



SPI Albania Project on Revising the Debt Contracting Regulatory Framework

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

Project Management Team

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Minutes

TAIEX EXPERT MISSION

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SUMMARY MINUTES

- 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 2004/18 is repeated word for word (but with additional description) in Albanian Public Procurement law.

The PWG has carried out a comparative exercise with neighboring 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 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

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.

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