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For PWG discussion and agreement*

CONSULTATION DOCUMENT

SPI Project on Revising the Debt Contracting Regulatory Framework

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 services¹, 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

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

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

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Milbana Treska, MoF

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

II. Purpose of the Consultations

Based on the A) International Experience² B) Note on Advisory, Technical and Other Supporting Services³ associated with Albania's debt borrowing, C) Qualitative cost and benefit analysis⁴, and the D) Report prepared by the External Expert⁵, **PWG prepared a draft decree⁶** 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.**

² <http://www.spi-albania.eu/admin/js/filemanager/files/web/2009program/procurementlaw/secondmeeting/SPI%20Albania%20Debt%20Contracting%20Project%20International%20Experience.pdf>

³ <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>

⁴ <http://www.spi-albania.eu/admin/js/filemanager/files/web/2009program/procurementlaw/secondmeeting/SPI%20Albania%20Debt%20Contracting%20Project%20Cost%20benefit%20Qualitative%20Analysis.pdf>

⁵ <http://www.spi-albania.eu/admin/js/filemanager/files/web/2009program/procurementlaw/SPI%20Albania%20Procurement%20of%20Financial%20Services%20Evaluation%20report-TAIEX%20expert.pdf>

⁶ <http://www.spi-albania.eu/admin/js/filemanager/files/web/2009program/SPI%20Albania%20Procurement%20of%20Financial%20Services%20PVKM,%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 :

- 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 value for money;
- iii) 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.

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Annex 1: Draft decree for the financial services related to the credit rating II

Annex 2: Note on Advisory, Technical and Other Supporting Services

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Annex 4: Cost and Benefit Qualitative Analysis

Annex 5: Evaluation Report by the Expert Mission



**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 te Dokumentave, brenda 5 diteve nga dalja e urdhrat, 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 pjesemarrrese.

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 services⁷ 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 loan⁸ 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.

⁷ In the ToRs prepared for this project, other supporting services include but are not limited to legal services.

⁸ 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 Eurobonds⁹ 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:

⁹ 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 credit¹⁰ 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 literature¹¹ 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 1993¹². 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.

¹⁰ Wikipedia: A standard commercial letter of credit is a document issued mostly by a financial institution which provides an irrevocable payment undertaking

¹¹ Choudhry, Moorad, The bond and money market,

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

¹² 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 investor¹³.

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 obligations¹⁴.

¹³ Choudhry, Moorad, The ibidem

¹⁴ 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.

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

Country	LOANS FROM FOREIGN GOVERNMENTS OR INTERNATIONAL FINANCIAL INSTITUTIONS	BANK BORROWINGS OR ISSUANCE OF SECURITIES OR OTHER FINANCIAL INSTRUMENTS	ADVISORY AND TECHNICAL SERVICES RELATED TO DEBT BORROWING	OTHER SUPPORTING SERVICES (including but not limited to legal services) RELATED TO DEBT BORROWING
Albania	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
EU Legislation	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,	The borrowing procedure of domestic or international loans from the Member States is not regulated. Neither is there any guideline deriving from the	The borrowing procedure of domestic or international loans from the Member States is not regulated. Neither is there any guideline deriving from the	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.

Country	LOANS FROM FOREIGN GOVERNMENTS OR INTERNATIONAL FINANCIAL INSTITUTIONS	BANK BORROWINGS OR ISSUANCE OF SECURITIES OR OTHER FINANCIAL INSTRUMENTS	ADVISORY AND TECHNICAL SERVICES RELATED TO DEBT BORROWING	OTHER SUPPORTING SERVICES (including but not limited to legal services) RELATED TO DEBT BORROWING
	OECD.	Organization for Economic Cooperation and Development, OECD.	Organization for Economic Cooperation and Development, OECD.	
Bulgaria	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
Former Yugoslav	Regulated by Public Debt Law	The Minister of Finance prescribes	The Minister of Finance prescribes	The Minister of Finance prescribes the manner and procedures

Country	LOANS FROM FOREIGN GOVERNMENTS OR INTERNATIONAL FINANCIAL INSTITUTIONS	BANK BORROWINGS OR ISSUANCE OF SECURITIES OR OTHER FINANCIAL INSTRUMENTS	ADVISORY AND TECHNICAL SERVICES RELATED TO DEBT BORROWING	OTHER SUPPORTING SERVICES (including but not limited to legal services) RELATED TO DEBT BORROWING
Republic of Macedonia	Not subject to public procurement rules	the manner and procedures	the manner and procedures	
Romania	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
Slovenia	Regulated through: (i) Public Finance Debt act	Regulated by Internal Guideline adopted by the Minister of	Regulated by Internal Guideline adopted by the	Regulated by Internal Guideline adopted by the Minister of Finance

Country	LOANS FROM FOREIGN GOVERNMENTS OR INTERNATIONAL FINANCIAL INSTITUTIONS	BANK BORROWINGS OR ISSUANCE OF SECURITIES OR OTHER FINANCIAL INSTRUMENTS	ADVISORY AND TECHNICAL SERVICES RELATED TO DEBT BORROWING	OTHER SUPPORTING SERVICES (including but not limited to legal services) RELATED TO DEBT BORROWING
	(ii) Public procurement act	Finance Not subject to public procurement rules	Minister of Finance Not subject to public procurement rules	Not subject to public procurement rules
Turkey	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
Serbia	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

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

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 within 2 weeks of the completion of your mission.

DETAILS OF THE EXPERT¹⁵ 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*

¹⁵ 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

- 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 vfm

vi) 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.

Finally I would like to thank all the participants in the PWG for their hospitality and warm welcome. I thoroughly enjoyed my visit and hope they found it worthwhile

Tony
3.12.2009