



*Document prepared by  
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## SPI Project on Revising the Debt Contracting Regulatory Framework

<http://www.spi-albania.eu/en/2009-program/procurement-of-financial-advisory-services/>

### Final Project Working Group Recommendations

March 2010

<b>Project information</b>
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<b>PUBLIC-PRIVATE FINANCIAL SECTOR MODERNIZATION MATRIX</b>					
<b>Italian Banking Association CRITERIA</b>	<b>European Central Bank CRITERIA</b>				
	<i>Asymmetric information reduction</i>	<i>Completeness of the market</i>	<i>Increased opportunities to engage in financial transactions</i>	<i>Reduced transaction costs</i>	<i>Increased competition</i>
Business development			X		
Industry competitiveness					
Industry reputation					

**Short description of the context:** In Albania obtaining loans from private banks (foreign and domestic) for the Government is subject to public procurement procedures pursuant to Article 26 of the State Borrowing Law no. 9665 dated 18.12.2006. However, advisory, technical and other supporting services related to the debt contracting process not only are not subject to public procurement rules, but they are also excluded from the jurisdiction of the law no. 9643 dated 20.11.2006 on Public Procurement (article 7), with the exception of legal services<sup>1</sup>, which are provided for in the Public Procurement Law. In addition to that, the exemption clause neither does not provide any definition for these services nor enumerates them.

**Stakeholder proposing the project: Ministry of Finance (MoF)**

**Other Stakeholders involved : Public Procurement Agency(PPA), Banks, Consulting Companies, Law Firms**

**Project objectives:**

<sup>1</sup> In the ToRs prepared for this project, other supporting services include but are not limited to legal services.

**General:**

- To enhance economic development

**Specific:**

- To facilitate Government access to the debt markets
- To increase transparency in using public funds

**Operational:**

-To improve Government debt contracting process by reviewing the relevant regulatory framework in order to cover the acquisition of advisory, technical and other supportive services.

**Description of the project contribution toward financial modernization:** By regulating environment for procuring advisory, technical and other supporting services, the access to debt borrowing improves and investments increase, facilitating economic development. For the financial and consulting industry, a regulated environment for advisory, technical and other supporting services related to debt borrowing means business development. For consumers as taxpayers for debt repayment, regulated debt borrowing services means transparency and better use of their taxes.

**Project Working Group:**

Project Owner : Sherefedin Shehu, MoF, Deputy Minister  
 Project Manager : Xhentil Demiraj, MoF, General Debt Director  
 Deputy Project Managers: Mrs. Anilda Sefgjini, PPA, Deputy General Director and Mrs. Elona Koci, Raiffeisen Bank  
 Project Working Group Members:  
 Milbana Treska, MoF  
 Xhorlin Pojani, MoF  
 Adrian Ceco, Intesa San Paolo Bank  
 Ajola Xoxa, Ervin Braho, Tonucci- Legal Consulting Company  
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**PWG meetings:**

1<sup>st</sup> meeting – May 21,2009 ; Output: Project ToRs; Note on the International Experience; Scoping of the Problem Document; Draft TAIEX application form;  
 2<sup>nd</sup> meeting – July 22, 2009; Output: Note on Advisory, Technical and Other Supporting Services; Cost-Benefit Qualitative Analysis; Proposal to amend current regulatory framework in the framework of Sovereign Debt Borrowings.  
 3<sup>rd</sup> meeting – November 22, 2009; Output: TAIEX expert mission mission evaluation report.

**Contributions:**

**PWG members:** participation in PWG meetings and discussions; feedback on the note on advisory, technical and other supporting services associated with Albania’s debt borrowing; cost-benefit qualitative analysis; International Experience; Proposal to amend current regulatory framework; Draft decree related to credit rating II services; Consultation Paper.  
**SPI Secretariat:** draft Project ToRs; Note on the advisory, technical and other supporting services; Note on the International Experience; Cost Benefit qualitative analysis; Proposal to amend current regulatory framework; Consultation Paper.

**Other Supportive Activities:** Presentation from the TAIEX Expert of UK experience

**Methodology:** EU Better Regulation (Annex 8)

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## 1. Summary of PWG Analysis

Recently foreign borrowing has gained momentum in Albania due to the access the country has to borrowing on the international financial markets based on the first improvement in 2007 of the country rating by Moody's. So are the advisory, technical and other supporting services associated to public debt borrowings, which according to the analysis that was based on the literature and current practice are very diverse considering that the financial sector is a dynamic one with products which are becoming more and more sophisticated.

In Albania the procurement environment of the advisory, technical and other supporting services related to the public debt contracting process is not regulated. Such services not only are not subject to public procurement rules, but they are also excluded from the jurisdiction of the law no. 9643 dated 20.11.2006 on Public Procurement (article 7), with the exception of legal services<sup>2</sup>, which are provided for in the Public Procurement Law. In addition to that, the exemption clause neither does provide any definition for these services nor enumerates them.

This provision creates difficulties to the Ministry of Finance when contracting very complex debt causing delays and additional costs. It also hampers banks, investors, law firms and consulting companies to offer their services related to debt borrowing to the Ministry of Finance.

International Experience (annex 3) shows that the procurement of advisory, technical and other supporting services associated to public debt borrowing in many countries is not being provisioned by the law, but rather it is solved according to country's circumstances. Some countries have been flexible in providing solutions using negotiation techniques between Government and potential foreign lenders. Negotiations have been conducted based on current needs and long-term development strategies of the Government. Others have issued Internal Guideline adopted by the Minister of Finance.

Regulating the environment for procuring said service becomes important especially now when the country prepares to receive a second credit rating, a prerequisite for the Albanian Government to borrow in international financial markets.

Therefore, adopting a legal act that regulates advisory, technical and other supporting services related to debt contracting would be an important step towards increased access to foreign borrowing and facilitated Government financing needs. Also, including clear provisions on financial services reduces the transaction costs for the Government and increases transparency. On a macro level this leads to the increase of investments and economic development stimulation.

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<sup>2</sup> In the ToRs prepared for this project, other supporting services include but are not limited to legal services.

## ***Strategy followed by the PWG***

The objective of this project was achieved through PWG discussions, informed by relevant analytical work prepared by the SPI Secretariat.

In order for all members in the PWG to have better information on what has been done so far by each of the PWG participating institutions and actual situation of the contracting environment of the advisory, technical and other supporting services in Albania, SPI Secretariat prepared a note on advisory, technical and other supporting services based on the literature and current experience of the Ministry of Finance and commercial banks acting as their agents (please see Annex 2).

To inform the deliberations of the project working group on the possible options for solving the contracting environment of the advisory, technical and other supporting services, SPI Secretariat prepared a compilation of the international practices (please see details in Annex 3). The effects of revising debt contracting regulatory framework of financial services in Albania are reflected by the cost - benefit qualitative analysis for authorities, banks, investors, firms and consumers (please see Annex 4).

In the effort to find a solution for institutionalizing the contracting of said services, the Ministry of Finance, which was the owner and project manager for this project on the basis of the final report with suggestions and recommendations delivered by the external expert (please see annex 5) prepared a draft decision for the financial service related to country risk assessment. This is considered as necessary for the realization of the borrowing process in international market (please see Annex 1). The decision was successfully approved by the Council of Ministers through the decision no 5 dated January 7, 2010.

In order to validate the PWG proposal/s before finalizing it and submitting it for SPI Committee approval, SPI Secretariat ran consultations with PWG members and circulated the prepared Consultation Document to get their feedback (please see Annex 6).

## **2. PWG Policy Recommendations**

### ***2.1. PWG recommendations for revising debt contracting regulatory framework in Albania***

The Project Working Group Members, based on their expertise and practical experience in dealing with the advisory, technical and other supporting services in Albania, on the various documents prepared by SPI Secretariat and finally on the external assistance contracted from the Ministry of Finance under TAIEX (EU Enlargement Department) have discussed and agreed on the legal decision for contracting said services, presented in Annex 1.

Considering that the definitions of the financial services in EU Directive 2004/18 are fairly general it is suggested that each Contracting Authority (CA) make its own reasoned judgements as to nature and extent (and for that reason there is little published guidance) of said services. Those judgements of a CA will be based in whole or in part on the law as it stands influenced by: (i) reasonableness (ii) value for money (iii) the market (is there a

market? can it would it respond?) (iv) volatility; (v) appropriateness and (vi) risk. This position would affect all CA's in Albania obtaining financial services in connection with borrowing or lending capital.

Following the recommendations given in the report prepared by external expert, the Ministry of Finance formulated the draft decision for the financial service related to country risk assessment (credit rating II), necessary for the realization of the borrowing process in international market.

The draft decision specifies that, according to article 7 of the Albanian Public Procurement Law, procurement of Credit Rating II service is allowed to be performed using procedures that are different from those provided in the Law. The draft decision provides:

- (i) the responsible authority for establishing the evaluation bidding committee,
- (ii) responsible structure for managing the procurement process and
- (iii) rules for keeping the documentation until its opening by the evaluation committee, as well as relevant deadlines for winner selection and the right to appeal to all entities participating in this procedure.

The decision was successfully approved by the Council of Ministers through decision no. 5 dated January 7, 2010. The Ministry of Finance proposes now to develop a single draft decision instead of separate drafts for each financial service, which would be valid for all advisory, technical and other supporting services.

Following the feedback received regarding the Consultation Document, PWG members agree to the proposals made and consider that the Credit Rating II document is a valid precedent for the new draft decision covering the procurement of other financial services associated with public borrowing.

### **3. Proposed SPI Committee Decision**

SPI Committee endorses PWG recommendations and the draft legal act by circulation on a no-objection basis.

### **4. Other actions**

In parallel, the Project Manager will forward the final PWG Recommendations to the Ministry of Finance, the SPI Albania stakeholder who requested this project.



**REPUBLIKA E SHQIPERISE  
KESHILLI I MINISTRAVE**

**PROJEKT-VENDIM**

**Nr. \_\_\_\_\_ Date. \_\_\_\_\_ 2009**

**“PER REALIZIMIN E SHERBIMIT FINANCIAR TE VLERESIMIT TE  
RISKUT TE VENDIT” (Credit Rating)**

Ne mbeshtetje te nenit 100 te Kushtetutes, te nenit 7 germa ç te ligjit nr. 9643 date 20.11.2006 “Per Prokurimin Publik” i ndryshuar, me propozim te Ministrit te Financave, Keshilli i Ministrave,

**VENDOSI:**

1. Ky vendim zbatohet per percaktimin dhe realizimin e procedures qe do te ndiqet per zhvillimin e procesit te Credit Rating per Qeverine e Republikes se Shqiperise.
2. Credit rating, ne kuptim te ketij vendimi, pershin sherbimin financiar ne formen e procesit vleresues te riskut te vendit, duke ofruar sherbimin e nevojshem per realizimin e procesit te transaksioneve te huamarrjes ne tregun nderkombetar.
3. Procedura e realizimit te ketij sherbimi financiar percaktohet si me poshte:

Titullari, nxjerr urdhrin per realizimin e ketij sherbimi financiar. Urdhri duhet te permbaje detyrimisht:

- a) sherbimin financiar qe eshte objekt i kesaj procedure.
- b) listen e institucioneve financiare pjesemarrese per te ofruar sherbimin e kerkuar, e cila do te percaktohet nga Komisioni i Hartimit te Dokumentave.
- c) perberjen dhe emrat e anetareve te Komisionit te Hartimit te Dokumentave dhe atij te Vleresimit te Ofertave, te cilet duhet te permbajne se paku nje kryetar dhe 2 specialiste te fushes. si dhe cdo element tjeter te vleresuar si te nevojshem.

4. Komisioni i Hartimit të Dokumentave, brenda 5 diteve nga dalja e urdhrit, pergatisin ftesen e nevojshme per oferte dhe e dergojne ate ne adresat perkatese. Ftesa duhet te permbaje:

- a) institucionin qe kryen proceduren per sherbimin sipas pikes 1
- b) sherbimin financiar qe kerkohet te realizohet
- c) kushtet specifike te kerkuara dhe
- d) daten, oren dhe vendin e paraqitjes se ofertes.

5. Dokumentacioni i paraqitur nga subjektet e interesuara, ruhet dhe nuk hapet nga Komisioni i vleresimit te ofertave deri ne daten dhe oren e caktuar ne ftese.

6. Ne marrjen e vendimit perfundimtar per perzgjedhjen e subjektit, komisioni i vleresimit te ofertave, bazohet respektivisht si me poshte:

- a) plotesimin e kriterëve te pergjithshme dhe teknike,
- b) cilesine e sherbimit te ofruar dhe reputacionin ne tregjet financiare me te njohura boterore.
- c) cmimim me te ulet per sherbimin e ofruar nga subjektet, per blerjen, shitjen/transferimin e instrumentit financiar.

Pesha specifike e secilit prej kriterëve te siperpermendur, do te percaktohet ne dokumentat e tenderit dhe do t'u njoftohet institucioneve financiare pjesemarrese.

7. Titullari i institucionit, ne baze te vendimit te dhene nga Komisioni i Vleresimit, miraton ose refuzon, brenda 5 ditesh shpalljen e fituesit.

8. Komisioni i vleresimit te ofertave, brenda 5 diteve nga shpallja e fituesit, njofton te interesuarit, per klasifikimin perfundimtar te ofertave.

9. Ankesat e subjekteve ndaj procedures se zhvilluar, i paraqiten brenda 5 diteve nga data e njoftimit titullarit te institucionit. Vendimi, jepet brenda 5 diteve nga paraqitja e ankeses, dhe eshte perfundimtar. Njoftimi perfundimtar i fituesit do te behet me te gjitha mjetet e komunikimit.

10. Ngarkohet Ministria e Financave per zbatimin e ketij akti.

Ky vendim hyn ne fuqi menjehere.

**KRYEMINISTER**

**Sali BERISHA**

**MINISTER I FINANCAVE**

**Ridvan BODE**



## Summary of the Note on Advisory, Technical and Other Supporting services associated with Albania's debt borrowing

### Context

In Albania obtaining loans from private banks (foreign and domestic) for the Government is subject to public procurement procedures pursuant to Article 26 of the State Borrowing Law no. 9665 dated 18.12.2006. However, advisory, technical and other supporting services related to debt contracting not only are not subject to public procurement rules, but they are also excluded from the jurisdiction of the law no. 9643 dated 20.11.2006 on Public Procurement (article 7), with the exception of legal services<sup>3</sup> which are provided for in the Public Procurement Law.

The Government has expressed its concern for this gap in the legal framework that can create difficulties for them in cases when they would like to borrow from commercial banks (such as the recent cases of syndicated loans). They have addressed this concern to the SPI Albania (after having raised it also with other IFIs), *First* to get a clear information on the best international practice in these cases, and *Second*, based on that, to prepare proposed revisions of the relevant legal framework.

Foreign borrowing has gained momentum due to the access the country has gained to international financial markets. It is also the Government strategy to reduce domestic borrowing and increase foreign borrowing as outlined in the Public Debt Strategy for 2008-2010.

Until 2007, Albania has contracted foreign official debt from international organizations like the World Bank, European Bank for Reconstruction and Development, European Investment Bank, Islamic Development Bank etc. and governments of various countries. Selection of creditors has not been conducted following public procurement rules, but in the case of the IFIs, it was based on the relevant Legal Agreements and Membership, whereas in the cases of bilateral donors, it has been based on the bilateral Agreements, always in the framework of the overall development strategy of the Albanian Government (i.e. PRSP/NSSD/ NSDI). As the debt for the most part was under soft terms, its borrowing cost was not very high.

After receiving country rating by Moody's, Albania was allowed to begin contracting debt in international capital markets. In 2008 the government contracted its first syndicated loan<sup>4</sup> from domestic and foreign banks under commercial terms. In 2009 the government contracted another syndicated loan assumed by two co-leading banks that have agreed to arrange a loan for the amount up to Euro 250 million.

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<sup>3</sup> In the ToRs prepared for this project, other supporting services include but are not limited to legal services.

<sup>4</sup> Wikipedia: By definition a syndicated loan is one that is provided by a group of lenders and is structured, arranged and administered by one or several commercial or investment banks known as arrangers.

Contracting syndicated loans or issuing government securities like Eurobonds<sup>5</sup> in international capital markets are complex processes, include many more stakeholders than the previous loans contracted from international organizations. In order to contract such kinds of borrowing the Government must undertake preliminary technical steps that are the object of Advisory, Technical and other Supporting Services that are going to be analyzed in this note.

## **Implications**

The gap identified in the legal framework may have negative consequences for the Ministry of Finance in contracting debt such as:

- Delays in contracting debt, as the analysis is to be handled with internal limited resources, with results on liquidity and costs;
- Increase in the transaction cost risk due to limited in-house analytics capabilities

The situation may hamper also banks and investors from offering the necessary financial services.

## **Scope of Analysis**

The purpose of the note is to enumerate and provide information on advisory, technical and other supporting services related to debt contracting relying on the literature and current experience of the Ministry of Finance and commercial banks acting as their agents. The most important argument for providing such information is that the exemption clause of public procurement law regarding “*financial services related to purchase, sale or title transfer or other financial instruments*” neither does provide any definition for these services nor enumerates them. Therefore, getting a clear understanding of the advisory, technical and other supporting services would help authorities determine the degree of regulatory intervention (amending relevant legal framework) as well as provide concise and clear clauses for the services in question.

This note was prepared by: (i) consulting the literature, (ii) based on meetings with individual members of the working group of the project in question. It makes also reference to the recent Albanian legislation in defining the advisory, technical and other supporting services.

## **I. Advisory, technical and other supporting services**

We can classify these services into three big categories:

### **A. Services prior to debt contracting**

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<sup>5</sup> Wikipedia: By definition a bond is a debt capital market instrument issued by a borrower who is then required to repay to the lender/investor the amount borrowed plus interest over a specified period of time

**A.1. Services falling under this category relate to contracting debt from private banks.** After the Ministry of Finance has expressed interest in contracting debt from banks or investors, it must at the same time express interest for selecting the Bank that would arrange the loan to be granted, which is realized by the issuing of a letter of credit<sup>6</sup> available for all life validity of the loan. The selected agent Bank/s will benefit a fee which is paid by the Ministry of Finance with the funds of the state budget for the service provided.

In some circumstances, the Ministry of Finance may also need to identify a guarantor of the debt to be issued, in full or in part.

As mentioned above, starting from year 2007 Albania has been allowed to contract debt in international capital markets. One of the debt instruments is Eurobond which has not been issued yet due to global financial crisis and the difficulties to get access to capital markets.

Other advisory, technical services include those services which are provided to the Ministry of Finance from an independent evaluator/consultant to help assess costs, risks when the bids have been received by the lenders.

**A.2. Other supporting services** related to debt contracting are mainly (but not limited only) legal services offered to the Ministry of Finance with regard to the foreign law that applies-mainly English law- in international agreements to resolve the disputes.

According to the literature<sup>7</sup> investors and borrowers in the Eurobond market may at one time fall under the auspices of a number of countries laws and regulations. The most important legal considerations relate to: (i) the possibility that the bonds are eventually distributed to residents in the United States and (ii) London, as the principal financial centre where the sale and trading of bonds takes place. The first consideration means that the market is subject to legislation in the US that dates from 1993<sup>8</sup>. The second consideration means that the market comes under certain aspects of English law.

The legal advisor will assume responsibility for the legal issues involved in the issuing Eurobond transaction. Even in this case the Ministry of Finance may be required to contract an independent consultant with experience in this field to make the assessments and referral to the English law and Albanian law so that confusions are avoided.

## **B. Services post debt contracting**

Services falling under this category relate to the debt management.

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<sup>6</sup> Wikipedia: A standard commercial letter of credit is a document issued mostly by a financial institution which provides an irrevocable payment undertaking

<sup>7</sup> Choudhry, Moorad, The bond and money market,

<http://books.google.com/books?id=Ih733yvfNBC&pg=PA377&lpg=PA378&ots=-ACNotYtkU&dq=issuing+eurobond>

<sup>8</sup> The US Securities Act of 1993

After the Ministry of Finance has entered into an agreement with the lender in order to start the implementation of the project the condition is that the agreement must be effective. In most cases one of the conditions of implementing the project is selection of the agent Bank for the Albanian side, which will facilitate the loan administration through connecting with the agent Bank of the lender for the purpose of obtaining the loan amount. In the case of Eurobond, advisory, technical and other supporting services include selecting of the fiscal agent whose main responsibilities are to pay interest and principal payments and to perform a number of administrative role, as well the publication of financial information and notices to the investor<sup>9</sup>.

Until now, these services are offered by domestic banks without any cost, (it refers to the normal transaction cost which has been paid by project account) and thus the selection of the Bank has been flexible for both sides.

Specifically, the selection made so far is based on:

- the experience that banks have had in providing these kinds of services;
- the reliability and reputation of the Bank in the domestic and foreign financial market;
- the Bank's financial situation and accuracy and correctness in delivering these services in favor of the Government of Albania.

Being that these kinds of services have not affected the state budget, the Ministry of Finance has been more flexible in this process. In general they affect the budget, because it is borrowing anyway, even if in soft terms. The real issue is that, since it had been regulated by the donor's procedures, the government had been more comfortable. In the case of commercial borrowing, the Government is more exposed to the risk of transacting at unfavorable conditions.

### **C. Services related to the Country Credit Rating**

Services belonging to this category are Advisory, technical and other supporting services that are provided by specialized international credit rating agencies such as Moody's or Standard & Poor and that relate to the sovereign rating given to the country regarding its economy and the repayment ability of the Government for its obligations taken over in the framework of government borrowing.

Sovereign ratings are used by governments to raise capital to finance national debt. They allow the government to secure additional funds at more competitive prices. In 2007 the international rating agency Moody's gave the country its first-ever sovereign ratings Ba1 for foreign-currency bonds and a B1 for the government's debt obligations<sup>10</sup>.

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<sup>9</sup> Choudhry, Moorad, The ibidem

<sup>10</sup> [http://www.setimes.com/cocoon/setimes/xhtml/en\\_GB/features/setimes/features/2007/08/16/feature-02](http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2007/08/16/feature-02)

## **II. Advisory, technical and other supporting services as defined in the Albanian Legislation**

According to the Stabilization and Association Agreement, annex IV a financial service is meant to include any service of any financial nature offered from a financial service provider to a party. The SAA agreement does not set any particular definition of advisory, technical and other supporting services related to debt contracting (please refer to appendix). According to this agreement in the definition of financial services among others it is included any activity that relates to giving loans of all kinds, all payments and money transfer services, as well as consulting, mediating and other services that accompany all bank services. Thus, there is not any distinction made for consulting and other services that accompany bank services when using the term “financial services”. They all fall under same category of “financial services”.

According to the article 54 of the Law “On banks in the Republic of Albania” no. 9662 dated 18.12.2006, same can be said about advisory, technical and other supporting services related to debt contracting where no specific definition is provided for said services (please refer to appendix). According to the this law the term used for financial service is instead “financial activity” in whose definition among others it is included lending of all types, all payments and money transfer services, guarantees and commitments, as well as advisory, intermediation and other auxiliary services that accompany all bank activities.

### **Conclusion**

The range of advisory, technical and other supporting services related to debt borrowing is very diverse due to the fact that the financial sector is a dynamic one with products which are becoming more and more sophisticated. As was mentioned earlier in this note, the Albanian Government has already entered the phase of contracting syndicated loans and is allowed to issue Eurobonds. Sophistication of financial instruments will grow hand in hand with the sophistication and diversity of their associated. Consequently, it may be difficult to determine accurately and conclusively all services associated to debt borrowing in addition to those mentioned in this note.

### **Recommendations**

Considering that the advisory, technical and other supporting services associated to the debt borrowing process are not provided for in any legislation in Albania and due to the very large range of these kind of services, it is recommended that the relevant legal regulation includes a general provision covering their contracting by the Government.

The services listed in this note could be attached to the legal provision for illustrative purposes. It is recommended that the list of services be amended with new services introduced and identified by authorities from time to time.

### Annex 3

#### **International Experience in Regulating Procurement Environment for Advisory, Technical and Other Supporting Services related to Debt Borrowing**

This section describes the experiences of other countries in dealing with advisory, technical and other supporting services in connection with debt borrowing. The aim of analysis of the international experience is to understand if the said services related to debt contracting are part of public procurement procedures and if not how other countries have solved the issue.

The countries analyzed are: Bulgaria, Former Yugoslav Republic of Macedonia, Italy<sup>11</sup>, Romania, Slovenia, Turkey and Serbia<sup>12</sup>.

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<sup>11</sup> The experiences of Bulgaria, Former Yugoslav Republic of Macedonia were prepared through interaction with the Ministries of Finances of the respective countries. The experience of Italy was prepared through interaction the Italian Banking Association.

<sup>12</sup> The experiences for Romania, Slovenia, Turkey and Serbia were extracted from the Memo prepared by the Albanian Legal Studio Kalo & Associates for SPI Albania.

**INTERNATIONAL EXPERIENCE  
RELATED TO ADVISORY, TECHNICAL AND OTHER SUPPORTING SERVICES ASSOCIATED WITH DEBT  
BORROWINGS**

<b>Country</b>	<b>LOANS FROM FOREIGN GOVERNMENTS OR INTERNATIONAL FINANCIAL INSTITUTIONS</b>	<b>BANK BORROWINGS OR ISSUANCE OF SECURITIES OR OTHER FINANCIAL INSTRUMENTS</b>	<b>ADVISORY AND TECHNICAL SERVICES RELATED TO DEBT BORROWING</b>	<b>OTHER SUPPORTING SERVICES (including but not limited to legal services) RELATED TO DEBT BORROWING</b>
<b>Albania</b>	Regulated through State Borrowing Law  Not subject to public procurement rules	Regulated through State Borrowing Law  Subject to public procurement rules	NOT REGULATED	NOT REGULATED with the exception of legal services which are provided for in the Public Procurement Law
<b>EU Legislation</b>	The borrowing procedure of domestic or international loans from the Member States is not regulated.  Neither is there any guideline deriving from the Organization for Economic Cooperation and Development, OECD.	The borrowing procedure of domestic or international loans from the Member States is not regulated.  Neither is there any guideline deriving from the Organization for	The borrowing procedure of domestic or international loans from the Member States is not regulated.  Neither is there any guideline deriving from the Organization for	The borrowing procedure of domestic or international loans from the Member States is not regulated.  Neither is there any guideline deriving from the Organization for Economic Cooperation and Development, OECD.

<b>Country</b>	<b>LOANS FROM FOREIGN GOVERNMENTS OR INTERNATIONAL FINANCIAL INSTITUTIONS</b>	<b>BANK BORROWINGS OR ISSUANCE OF SECURITIES OR OTHER FINANCIAL INSTRUMENTS</b>	<b>ADVISORY AND TECHNICAL SERVICES RELATED TO DEBT BORROWING</b>	<b>OTHER SUPPORTING SERVICES (including but not limited to legal services) RELATED TO DEBT BORROWING</b>
		Economic Cooperation and Development, OECD.	Economic Cooperation and Development, OECD.	
<b>Bulgaria</b>	Regulated through Government Debt Act  Not subject to public procurement rules	Regulated through negotiations between Government and potential foreign lenders. Negotiations are conducted based on current needs and long-term development strategies of the Government  Not subject to public procurement rules	Regulated through negotiations between Government and potential foreign lenders. Negotiations are conducted based on current needs and long-term development strategies of the Government Not subject to public procurement rules	Regulated through negotiations between Government and potential foreign lenders. Negotiations are conducted based on current needs and long-term development strategies of the Government  Not subject to public procurement rules
<b>Former Yugoslav Republic of</b>	Regulated by Public Debt Law	The Minister of Finance prescribes the manner and	The Minister of Finance prescribes the manner and	The Minister of Finance prescribes the manner and procedures



<b>Country</b>	<b>LOANS FROM FOREIGN GOVERNMENTS OR INTERNATIONAL FINANCIAL INSTITUTIONS</b>	<b>BANK BORROWINGS OR ISSUANCE OF SECURITIES OR OTHER FINANCIAL INSTRUMENTS</b>	<b>ADVISORY AND TECHNICAL SERVICES RELATED TO DEBT BORROWING</b>	<b>OTHER SUPPORTING SERVICES (including but not limited to legal services) RELATED TO DEBT BORROWING</b>
<b>Macedonia</b>	Not subject to public procurement rules	procedures	procedures	
<b>Romania</b>	Regulated by the Government Emergency Ordinance GEO 34/2006. Selection of a creditor is subject to public procurement procedures if the loan exceeds the threshold of Euro 15,000 with certain exemptions	Regulated by the Government Emergency Ordinance GEO 34/2006. Selection of a creditor is subject to public procurement procedures if the loan exceeds the threshold of Euro 15,000 with certain exemptions	Regulated by the Government Emergency Ordinance GEO 34/2006. Selection of a creditor is subject to public procurement procedures if the loan exceeds the threshold of Euro 15,000 with certain exemptions	Regulated only legal consulting services which are subject to public procurement procedures to certain thresholds
<b>Slovenia</b>	Regulated through: (i) Public Finance Debt act (ii) Public procurement	Regulated by Internal Guideline adopted by the Minister of Finance	Regulated by Internal Guideline adopted by the Minister of Finance	Regulated by Internal Guideline adopted by the Minister of Finance  Not subject to public procurement rules

<b>Country</b>	<b>LOANS FROM FOREIGN GOVERNMENTS OR INTERNATIONAL FINANCIAL INSTITUTIONS</b>	<b>BANK BORROWINGS OR ISSUANCE OF SECURITIES OR OTHER FINANCIAL INSTRUMENTS</b>	<b>ADVISORY AND TECHNICAL SERVICES RELATED TO DEBT BORROWING</b>	<b>OTHER SUPPORTING SERVICES (including but not limited to legal services) RELATED TO DEBT BORROWING</b>
	act	Not subject to public procurement rules	Not subject to public procurement rules	
<b>Turkey</b>	Regulated by Public Finance and Management of Debt States Law  Not subject to Public Procurement Law	Regulated by Public Finance and Management of Debt States Law  Not subject to public procurement rules	Regulated by Public Finance and Management of Debt States Law  Not subject to public procurement rules	Regulated by Public Finance and Management of Debt States Law  Not subject to public procurement rules
<b>Serbia</b>	Regulated through negotiations because the Government borrows only under non commercial terms  Not subject to public procurement rules	Not applicable as the Government borrows only foreign debt under non commercial terms  Not subject to public procurement rules	Not applicable as the Government borrows only foreign debt under non commercial terms  Not subject to public procurement rules	Not applicable as the Government borrows only foreign debt under non commercial terms  Not subject to public procurement rules
	Regulated through the	Regulated through	Excluded from the	

<b>Country</b>	<b>LOANS FROM FOREIGN GOVERNMENTS OR INTERNATIONAL FINANCIAL INSTITUTIONS</b>	<b>BANK BORROWINGS OR ISSUANCE OF SECURITIES OR OTHER FINANCIAL INSTRUMENTS</b>	<b>ADVISORY AND TECHNICAL SERVICES RELATED TO DEBT BORROWING</b>	<b>OTHER SUPPORTING SERVICES (including but not limited to legal services) RELATED TO DEBT BORROWING</b>
<b>Italy</b>	Code of Public Contracts no. 163 dated 12.04.2006	the Code of Public Contracts no. 163 dated 12.04.2006	public procurement law. Regulated through competitive tendering	

## Appendix

### 1.1 EU Legislation<sup>13</sup>

According to the research, the European Community *acquis* does not seem to have regulated the procedure of borrowing domestic or international loans from the Member States. Neither is there any guideline deriving from the Organization for Economic Cooperation and Development, OECD.

### 1.2 Bulgaria

In Bulgaria issuing state debt and the state loans are regulated through the Government Debt Act<sup>14</sup>. According to this Act the issuing state debt and the state loans are not subject to public procurement rules.

When the State needs to borrow from abroad the Minister of Finance has the right to conduct direct negotiations with potential foreign lenders. In his task the Minister of Finance is supported by a directorate in the Ministry of Finance and sometimes external consultants may be hired.

In Bulgaria there is not a formal procedure similar to that of public procurement for selection of international lenders. The Ministry of Finance decides with which International Financial Institution (IFI) to conduct negotiations based on current needs and long-term development strategies. IFI-s are in constant interaction with the Government of Bulgaria, and in this way they are familiar with the socio-economic situation of the country. Based on the facts that IFI-s know for Bulgaria and also on their experience they offer all the time various financial products for different sectors. When there is a specific need the Ministry of Finance knows whom investor to contact in order to start negotiations. From the technical point of view the Minister of Finance will sign the loan agreements on behalf of the Government which then is approved by the Council of Ministers in accordance with the Act of International Treaties of the Republic of Bulgaria.

### 1.3 Former Yugoslav Republic of Macedonia

In Former Yugoslav Republic of Macedonia (FYROM) the issuing of state debt and state loans are regulated by the Public Debt Law<sup>15</sup>. Even in this case as in the case of Bulgaria

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<sup>13</sup> This reference has been provided by the Legal Studio Kalo & Associates

<sup>14</sup> Law on Government Debt Act in the Republic of Bulgaria, Promulgated, State Gazette No. 93/1.10.2002, amended SG No. 34/19.04.2005, effective 1.06.2005, amended and supplemented, SG No. 52/29.06.2007, effective 1.11.2007

<sup>15</sup> Law on Public debt in Former Yugoslav Republic of Macedonia, published in the Official Gazette no. 62/05, 88/08, July 2008, [http://www.finance.gov.mk/files/u4/public\\_debt\\_law\\_cleared\\_version.pdf](http://www.finance.gov.mk/files/u4/public_debt_law_cleared_version.pdf)

obtaining external debt is not subject to public procurement law. According to article 18 of the public debt law, point 5 for borrowing by issuance of government securities the Minister of Finance prescribes the manner and the procedure for issuance and payment of government securities. Meanwhile according to same article point 6, the Minister of Finance shall make the selection of settlement institution and determine the primary issue of government securities traded on an international financial market.

#### **1.4 Italy**

In Italian framework in the public procurement field is regulated by the “Code of Public Contracts no.163 dated 12.04.2006 related to works, services and furniture in light of the Directives 2004/17/EC and 2004/18/EC.

The law applies to all public contracts including the public service contracts having as object the execution of services in Annex 2 of the Directive. In the Annex A in Part II there are specifically mentioned the services of great interest to the banking sector, being called "Financial Services".

Article 19 of the code on "contract for services excluded" specifies (Article 1 letters d) that the code does not include, among other things, public contracts related to financial services related to the issuance, purchase, sale and transfer of titles or other financial instruments, in particular operations to supply money and services offered by the Italian Central Bank.

Following operational consequences on excluded services contracts reference should be made to Article 27 of the Code taking into account the relevant principles of contracts excluded. The article determines that credibility should be based on the principles of efficacy, efficiency, equality, equal treatment, transparency, proportionality, continuity and must be preceded by inviting at least 5 competitors if compatible with the object of the contract.

#### **1.5 Romania**

The Romanian framework in the public procurement field is mainly regulated by Government Emergency Ordinance no.34/2006 for the award of public procurement contracts, public works concession and services concession contracts (GEO 34/2006) which transposes the two European Directives in the field.

As a rule, under GEO 34/2006, selection of a creditor by a contracting authority is subject to public procurement procedures, if the loan exceeds the thresholds of 15,000 Euro with certain exemptions such as the cases in which the public procurement contract is awarded based on:

(i) an international agreement concluded in conformity with the Treaty with one or more States that are not members of European Union, and covering supplies or works intended for implementing or exploiting a joint project with the signatory States, and only if

through the respective agreement a specific procedure for awarding this contract was mentioned;

(ii) the application of a procedure specific to certain international bodies and institutions (e.g. IMF, EBRD, World Bank);

(iii) the application of a specific procedure provided by the Community regulations, within the programs and projects concerning the territorial cooperation

The award of the legal consultancy contracts related directly with contracting the credit is also included in the scope of public procurement procedures, subject to certain thresholds.

## **1.6 Slovenia**

The Public Finance Act regulates the state debt-related transactions in the following manner: decisions regarding transactions in relation to public borrowing, public debt management and securities market interventions shall be adopted by the minister responsible for finance on the basis of the annual budget financing programme adopted by the Government. When exercising his duties under the Public Finance Act, the minister of finance is bound by the provisions of the Public Procurement Act-in cases when the states wishes to raise money directly (i.e. by a loan or financial leasing). In such cases, the public procurement procedure as prescribed by the Public Finance Act has to be observed for both the procurement of a loan and the procurement of directly related financial services and other supplementary services (i.e. legal consultancy).

In case that the state acquires money or capital by issuing, selling or buying or transferring securities or other financial instruments, the exemption clause of Public Procurement shall apply. Namely, the Public Procurement Act shall not be used for the procurement related to the above financial instruments (i.e. the minister of finance shall not be bound by the provisions of the Public Procurement Act when acquiring money or capital with securities or other financial instruments). This type of procurement is the most common in Slovenia. According to the information provided the procurement for the directly related financial services and other supplementary services (e.g. legal consultancy) is also exempted in this case.

According to the Ministry of Finance, the procurement for obtaining state loans with securities or other financial instruments is regulated by the government guidelines and the procurement for the related financial services and other supplementary services (i.e. legal consultancy) is regulated by an internal guideline adopted by the minister of finance.

## **1.7 Turkey**

Credit relationships of public authorities, including loans to be obtained from abroad, are not subject to the Public Procurement Law and the Public Procurement Contracts Law.

The Law regulating public finance and management of debts states that all the negotiations and dealings in relation to obtaining all kinds of foreign financing from foreign sources by any of the public authority or entity with a treasury guarantee from UT are conducted and finalized by UT itself. For the loan transactions made by the Public Authorities or Entities without a treasury guarantee the preliminary permission of UT is required to be obtained.

Therefore, it is safe to say that UT has the influence or at least the final saying on the terms of the loan agreement as it conducts the negotiations or has to give its permission, depending on the loan being with or without a treasury guarantee.

## **1.8 Serbia**

Financial services as defined by the Procurement Law do not include issuance, trading and purchasing of securities or other financial instruments, as well as services provided by the National Bank of Serbia. Consequently, the public procurement rules and procedures are applicable in situations when the state selects financial creditor and/or procure financial services related directly with such selection (depending of variety of cases, the sole procedure of selection could differ from case to case).

However, the Procurement Law does make a list of exemptions when the provisions of this law are not applicable to certain cases. Among others, the Procurement Law is not applicable in those situations when the international agreement that Serbia has entered into predicts differently. Finally, and most importantly, Serbia is not allowed to borrow on commercial terms and conditions (commercial financial market) due to the last arrangement concluded with the International Monetary Fund. Therefore, the loans could be obtained only under non-commercial terms and conditions (so called: soft-loans), provided by various development finance organizations such as EBRD, EIB, WB and others (e.g. KfW). In those situations, no public procurement or any other competitive procedure is applicable in practice. Technically, the crucial role is on the Serbian Finance Ministry who forms a team for negotiations, thus representing the Government against the creditors' side.

### **Cost Benefit Qualitative Analysis**

In the framework of SPI Albania Public Procurement Project, a proposal has been made to amend the current regulatory framework in order to regulate the environment for procuring advisory, technical and other supporting services. Therefore, SPI Secretariat is conducting a cost-benefit analysis that highlights the effects of improving procuring environment for said services.

According to the analysis, the Ministry of Finance, Public Procurement Agency, banks and investors representing the regulated authorities will not incur any human resources or infrastructural costs. The only costs incurred for the Ministry of Finance and/or Public Procurement Agency will be transaction costs during the procurement process of advisory, technical and other supporting services.

In considering the benefits for the authorities the analysis shows that the access to foreign borrowing will improve, investments increase and this way the Government can meet its financing needs on time. Another benefit for the Ministry of Finance is that its capacities are built as the contracting skills and power are improved. Also, the budgeting process management is improved due to allocation of the funds for procuring such services at the beginning when the draft budget is prepared.

Another benefit for the authorities is that the transparency on the usage of public funds will increase, building confidence among all interested parties. On a macro level, as a result of investment increase the economic development is stimulated.

For the banks and investors a regulated environment means business development. It also helps stimulate the provision of more advanced financial services by local banks and professional service firms with positive spillover effects on activities with other bank clients.

For the consulting firms, regulating the procurement environment for said services, means higher competition making them improve their service product offering, leading to business development.

For consumers as taxpayers for debt repayment regulating the procurement environment of the services associated to debt borrowing means transparency and better use of their taxes.

Authorities according to the analysis might have to incur higher costs due to more resources allocated for the procurement of various services for meeting Government borrowing needs.

In total the benefits brought by regulating the procurement environment through amending relevant law for advisory, technical and other supporting services associated to debt borrowing contracting process would exceed the additional costs for authorities.



If in this model we consider all of the above main categories of the economy actors, then overall Albanian economy will have higher net benefits from the improvement of procurement environment for services related to debt borrowing.

## **EVALUATION REPORT - Expert Mission**

- Please complete this report in detail and return it electronically to: [agata.berdys@ec.europa.eu](mailto:agata.berdys@ec.europa.eu) within 2 weeks of the completion of your mission.

### **DETAILS OF THE EXPERT<sup>16</sup> Tony Wiltshire**

Country visited	Albania
Institution(s) and name(s) of person(s) involved in the visit	Ministry of Finance

Name, position and institution	Mr X Demiraj Director Ministry of Finance
Country	Albania
Telephone and E-mail	

### **REPORT**

1. <u>Objective of the mission</u>	To assist the PWG in their project to improve the debt contracting process by reviewing the current regulatory framework in order to cover the acquisition of financial and other supporting services
2. <u>Observations: state of play; outcome of discussions; etc.</u>	See below*
3. <u>Conclusions</u>	See below*

<sup>16</sup> Data Protection

Personal data contained in this document will be processed in accordance with the privacy statement of the TAIEX instrument (see <http://taiex.cec.eu.int/PrivacyStatement>) and in compliance with the Regulation (EC) N° 45/2001.

4. <u>Recommendations (if any)</u>	See below*
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- The PWG has identified 4 options as a way forward.
- Option 1 Amend the PP law to include clear provision on advisory technical and other supporting services related to the borrowing of debt and to treat the acquisition of such services as PP. Currently these are not regulated except for Legal Services.
- Option 2 Amend foreign and domestic borrowing law to include clear provisions on advisory technical and supporting services in connection with debt borrowing.
- Option 3 Issue another legal act that would regulate the advisory technical and support services in connection with debt borrowing.
- Option 4 Do nothing

It was the view of the PWG that action was needed to address the issue as current practice was not economic effective or efficient and was not therefore value for money. TW explained the UK methodology and the provisions of EU Directive 2004/18 (replicated in UK law) which states that Financial Services are covered as a Part A service- being:

Banking Services (CPC ex 81 812 814)

Accounting/ Auditing (CPC 862)

Management consultancy (CPC 865 866), and as a general catch all....

Other services (for which there cannot be a CPC)

Excepted out are financial services in connection with the issue sale purchase or transfer of securities or other financial instruments. This wording in EU 200/18 is repeated word for word (but with additional description) in Albanian Public Procurement law.

The PWG has carried out a comparative exercise with neighbouring countries and their approach to this issue. Of the sample only Italy could be described as ‘old’ EU; Slovenia joined in 2004; Bulgaria and Romania the latest joiners. The remainder of the sample are countries looking to join the EU at some point (Turkey Serbia and FYR Macedonia). If nothing else the sample revealed a multiplicity of approaches which were in some cases apparently contradictory. This may be for a variety of reasons including lack of skills or understanding of the EU regime; endemic cultural approach; political will (or lack).

It is not difficult to identify the EU’s approach (and thus Albanian PP law approach in replicating the provisions) by its exceptions to 200/18. A consensus would have been sought from Member States as to current and effective practice. The transactions in connection with the borrowing (and lending) of capital do not easily lend themselves to a PP process, that there is not really a market open to competition in that sense, and that a time consuming PP process in a notoriously short term and volatile market place would be unlikely to offer a competition or value for money. Indeed recent experience of such a global market in 2009 has endorsed the original stance in 200/28 by highlighting the need for swift and decisive action. The EU seems to have pre-empted the current global

financial crisis (by chance perhaps) by taking a pragmatic strategy based on risk and value for money.

It is clear that the financial service in connection with the issue sale purchase or transfer of financial instruments is excluded from PP law under 2004/18 as it is in Albanian PP law. The question is how far does the wording ‘financial service in connection with’ stretch? The definitions in 2004/18 are fairly general and deliberately so. It is for each Contracting Authority (CA) to make its own reasoned judgements as to nature and extent (and for that reason there is little published guidance). Those judgements of a CA will be based in whole or in part on the law as it stands influenced by reasonableness; value for money; the market (is there a market? can it would it respond?) volatility; appropriateness and risk. Any judicial decision in the EU would be ‘purposive’ in other words what is that part of 2004/18 (including the exceptions) trying to achieve and why.

Simply the transaction with the borrower would be absolutely excluded from PP as would any financial services ‘in connection’ therewith. To my mind this would definitely include such niche services as those provided by Moody’s Dunn and Bradstreet and Standard and Poor. There may well be others. The final point is ‘does the exception go further than that?’ There is no definitive answer to this and each case would need to be judged individually. Again the checklist above would be useful and certainly there are some services around this subject area which readily lend themselves to a PP – Treasury Management being one, and this is often subjected to PP in the UK where there are limited resource in-house and where it is believed that better vfm can be obtained (eg it would be possible to specify targets for the provider in the Specification).

There is advice available from the UK Government which endorses this view. In addition, even where a particular financial service is covered, it does not, however, mean that a contract for service will have to be awarded by competitive tendering. A Negotited Procedure can be used ‘when the nature of the services to be provided ... is such that a specification cannot be drawn up with sufficient precision to permit the award of the contract using (other) procedures

**Conclusion.** The position seems clear from both an EU perspective and Albanian PP law. The lawyers in Albania will need to look at whether Albania’s State Borrowing Law in any conflicts with this.

One further point is that this position would affect all CA’s in Albania obtaining financial services in connection with borrowing or lending capital.

**Transparency.** The above interpretation is practical pragmatic and would show vfm. However it does raise the issue of transparency and steps will need to be taken to ensure that there is at least the same level of transparency if not more. In the UK these issues are dealt with by public sector bodies having

- i) The person responsible for obtaining such services preparing an explanatory report for the organisation’s internal auditors
- ii) Such arrangements are available for scrutiny by both internal and external auditors looking at law, process and vfm
- iii) Such arrangements are also available for annual retrospective scrutiny by politicians

Because there has been a lack of consensus as to the nature and extent of the Albanian PP law exception the change of approach may require the Ministry to consider any suitable additional checks and balances that would satisfy concerns from others particularly politicians. This issue is addressed in the next part of this report.

Following discussion and resolution of the original objective of the project, the Director, Mr Demiraj raised an additional related point for clarification.

The obtaining of international loans in relation to the Albanian Constitution.

The Constitution states at Art 121 Para 1(d) 'the ratification and denunciation of international agreements by the Republic of Albania is done by law if they have to do with the undertaking of (international) financial obligations by Albania'

This causes a problem in that such ratifications can take some time to endorse by Parliament and because the lender has already allocated (even though they have not been released) funds the Government is paying interest from that point. Clearly this is not cost effective. The issue is how to put into place an architecture that would satisfy the Albanian Constitution but eradicate the delays (ie the need for individual political approvals). In practical terms the statement in the Constitution was perhaps not included to cover such situations however custom and practice has meant the it is now included.

The architecture that I propose is that already in place in the UK for public bodies. It would I hope satisfy the Albanian Constitution, add greater transparency, and set out a different approach to scrutiny of the whole process of borrowing and lending (whether national or international). Albania's Council of Ministers could be asked to approve a new architecture which would identify changes to the current system, the undoubted benefits (savings) and improved checks and balances.

## **The architecture.**

### **Treasury Management Policy Statement. (TMPS)**

The TMPS would be a yearly presentation for approval/ scrutiny by politicians, and would cover the following:

1 Adoption of TMPS

2 Set out the organisation and what it will achieve (this will be elaborated in the Treasury Management Strategy

3 Delegation of responsibility for implementation and execution and administration of the operational elements of the Strategy to the Director (?)

4 Principles

Define TM

Identify monitoring, control of risk being a primary criteria by which effectiveness of TM is measured

Effective TM supports business and service objectives

5 Objectives

Reduce cost of external debt

Effect funding at lowest point of interest

Maintain a flexible approach

Constant review

Prudent levels of volatility depending on interest rates  
Upper/ lower limits of structure of borrowing  
Do not breach prudential limits set by politicians  
Adhere to TMPS  
Annual review by politicians  
6 Roles.  
Define

### **Treasury Management Strategy (TMS)**

This would be a twice yearly report to politicians for approval/ scrutiny. It would cover the following:

- 1 Expected treasury activity for the year including national and international activity
- 2 Borrowing/ lending strategy in light of anticipated interest movements
- 3 Prospects for interest rates
- 4 Limits on activity
- 5 Borrowing/ investment strategy
- 6 Policy on credit liabilities
- 7 Expectations of debt rescheduling

I could if appropriate try and obtain typical examples of both TMPS and TMS.

**Conclusion.** The above represents a positive and pragmatic way forward on a number of fronts (wider than the original project requirement). This project has to be concluded by the PWG by 20/12/2009 and therefore scope for further work is extremely limited. The Albanians feel that they would wish to gather as many examples of good practice as possible. This would be both time consuming and very wide ranging. I think it better to choose a neighbouring country who has similar problems and which has addressed them effectively. There is an inclination to choose FYR Macedonia. I cannot comment on the appropriateness of this choice. My own personal view would be that perhaps there is better value in choosing an established country like the UK and copy their best practice – accession to the EU being Albania's ultimate aim.

## CONSULTATION DOCUMENT

### I. Project information

**Short description of the context:** In Albania obtaining loans from private banks (foreign and domestic) for the Government is subject to public procurement procedures pursuant to Article 26 of the State Borrowing Law no. 9665 dated 18.12.2006. However, advisory, technical and other supporting services related to the debt contracting process not only are not subject to public procurement rules, but they are also excluded from the jurisdiction of the law no. 9643 dated 20.11.2006 on Public Procurement (article 7), with the exception of legal services<sup>17</sup>, which are provided for in the Public Procurement Law. In addition to that, the exemption clause neither does not provide any definition for these services nor enumerates them.

This provision creates difficulties to the Ministry of Finance when contracting very complex debt because advisory, technical and other supporting services associated to the debt borrowing contracting process lack coverage in the law. This causes delays and additional costs and it hampers banks, investors, law firms and consulting companies to offer their services related to debt borrowing to the Ministry of Finance.

**Stakeholder proposing the project: Ministry of Finance (MoF)**

**Other Stakeholders involved (sponsors): Public Procurement Agency(PPA), Banks, Consulting Companies, Law Firms**

**Project objective:**

To improve Government debt contracting process by reviewing the relevant regulatory framework in order to cover the acquisition of advisory, technical and other supportive services.

**Description of the project contribution toward financial modernization:** By regulating environment for procuring advisory, technical and other supporting services, the access to debt borrowing improves and investments increase, facilitating economic development. For the financial and consulting industry, a regulated environment for advisory, technical and other supporting services related to debt borrowing means business development. For consumers as taxpayers for debt repayment, regulated debt borrowing services means transparency and better use of their taxes.

**Project Working Group:**

PO: Sherefedin Shehu, MoF, Deputy Minister

PM: Xhentil Demiraj, MoF, General Debt Director

<sup>17</sup> In the ToRs prepared for this project, other supporting services include but are not limited to legal services.

DPM: Mrs. Anilda Sefgjini, PPA, Deputy General Director  
DPM: Mrs. Elona Koci, Raiffeisen Bank  
PWG members:  
Milbana Treska, MoF  
Xhorlin Pojani, MoF  
Adrian Ceco, Intesa San Paolo Bank  
Ajola Xoxa, Ervin Braho, Tonucci- Legal Consulting Company  
Av. Jola Gjuzi, Av. Fatos Lazimi, Kalo- Legal Consulting Company

## II. Purpose of the Consultations

Based on the A) International Experience<sup>18</sup> B) Note on Advisory, Technical and Other Supporting Services<sup>19</sup> associated with Albania's debt borrowing, C) Qualitative cost and benefit analysis<sup>20</sup>, and the D) Report prepared by the External Expert<sup>21</sup>, **PWG prepared a draft decree<sup>22</sup>** related to the advisory, technical and other supporting services limited to credit rating services only that was approved by the Council of Ministers. The consultations are intended to provide feedback on the PWG proposal/s before they are submitted for SPI Committee approval.

## III. Procedures to Run the Consultations

Please provide your opinions to PWG recommendations through inserting comments in the text or in a separate document or by modifying the document with track changes. Please send your answers to SPI Secretariat who stands ready to offer you more details. Your answers will be treated in strict confidentiality. The results of the consultations will be aggregated by SPI Secretariat and will not be disclosed at the individual level. PWG will analyze the feedback received and will decide on how to modify its proposal. **Please send your feedback by February 22, 2010.**

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<sup>18</sup> <http://www.spi-albania.eu/admin/js/filemanager/files/web/2009program/procurementlaw/secondmeeting/SPI%20Albania%20Debt%20Contracting%20Project%20International%20Experience.pdf>

<sup>19</sup> <http://www.spi-albania.eu/admin/js/filemanager/files/web/2009program/procurementlaw/secondmeeting/02%20SPI%20Albania%20-%20Debt%20Contracting%20project-%20Final%20Note%20on%20advisory%20technical%20services.pdf>

<sup>20</sup> <http://www.spi-albania.eu/admin/js/filemanager/files/web/2009program/procurementlaw/secondmeeting/SPI%20Albania%20Debt%20Contracting%20Project%20Cost%20benefit%20Qualitative%20Analysis.pdf>

<sup>21</sup> [http://www.spi-albania.eu/admin/js/filemanager/files/web/2009program/procurementlaw/SPI%20Albania\\_Procurement%20of%20Financial%20Services\\_Evaluation%20report-TAIEX%20expert.pdf](http://www.spi-albania.eu/admin/js/filemanager/files/web/2009program/procurementlaw/SPI%20Albania_Procurement%20of%20Financial%20Services_Evaluation%20report-TAIEX%20expert.pdf)

<sup>22</sup> [http://www.spi-albania.eu/admin/js/filemanager/files/web/2009program/SPI%20Albania\\_Procurement%20of%20Financial%20Services\\_PVKM,%20CREDIT%20RATING.pdf](http://www.spi-albania.eu/admin/js/filemanager/files/web/2009program/SPI%20Albania_Procurement%20of%20Financial%20Services_PVKM,%20CREDIT%20RATING.pdf)



For eventual further clarifications needed, please indicate below the contacts of the person who completed the questionnaire:

**Name:** .....

**Position:** .....

**Bank/other institution:** .....

**Email address:** .....

**Tel/Fax:** .....

**THANK YOU FOR PARTICIPATING IN THESE CONSULTATIONS !**

## IV. CONSULTATION ON PWG PROPOSAL

### a. Background Information

The analysis of the Advisory, Technical and Other Supporting Services (annex 2) which relies on the literature and current experience of the Ministry of Finance and commercial banks acting as their agents, concluded that **the range of said services related to debt borrowing is very diverse due to the fact that the financial sector is a dynamic one** with products which are becoming more and more sophisticated. Sophistication of financial instruments will grow hand in hand with the sophistication and diversity of their associated. Consequently, it may be difficult to determine accurately and conclusively all services associated to debt borrowing in addition to those mentioned in the said note. This analysis further recommended that the advisory, technical and other supporting services associated to debt borrowing be included in the relevant legal regulation under a general provision covering their contracting by the Government.

The **research on International Experience (annex 3)** showed that countries have solved the **issue of procurement of advisory, technical and other supporting services according to each country's specific institutional and regulatory context**. Some countries have been flexible in providing solutions using negotiation techniques between Government and potential foreign lenders. Negotiations have been conducted based on current needs and long-term development strategies of the Government. Others have issued Internal Guideline adopted by the Minister of Finance. Under this project, PMG together with the Ministry of Finance decided that no quantitative analysis could be possible due to data issues. Therefore, only qualitative cost and benefit analysis was undertaken in the framework of this project (annex 4).

Under this project the Ministry of Finance (MoF) contracted external assistance from TAIEX (EU Enlargement Department) to provide information related to successful legal frameworks of EU member states and help MoF formulate clear definition on financial services and draft the relevant regulatory proposal. A final report with suggestions and recommendations was delivered in this regard (annex 5), whose findings are explained in the remaining section. As per UK methodology and provisions of EU Directive 2004/18, Financial Services are covered as "part A" service being:

1. Banking Services
2. Accounting/Auditing
3. Management Consultancy
4. Other Services

Excepted out are financial services in connection with the issue, sale, purchase, or transfer of securities, or other financial instruments. This wording in EU 2004/18 is repeated word for word, (but with additional description) in Albanian Public Procurement law.

**The transactions in connection with the borrowing (and lending) of capital do not easily lend themselves to a public procurement process**, that there is not really a market open to competition in that sense, and that a time consuming Public Procurement process in a notoriously short term and volatile market place would be unlikely to offer a competition or value for money.

Indeed recent experience of such a global market in 2009 has endorsed the original stance in EU Directive 2004/28 by highlighting the need for swift and decisive action. The EU seems to have pre-empted the current global financial crisis (by chance perhaps) by taking a pragmatic strategy based on risk and value for money.

There is advice available from the UK Government which endorses this view. In addition, even where a particular financial service is covered, it does not, however, mean that a contract for service will have to be awarded by competitive tendering. **A Negotiated Procedure can be used when the nature of the services to be provided is such that a specification cannot be drawn up with sufficient precision to permit the award of the contract using (other) procedures.** This would show value for money, however it does raise the issue of transparency and **steps will need to be taken to ensure that there is at least the same level of transparency if not more.** In the UK these issues are dealt with by public sector bodies having :

- iv) the person responsible for obtaining such services preparing an explanatory report for the organisation's internal auditors;
- v) such arrangements are available for scrutiny by both internal and external auditors looking at law, process and value for money;
- vi) such arrangements are also available for annual retrospective scrutiny by politicians.

The architecture proposed for dealing with transparency issues is that already in place in the UK for public bodies. A similar procedure applied in Albania would satisfy the Albanian Constitution, add greater transparency, and set out a different approach to scrutiny of the whole process of borrowing and lending (whether national or international). Albania's Council of Ministers (CoM) could be asked to approve a new architecture which would identify changes to the current system, the undoubted benefits (savings) and improved checks and balances.

Concretely, **CoM could approve the Treasury Management Policy Statement** (yearly presentation for approval/scrutiny by politicians) covering principles, objectives, management structure for effective borrowing **and Treasury Management Strategy** (a twice yearly report to politicians for approval/scrutiny) covering more technical issues related to borrowing like expected domestic and international borrowing, interest rates etc.

#### **b. Proposals for regulatory measures to be taken by Contracting Authority/Ministry of Finance**

Considering that the definitions of the financial services in EU Directive 2004/18 are

fairly general it is suggested that each Contracting Authority (CA) make its own reasoned judgements as to nature and extent (and for that reason there is little published guidance) of said services. Those judgements of a CA will be based in whole or in part on the law as it stands influenced by: **(i) reasonableness (ii) value for money (iii) the market (is there a market? can it would it respond?) (iv) volatility; (v) appropriateness and (vi) risk.** This position would affect all CA's in Albania obtaining financial services in connection with borrowing or lending capital.

Following the analytical work undertaken for this project and the recommendations given in the report prepared by external expert, **the Ministry of Finance formulated the draft decision for the financial service related to country risk assessment (credit rating II)**, necessary for the realization of the borrowing process in international market (annex 1). The draft decision specifies that according to article 7 of the Albanian Public Procurement Law procurement of Credit Rating II service is allowed to be performed using procedures that are different from those provided in the Law. **The draft decision provides: (i) the responsible authority for establishing the evaluation bidding committee, (ii) responsible structure for managing the procurement process and (iii) rules for keeping the documentation until its opening by the evaluation committee, as well as relevant deadlines for winner selection and the right to appeal to all entities participating in this procedure.**

**The decision was successfully approved by the Council of Ministers through its decree no. 5 dated January 7, 2010.**

**The Ministry of Finance proposes now to develop a single draft decision instead of separate drafts for each financial service, which would be valid for all advisory, technical and other supporting services.**

### **c. Questions for Consultation**

- 1. Are you satisfied that the Credit Rating II Decision, as worded, is a valid precedent for the new draft decision covering the procurement of other financial services associated with public borrowing?**
- 2. Which specific financial service would merit a different treatment and why?**
- 3. What are the main risks associated with the proposed approach for a single decision covering all advisory, technical and other supporting services?**
- 4. How do you propose to mitigate the perceived risks?**

*Please state your agreement and/ or your comments to the above or your additional proposals to the regulation proposed.*

## Scoping of Problem” Document

### Section 1 Project information

PUBLIC-PRIVATE FINANCIAL SECTOR MODERNIZATION MATRIX					
Italian Banking Association CRITERIA	European Central Bank CRITERIA				
	<i>Asymmetric information reduction</i>	<i>Completeness of the market</i>	<i>Increased opportunities to engage in financial transactions</i>	<i>Reduced transaction costs</i>	<i>Increased competition</i>
Business development			X		
Industry competitiveness					
Industry reputation					

**Short description of the context:** In Albania obtaining loans from private banks (foreign and domestic) for the Government is subject to public procurement procedures pursuant to Article 26 of the State Borrowing Law no. 9665 dated 18.12.2006. However, advisory, technical and other supporting services related to the debt contracting process not only are not subject to public procurement rules, but they are also excluded from the jurisdiction of the law no. 9643 dated 20.11.2006 on Public Procurement (article 7), with the exception of legal services<sup>23</sup>, which are provided for in the Public Procurement Law. In addition to that, the exemption clause neither does not provide any definition for these services nor enumerates them.

This provision creates difficulties to the Ministry of Finance when contracting very complex debt because advisory, technical and other supporting services associated to the debt borrowing contracting process lack coverage in the law. This cause delays and additional costs and it hampers banks, investors, law firms and consulting companies to offer their services related to debt borrowing to the Ministry of Finance.

**Stakeholder proposing the project: Ministry of Finance (MoF)**

**Other Stakeholders involved (sponsors): Public Procurement Agency(PPA), Banks, Consulting Companies, Law Firms**

**Project objective:**

To improve Government debt contracting process by reviewing the relevant regulatory

<sup>23</sup> In the ToRs prepared for this project, other supporting services include but are not limited to legal services.

framework in order to cover the acquisition of advisory, technical and other supportive services.

**Description of the project contribution toward financial modernization:** By regulating environment for procuring advisory, technical and other supporting services, the access to debt borrowing improves and investments increase, facilitating economic development. For the financial and consulting industry, a regulated environment for advisory, technical and other supporting services related to debt borrowing means business development. For consumers as taxpayers for debt repayment, regulated debt borrowing services means transparency and better use of their taxes.

**Project Working Group:**

PO: Sherefedin Shehu, MoF, Deputy Minister

PM: Xhentil Demiraj, MoF, General Debt Director

DPM: Mrs. Anilda Sefgjini, PPA, Deputy General Director

DPM: Mrs. Elona Koci, Raiffeisen Bank

PWG members:

Milbana Treska, MoF

Adrian Ceco, Intesa San Paolo Bank

Ajola Xoxa, Ervin Braho, Tonucci- Legal Consulting Company

Av. Jola Gjuzi, Av. Fatos Lazimi, Kalo- Legal Consulting Company

Representative from National Commercial Bank

Representative from Tirana Bank

<b>The EU Better Regulation Approach</b>	
<b>Steps</b>	<b>Purpose</b>
<b>Scoping of problem</b>	
1. Problem identification	To understand if a market/regulatory failure creates the case for regulatory intervention.
2. Definition of policy objectives	To identify the effects of the market /regulatory failure to the regulatory objectives.
3. “Do nothing” option	To identify and state the status quo.
4. Alternative policy options	To identify and state alternative policies (among them the “market solution”).

<b>Section 1: Scoping the problem</b>
<b>1.1. Problem identification</b>
<p>Public procurement is the process of using public funds by certain public body, for the purpose of acquiring external resources, generally from commercial bidders. In order to regulate this process, as the part of public sector reform and in relation to future EU membership, Albania has adopted a modern public procurement Law no. 9643 dated 20.11.2006 in line with the Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.</p> <p>The public procurement law regulates all main aspects of government and public bodies purchasing activities and provides them with the tools to be able to achieve “value for money” when procuring goods, services and works. It defines the main methods of public procurement, and steps to be used when applying them.</p> <p>In Albania, foreign and domestic borrowing is governed by the Law no. 9665 dated 18.12.2006 on “State borrowing, state debt and state guarantee loans in the Republic of Albania”. According to article 26 of this law, in cases when Ministry of Finance obtains loans from private banks for financing public investments projects, creditor’s selection is made through public procurement procedures. Recently foreign borrowing has gained momentum due to the access the country has to borrowing on the international financial markets, based on an improvement in 2007 of the country rating by Moody’s. It is also the Government strategy to reduce domestic borrowing and increase foreign borrowing for financing investment projects and fiscal deficit, as outlined in the Public Debt Strategy for 2008-2010.</p> <p>Until 2007, Albania has contracted foreign official debt from international organizations like the World Bank, European Bank for Reconstruction and Development, European Investment Bank, Islamic Development Bank etc. and governments of various countries.</p>

Selection of creditors has not been conducted following public procurement rules, but in the case of the IFIs, it was based on the relevant Legal Agreements and Membership, whereas in the cases of bilateral donors, it has been based on the bilateral Agreements, always in the framework of the overall development strategy of the Albanian Government (i.e. PRSP/NSSSED/ NSDI). As the debt for the most part was under soft terms, its borrowing cost was not very high.

After receiving country rating by Moody's, Albania was allowed to begin contracting debt in international capital markets. In 2008 the government contracted its first syndicated loan<sup>24</sup> from domestic and foreign banks under commercial terms. In 2009 the government contracted another syndicated loan assumed by two co-leading banks that have agreed to arrange a loan for the amount up to Euro 250 million.

Contracting syndicated loans or issuing government securities like Eurobonds<sup>25</sup> in international capital markets are complex processes, include many more stakeholders than the previous loans contracted from international organizations. When contracting complex debt, Ministry of Finance would need advisory, technical and other supporting services (eg. legal services) in order to better assess costs, risks and to increase its negotiating capabilities.

Article 7 of the Law no. 9643 dated 20.11.2006 on Public Procurement excludes from the jurisdiction of the law financial services related to purchase, sale or title transfer or other financial instruments. The exemption clause neither does provide any definition for these services nor enumerates them. Also they are not provided for in any other legislation in Albania. The SPI Albania Secretariat has identified some advisory, technical and other supporting services related to debt contracting relying on the literature and current experience of the Ministry of Finance and commercial banks acting as their agents, but the list could be longer<sup>26</sup>.

In general, the range of advisory, technical and other supporting services related to debt borrowing is very diverse due to the fact that the financial sector is a dynamic one with products which are becoming more and more sophisticated. Sophistication of financial instruments will grow hand in hand with the sophistication and diversity of their associated services. Consequently, it may be difficult to determine accurately and conclusively all services associated to debt borrowing.

However, getting a clear understanding of the advisory, technical and other supporting services would help authorities determine the degree of regulatory intervention (amending relevant legal framework), as well as provide concise and clear clauses for the services in question.

The gap identified in the legal framework may have negative consequences for the Ministry of Finance in contracting debt such as:

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<sup>24</sup> Wikipedia: By definition a syndicated loan is one that is provided by a group of lenders and is structured, arranged and administered by one or several commercial or investment banks known as arrangers.

<sup>25</sup> Wikipedia: By definition a bond is a debt capital market instrument issued by a borrower who is then required to repay to the lender/investor the amount borrowed plus interest over a specified period of time

<sup>26</sup> For a deeper understanding of said services, please refer to the attached annex.



- Delays in contracting debt as the analysis is to be handled with internal limited resources, with results on liquidity and costs;
- Increase in the transaction cost risk due to limited analytics capabilities.

The situation may hamper also banks and investors from offering the necessary financial services. In this context, there is a need first, to identify and get a clear understanding on the advisory, technical and other supporting services associated to debt borrowing contracting process and second, revise/amend the relevant legal framework to include clear provisions on such services.

By regulating environment for procuring advisory, technical and other supporting services, the access to debt borrowing improves, thus facilitating Government financing needs. Also, including clear provisions on advisory, technical and other supporting services reduces the transaction costs for the Government and increases transparency. On macro level, the investments could increase and therefore economic development would be stimulated.

### *1.1.2 Market Analysis*

*General market:* Financial market

*Specific segment:* Debt borrowing

### *1.1.3 Legal framework*

Law No.9643 dated 20.11.2006, article 7 on Public Procurement

Law no. 9665 dated 18.12.2006, article 26 on “State borrowing, state debt and state guarantee loans in the Republic of Albania”

*International benchmark:* Directive 2004/18/EC of the European Parliament and of the Council of March 31,2004 on the coordination of procedures for the award of public works, contracts, public supply contracts and public service contracts.

### *1.1.4 Stakeholders - Institutional framework*

- **Ministry of Finance:** The Ministry of Finance is the most important Government institution whose role is to mobilize and use effectively and efficiently public financial resources in order to reach goals and objectives set out in the Government program. According to the Law no. 9665 dated 18.12.2006 “On State borrowing, state debt and state guarantee loans in the Republic of Albania”, the Minister of Finance has the exclusive authority to manage government borrowing to meet essential financial needs (eg. finance budget deficit etc) of the government with the lowest cost.
- **Public Procurement Agency:** PPA is the central and highest body entrusted with the supervision and coordination of the public procurement system in Albania. PPA’s main objectives are enforcing current public procurement legislation and bringing it to EU standards, providing transparency and rigorous implementation of tendering procedures etc.
- **Commercial banks.** The Albanian banking system consists of 16 commercial banks having as main area of activity lending to individuals, companies and Government.
- **Consulting companies/Legal firms**

## 1.2. Market/regulatory failure analysis (nature and evidence)

As a principle, the public procurement law regulates all main aspects of government and public bodies purchasing activities and provides them with the tools to be able to achieve “value for money” when procuring goods, services and works. The current regulatory framework excludes from the jurisdiction of the law financial services related to purchase, sale of title transfer. Such provision makes it difficult for the Ministry of Finance to acquire advisory, technical and other supporting services that are associated to the process of debt contracting. In addition to that the exemption clause neither does provide any definition for these services nor enumerates them.

This regulatory failure might determine delays, higher risks and costs in contracting debt.. There is no evidence of the occurrence of these effects, but the potential difficulties and risks are recognized by the authorities. The Albanian Government has expressed its concern for this gap in the legal framework that can create difficulties for them in cases when they would like to borrow from commercial banks (such as the recent cases of syndicated loans). They have addressed this concern to the SPI Albania (after having raised it also with other IFIs), *First* to get a clear information on the best international practice in these cases, and *Second*, based on that, to prepare proposed revisions of the relevant legal framework.

## 1.3. Policy Goal(s) threatened by the failure [e.g. financial stability, market integrity, market confidence, consumer protection, facilitating innovation, enhancing competition]

### **General Objectives:**

- To enhance economic development

### **Specific objectives:**

- To facilitate access to the debt markets
- To increase transparency in using public funds

### **Operational:**

- To improve Government debt contracting process regarding the acquisition of advisory, technical and other supporting services.

## 1.4. “Do nothing” option

**1.4.1 Possible medium-term (max 2 years) self – corrective market actions** (e.g. mechanisms through which the “Do Nothing” option would address the market/regulatory failure).

The non-revision of the public procurement law with regard to acquisition of advisory, technical and other supporting services could cause delays for the Ministry of Finance in contracting debt, as the analysis is to be handled with internal limited resources. This has impact on liquidity and costs. Such situation would involve increase in the transaction

cost risk and would threaten Government’s transparency in using public funds.

**1.4.2. Impact of the “Do Nothing” option to the various stakeholders**

**Impact on authorities:**

- exposure to liquidity and transaction cost risk
- lower economic development
- lower transparency on the usage of public fund

**Impact on banks:**

- missed opportunities for business

**Impact on consulting companies:**

Lower business

**1.5. Alternative policy option(s)**

**1.5.1. Description of Option 1:**

To amend the current Public Procurement Law to include clear provisions on advisory, technical and other supporting services related to debt borrowing and treat the acquisition of such services as public procurement.

**1.5.2. Description of Option 2**

To amend the current foreign and domestic borrowing law to include clear provisions on advisory, technical and other supporting services related to debt borrowing.

**1.5.3. Description of Option 3**

To issue another legal act that would regulate the issue of advisory, technical and other supporting services associated to debt borrowing.

<b>Summary Problem Scoping</b>			
<b>Revising the Debt Contracting Regulatory Framework</b>			
<b>Market failure</b>			
Asymmetric information	Market power	Positive externalities	Negative externalities
<b>(Existing) Regulatory failure</b>			
Regulation wrongly prescribed for the market	Regulations succeeded in addressing the failure; a different market failure (e.g. side effect)	Regulation made it worse	Regulation so far has failed to work; maybe in due course
X			

## Note on Advisory, Technical and Other Supporting services associated with Albania's debt borrowing

### Context

In Albania obtaining loans from private banks (foreign and domestic) for the Government is subject to public procurement procedures pursuant to Article 26 of the State Borrowing Law no. 9665 dated 18.12.2006. However, advisory, technical and other supporting services related to debt contracting not only are not subject to public procurement rules, but they are also excluded from the jurisdiction of the law no. 9643 dated 20.11.2006 on Public Procurement (article 7), with the exception of legal services<sup>27</sup> which are provided for in the Public Procurement Law.

The Government has expressed its concern for this gap in the legal framework that can create difficulties for them in cases when they would like to borrow from commercial banks (such as the recent cases of syndicated loans). They have addressed this concern to the SPI Albania (after having raised it also with other IFIs), *First* to get a clear information on the best international practice in these cases, and *Second*, based on that, to prepare proposed revisions of the relevant legal framework.

Foreign borrowing has gained momentum due to the access the country has gained to international financial markets. It is also the Government strategy to reduce domestic borrowing and increase foreign borrowing as outlined in the Public Debt Strategy for 2008-2010.

Until 2007, Albania has contracted foreign official debt from international organizations like the World Bank, European Bank for Reconstruction and Development, European Investment Bank, Islamic Development Bank etc. and governments of various countries. Selection of creditors has not been conducted following public procurement rules, but in the case of the IFIs, it was based on the relevant Legal Agreements and Membership, whereas in the cases of bilateral donors, it has been based on the bilateral Agreements, always in the framework of the overall development strategy of the Albanian Government (i.e. PRSP/NSSSED/ NSDI). As the debt for the most part was under soft terms, its borrowing cost was not very high.

After receiving country rating by Moody's, Albania was allowed to begin contracting debt in international capital markets. In 2008 the government contracted its first syndicated loan<sup>28</sup> from domestic and foreign banks under commercial terms. In 2009 the government contracted another syndicated loan assumed by two co-leading banks that have agreed to arrange a loan for the amount up to Euro 250 million.

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<sup>27</sup> In the ToRs prepared for this project, other supporting services include but are not limited to legal services.

<sup>28</sup> Wikipedia: By definition a syndicated loan is one that is provided by a group of lenders and is structured, arranged and administered by one or several commercial or investment banks known as arrangers.

Contracting syndicated loans or issuing government securities like Eurobonds<sup>29</sup> in international capital markets are complex processes, include many more stakeholders than the previous loans contracted from international organizations. In order to contract such kinds of borrowing the Government must undertake preliminary technical steps that are the object of Advisory, Technical and other Supporting Services that are going to be analyzed in this note.

## **Implications**

The gap identified in the legal framework may have negative consequences for the Ministry of Finance in contracting debt such as:

- Delays in contracting debt, as the analysis is to be handled with internal limited resources, with results on liquidity and costs;
- Increase in the transaction cost risk due to limited in-house analytics capabilities

The situation may hamper also banks and investors from offering the necessary financial services.

## **Scope of Analysis**

The purpose of the note is to enumerate and provide information on advisory, technical and other supporting services related to debt contracting relying on the literature and current experience of the Ministry of Finance and commercial banks acting as their agents. The most important argument for providing such information is that the exemption clause of public procurement law regarding “*financial services related to purchase, sale or title transfer or other financial instruments*” neither does provide any definition for these services nor enumerates them. Therefore, getting a clear understanding of the advisory, technical and other supporting services would help authorities determine the degree of regulatory intervention (amending relevant legal framework) as well as provide concise and clear clauses for the services in question.

This note was prepared by: (i) consulting the literature, (ii) based on meetings with individual members of the working group of the project in question. It makes also reference to the recent Albanian legislation in defining the advisory, technical and other supporting services.

## **I. Advisory, technical and other supporting services**

We can classify these services into three big categories:

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<sup>29</sup> Wikipedia: By definition a bond is a debt capital market instrument issued by a borrower who is then required to repay to the lender/investor the amount borrowed plus interest over a specified period of time

## **A. Services prior to debt contracting**

**A.1. Services falling under this category relate to contracting debt from private banks.** After the Ministry of Finance has expressed interest in contracting debt from banks or investors, it must at the same time express interest for selecting the Bank that would arrange the loan to be granted, which is realized by the issuing of a letter of credit<sup>30</sup> available for all life validity of the loan. The selected agent Bank/s will benefit a fee which is paid by the Ministry of Finance with the funds of the state budget for the service provided.

In some circumstances, the Ministry of Finance may also need to identify a guarantor of the debt to be issued, in full or in part.

As mentioned above, starting from year 2007 Albania has been allowed to contract debt in international capital markets. One of the debt instruments is Eurobond which has not been issued yet due to global financial crisis and the difficulties to get access to capital markets.

Other advisory, technical services include those services which are provided to the Ministry of Finance from an independent evaluator/consultant to help assess costs, risks when the bids have been received by the lenders.

**A.2. Other supporting services** related to debt contracting are mainly (but not limited only) legal services offered to the Ministry of Finance with regard to the foreign law that applies-mainly English law- in international agreements to resolve the disputes.

According to the literature<sup>31</sup> investors and borrowers in the Eurobond market may at one time fall under the auspices of a number of countries laws and regulations. The most important legal considerations relate to: (i) the possibility that the bonds are eventually distributed to residents in the United States and (ii) London, as the principal financial centre where the sale and trading of bonds takes place. The first consideration means that the market is subject to legislation in the US that dates from 1993<sup>32</sup>. The second consideration means that the market comes under certain aspects of English law.

The legal advisor will assume responsibility for the legal issues involved in the issuing Eurobond transaction. Even in this case the Ministry of Finance may be required to contract an independent consultant with experience in this field to make the assessments and referral to the English law and Albanian law so that confusions are avoided.

## **B. Services post debt contracting**

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<sup>30</sup> Wikipedia: A standard commercial letter of credit is a document issued mostly by a financial institution which provides an irrevocable payment undertaking

<sup>31</sup> Choudhry, Moorad, The bond and money market,

<http://books.google.com/books?id=Ih733yvfncC&pg=PA377&lpg=PA378&ots=-ACNotYtkU&dq=issuing+eurobond>

<sup>32</sup> The US Securities Act of 1993

Services falling under this category relate to the debt management.

After the Ministry of Finance has entered into an agreement with the lender in order to start the implementation of the project the condition is that the agreement must be effective. In most cases one of the conditions of implementing the project is selection of the agent Bank for the Albanian side, which will facilitate the loan administration through connecting with the agent Bank of the lender for the purpose of obtaining the loan amount. In the case of Eurobond, advisory, technical and other supporting services include selecting of the fiscal agent whose main responsibilities are to pay interest and principal payments and to perform a number of administrative role, as well the publication of financial information and notices to the investor<sup>33</sup>.

Until now, these services are offered by domestic banks without any cost, (it refers to the normal transaction cost which has been paid by project account) and thus the selection of the Bank has been flexible for both sides.

Specifically, the selection made so far is based on:

- the experience that banks have had in providing these kinds of services;
- the reliability and reputation of the Bank in the domestic and foreign financial market;
- the Bank's financial situation and accuracy and correctness in delivering these services in favor of the Government of Albania.

Being that these kinds of services have not affected the state budget, the Ministry of Finance has been more flexible in this process. In general they affect the budget, because it is borrowing anyway, even if in soft terms. The real issue is that, since it had been regulated by the donor's procedures, the government had been more comfortable. In the case of commercial borrowing, the Government is more exposed to the risk of transacting at unfavorable conditions.

### **C. Services related to the Country Credit Rating**

Services belonging to this category are Advisory, technical and other supporting services that are provided by specialized international credit rating agencies such as Moody's or Standard & Poor and that relate to the sovereign rating given to the country regarding its economy and the repayment ability of the Government for its obligations taken over in the framework of government borrowing.

Sovereign ratings are used by governments to raise capital to finance national debt. They allow the government to secure additional funds at more competitive prices. In 2007 the international rating agency Moody's gave the country its first-ever sovereign ratings Ba1 for foreign-currency bonds and a B1 for the government's debt obligations<sup>34</sup>.

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<sup>33</sup> Choudhry, Moorad, The ibidem

<sup>34</sup> [http://www.setimes.com/cocoon/setimes/xhtml/en\\_GB/features/setimes/features/2007/08/16/feature-02](http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2007/08/16/feature-02)

## **II. Advisory, technical and other supporting services as defined in the Albanian Legislation**

According to the Stabilization and Association Agreement, annex IV a financial service is meant to include any service of any financial nature offered from a financial service provider to a party. The SAA agreement does not set any particular definition of advisory, technical and other supporting services related to debt contracting (please refer to appendix). According to this agreement in the definition of financial services among others it is included any activity that relates to giving loans of all kinds, all payments and money transfer services, as well as consulting, mediating and other services that accompany all bank services. Thus, there is not any distinction made for consulting and other services that accompany bank services when using the term “financial services”. They all fall under same category of “financial services”.

According to the article 54 of the Law “On banks in the Republic of Albania” no. 9662 dated 18.12.2006, same can be said about advisory, technical and other supporting services related to debt contracting where no specific definition is provided for said services (please refer to appendix). According to the this law the term used for financial service is instead “financial activity” in whose definition among others it is included lending of all types, all payments and money transfer services, guarantees and commitments, as well as advisory, intermediation and other auxiliary services that accompany all bank activities.

### **Conclusion**

The range of advisory, technical and other supporting services related to debt borrowing is very diverse due to the fact that the financial sector is a dynamic one with products which are becoming more and more sophisticated. As was mentioned earlier in this note, the Albanian Government has already entered the phase of contracting syndicated loans and is allowed to issue Eurobonds. Sophistication of financial instruments will grow hand in hand with the sophistication and diversity of their associated. Consequently, it may be difficult to determine accurately and conclusively all services associated to debt borrowing in addition to those mentioned in this note.

### **Recommendations**

Considering that the advisory, technical and other supporting services associated to the debt borrowing process are not provided for in any legislation in Albania and due to the very large range of these kind of services, it is recommended that the relevant legal regulation includes a general provision covering their contracting by the Government.

The services listed in this note could be attached to the legal provision for illustrative purposes. It is recommended that the list of services be amended with new services introduced and identified by authorities from time to time.



## Appendix

### **Advisory, technical and other supporting services as defined in the Albanian Legislation**

According to the Stabilization and Association Agreement, annex IV, a financial service is meant to include any service of any financial nature offered from a financial service provider to a party.

According to this agreement these services include all insurance and insurance related services and bank services and other financial services (excluding insurance). For the purpose of this note reference is made only to bank services and other financial services which are the following:

1. Acceptance of deposits and other public re-payable funds;
2. giving loans of all kinds, including inter alia, consumer's crediting, mortgage crediting, production and financing of trade transactions;
3. taking loans in monetary value;
4. all payments and money transfer services, including crediting, price and debit cards determination, travel check and bank drafts
5. guarantees and engagements
6. trading for personal or clients purpose in the currency market, in the decentralized market or in another form such as:
  - (a) currency market instruments (checks, invoices, deposit certificates etc)
  - (b) foreign transactions
  - (c) derivative products which include but are not limited to predetermined contracts and options
  - (d) exchange values and interest valuation instruments, including such products as exchanges , future interest value determining agreements etc
  - (e) titles with transferring value
7. taking part in all insurance issues, including agreeing and becoming an agent and insuring services related to such issues
8. management of assets such as currency or portfolio's management, all forms of collective investment management, pension funds management, taking into custody, depositing and good faith services;
9. choosing and clarification of financial assets services, including titles, derivative products and other negotiable instruments;
10. financial data acquisition and transfer and financial data and related programs processing from other financial services providers
- 11. consulting, mediating services and other services related to those listed in points (1) –(10) above, including crediting reference and analyze, investment and portfolio search and consulting on gains and on company's re-structuring and strategy.**

According to Stabilization and Association Agreement, Annex IV, the following activities are excluded from the definition of financial services:

- (i) activities performed by central banks or any other public institution in accordance with monetary and exchange policies;
- (ii) activities performed by central banks, government agencies or departments, or public institutions on behalf of or on government guarantee, excluding those activities that may be performed by financial services insurance subject in concurrence with other public entities;

From the banking perspective financial activity is defined in article 54 of the Law “On banks in the Republic of Albania” no. 9662 dated 18.12.2006. According to paragraph 2 of this article the following shall be considered as financial activities:

1. Lending of all types including inter alia, consumer credit, mortgage, factoring and financing of commercial transaction
2. Leasing
3. All payments and money transferring services, including credit, charge and debit cards, travelers, cheques, bankers draft;
4. Guarantees and commitments
5. Trading for own account or for the account of clients, whether on a foreign exchange, in an over-the-counter market or otherwise the following:
  - (i) money market instruments (cheques, bills, certificates of deposit etc)
  - (ii) foreign exchange
  - (iii) derivative products, included, but not limited to futures or options;
  - (iv) exchange rates and interest rate instruments including products such as swaps and forward agreements;
  - (v) transferable securities
  - (vi) other negotiable instruments and financial assets including bullion;
  - (vii) participation in issues of all kinds of securities including, underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;
6. Money broking
  - (i) asset management such as cash or portfolio management, fund management, custodial, depository and trust services;
  - (ii) settlement and clearing services for financial assets, including securities, derivative products and other negotiable instruments;
  - (iii) provision and transfer of financial information and financial data processing and related software by providers of other financial services
7. **advisory, intermediation and other auxiliary financial services of all activities listed in points (1) – (6) above, including credit reference and analyses, investment and portfolio research and advice, advise on acquisitions and on corporate restructuring and strategy.**

## SPI Albania Methodology

<b>The EU Better Regulation Approach</b>	
<b>Steps</b>	<b>Purpose</b>
<b>Scoping of problem</b>	
1. Problem identification	To understand if a market/regulatory failure creates the case for regulatory intervention.
2. Definition of policy objectives	To identify the effects of the market /regulatory failure to the regulatory objectives.
3. Development of “do nothing option”	To identify and state the status quo.
4. Alternative policy options	To identify and state alternative policies (among them the “market solution”).
<b>Analysis of impact</b>	
5. Costs to users	To identify and state the costs borne by consumers
6. Benefits to users	To identify and state the benefits yielded by consumers
7. Costs to regulated firms and regulator	To identify and state the costs borne by regulator and regulated firms
8. Benefits to regulated firms and regulator	To identify and state the benefits yielded by regulator and regulated firms
9. Data Questionnaire	To collect market structure data to perform a quantitative cost and benefit analysis
<b>Consultations</b>	
10. Policy Document	To learn market participant opinions on various policy options
<b>Conclusion</b>	
11. Final Recommendations	Final report to decision-makers, based on Cost Benefit Analysis and market feedback