

## In Focus

LEGAL · TAX · ACCOUNTING

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### RECENT DEVELOPMENTS

#### Albania

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- Companies Law to change
- Procedures introduced for the registration of tax representatives

### ARTICLE

- Resignation of administrators of commercial companies to be introduced

- **A new concession law to govern forthcoming concessions**

A new concession law (law no. 125/2013, dated 24 April 2013 “On Concessions and Public Private Partnership”) entered into force on 25 May 2013 (the “New Law”).

It introduces some new provisions replacing and/or repealing entirely those existing under the former law on concessions (law no. 9663 of 18 December 2006, as amended).

#### **Bonuses related to unsolicited proposals**

A party submitting an unsolicited proposal will no longer be eligible for a bonus, as had been the case under the former law. Instead, they will be paid a compensation of 0.5% to 2% of the value of the project if the project is awarded to another bidder.

The New Law does not define whether the concessionaire or the contracting authority will bear the cost of this compensation. It is expected that this issue, together with any other questions, will be dealt with in the secondary legislation to be enacted by the Council of Ministers to implement the New Law.

#### **Contracts under the provisions of the public procurement law**

It will no longer be for the Council of Ministers to define the rules for the publication of and procedures for selecting the winning bidder of a concession contract. Under the New Law the existing rules of public procurement law will apply with a few changes.

In addition, the signing of the concession contract will take place only after the relevant term of appeal, as provided for in the public procurement law, has elapsed.

#### **Approval of the concession contract**

The New Law repeals the requirement for a concession contract to be approved by the Council of Ministers and/or Parliament. This will certainly make it easier to amend the contract in future if this should prove necessary.

#### **Public Private Partnership (PPP)**

The New Law introduces the concept of PPP, defining it as a form of concession where the contracting authority (the State), the party awarding the concession, transfers to a private investor the right to carry out a public activity and all or most of the commercial risks associated with such activity, and includes an obligation on the part of the private investor to develop, improve and make investments in connection with that activity.

The PPP can be created by executing a concession contract and/or by establishing a special purpose vehicle company (an SPV) with a mixed (i.e. public and private) capital structure. It will be for the Council of Ministers to enact the relevant secondary legislation to implement this.

#### **Project finance**

The New Law explicitly empowers the contracting authority to become a party to any other agreements that may be necessary to secure the financing of the concession project. This would allow the bidders to bring on board banks and/or financing institutions at the tender phase and negotiate more bankable concession contracts.

The New Law is unclear, however, in defining the kind of security interests that banks and/or financial institutions may take from the concessionaire.

Article 40.1 refers to security interests over “...payments that the concessionaire has received or receivables under the concession contract, without prejudice to the concessionaire’s rights over its other assets...”. The question that arises is whether it will still be possible under the New Law to secure charges, pledges and/or mortgages over the assets of the concession project itself.

Obviously such uncertainty should be clarified with the contracting authority on a case-by-case basis. Any security interests to be granted and any assignment and/or transfer of rights will need to be approved in advance by the contracting authority.

## Hydropower plant (HPP) concessions

The New Law will not apply to concessions for the construction, maintenance and operation of hydropower plants for the next four years. The law does not clearly indicate which legislation will apply to such projects instead.

While article 5.1(i) of the New Law excludes HPP projects, article 7 states that the bonus mechanism

which existed under the former law relating to unsolicited proposals would be applicable to these projects, too.

Article 51 of the New Law states that both of the above stated provisions will cease to apply four years after the New Law enters into force. Until then, a reasonable interpretation could be that HPP projects will continue to be subject to and governed by the former concession law and relevant secondary legislation.

In any case, existing concession contracts signed and/or tenders for awarding concessions started before 25 May 2013 (when the New Law entered into force) will still be subject to the former concession law.

## • Companies Law to change

The Council of Ministers has proposed some amendments to law no. 9901, dated 14.04.2008 "On Entrepreneurs and Companies". The draft law was submitted to Parliament for approval before the parliamentary elections. It may be expected that the draft will be discussed in the first sessions of the new Parliament.

The main proposed amendments are as follows:

- (i) the amount of the registered share capital and value of the paid-in capital will have to be stated in all correspondence from the company addressed to third parties.
- (ii) new rules will be introduced governing the invalidity of the company and its corporate acts, as well as statutes of limitation for such invalidity claims.
- (iii) provisions on 'piercing the corporate veil' will also be amended so that an individual shareholder or director (a member of the management body) or a representative of the shareholder (where the shareholder is a legal entity) shall be held personally liable for the company's debts if they willingly commit one of the actions set forth in article 16, for the unfair benefit of either themselves or for a third party.
- (iv) the capital of a limited liability company will be divided into a number of shares equal to the number of shareholders, and each shareholder will own a single share representing a part of the capital in

proportion with the value of that shareholder's contribution.

(v) resignation of directors and members of the management body will be subject to specific and detailed rules.

(vi) new cases/grounds for dissolving a limited liability and joint stock company and a dissolution process will be introduced.

(vii) specific rules on mergers (such as agreements for and report of mergers, increases of share capital, a right for shareholders to request documents related to the merger, etc.) will be amended.

(viii) commercial companies registered in the Commercial Register before 20 May 2008, which by 20 May 2011 had not harmonized their functioning and organization pursuant to law 9901/2008, must, no later than three months from the entry into force of the new law, either (a) approve and file amendments to their laws bringing them into accord with law 9901/2008; or (b) file with the NRC a statement from the director declaring that the company's bylaws meet the requirements of law 9901/2008.

Failure to do so will result in a penalty of 30,000 Leke. In addition, the NRC will not file any corporate acts or perform other services for a company which has not complied with the above requirement by the deadline.

- **Procedures introduced for the registration of tax representatives**

On 3 June 2013, the Minister of Finance issued instruction no. 17 (the "Instruction") making some amendments to Instruction 24/2008 "On Tax Procedures". The Instruction is published in the Official Gazette no. 99, dated 14 June 2013.

Among other measures, the Instruction implements the new provisions of the Tax Procedures Law relating to tax representatives, which entered into force on 24 January 2013.

Under specific circumstances, a foreign entity, which is liable to pay VAT in Albania, may appoint a tax representative for VAT purposes. The tax representative may be a resident individual or a legal entity.

The tax representative must be registered with the Regional Tax Directorate, which will issue a tax identification number and a certificate of registration. Registration with the Regional Tax Directorate should be performed no more than five days after the appointment of the tax representative. Several documents must be filed with the Regional Tax Directorate:

- (i) An application form;
- (ii) A resolution by the foreign entity appointing the tax representative or a Power of Attorney issued to the representative (the resolution must be printed under the company's letterhead and sealed with the company's stamp. If no seal is available, the resolution must be notarized

by a Public Notary and legalized) or a Power of Attorney (which must be notarized by a Public Notary and legalized);

(iii) The agreement between the foreign entity and the tax representative (certified by a Public Notary);

(iv) A certificate on registration of the foreign entity with the tax authorities of its country of origin (issued no earlier than 90 days before the date of application for registration of the tax representative);

(v) A notarized copy of the tax representative's identification card (if the tax representative is a natural person);

(vi) An extract from the tax representative's corporate registration from the NRC and from its bylaws (if the tax representative is a legal entity).

(vii) Any documents submitted to the Albanian public authorities for the purposes of registration, which are in a foreign language and executed abroad or issued by foreign public authorities, should either be the original documents or certified true copies (only one original or certified copy is needed). In addition, they should be legalized (with apostille) in accordance with the Hague Convention of October 1961 if the country of residence of the foreigner has ratified the Convention and has not expressed any reservations as regards its application in Albania; otherwise, the so-called "long legalization procedure" should be followed. They will then be translated into Albanian and the translation will be notarized (certified) by an Albanian Public Notary.

## ARTICLE

- **Resignation of administrators of commercial companies to be introduced**

Contributed by Ms. Jonida Skendaj as first published in International Law Office

The Council of Ministers has introduced a new draft law to Parliament on amendments to the Law on Entrepreneurs and Companies (9901, April 14 2008).

The draft law introduces the option for administrators to resign and the relevant procedures. The proposed amendment is a novelty since the Law on Entrepreneurs and Companies does not set out specific rules on the resignation of administrators. Although companies may include such rules in their articles of association or internal regulations governing the functioning of the management body, this is not common practice. Thus, by such amendment, the government aims to fill a gap that has led to debate and practical problems.

The proposed amendment provides that if an administrator or member of the management or supervisory board intends to resign from his or her post, he or she must give written notice to the general assembly. The amendment requires the resigning administrator or board member to convene the general assembly in order to appoint a new administrator or board member before the date on which such resignation becomes effective. In this way, the company will not be left without management.

Should the general assembly fail to agree on the appointment of the new administrator or board member

at the meeting convened by the resigning person, he or she must submit the written notice of resignation, along with the copy of the notice for the general assembly meeting, to the National Registration Centre (the entity in charge of filing corporate acts), which will record the resignation.

These rules will apply to administrators of limited liability companies and members of the management or supervisory board of a joint stock company. An administrator of a joint stock company shall provide his or her resignation letter to the management or supervisory board. In the written notice the resigning administrator should specify a date on which the resignation will become effective, in light of the company's activity. Even in such cases, the resigning administrator will have the right to file the resignation with the National Registration Centre if the management board does not agree on the appointment of a new administrator before the date on which the resignation becomes effective.

In any case, the resignation of the administrator or a member of the management or supervisory board will not affect the company's right to claim damages for a breach of fiduciary duties by the resigned administrator or member.

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