

Albanian Bulletin

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Investment in Albania update

Investment in Albania 2008 - II

- Law no. 9901 dated 14 April 2008 “On traders and commercial companies”, entered in force on 21 May 2008
- Law no. 9959 “On the foreigners in the Republic of Albania”, dated 01 August 2008 to be entered in force on 01 December 2008,
- Decision 774,775,776 dated 04 June 2008 “On Economic Zones” entered in force on 26 June 2008
- Law no. 9897 dated 10 April 2008 “On chambers of commerce and industry”
- Law no. 8901 dated 23 May 2002 and Law no. 9919 dated 19 May 2008 “On bankruptcy”
- Instruction 22 dated 29 July 2008 “On the appointment of temporary bankruptcy administrators”

Law no. 9901 dated 14 April 2008 “On traders and commercial companies”, entered in force on 21 May 2008

The legal personality of a commercial company

The commercial company gains its legal personality at the moment of its registration near the National Registration Center.

Extension to the trade name

Extensions following the trade name:

- TR (registered trader)
- SHK (societe collectif – general partnership)
- SHKM (societe comandite – limited partnership)
- SHPK (limited company)
- SHA (joint stock company)

Legal seat

The legal seat of the Company is where its main activity is carried out, if not otherwise stated in its bylaws.

Solidary responsibility of the founders of the company

The founders/the persons who act on behalf of the company (the promoters) are jointly responsible for any obligations created before the company gains its legal personality.

Minority interests (protection of “non controlling interests”)

The law recognizes broader rights to the owners/shareholders who have at least 5% of the voting rights or own 5% of the shares in a company, in cases when:

- They file claims as per article 10 of the Law,
- They ask for the General Assembly meeting and/or the inclusion in the order of the day of additional issues. They can file a claim which may result in a lawsuit against the administrator for breach of the loyalty obligation in non fulfilling their requirement within 15 days from the submission of the request from their part.
- They address to the Assembly for filing a derivative claiming the annulment of the Administrators decisions, when the latter constitute serious breach of law or statute.
- They require secrete voting in the General Assembly meeting of the joint stock company.
- They address to the General Assembly of the joint stock company to file a derivative action for the annulment of the Administrator’s decisions, and depeding on the case, of the Administration Council or the Supervisory Council, when such decisions are regarded as serious breaches of law or statute.
- They ask to the General Assembly of the joint stock company to appoint an independent expert specialized in the field, when they have jusitified doubts about breach of law or statute.
- They select one member of the Administrative Council by special decision, but in any case without increasing the maximum number of the Councile Members (21 members).
- They ask to the Administrative Council to exercise special supervision about particular issues, especially when the legal basis of the Administrator’s decisions is under review.

The statute of limitations

The specific period for filing a claim or lawsuit under this law is 3 (three) years.

Administrative offences

Any publication of official documentation or correspondence from part of the Company, Branch or Representative Office, addressed to third parties, without containing the data defined in the law, is considered an administrative offence and is subject of a penalty of 15,000 ALL. The penalty is imposed by the tax authorities.

The person, who is both Administrator and Sole Owner/Sharholder of the company, cannot enter into loan or guarantee agreements with the company. The other agreements entered into between this person and the company, are registered in the minutes, which are kept near the main office of the company. The non compliance with such procedure is considered an administrative offence and is subject of a penalty of 15,000 ALL, which is imposed by the tax authorities.

Basic governance principles of a commercial company

During the exercising of their rights the partners, shareholders or stockholders, the administrators, the members of the Administration or Supervisory Council, they should take into account: (i) their right to be informed (ii) their abusive actions with their duties and against the company (iii) the compliance with non competition clause (iv) the preservation of the industrial secret (v) the safeguarding of the non controlling interests.

The Council of Employees

The Council of Employees is created in a Company of more than 50 employees having a maximum number of 30 employees; and in a Company with 20-50 employees having one member for each 10 employees. The costs of the selection and of the functioning of the Council are covered by the commercial company.

It is not obligatory any more the participation of the employees in the administrative level, the agreement between the legal representative of the company and the Council of Employees is not obligatory with regard to this issue.

Dissolution of a Company

A new cause for dissolving a commercial company is (i) when it has not carried out any economic activity for a period of two years and has not notified as a consequence the suspension of its activity in accordance to article 43.2 of Law no. 9723 dated 03 may 2008 “On the National Business Registration Center”.

Limited partnerships

In a limited partnership, in case the promoters of the partnership (i.e. in this case its general and limited partners) take over obligations on behalf and for the account of the partnership, before it is registered near the National Business Registration Center, the limited partner who accepts such obligations, is jointly liable with the other partners the same as having the status of a non limited (general) partner, with exception of the case when the third party was aware of the limitations of his liability, or given the circumstance it should have been aware of that.

The establishment capital of a limited liability company (.Ltd)

The Ltd cannot have an establishment capital lower than the amount of 100 ALL.

The Statute defines the way of settlement of the shares in money or in kind.

The responsibility of the sole owner in an Ltd

In case the .Ltd remains with a Sole Owner, the latter has the obligation to register that fact in accordance with the article 43 of Law no. 9723 dated 03 may 2008 “On the National Business Registration Center. In case the Sole Owner does not act in compliance with this obligation he is personally responsible for the liabilities of the Company.

The distribution of profit shares in an .Ltd

The .Ltd can distribute the profit share to its Shareholders only if after such distribution: (i) the assets of the company cover entirely its liabilities (ii) the company has sufficient liquidities to cover its short term liabilities (i.e. which become due within the next 12 months).

The Administrators of the company are responsible to issue and guarantee the validity of the Certificate of Liquidity/Solvency of the Company, in order justify the profit share distribution.

The register of Decisions

All the Decisions as per this Law taken from the Sole Owner of an Ltd should be registered in the register of decisions; otherwise such decisions are absolutely invalid.

Also the Decisions of the General Assembly of an Ltd should be kept in minutes which are safeguarded by the Administrator.

The General Assembly meetings in the .Ltd and in the Joint Stock Company

In addition to its annual ordinary meeting, the General Assembly is called in meeting also when:

- (i) based on the year end or interim financial reports there is the risk that the assets of the company do not cover its liabilities becoming due within the upcoming 3 (three) months and in case of a joint stock company it is evident that its losses equal to 50% of its registered capital;
- (ii) the company proposes to sell or make use of its assets in any other legal form, which constitute 5% or higher of the total of its assets presented in the last certified financial statements of the company;
- (iii) within the first 2 (two) years after its registration, the company proposes to purchase from one of the shareholders/stockholders assets which value is higher than 5% of the total amount of its assets as presented in its last certified financial statements.

The Quorum in an Ltd or Joint Stock

In cases when simple majority is required the decisions are taken only in presence of the shareholders/stockholders who own at least 30% of the shares/stocks.

When for taking the Decision a qualified majority is required, such Assembly Decision is legally valid only if it is taken by the shareholders/stockholders who own more than half of the total number of votes (shares).

The Assembly should decide with at least $\frac{3}{4}$ of the votes (shares) for decisions regarding: (i) changes of statute (ii) the decrease of the registered capital (iii) the profit distribution (iv) reorganization or dissolution of the company.

The Administrator of an Ltd

His appointment term cannot be more than 5 (five) years.

The administrators of a mother company cannot be appointed as administrators of a controlled company and vice versa. Any nomination contrary to this disposition is invalid.

The Assembly can dismiss the Administrator at any time based on a simple majority decision. The representative rights of the administrators and any variation should be notified for registration near the National Business Registration Center.

Auditors and legal reserve in an Ltd

The new law does not specify any obligations for the Ltd to have an obligatory year end audit when overcoming certain financial data. Furthermore, the new law does not require the creation of a legal reserve in case of an Ltd (i.e. leaves it at the discretion of the articles of the company).

The establishment capital of a Joint Stock Company (JS)

The establishment capital of a JS with private offer cannot be lower than 2,000,000 ALL, whereas the establishment capital of a JS with a public offer cannot be lower than 10,000,000 ALL.

The shares are allotted at nominal value or more than their nominal value but it is prohibited to allot shares at a discount on their nominal value.

The issuance of shares

The shares issued for consideration in cash must be settled prior to the registration of the JS at least at $\frac{1}{4}$ of their nominal value. The remaining amount can be settled via one or more installments based on the decision of the administrative body of the company, whereas the share premium should be paid in full. The shares issued against non cash consideration should be paid in full prior to the registration of the company.

The shareholder is obliged to pay to the company a penalty for delayed payment of share consideration at 4% a year, commencing from the date his liability to pay has become due, according to the above paragraph.

The Company can reduce its share capital equal to the value of the share and cancel the share (extinguishing liability) in case the shareholder does not make the payment within 3 (three) months from the deadline as per the above paragraph. The company does not accept a non cash consideration for the shares in case such consideration is pledged or is a compensation of a liability that the company owes to the shareholder.

If the JS is established by a Sole Shareholder and the latter has not not paid the shares in full for cash or non cash consideration prior to its registration near the National Business Registration Center, should guarantee the payment of the shares through the issuance of a bank guarantee at an amount equal to the subscribed and unpaid capital with a validation term not longer than 1 (one) year and submit this to the National Business Registration Center.

Preference shares

The preference shares can be issued without any voting rights. In this case, this class of shares cannot constitute more than 49 per cent of the registered capital of the company.

Legal reserve

The company should create a legal reserve at least 5% out of its net profit after tax, until this reserve is equal to 10% of the capital of the company or equal to a higher percentage of capital as defined in the statute.

The variation of class rights

The shareholders' rights can be changed only based on a decision taken from at least $\frac{3}{4}$ voting rights.

Shareholders' loans

In case the shareholder lends to the company under less favourable conditions than those of the market and the company is in the state of insolvency to pay back the loan, the shareholder has not right to ask for repayment when this action would cause the reduction of the share capital under its minimum value.

When the shareholder acts as a guarantor to the loan given to the company from a third party, the first is liable up to the amount guaranteed at the moment the loan is paid back. The shareholder is not held liable for the loan amounts in case the collateral placed as a guarantee is transferred to the company for the payment of the loan.

Restrictions on capital maintenance

The company cannot enjoy for its own shares the rights that according to law are deriving from their possession. However, the Law does not mention any limited circumstances when the company can acquire its own shares (eg. redeemable shares).

Single board and Supervisory board structures

The JS can choose between the Single Board and the Supervisory Board structure, depending on the provisions of its statute:

- a) Administrative Council (or Board of Directors), which is a unitary board structure. The Company is managed by a single board of Directors who exercise both administrative and supervisory functions.
- b) The Supervisory Council or the Supervisory Board structure. In this structure there is a management board (one or more administrators) to run the company and a supervisory board to oversee the management board.

Good governance report

In the annual report of the company's activity and the presentation of annual financial statements, the joint stock companies should include also the report on good governance.

Members of the supervisory board

One individual cannot be chosen as member of the Board of Directors, in case he is also:

- a) Member of the Board of Directors or of the Supervisory Board in two other Albanian tax resident companies,
- b) Administrator (Director) of the mother company or of a controlled company,

- c) The Administrator (Director) of another company, who has as director or member of Board of Directors one individual who is also member of the Supervisory Board or of the Board of Directors of the first company.

The membership in the Supervisory Board or in the Board of Directors of a group of companies is regarded as only one membership.

Increase of share capital

The administrators/directors of the company can have the power to allot shares and the authority to exercise the power given by the articles (statute) or an ordinary resolution in general meeting. The maximum number of shares that may be allotted cannot exceed half of the amount of the registered capital at the date the decision for allotting shares is taken and the timescale to take the decision is within 5 (five) years from the registration of the company.

Pre-emption rights

The general meeting can resolve the issuance of new shares to be subscribed by the existing shareholders. The rights issue can be given only by unanimous approval by all shareholders.

Non cash consideration

The reserves and the non distributed profit cannot be capitalized in case the previous year end balance sheet is in losses.

Loan capital

The law recognizes convertible bonds (in shares) and bonds with participation in profit.

Reduction of share capital

The normal reduction of capital is achieved by reduction of the nominal value of shares. However the law does not clarify cases since most of the common cases of share capital reduction include reduction of the nominal value of the shares (eg. reducing liability on partly paid shares, pay off part of paid up share capital out of surplus assets, cancel paid up share capital which has been lost).

The reduction of share capital to cover losses (i.e. to cancel paid up share capital which has been lost/which is no longer represented by available assets) and the written off debit balance on reserves by reduction of nominal value of shares, is done through a simplified procedure.

The reduction of the share capital can be achieved also by cancelling paid up share capital only when:

- a) This action is allowed by the articles (statute) or upon a resolution that has amended the statute taken before the subscription of the shares which will be subject of annulment,
- b) The company acquires its own shares based on a specific procedure (although not specifically set by this law),
- c) The shareholders who own this class of shares accept the cancellation.

This procedure should meet the criteria of normal reduction of share capital.

Law no. 9959 dated 01 08 2008 “On foreigners”

Types of entry visas in the Republic of Albania

The new Law defines the types of entry visas the Ministry of Foreign Affairs issues to the foreigners who ask to enter the Albanian boarder. The types of visas vary from type A-D. The D visa has a variable term of stay in Albania and is issued for the purposes of (i) carrying out economic activity (ii) professional or commercial activity (iii) individual employment (iv)

studying (v) family reunion (vi) seasonal employment (vii) humanitarian or religious activity (viii) having the marital status or being a child of an Albanian citizen (viiii) diplomatic or service visa.

Exemption from the obligation of getting an entry visa

The citizens of the countries with which Albania has mutual agreements or with which has kept a unilateral position and who stay in Albania less than 90 days within a consecutive period of 180 days from their first entry. They are obliged to contact the Regional Directorate of Border and Migration within 30 days after their entrance in the territory of the Republic of Albania.

Exemptions from the obligation of getting a working permit

The exemption from the obligation of getting a working permit is granted to the following foreigners :

- The consultants or councilors to the central governmental institutions,
- the technical assistance missions to the central institutions, and to the international organizations ;
- the representatives of the international organizations having the diplomatic status ; the foreigner who enjoys diplomatic and consulate privileges and immunities according to the international law ;
- the inter country transportation personnel of people and merchandise when they do not stay in Albania for a period of more than 3 (three) months and their normal place of business is outside Albania ;
- the foreigner who is a member of the military forces or of a civil unit of a NATO member,
- the person who holds more than one citizenship one of which is Albanian ;
- media representatives, reporters or foreign correspondents accredited to the Republic of Albania and who work for a foreign employer;
- persons who negotiate on an agreement or take care of a fair exposition for a period up to 1 (one) month ;

- persons who install machineries or constructions that are part of a consignment contract with a foreign company, and who based on such contract repair or start up the machinery as well as perform the training of the Albanian or foreign personnel for a period of not more than a month ;
- the main directing bodies of a non for profit organizations who are not remunerated for the job carried out ;
- representatives of religious or humanitarian institutions, duly known and registered near the relevant official Albanian authorities ;
- crew members of a ship or airplane with a temporary staying in Albania for less then three months ;
- business vistors who stay in Albania for less than one month, lecturers, foreign specialist or researchers who come in Albania in view of a biletaral governmental agreement or of an agreement between the educational institutions.

Restrictions on the issuance of a working permit

The governmental authority in charge of issuing the working permit, before giving its approval to the request submitted by the foreign individual for filling in a free working place as an employee, should perform an evaluation if this working place can be occupied by:

(i) employed Albanian citizens; (ii) foreigners who are family members of the Albanian citizens (iii) family members of the foreigner who is permanently staying in Albania (iv) citizens of the EU member states or of the countries with which Albania has signed bilateral or multilateral agreements (vi) foreigners with a legal stay in Albania and who have carried out or are carrying out a legal activity without interruptions in the Republic of Albania or a period of more than two years within a timeframe of five years.

The Employer and the relevant public authorities have the responsibility to publish the announcement for the free working within a period of 4 (four) weeks.

Exemption from the above procedure

The exemption from the compliance with the above procedure is granted to :

- foreigners who have continuously applied for working permit for a period of two years,
- Foreigners, when the number of foreign employees is not higher than 10% of the total number of the employees listed in the payroll for the past 12 months,
- The employees working under secondment contracts (working permit type „A/TN“), on the condition that they have the status of „executive personnel (managerial position)“ or „specialists (key personnel)“. The maximum validity of this working permit is up to 5 (five) years and the foreigner is obliged to comply with the local law requirements on social and health contributions in absence of the bilateral or multilateral governmental agreements.

Decision no. 774 - 776 dated 04 June 2008 “On economic Zones”

These decisions recognize as economic zones with the status “Industrial Park” important areas in Vlora, Elbasan and Shkodra cities.

In these zones can be carried out the following economic activities:

- industrial and production;
- trade;
- import – export;
- services.

The period until when these zones are granted the above status is 35 years and the land surface is given in concession.

The selection procedure for the interested businesses who will develop the zones will be carried out in accordance with Law no. 9663 dated 18 December 2006 “On concessions”.

Law no. 9897 dated 10 April 2008 “On chambers of commerce and industry”

The membership in the Chamber is voluntary for all taxpayers registered near the commercial register.

The members of the Chamber pay the annual membership quota. The amount and the collection procedure of such quota are based on the decision of the Chamber’s Assembly.

Law no. 8901 dated 23 May 2002 and Law. No 9919 dated 19 May 2008 “On Bankruptcy”

The cause for initiating the bankruptcy procedure

The bankruptcy procedure is opened only in the case of: (i) insolvency of debtor (when the taxpayer is not able to pay its liabilities within their maturity date), (ii) on request of debtor (when the taxpayer forecasts insolvency in the short run), (iii) bad debt repayment ratio (the taxpayer’s debt overcome its assets) or when the taxpayer is able to assess with certainty that the business cannot continue as a going concern.

The request to start bankruptcy procedure

The bankruptcy procedure starts only at request of the debtor or creditor.

In case of juridical persons (i.e. companies) the bankruptcy procedure can start on request of the tax authorities, when the company has presented a set of financial statements in losses for a period of 3 (three) years.

The right of the tax authorities to start bankruptcy procedure

The tax authorities and the creditors of the taxpayer have the legal right to initiate the bankruptcy procedure against the taxpayer.

The tax authorities are obliged to start such procedure near the court of jurisdiction where the taxpayer is located, within 30 days from the identification of its insolvency

Obligation of owners/shareholders to declare bankruptcy

In case the owners or shareholders of the company were aware of the insolvency of the company and they have not filed near the commercial section of the court the request for opening the bankruptcy procedure within 3 months after the date when they were aware of the fact, they are personally responsible and subject of a penalty from 200,000 ALL until 500,000 ALL imposed by the tax authorities.

Instruction no. 22 dated 29 July 2008 “On the appointment of temporary bankruptcy administrators”

The temporary bankruptcy administrators appointed by court should meet some requirements from which the most important: (i) should be Certified Auditors, (ii) have a job experience as Certified Auditor for a period of not less than 5 (five) years.

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