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In Focus
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- **Law on social enterprises in the Republic of Albania**

'Social enterprises' is quite a new concept for the Albanian legal framework. The Parliament approved on 09.06.2016 the Law no. 65/2016 "On Social Enterprises in the Republic of Albania". This law aims to regulate the organization of such entities as well as to define the criteria to be met in order for an enterprise to acquire the status of a "social enterprise".

The law provides that the social enterprises, in the framework of conducting their activity for the community interest, shall respect commonly accepted principles such as the principle of transparency, sustainability, autonomy, accountability, collective dimension, and efficiency.

The social enterprises shall be promoted by implementing supportive measurers (i.e. financial) and through the development of the information and education systems. The Ministry in charge of social issues shall be entitled to draw up the promotion and development policies of the social enterprises, while the local government units shall support and implement the policies within their territories.

In addition, the law determines the following criteria to be met in order to acquire the status of a "social enterprise":

A) Economic criteria:

i. Conduct a continuous activity in the field of production or services;

ii. At least 20% of the income after the second year of activity, and at least 30% of the income after the third year of activity, shall be realized from the following activities: *social services; employment intermediation; youth employment; health services; education services; environmental protection; tourism, culture and cultural heritage promotion; sport activities with entertaining or socializing purposes; local communities development.*

iii. Apart from the volunteers, the social enterprise shall hire at least 3 employees;

iv. The income shall serve to the continuous development of the social enterprise.

B) Social criteria:

i. It should foster social objectives;

ii. At least 30% of the employees shall come from socially and economically marginalized groups.

As regards the form of organization, the social enterprise shall be organized as a non for profit organization. The status of the social enterprise is granted by the Ministry of Social Welfare and Youth.

The financial funds of the social enterprises may derive from their own economical activity, public subsidies, private donations, or other means as permitted by the law.

- **Amendments to Law no. 108/2013 "On Foreigners"**

On 14.07.2016, the Parliament of Albania adopted Law no. 74/2016 "On some amendments and additions to law no. 108/2013 On Foreigners".

The amendments aim to solve the problems encountered during the implementation of the law and further approximation with EU *acquis*, as regards to the provisions regulating the entry, residence, employment and exit of foreigners in the Republic of Albania.

Law no. 74/2016 further clarifies or completes various definitions such as the definition of "key personnel", which now includes the well defined categories of business visitor, manager/administrator, specialist, and graduate trainee. This intervention is important as regards to the favorable treatment reserved for these categories in terms of employment in the country.

In relation to the residence and employment of persons providing contracted services, the law introduces the work permit for contracted services together with the structure, criteria and categories.

Additionally, Law no. 74/2016 excludes from payment of official fees the citizens of the Republic of Kosovo and citizens pertaining to Albanian ethnic groups in the Republics of Serbia, Montenegro and Macedonia, that have entered in Albania for studying purposes.

As regards to the issuance of the permanent residency permit on special cases, the amendments provide that the foreigner, his/her family members as well as the key personnel, can obtain permanent residency permits provided that the foreigner has invested in a strategic sector in Albania with a value of no less than 2 million euro and has created more than 100 jobs for at least one year.

The implementation of the amendments will be subject to the adoption of the respective sublegal acts that shall be enacted within 6 months following the adoption of the law.

- **Developments in Competition Law**

Guidelines on the conditions and obligations in concentration cases

Concentrations that meet the notification criteria are subject to the review of the Competition Authority ("ACA"). In some cases they may present competition concerns and be prohibited from the ACA; however, the parties may ask the ACA to not prohibit the concentration by proposing some remedies.

It is these remedies that the Decision of ACA no. 374 "On approval of the guidelines for conditions and obligations in concentration cases" aims to regulate. Such Decision has been drafted in line with the EU Commission's notice "On remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004".

General principles

- If the CC assesses that the concentration affects competition, in a way that, could significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, the parties may seek to modify the concentration in order to resolve the competition concerns and thereby gain the authorization for their merger. Such modifications may be fully implemented either before or after the decision of the CC. However, in practice the second option is more common.
- The CC communicates its competition concerns to the parties allowing them to formulate appropriate and corresponding remedies' proposals. The CC may not unilaterally impose any condition to its decision, but only on the basis of the parties' commitments. Therefore, if the parties propose adequate remedies to eliminate the competition concerns, the CC will issue its authorization.
- Further, the CC has to assess whether the proposed remedies, once implemented, would eliminate the identified competition concerns. To this end, the parties have the obligation to provide all necessary information for the CC's assessment of the remedies' proposal.

The procedure

- The CC may accept commitments in either phase of the procedure. However, given the fact that an in-depth investigation is only carried out in the second phase, commitments submitted to the commission in the first phase must be sufficient to clearly eliminate "serious doubts".
- If the commission finds that the merger leads to a significant impediment to effective competition, the commitments must be sufficient to eliminate such impediment.
- Even though the commitments have to be offered by the parties, the CC will have to ensure the enforceability of commitments by granting its authorization only upon compliance with the commitments.

Different types of remedies (conditions and obligations)

Business' divestiture to an adequate purchaser

The guideline suggests that the most effective way to maintain effective competition is to create the conditions for the emergence of a new competitive entity, or for the strengthening of existing competitors via divestiture by the merging parties.

Divestiture of successful and competitive business

The divested activities must consist of a successful business that, if operated by an adequate purchaser, can effectively compete with the merged entity on a lasting basis and that is divested as an ogoing concern. For the business to be successful, it may also be necessary to include activities which are related to markets where the CC did not identify competition concerns if this is required to create an effective competitor in the affected markets. Generally, a successful business is a business that can operate on a stand-alone-basis, which means it can exist without supplies from the merging parties of input materials or other forms of cooperation apart from those during a transitory period.

Divestiture of assets, in particular of brands and licenses

Only in exceptional cases a divestiture package, including only brands and supporting production and/or distribution assets, may be sufficient to create the conditions for effective competition. In such circumstances, the package consisting of brands and assets must be sufficient to allow the commission to conclude that the successive business will be immediately successful in the hands of the adequate purchaser. Divestitures of a business generally appear preferable to the granting of licenses to IP rights, as the granting of a license involve more doubts, will not enable the licensee to compete immediately in the market, requires an on-going relationship with the parties which may allow the licensor to influence the licensee in its competitive behavior and may give rise to disputes between the licensor and the licensee over the scope and the terms and conditions of the license.

Re-branding

In exceptional cases, the CC accepts commitments to grant an exclusive, time-limited license for a brand with the purpose of allowing the licensee to re-brand the product in the anticipated period.

The CC may revoke its authorization in case of failure to comply with the commitments.

After the first license phase of the re-branding commitments, the parties commit in a second phase to abstain from any use of the brand. The goal of such commitments is to allow the licensee to transfer the customers from the licensed brand to its own brand in order to create a successful competitor, without the licensed brand being permanently divested.

Non-reacquisition clause

In order to maintain the structural effect of a remedy, the commitments have to stipulate that the merged entity cannot subsequently gain influence over the whole or parts of the divested business for a significant period of up to 10 years.

Crown Jewels

In certain cases, the implementation of the preferred divestiture might be uncertain in view, for example, of third parties' pre-emption rights or uncertainty as to the transferability of key contracts, IP rights, or the uncertainty of finding an adequate purchaser. In such case, the parties will have to propose a second alternative divestiture which the parties will be obliged to implement if they are not able to implement the first commitment within the given time frame for the first divestiture. Such an alternative commitment is known as a "*crown jewel*", meaning that it should be at least as good as the first proposed divestiture in terms of creating a successful competitor upon implementation.

Transfer to an adequate purchaser

The intended effect of the divestiture will only be achieved if and once the business is transferred to an adequate purchaser, which will turn it into an active competitive force in the market. In order to ensure that the business is divested to an adequate purchaser, the CC will consider the following standard criteria:

a. the purchaser is required to be independent and separate from the parties; the purchaser must possess the financial resources, proven relevant expertise and have the incentive and ability to maintain and develop the divested business as a viable and active competitive force in competition with the parties and other competitors; and

b. the acquisition of the business by a proposed purchaser must neither be likely to create new competition concerns nor give rise to a risk that the implementation of the commitments will be delayed.

Identification of a suitable purchaser

In general, there are three ways to ensure that the business is transferred to an adequate purchaser:

First, the business is transferred within a fixed time-limit after adoption of the decision to a purchaser, which is approved by the CC according to the aforementioned requirements.

Second, in addition to the conditions set out for the first category, the commitments provide that the parties may not complete the notified operation before having entered into a binding agreement with a purchaser for the business approved by the CC (so-called "*up-front-buyer*").

Third, the parties identify a purchaser for the business and enter into a binding agreement already during the CC's procedure (so-called "*fix-it-first*" remedy).

Removing links with competitors

Divestiture commitments may also be used for removing links between the parties and competitors if such links contribute to the competition concerns. The divestiture of a minority shareholding in a joint venture may be necessary in order to serve as a structural link with an important competitor, or, similarly, the divestiture of a minority shareholding in a competitor.

Other remedies

Divestitures, or the removal of links with competitors, are not the only remedy possible to eliminate certain competition concerns.

Access remedies

In a number of cases, CC accepts remedies stipulating the granting of access to important infrastructure, networks, key technology, including patents, *know-how* or other IP rights, and essential inputs. Normally, the parties grant such access to third parties on a non-discriminatory and transparent basis.

Review clause

Notwithstanding the type of remedy, commitments will usually provide for a review clause. This may allow the commission, upon request by the parties showing reasonable cause, to grant an extension of deadlines or, in exceptional circumstances, to waive, modify or substitute the commitments.

Lastly, the guidelines provide for specific aspects of the two phases of the submitting commitment procedure as well as requirements for the implementation of the commitments. Therefore, the safeguards are important to ensure the effective and timely implementation of the commitments.

These implementing provisions will normally form part of the commitments entered into by the parties *vis-à-vis* the CC. As previously stated, the CC may revoke its authorization if the parties fail to comply with the commitments.

New Instruction on Simplified Procedures of Merger Control

On 8 June 2016, ACA adopted the Instruction "On a simplified procedure for treatment of certain concentrations".

The Instruction provides for a short form decision of the CC declaring a concentration compatible with the internal market pursuant to the simplified procedure, subject to meeting of certain conditions. A simplified notification form is filled-in.

The CC adopts a short-form clearance decision within 25 working days from the day of confirmation that the notification form and the accompanying documents are complete.

However, in the period leading up to the 25 working days deadline, the ACA reserves the right to revert to the normal first phase merger procedure and thus launch investigations and/or adopt a full decision, if considered as appropriate regarding the case in question.

This simplified procedure is applicable whenever the following concentrations occur:

(a) two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no actual or foreseen activities within Albania; such cases occur where:

(i) the turnover of the joint venture and/or the turnover of the contributed activities is less than 300 million Leke in Albania at the time of notification; and

(ii) the total value of assets transferred to the joint venture is less than 300 million Leke in Albania at the time of notification;

(b) two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, provided that none of the parties to the concentration are engaged in business activities in the same product and geographic market, or in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged;

(c) two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking and both of the following conditions are fulfilled:

(i) the combined market share of all the parties to the concentration that are engaged in business activities in the same product and geographic market (horizontal relationships) is less than 15 %;
(ii) the individual or combined market shares of all the parties to the concentration that are engaged in business activities in a product market which is upstream or downstream from a product market in which any other party to the concentration is engaged (vertical relationships) are less than 25 %;

(d) a party is to acquire sole control of an undertaking over which it already has joint control.

(e) the ACA may also apply the simplified procedure where two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, and both of the following conditions are fulfilled:

(i) the combined market share of all the parties to the concentration that are in a horizontal relationship is less than 50 %; and

(ii) the increment (delta) of the Herfindahl-Hirschman Index (HHI) resulting from the concentration is below 150.

Investigations of the ACA on Restrictive Agreements (article 4 of the Competition Law)

Electricity market

Due to continuous claims on potential restrictive agreements between Electricity Distribution Operator (EDO) and bidders, the Albanian Competition Authority (hereinafter referred to as “ACA”) has carried out an in-depth investigation of the electricity market with the focus on the behavior or collaboration of the undertakings participating in the bidding process.

ACA investigated the participating undertakings, defined the relevant market and analyzed the competition as per their behavior. In this view, ACA concluded that the relevant product market is the purchase of electricity to recover losses in the distribution network of EDO which is the sole operator standing in the position of a natural monopoly in the distribution market and in the retail supply for the public; while the geographic market is the territory of Republic of Albania.

Due to losses in the distribution network and the electricity supply safety, EDO is the sole operator in the purchase of electricity to recover these losses. Therefore, the market is inflexible and irreplaceable regarding the request. Concerning the substitutability of supply, there are 66 operators licensed to sell the electricity but EDO delivers its request only to 22 operators and there are only 4-5 operators participating in the bidding process. Therefore, the supply is inflexible.

After defining the market, ACA studied the market shares of the participating undertakings for the year 2014, analyzed the bidding procedure and encountered several inconveniences related to the regulatory and legal framework of the procurement process, transparency of such process and the behavior of the participants.

Through Decision no. 388 dated 14.12.2015, ACA has closed the in-depth investigation procedure on “The market of electricity purchase to recover the losses in the distribution system” and gave some recommendations to EDO, Regulatory Entity of Electricity (REE), and Ministry of Industry and Energy as below:

- To complete the sublegal framework as per the provisions of Law no. 43/2015 “On Electricity” regarding the special regulations on the electricity purchase;
- To focus on the previous recommendations regarding the principles of competition and transparency of procedures and implementation of the bidding rules according to the best practices of the Energy Community Secretariat and member states;
- To prevent undertakings which are part of the same group or have related shareholders to participate in the bidding process with separate bids.

Fiscal cash registers

Through Decision no. 387 dated 14.12.2015 ACA has given some recommendations on the fiscal cash register equipment services market.

During the period of January 2014 - September 2015 the Competition Secretariat conducted a monitoring session and gathered information from the Customs General Directory, Tax General Directory and all the undertakings involved in the marketing of fiscal cash register equipments.

According to ACA’s definition, the relevant product’s market includes two sub-markets: (i) fiscal cash register equipment supply; (ii) fiscal cash register equipment maintenance services while the relevant geographic market is the territory of the Republic of Albania.

Pursuant to Law no. 9920 dated 19.05.2008 “On Tax Procedures in the Republic of Albania”, taxpayers marketing goods and/or services, for which payments are not effectuated through banks, must introduce and use the fiscal system through the fiscal cash register equipment in order to register the performance of the cash payment and issue the mandatory tax voucher.

In this view, the Council of Ministers is the body entitled to approve the technical and functional characteristics of the cash register equipment and authorization granting/removal criteria.

Thus, every undertaking may easily apply to the Ministry of Finance in order to obtain the said authorization for the marketing and maintenance of the fiscal cash register equipment without encountering any legal barriers.

On the other hand, the applying undertakings face some economic requirements such as an annual turnover for the last 3 years in total of not less than 10 million Euros or the equivalent, and a bank guarantee at the value of 500 000 USD in the account of the Ministry of Finance.

Therefore, ACA has recommended to the Council of Ministers and Ministry of Finance to review their requirements because, even though there are no legal barriers in the relevant market, the economic requirements hurdle the undertakings to enter the market and eventually restrict the competition.

Banking sector

ACA decided to initiate a general investigation in the banking sector due to some concerns regarding potential competition infringement.

ACA has observed that during the last years the banking market displays characteristics of a market with relatively high profit rates in a time of credit stagnation, very low interests of deposits, relatively high spread between credit and deposit interests, a trend of increasing the interests of government bonds (mainly long term) while the basic interest rate of deposit tend to decrease in the circumstances of an easing monetary policy.

Such characteristics raise doubts of possible competition infringement due to potential restrictive agreements or abuse of dominant position.

As a result, ACA is monitoring the banking sector for the period 2014 and first nine months of 2015.

ACA will be assisted by an expert of the banking sector during the general investigation which will focus on the competition assessment according to the relevant market of banking products/services.

Review of legal acts from the Competition Law perspective

Based on Articles 69 and 70 of Competition Law, ACA has passed Decision no. 389, dated 14.12.2015 "On the necessity of acquiring the prior assessment of the Albanian Competition Authority for the draft law "On some amendments and addendums of Law no. 9374, dated 21.4.2005, "On State Aid"".

Articles 69 and 70 of Competition Law provide that the central and local public administrative bodies should require the assessment of draft acts from the competition law perspective by ACA before approving the draft acts that contain (i) quantitative restrictions for entering a market; (ii) granting exclusive or special rights in given areas for certain undertakings and products; (iii) application of same price and selling conditions practices; and provide ACA with the authority to assess/evaluate the scale of competition restriction or infringement.

The Economy and Finance Commission has continuously requested from public institutions to firstly acquire the assessment of ACA for a more effective use of the public property.

According to the EU legislation, the control of state aid is part of the competition policy.

Therefore, ACA has addressed to the Council of Ministers and the Parliament of Albania the recommendation to consult ACA's assessment regarding any normative draft in case of possible competition infringement affecting the relevant markets.

Fines leniency

ACA has passed Decision no. 382, dated 17.11.2015 "On the approval of fines leniency policy" and "Application Form for Fines Leniency" which gives the undertakings the possibility to collaborate with ACA against illegal agreements between undertakings that infringe the competition in the market.

The Fines Leniency Policy has been drafted with the purpose to uncover cartel agreements that:

(i) fix the purchase/selling price of a product;

(ii) restrict or control the production, technical development or investments;

(iii) divide the markets or the supply sources;

(iv) apply different conditions for the same transactions for other parties;

(v) coerce other competitors to accept disproportional additional obligations in order to enter a contract.

Due to the secretive nature of such agreements, it is difficult for ACA to spot them and initiate an investigation. Therefore, undertakings which participate in such agreements but intend to withdraw may report the illegal activity causing the competition infringement and may be subject to the leniency policy which includes:

- Partial leniency (partial immunity from fines);
- Full leniency (full immunity from fines).

For an undertaking to benefit the full leniency, it should be the first one to help ACA on cartel detection and initiate an investigation accordingly.

The applicant must also assure that it has been immediately withdrawn from the infringing agreement.

The undertaking should provide up to the end of the procedure true and accurate information and evidence on the infringing agreement and its participants.

ACA on the other hand, if possible, will ensure the confidentiality of the identity of the applicant until the end of the investigation procedure. If an undertaking is not eligible for the full leniency program, it may apply for a reduction from fines by providing significant additional information regarding the infringing agreement.

The first undertaking to approach ACA with additional information and evidences on a cartel already being investigated, benefits up to 30-50% fine reduction, the second one benefits up to 20-30%, and the following undertakings benefit up to 20% of reduction.

In any case, ACA will not qualify an undertaking as eligible for the leniency program if such undertaking has been the ring leader in the cartel.

ACA has provided an e-mail address to submit the application form (accessible on ACA website) and phone number for all the applicants intending to notify an infringing agreement and collaborate to stop its effects in competition.

Exclusive Concessions

In line with Article 69 of the Competition Law, ACA has passed Decision no. 377 dated 22.10.2015 “On the necessity of acquiring the prior assessment of the Competition Authority in granting exclusive or special rights through concession agreements”.

ACA reminds that concession agreements that grant such rights are subject to ACA scrutiny.

In that specific case, as a result of its examination, ACA has made certain recommendations to the Contracting Authority, which tend to maintain competition on the relevant market in terms of fees and costs.

- **The first ICSID claim brought against Kosovo**

On June 4, 2015 a Request for Arbitration from ACP Axos Capital GmBH (the ‘Claimant’) against the Republic of Kosovo (the ‘Respondent’) was registered with the International Center for Settlement of Investment Disputes (‘ICSID’).

The Claimant, a joint investment company based in Germany, was awarded as the winning bidder for the purchase of 75 % of the shares of the public enterprise Post and Telecommunication of Kosovo. However, the privatization was not approved by the Kosovo Assembly, so the Claimant is now seeking damages relief.

The document on case details published by ICSID cites as the legal basis the Bilateral Investment Treaty entered between former Yugoslavia and Germany, taken over by Kosovo in 2011, and the Kosovo Law on Foreign Investments (law no. 04/L-220).

Each Party has appointed its arbitrator and the ISCID Secretary-General has appointed the third arbitrator to serve as Chairman.

Based on the procedural rules published by ISCID, it is expected that on 16 August 2016 the Respondent will raise jurisdictional and admissibility objections and will also address the issue of bifurcation.

If you wish to know more on issues highlighted in this edition, you may approach your usual contact at our firm or the following:

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Boga & Associates

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

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 and Kosovo business environment.

With its diverse capabilities and experience, the firm acts for leading businesses in most major industries, including banks and financial institutions, as well as companies working in insurance, construction, energy and utilities, entertainment and media, mining, oil and gas, professional services, real estate, technology, telecommunications, tourism, transport, infrastructure and consumer goods sectors.