



US Overseas Investment Report **2017**

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IFLR
INTERNATIONAL FINANCIAL LAW REVIEW

Albania

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SECTION 1: Market outlook

1.1 What is the outlook for US investment into your jurisdiction over the next 12 months, given the new US administration's protectionist focus?

The outlook for US investment into Albania over the next 12 months is not promising, not because of the new US administration's protectionist focus but due to domestic reforms that still need time to show results.



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1.2 Are there any industries in particular that you think are more likely to be affected by the US's new economic stance?

The petroleum industry in Albania is more likely than other sectors to be affected by the US administration's new economic stance.

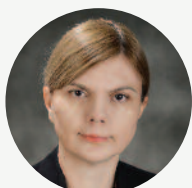
SECTION 2: Approving foreign investments

2.1 Explain the foreign investment approval process and approval timetable.

Foreign investment is governed by several laws and regulations; the most significant are the Albanian Constitution and Law 7764 On Foreign Investments dated November 2 1993, as amended (Law on Foreign Investments).

According to the Law on Foreign Investments, there are no specific approval processes and timetables to be followed in general by the foreign investors.

The constitution guarantees fundamental rights, such as private ownership, freedom of economic activity, free market economy, anti-monopolistic protection, free repatriation of capital and profits, and equal treatment of foreign and domestic investments and investors.



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About the author

Ardjana Shehi is a senior partner at Kalo & Associates, Tirana, primarily in the finance and tax practice. Shehi holds a law degree (LLM) and an MBA. She has completed various legal training programmes in foreign institutions, such as the University of Birmingham and Copenhagen Business School, among others. Shehi holds a UK CIPD certificate in training and human resources. With over 25 years of extensive legal experience, Shehi has excellent knowledge and experience in providing legal services, analysing legal frameworks and drafting legislation, and in providing training to the Albanian legal community, particularly Albanian judges.

Shehi has excellent experience in finance, tax and bankruptcy law. Her clients include many international organisations and foreign and multinational companies (Fortune 100 and Fortune 500). These include: the International Finance Corporation (IFC), Black Sea Trade and Development Bank (BSTDB), European Bank for Reconstruction and Development (EBRD), Bechtel International, Lockheed Martin, Shell, EVN, Cairn, Vodafone, Ericsson, Philip Morris, IATA and CIT (Aviation), among others.

Shehi has been a key expert in drafting laws, such as the Taxpayers' Advocate Law (2016), Renewable Energy Law (2013), Concession Law (2012), Pension Fund Law and Investment Fund Law (2009), among others.



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About the author

Irv Vaso is an associate in finance and tax group of Kalo & Associates, Tirana. He has an LLB and has further completed a master's degree (LLM) in civil and corporate law. The primary focus of his practice is on employment related issues and issues related to employment tax liabilities, including but not limited to drafting and reviewing employment and management service contracts, collective labour agreements with trade unions, advice related to mandatory social security and health insurance contributions (which together with personal income tax are considered as tax liabilities), termination payments and redundancy settlements/compromise agreements, employment tax due diligence, benefit packages, retirement and pension planning, share options and other share schemes advice, and Albanian tax residence rules applicable to foreign employees and expats, etc.

Vaso has excellent relationships with different ministries and several second-tier public institutions. Mostly, he liaises between the firm and the relevant state authorities aiming to receive advanced ruling for the implementation of Albanian legislation regarding employment matters and social contributions. In addition, he covers issues including entry clearance requirements, residence permit and work permits.

Law 10303, dated July 15 2010, established the Albanian Investment Development Agency (Aida), which is the designated national investment promotion agency.

The following tasks are assigned to Aida: to facilitate and support direct investment in Albania; to increase the competitiveness of small and medium-sized enterprises; to promote and support exports of goods and services. It conducts activities to improve the business climate, helping private companies at all stages of their economic activity, as well as intermediating with investors and state authorities. Aida may be a valuable resource for potential investors looking to invest in Albania.

2.2 Are there any investment restrictions in specially regulated sectors and is the government entitled to any special rights in these sectors?

There are no investment restrictions in any type of sectors in Albania; on the contrary, under the Law on Foreign Investments, foreign investors are granted the same treatment as nationals and do not require any additional licence or approval to invest in the country. Foreign investors are free to establish legal presence, subsidiaries, representative offices, and branches to the same extent as any domestic business may and the foreign investor shall not be subjected to less favourable treatment in terms of taxes.

According to some recent legal amendments, under article 8(a) of the Law on Foreign Investments, the Council of Ministers may grant special state protection to a foreign investment in the case that the investment is performed in public infrastructure or tourism, energy

and agriculture on the basis of a state concession contract; or on immovable property granted by Albanian government; or on an immovable property upon which the foreign investor has acquired proprietary rights. The latter is on the basis of documents or public acts lawfully issued by a competent state body or public entity, and where an investor performs or plans to perform an investment for a value not less than €10 million (\$11.75 million).

2.3 Which authority oversees competition clearance and give a brief overview of the merger clearance process?

The Albanian Competition Authority (ACA) is established by the Competition Law, and is composed of a commission of five members and a secretariat. The Competition Commission is the decision making body.

The Competition Law requires mandatory notification of all transactions that result in a 'concentration of undertakings' and which meet the relevant thresholds independently of whether such transaction is by way of a merger, an acquisition or a public takeover. Any joint-venture (JV) that performs the function of an independent economic unit is also subject to the Competition Law. More specifically, a concentration under the Competition Law shall be deemed to arise where a change of control on a lasting basis results from:

- the merger of two or more previously independent undertakings or parts of undertakings; or
- the acquisition by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

The creation of a JV shall not be deemed to be a JV if the scope of the JV is the coordination of competing activities between two or more independent undertakings.

Concentrations require notification with the Competition Authority if in the last financial year preceding the concentration some relevant legal conditions are met.

Procedural deadlines

The deadline for notification is 30 calendar days from the date of the conclusion of an agreement for merger, acquisition of control, creation of a JV or submission of a public bid for acquisition or exchange. A filing shall be made on the basis of the main signed transaction agreement. There are no specific rules referring to memoranda of understanding (MoUs), good faith intentions etc. The period starts to run from the next day of the agreement.

The ACA must decide whether to clear the transaction or to commence an in-depth investigation within two months of receipt of the notification. The period of two months shall begin on the first working day following the confirmation by the ACA of the acknowledgement of receipt of a proper notification; or, if the information to be supplied with the notification is incomplete, on the day following the receipt of the complete information.

The ACA may, however, extend this deadline by a further specific legal term if the participating parties commit to undertake to remedy any adverse effects of the merger to obtain clearance.

Based on the Instruction on Simplified Procedures for the Review of Concentrations, the ACA may decide to clear a transaction within a specific legal deadline in the following cases:

- a) An acquisition between undertakings on condition that none of the participating undertakings shall be engaged in the same business activity for the same product and market;
- b) An acquisition between undertakings if both the following conditions are simultaneously met:
 - i The combined market share of all the parties dealing with the same business activity in the same product or geographic market (horizontal relationship) is less than 15%.
 - ii Individual or combined market shares of all parties in the concentration dealing with business activities in a product market which is an upstream or downstream market of a product market in which any other party in the concentration is engaged (vertical relationship) is less than 25%.
- c) An acquisition where both the following conditions are met:
 - i The combined market share of all the parties in the concentration being in a horizontal relationship is less than 50%.
 - ii The delta of the Herfindahl-Hirschman Index (a measure of market concentration) resulting from the concentration is under 150.

The ACA may always apply the standard review periods if it judges that the concentration deserves closer investigation. On the other hand, the ACA may select not to apply the simplified review period even in those cases when clearly there are no market overlaps but the markets concerned are considered 'neighbouring markets'.

Where the ACA commences an in-depth investigation, it has an additional period to decide whether to unconditionally clear the concentration or to clear it subject to conditions or to prohibit the concentration.

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 'silence-is-consent-rule,' unless the ACA extends or suspends the above-mentioned time limits.

Notification fee (to obtain notification forms):

- ALL7,500 (\$66.5) for undertakings that acquire control with a domestic total turnover of ALL200 million to ALL1 billion;
- ALL15,000 for undertakings that acquire control with a domestic total turnover of above ALL1 billion.

Clearance fee:

- ALL250,000 for undertakings that acquire control with a domestic total turnover of ALL200 million to ALL1 billion;
- ALL500,000 for undertakings that acquire control with a domestic total turnover of above ALL1 billion.

2.4 Are there further approval requirements that foreign investors should be aware of?

Foreign investors are entitled to the same rights as Albanian investors. Furthermore, according to the Law on Foreign Investments, all foreign investments have equal and unbiased treatment protection and security.

SECTION 3: Investment techniques

3.1 What are the most common legal entities used for US investment in your jurisdiction?

Any entity intending to carry out an economic activity in Albania is required to have a legal presence in Albania in the form of a newly established and registered Albanian legal entity or in the form of a branch of a foreign company. Law 9901, dated April 14 2008, On Entrepreneurs and Commercial Companies, as amended (the Albanian Company Law), Law 131/2015, dated November 26 2015 On the National Business Centre and Law 9723, dated May 3 2007 On the business registration, as amended, provide the rules for the registration of such legal presence at the National Business Centre (NBC).

The subsidiary shall be deemed to be a separate entity, taking one of the forms provided for by the Albanian Company Law. Regardless of the chosen commercial form, the subsidiary shall have a determined name, object of activity, legal seat (registered office) pursuant to lease or ownership title, and management (a sole or more managers). The business forms typically used that are provided for under the Albanian Company Law are: general partnership; limited partnership; limited liability company (LLC); or joint stock company (JSC).

General and limited partnerships are rarely used in practice, whereas LLCs (SHPK) and JSCs (SHA) are the most frequently used forms of business.

The LLC is the most commonly chosen and appropriate legal form for conducting business in Albania. In principle, its shareholders are not responsible for the company's obligations, and they are personally liable for losses only to the extent of their unpaid capital contribution (there are some exceptions). The initial capital for incorporating this type of legal entity is ALL100. The LLC may also have only one sole shareholder, in which case all the resolutions of the company must be registered in the register of resolutions of the company.

In a JSC the capital is divided into shares. The shareholders are not responsible for the company's obligations and they are liable for losses only to the extent of their unpaid capital contribution (with some exceptions).

The required capital contribution is at least ALL3.5 million for companies with private offer and ALL10 million for companies with public offer. JSCs have a more complex organisational structure compared to other types of companies and are typically a mandatory form of company for sectors such as insurance.

3.2 What are the key requirements for establishment and operation of these legal entities?

The registration of a subsidiary in the form of LLC or JSC is made through the National Business Centre (NBC) and by law, if all the documents filed will be complete, registration should take place within 24 hours as of the date of application. In practice, this may take up to three days if there is any clarification required from the NBC personnel with respect to the documents. Registration with the NBC constitutes registration with the tax authorities and equipment with the fiscal VAT certificate, i.e. the entity as of that moment can start to issue invoices.

All foreign documents required for registration must be duly notarised and apostilled.

All the documents noted above before submission for registration must be accompanied with a certified translation in the Albanian language.

The organisational structure of both legal entities is briefly described below:

LLC

The governing bodies of an LLC are:

1. General assembly

- change of the denomination of the company, change of seat or activity;
- increase or decrease of the share capital of the company;
- sale or transfer of shares to third parties;
- dissolution and liquidation of the company;
- appointment or discharge of administrator(s)/managing directors of the company;
- approval of balance-sheet;
- appointment of the chartered accountant of the company; and
- any other change of the company bylaws, etc.

2. Managing directors (MDs)

The daily management is performed by MD(s) appointed by the general assembly. According to the current Albanian Company Law MDs may not be appointed for more than five years but their term is renewable. The MDs represent the company before third parties and they may appoint other persons to act on the company's behalf.

Under article 95 of the Albanian Company Law, a director of the mother company cannot simultaneously be the director of its controlled subsidiary.

The appointment of an auditor is only obligatory in the case of a LLC if at the closing of the accounting period (financial year) the company exceeds the following thresholds: the total of the balance sheet assets for the financial year in question is equal to, or more than ALL50 million; the total turnover of the financial year in question is equal to, or more than ALL100 million; or it has on average 30 employees during the financial year in question.

JSC

The organisational structure of a JSC is as follows:

- The general assembly; and
- Either, the managing council as a single management organ that comprises both supervisory and management functions (one tier system); or the supervisory board and the MD(s) (two tier system). In the latter, the supervisory and the management functions are divided between these two organs.

In the latter case, MDs may be appointed either by the general assembly or by the supervisory board.

In a JSC, the managing council (in the one tier system) and the supervisory board (in the two tier system) should have no fewer than three and no more than 21 members. They cannot be appointed for a period exceeding three years – their mandate being renewable without limitation.

The initial capital must be fully subscribed to before the registration of the company with the NBC. At the same time, at least one quarter of the nominal value of the shares must be paid and the remaining unpaid capital must be paid in one or more instalments, according to the decision of the management organs of the JSC. As for the shares

contributed in kind, they must be fully subscribed and paid in before registering with the relevant authority (NBC). Contributions in services are not permitted.

SECTION 4: Dispute resolution

4.1 How effective are local courts' enforcement and dispute resolution proceedings, and what should US investors be particularly aware of?

According to the Law on Foreign Investments, all foreign investors are entitled to submit disputes to an Albanian court or to the Arbitration Court in Tirana. In the event of a dispute arising between a foreign investor and either a private Albanian party or the Albanian government, the dispute may be submitted for resolution to a previously agreed dispute resolution procedure. If such procedure has not been specified, the foreign investor may submit the dispute to an authorised court or arbitrator as provided by Albanian law.

According to the Albanian Private International Law, foreign investors have the right to choose a foreign dispute resolution centre. Further, under the laws of the Republic of Albania: the submission by the foreign investor of any dispute, controversy or claim arising out of or relating to the business in Albania to arbitration is a valid submission to arbitration; and the submission by the foreign investor to the jurisdiction of a foreign court is a valid and enforceable choice. In addition, in compliance with the June 10 1958 New York Convention on the Recognition of Enforcement of Foreign Arbitral Awards, an arbitral award obtained against Albanian parties working with US citizens in an arbitration proceeding and/or a judgement obtained against Albanian or third parties located in Albania from the foreign court will be enforced by the courts in the Republic of Albania, without re-examination or re-litigation of the matters, unless the foreign arbitral award or foreign court judgement violates basic principles of Albanian Law.

4.2 Does your jurisdiction have a bilateral investment protection treaty with the US and is that commonly used by investors?

On June 10 1992, the Republic of Albania and the US entered into an agreement concerning economic, technical and related assistance. This agreement sets forth a framework concerning economic, technical and related assistance which may be provided by the US government, subject to the applicable US laws and regulations.

The US signed a bilateral investment treaty in 1995, which entered into force in January 1998. The bilateral investment treaty (BIT) with Albania is based on the view that an open investment policy contributes to economic growth. This Treaty aims to assist Albania in its efforts to develop its economy by creating conditions more favourable for US private investment and thus strengthen the development of its private sector.

There is no free trade agreement or bilateral tax treaty between the two countries.

4.3 Do local courts respect foreign judgments and are international arbitration awards enforceable?

Albania is a signatory to the 1958 New York Convention and the Geneva Convention of 1961. The ratifying law provides that Albania is committed to recognise and enforce any international arbitration award concerning a dispute relating to foreign investment. Albanian legislation provides for the possibility of entering a clause into a contract indicating the steps to be taken to resolve disputes. If this clause has been inserted, the foreign investor may turn to a court or arbitrator, as required by Albanian law.

In addition, Albania is a member state to the International Centre for the Settlement of Investment Disputes (ICSID Convention). Disputes concerning unequal treatment or expropriation of foreign investment by the Government of Albania may also be submitted to ICSID, as determined by the Convention on the Settlement of Investment Disputes, adopted in Washington in 1965.

Under Albanian law, every international arbitration decision is final and irrevocable for the parties to the dispute. There is recognition and enforcement procedure to follow for the enforcement of a final award in Albania, but such does not require the discussion of the merits of the dispute, simply procedural issues to be reviewed.

SECTION 5: Forex controls and local operations

5.1 What foreign currency or exchange restrictions should foreign investors be aware of?

There are no foreign currency or exchange restrictions, however the Albanian foreign exchange control regime is regulated by Regulation 70, dated September 30 2009 of the Supervisory Council of the Bank of Albania On Foreign Exchange Activities, as amended (the FX Regulation). The FX Regulation is applied to all transactions between residents and non-residents exercising foreign means of payment and to unilateral transfers of assets from and into the Republic of Albania.

Pursuant to the FX Regulation, foreign exchange transactions represent transactions and/or transfers among residents and non-residents or vice-versa, which are mainly composed of capital transactions and transfers, and current transactions and transfers.

Except for required documentation, which is duly verified by an Albanian licensed entity, no further authorisation or approval is required to transfer the hard currencies abroad. The FX Regulation provides that transfers carried out between residents and non-residents, and which are recorded in the current account of the balance of payments, may be carried out in freely convertible currency units. Current transfers and transactions between residents and non-residents are conducted freely after having submitted a number of required documents.

The FX Regulation provides that in addition to the requirements provided by such regulation, in respect of outbound payment transactions, the rules set out by international agreements ratified by the Republic of Albania, inter-bank bilateral and multilateral agreements where Bank of Albania is a party, as well as banking custom, shall be implemented simultaneously.

SECTION 6: Tax implications

6.1 Are there tax structures and/or favourable intermediary tax jurisdictions that are particularly useful for US investors into the country?

Albania is a signatory to 41 Double Tax Treaty (DTT) agreements and, therefore, any of the relevant countries that have entered into a DTT with Albania could be used as a favourable intermediary tax jurisdiction by the US investors in Albania.

6.2 Has your jurisdiction benefited from the recent trend of US companies pursuing inversion structures? If yes, do you believe this will be threatened under the new administration?

As far as we understand, Albania has not benefited notably from the trend of US companies pursuing inversion structures. Therefore, the related effects will not be threatened by the new administration.

6.3 What are the applicable rates of corporate tax and withholding tax on dividends?

According to the applicable law, the corporate income tax rate is 15%. The law provides also for a simplified corporate income tax. For annual turnover of ALL5 million to ALL8 million the applicable tax rate is five percent, and for annual turnover between zero and ALL5 million the applicable tax rate is zero percent. The applicable tax rate for the withholding tax on dividend is 15%.

6.4 Does the government have any tax incentive schemes in place?

Regarding entities funded by US government funds, the Bilateral Agreement entered into between Albania and the US provides for a number of tax exemptions, guided by the principle that no US government fund will be used to pay any type of taxes, either direct or indirect, in the Republic of Albania.

Regarding the tax exemptions provided by the Albanian fiscal legislation, note that the most important tax exemptions are exemptions related to VAT, including but not limited to VAT on import.

6.5 Are there any reciprocal tax arrangements between your jurisdiction and the US? If so, how can they aid investors?

There is no effective DTT between the US and Albania. However, given that there is no relevant applicable DTT, according to Albanian tax legislation, any tax paid by US citizens in the US can be tax credited in Albania to the level of 15%.

6.6 Do you think that the introduction of new rules and regulations in the US, such as the Bring Jobs Home Act, is likely to have an impact on investment into your country?

Given that Albania does not have a considerable presence of US investors, the Bring Jobs Home Act will not have any impact on US investment in Albania. Notwithstanding the above, given that Albania is a beneficiary of Usaid funds, any decrease in the US aid budget will have an impact, especially in funding the NGO sector and, as a consequence, in the implementation of several developing strategies and projects in Albania.