KEY ASPECTS OF THE DRAFT LAW ON INVESTMENTS IN THE REPUBLIC OF ALBANIA

Introduction

From a legal perspective, investment activity lies at the intersection of public and private law, bringing together individual economic freedom and the State's regulatory interests. An investment entails both the allocation of capital and the establishment of a legal relationship governed by domestic law (property, commercial, tax and administrative law) and by international treaties.

This regulatory framework rests on fundamental principles, including the rule of law, legal certainty, the protection of property, non-discrimination and respect for investors' legitimate expectations. Legal certainty requires clear and stable rules, since sudden legislative changes, discriminatory taxation or the unjustified revocation of licenses can give rise to international disputes.

Legal safeguards underpin investor confidence and operate at two complementary levels, domestic and international. At the domestic level, these safeguards derive from the Constitution, civil and commercial codes, and legislation specifically governing investment. An independent and efficient judiciary is equally important, as it ensures that investors' disputes are resolved impartially.

Investment guarantees are subject to the State's sovereign right to regulate economic activity to safeguard fundamental constitutional values. Legal restrictions may be justified by the need to protect national security, public order, public morals and the environment, to uphold social and labour standards and fiscal integrity, or to combat corruption.

To be lawful, however, these restrictions must be provided for by law, be non-discriminatory and comply with the principles of necessity and proportionality.

When we think of investment, we usually think of money, factories or technology. From a legal perspective, investment is where the freedom to do business meets the State's power to regulate.

Before committing capital in a country, investors need legal certainty and predictability. Put simply, they want to know that the rules of the game won't change halfway through. Providing that certainty is more complex today as investment extends beyond physical assets to digital assets, algorithms and databases, all of which call for new rules to protect them.

Regulating investment well means striking the right balance. Strong legal safeguards help attract capital and support economic growth. Clear, carefully designed restrictions help protect national security, the environment and democratic institutions. A sound investment law does both, giving investors confidence while protecting the long-term interests of society.

Key legal questions the draft law should address.

1. Once adopted and in force, will the Law on Investments in the Republic of Albania apply alongside more specific laws adopted by Parliament, under the principle of lex specialis derogat legi generali (specific legislation takes precedence over general legislation)? For example, will Parliament continue to adopt laws such as Law No. 79/2022, which approved the framework agreement between the Council of Ministers of the Republic of Albania and Eagle Hills Real Estate Development, Albanian Seaports Development Company sh.a. and Nshmi Development LLC concerning the 'Durrës Marina & Yachts' strategic investment project" ?!

2. Will companies registered in so-called 'tax havens' be eligible for the benefits provided under this law" ?!

3. Once adopted and in force, will the Law on Investments in the Republic of Albania apply alongside concession and public-private partnership (PPP) contracts that may be approved by Parliament through legislation or by the relevant authorities? For example, will contracts such as the concession/PPP agreement for the 'Marina di Valona' tourist port in Vlorë continue to be approved? That agreement was concluded between the Ministry of Infrastructure and Energy and a consortium of economic operators comprising 'Marina di Valona' sh.p.k., 'Marina projects' ltd, 'Brunes' sh.p.k. and 'Ndregjoni' sh.p.k.

4. Once it enters into force, how will the Law on Investments in the Republic of Albania affect the right of wholly state-owned companies to set up joint ventures with Albanian or foreign partners? For example, how would it apply to a venture such as the partnership between KAYO and Guna Tactical sh.a. to manufacture military clothing?!

The terms 'military goods' and 'controlled goods' appear only in the draft law's definitions.

5. Article 22 of the draft law provides as follows:

Article 22

State participation in investment

1. The Albanian State may participate in investments where such participation is justified by the public interest and by the investment's expected contribution to the country's economic development.

2. The State may participate in investments by making available immovable property, assets, property rights, infrastructure or funds, or by making other forms of contribution permitted under the legislation in force.

3. State participation under this Article shall be carried out in accordance with the legislation in force and shall ensure the protection of the public interest and the efficient use of public resources.

Article 22 addresses the broad issue of State participation in investment in general terms. What constitutes a public interest in this context, and what measurable criteria, if any, are used to assess it? What contribution must an investment be expected to make to the country's economic development? Is there a minimum threshold, and who sets it? Finally, what safeguards will ensure transparency in decisions taken under Article 22?

6. The draft law should expressly spell out the consequences of failing to implement an investment as approved. For example, if a domestic or foreign private investor fails to carry out an approved investment, under what circumstances may the investment agreement be terminated or the approval revoked? What legal instrument should the competent State authority use, and what

procedure should it follow? How should the law address the consequences, including the treatment of any work already carried out before the approval was revoked?

7. Once the Law on Investments in the Republic of Albania enters into force, how will it apply alongside Law No. 8561 of 22 December 1999 'On Expropriation and the Temporary Use of Private Property in the Public Interest'? In particular, how will it interact with Article 8(f) of that law, which identifies the implementation of strategic investments in accordance with the legislation in force as a ground for expropriation.*"*

8. The public consultation page for the draft Law on Investments in the Republic of Albania also includes a Table of Concordance with EU legislation. The table's final column, headed 'Remarks', contains comments on several provisions of the draft law and the corresponding EU regulations. These comments suggest that the draft law still needs further work.

For example, the 'Remarks' column contains the following comment on Article 4(5) and (21) of the draft law":

"The draft law defines both 'foreign investor' and 'third country'. However, the definition of 'foreign investor' is not expressly linked to the definition of 'third country', and paragraph 21 introduces an additional security-related criterion. ***The relationship between these provisions should be clarified to ensure a consistent scope of screening."***

Conclusion

A. Albania needs a new law governing domestic and foreign investment. The law adopted in 1993 can no longer remain in force, and Albania's social, economic, institutional and democratic development has yet to reach a stage where a dedicated investment law would be unnecessary.

B. Consultations on the draft law should continue with a broader range of stakeholders, particularly domestic and foreign business organisations. Their input is essential to improving the text.

C. A Regulatory Impact Assessment (RIA) should be prepared as an essential step in the legislative process. The Table of Concordance with EU legislation should also be completed in full.

D. The draft law should use more precise legal language, avoid broad formulations and refrain from restating principles already set out in the Constitution or other laws. Several articles refer generically to 'the legislation in force'. These references should identify the specific legislation that applies, especially since the accompanying explanatory memorandum neither identifies nor analyses it.

E. The law should form the backbone of Albania's investment framework and expressly prohibit circumvention of its provisions through special legislation, public-private partnership contracts or other means.

F. The law should expressly exclude companies registered in tax havens or offshore jurisdictions from eligibility for benefits.

G. The procedure for monitoring whether investments receiving benefits under the law are carried out as approved should be strengthened. The law should specify the legal instruments available to the competent authority and address the consequences of revoking an investment's status. Investors convicted of offences such as tax evasion should be ineligible for benefits. If an investor commits tax evasion during the approval process or while implementing the investment and is subsequently convicted by a final judgment, will any benefits already granted be withdrawn? What penalties would apply? The draft law leaves these questions open.

H. The draft law addresses only one part of the wider framework governing investment and business. Even an investor who qualifies for benefits and complies with the law may still have to contend with a 25th amendment to the Law on Tax Procedures or wait ten years for the courts to resolve a dispute with the tax authorities. A comprehensive reform effort should therefore include amendments to other relevant laws.