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Technical Note on the Amendments brought to Law 244/2021

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I. PP Law 244 is the fruit of four years of national commitment and concerted efforts with the international community to progress against all odds.

1. Despite challenges of many folds and a multi-faceted crisis, Lebanon marked a key milestone in advancing Public Procurement Reform through the voting on June 30, 2021 and entry into force on July 29, 2022 of the Public Procurement Law (PPL) 244/2021.
2. The PPL 244/2021 is based on the UNCITRAL Model Law and on the OECD 12 guiding principles on Public Procurement. It is the result of a consultative process and the recommendations of Lebanon's MAPS assessment¹, conducted with the technical support of the World Bank and the Agence Française de Développement. It is also the result of two years of national consultations, benchmarking with international practices and of concerted efforts with the international development partners, namely the World Bank, the OECD, the EU/OECD-SIGMA and the AFD.
3. PPL 244/2021 is the result of an evidence-based, consultative and participative process to reform an archaic, fragmented public procurement system, non-compliant to international standards that led to losses in billions of dollars, degraded public services, and colluded practices.
4. Its entry into force marks a key milestone on the path for long-awaited structural reforms that the Government of Lebanon committed to at the CEDRE Conference (2018) and across successive governmental declarations since 2019. The Lebanese business community and civil society have been advocating for corruption-free public procurement and the respect of key principles, such as integrity, transparency, accountability, fairness, and equality.

II. PPL 244/2021 is fore and foremost a policy instrument to fight corruption in public procurement and instill professional practices aligned with international norms.

1. Public procurement reform is one of the ambitious structural reforms needed to create an enabling environment for stronger inclusive growth, mentioned in the International Monetary Fund's Staff-level agreement (April 2022) "the modernization of the PFM framework, implementation of the recently approved procurement law... will increase transparency and spending efficiency".
2. PPL 244/2021 is a pillar of Lebanon's National Anti-Corruption Strategy adopted on May 2020. Article 9 of the United Nations Convention Against Corruption (UNCAC) adopted by the United

¹ Lebanon's MAPS Assessment Report (2021), <https://www.mapsinitiative.org/assessments/MAPS-Lebanon-final-report.pdf>

Nations General Assembly resolution 58/4 of 31 October 2003 provides for a road map to strengthening integrity in procurement. Lebanon ratified the Convention in 2009.

3. **PPL 244/2021 implementation is thus a renewal of Lebanon's commitment to the anti-corruption agenda** (the commitment to UNCAC and the enactment of a set of national anti-corruption legislations). **In Lebanon, public procurement accounts for, on average, 20% of central government expenditures and 6.5% of GDP** (Institut des Finances Basil Fuleihan, 2020).² Lebanon's obsolete public procurement system increased corruption risks and contributed to ranking Lebanon's public procurement system below average internationally, reflecting negatively on the economy's competitiveness. **The country's ranking fell to 150/180 as per the Corruption Perception Index (2022).**³

III. The International Community's engagement in favor of PPL 244/25021 enactment and sound implementation goes beyond technicality. It is a foundation for trust and for fiscal reform.

1. **The international community welcomed the voting of the new PP Law 244.** It has many times insisted that public procurement reform is one of the critical structural reforms to strengthen financial governance, improve the quality of public services, attract investments, and enhance transparency. Procurement reform was thus highlighted in the **Reform, Recovery and Reconstruction Framework (3RF)**, jointly developed by the World Bank, the United Nations, and the European Union.
2. **This reform was also mentioned as a condition under the IMF's Staff-Level Agreement (SLA) of April 2022.** The latest International Monetary Fund's Staff Concluding Statement of the 2023 Article IV Mission of March 23, 2023 stated clearly that *"the approved procurement law, which is in line with the best international standards, should be implemented promptly, starting with the full functionality of the Procurement Authority and the e-procurement platform"*.
3. **A recent statement dated April 26, 2023 by the Ambassadors of Canada, France, Germany, Italy, Japan, the United Kingdom, the United States, and the European Union in Beirut called upon the Lebanese Authorities to urgently initiate a multi-pronged reform program necessary to restore financial stability, fight corruption, install a sustainable path for public finances, regain the confidence of investors through enhanced transparency and accountability and rebuild the economy.**
4. **Ensuring that aid funds are disbursed through sound country mechanisms that are aligned with international norms is a major concern of the donor community.** The international aid funds disbursed in Lebanon between 2018 and 2020 amounted to more than USD 1.5 billion each year, with a peak of USD 1.7 billion in 2020 (UN, 2021)⁴. A recent study showed that from 1991 to 2022, the Lebanese governments signed 714 agreements to receive development assistance, totaling roughly \$22.6 billion (inflation adjusted, in 2021 prices), 40% (\$8.9 billion) of which were grants and 60% (\$13.7 billion) loans. Development assistance at this scale is significant for a small economy such as Lebanon's, representing more than 10% of GDP in 1991 and 2014, and more than 6% in 1995 and 2007.⁵

IV. Proposals for amendments of PPL 244 were subject of many controversies

The PPL 244 entered into force on July 29, 2022. Less than one year of implementation has passed, during which, and despite dire conditions and meagre funding, training and awareness raising were on going by the Ministry of Finance - Institut des Finances Basil Fuleihan. Dedicated funding was not allocated sufficiently to accelerate the wide dissemination of learning and knowledge, to implement e-

² Institut des Finances Basil Fuleihan, Economic estimates of the size of public procurement, April 2020, <http://www.institutdesfinances.gov.lb/wp-content/uploads/2020/04/Methodological-note-Economic-estimate-of-PP-size-Apr2020.pdf>

³ Transparency International, <https://www.transparency.org/en/countries/lebanon>

⁴ UN (2021), Aid to Lebanon: Tracking of development aid received to Lebanon, <https://lebanon.un.org/en/110415-aid-lebanon-tracking-development-aid-received-lebanon>.

⁵ The Policy Initiative (2023), From Hariri's Loans to Aoun's Drought: The History of Lebanon's Foreign Aid, <https://www.thepolicyinitiative.org/article/details/270/from-hariris-loans-to-aouns-drought>.

procurement, to establish the two institutions: the Public Procurement Authority and the Complaints Authority, and other related basic requirements.

International literature points to the fact that lack of capability at the institutional level is the main barrier to effective procurement reform. In Lebanon, resistance to change is compounded by entrenched interests, weak understanding of public procurement principles, standards and relationship with sound fiscal management. It is further heightened by several practical difficulties resulting from the economic and financial crisis the country is going through.

- 1. Four proposals for amending the PPL no. 244/2021 were submitted to Parliament by three different political groups and an independent MP.** It is to be noted that the proposals did not result from any legislative impact assessment exercise nor a consultative one. Many were contrary to the **OECD 12 guiding principles on Public Procurement, namely the principles of inclusiveness, integration, competition, transparency and accountability.** The amendments were not read out loud during the parliamentary session nor discussed in parliamentary committees.
- 2. On April 18, 2023, the Parliament voted one of the proposals in a swift vote taking on the character of double emergency, under one single article, which is in itself irregular. No discussion took place, and the other three proposals were not mentioned.** It is custom, in cases where several proposals concern a specific law, that parliament forms a special committee to discuss the proposals and report to the general assembly. The latter would then put the findings to discussion and to vote.
3. According to the MP Head of the committee who studied and proposed PPL 244/2021 to voting back in 2020, the amendments “*distorted the only reform that parliament managed to pass in recent years*” in a session regarded by many MPs as unconstitutional. According to him, “*this vote risks sending an ambiguous message to stakeholders, like the International Monetary Fund and other international supporters of Lebanon*”.
- 4. Moreover, the vote of PPL 244/2021 amendments was widely regarded as unconstitutional since the Parliament is in electoral exercise and not in a legislative one.** This situation prompted 11 parliamentarians to submit an appeal before the Constitutional Council to annul this vote and stop the effect of the Law 309/2023 that amended Law 244/2021. In their statement, they considered that there are no justified reasons to pass the amendments to PPL 244/2021 in the form of “legal urgency” and without due discussions nor stakeholders’ consultations.
- 5. International benchmarks show that new PP legislation often requires adjustments after a period of implementation. The National Coordinator (Ministry of Finance - Institut des Finances Basil Fuleihan) had planned to undertake an assessment following one year of implementing Law 244.** The assessment would be carried out by the World Bank based on an online survey and an inclusive consultative exercise. It is expected to produce quantitative and qualitative data and a set of recommendations for priority amendments that are in line with international standards. The inter-ministerial committee in charge of following up the PP reform, the Public Procurement Authority and all stakeholders would be provided with the results of this evidence-based exercise.

V. Amendments to PPL 244/2021 and the related risks

The voted amendments carry several risks in terms of the effective implementation of PPL no.244/2021. Some of them are in contradiction with the 8 principles based on which the law was designed; the latter being derived from the OECD 12 principles on good public procurement. The box below summarizes the amendments and maps the risks.

BOX: Analysis of voted amendments to Law 244/2021

The below analysis was prepared by the Institut des Finances Basil Fuleihan in its capacity as National Coordinator of the reform, engaging a core group of national legal, procurement and policy experts.

Amendments to Article 7 concerns the establishment of preconditions for the access of non-Lebanese companies to governments tenders. With this amendment, non-Lebanese entities wishing to participate in a public bid would need to obtain a certificate of eligibility issued by the Ministry of Economy and Trade attesting that they are not in breach of the 1955 Israel Boycott Law already in force. The amendment does not specify the mechanisms for publishing decisions nor the means of appeal or challenge of decisions. It is in contradiction with the principles of transparency.

Amendments to Article 7 concerns the declaration of beneficial owners. It is a commendable amendment. However, no enforcement mechanism is set, nor the requirement to establish a publicly accessible business registry. It is to be noted that it is not necessary to amend PPL 244/2021 to introduce BO transparency because the declaration of beneficial ownership is already provided for in the standard procurement documents to be issued by the PPA.

Amendments to Article 11 concerns the timeliness of publication of procurement plans and exemption of specific procuring entities from this key requirement:

Timelines for the submission and publication of annual procurement plans were changed. They would thus be published in a period up to three months after the beginning of the fiscal year.

All military and security entities are exempted from any obligation to submit their procurement plans to the PPA and to publishing them. It is to be noted that these entities are major buyers.

- This amendment jeopardizes the principle of budget integration critical for fiscal discipline. Budget integration rationalizes spending by combining procurement processes with public finance management. It is needed to improve procurement management, disbursement and cash management, arrears, etc.
- It is in contradiction with the principles of transparency and competition. Publishing procurement plans ensures a level playing field for potential bidders to gain information on government plans thus allowing them to prepare themselves to participate in public markets. Exempting the largest buyers from these requirements without any justification jeopardizes the principle of integration, limits the visibility of the Ministry of Finance over financing needs and restricts access to information to economic operators.

Amendments to Article 19 provides that:

The criteria for **pre-qualification** and classification of suppliers, companies and service providers are now defined by the Public Procurement Authority in collaboration with the procurement entities. The amendment re-introduces the practice of **"classification" whose mechanisms are unknown.**

Prior approval by the Public Procurement Authority of the pre-qualification and classification criteria is now required for each transaction where pre-qualification is required.

This practice is contradictory with the role of the regulator (PPA) and prompts its interference in executive procurement processes. It also reintroduces the practice of "classification" repealed by Article 114 of Law 244, which contradicts international standards and restricts competition.

It is not clear whether there is an obligation to publish these criteria or not. The means of redress in the event of damage are not specified. This amendment is in contradiction with the principles of transparency and competition.

Amendments to clause 46 grants State Owned Enterprises (SOEs) the right to compete with the private sector when direct selection methods are used.

Amendments to Articles 100 and 101 change the processes of selecting members of both tender and acceptance committees. The selection criteria of committees' members that were previously detailed in PPL 244/2021 based on the principles of integrity and professionalization (mandatory training) including background verification/checks by the Central Inspection, the Court of Accounts and the Disciplinary Court, records of good conducts and proof of no conflicts of interest were abolished. They were replaced by one conditionality namely "previous experience", and criteria to be subsequently defined by the Public Procurement Authority, without specifying the nature nor the basis for defining these set of criteria.

Based on the above, two risks are noted:

- with respect to creating a conflictual mandate of the Public Procurement Authority being a regulator and now also in charge of transactional aspects of the bidding process
- restituting the classification practice (versus proposed pre-qualification), which is historically a gateway to clientelism and elite capture limiting competition and entry of newcomers into public markets as shown by various studies.

VI. There are strong incentives to divert or reverse the PP reform process

1. Evidence from around the world including work by Beschel and Ahern (2012) point to cases where public procurement reform touched on areas of corruption, leading to strong incentives to delay or divert the reform process. Ameyaw et al. (2012) note that 'the quantum of money changing hands through corruption in public procurement is estimated at \$390-400 billion per annum all over the world'.⁶
2. It was recently reported⁷, that 38% of firms contracted by Lebanon's Council for Development and Reconstruction (CDR) - the country's largest infrastructure development agency - were awarded to politically connected firms that won more than 60% of these contracts and captured about 78% of the total value across sectors (the CDR awarded 394 infrastructure procurement contracts in the value of around US\$4 billion between 2008 and 2018 in transport, water works, solid waste, education, others).

VII. Development partners are closely monitoring the situation

1. Development partners consider that the progress of the PP reform is an indication of the commitment of the Lebanese Parliament to combat corruption and advance structural reforms.
2. Since 2018, the World Bank, the OECD, the EU/OECD SIGMA and other development partners have mobilized experts to provide technical assistance to support Lebanon (through the Ministry of Finance – Institut des Finances Basil Fuleihan) in advancing public procurement reform, including the law drafting and enactment process. The PP law was a milestone achievement.
3. The World Bank and OECD recommend that amendments to the PPL 244/2021 should be grounded in an evidence-based consultative process, informed by an impact assessment and consultations with stakeholders. Any proposed amendment needs to be aligned with international standards and the OECD 12 guiding principles on Public Procurement.

VIII. The National Coordinator (NC) is voicing its concerns repeatedly

1. In its reports on the progress of the PP reform, dated September 2022⁸ and May 2023⁹, the National Coordinator (NC) voiced its concerns of seeing the reform derailed or diverted. It stated that evidence, including research by the World Bank, point to the fact that when individuals and institutions benefit from an existing system, they see little reason to comply with new rules and try to reverse, divert or obstruct them.
2. The NC called upon the development partners to **heighten their engagement, both financial and technical**, to implement the National PP reform Strategy endorsed by the Council of Ministers (Decision number 66 dated May 20, 2022).
3. The NC called upon the development partners to provide their **support to the coordination function, including well-constructed change management approaches, good coordination among various actors, coaching, accompaniment, explanation and awareness building, etc.** which, if not provided, would reinforce resistance to change and build strong incentives to delay or divert the reform process.

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⁶ Telgen, J., van der Krift, J., and Wake, A. (2016). Public procurement reform: Assessing interventions aimed at improving transparency. London: DFID. <https://gsdrc.org/wp-content/uploads/2017/05/Public-Procurement-Reform.pdf>

⁷ The Policy Initiative (2022), Cartels in Infrastructure Procurement, https://api.thepolicyinitiative.org/content/uploads/files//KAS-Cartels-in-Infrastructure-Procurement-Report_USE.pdf.

⁸ Progress report - Public Procurement Reform in Lebanon - A Nationally led reform at risk, September 2022, <http://www.institutdesfinances.gov.lb/wp-content/uploads/2022/11/Progress-report-Lebanon-PP-reform-at-risk-Sept22-Final.pdf>

⁹ Progress report - Public Procurement Reform in Lebanon - A Nationally led reform at risk, May 2023 <http://www.institutdesfinances.gov.lb/wp-content/uploads/2023/05/Progress-report-Lebanon-PP-reform-at-risk-May2023.pdf>