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Draft Document for PWG discussion*

## **SPI Albania Project on Revising the Debt Contracting Regulatory Framework**

### **Proposal to Amend the Current Regulatory Framework in the framework of Sovereign Debt Borrowings**

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#### **Context**

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 and other international borrowings (e.g. Eurobonds) for financing public investments projects, creditor’s selection is made through public procurement procedures.

When contracting complex debt, Ministry of Finance would need advisory, technical and other supporting services <sup>1</sup> in order to better assess costs, risks and to increase its negotiating capabilities. This notwithstanding, 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. This provision restrains Ministry of Finance whenever contracting debt from requesting necessary advisory, technical and other supporting services from domestic and international banks and professional firms.

#### **Implications**

This situation has 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 costs and risks due to limited in-house analytics capabilities;

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<sup>1</sup> For a deeper understanding of the advisory, technical and other supporting and other supporting services please refer to the Note on such services prepared by SPI Secretariat in the framework of this project.

## **Scope of Analysis**

The purpose of the SPI Albania Project on Revising the Debt Contracting Regulatory Framework with regards to advisory, technical and other supporting services is to solve the conflict created between the two laws mentioned above by regulating the environment for procuring advisory, technical and other services associated to debt contracting. By regulating the procurement environment the access to foreign 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.

The Public Procurement Law no. 9643 dated 20.11.2006 was prepared in line with the EU 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. The approximation of the Albanian legislation with the EU is an obligation deriving from the Albanian commitments towards EU mainly the Stabilization and Association Agreement entered into between the EU Communities and Member States and the Republic of Albania ratified by the Albanian Parliament by Law no. 9590 dated 27.7.2006 and the Council of Minister's Decision no. 463 dated 5.7.2006 "On approval of the national plan for the implementation of the Stabilization and Association Agreement". Specifically article 7 (ç) of the Public Procurement Law is compliant with Article 16 (d) of the aforesaid EU Directive.

Therefore, any amendment made to the Public Procurement Law to cover the public procurement of advisory, technical and other supporting services related to debt contracting would not be advisable. Furthermore, it is not in the interest of the Ministry of Finance to follow the same public procedures as those provided in the Public Procurement Law due to their presumed non flexibility.

## **Public Procurement Law Flexibility**

In the Public Procurement Law mentioned above in article 7 (ç) it is provided that the exceptional cases are regulated by other legal or sublegal acts. This leaves the room open for introducing new provisions on the public procurement to be followed in the case of creditor selection and financial services mentioned in the Public Procurement Law. Accordingly, it would make much more sense even from the legislative technique point of view, to provide for such activities in the State Borrowing Law. An argument for doing so derives also from the analysis of international experience of various countries dealing with the issue of advisory, technical and other supporting services. From the analysis it is concluded that in most cases, financial services related to the purchase, sale or transfer of titles or the financial instruments are excluded from the jurisdiction of the public procurement law. In such cases their procurement has been regulated by special acts of the Ministry of Finance (e.g., Bulgaria, Former Yugoslav Republic of Macedonia, Slovenia).

As for the legal consulting services the situation seems different since the legal consulting services are subject to Public Procurement Law. If the legal services remain under the current PPL separated from the advisory, technical and other supporting services for which arguments are given to be provided for in the State Borrowing Law, procurement process might be more complicated if different provisions for procurement are being provided for both categories (e.g. public borrowing law could provide for using simplified procurement procedures when procuring advisory, technical and other supporting service). As a result, it may happen that the procurement process of all the above mentioned services be performed at different times, thus delaying the whole borrowing process. Therefore it may be desirable to attach these services to the main advisory, technical services associated to debt contracting and regulate through including in the State Borrowing Law.

Another argument to bring legal consulting services under the provisions of the State Borrowing Law and remove reference thereto in the Law on Public Procurement could be the one stated in Article 31 of the aforesaid EU Directive to which “*contracting authorities which carry out particularly complex projects may, without this being due to any fault on their part, find it objectively impossible to define the means of satisfying their needs or of assessing what the market can offer in the way of technical solutions and/or financial/legal solutions. This situation may arise in particular with the implementation of important integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing the financial and legal make up of which cannot be defined in advance. To the extent that use of open or restricted procedures does not allow the award of such contracts, a flexible procedure should be provided which preserves not only competition between economic operators, but also the need for the contracting authorities to discuss all aspects of the contract with each candidate. However, this procedure must not be used in such a way as to restrict or distort competition, particularly by altering any fundamental aspects of the offers, or by imposing substantial new requirements on the successful tenderer, or by involving any tenderer other than the one selected as the most economically advantageous*”<sup>2</sup>.

### **Recommendation<sup>3</sup>**

In order to have public procurement procedures applicable not only to the selection of a creditor as designated in Article 26 of the State Borrowing Law, but also to advisory, technical and other related supporting services related to debt contracting it is recommended that an addition be made to Article 26.

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<sup>2</sup> The legal reasoning reproduced in this paragraph has been provided by the Legal Studio Kalo & Associates as stipulated in their Memo dated 19 June 2009 on State Borrowing and Public Procurement Procedures.

<sup>3</sup> This recommendation has been prepared and agreed through consultation of SPI Albania Secretariat and Legal Studio Kalo & Associates and is stipulated in the Memo dated 19 June 2009 on State Borrowing and Public Procurement Procedures prepared by the Legal Studio.

Accordingly the second sentence of Article 26 would read as follows: ***“When, for the financing of a public investment project, a loan is to be obtained from private bank/s and capital markets transactions that is issuance and placement of securities with investors take place, the creditor’s selection, the contracting of advisory, technical services in connection with such selection process and the other supporting services (including but not limited to the legal consulting services) are made through public procurement procedures, when the international agreement does not provide otherwise”.***

Given the generality of the concept of financial services, it is advisable that the State Borrowing Law avoids for any definition of such. On the other side, for purposes of flexibility but also to avoid any claims for discretionary abuse, it is recommendable that the Minister of Finance issues an Instruction stipulating for all those services that are meant to be included in the concept of advisory, technical and other supporting services under Article 26 of the State Borrowing Law. It will be of course much easier for the Minister of Finance to change the content of such Instruction from time to time, when new services are identified and introduced in the financial area.