER ALLOWED TO PROCEED WITH THE LEGAL ADVICE/TRANSACTION, AND, IF SO, MUST CONSENT FROM AUTHORITIES BE OBTAINED FIRST?

When doubts arise that the transaction intended to be performed by the client would involve money laundering or financing of terrorism, the lawyer is obliged to report it immediately to the competent authorities and request instructions whether to proceed or not with such transaction.

Under article 12 of the OPMLTF, the competent authority is obliged to respond with instructions within 48 hours from the notification.

IS THERE A TIPPING-OFF PROHIBITION? IF YES, PLEASE DESCRIBE.

There is a tipping-off prohibition under article 15 OPMLTF. Lawyers are not allowed to disclose any information regarding the reported transaction nor are they permitted to notify any person who is involved in that transaction.

DESCRIBE ANY RESTRICTIONS ON ACCEPTING A NEW CLIENT.

Under OPMLTF, lawyers are not permitted to open or maintain business relationships with anonymous clients or clients using fictitious names. Accounts cannot be opened which only contain account numbers for identification.

Additionally, lawyers are not allowed to establish or carry out business relationships if there are unable to fulfil their enhanced due diligence obligations (Article 4 and 7 of OPMLTF).

ARE THERE ONGOING MONITORING REQUIREMENTS FOR EXISTING CLIENTS? IF YES, PLEASE DESCRIBE.

Under Article 11 OPMLTF, lawyers are required to undertake continuous monitoring of business relationships with their clients and periodically update their clients' data.

If there are suspicions regarding changes of a client's situation, records need to be updated immediately.

DESCRIBE ANY OTHER WAYS IN WHICH LAWYERS ARE AFFECTED BY ANTI-MONEY LAUNDERING LEGISLATION.

Failure to comply with AML obligations can lead to fines listed in article 27 OPMLTF or license revocation (art. 26).

HAVE LAWYERS IN YOUR JURISDICTION BEEN IMPLICATED IN MONEY LAUNDERING, INCLUDING ANY TYPE OF COMPLAINT, ARREST OR PROSECUTION?

To the best of our knowledge, lawyers have not been implicated in any money laundering complaint, arrest or prosecution.

HAS THE FINANCIAL ACTION TASK FORCE (FATF) CONDUCTED A MUTUAL EVALUATION OF THIS COUNTRY, AND, IF SO, WHAT WERE THE FINDINGS CONCERNING LAWYERS' COMPLIANCE WITH THE FATF 40+9 RECOMMENDATIONS?

In the Improving Global AML /CFT Compliance: On Going Process report, dated 14 February 2014, FATF refers that provides that in June 2012, Albania made a high level political commitment to work with the FATF and MONEYVAL to address its strategic AML/CFT deficiencies. Since October 2013, Albania has taken steps towards improving its AML/CFT regime, including by bringing into force new legislation enhancing the regime for freezing terrorist assets. However, certain strategic AML/CFT deficiencies remain. Albania should continue to work on implementing its action plan to address these deficiencies, including by: (1) addressing the remaining issues in its terrorist asset freezing regime; and (2) enhancing the framework for international cooperation related to terrorist financing. The FATF encourages Albania to address its remaining deficiencies and continue the process of implementing its action plan.

Sources: US Department of State MONEYVAL

PRIVATIZATION IN ALBANIA: A SNAPSHOT



Genc Boga



Sabina Lalaj

“This article was first published on CEE Legal Matters Experts Review on Privatizations/PPP www.ceelegalmatters.com”.

The privatization era in Albania began in 1991, following the adoption of the country’s new Constitution and the “On Sanctioning and Protection of Private Property, Free Initiatives, and Privatization” Law.

The provisions of this new law laid the foundations for the transition from a centralized state-controlled economy to a free market economy, opening the door to the process of privatization. In addition, a series of laws were adopted to provide a further regulatory layer and to sanction the creation of private property and subordinate rights. Law no. 7501, “On Land”, dated July 19, 1991, and law no. 8053, “On Transfer Without Compensation of Agricultural Land Ownership”, dated December 21, 1995, stipulated that agricultural fields, which had been previously controlled by collective and state farms, were to be divided into plots and distributed to the collective members and farm employees in a system of family ownership.

Law no. 7652, “On State Housing Privatization”, dated December 23, 1992, required residential properties, including apartments and houses with small land plots, to be transferred into the ownership of their occupants.

Law no. 7698, “On Restitution and Compensation of Properties to Former Owners”, dated April 15, 1993 (which was revised by law no. 9235, “On Restitution and Compensation of Property”, as amended, dated July 29, 1994), enabled families that had owned land and property prior to 1945 to claim restitution of their non-agricultural properties, or alternatively to receive other property or financial compensation.

The following five years saw successive governments engage in a program of accelerated privatization; the process was carried out under the guidance of the World Bank and the International Monetary Fund. During this period, the majority of small-and-medium-sized enterprises in the country were sold, leased, or liquidated. By 1996, much of Albania’s economy had shifted into private hands.

A mass privatization program, enabling citizens to buy equity in public enterprises, also began in 1995. However, this process proved difficult to implement, and it was halted in 1997.

The process suffered from lack of strategy and organization in the liberalization of the market. The lack of capital available, due to an underperforming financial and banking system, also impaired the process.

In April 1998, the government approved the Strategic Sectors Privatization Strategy and began privatization of strategic sectors, including large, state-owned industries. Law no. 8306, dated March 14, 1998, provided a privatization strategy for sectors considered to hold significant importance for the country’s economy.

Examples include: telecommunications; posts; mining; oil and gas; forests and waters; airport; insurance companies; and state-owned second tier banks. State enterprises and companies with state-owned capital operating in strategic sectors were, as a result of the law, also open to privatization. In order for a state-owned enterprise to be privatized, a specific law had to be approved by the Albanian parliament. This practice remains in force today.

In the years following law no. 8306, numerous companies operating in strategic sectors were entirely or partially privatized.

The privatization of the energy sector was a special focus in the last decade, and it remains so today. Between 2005 and 2010, the Albanian government unbundled the industry’s transmission and distribution systems, introduced a new power market model, and granted concessions for the development of new hydropower plants to private investors.

The privatization of the Transmission Operator System was followed by the privatization in 2013 of four existing medium-sized hydropower plants on the Mat and Bistrica rivers, which have a combined capacity of 76.7 megawatts. The four plants were privatized through competitive international tenders.

However, the wave of privatization seen in previous years has declined recently as Albania, like many countries, was hit by the global economic crisis. The failed sale of the shares held by the Albanian state in INSIG SHA, the only state-owned insurance company, is a particular example of the effects of the financial crisis. The Albanian parliament authorized sale of the state's shares in 2006; there were also attempts to offer the shares to strategic investors in the international markets – and later in the domestic market, too. The offering did not attract investors, however, and the company, which has subsidiaries in the Republic of Kosovo and FYROM, continues to be owned entirely by the Albanian state.

BRIBERY & CORRUPTION, ALBANIA



Silva Velaj



Sabina Lalaj

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Brief overview of the law and enforcement regime

The main laws governing and dealing with anti-bribery and anti-corruption in Albania are:

- (i) Criminal Code of the Republic of Albania approved upon Law no. 7895, dated 27 January 1995, as amended (the "Criminal Code"), whose latest amendments (i.e. Law no. 98/2014, dated 31 July 2014) have significantly enhanced the provisions governing corruption by adding new articles that define its meaning.
- (ii) Criminal Procedure of the Republic of Albania passed upon Law no. 7905, dated 21 March 1995 (the "Criminal Procedure Code") as amended, governing the investigation procedures of bribery and corruption.
- (iii) Law no. 9745, dated 14 June 2007, "On the criminal liability of the legal entities", which provides for the criminal liability of legal entities where the offence has been committed on behalf of the legal entity or for the benefit of the legal entity through its bodies or representatives.
- (iv) Law no. 9643, dated 20 November 2006, "On public procurement", which also contains anti-corruption provisions.
- (v) Law no. 9367, dated 07 April 2005, "On the prevention of the conflict of interests in the exercising of public functions" (the "Conflict of Interest Law") as amended. The rules defined by this law are obligatory for implementation inter alia by every state institution, central or local, and every organ or subject created by and/or under the above subjects, including state or local undertakings, commercial companies with a controlling participation of state or local capital, non-profit organisations and other legal entities controlled by the above subjects.
- (vi) Law no. 9049, dated 10 April 2003, "On the declaration and audit of assets, financial obligations of elected persons and certain public officials" (hereinafter, "the Law on Declaration of Assets") as amended.

The main bodies involved in the identification and prevention of bribery and corruption are the Prosecutor Office, the High Inspectorate of Declaration and Audit of Assets, and all structures created for such purpose within public bodies.

The penalties provided by the Albanian legislation for cases of bribery and corruption are the following:

1. For individuals, the penalties provided in the Criminal Code vary, up to imprisonment up to five years. When the criminal offence is carried out by high state officials, the penalty consists in imprisonment for up to 12 years.
2. For legal entities, under the Law on the Criminal Liability of Legal Entities, the penalties vary from fines, the minimum being ALL 300,000 (€2,150), to the winding-up of the legal entity. Also, the same law provides for supplementary punitive measures, such as prohibition from participating in public tenders, for soliciting public funds, obtaining specific licences and permits, termination of several of the activities conducted by the legal entity, etc.

Overview of enforcement activity and policy during the past two years

The Prosecution Office has become more active in recent years as a result of the establishment of a task force, and there have been a number of high-profile investigations and criminal prosecutions. However, improvements still need to be made to: (i) the consolidation of investigations and increasing efficiency of criminal prosecution through implementation of effective tools to aid investigations; (ii) increasing the supervision of the police force; (iii) the consolidation and expansion of the public's access to information; (iv) the consolidation of the use of information technology; and (v) the consolidation of the co-operation mechanisms between the Prosecution Office, the police and other agencies dealing with bribery and corruption.

The new Law no. 99/2014, dated 31 July 2014, "On amendments to Law no. 7905, dated 21 March 1995, 'Criminal Procedure Code of the Republic of Albania', as amended", provides that the Prosecution Office for Serious Crimes has the jurisdiction for investigating cases of corruption among high-level officials; judges, attorneys and other senior officials, excluding officers who are investigated by the General Prosecution Office. Based on the latter, a Corruption and Asset Investigation Unit was established in September 2014 near the Prosecution Office for Serious Crimes, to investigate cases of corruption among the above mentioned high-level officials, including the elected local government representatives.

As regards cases that have been prosecuted and sanctions imposed, please note that the following case to which we refer herein is dated September 2014 and is currently being tried by the Court for Serious Crimes. On 6 September 2014 the Court for Serious Crimes set the security measure of indefinite "detention in prison" for the Mayor of the Municipality of Berzhite (Tirana) and the Head of the Tax Office of this municipality, who in a corrupt way had acquired a cash amount of €4,500 in exchange for granting a permit for the use of a public space. The accuser, after being assured in July by the Mayor of the municipality about the obtainment of the permit, had began the works in the public area. The works had been interrupted without any legitimate cause, but upon the request of the Mayor and the Head of the Tax Office to pay them the amount of €4,500 in cash. After the initial denunciation, the accuser was assisted by the Tirana Regional Police Department in performing the interceptions authorised by the Prosecution Office where a public official is accused of bribery.

In a public statement in September 2014, the General Prosecutor declared that currently, besides the issues that are on trial, the Albanian authorities have under investigation a number of officials, mostly of senior rank, suspected of being involved in criminal acts of corruption and abuse of office. Also, the Prosecutor said that because of the current volume of work, an increase in human resources is considered necessary, as the number of investigations into corruption at high levels is undergoing significant growth.

Law and policy relating to issues such as facilitation payments and hospitality

Matters related to ethics and the independence of public officials during the course of their activities are mainly governed by the Conflict of Interest Law, Law no. 9131, dated 08 September 2003, "On Ethics' Rules in the Public Administration" (the "Ethical Rules Law") and Decision of Council of Ministers no. 714, dated 22 October 2004, "On Personal Activities and Receipt of Gifts by Public Officers During Exercise of their Office".

Article 4 of the Conflict of Interest Law defines a 'public official' as, inter alia, any person (officer/official) having a public office and certain responsibilities and competencies in the state authorities of the central or local government. As a general rule, the public officials must not directly and/or indirectly solicit or accept gifts, favours, or any other benefits, from any third party (natural person and/or private or public legal entity) that would create, or would be perceived to create, a situation of conflict of interest which would influence/ affect the independence of the public officials in the course of performing official duties. Customary invitations, gift(s) of symbolic value, traditional or courtesy gifts, where custom and traditional "code of behaviour" so requires, but which do not lead to a perception of influencing the public official's behaviour in terms of ethics and independence, are permitted.

The Conflict of Interest Law defines a situation leading to conflict of interest as any situation, connected with the public duties carried out by the public officials and their direct and/or indirect personal interests, which would influence the independence of the public officials during the course of their official duties. Personal interests of a public official for the purpose herein shall be considered as any interest deriving, inter alia, from gifts, favours and other benefits/preferential treatments.

The Conflict of Interest Law forbids the acceptance of gifts/hospitality by public officials during the performance of their duties.

As far as it constitutes corruptive practice, the giving of gifts or hospitality to government officials and public servants is considered as active bribery and prohibited by the articles 244, 245 and 245/1, first paragraph, 319, 319/b and 328 of the Criminal Code.

The same consideration is to be made also in relation to the giving of gifts and hospitality in the private sector, as far as it constitutes a corrupt practice. The relevant provision prohibiting such practice is article 164 (a) of the Criminal Code.

Key issues relating to investigation, decision making and enforcement procedures

The Prosecution Office is the competent authority for investigating and prosecuting corruption. The Prosecution Office is organised and operates under the supervision of the general prosecutor as a centralised structure, and includes the office of the General Prosecutor, the Prosecution Council and the District Prosecution Offices. The court is the competent decision-making authority whose decisions are enforceable. Also, law no. 99/2014 amending the Criminal Procedure Code provides that corruption at the level of senior officials is considered a serious crime to be examined by the Serious Crimes Court. Article 300 of the Albanian Criminal Code and articles 281, 282, and 283 of the Criminal Procedure Code provide that any person must self-report when he obtains knowledge about any crime committed or that is taking place.

An Anti-corruption Commission has been established by a Decision of the Council of Ministers in order to: (i) establish a strategy for the organisation and direction of the fight against corruption; (ii) effectively co-ordinate the anti-corruption activities of the state institutions and private sector; and (iii) ensure the necessary co-operation with the international financial institutions supporting the government's anti-corruption initiatives.

The General Prosecutor has publicly declared that the priorities of his work in the General Prosecution Office shall consist of detecting corruption cases within the General Prosecution Office itself and District Prosecution Offices, and corruption in the public administration, and in the immediate commencement of criminal proceedings against the persons involved thereof.

Further, the General Prosecution Office has created, on its official website, a new page where any citizen can directly report corruption cases, including the names of the persons involved in such cases. Several cases are reported each day by citizens. Further, as per the said publicly available information, the persons involved in the reported corruption cases are high-ranking officials and politicians whose names are currently not available to the public and not officially confirmed, but shall be made publicly known in the future.

The General Prosecution Office has established a special office, having as its target the following-up of mass-media developments or citizens' reports or claims. Any case of such nature is taken into consideration by the special office within the General Prosecution Office, and then such cases are observed, and it is verified whether the elements of the criminal offence exist in order to initiate the investigation proceedings. All the reported corruption cases are in the process of verification and the special office of the General Prosecution Office dealing with them must decide whether the elements to commence the criminal proceedings exist.

Corruption in Albania constitutes a crime under the provisions of the Albanian Criminal Code, and therefore the Prosecution Office is the competent authority for investigating and prosecuting corruption. The Prosecution Office puts forth the criminal prosecution, as well as representing the accusation in court on behalf of the state. This office is organised and operates under the supervision of the General Prosecutor as a centralised structure, and includes the office of the General Prosecutor, the Prosecution Council and the District Prosecution Offices. The Prosecution Office exerts its functions through the prosecutors. The court is the competent decision-making authority whose decisions are legally enforceable.

Corporate liability for bribery and corruption offences

The definition of a corruption offence is provided under the provisions of the Albanian Criminal Code, which indicates the two forms of corruptions as active and passive corruption: (i) active corruption includes the promising, offering, giving, directly or indirectly, of any type of irregular advantage or irregular promise, for oneself or for other persons, or the acceptance of an offer or a promise deriving from an irregular advantage, in order to perform or not to perform an action which is related to a person's duty/position or capacity; and (ii) passive corruption includes the requesting, receiving, directly or indirectly, of any type of irregular advantage or irregular promise, for oneself or for other persons, or the acceptance of an offer or a promise deriving from an irregular advantage, from a person serving in a leading function/office or who works in any position of the private sector, in order to perform or not to perform an action which is related to a person's duty/position or capacity. Article 164(a) of the Criminal Code provides for the offence of active bribery in the private sector, i.e. by legal entities.

Further, the concept of criminal liability of legal entities in the Republic of Albania was introduced through the Law on the Criminal Liability of Legal Entities. Article 2 of the Law on the Criminal Liability of Legal Entities provides that the provisions of the said law are applicable to legal entities only in case the Albanian Criminal Code, the Criminal Procedure Code and other criminal provisions do not provide otherwise. The provisions of the civil-commercial legislation also apply to legal entities, to the extent that such law does not provide otherwise.

Provisions of the Law on the Criminal Liability of Legal Entities are applicable to Albanian legal entities and to foreign legal entities that have acquired legal personality according to the provisions of the Albanian Company Law (Law no. 9901, dated 14 April 2008, On Entrepreneurs and Commercial Companies). The law applies to both national and foreign legal persons (e.g., joint stock and limited liability companies, and non-profit organisations) and, with a few exceptions, to local governmental bodies, public legal entities, political parties and labour unions.

Article 3 of the Law on Criminal Liability of Legal Entities does not provide for the specific offence of bribery of companies, but does provide for the criminal liability of a legal entity for offences performed on its behalf or for its benefit by: (i) the bodies and representatives of such legal entity; or (ii) by a person being under the authority of the person that manages the legal entity.

According to the law provisions, a legal entity can be held criminally responsible for a wide variety of crimes committed in its name or for its benefit: (i) by its managing body or legal representatives; (ii) by a person who is under the authority of the person who runs, represents and administers the legal entity; or (iii) due to a lack of control or surveillance by the person who runs, represents and administers the legal entity. According to the law, any individual who, under Albanian legislation and the bylaws of the legal entity, represents, runs, administers or controls the activity and the managing bodies of such entity, is considered to be a managing body or a representative of the legal entity.

Two types of penalty are imposed on legal entities: principal penalties; and supplementary penalties, which are applicable to the offender in addition to the principal penalties. The principal penalties consist of pecuniary fines or compulsory dissolution of the legal entity, while the supplementary penalties may lead to, for example: (i) the cessation of one or more of the offending company's activities; (ii) its temporary receivership; (iii) a prohibition on participating in public procurement procedures; and/or (iv) publication of the court decision.

The court may sentence the compulsory dissolution of the legal entity where: (i) the legal entity has been established for the purpose of conducting criminal activities; (ii) the legal entity has devoted a significant proportion of its activities to commit the criminal offence; (iii) the criminal offence has severe consequences; or (iv) the legal entity is a recidivist.

Although the law has been in force since 2007, it is hard to apply, and so far little progress has been made in punishing criminal offences committed by legal entities. This should probably be ascribed to that part of the Albanian judiciary system which remains loyal to the maxim "societas delinquere non potest" ("companies cannot be criminals"), and a certain lack of expertise in this particular branch of criminal law.

Overview of cross-border issues

In an effort to meet the best international practice in the fight against corruption, Albania has ratified several conventions such as the Civil Convention "On corruption", ratified on 06 July 2000 upon law 8635; in 2006 has ratified the United Nation Conventions against Corruption approved in New York on 31 October 2003; and the Criminal Law Convention on Corruption signed by Albania on 27 January 1999, ratified on 19 July 2001.

Albania since 2001 has been a member of GRECO and part of the regional anticorruption initiative, a platform for the government, civil society and international organisations for exchanging expertise and know-how on the subject, and for co-ordinating efforts between and within government branches. The recent years' results show the progress made with regard to police co-operation and the fight against organised crime and corruption. Strengthening the capacity of law enforcement agencies to ensure the imposition of the law is a priority action plan embodied in this. Interagency and international police co-operation have continued to give good results, as regards the operations, arrests and joint investigations, including the investigations of criminal assets. The national anti-trafficking efforts are co-ordinated in a comprehensive way, engaging not only with state authorities, but also independent institutions, civil society and the general public.

Proposed reforms/The year ahead

The latest reform has been the one related to the amendment of the Albanian Criminal Code, concretely Law no. 98/2014, dated 31 July 2014, and the amendments of the Albanian Criminal Procedure Code, concretely Law no. 21/2014 dated 10 March 2014 and Law no. 99/2014 dated 31 July 2014. These amendments have further enhanced the provisions governing corruption and bribery, and most importantly they have stipulated that the body now responsible for the prosecution of all cases of corruption among high-level officials is the Prosecution Office for Serious Crimes. In the framework of anti-corruption reforms during the last quarter in 2013, several concrete measures have been undertaken to ensure the strong political will of the Government to resolve the phenomenon of corruption in the country.

During this period the National Anticorruption Coordinator (KKAK) was established as an important organ at a ministry level, co-ordinating anti-corruption efforts and policies at a national level. Along with the set-up of KKAK, two important processes began: a) the development of the National Anti-Corruption Strategy 2014-2017; and b) the creation of a network of co-ordinators and focal points of corruption, in the independent institutions as well as at the executive level (including the local level). Regarding the harmonised statistics and solid background on corruption issues, working groups chaired by the Minister of Justice have prepared the data for the third quarter of 2013. During 2014, work will be focused on the establishment of an electronic database that enables in-depth analysis based on statistics and data generated in each quarter. The process will be led by KKAK.

The approval of the EU candidate status for Albania brings new challenges in the fight against corruption. In light of this, the new government has committed to conduct a detailed review of the existing legislation and come up with legal initiatives that will be aimed at:

- reducing the room for involvement in corrupt practices to the largest extent possible, both in the public and private sector, in line with EU standards and international instruments (such as GRECO, OECD, UNCAC);
- pursuing state policies and applying specific measures in this area, including steps to upgrade and expand e-governance systems;
- improving in a dramatic way services for citizens in all public service sectors, in a bid to reduce every motive and opportunity for public officials and citizens to engage in corruption;
- implementing the National Strategy and Action Plan against Corruption; and
- working with commitment to ensure law enforcement and launch new initiatives in relation to the publication of official documents and transparency of administrative procedures.

PHARMACEUTICAL ADVERTISING 2014, ALBANIA



Ened Topi



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1 General - Medicinal Products

1.1 What laws and codes of practice govern the advertising of medicinal products in Albania?

There is no specific regulation on the advertising of medicinal products in Albania. The current legal framework governing this field is fragmented and still under development.

However, some provisions on the advertising of medicinal products are found in the Law no. 9323, dated 25.11.2004 "On Medicinal Products and Pharmaceutical Service", Law no. 9902, dated 17.04.2008 "On the Protection of the Consumers" and Regulation no. 73 of the Ministry of Health, dated 03.02.2009 "On the Registration of Medicinal Products in the Republic of Albania".

It is to be noted that, subject to provisions of the Law no. 9323, dated 25.11.2004 "On Medicinal Products and Pharmaceutical Service", it is the Minister of Health that shall approve the rules and procedures for the advertising of medicinal products in Albania. However to date such document is not available.

1.2 How is "advertising" defined?

"Advertising" is defined as any type of presentation of commercial activities, businesses, vocations and professions, to promote the supply of goods and services, including rights and obligations.

"Advertising" is also defined as any form of publication or broadcast upon payment or other benefits by a public or private enterprise or by a person for self-advertising purposes, associated with its own trading and profitable activities, professional or expertise as well as support on the supply with goods or services, including immovable property.

1.3 What arrangements are companies required to have in place to ensure compliance with the various laws and codes of practice on advertising, such as "sign off" of promotional copy requirements?

The Albanian legislation is silent on this matter.

1.4 Are there any legal or code requirements for companies to have specific standard operating procedures (SOPs) governing advertising activities? If so, what aspects should those SOPs cover?

There are no explicit requirements for companies to have in place SOPs on advertising activities.

1.5 Must advertising be approved in advance by a regulatory or industry authority before use? If so, what is the procedure for approval? Even if there is no requirement for prior approval in all cases, can the authorities require this in some circumstances?

Regulation no. 73, dated 03.02.2009 "On the Registration of Medicinal Products in the Republic of Albania" determines that, in all cases, the advertising of OTC medicinal products is permitted only with the prior approval of the National Centre for the Control of Medicinal Products. The latter is a specialised institution for the analysis, registration and control of medicinal products, and the inspection of activities in the pharmaceutical field.

1.6 If the authorities consider that an advertisement which has been issued is in breach of the law and/or code of practice, do they have powers to stop the further publication of that advertisement? Can they insist on the issue of a corrective statement? Are there any rights of appeal?

There are no specific provisions that regulate this issue. However, general provisions of the Albanian Civil Code would apply. In this context, subject to these

provisions, a remedy would be requested to the court that, upon request of the interested party, it orders the immediate cessation of the publication and the obligation of the responsible entity to conduct a public disproof, including payment of any damages relief.

1.7 What are the penalties for failing to comply with the rules governing the advertising of medicines? Who has responsibility for enforcement and how strictly are the rules enforced? Are there any important examples where action has been taken against pharmaceutical companies? To what extent may competitors take direct action through the courts?

Law no. 9323, dated 25.11.2004 "On Medicinal Products and Pharmaceutical Service", determines that violation of provisions regulating pharmaceutical advertising and the advertising of non-OTC medicinal products in breach of the Regulation on Advertising and Promotion are subject to a fine of 100,000 ALL, and in case of repetition, to the revocation of the licence.

The National Centre for the Control of Medicinal Products is the authority responsible for the enforcement of these rules.

Also, based on article 57 of the same law, whenever the breach of law does not constitute a criminal offence but remains an administrative violation, the sanctions for pharmaceutical entities vary from seizure of the medicinal products and revocation of the licence, to fines up to 200,000 ALL.

1.8 What is the relationship between any self-regulatory process and the supervisory and enforcement function of the competent authorities? Can, and, in practice, do, the competent authorities investigate matters drawn to their attention that may constitute a breach of both the law and any relevant code and are already being assessed by any self-regulatory body? Do the authorities take up matters based on an adverse finding of any self-regulatory body?

The Albanian legislation does not specifically address this matter, but as mentioned above, the National Centre for the Control of Medicinal Products is vested with the authority to inspect the activities in the pharmaceutical field and to enforce the rules covering this field.

1.9 In addition to any action based specifically upon the rules relating to advertising, what actions, if any, can be taken on the basis of unfair competition? Who may bring such an action?

Based on the provisions of the Albanian Civil Code, in all cases of unfair competition, upon the request of the interested party, the court decides on the necessary measures for the elimination of consequences. When actions of unfair competition have been performed upon misconduct, the entity responsible is obliged to compensate the damage.

2 Providing Information Prior to Authorisation of Medicinal Product

2.1 To what extent is it possible to make information available to healthcare professionals about a medicine before that product is authorised? For example, may information on such medicines be discussed, or made available, at scientific meetings? Does it make a difference if the meeting is sponsored by the company responsible for the product? Is the position the same with regard to the provision of off-label information (i.e. information relating to indications and/or other product variants not authorised)?

According to paragraph 3 of article 21/1 of the Law no. 9323, dated 25.11.2004 "On Medicinal Products and Pharmaceutical Service", all adverse and/or harmful effects, observed during the clinical studies on the medicinal products, are reported to the Centre of Pharmacovigilance (CP).

There are no further specifications regarding the information that is usually made available to healthcare professionals. Also, paragraph 2 of the same article states that "Healthcare professionals (doctors, dentists, pharmacists and nurses) and users of medicinal products, report on any adverse effect, associated with the medicinal products, at the Centre of Pharmacovigilance".

2.2 May information on unauthorised medicines be published? If so, in what circumstances?

The Albanian legislation does not provide regulation for the publication of information on unauthorised medicinal products.

2.3 Is it possible for companies to issue press releases about medicinal products which are not yet authorised? If so, what limitations apply?

Please refer to our answer to question 2.2 above.

2.4 May such information be sent to healthcare professionals by the company? If so, must the healthcare professional request the information?

The Albanian legislation is silent on this matter.

2.5 How has the ECJ judgment in the Ludwigs case, Case C-143/06, permitting manufacturers of non-approved medicinal products (i.e. products without a marketing authorisation) to make available to pharmacists price lists for such products (for named-patient/compassionate use purposes pursuant to Article 5 of the Directive), without this being treated as illegal advertising, been reflected in the legislation or practical guidance in Albania?

The ECJ judgment in the Ludwigs case has not been reflected in the Albanian legislation as far as Albania is not a Member State of the EU.

2.6 May information on unauthorised medicines or indications be sent to institutions to enable them to plan ahead in their budgets for products to be authorised in the future?

The Albanian legislation is silent on this matter.

2.7 Is it possible for companies to involve healthcare professionals in market research exercises concerning possible launch materials for medicinal products as yet unauthorised? If so, what limitations apply? Has any guideline been issued on market research of medicinal products?

The Albanian legislation is silent on this matter.

3 Advertisements to Healthcare Professionals

3.1 What information must appear in advertisements directed to healthcare professionals?

The Albanian legislation is silent on this matter.

3.2 Are there any restrictions on the information that may appear in an advertisement? May an advertisement refer to studies not in the SmPC?

Upon instruction of the National Centre for the Control of Medicinal Products, the elements that an advertisement of medicinal products shall contain are determined, as well as the procedures to be followed for the evaluation of requests for approval of spots or advertising materials, and suggesting in any case, accuracy of information and data that are transmitted, as requested by the interested parties:

In this view the National Centre for the Control of Medicinal Products indicates that the following must accompany the request for approval of the advertisement presented by an interested party:

- a CD with the contents of the spot or advertising materials that will be used to advertise;
- a summary of Product Characteristics (SmPC) of the medicinal products, for which the approval of the advertisement is requested;
- a leaflet; and
- a mock-up of the medicinal products.

The Albanian legislation does not provide any specification whether an advertisement may refer to studies not in the SmPC.

3.3 Are there any restrictions to the inclusion of endorsements by healthcare professionals in promotional materials?

There are no legal provisions that regulate this issue.

3.4 Is it a requirement that there be data from any or a particular number of “head to head” clinical trials before comparative claims are made?

There are no legal provisions that regulate this issue.

3.5 What rules govern comparative advertisements? Is it possible to use another company’s brand name as part of that comparison? Would it be possible to refer to a competitor’s product which had not yet been authorised in Albania?

Comparative advertisement is regulated by the provisions of Law no. 9902, dated 17.04.2008 “On the Protection of the Consumers”. The comparative advertisement is permitted when in accordance with the following conditions:

- a) it does not constitute a misleading practice or provides missing/misleading information according to the provisions of the applicable legislation;
- b) it compares goods or services meeting the same needs or intended for the same purpose;
- c) it objectively compares one or more important characteristics, verifiable and representative goods and services, in which the price may be included;
- d) it does not discredit or denigrate the trademarks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor;
- e) in the case of products with denomination of origin, it connects in each case to products with the same designation;
- f) it does not unfairly benefit from the reputation of a trademark, trade name or other distinguishing marks of a competitor or of the denomination of origin of competing products;
- g) it does not present goods or services as imitations or replicas of goods or services pertaining to a trade name or trademark protected; and
- h) it does not create confusion among traders, between the entity that promotes its goods or services and a competitor or between the trademarks, trade names, other distinguishing marks, goods or services of an entity that promotes its goods or services and those of a competitor.

Regarding the possibility to refer to a competitor’s product which has not yet been authorised, there is not any explicit determination in the Albanian legislation.

From an overall interpretation of the law, it can be estimated that such reference is not allowed as long as advertising itself is only allowed for medicinal products that are already authorised and registered.

3.6 What rules govern the distribution of scientific papers and/or proceedings of congresses to healthcare professionals?

The Albanian legislation is silent on this matter.

3.7 Are “teaser” advertisements permitted that alert a reader to the fact that information on something new will follow (without specifying the nature of what will follow)?

There are no specific rules regarding “teaser” advertisements.

4 Gifts and Financial Incentives

4.1 Is it possible to provide healthcare professionals with samples of products? If so, what restrictions apply?

The Albanian legislation is silent on this matter.

4.2 Is it possible to give gifts or donations of money to healthcare professionals? If so, what restrictions apply?

According to article 59 of the Code of Ethics and Medical Deontology, dated 11.11.2011, it is forbidden for a healthcare professional to demand or accept gifts or unsubstantiated and compromising funding from companies, firms or individuals marketing medicinal products, medical equipment or other medical materials, with the exception of those related to activities organised for the function of education of healthcare professionals and their vocational training.

4.3 Is it possible to give gifts or donations of money to healthcare organisations such as hospitals? Is it possible to donate equipment, or to fund the cost of medical or technical services (such as the cost of a nurse, or the cost of laboratory analyses)? If so, what restrictions would apply?

There are no provisions that govern this issue.

4.4 Is it possible to provide medical or educational goods and services to healthcare professionals that could lead to changes in prescribing patterns? For example, would there be any objection to the provision of such goods or services if they could lead either to the expansion of the market for, or an increased market share for, the products of the provider of the goods or services?

The Albanian legislation is silent on this matter.

4.5 Do the rules on advertising and inducements permit the offer of a volume-related discount to institutions purchasing medicinal products? If so, what types of arrangements are permitted?

The Albanian legislation does not regulate this matter.

4.6 Is it possible to offer to provide, or to pay for, additional medical or technical services or equipment where this is contingent on the purchase of medicinal products? If so, what conditions would need to be observed?

The Albanian legislation does not regulate this matter.

4.7 Is it possible to offer a refund scheme if the product does not work? If so, what conditions would need to be observed? Does it make a difference whether the product is a prescription-only medicine, or an over-the-counter medicine?

The Albanian legislation does not regulate this matter.

4.8 May pharmaceutical companies sponsor continuing medical education? If so, what rules apply?

Yes, companies may sponsor continuing medical education as this falls under the same provision as mentioned above in question 4.2. There are no other indications in the Albanian legislation specifying the rules that apply in this case.

5 Hospitality and Related Payments

5.1 What rules govern the offering of hospitality to healthcare professionals? Does it make a difference if the hospitality offered to those healthcare professionals will take place in another country? Is there a threshold applicable to the costs of hospitality or meals provided to a healthcare professional?

Even though the Albanian legislation does not give an accurate definition of “hospitality”, from article 59 of the Code of Ethics and Medical Deontology, mentioned in question 4.2 above, we understand that it is not possible for a healthcare professional to receive hospitality except when this is part of the funding for their education or vocational training.

5.2 Is it possible to pay for a healthcare professional in connection with attending a scientific meeting? If so, what may be paid for? Is it possible to pay for his expenses (travel, accommodation, enrolment fees)? Is it possible to pay him for his time?

Whenever the attendance of a scientific meeting is part of the education or vocational training of a healthcare professional, it falls under the same regulation provided by article 59 of the Code of Ethics and Medical Deontology.

5.3 To what extent will a pharmaceutical company be held responsible by the regulatory authorities for the contents of and the hospitality arrangements for scientific meetings, either meetings directly sponsored or organised by the company or independent meetings in respect of which a pharmaceutical company may provide sponsorship to individual healthcare professionals to attend?

The Albanian legislation is silent on this matter.

5.4 Is it possible to pay healthcare professionals to provide expert services (e.g. participating in advisory boards)? If so, what restrictions apply?

The Albanian legislation is silent on this matter.

5.5 Is it possible to pay healthcare professionals to take part in post-marketing surveillance studies? What rules govern such studies?

There are no specific legal provisions regulating this issue.

5.6 Is it possible to pay healthcare professionals to take part in market research involving promotional materials?

The Albanian legislation is silent on this matter.

6 Advertising to the General Public

6.1 Is it possible to advertise non-prescription medicines to the general public? If so, what restrictions apply?

There are few restrictions on the information that may appear in an advertisement/commercial addressed to the general public.

Based on Regulation no. 73 of the Ministry of Health, dated 03.02.2009 “On the Registration of Medicinal Products in the Republic of Albania”, in the section about OTC medicinal products, and specifically letter C of this section, there are a few criteria required in all cases of advertising of OTC medicinal products such as:

- advertisement for medicinal products of this category is permitted only with the prior approval of the National Centre for the Control of Medicinal Products;
- the advertisement shall not be addressed to children;
- an advertisement may state that a medicinal product can cure, prevent or relieve a symptom only if this is proved;
- the advertisement shall inform on the respective limits of the use of the medicinal product when necessary; and
- the advertisement is allowed only for medicinal products of this category which are already registered.

6.2 Is it possible to advertise prescription-only medicines to the general public? If so, what restrictions apply?

The advertisement of prescription-only medicines to the general public is forbidden.

Based on article 52 of Law no. 9323, dated 25.11.2004 “On Medicinal Products and Pharmaceutical Service”, advertising via mass media is allowed only for OTC (over the counter, non-prescription medicines) medicinal products, whereas other medicinal products are only able to be promoted in literature and professional scientific activities.

6.3 If it is not possible to advertise prescription-only medicines to the general public, are disease awareness campaigns permitted encouraging those with a particular medical condition to consult their doctor, but mentioning no medicines? What restrictions apply?

The Albanian legislation does not provide any legal regulation regarding these awareness campaigns.

6.4 Is it possible to issue press releases concerning prescription-only medicines to non-scientific journals? If so, what conditions apply?

There are no specific provisions that would apply in case of press releases concerning prescription-only medicinal products to non-scientific journals.

6.5 What restrictions apply to describing products and research initiatives as background information in corporate brochures/Annual Reports?

There are no specific provisions stipulated by the applicable law regarding this issue.

6.6 What, if any, rules apply to meetings with, and the funding of, patient organisations?

The Albanian legislation is silent on this matter.

7 Transparency and Disclosure

7.1 Is there an obligation for companies to disclose details of ongoing and/or completed clinical trials? If so, what information should be disclosed, and when and how?

The Albanian legislation is silent on this matter.

7.2 Has your national code been amended in order to implement the 2013 EFPIA Code on Disclosure of Transfers of Value from Pharmaceutical Companies to Healthcare Professionals and Healthcare Organisations and, if so, does the change go beyond the requirements of the EFPIA Disclosure Code or simply implement them without variation?

The EFPIA Disclosure Code is not implemented in Albania.

7.3 If the EFPIA Disclosure Code has not been implemented in Albania, is there a requirement in law and/or self-regulatory code for companies to make publicly available information about transfers of value provided by them to healthcare professionals, healthcare organisations or patient organisations? If so, what information should be disclosed, from what date and how?

There are no legal provisions regarding this issue.

8 The Internet

8.1 How is Internet advertising regulated? What rules apply? How successfully has this been controlled?

Internet advertising in Albania is regulated as one of the forms of advertising mentioned above in question 1.2. Further, the rules set forth in Law no. 9902, dated 17.04.2008 "On the Protection of the Consumers" regulating the types of illegal publicities and the responsibility held in such cases, also apply to internet advertising.

8.2 What, if any, level of website security is required to ensure that members of the general public do not have access to sites intended for healthcare professionals?

There are no legal provisions regulating this issue.

8.3 What rules apply to the content of independent websites that may be accessed by a link from a company-sponsored site? What rules apply to the reverse linking of independent websites to a company's website? Will the company be held responsible for the content of the independent site in either case?

There are no legal provisions regulating this issue.

8.4 What information may a pharmaceutical company place on its website that may be accessed by members of the public?

There are no specific provisions determining the information that may be assessed by the public on the websites of pharmaceutical companies, however from an overall interpretation of Law no. 9323, dated 25.11.2004 "On Medicinal Products and Pharmaceutical Service" and Regulation no. 73 of the Ministry of Health, dated 03.02.2009, "On the Registration of Medicinal Products in the Republic of Albania" it appears that only information about non-prescription medicines (over the counter medicinal products) is allowed to be assessed by the general public on such websites.

8.5 Are there specific rules, laws or guidance, controlling the use of social media by companies?

There are no specific legal acts controlling the use of social media by companies.

9 Developments in Pharmaceutical Advertising

9.1 What have been the significant developments in relation to the rules relating to pharmaceutical advertising in the last year?

As mentioned, the legal framework in Albanian relating to pharmaceutical advertising is fragmented and under development.

9.2 Are any significant developments in the field of pharmaceutical advertising expected in the next year?

To the best of our knowledge, so far there are no draft laws or regulations that would regulate this area in the next year.

9.3 Are there any general practice or enforcement trends that have become apparent in Albania over the last year or so?

To the best of our knowledge there are no general practices and/or enforcement that have been apparent and/or conducted in the last year or so.

9.4 Has your national code been amended in order to implement the 2013 version of the EFPIA Code on the promotion of prescription-only medicines to, and interactions with, healthcare professionals (the EFPIA HCP Code) and, if so, does the change go beyond the new requirements of the EFPIA HCP Code or simply implement it without variation?

Albania is not a member of the EFPIA.

PHARMACEUTICAL ADVERTISING 2014, KOSOVO



Sabina Lalaj



Besarta Kllokoqi

"This article appeared in the 2014 edition of The International Comparative Legal Guide to: Pharmaceutical Advertising; published by Global Legal Group Ltd, London. (www.iclg.co.uk)".

1 General - Medicinal Products

1.1 What laws and codes of practice govern the advertising of medicinal products in Kosovo?

In Kosovo, the advertising of medicinal products is governed by the Law no. 04/L-190, dated April 7th, 2014 "On Medicinal Products and Medical Devices" (the Law), that was recently approved by the Kosovo Parliament. The Law entered into force on May 10th, 2014.

New secondary legislation (administrative instructions and regulations) will be approved within six months from the entry into force of the Law. Until then the existing administrative instructions and regulations shall remain in force, insofar as their provisions do not contradict the provisions of the Law.

The Law applies to all public authorities and public and private enterprises, as well as legal entities and natural persons engaged in manufacturing, trading and other activities that involve medicinal products and medical devices.

Kosovo Medicines Agency (KMA) is the competent authority that supervises the implementation of the Law and issues relevant authorisations related to medicinal products and medical devices for human use.

1.2 How is "advertising" defined?

Article 19 of the Law defines the medicinal product advertising and promotion as the activity of informing on, or encouraging the use of, the medicinal product with the aim of increasing the number of prescriptions, delivery, sale or consumption of medicinal products.

In particular, advertising includes: (i) advertising of medicinal products addressed to the public; (ii) advertising of medicinal products addressed to persons qualified to prescribe or trade in medicinal products; (iii) visits by medical and sales representatives to persons qualified to prescribe or trade in medicinal products; (iv) supply of samples of medicinal products carried out pursuant to prior approval by the donor and the recipient of the sample; (v) sponsorship of

promotional meetings for persons qualified to prescribe or trade in medicinal products; and (vi) sponsorship of conferences, meetings and scientific congresses for persons qualified to prescribe medicinal products or for persons trading in medicinal products.

1.3 What arrangements are companies required to have in place to ensure compliance with the various laws and codes of practice on advertising, such as "sign off" of promotional copy requirements?

The Law provides for various arrangements that the companies should have in place to ensure compliance with the regulatory framework on advertising. First of all for advertising medicinal products, companies should obtain a Marketing Authorisation, consisting of the permission given by the KMA approving the release of the medicinal product on the market based on the fulfilment of quality requirements, safety requirements and efficiency for human use in therapeutic treatment.

Any advertising of a medicinal product subject to medical prescription (POM) which is addressed to the public is strictly forbidden. The advertising or promotion of medicinal products should be approved by the KMA. All information provided in the advertising of a medicinal product has to comply with the health conditions of the Marketing Authorisation, in particular the approved Summary of Product Characteristics (SmPC), should encourage the rational use of the medicinal product by presenting it objectively and should be in accordance with pharmaceutical industry codes of ethical marketing practice.

The advertising should not be misleading and should not involve offering or promising any indirect benefits for purchasing the medicinal product or for delivery of evidence that the medicinal product has been purchased.

1.4 Are there any legal or code requirements for companies to have specific standard operating procedures (SOPs) governing advertising activities? If so, what aspects should those SOPs cover?

There are no explicit requirements for companies to have in place SOPs on advertising activities.

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- 1.5 Must advertising be approved in advance by a regulatory or industry authority before use? If so, what is the procedure for approval? Even if there is no requirement for prior approval in all cases, can the authorities require this in some circumstances?
-

The advertising or promotion of medicinal products should be approved by the KMA. The procedure for approval may vary depending on the medicinal product for which the Marketing Authorisation is being granted. The Administrative Instruction no. 17-2013 "On marketing authorization of medicinal products to be placed in the market of the Republic of Kosovo" (the Administrative Instruction) provides for various procedures for obtaining the Marketing Authorisation. However, the existing secondary legislation is subject to revision due to the entry into force of the Law.

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- 1.6 If the authorities consider that an advertisement which has been issued is in breach of the law and/or code of practice, do they have powers to stop the further publication of that advertisement? Can they insist on the issue of a corrective statement? Are there any rights of appeal?
-

Pursuant to the Administrative Instruction, the KMA is entitled to suspend the marketing authorisation, impose the withdrawal of the medicinal product from the market, cancel the marketing authorisation and impose administrative fines payable in the account of the KMA. The Law provides that the Board of Appeals has the responsibility to review any appeal filed by any entity or natural person related to the decisions issued by the KMA, based on the Law and relevant secondary legislation. However, the Board of Appeals is not yet functional and, pursuant to the Law, its members will be appointed within the next six months.

Meanwhile, the provisions of the Law on Consumer Protection (LCP) also remain applicable. In addition, this issue may be regulated and/or amended by specific regulation enforced by the secondary legislation that will be issued for the implementation of the Law.

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- 1.7 What are the penalties for failing to comply with the rules governing the advertising of medicines? Who has responsibility for enforcement and how strictly are the rules enforced? Are there any important examples where action has been taken against pharmaceutical companies? To what extent may competitors take direct action through the courts?
-

Violation of the provisions of the Law and secondary legislation issued for its implementation and of the terms of authorisations and licences is subject to penalties. The KMA initiates civil or criminal procedures for illegal actions of natural persons or legal entities.

Among the penalties defined under the Law, it is worth noting the absolute prohibition from operating in the

market for a period of three to five years, as a result of carrying out activities without an authorisation or licence.

Other breaches are subject to fines from EUR 1,000 up to EUR 50,000 depending on the responsibility of the person and potential damages caused to peoples' health.

The above penalties are imposed independently from any criminal action initiated against the breaching subject.

Furthermore, the Law provides penalties in case of advertising of a medicinal product subject to medical prescription (POM) which is addressed to the public. The penalties include punishment with a fine in the amount of EUR 5,000 or suspension of the product from circulation in the market for up to six months.

Additional regulation on punitive measures for various breaches is expected to be provided by the secondary legislation that will be issued for the implementation of the Law.

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- 1.8 What is the relationship between any self-regulatory process and the supervisory and enforcement function of the competent authorities? Can, and, in practice, do, the competent authorities investigate matters drawn to their attention that may constitute a breach of both the law and any relevant code and are already being assessed by any self-regulatory body? Do the authorities take up matters based on an adverse finding of any self-regulatory body?
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When investigating matters that may constitute a breach of Law, the authorities follow the procedures defined therein, acting independently from any assessment of a self-regulatory body. Any breach of codes ascertained by a self-regulatory body is sanctioned by the said self-regulatory body.

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- 1.9 In addition to any action based specifically upon the rules relating to advertising, what actions, if any, can be taken on the basis of unfair competition? Who may bring such an action?
-

The unfair competition in advertising is governed by the LCP, and the provisions of the Law on Protection of Competition are also applicable.

The LCP prohibits deceptive advertising and comparative advertising, and states that interested parties have the right to require the competent inspectorate of the Ministry of Trade and Industry to stop misleading or unpermitted comparative advertising if it possesses evidence of inaccuracy of factual claims.

Upon request of the party, the inspectorate orders the prohibition of misleading and comparative advertising, charging the costs of the broadcaster to the advertising sponsor.

The competent bodies for market surveillance require the publisher of advertising to submit evidence within seven days in order to confirm the accuracy of the factual claims contained in the contested advertisement.

If the publisher of the advertising does not present the required evidence within said period or the inspectorate considers that the evidence is incomplete, the advertising shall be considered as misleading, questionable and inaccurate.

2 Providing Information Prior to Authorisation of Medicinal Product

2.1 To what extent is it possible to make information available to healthcare professionals about a medicine before that product is authorised? For example, may information on such medicines be discussed, or made available, at scientific meetings? Does it make a difference if the meeting is sponsored by the company responsible for the product? Is the position the same with regard to the provision of off-label information (i.e. information relating to indications and/or other product variants not authorised)?

As mentioned under questions 1.3 and 1.4 above, the promotion and advertising of medicinal products and devices should be approved by the KMA and the interested party should obtain a Marketing Authorisation.

Every month, the KMA publishes the list of products with Marketing Authorisation.

2.2 May information on unauthorised medicines be published? If so, in what circumstances?

The specific legislation does not provide regulation for the publication of information on unauthorised medicinal products. Only the publication of information relating to human or animal health or diseases is allowed, provided that there is no reference, even indirect, to medicinal products.

2.3 Is it possible for companies to issue press releases about medicinal products which are not yet authorised? If so, what limitations apply?

Please refer to our answer to question 2.2 above.

2.4 May such information be sent to healthcare professionals by the company? If so, must the healthcare professional request the information?

Sending of information of unauthorised medicinal products to healthcare professionals is not regulated by the legal framework currently in force.

2.5 How has the ECJ judgment in the Ludwigs case, Case C-143/06, permitting manufacturers of non-approved medicinal products (i.e. products without a marketing authorisation) to make available to pharmacists price lists for such products (for named-patient/compassionate use purposes pursuant to Article 5 of the Directive), without this being treated as illegal advertising, been reflected in the legislation or practical guidance in Kosovo?

Kosovo is not a Member State of the EU and the rulings of cases by the ECJ have not been reflected in the legislation in Kosovo or the practical guidance applicable.

2.6 May information on unauthorised medicines or indications be sent to institutions to enable them to plan ahead in their budgets for products to be authorised in the future?

The issues of budgets for products to be authorised in the future is not regulated by the legislation currently in force.

2.7 Is it possible for companies to involve healthcare professionals in market research exercises concerning possible launch materials for medicinal products as yet unauthorised? If so, what limitations apply? Has any guideline been issued on market research of medicinal products?

There are neither limitations nor special regulations in the Law regarding the possibility for companies to involve healthcare professionals in market research exercises concerning possible launch materials.

3 Advertisements to Healthcare Professionals

3.1 What information must appear in advertisements directed to healthcare professionals?

All information provided in the advertising of a medicinal product has to comply with the health requirements of its Marketing Authorisation, in particular with the approved SmPC.

3.2 Are there any restrictions on the information that may appear in an advertisement? May an advertisement refer to studies not in the SmPC?

The printed or electronic advertising or promotional material presented to healthcare professionals should have the full text of the SmPC attached, unless a specific exemption has been granted by the KMA.

3.3 Are there any restrictions to the inclusion of endorsements by healthcare professionals in promotional materials?

There are no legal provisions regarding this issue.

3.4 Is it a requirement that there be data from any or a particular number of "head to head" clinical trials before comparative claims are made?

No such requirements exist under the current legislation.

3.5 What rules govern comparative advertisements? Is it possible to use another company's brand name as part of that comparison? Would it be possible to refer to a competitor's product which had not yet been authorised in Kosovo?

Comparative advertising by using a competitor's brand name in comparative advertisements is prohibited by the LCP.

3.6 What rules govern the distribution of scientific papers and/or proceedings of congresses to healthcare professionals?

Please refer to our answer to question 3.2 above.

3.7 Are "teaser" advertisements permitted that alert a reader to the fact that information on something new will follow (without specifying the nature of what will follow)?

There are no specific rules regarding "teaser" advertisements.

4 Gifts and Financial Incentives

4.1 Is it possible to provide healthcare professionals with samples of products? If so, what restrictions apply?

Providing healthcare professionals with samples of products should be in compliance with the provisions of article 19 of the Law that regulates medicinal product advertising.

As mentioned above, advertising also includes the advertising of medicinal products addressed to persons qualified to prescribe them or to persons trading them, as well as visits by medical and sales representatives to persons qualified to prescribe medicinal products or to persons trading in medicinal products.

In this regard, the supply of samples of medicinal products should be carried out pursuant to prior approval by the donor and the recipient of the sample. The number of received samples must not exceed 10 samples per year. The sample should clearly note on the external packaging "Free sample – not for sale". Such products should possess a Marketing Authorisation.

4.2 Is it possible to give gifts or donations of money to healthcare professionals? If so, what restrictions apply?

Pursuant to article 50 of the Code of Ethics and Medical Deontology (the Medical Code), healthcare professionals are not allowed to accept material gifts or obligations from companies, firms or individuals that trade in medicinal products and other materials, with the exclusion of financing for conferences, seminars and congresses whose purpose is professional qualification.

Also, as a general remark, pursuant to article 19 paragraph 10 of the Law, medicinal product advertising shall not involve offering or promising any indirect benefits for purchasing the medicinal product or for delivery of evidence that the medicinal product has been purchased.

4.3 Is it possible to give gifts or donations of money to healthcare organisations such as hospitals? Is it possible to donate equipment, or to fund the cost of medical or technical services (such as the cost of a nurse, or the cost of laboratory analyses)? If so, what restrictions would apply?

Law no. 04/L-125 "On Health" (article 57) recognises donations as one of the sources for funding healthcare services in Kosovo.

Donations of medicinal products and devices are also regulated in article 40 of the Law. The donated medicinal products and devices shall be imported and used in the Republic of Kosovo through the KMA alone, by prior approval of the Minister of Health, and should contain a clear and permanent label that states that the medicinal product and/or device is a donation and is given for free.

The authorisation for importing medicinal products and devices that have been donated should be issued if:

- a. for each medicinal product, detailed information is provided, including the International Non-proprietary Name (INN), or the proprietary name, amount and expiry date;
- b. the type and amount of donated medicinal products and/or devices is necessary for the health protection system;
- c. the medicinal product and medical device has at least one year remaining from the expiry date;
- d. the medicinal product and/or device has a total use term of one year or less from the date of production, the import should be allowed if the medicinal product has 2/3 of such term remaining when imported to the Republic of Kosovo;
- e. the product and device possesses a marketing authorisation in the place of origin, and its quality should be verified by the Quality Control Laboratory. If the place of origin is a third country, the product and/or device should also possess an Analysis Certificate or Product Quality Statement; and
- f. for all criteria that are not included in these provisions, the criteria for donation of medicinal products defined by the World Health Organization should be taken into consideration.

The Law stipulates that conditions under (c) and (d) herein above may be reconsidered by the Donation Commission of the Ministry of Health in special circumstances when a donation is necessary and the demand for the product or device is urgent.

The KMA supervises the warehousing, labelling and distribution of donated medicinal products and devices.

4.4 Is it possible to provide medical or educational goods and services to healthcare professionals that could lead to changes in prescribing patterns? For example, would there be any objection to the provision of such goods or services if they could lead either to the expansion of the market for, or an increased market share for, the products of the provider of the goods or services?

Please refer to our answer to question 4.2 above.

4.5 Do the rules on advertising and inducements permit the offer of a volume-related discount to institutions purchasing medicinal products? If so, what types of arrangements are permitted?

The Law provides no regulations in this regard.

4.6 Is it possible to offer to provide, or to pay for, additional medical or technical services or equipment where this is contingent on the purchase of medicinal products? If so, what conditions would need to be observed?

Provisions of the Law that regulate advertising are not clear on this point. However, as a general remark, article 19 paragraph 10 of the Law provides that medicinal product advertising shall not involve offering or promising any indirect benefits for purchasing the medicinal product or for delivery of evidence that the medicinal product has been purchased. Therefore, this scenario could be considered as a breach of advertising requirements provided by the Law.

4.7 Is it possible to offer a refund scheme if the product does not work? If so, what conditions would need to be observed? Does it make a difference whether the product is a prescription-only medicine, or an over-the-counter medicine?

Refund schemes regarding medicinal products are not regulated by legislation in Kosovo. However, the possibility to offer a refund may be open as long as such a scheme is consistent with the rules on advertising.

4.8 May pharmaceutical companies sponsor continuing medical education? If so, what rules apply?

In general, the Medical Code provides that financing for conferences, seminars and congresses whose purpose is professional qualification is not considered as accepting material gifts or obligations from companies, firms or individuals that trade in medical products and other materials.

However, sponsoring continuing medical education exceeds the purpose of the promotional activity and sponsorship, which is considered as advertising under article 19 paragraphs 2.5 and 2.6.

Therefore this matter should be assessed on a case-by-case basis and in cooperation of the Board for Continual Medical Education within the Ministry of Health.

5 Hospitality and Related Payments

5.1 What rules govern the offering of hospitality to healthcare professionals? Does it make a difference if the hospitality offered to those healthcare professionals will take place in another country? Is there a threshold applicable to the costs of hospitality or meals provided to a healthcare professional?

Other than the possibility of sponsoring conferences, meetings and scientific congresses for healthcare professionals, in the framework of advertising, based on the relevant approval, the Law does not provide further regulations regarding the offering of hospitality to healthcare professionals.

Pursuant to the Medical Code, a healthcare professional (i.e. physician) is prohibited to request or take illegal and compromising gifts of a financial nature from a company, firm or individual engaged in the trading of medicinal products and devices, with the exception of legal financing only for accredited activities that are organised in the context of educational and training purposes for physicians.

5.2 Is it possible to pay for a healthcare professional in connection with attending a scientific meeting? If so, what may be paid for? Is it possible to pay for his expenses (travel, accommodation, enrolment fees)? Is it possible to pay him for his time?

The sponsoring of conferences, meetings and scientific congresses for healthcare professionals or for persons trading medicinal products is considered as a form of advertising of medicinal product, and therefore it requires the prior approval of the KMA.

As it concerns the payment and expenses, please refer to our answer to question 5.1 above.

5.3 To what extent will a pharmaceutical company be held responsible by the regulatory authorities for the contents of and the hospitality arrangements for scientific meetings, either meetings directly sponsored or organised by the company or independent meetings in respect of which a pharmaceutical company may provide sponsorship to individual healthcare professionals to attend?

The organisation of these meetings is considered advertising. However, apart from the obligation of holding the relevant Marketing Authorisation and having the approval of the KMA for the advertising activity, there are no specific provisions regulating this issue.

5.4 Is it possible to pay healthcare professionals to provide expert services (e.g. participating in advisory boards)? If so, what restrictions apply?

Please refer to our answer to question 5.1 above regarding payments.

5.5 Is it possible to pay healthcare professionals to take part in post-marketing surveillance studies? What rules govern such studies?

There are no specific legal provisions regulating this issue.

5.6 Is it possible to pay healthcare professionals to take part in market research involving promotional materials?

Please refer to our answer to question 5.1 above.

6 Advertising to the General Public

6.1 Is it possible to advertise non-prescription medicines to the general public? If so, what restrictions apply?

Besides the requirement that all medicinal products should have the marketing authorisation granted by the KMA, there are no other restrictions for advertising non-prescription medicinal products to the general public.

6.2 Is it possible to advertise prescription-only medicines to the general public? If so, what restrictions apply?

Advertising of a medicinal product subject to medical prescription (POM) to the general public is forbidden.

6.3 If it is not possible to advertise prescription-only medicines to the general public, are disease awareness campaigns permitted encouraging those with a particular medical condition to consult their doctor, but mentioning no medicines? What restrictions apply?

Information relating to human or animal health or diseases is not considered as advertising activity, and is allowed only if there is no reference, even indirect, to medicinal products.

6.4 Is it possible to issue press releases concerning prescription-only medicines to non-scientific journals? If so, what conditions apply?

There are no specific provisions that would apply in case of press releases concerning prescription-only medicinal products to non-scientific journals; however, the press release would be considered as advertising and as such it is prohibited.

6.5 What restrictions apply to describing products and research initiatives as background information in corporate brochures/Annual Reports?

There are no specific provisions stipulated by the Law regarding this issue.

6.6 What, if any, rules apply to meetings with, and the funding of, patient organisations?

There are no specific provisions stipulated by the Law regarding this issue.

7 Transparency and Disclosure

7.1 Is there an obligation for companies to disclose details of ongoing and/or completed clinical trials? If so, what information should be disclosed, and when and how?

Pursuant to the Law, the sponsor shall apply for an opinion on the clinical trial at the Ethics Committee and also for the authorisation of the clinical trial at the KMA. Prior to deciding on such application, the KMA shall obtain the opinion of the Ethics Committee.

The Ethics Committee is an independent body, consisting of healthcare professionals and non-medical members, whose responsibility it is to protect the rights, safety and wellbeing of human subjects involved in a trial, and to provide public assurance of that protection, by, among other things, expressing an opinion on the trial protocol, the suitability of the investigators and the adequacy of the facilities, and on the methods and documents to be used to inform trial subjects and obtain their informed consent. The Ethics Committee is not yet functional, since its members will be appointed within six months from the entry into force of the Law.

Furthermore, the KMA is also authorised to inspect clinical trials for compliance with good clinical practice. Considering the above, the details/information regarding clinical trials will be disclosed to the KMA and Ethics Committee from the moment of application and during ongoing trials.

7.2 Has your national code been amended in order to implement the 2013 EFPIA Code on Disclosure of Transfers of Value from Pharmaceutical Companies to Healthcare Professionals and Healthcare Organisations and, if so, does the change go beyond the requirements of the EFPIA Disclosure Code or simply implement them without variation?

The EFPIA Disclosure Code is not implemented in Kosovo.

7.3 If the EFPIA Disclosure Code has not been implemented in Kosovo, is there a requirement in law and/or self-regulatory code for companies to make publicly available information about transfers of value provided by them to healthcare professionals, healthcare organisations or patient organisations? If so, what information should be disclosed, from what date and how?

There are no legal provisions regarding this issue.

8 The Internet

- 8.1 How is Internet advertising regulated? What rules apply? How successfully has this been controlled?

There are no specific provisions directly related to internet advertising; however, the Law foresees that the sale of medicinal products, and supplements/vitamins can be carried out through the Internet too. Moreover, for prescribed medicinal products, an online prescription must exist.

- 8.2 What, if any, level of website security is required to ensure that members of the general public do not have access to sites intended for healthcare professionals?

There are no legal provisions regulating this issue.

- 8.3 What rules apply to the content of independent websites that may be accessed by a link from a company-sponsored site? What rules apply to the reverse linking of independent websites to a company's website? Will the company be held responsible for the content of the independent site in either case?

There are no legal provisions regarding this issue.

- 8.4 What information may a pharmaceutical company place on its website that may be accessed by members of the public?

There are no legal provisions regarding this issue.

- 8.5 Are there specific rules, laws or guidance, controlling the use of social media by companies?

There are no specific legal acts controlling the use of social media by companies.

9 Developments in Pharmaceutical Advertising

- 9.1 What have been the significant developments in relation to the rules relating to pharmaceutical advertising in the last year?

As mentioned earlier, the new Law no. 04/L-190 "On medicinal products and medical devices" entered into power on May 10th, 2014. In addition, new secondary legislation is expected to be promulgated for the implementation of the new Law.

Furthermore, the Medical Code was signed on May 5th, 2014, between the Ministry of Health of the Republic of Kosovo and the Chamber of Doctors of Kosovo, which provides for the duties and responsibilities of doctors, the obligations of doctors towards their patients, the relationship between doctors and health institutions, royalties, participation in the scientific researches, etc.

- 9.2 Are any significant developments in the field of pharmaceutical advertising expected in the next year?

Pursuant to the Law, new secondary legislation shall be promulgated within a six-month timeframe regulating specific issues that are currently foreseen in general concept by the Law.

In addition, the members of the Ethics Committee, the Board of Appeals and the Commission for evaluation of medicinal products and medical devices shall be appointed within six months starting from May 10th, 2014.

- 9.3 Are there any general practice or enforcement trends that have become apparent in Kosovo over the last year or so?

There are no general practices that have been apparent and/or conducted in the near past.

- 9.4 Has your national code been amended in order to implement the 2013 version of the EFPIA Code on the promotion of prescription-only medicines to, and interactions with, healthcare professionals (the EFPIA HCP Code) and, if so, does the change go beyond the new requirements of the EFPIA HCP Code or simply implement it without variation?

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REAL ESTATE

REAL ESTATE FOCUS 2009, ALBANIA



Gerhard Velaj

"This article appeared first on the May edition of Corporate INTL Real Estate Focus 2009".

Established in 1994, Boga & Associates has emerged as one of the largest and most consolidated law firms in Albania, with a reputation for providing the highest quality legal services to its clients. The firm maintains its commitment to quality through the skills and determination of a team of attorneys and other professionals with a wide range of skills and experience. The extensive foreign language capabilities of the team help to ensure that its international clientele have easy access to the expanding Albanian business environment.

The firm has established a reputable real estate team that delivers services to a wide range of domestic and international clients, including property owners, investors, developers, lenders, insurance companies, governmental and non-governmental agencies and public authorities across a variety of sectors: infrastructure projects, industrial properties, expropriation. The team has sound experience in construction and/ or permanent lending transactions, different aspects of commercial real estate development, ownership and management arrangements for real estate property and insurance claims including building, contents and business interruption claims.

Our firm has assisted many foreign clients investing in real estate in Albania. In addition, we have a strong experience and knowledge of the real estate legislation and market in Kosovo, where we have assisted our clients in transactions regarding the purchase and lease of immovable properties such as land plots, agricultural land and apartments.

When working with foreign clients in cross border transactions we find that the sometimes stark differences between the parties' corresponding legal frameworks and practices are often the primary challenges in the transaction. The deep knowledge of the legal framework and practice of the country where the transaction is executed and will be developed is a great asset in overcoming such complexities.

In the last year, we have assisted one of the largest real estate agencies in the country with the development and the sale of a residence in a key tourist area in Albania. The purchasers were all foreign citizens from numerous different countries and were assisted by our office. Our team was on hand throughout the whole transaction to deal with all the legal issues regarding real estate and also to provide legal due diligence services and legal assistance for the signature of the undertaking and final purchase contract. In addition, we have successfully assisted a prestigious foreign university in Tirana with the completion of a major real estate transaction for the purchase of a large surface of land.

The effect of the global economic crisis has started to show in the Albanian market and as a result, real estate sales have in the last few months. We believe that this steep reduction in sales is directly linked to an increase in credit restrictions applied by the banks.

REAL ESTATE AND GENERAL PRACTICE, ALBANIA



Sokol Elmazaj

“This article was originally edited by, and first published on, www.internationallawoffice.com - the Official Online Media Partner to the IBA, an International Online Media Partner to the ACC and the European Online Media Partner to the ECLA. Register for a free subscription at www.internationallawoffice.com/subscribe.cfm.”

Registration of Real Estate

Pursuant to the Law on the Registration of Real Estate (7843), real estate must be registered with the relevant register. These registers are open to the public. All administrative units are under the jurisdiction of an office of real estate registration, which keeps and administers the Real Estate Register. The offices of real estate registration are supervised by the Central Office of Real Estate Registration, which is governed by the main and vice registrars (who are appointed by the Council of Ministers).

The Real Estate Register contains all the details of the real estate - that is:

- the identity of the owner;
- the limits of the property;
- the date of registration;
- the deed of ownership; and
- plans showing the location of property.

Moreover, all leases, mortgages, assignments of easements, rights to use or other rights connected to or deriving from the transfer of real estate to a third party must be noted in the register; any contract or other instrument affecting these transactions should be filed with the competent office of real estate registration within 30 days of its execution.

Real estate registered for the first time will be subject to temporary registration. The competent office shall publish the act of temporary registration for 90 consecutive days.

During this period, interested persons may file a claim for correction of any eventual mistakes. No claim submitted after the expiry of the 90-day term will be considered. Where no claim has been submitted within this period or any claim has been settled by the parties, the property under temporary registration will be classified as permanently registered.

Where the parties have failed to agree on a solution, the competent court will be authorized to rule on the case. The registrar shall note any pending actions in the register and indicate which court is hearing the case.

Restriction on Acquisition of Land by Foreigners

The Civil Code provides that no real estate transaction may take place if the real estate is not registered with the Real Estate Register. The acquisition of real estate (eg, acquisition of plots by foreigners) is restricted by the Law on the Acquisition of Plots (7980).

Pursuant to the law, foreign entrepreneurs or legal entities may acquire plots in Albania only if the investment for construction on the plot exceeds three times the value of the plot.

Restitution and Compensation

The Albanian courts deal with a considerable number of real estate disputes. Most disputes arise between investors and former owners to which the Committee of Restitution and Compensation of Property has restituted land that the Albanian government had leased long term to investors or otherwise disposed of.

Real estate used to be under public property, but in 1993 Parliament passed the Law on the Restitution and Compensation of Properties to Former Owners (7698). The law provides that the government - through the Committee of Restitution and Compensation of Property to Former Owners - acknowledged the ownership, would compensate and, where possible, retribute to former owners property that had been confiscated or expropriated under laws, subordinated laws or court resolutions issued after November 29 1944. The process of restitution and compensation of immovable property is still ongoing. This has led to an increase in costs for investors, as the law provides that investors should buy or lease the land from the former owner under the terms and conditions agreed by the parties.

TAX

CORPORATE TAX 2015, ALBANIA



Alketa Uruci



Andi Pacani

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1 Tax Treaties and Residence

1.1 How many income tax treaties are currently in force in Albania?

Albania has concluded tax treaties with 36 countries (out of which 34 are already in force).

1.2 Do they generally follow the OECD or another model?

Albanian tax treaties follow the OECD model.

1.3 Do treaties have to be incorporated into domestic law before they take effect?

Albanian constitution requires treaties to be ratified by the Parliament.

1.4 Do they generally incorporate anti-treaty shopping rules (or “limitation on benefits” articles)?

The treaties do not incorporate anti-treaty shopping rules.

1.5 Are treaties overridden by any rules of domestic law (whether existing when the treaty takes effect or introduced subsequently)?

A treaty prevails over domestic law regardless of whether the domestic legislation existed previously or is introduced subsequently to it.

1.6 What is the test in domestic law for determining corporate residence?

Entities that are established in Albania or have the place of effective management in Albania are considered resident.

2 Transaction Taxes

2.1 Are there any documentary taxes in Albania?

No, there are no documentary taxes in Albania.

2.2 Do you have Value Added Tax (or a similar tax)? If so, at what rate or rates?

Yes, VAT was brought in first in 1995. The standard rate of VAT is 20%, which applies to all persons (companies and entrepreneurs) having an annual turnover exceeding 5 million Leke (approx. 35,000 Euro). Exceptionally, some specific categories of activities (such as lawyers, economists, auditors, doctors, dentists) are VAT tax-payers irrespective of their annual turnover (i.e. there is no VAT threshold).

There are exceptions to the standard rate as regards to medical services and medicaments at the reduced rate of 10% and exports of goods and international transport of goods and passengers and related services which are subject to VAT at 0% (VAT exemption with right of deduction).

2.3 Is VAT (or any similar tax) charged on all transactions or are there any relevant exclusions?

VAT regulations provide for supplies exempt from VAT without right of deduction. The most important are as follows:

- Lease and sale of land.
- Sale of buildings.
- Long lease of buildings (when the lease duration exceeds two months).
- Financial services.
- Certain services rendered by not-for-profit organisations.
- Educational services rendered by private and public educational institutions.

- Postal services.
- Certain supplies in connection with oil exploration.
- Supply of newspapers, magazines and books of any kind.
- Supply of advertising in electronic and written media.
- Supply of services performed outside Albania by a taxable person whose place of activity or residence is in Albania.
- Supply of services relating to gambling activities, casinos and hippodromes.

2.4 Is it always fully recoverable by all businesses? If not, what are the relevant restrictions?

Generally, tax-payers registered for VAT are entitled to recover the input VAT, provided that the VAT is charged in relation with their taxable activity. VAT cannot be reclaimed on recreation and accommodation expenses, passenger vehicles, fuel under certain conditions, promotional materials and all expenses related to the above-mentioned expenses.

2.5 Are there any other transaction taxes?

There is a tax on transfer of ownership right on real estate, payable by legal entities in case of sale or donation of real estate.

2.6 Are there any other indirect taxes of which we should be aware?

Except for VAT and excise, carbon and circulation tax is levied on the production and importation of certain combustible goods(including fuel) in Albania.

3 Cross-border Payments

3.1 Is any withholding tax imposed on dividends paid by a locally resident company to a non-resident?

Dividends and profit sharing paid to non-residents are subject to a final withholding tax at a rate of 10%, unless a double tax treaty provides for a lower rate.

3.2 Would there be any withholding tax on royalties paid by a local company to a non-resident?

Royalties paid to non-residents are subject to a final withholding tax at a rate of 10%, unless a double tax treaty provides for a lower rate.

3.3 Would there be any withholding tax on interest paid by a local company to a non-resident?

Interests paid to non-residents are subject to a final withholding tax at a rate of 10%, unless a double tax treaty provides for a lower rate.

3.4 Would relief for interest so paid be restricted by reference to “thin capitalisation” rules?

The only thin capitalisation rule limits the tax deduction (for corporate income tax purposes) for interest paid on a loan to the portion of interest paid on the loan not exceeding four times the company’s net assets (i.e. debt/equity ratio of 4:1). The rule applies to all loans taken, except for short-term loans (less than 1 year). It does not apply to banks, finance leases and insurance companies.

3.5 If so, is there a “safe harbour” by reference to which tax relief is assured?

There is no such provision in Albanian legislation.

3.6 Would any such rules extend to debt advanced by a third party but guaranteed by a parent company?

The debt/equity ratio is calculated without taking into consideration the source of the financing or relevant guarantees.

3.7 Are there any other restrictions on tax relief for interest payments by a local company to a non-resident?

The interest in excess of the annual average bank interest rate is non-deductible for tax purposes.

3.8 Does Albania have transfer pricing rules?

Transfer pricing adjustments may be made if conditions set in a transaction between related persons differ from those that would have been applied between not-related persons. As a general rule, two persons are deemed to be related if the activities of one person are controlled by the other or if one person acts in accordance with the instructions, requests or decisions of the other. In particular, the following are regarded as related-persons: (a) spouses; (b) a legal entity and any person who owns, directly or indirectly, at least 50% of the shares or voting rights in that entity; and (c) two or more legal entities if a third person owns, directly or indirectly, at least 50% of the shares or voting rights in each entity.

The instructions of the Ministry of Finance provide that transfer pricing adjustments may be made only by the Commission of Transfer Pricing in the General Tax Directorate; thus, the tax authorities must submit all transfer pricing cases to the Commission. The instructions also state that, in applying the transfer pricing rules, the commission should refer to the 1995OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.

The Commission may enter into an agreement with the tax-payer, which may regulate and determine in advance the transfer pricing methods and modalities. The agreement should be signed by the General Director.

4 Tax on Business Operations: General

4.1 What is the headline rate of tax on corporate profits?

Since 2008, Albania has applied a flat tax rate of 10%.

4.2 When is that tax generally payable?

The corporate income tax system provides for a prepayment of the tax in monthly instalments by the 15th of each month based on the profit realised in the two previous years. (In the event the tax-payer is in its first year of activity, the instalments are calculated based on the forecast of the profit for the current year.)

On the 31st March of the following year, when all corporate tax subjects are required to file with tax authorities, their profit tax declaration for the previous year, the exact due amount of the tax is reconciled and the difference is paid to the state. Any tax paid in excess through instalments is carried forward or reimbursed.

Starting from 1st January 2013, tax-payers may opt to prepay the corporate income tax on a quarterly basis (at the last day of each quarter).

4.3 Is the tax base accounting profit subject to adjustments, or something else?

Yes, the taxable profit that results from the financial statements prepared under and in pursuance with accounting regulations is adjusted as provided for and required by the tax regulation.

4.4 If the tax base is accounting profit subject to adjustments, what are the main adjustments?

The main adjustments consisting of: depreciation allowances; restrictions related to thin capitalisation of loan interests and other expenses (e.g. thresholds with tax deductions for representation and sponsorship expenses); bad debts requirements; penalties; and provisions expect for the banks and insurance companies, etc.

4.5 Are there any tax grouping rules? Do these allow for relief in Albania for losses of overseas subsidiaries?

No, there are no tax-grouping rules.

4.6 Is tax imposed at a different rate upon distributed, as opposed to retained, profits?

No, there is no difference in this regard.

4.7 Are companies subject to any other national taxes (excluding those dealt with in "Transaction Taxes") - e.g. tax on the occupation of property?

Property tax is levied annually on all residents and non-residents who own agricultural land or buildings in

Albania. Agricultural land is classified into ten groups and it is taxed at rates varying from ALL 700 to 5,600 per hectare. Buildings are classified according to their use and taxed at rates ranging from ALL 5 to 200 per m². A 50% tax credit is available for the tax due on buildings located in rural areas. The local municipality may modify the tax rates set by the law. In addition, it decides on the payment schedule of the tax and on reductions for immediate payment of tax.

4.8 Are there any local taxes not dealt with in answers to other questions?

There are a variety of national and local taxes. These include tax in new constructions, hotel tax, royalty tax, advertising tax, etc.

5 Capital Gains

5.1 Is there a special set of rules for taxing capital gains and losses?

There are no specific capital gains taxes for corporate income tax subjects. As a general rule, capital gains are included in the business profit of the entity and taxed at the same rate of 10%.

5.2 If so, is the rate of tax imposed upon capital gains different from the rate imposed upon business profits?

As indicated in question 5.1, capital gain are taxed together with business profit at a rate of 10%.

5.3 Is there a participation exemption for capital gains?

Tax legislation does not provide for a participation exemption for capital gains.

5.4 Is there any special relief for reinvestment?

There is no rollover relief available in Albania.

5.5 Does Albania impose withholding tax on the proceeds of selling a direct or indirect interest in local assets/shares?

There is no withholding tax on proceeds of sale of interest in assets/shares.

6 Local Branch or Subsidiary?

6.1 What taxes (e.g. capital duty) would be imposed upon the formation of a subsidiary?

There are no taxes payable upon the formation of subsidiaries.

6.2 Are there any other significant taxes or fees that would be incurred by a locally formed subsidiary but not by a branch of a non-resident company?

No, there are no such taxes or fees specifically designed for subsidiary.

6.3 How would the taxable profits of a local branch be determined in its jurisdiction?

Branches are taxed only on the taxable income from an Albanian source of income. The taxable income is determined in the same manner as for resident companies. 6.4 Would such a branch be subject to a branch profits tax (or other tax limited to branches of non-resident companies)? There are no specific taxes for the branch profit. Taxable income of branches is subject to profit tax at the same rate of 10% as with any other Albanian entity.

6.5 Would a branch benefit from double tax relief in its jurisdiction?

Branches are considered as permanent establishment, hence it may benefit from double tax relief.

6.6 Would any withholding tax or other similar tax be imposed as the result of a remittance of profits by the branch?

Transfers or repatriation of profits is not subject to any tax in Albania.

7 Overseas Profits

7.1 Does Albania tax profits earned in overseas branches?

Foreign-sourced income is taxable in Albania. However, tax credit is allowable for the amount of income tax paid overseas for the income derived abroad up to the amount that would have been payable in Albania for an Albanian sourced income.

7.2 Is tax imposed on the receipt of dividends by a local company from a non-resident company?

Receipt of dividends is tax exempt income in Albania.

7.3 Does Albania have “controlled foreign company” rules and, if so, when do these apply?

No, there are no “controlled foreign company” rules.

8 Anti-avoidance

8.1 Does Albania have a general anti-avoidance or anti-abuse rule?

Albanian fiscal legislation does not provide for a general anti-avoidance rule. However, it gives tax authorities the right to use alternative methods of tax assessments when verifying the lack of economic substance in a transaction.

8.2 Is there a requirement to make special disclosure of avoidance schemes?

Under current legislation, there are no requirements to disclose any avoidance scheme.

CORPORATE TAX 2015, KOSOVO



Alketa Uruci



Andi Pacani

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1 Tax Treaties and Residence

1.1 How many income tax treaties are currently in force in Kosovo?

As independent country, Kosovo has concluded two new tax treaties. They were entered into with the Republic of Albania and the Republic of Macedonia and have been in force since 2006 and 2012 respectively. Kosovo have also succeeded four other tax treaties on avoidance of double taxation with respect to taxes on income and capital from former Yugoslavia (with United Kingdom, Germany, Belgium and Finland, as well as with Czech Republic for the avoidance of double taxation on inheritance tax).

1.2 Do they generally follow the OECD or another model?

The treaties generally follow the OECD model.

1.3 Do treaties have to be incorporated into domestic law before they take effect?

The new tax treaties must be ratified by Parliament. A treaty ratified by Parliament becomes part of the Kosovo legal system after publication in the Official Gazette and prevails over any law which differs from the treaty's provisions.

1.4 Do they generally incorporate anti-treaty shopping rules (or "limitation on benefits" articles)?

The treaties do not incorporate anti-treaty shopping rules.

1.5 Are treaties overridden by any rules of domestic law (whether existing when the treaty takes effect or introduced subsequently)?

A treaty prevails over domestic law regardless of whether the domestic legislation existed previously or is introduced subsequently to it.

1.6 What is the test in domestic law for determining corporate residence?

The test of corporate residence means: (i) being established in Kosovo; or (ii) having the place of effective management in Kosovo.

2 Transaction Taxes

2.1 Are there any documentary taxes in Kosovo?

No, there are no documentary taxes in Kosovo.

2.2 Do you have Value Added Tax (or a similar tax)? If so, at what rate or rates?

Kosovo introduced VAT in 2001. Currently, the VAT rate is 16%; exports are zero rated. A new Law "On VAT" entered into force on 1 July 2010. The turnover threshold for registration purposes is set to EUR 50,000.

2.3 Is VAT (or any similar tax) charged on all transactions or are there any relevant exclusions?

The following activities are VAT exempt:

- insurance and reinsurance transactions;
- financial services; the supply of postage stamps;
- fiscal stamps and other similar stamps;
- betting, lotteries and other forms of gambling;
- the supply of land;
- the supply of houses, apartments or other accommodation used for residential purpose; and
- the leasing or letting of immovable property.

2.4 Is it always fully recoverable by all businesses? If not, what are the relevant restrictions?

Generally, taxpayers registered for VAT are entitled to recover the input VAT, provided that the VAT is charged

in relation with their taxable activity. When tax-payers perform both taxable and exempt supplies, VAT may be partially reclaimed. VAT cannot be reclaimed on certain recreation expenses and representation costs, and it is limited on car expenses which are not used solely for business purposes.

2.5 Are there any other transaction taxes?

Excise tax applies to a limited number of goods such as coffee, tobacco, alcoholic drinks, soft drinks, derivatives of petroleum and motor vehicles used mainly for the transport of passengers.

2.6 Are there any other indirect taxes of which we should be aware?

Except for VAT and excise, there are no other indirect taxes.

3 Cross-border Payments

3.1 Is any withholding tax imposed on dividends paid by a locally resident company to a non-resident?

No, there is no withholding tax on dividends distributed from a Kosovo resident company.

3.2 Would there be any withholding tax on royalties paid by a local company to a non-resident?

Yes. There is a 10% withholding tax on royalties paid by a Kosovo company to a non-resident.

3.3 Would there be any withholding tax on interest paid by a local company to a non-resident?

Yes. There is a 10% withholding tax on interest paid by a Kosovo company to a non-resident.

3.4 Would relief for interest so paid be restricted by reference to “thin capitalisation” rules?

No, there are no “thin capitalisation” rules or any similar rules.

3.5 If so, is there a “safe harbour” by reference to which tax relief is assured?

No, there is no such provision.

3.6 Would any such rules extend to debt advanced by a third party but guaranteed by a parent company?

As indicated in question 3.4, there are no “thin capitalisation” rules in place.

3.7 Are there any other restrictions on tax relief for interest payments by a local company to a non-resident?

No, there are not.

3.8 Does Kosovo have transfer pricing rules?

Corporate Income Tax Law provides that the prices between related parties should be fixed at open market value. Such value should be determined under the uncontrolled price method, and when this is not possible, the resale price method or the cost-plus method. Additional rules are provided for by an administrative instruction.

4 Tax on Business Operations: General

4.1 What is the headline rate of tax on corporate profits?

Kosovo Corporate Income Tax Law provides for a flat rate of 10%.

4.2 When is that tax generally payable?

The tax is payable on quarterly advance payments and final settlement is made on or before 31 March of the following year upon the submission of financial statements.

4.3 Is the tax base accounting profit subject to adjustments, or something else?

Yes, the taxable base is calculated starting from the profit shown in the financial statements, and is adjusted in accordance with the limitations provided in Corporate Income Law.

4.4 If the tax base is accounting profit subject to adjustments, what are the main adjustments?

The Corporate Income Law provides a list of expenses that are non-deductible for tax purposes, consisting of:

- fines and penalties;
- income tax paid or accrued for the current or previous tax period and any interest or late penalty incurred for late payment of it;
- any loss from the sale or exchange of property between related persons;
- pension contributions above the maximum amount allowed by the Kosovo Pension Law;
- bad debts that do not meet the specified conditions;
- contributions made for humanitarian, health, or education;
- religious, scientific, cultural, and environmental protection;
- sports purposes, which exceed 5% of taxable income (before the deduction of such expenses);

- representation costs (these include publicity, advertising, entertainment and representation), which exceed 2% of the total gross income; and
- accrued expense for which the withholding tax should be paid, unless such expense is paid on or before 31 March of the subsequent tax period.

4.5 Are there any tax grouping rules? Do these allow for relief in Kosovo for losses of overseas subsidiaries?

No, there are no tax-grouping rules.

4.6 Is tax imposed at a different rate upon distributed, as opposed to retained, profits?

No, there is no difference in this regard.

4.7 Are companies subject to any other national taxes (excluding those dealt with in "Transaction Taxes") - e.g. tax on the occupation of property?

Yes, there are property taxes in Kosovo. All persons that own, use or occupy immovable property are subject to tax on real estate. The annual tax rates vary between 0.05% and 1% of the market value of the real estate, depending on the location.

4.8 Are there any local taxes not dealt with in answers to other questions?

No, there are not.

5 Capital Gains

5.1 Is there a special set of rules for taxing capital gains and losses?

Yes, Corporate Income Law indicates the rules applicable to capital gain. As a general rule, capital gains and losses are treated as ordinary income/losses from economic activity. Capital gains are not recognised for fixed assets which are depreciated in a pool and purchased prior to 1 January 2010.

5.2 If so, is the rate of tax imposed upon capital gains different from the rate imposed upon business profits?

Capital gains are taxed at the same rate as business profit.

5.3 Is there a participation exemption for capital gains?

No, there is no exemption.

5.4 Is there any special relief for reinvestment?

No, there is no relief for reinvestment.

5.5 Does Kosovo impose withholding tax on the proceeds of selling a direct or indirect interest in local assets/shares?

No, there is no withholding tax on the proceeds of selling a director indirect interest in local assets/shares.

6 Local Branch or Subsidiary?

6.1 What taxes (e.g. capital duty) would be imposed upon the formation of a subsidiary?

There are no taxes payable upon formation of a subsidiary.

6.2 Are there any other significant taxes or fees that would be incurred by a locally formed subsidiary but not by a branch of a non-resident company?

No, there are no such taxes or fees.

6.3 How would the taxable profits of a local branch be determined in its jurisdiction?

Branches are taxed only on the taxable income from a Kosovo source of income. The taxable income is determined in the same manner as for resident companies.

6.4 Would such a branch be subject to a branch profits tax (or other tax limited to branches of non-resident companies)?

There is no branch profit tax. Taxable income of branches is subject to Corporate Income Tax at the same rate of 10%.

6.5 Would a branch benefit from double tax relief in its jurisdiction?

Branches have the same treatment under the local legislation.

6.6 Would any withholding tax or other similar tax be imposed as the result of a remittance of profits by the branch?

No, there is no withholding tax or other tax as regards the remittance of profit by the branch.

7 Overseas Profits

7.1 Does Kosovo tax profits earned in overseas branches?

Foreign-sourced income is taxable in Kosovo. However, tax credit is allowable for the amount of income tax paid overseas for the income derived abroad.

7.2 Is tax imposed on the receipt of dividends by a local company from a non-resident company?

No, dividends distributed by a non-resident to a local company are considered as exempt income.

7.3 Does Kosovo have “controlled foreign company” rules and, if so, when do these apply?

No, there are no “controlled foreign company” rules.

8 Anti-avoidance

8.1 Does Kosovo have a general anti-avoidance or anti-abuse rule?

Tax Procedure Law provides for the right of tax authorities to disregard and re-characterise a transaction or element of the transaction that does not have a substantial economic effect, where the form of the transaction does not reflect its economic substance and where it was entered into as part of a scheme to avoid a tax liability.

8.2 Is there a requirement to make special disclosure of avoidance schemes?

No, there are no requirements to disclose avoidance schemes.

TAX ON INBOUND INVESTMENT 2015, ALBANIA



Alketa Uruci



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Acquisitions (from the buyer's perspective)

1 Tax treatment of different acquisitions

What are the differences in tax treatment between an acquisition of stock in a company and the acquisition of business assets and liabilities?

A foreign purchaser may acquire an Albanian company (the target company) by purchasing either its assets or its stock. A foreign company acquiring the (Albanian) assets of an Albanian company for carrying on business in Albania will normally be regarded as having a permanent establishment in Albania; thus, it will be taxable in Albania in accordance with domestic tax 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 of the target company through a third company newly established in Albania by the foreign company, or through an existing Albanian company, shares of which have been previously purchased by the foreign company. Most tangible and intangible assets may be depreciated, except for land, securities and some other specific assets. On a decline basis, buildings are depreciated at 5 per cent per annum, software at 25 per cent per annum, and all other assets at 20 per cent per annum. Trademarks and other intangibles are depreciated at 15 per cent per annum on a straightline basis. Under the Income Tax Law (No. 8438 of 1998), there are no immediate Albanian tax consequences for a foreign company when it acquires the stock of an Albanian company. Apart from the carry-forward of losses, as described below, the tax position of the acquired Albanian company remains unchanged. With regard to the tax liability of the buyer towards the stock or business activity purchased, differences result due to the nature of the transaction and the impact of other applicable legislation.

Consequently, as a result of the acquisition of stock in a company, the buyer might be liable for latent tax liabilities affecting the company. (The Tax Procedures

Law (No. 9920 of 2008) has the effect of piercing the corporate veil; therefore, even a shareholder of a company where the legal form imposes limitation of its liability up to its contribution into the company may become liable for the tax liabilities of the company.) As a result of the acquisition of business assets and liabilities (ie, activity) the buyer may also become liable for tax liabilities pertaining to the activity purchased before its acquisition (for details and exceptions, see question 9). It is not possible to obtain assurances from the tax authorities that a potential target company has no tax liabilities or advice on whether the target is involved in a tax dispute. Hence, the extent of indemnities or warranties is a matter of negotiation between the parties. 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 stock or business assets and liabilities will be subject to Albanian income tax (currently at 15 percent), except when double tax treaties, providing otherwise, are applicable. For differences in VAT treatment, see question 6.

2 Step-up in basis

In what circumstances does a purchaser get a step-up in basis in the business assets of the target company? Can goodwill and other intangibles be depreciated for tax purposes in the event of the purchase of those assets, and the purchase of stock in a company owning those assets?

As per the Albanian National Accounting Standards and International Financial Reporting Standards, applicable in Albania from 1 January 2008, goodwill is subject to impairment and not to depreciation. In a purchase of stock in a company owning goodwill and other intangibles, no depreciation of such assets is allowed for tax purposes to the buyer.

3 Domicile of acquisition company

Is it preferable for an acquisition to be executed by an acquisition company established in or out of your jurisdiction?

If the acquisition of business assets is made by an acquisition company established in Albania, the permanent establishment issue mentioned in question 1 will have no impact on the acquisition. In terms of acquisition of stock, there are no tax incentives or differences at the moment of acquisition. Tax differences arise in terms of taxation of dividends distributed by the target company. In fact, if stocks are purchased by the foreign investors through a local company, dividends distributed by the target company to the local subsidiary of the foreign investor are exempt from taxation, provided that both the target company and the local subsidiary are Albanian tax residents and subject to corporate income tax.

4 Company mergers and share exchanges

Are company mergers or share exchanges common forms of acquisition?

In practice, company mergers (as defined under Albanian commercial legislation, ie, fusion-absorption or fusion-creation of a new entity) and share exchanges are not common forms of acquisition in Albania. This is because of the lengthy procedures for realisation of mergers under Albanian commercial legislation. The most common form of acquisition is the share or stock purchase transaction.

5 Tax benefits in issuing stock

Is there a tax benefit to the acquirer in issuing stock as consideration rather than cash?

There is no tax benefit to the acquirer in issuing stock as consideration rather than cash. The tax legislation does not expressly provide for the tax treatment of the vendor; in any case, it results in taxation of the entity receiving the shares in exchange for the in-kind contribution being deferred until future sale of the shares gained in exchange for the contribution.

6 Transaction taxes

Are documentary taxes payable on the acquisition of stock or business assets and, if so, what are the rates and who is accountable? Are any other transaction taxes payable?

There are no payable documentary taxes on the acquisition of stock or business assets.

Under the VAT law, both transactions are exempt from Albanian VAT (currently at 20 per cent). Where such exemption benefits the acquisition of stock

because of the nature of the transaction (ie, share or stock transactions), the exemption of acquisition of business assets is subject to fulfillment of economic and legal conditions. Business assets transactions will be exempted from VAT if the transaction falls under the category of 'transfer of economic activity', defined as a transaction where the taxable person transfers its activity entirely or partially to another person who is already or becomes a taxable person by continuing to conduct such activity, and when the following economic and legal conditions are fulfilled:

- The transferred activity must have economic autonomy; that is, it must continue to be conducted independently after the transfer. Economic autonomy requires the presence of all conditions necessary for the realisation of the activity (such as the premises, raw materials, equipment, etc). If the transfer consists only of one of these elements (eg, raw materials only), the transfer will be considered as supply of goods and thus be subject to VAT.
- The legal requirement consists of the conclusion of a written agreement before a notary public and verification of the balance sheet of the transferor, especially the identification of the assets used for the transferred activity and income realised from the said transfer.

The same verifications will apply to the balance sheet of the transferee. 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 immoveable properties, a tax for transfer of ownership title over the immoveable properties shall apply (such tax is 2,000 leke per square metre for commercial buildings located in Tirana, the capital city (the tax is lower in other districts); furthermore, the tax is 2 per cent of the sale price for all immoveable properties other than buildings).

7 Net operating losses, other tax attributes and insolvency proceedings

Are net operating losses, tax credits or other types of deferred tax asset subject to any limitations after a change of control of the target or in any other circumstances? If not, are there techniques for preserving them? Are acquisitions or reorganisations of bankrupt or insolvent companies subject to any special rules or tax regimes?

Net operating losses do not survive where direct or indirect ownership of the share capital or voting rights of the target changes by more than 50 per cent in number or value. According to the instruction of the minister of finance, net operating losses are strictly related only to the taxpayer.

No other special rules or tax regimes are applicable to acquisitions or reorganisations of bankrupt or insolvent companies.

8 Interest relief

Does an acquisition company get interest relief for borrowings to acquire the target? Are there restrictions on deductibility where the lender is foreign, a related party, or both? Can withholding taxes on interest payments be easily avoided? Is debt pushdown easily achieved? In particular, are there capitalisation rules that prevent the pushdown of excessive debt?

As a general rule, interest paid on loans stipulated for acquiring the target is tax-deductible. The nationality of the lender does not imply any restrictions on the interest's tax deductibility, while the fact that it might be a related party involves consideration of the transaction under transferpricing rules.

Albanian fiscal legislation restricts such deductibility to compliance with the following rules:

- thin capitalisation: the loan for which the interest is paid is less than four times the amount of the taxpayer's net assets (this rule is not applicable to banks, insurance and leasing companies, or for loans that are granted from banks for a duration of less than one year);
- interest paid by the taxpayer during the financial year is less than the average of 12 months' credit interest rate applied by Albanian second tier banks; and
- transfer pricing: to be deductible, the interest amount should be qualified as determined pursuant to the arm's-length principle. As a general rule, the 10 per cent withholding tax applies to the interest payments made to the foreign lender by the Albanian taxpayer, unless a double tax treaty for avoidance of double taxation entered into between Albania and the country of residence of the foreign lender provides for a lower rate.

When provisions of double tax treaties are applicable, the foreign lender (or Albanian taxpayer) should file with the Albanian General Tax Directorate (the competent public body to implement and interpret the tax treaties) the application form for implementation of the tax treaty along with its certificate of tax residence.

Debt pushdown in the form of a merger may be achieved if the merger is approved by the shareholders representing 75 per cent of the share capital (in a joint-stock company) and is not challenged by the creditors of the target. Albanian income tax legislation does not provide for special rules regarding mergers or debt pushdown. However, the tax deductibility of the interests, after the companies are merged, will be considered by the tax authorities under the general legal deductibility requirement, namely incurrence of expenses in the direct interest of the taxpayer and their qualification as a normal management act.

9 Protections for acquisitions

What forms of protection are generally sought for stock and business asset acquisitions? How are they documented? How are any payments made following a claim under a warranty or indemnity treated from a tax perspective? Are they subject to withholding taxes or taxable in the hands of the recipient?

The tax legislation does not indicate any specific rule with regard to the liability of the seller or acquirer over the debts affecting the stock or business assets and the protection of the acquirer in such cases. However, other legal provisions may be considered for determining such liability.

In the particular case of business activity acquisition, rights and liabilities of such activity are binding on the acquirer provided that the trademark or the registered name of the business activity are also acquired by the acquirer, except when the parties have agreed to restrict or exclude the liability of the acquirer over the acquired activity. Such agreement may not be opposed to third parties, even if disclosed to the public (ie, through filing with the Commercial Register), except when the third parties' acknowledgement of the agreement is proved; or it is proved that, given the circumstances, the third party should have acknowledged such agreement. 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.

Normally, such warranties and representations are indicated in the stock or business asset agreement. Payments made, following a claim under a warranty or indemnity are taxable in the hands of the recipient and non-deductible for the payer. No withholding taxes apply on such payments.

Post-acquisition planning

10 Restructuring

What post-acquisition restructuring, if any, is typically carried out and why?

The post-acquisition restructuring would depend on the business and purpose of the acquisition or restructuring by the acquirer. There is no typical practice in Albania.

11 Spin-offs

Can tax neutral spin-offs of businesses be executed and, if so, can the net operating losses of the spun-off business be preserved? Is it possible to achieve a spin-off without triggering transfer taxes?

No tax-neutral spin-offs of business may be executed. The previous losses of the spin-off business are lost (see question 7).

12 Migration of residence

Is it possible to migrate the residence of the acquisition company or target company from your jurisdiction without tax consequences?

Under commercial legislation, the migration of the residence (legal seat indicated in the by-laws or the real legal seat) of an Albanian company into another

jurisdiction has some implications. In fact, the legislation provides that the territory where the legal seat of the company is located determines the law applicable to the company. Therefore, change of the jurisdiction of the legal seat implies change of legal jurisdiction; hence, dissolution of the company. The dissolution of the company is preceded by its liquidation, which has tax consequences in terms of the taxation of income resulting from the liquidation process.

13 Interest and dividend payments

Are interest and dividend payments made out of your jurisdiction subject to withholding taxes and, if so, at what rates? Are there domestic exemptions from these withholdings or are they treaty-dependent?

Interest and dividend payments made by an Albanian tax resident to a foreign entity are subject to a 10 per cent withholding tax. Double tax treaties may provide for lower tax rates.

No withholding tax applies to interest and dividend payments made to an Albanian tax-registered entity. For the recipient, interest is subject to corporate income tax (as ordinary income) while dividends are free from it.

14 Tax-efficient extraction of profits

What other tax-efficient means are adopted for extracting profits from your jurisdiction?

There are no other tax-efficient means for extracting profits from Albania.

Disposals (from the seller's perspective)

15 Disposals

How are disposals most commonly carried out – a disposal of the business assets, the stock in the local company or stock in the foreign holding company?

The most commonly carried out disposal in Albania is disposal of the stock in the local company.

16 Disposals of stock

Where the disposal is of stock in the local company by a non-resident company, will gains on disposal be exempt from tax? Are there special rules dealing with the disposal of stock in real property, energy and natural resource companies?

The gains on disposal will not be exempt from taxation (such gains will be considered as having an Albanian source under the Income Tax Law) unless a double taxation treaty provides otherwise.

Under national legislation, there are no special rules dealing with the disposal of stock in real property, energy and natural resource companies. Some double tax treaties entered into by Albania, however, provide for such rules if the stock represents the share capital of a real property company.

17 Avoiding and deferring tax

If a gain is taxable on the disposal either of the shares in the local company or of the business assets by the local company, are there any methods for deferring or avoiding the tax?

The Income Tax Law does not provide for any possibility to defer or avoid taxation.

KOSOVO BILATERAL TAX AGREEMENTS RATIFIED



Fitore Mekaj

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Although Kosovo declared its independence from Serbia in 2008, the tax authorities have not officially abolished the tax treaties that were signed by the former Yugoslavia. On the other hand, the Kosovar tax authorities have not accepted the direct application of these tax treaties.

In the past few years, Kosovo and several European countries have enacted several agreements signed by the former Yugoslavia. The president of Kosovo has signed the respective decrees for the approval of these agreements, including double taxation treaties. In practice, there are still uncertainties with regard to the initial date of their application.

The president has ratified by decree the following double taxation treaties signed by the former Yugoslavia:

- agreements for the avoidance of double taxation with respect to taxes on income and capital that were entered into with:
- the United Kingdom (published in the Official Gazette on September 6 2010);
- Germany (published in the Official Gazette on September 8 2011);
- Belgium (published in the Official Gazette on April 2 2010); and
- Finland (published in the Official Gazette on September 8 2011); and
- an agreement with the Czech Republic for the avoidance of double taxation on inheritance tax (published in the Official Gazette on April 4 2011).

Since independence, Kosovo has entered into double taxation treaties for the avoidance of double taxation with respect to taxes on income and capital with Albania (effective January 1 2006) and Macedonia (effective April 13 2012).

The government’s main objective in enacting the double taxation treaties is to promote foreign investment and economic trade between Kosovo and other countries.

The following table lists the tax rates of countries with which Kosovo has established bilateral relations through double taxation treaties.

Country	Dividends		Interest	Royalties
	Qualified companies	Others		
Albania	10%	10%	10%	10%
Macedonia	-	5%	10%	10%
Belgium	10%	15%	15%	10%
Finland	5%	15%	-	10%
Germany	15%	15%	-	10%
United Kingdom	5%	15%	10%	10%

VAT AND EXPORT SERVICES IN ALBANIA



Mirjeta Emini

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In the ambit of the Stabilization and Association Agreement entered into between Albania and EU, Albania has adopted certain amendments to its VAT legislation aiming to harmonize its internal legislation with that of the EU. Some newly adopted rules on VAT treatment of exports have been associated to the harmonization obligation. Though sub-legal acts have also been passed to implement the new law provisions, some ambiguities in their practical application still persist.

Until January 2010, the export of services under VAT legislation was considered as exempted supply with right of deduction (i.e. subject to a VAT at 0% with the right to deduct the input VAT related to such supplies). Under the previous article 31 of Law no. 7828, dated 27.04.1995 “On VAT”, the VAT at the rate of 0% was applied on:

- a. supply of services conducted outside the territory of the Republic of Albania from a taxable person whose place of business or whose residence, in the case of individuals, is in Albania;
- b. supply of services related to the international transportation of passengers and goods; and
- c. supply of goods and services related to the commercial or industrial activity in the sea.

Starting from January 2010, with adoption of some amendments to the above provisions, the services under point (a) are considered as VAT exempted supply with no right of deduction. This means that no VAT should be applied from an Albanian supplier, but the input VAT related to purchases made by this supplier for such export supplies are no longer deductible. With the new change the taxpayer, having taxable and exempt supplies, should apply the partial VAT credit scheme.

Nonetheless, there are certain exemptions to the VAT non deductibility rule set forth in joint instruction issued by the Minister of Finance and the Minister of Public Works, Transportation and Telecommunication (Instruction no. 13, dated 18.09.2010). This instruction has determined the specific categories of supplies related to the international transport of goods and passengers considered as export and taxable at 0% rate. These categories include the international transport in the sea and the international air transport as well as the related services.

For the first time, through such instruction, telecommunication roaming services invoiced to non-resident operators are considered as export services and consequently as zero rated supplies (and not as exempt supplies). In addition, the telecommunication services of interconnection offered to a foreign operator from the Albanian operators will be also considered as export of services, for VAT purposes. This specific wording served to put some clarity in the VAT treatment of telecommunication services, which until that moment were ambiguous.

Nevertheless, the definition of “export of services”, which has continuously been a challengeable issue between the taxpayers and the tax authorities in Albania, remains still an issue. Pursuant to the provision of the article 15/1 of the VAT Law, the place of supply of services is where the services are produced, unless otherwise provided under this law. Pursuant to article 15/4 of the VAT Law, in principle, services are considered to have been rendered at the place where the supplier is established. Albanian tax authorities link the determination of place of supply of services with the place of use/consumption of the services i.e. whether the services rendered to foreign entities are used by the latest abroad or in Albania. In other words, if the services rendered to foreign entities are used by the latest abroad or in Albania. In other words, if the services are required and necessary for an activity of the foreign entity in Albania, the services may be considered as used/consumed in Albania and subject to the VAT at 20% rate. Hence, the fact that the services were provided to a client outside Albania is not relevant for the tax authorities.

In the past, the question whether the services rendered within Albanian territory and consumed by a foreign entity would be considered as export of services were at the centre of debates and subject to different interpretation issued by the tax authorities. Unfortunately, the amendments of January 2011 have not put an end to such discussions and ambiguities. Again, the tax authorities tend to consider the place where the services are rendered as the basis for considering the services as taxable, without any written and clear guidelines being issued for avoiding different interpretations and their impact to the status of the taxpayers’ obligations.

WITHHOLDING TAX IN KOSOVO



Mirjeta Emini



Andi Pacani

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The Corporate Income Tax Law (03/L-162, December 29 2009), which entered into force on January 1 2010, has introduced for the first time a withholding tax on certain payments made to non-resident taxpayers. Previously, the legislation did not provide clear provisions for the taxation of non-residents without a permanent establishment in Kosovo that rendered services in Kosovo. The interpretations of the tax authorities were thus inconsistent.

The new law provides that the following will be subject to withholding tax at a rate of 5%:

- income attributable to non-resident entertainers (eg, theatre, motion picture, radio or television artists, singers, musicians or sportspeople), generated from personal activities exercised in Kosovo; and
- income generated in Kosovo by non-resident persons or entities for services performed in Kosovo, provided that the non-resident has no permanent establishment in Kosovo and the gross compensation paid exceeds €5,000 in any tax period (calendar year).

Withholding tax is also levied on income from interest, royalties, rents, lotteries and games of chance earned by Kosovo residents or non-residents. Reflecting the change in the corporate income tax rate, except for the withholding tax on rent (9%), all other income is taxed at 10%.

The withholding tax will be levied even in cases where the recipient of the income is subject to corporate income tax and such income is included in the recipient's taxable profits. The withholding tax is offset against the corporate income tax payable by the recipient on the annual tax return.

Pursuant to the new law, dividends received by resident and non-resident taxpayers are not subject to the withholding tax.

