

International Comparative Legal Guides



Foreign Direct Investment Regimes 2021

A practical cross-border insight into FDI screening regimes

Second Edition

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1 Foreign Investment Policy

1.1 What is the national policy with regard to the review of foreign investments (including transactions) on national security and public order grounds?

Albanian legislation creates a welcoming environment for investments. In general, foreign investments are subject to the same regulations as domestic investments. The national policy regarding the review of foreign investments is based on the principle of non-discrimination between foreign and domestic investors. Fundamental rights are guaranteed, 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.

However, article 10 of the Law “On Foreign Investments” provides that none of the provisions of the law shall impede the Republic of Albania in enforcing the measures necessary to maintain the public order to fulfil its international obligations regarding the maintenance or establishment of world peace and security, protection of national security or defence interests.

There is no specific supervising authority on foreign investments, and they are not conditioned upon any preliminary authorisation.

1.2 Are there any particular strategic considerations that apply during foreign investment reviews?

The law “On Foreign Investors” mirrors the principle of equal treatment of foreign investors and domestic investors.

1.3 Are there any current proposals to change the foreign investment review policy or the current laws?

Currently there is a draft law on foreign investment that will abrogate the existing laws, those being Law no. 7764 dated 2 November 1993 “On Foreign Investments” and Law no. 55/2015 “On Strategic Investments in the Republic of Albania”.

The drafting started in January 2017, in view of the implementation of Decision of Council of Ministers no. 579 dated 3 August 2016 “On the approval of the investment policy guide of Albanian Government”, where, among others, one of the reforms to be undertaken is a new law on foreign investments. It is conceived as a direct application of the constitutional principles, namely articles 16 (Equality of Rights and Fundamental Freedoms between Albanian Citizens and Foreign

Citizens or Stateless), 18 (Equality before the Law, Prohibition of Discrimination), 41 (Right to private property) and 42 (Right to due process) of the Constitution.

The main objectives of the draft law are to:

- i) establish a comprehensive legal regime for domestic, foreign, general and strategic investments;
- ii) encourage domestic and foreign investments in Albania with a single law;
- iii) provide fair and equal treatment, and the protection of domestic and foreign investment;
- iv) provide investors with transparent and easy access to the market;
- v) provide a quick and fair solution to any potential disagreement arising from the development of the investment; and
- vi) ensure full compliance with the international investment agreements and international obligations of Albania and with the EU *acquis*, etc.

2 Law and Scope of Application

2.1 What laws apply to the control of foreign investments (including transactions) on grounds of national security and public order? Are there any notable developments in the last year?

Foreign investments are subject to Law no. 7764, dated 2 November 1993, “On Foreign Investments”, Law no. 55/2015 “On the Strategic Investments in the Republic of Albania”, Law no. 123/2013 “On Concessions and Public Private Partnership”, Law no. 9901, dated 21 May 2008, “On Entrepreneurs and Commercial Companies”, Law no. 9723, dated 3 May 2007, “On the National Registration Centre”, as well as tax laws that include Law no. 8438, dated 28 December 1998, “On Income Tax”, Law no. 92/2014 “On Value Added Tax”, Law no. 9975, dated 28 July 2008, “On National Taxes”, Law no. 9632, dated 30 October 2006, “On Local Taxes” and bilateral treaties on investments, double tax treaties of income and capital.

However, these laws do not *per se* provide for control on grounds of national security and public order.

There have not been any notable developments in the last year.

2.2 What kinds of foreign investments, foreign investors and transactions are caught? Is the acquisition of minority interests caught?

Albania welcomes any form of investment and investor. Specifically, the law “On Strategic Investments in the Republic of Albania” has defined certain economic sectors as strategic.

The purpose of such law is to promote and attract strategic local and foreign investments in those sectors that are identified as strategic by introducing special favourable, easing or expediting administrative procedures for supporting and providing services to investors.

The following are considered strategic sectors:

- a) Energy and mining.
- b) Transport, electronic communications infrastructure and urban waste.
- c) Tourism (tourist structures).
- d) Agriculture (large agricultural farms) and fisheries.
- e) Economic zones.
- f) Development priority areas.

2.3 What are the sectors and activities that are particularly under scrutiny? Are there any sector-specific review mechanisms in place?

So-called regulated activities are under scrutiny, such as financial services (subject to licensing by the Bank of Albania) or other financial services (i.e. insurance), which are subject to the Financial Supervising Authority.

2.4 How are terms such as 'foreign investor' and 'foreign investment' specifically addressed in the law?

According to article 1 of "On Foreign Investments", "*foreign investor*" includes:

- i) every *physical person* who is a citizen of a foreign country;
- ii) every physical person who is a citizen of the Republic of Albania, but resides outside the country;
- iii) every *legal person* established in accordance with the law of a foreign country; and
- iv) every *Community company or Albanian company* which directly or indirectly intends to carry out or is carrying out an investment in the territory of the Republic of Albania in accordance with its laws or has made an investment in accordance with the laws of the period from 31 July 1990 onwards.

According to article 1 of "On Foreign Investments", "*foreign investment*" includes every investment in Albanian territory which can be directly or indirectly owned by a foreign investor and may comprise:

- i) movable or immovable property, tangible or intangible, or any other kind of ownership right;
- ii) a company, rights deriving from all kind of interest in a company;
- iii) loans, monetary liabilities in an activity which has an economic value and is related to an investment;
- iv) intellectual and industrial property; and
- v) any other right acknowledged by laws or contracts, and any licence or permit granted pursuant to law.

2.5 Are there specific rules for certain foreign investors such as state-owned enterprises (SOEs)?

To the best of our knowledge, there are no specific rules for state-owned enterprises. The law permits 100% foreign ownership and there is no limit on quotes/shares and the number or type of foreign investors.

2.6 Is there a local nexus requirement for an acquisition or investment to fall under the scope of the national security review? If so, what is the nature of such requirement (existence of subsidiaries, assets, etc.)?

There are no provisions in this regard.

2.7 In cases where local presence is required to trigger the review, are indirect acquisitions of local subsidiaries and/or other assets also caught?

There are no provisions in this regard.

3 Jurisdiction and Procedure

3.1 What conditions must be met for the law to apply? Are there any monetary thresholds?

There are no such thresholds in place. However, Law no. 55/2015 "On Strategic Investment in the Republic of Albania" (article 8) establishes the criteria that must be met for investments to be considered strategic; for example:

- For the energy and mining sectors and subsectors, the investment should be equal to or greater than EUR 30,000,000 for investors/projects that will receive the status "Strategic investment/investor, assisted procedure"; or equal to or greater than EUR 50,000,000 for investors/projects that will receive the status of "Investment/strategic investor, special procedure".
- For the transport, electronic communications infrastructure and urban sectors and subsectors, the investment should be equal to or greater than EUR 30,000,000 for investors/projects that will receive the status of "Investment/strategic investor, assisted procedure"; or equal to or greater than EUR 50,000,000 for investors/projects that will qualify for "Investment/strategic investor" status, special procedure, etc.

Nevertheless, the Draft Law that is expected to be approved does not provide any monetary threshold.

3.2 Is the filing voluntary or mandatory? Are there any filing fees?

When it comes to an application for the status of strategic investment, services for projects and strategic investors are provided by the Albanian Investment Development Agency (AIDA), which performs the role of a "unique window" and is responsible for providing one-stop services about projects and strategic investments, for which fees are applied. During the application, the investors must pay the administrative service and cost fees, which amount to ALL 70,000. However, the Draft Law "On Investments" does not yet provide any voluntary or mandatory filing or any filing fees.

3.3 In the case of transactions, who is responsible for obtaining the necessary approval?

Necessary approvals are regulated by the specific law depending on the nature and kind of application that will be completed by the investor.

3.4 Can foreign investors engage in advance consultations with the authorities and ask for formal or informal guidance on the application of the approval procedure?

Foreign companies that need advance consultation may, for formal or informal guidance, address the AIDA, which provides information and consulting services. AIDA is the main governmental agency promoting, facilitating and supporting foreign direct investment in Albania.

3.5 What type of information do investors have to provide as part of their filing?

Different investments require the submission of different information. The Law “On Strategic Investments in the Republic of Albania” makes submission of the following documents mandatory:

- a) An investment business plan, the investment financing plan and work programme for the performance of the strategic investment/project.
- b) Assessment of the social and economic impact of the strategic project.
- c) A list of incentives and requirements for support and services that the investing entity requires from the Albanian state for the realisation of the investment project.
- d) Documentation proving financial capacity for implementation of the investment project as a way to guarantee the implementation and development of the project in question.
- e) A statement of the interested investor on the authenticity of data and documents submitted in the dossier.
- f) An authorisation in writing by the investor, whereby the Agency is authorised in the case of an application for inclusion in the administrative procedures for receiving the status of “Strategic investor/investment – assisted/special procedure” to carry out all the necessary verifications of the data submitted in the file, and the investor’s consent for the publication of the proposed investment details, except for the data it considers to be confidential and cannot be made public or divulged to third parties.
- g) Proof of payment of applicable fees.

3.6 Are there sanctions for not filing (fines, criminal liability, unwinding of the transaction, etc.) and what is the current practice of the authorities?

As indicated above, obtaining the status of strategic investment is a voluntary application; hence no sanctions apply. In this regard, article 17 of the Law “On Strategic Investments in the Republic of Albania” determines that if the Agency finds the documentation to be incomplete, it shall, in cooperation with the relevant institutions/entities responsible for strategic investment in their areas of responsibility, ask the investor to complete all the required documents and data. The investor must complete the documentation within 10 days from the date of receiving the notification.

3.7 What is the timeframe of review in order to obtain approval? Are there any provisions expediting the clearance?

In reference to an application for obtaining the status of strategic investment, the applicable timeframe is 30 days. In case a review is required by a specific law (not necessarily applicable to a foreign investment *per se*), this is subject to that specific law.

3.8 Does the review need to be obtained prior to or after closing? In the former case, does the review have a suspensory effect on the closing of the transaction? Are there any penalties if the parties implement the transaction before approval is obtained?

As noted above, in the case that a review is required by a specific law (not necessarily applicable to a foreign investment *per se*), this is subject to that specific law. In such cases, the closing of the transaction is conditional upon obtaining clearance from the regulatory authority. By way of example, in case of transactions which are subject to competition law, their closing is conditioned by the approval of the Competition Authority.

3.9 Can third parties be involved in the review process? If so, what are the requirements, and do they have any particular rights during the procedure?

This is not applicable in Albania.

3.10 What publicity is given to the process and the final decision and how is commercial information, including business secrets, protected from disclosure?

The general principle provided by Law “On the Right to Information” (Law no. 119/2014) is that everyone has the right to access public information (i.e. any data recorded in any form or format, during the exercising of public functions, whether or not it is prepared by a public authority). Nonetheless, the right to information may be restricted if it is necessary, proportionate and if its disclosure may affect the right to a private life, trade secrets, copyright and patents.

3.11 Are there any other administrative approvals required (cross-sector or sector-specific) for foreign investments?

This is to be assessed on case-by-case basis, subject to specific applicable laws. In addition to potential licensing requirements, or the examples given above, there are certain cases in which ownership thresholds apply. By way of example, in the audio-visual broadcasting sector, an entity or person may not hold more than 40% of the share capital in a national audio-visual company. An entity or person holding shares in a national audio-visual company may not hold more than 20% of the share capital in another national audio-visual company. An entity or person that holds shares in local or regional audio-visual companies may not hold more than 40% of the share capital in another local or regional audio-visual company. Hence, this is subject to the review of the regulatory authority (i.e. the Audio-visual Media Authority).

4 Substantive Assessment

4.1 Which authorities are responsible for conducting the review?

The authority that conducts reviews for local investors also conducts reviews for foreign investors.

4.2 What is the applicable test and who bears the burden of proof?

The law is silent in this regard.

4.3 What are the main evaluation criteria and are there any guidelines available?

The law is silent in this regard.

4.4 In their assessment, do the authorities also take into account activities of foreign (non-local) subsidiaries in their jurisdiction?

This is subject to the specific regulatory authority.

4.5 How much discretion and what powers do the authorities have to approve or reject transactions on national security and public order grounds?

Since there is no specific *per se* approval requirement based on national security or public order, this will be subject to local practice. However, to the best of our knowledge, there have not been any cases of rejection on the grounds of national security or public order.

4.6 Can a decision be challenged or appealed, including by third parties? Is the relevant procedure administrative or judicial in character?

In cases where a control applies (i.e. besides national security grounds), the decision of the public authority may be subject to a challenge either with administrative bodies (higher authorities) or the court.

4.7 Is it possible to address the authorities' objections to a transaction by providing remedies, such as undertaking or other arrangements?

This may be applicable in certain cases. For instance, the Competition Commission may approve a transaction subject to the remedies undertaken by the parties.

4.8 Are there any other relevant considerations? What is the recent enforcement practice of the authorities and have there been any significant cases? Are there any notable trends emerging in the enforcement of the FDI screening regime?

Local practice generally applies the principles of the laws indicated above, with the aim of creating a welcoming investment climate in the country.

Albania continues to be open to foreign investments and does not enforce any screening regimes. Moreover, the draft Law that is expected to be approved does not provide any screening rules or mechanisms either.



Genc Boga is the founder and Managing Partner of Boga & Associates, operating in Albania and Kosovo.

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Boga & Associates, established in 1994, has emerged as one of the premier law firms in Albania and Kosovo, earning a reputation for providing the highest quality of legal, tax and accounting services to its clients. Until May 2007, the firm was a member firm of KPMG International and the Senior Partner/Managing Partner, Mr. Genc Boga, was also the Senior Partner/Managing Partner of KPMG Albania.

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