

ALBANIA & KOSOVO LEGAL NEWSLETTER

TRUSTED LAWYER

The Austrian Embassy announced on its website that it had recently appointed the Managing Partner of KALO & ASSOCIATES as their Lawyer of Trust.

The Embassy stressed that the Lawyer of Trust, as approved by the Ministry of European and International Affairs, plays an important role in acting as legal counsel for protecting the interests of the Austrian Embassy in Albania and also that of Austrian citizens and enterprises in Albania. (For further information you can visit the following websites:

<http://www.bmeia.gv.at/botschaft/tirana/die-botschaft.html> or
<http://www.bmeia.gv.at/al/ambasada/tirane/ambasada.html>

KALO & ASSOCIATES SUPPORTING INTERESTS OF INVESTORS IN ALBANIA



As a long-standing lawyer in Albania, at the front line of investor interests, managing Partner of KALO & ASSOCIATES, Perparim KALO was a keynote speaker commenting on the current foreign investment environment in Albania.

The highlights focused on the present business climate but also advised investors about areas to be approached with caution.

LEGAL UPDATES

Foreign Investment Law: New “Special State Protection”

The change in the relatively long-standing Foreign Investment Law of 1993 has been the subject of much debate and speculative anticipation.

This Law, as amended, still contains the typical protection one expects to see for protection of foreign investment, e.g. guaranteed equal treatment, protection from expropriation and if necessary guaranteed fair compensation, right of repatriation of funds, right to employ foreign employees etc.

However, even with the vast improvement in the foreign investment climate in Albania investors still face lack of legal certainty and security in enforcement of law, enforcement of contracts, and security of real estate title. To be fair this problem is also faced by all investors (whether domestic or foreign) and is not an uncommon problem in the Balkan region. Albania like other Balkan countries wishes to attract investors for large value projects and recognises the need to offer reassurance.

This new amendment introduces the concept of “Special State Protection”. This Special State Protection would be made available to investments that are carried out in the field of public infrastructure or tourism, energy or agriculture on the basis of a Concession, or those investments which are based on real estate, the use of which or ownership title of which has been granted through administrative acts and anticipate investment of at least EUR.10 Million.

What does this mean exactly?

The special protection is focused in two main areas; firstly, the state advocate would be involved at its own expense, in representing the interest of the foreign investors at all stages of a dispute resolution process in relation

to disputes between foreign investors and any other parties; and secondly, in special cases where a case has been lost by the foreign investor the Albanian government would expropriate the property of the winning party so as to allow the foreign investor to continue its business operations without hindrance.

This new change seeks to reinforce the idea that a foreign investment (in those specified sectors) may be considered to be an important public interest, to the extent that (it being a foreign investment on its own) may warrant interference with other people’s rights (i.e. through expropriation).

Each case of “Special State Protection” must be approved by a Council of Ministers Decision, a body which enjoys high discretion in this regard.

This concept has not yet been tested by constitutional court and even to date we note there have been a number of constitutional arguments against this new amendment, the ramifications of which remains to be seen.

By Sophia Darling, Partner

New Mining Law:

The Albanian Parliament approved a new Mining Law (effective as from 28.08.2010) repealing the previous 1994 Law.

The New Mining Law is an improvement on the Old Law and has introduced many changes however, some points of interest for investors not addressed, such as that related to offering security/collateral for financing projects in this sector and e.g. any possibility for registration of any third party interests over the mining permit itself.

Mining Permits Applications: Under the Old Law there was effectively no competitive or bidding procedure

continue page 2



from page 1

anyone who met the criteria could simply apply. The New Law however now provides for three types of mining zones: (i) open areas (granted on a “first come first served” basis); (ii) competitive (subject to open tender procedures to be determined by the Council of Ministers); and (iii) areas granted under concession procedures pursuant to the Concession Law.

Types of Permits: There are now only two types of mining permits (i) prospecting-exploration permits and (ii) exploitation permits. The activity of Prospecting and Exploration has now, for the purpose of applications, been merged into one.

Financial Guarantees: Mining permits holders under this new law are now obliged to offer financial security to cover (i) rehabilitation of the environment; (ii) completion of the minimum working schedule; and (iii) completion of the investment plan. These three types of financial guarantees must also be provided by existing mining permit holders and by any new permit holder, with such guarantee to be deposited each year following the date of the grant of the permit.

Transitional Provisions: It is arguable that the transitional provisions do not adequately provide for sufficient legal certainty for existing permit holders and how the very significant changes in the law will impact existing permit holders. In addition to that regarding the application of the financial guarantee the only other transitional reference to existing mining permits provides that any application for renewal of existing permits should be made pursuant to the provision of the New Mining Law. The Question remains as to how the different duration terms under the New Law shall apply (if at all).

Other changes include limitations on surface size of mining areas granted to permit holders; change of the terms and conditions of mining permits; issuance of mining permits through the National Licensing Centre; new configuration of the groups of minerals etc.

Infrastructure & NR Department

APPROXIMATION OF COMPETITION LAW WITH EU LAW

The much anticipated changes to the Law on the Protection of Competition (dated 28.07.2003) prepared by the Competition Authority in cooperation with GTZ have been finally endorsed by the Albanian Parliament and entered into force on 22.10.2010. The changes have been introduced to fully harmonize the Competition Law with EC competition laws. This complete harmonization offers much comfort to the Competition Authority (“CA”), lawyers and other practitioners as they can now also seek to rely on EC legislation and case law for purposes of interpretation of the law where there are gaps in the applicable secondary legislation adopted by the Competition Authority and, of course, gaps because of the lack of precedents.

I focus here on the changes only brought about for “**Merger Control**”:

Concentration Redefined – A concentration is no longer just a merger or acquisition but now one which shall result in the lasting change in the control of the undertakings concerned. This requirement is in line with the concept of a concentration contained in the European Commission’s Consolidated Jurisdictional Notice and does remove some degree of uncertainty as to what operations would really amount to a concentration, for e.g. in the case of a minority acquisition now it is clear under this new definition that such acquisition shall amount to a concentration if it changes, on a lasting basis, the balance of control in an undertaking.

Turnover Thresholds – The worldwide and domestic jurisdictional thresholds have been considerably lowered. A concentration notification threshold shall be triggered if the combined worldwide turnover of the undertakings concerned is more than 7 billion LEK (was 70 billion) and the turnover of at least one undertaking in the domestic market is more than 200 million LEK (was 500 million LEK) or the combined domestic turnover is 400 million LEK (was 800 million LEK) and the turnover of at least one undertaking is more than 200 million LEK. Lowering the thresholds will inevitably increase the number of concentrations triggering the CA clearance requirements.



Artist: Isuf Sulovari

Landscape, oil on board

Substantive Test – When assessing the competitive effects of a concentration the CA may now also consider the economic efficiencies thereof, such as an increase in the welfare of consumers, and this being a result of the concentration and verifiable.

Filing Deadline – This amendment has finally increased the previously short CA notification period from 7 to 30 calendar days as of the signing date, addressing a problem acknowledged by both the CA and notifying parties on the significant problems arising from the short 7 day deadline. Given this new generous deadline, it would be fair to conclude that the CA may not now be so lenient where parties fail to comply with this new deadline to submit the actual notification.

Penalties – Failure to notify under this new law is now considered to be a less serious infringement and is subject to a penalty of up to 1% of the turnover of the undertakings concerned (reduced from the range of 2 – 10%). Serious infringements are subject to penalties of up to 10% of the turnover (were from 2 – 10%), thus giving slightly broader margins to the CA in imposing penalties by taking into consideration all the circumstances related to the infringement and the economic situation of the undertakings concerned. Additionally, implementing a concentration before the suspension period i.e. without notifying or prior to acquiring clearance or in breach of conditions imposed by the CA, shall be subject to a penalty only if competition in the market is restrained as a result of such implementation, meaning that those undertakings actually implementing a merger without any negative impact in the market may simply only be penalized for failure to notify (as opposed to potentially facing the penalty of declaration of the merger being null and void).

By Anisa Rrumbullaku, LL.M.
Head of Corporate



ALBPETROL SHA

The Council of Ministers Decision Nr 275, dated 26.04.2010, has also determined that state-owned companies 'Alpetrol' Sh.a, 'Oil Plant Refinery Kucova' Sh.p.k and 'Mechanical Plant Patos' Sh.p.k are to be merged. Baker Potts is selected as transaction advisor.

INSIG SHA

The teaser has been issued, and following IFC's and EBRD's put option for 39% of the shares 100% is now

PROJECT UPDATES

freely available for foreign and domestic investors in INSIG shares. Form and structure of the sale is still pursuant to Law No 10168, dated 22.10.2009.

NATIONAL LOTTERY

This enterprise is still intended to be offered under tender procedures pursuant to a decision of the Ministry of Finance (which has already been empowered by a decision of the council of ministers to initiate 'competitive procedures').

HPPs operated by Albanian Power Corporation (KESH)

The Government still plans to privatise medium sized Hydro Power Plants currently under KESH operation that altogether amount to some 80MW.

The Government is also considering re-opening the tender for the SKAVICA HPP and other *privatisation deals such as state-owned stake in Albanian Refinery and Marketing of Oil (ARMO) and in the Power Distribution Operator (OSSH).*

CHANGES IN TAXABLE PROFIT OF BANKS

Very recently, the Ministry of Finance proposed a draft amendment with the aim of making some changes to the existing Income Tax Law. The proposed changes, among others, are to the existing Article 25 of the Income Tax Law on "special reserves for banks and insurance companies". The draft amendment states that the provisioning expenses should not be deductible for tax purposes by the banks.

It is evident that this change will deeply impact the banking system in Albania, as it will affect the capacity and indeed willingness of the banks to provide the necessary lending which, especially at this time, is crucial for the health of the Albanian economy. This is an important reason to oppose the draft amendment and not only this change.

The existing Income Tax Law constitutes conformity between the regulatory and tax treatment for loan loss provisioning and the said draft amendment completely disrupts this conformity. Most of the EU countries do have conformity between regulatory and tax treatment and such conformity has proven to be very positive for the banking sector. Albania ought to take this positive example and remain with the existing conformity. According to the effective Stabilisation and Association Agreement ('SAA') between Albania and the EU, Albania has the legal obligation to approximate the legislation with that of the EU. According to the SAA the approximation of legislation relating to financial services is a priority for Albania, and Albania has also undertaken to consult with the EU in order to ensure equal tax treatment of businesses (including the banking sector) with those of EU countries.

It is understood that the existing acknowledgement of the tax deductibility of loss loan provisioning does not in fact result in additional income for the banks

and this surely should be considered by the Albanian state in deciding whether to approve such a draft amendment. The acknowledgement of tax deductibility of the bad debt only is not sufficient comfort for the banking sector. The draft amendment if approved in its current form without other associated changes in the tax legislation or in any corresponding Bank of Albania regulation would not offer any reassurance and guarantee to the banks that they would not suffer additional fiscal burdens.

This proposed amendment seeks to prevent tax deductibility for all loan provisions without differentiating between the various types of credits (*vis-a-vis* loan loss provisioning); a differentiated avoidance of tax deductibility for different provisioning ought to be considered by the government.

The Albanian banking sector has yet to have accomplished promoting itself sufficiently and this sector is still experiencing difficulties due to the recent worldwide financial crisis. This draft amendment if approved in this time, certainly would increase the negative effects if compared to the same effects the same draft amendment would bring if approved in times where there are less urgent financial and economic challenges for the Albanian banking sector.

The proposed amendment shows that the Albanian state does not intend to prevent the provisioning tax deductibility in the insurance industry. The same intention surely ought to be applied to the banking sector. This is particularly so as both sectors confront much the same problems and insofar as Albanian legislation and SAA classifies the insurance services as financial services should to be subject to the same (principally) legal and tax regime.

By Ardjana Shehi, MBA
Tax Partner

**KALO & ASSOCIATES
- FINALIST OF THE
LAWYER AWARDS****For the second consecutive year**

KALO & ASSOCIATES was recognised for its regional presence and excellent services it offers for commercial clients in both Albania and Kosovo. In the second year the number of submissions across Europe and for each category increased significantly as the competition intensified for the best law firms' categories across Europe. The firm was one of 6 nominees for the award: (BEST LAW FIRM OF EASTERN EUROPE & BALKANS)

A ten-strong judging panel evaluated: strategic vision, strong partnership ethos, financial performance and growth, consistent excellence in selected sectors and talented management.

The firm was awarded "Highly Commended" in same category last year.

**OKTOBERFEST – MUNICH**

The timing of The European Lawyer Award



event, held in Berlin this year, meant that we were able to combine business with pleasure (though any award ceremony is in fact pure pleasure) and attend the renowned Oktoberfest in Munich. We could say that is actually where the celebrations truly began.

Without disclosing too much, it was fair to say our lawyers, as they are to their client's interests, were fully dedicated to the spirit of the annual beer festival!



KOSOVO NEWS

KALO & ASSOCIATES KOSOVO: KEYNOTE SPEAKERS AT NEW YORK KOSOVO- US TRADE AND INVESTMENT FORUM



The Kosovo-U.S. trade and investment forum opened in New York under the auspices of the Kosovo Embassy in Washington and the U.S. Developing Markets Associates. The forum offered information about possibilities for investing in Kosovo and will enable potential investors to meet with top Kosovo officials including Economy and Finance Minister Ahmet Shala.

Managing Partner of Kalo & Associates, Perparim KALO, and contact partner in our Prishtina office, Ahmet HASOLLI, were invited to support the investment forum and, as highly reputable lawyers representing foreign investors, asked to speak on the legal framework and legal climate in Kosovo. As an exclusive lawyer for Bechtel, the first investor to have secured a large-scale contract with the Kosovar government, Ahmet Hasolli was able to offer an astute insight into the workings of the Kosovar legal system and the ramifications for foreign investments.

KOSOVO JUDICIAL REFORM – NEW LAW ON COURTS

The Kosovo Parliament on 22 July 2010 approved the long-expected Law No.03/L-199 “On Courts” that regulates the organization, functions and jurisdiction of the Kosovo Judicial System.

This law shall be implemented in two separate phases: (i) Planning Phase: from 1st January until 31st December of 2011, when the Kosovo Judicial Council shall prepare the implementation plan to facilitate the transition from current court structure to the court structure as established by this Law; and (ii) Implementation Phase: will start from 1st January 2012 until 31st December 2012 and the Kosovo Judicial Council has supervisory functions established.

The new law reforming the present structure of the Kosovo Judicial System finally shall be applicable as from 1st January 2013. Under this new Law on Courts the Kosovo Judicial System shall be divided as below:

(i) Basic Courts: Under this new law seven Basic Courts are to be set up throughout the Republic of Kosovo. As for commercial and administrative cases the Basic Court of Prishtina will have the exclusive competence for all of the Republic of Kosovo. The newly established Department for Commercial Matters under the authority of the Prishtina Basic Court will be recognised as competent to settle commercial disputes, and others relating to aviation,

intellectual property, anti-trust cases, competition and other matters provided in the Law.

(ii) Court of Appeals: A Court of Appeals will be established as a second instance court with territorial jurisdiction throughout the republic of Kosovo with the seat of the Court of Appeals being in Prishtina. The competence of the Court of Appeals is to review all decisions rendered by the Basic Courts including reviewing: (i) all appeals resulting from decisions of Basic Courts; (ii) decisions at third instance when that is permitted by Law; (iii) conflicts of jurisdiction between Basic Courts; (iv) other cases as provided by the Law.

(iii) Supreme Court: The Supreme Court will continue to be the highest judicial authority in Kosovo that includes the Appeals Panel of the Kosovo Property Agency and the Special Chamber of the Supreme Court. The competence of the Supreme Court is to adjudicate: (i) requests for extraordinary legal means against final decisions of the courts of the RoK as provided by the Law; (ii) revisions against second instance decisions; and (iii) in its special chamber Privatization Agency or Kosovo Trust Agency cases.

Moreover as part of the development of the justice system the Kosovo Parliament and President of Kosovo have appointed judges and prosecutors in all offices.

Disclaimer: This newsletter is only to provide general information and nothing in it shall be construed as legal advice; professional advice should be sought prior to any action being undertaken based on any of the contents of this newsletter.

CONTACT

info@kalo-attorneys.com

PTK Privatisation

Due to the political situation occurring in Kosovo the process for privatization of PTK has been stalled. Our projections are that any PTK privatisation process will continue after consolidation by Government arising from emergency elections assigned for 12/Dec/2011.

HPP - ZHUR

The process of the review of both the RfP and Project Agreements

PROJECT UPDATES

with opportunity for Bidder comments is underway and has in fact already been postponed once, in the interest of transparency. In view of the Inter-Ministerial Steering Committee (ISC) on behalf of the Government of the Republic of Kosovo being the contracting authority and the current political climate of the break-up of government it is very likely that there shall be further delays in

this project also.

The four qualified consortia shall be also waiting for the establishment of the new government in the light of the early general election set for December 12th 2010 in Kosovo. According to the competent authority, the steering committee (to be eventually reconfigured as a result of the governing structures upon elections) is to proceed with further decisions in the process which is expected to commence in early 2011.

