Terms of Reference for Consultancy

Eurobond Engagement

About The Institute for Social Accountability (TISA)

TISA was launched in Nairobi in 2008 to promote citizen empowerment and government accountability, at a moment of promise, when Kenya was charting a path to constitutional reform. Since the adoption of Kenya's 2010 Constitution, *TISA* has sought to advance the Constitution's central tenet: transforming the way power in Kenya is distributed and managed, chiefly through the devolution of government power from the national to the county (sub- national) level. The goal of social accountability is to empower citizens to demand sound delivery of services by holding their leaders to account through direct engagement. Thus, *TISA's* mission is to help Kenyans find their voice and agency to claim their rights to services; make the Kenyan government accountable for its duties and promises; and ultimately, make the constitution a lived experience.

TISA under the *Okoa Uchumi Campaign* seeks to build citizen voice and demand into critical national monetary and fiscal prioritization areas where citizen voice is presently missing. The campaign aims to link public debt/ national revenue decisions to every-day lives of citizens as a basis for building citizen demand. The campaign will bolster civil society campaigns for political accountability in debt management, towards the sustainable resolution of Kenya's debt crisis, and the attainment of balanced budgets which support socio economic inclusion.

About the Project

With support from *Oxfam in Kenya, TISA* is implementing a project titled *Civil Society Capacity Building for Improved Fiscal Justice in East Africa – Kenya. TISA* under this project and under the *Okoa Uchumi Campaign* seeks to contribute towards improved access to public debt information, greater transparency in the public debt management and reporting process, and compliance with public finance management law. This project comes against the backdrop of Kenya's entry into an IMF supported fiscal consolidation and structural adjustment program in which the government outlines measures to address the country's public debt situation, as well as Kenya's recent Eurobond Issue on 17th June 2021.

Background Information on Eurobonds

Eurobond refers to international commercial financing/borrowing through bond issuance in foreign currency, often made by governments. There has been an increase in Eurobond issuance by African countries in the last ten years.[1] African governments prefer Eurobond issuance because it is easy to raise large amounts of funds through such bonds, with no conditionalities on their use.[2] However, Eurobond issuance entails serious risks and challenges especially for African countries. These include exchange rate risk because borrowing is in foreign currency, therefore substantial depreciation of local currency increases the cost of debt service. High interest rates risk because of high yield demands by investors making Eurobonds costly for governments. Exposure to specific legal risks because issuing Eurobond with no collective action clauses and modified *pari passu* is risky due to the difficulties this could cause for the borrower in the case of default. The risk of overborrowing or excessive accumulation of debt places a country at risk of debt distress.[3]

[1] https://documents1.worldbank.org/curated/en/491301554821864140/pdf/Issuing-International-Bonds-A-Guidance-Note.pdf
[2] https://documents1.worldbank.org/curated/en/491301554821864140/pdf/Issuing-International-Bonds-A-Guidance-Note.pdf
[3] http://slettgjelda.no/assets/docs/Bond-to-happen_Debt-Justice-Norway.pdf

In addition to the above-mentioned risks, the most prominent challenge in government Eurobond issuance is limited transparency. Government Eurobond issuance process is closed, obscure and devoid of transparency. Governments usually appoint underwriters to manage the Eurobond issuance. The underwriters act as intermediaries between the bond issuers and buyers and recommend the interest rate on the bond. Civil society, citizens and oversight institutions do not have access to information on how the size, interest rates, and terms of the loans are determined.[4] Furthermore, there is no requirement for government to provide comprehensive information on the specific use to be made of the loan proceeds in the prospectus during the Eurobond initial public offerings; nor to account for whether the funds were used for the purpose it was raised for, magnifying the risk of fiscal indiscipline.[5] This means that Eurobonds do not have checks and balances, nor conditionalities and lines of accountability for use of the funds.[6]

Kenya's Eurobond Issuance

Kenya has issued 4 Eurobonds between 2014 and 2021. In June 2014, Kenya placed its first US$2 billion Eurobond, that was issued in two tranches: a five-year $500 million bond at a yield of 5.875 percent, and a 10-year $1.5 billion bond at 6.875 percent, and a further US$750 million in December 2014 ($250 million to the five-year tranche at a 5.0 percent yield and $500 million to the 10-year tranche at 5.9 percent.). In February 2018, Kenya raised an additional US$2 billion in a new sovereign bond issue; the bond was issued in two equal tranches of 10 years at a coupon of 7.25 percent and 30 years at a coupon of 8.25 percent.[7] In May 2019, Kenya issued another sovereign bond of US$2.1 billion. The issuance comprised two tranches: a 7-year $900 million bond at a coupon of 7 percent and a 10-year $1.2 billion bond at 8 percent. On 17th June 2021, Kenya raised US$ 1 billion through issuance of a 12-year Eurobond with a coupon rate of 6.3 percent.

Kenya's first Eurobond issuance in 2014 was devoid of transparency and marred with numerous allegations of mismanagement of the funds. The Office of the Auditor General could not trace the use of proceeds to any specific projects and found that some of the funds were expended outside the government IFMIS. The government was not transparent upfront on its plan to handle the proceeds of the bond in its foreign bank deposits including the length of time before repatriating the funds, and its intention to pay external obligations directly from the offshore account. The government ran into controversies regarding delays in transferring the repatriated bond proceeds into the Consolidated Fund. Furthermore, there were shortcomings in fiscal reporting by the government whose accounting of the Eurobond proceeds was confusing.[8]

The Parliamentary Budget Office *Budget Watch Report 2014* cautioned that Eurobonds have a drawback because when the government floats them it gives a raft of projects that it will finance without going to specifics. This means that the money that is raised can be used for other purposes and ultimately the expected benefits may not be realized. For instance, one objective of Kenya's first Eurobond issuance was to reduce the crowding out of the private sector in the domestic money market. However, the expected drop-in interest rates did not materialize. The 2019 special audit report by the auditor general on the proceeds and utilization of Kenya's first Eurobond issuance recommended that subsequent issuance of international sovereign bonds should be earmarked and be identifiable to specific projects.[9] However, information about Kenya's 2018 and 2019 Eurobond issuances are not publicly available.

In June 2021, Kenya issued its fourth Eurobond as per the government's borrowing plan under the IMF supported fiscal consolidation and structural adjustment program. The IMF program report dated April 2021

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[4] http://slettgjelda.no/assets/docs/Bond-to-happen_Debt-Justice-Norway.pdf
[5] https://theconversation.com/african-countries-arent-borrowing-too-much-theyre-paying-too-much-for-debt-131053
[6] *Misheck Mutize* in his article, *"African Governments Have Developed a Taste for Eurobonds: Why It's Dangerous,"* https://theconversation.com/african-governments-have-developed-a-taste-for-eurobonds-why-its-dangerous-165469
[7] https://www.imf.org/en/Publications/CR/Issues/2018/10/23/Kenya-Staff-Report-for-the-2018-Article-IV-Consultation-and-Establishment-of-Performance-46301
[8] https://www.internationalbudget.org/wp-content/uploads/how-can-government-foreign-debt-be-made-more-transparent-ibp-brief-2017.pdf
[9] http://www.parliament.go.ke/sites/default/files/2021-03/Special%20Audit%20Report%20on%20the%20Proceeds%20and%20Utilization%20of%20Euroboand%202019.pdf

allows for another $5 billion Eurobond issuance to be used exclusively for debt management operations such as refinancing of the 2024 Eurobond and retiring of relatively expensive syndicated loans. The Kenyan government is also expected to use the money to fund high-yielding infrastructure projects listed in the IMF program in what is aimed at preventing a repeat of the speculation that surrounded the first Eurobond.[10]

International Best Practices

The UNCTAD principles on Promoting Sovereign Lending and Borrowing aim to promote responsible behavior and are considered best practices for bond investors and issuers. Specifically, the key principles that apply to sovereign borrowers/bond issuers are agency, transparency, disclosure, publication, adequate management, and monitoring, avoiding incidences of over-borrowing, and restructuring. According to the UNCTAD principle of transparency, the process for obtaining financing and assuming sovereign debt obligations and liabilities should be transparent. Governments have a responsibility to put in place and implement a comprehensive legal framework that clearly defines procedures, responsibilities, and accountabilities. Additionally, the principle of disclosure and publication, relevant terms and conditions of a financing agreement should be disclosed by the sovereign borrower, be universally available and be freely accessible in a timely manner through online means to all stakeholders, including citizens. An audit institution should conduct independent, objective, professional and timely audits of their debt, and the findings of such audits should be publicized to ensure transparency and accountability in debt management. The UNCTAD principles on Promoting Sovereign Lending and Borrowing are voluntary thus not binding on governments. [11]

Kenya Legal Framework

The Constitution states that there shall be openness and accountability including public participation in all financial matters and fiscal reporting shall be clear. It further states that within seven days after either House of Parliament so requests by resolution, the Cabinet Secretary responsible for finance shall present to the relevant committee, information concerning any loan or guarantee, including all information necessary to show; the extent of the total indebtedness by way of principal and accumulated interest; the use made or to be made of the proceeds of the loan; the provision made for servicing or repayment of the loan; and the progress made in the repayment of the loan.

The Public Finance Management Act provides that at the end of every four months, the Cabinet Secretary shall submit a report to Parliament stating the loan balances brought forward, carried down, drawings and amortizations on new loans obtained from outside Kenya or denominated in foreign currency, and such other information as may be prescribed by regulations, specifying- (a) the names of the parties to the loan; (b) the amount of the loan and the currency in which it is expressed and in which it is repayable; (c) the terms and conditions of the loan, including interest and other charges payable and the terms of repayment; (d) the amount of the loan advanced at the time the report is submitted; (e) the purpose for which the loan was used and the perceived benefits of the loan; and such other information as the Cabinet Secretary may consider appropriate.

Problem Statement

Contrary to the Constitution, the PFM Act is ambiguous on the standard of reporting required on public debt, and there is only bare minimum compliance with reasonable standards of disclosure and transparency by the National Treasury and Parliament in respect to public debt accumulation and expenditure. For instance, Kenya's Eurobond issuance process is devoid of transparency, accountability, public participation, clear reporting, and information about loans as well as the use made or to be made of the proceeds of the loan and the perceived benefits of the loan are not publicly available. Hence, one cannot access comprehensive information on Kenya's Eurobond issuances from National Treasury and Parliament reports.

[10] https://www.standardmedia.co.ke/business/business/article/2001408904/imf-okays-kenya-plan-for-sh500b-eurobond
[11] http://slettgjelda.no/assets/docs/Bond-to-happen_Debt-Justice-Norway.pdf

This situation is made worse by the lack of international rules governing borrowing or lending through sovereign bond issuance or investment. Governments take advantage of the low levels of disclosure standards in sovereign bond prospectuses, specifically the clause "Use of Proceeds" that provides limited information in legally unenforceable language.[12]

Concerns

Whereas the Constitution Article 10 provides that the national values and principles of governance such as integrity, transparency and accountability bind all State organs, State officers, public officers whenever any of them make or implement public policy decisions, Kenya's Eurobond issuance process is devoid of transparency and accountability.

Whereas the Constitution Article 35 provides that the State shall publish and publicize any important information affecting the nation, critical information on Kenya's Eurobond issuances between 2014 and 2021 such as the prospectus and loan agreements specifically pari passu and collective action clause has never been published nor publicized.

Whereas the Constitution Article 201 provides that there shall be openness and accountability, including public participation in financial matters, the process of obtaining financing through Eurobond issuance is devoid of transparency, accountability, and public participation in borrowing decisions such as selection and appointment of underwriters, determination of the size, interest rates, and terms of the loans.

Whereas the Constitution Article 201(e) provides that fiscal reporting shall be clear, Kenya's Eurobond reporting on the use made or to be made of loan proceeds is not clear.

Whereas the Constitution Article 211(1)(b) provides that Parliament may by legislation impose reporting requirements on borrowing by national government, the legal framework is not comprehensive and does not clearly define procedures, responsibilities, and accountabilities in Kenya's Eurobond issuance.

Contrary to Article 211(2) of the Constitution and Public Finance Management Act, there is no publicly available information concerning Kenya's Eurobond issuances specifying - (a) the names of the parties to the loan; (b) the amount of the loan and the currency in which it is expressed and in which it is repayable; (c) the terms and conditions of the loan, including interest and other charges payable and the terms of repayment; (d) the amount of the loan advanced at the time the report is submitted; (e) the purpose for which the loan was used and the perceived benefits of the loan.

There is minimal compliance with the *2019 Special Audit Report of the Auditor General on the Proceeds and Utilization of Eurobond* recommendation that subsequent issuance of international sovereign bonds should be earmarked and be identifiable to specific projects.

Whereas the Constitution Article 73 requires State Officers to exercise their authority in a manner that is consistent with the purposes and objects of the Constitution as well as the guiding principles of leadership and integrity including - objectivity and impartiality in decision making, ensuring decisions are not influenced by improper motives, corrupt practices, conflict of interest, accountability to the public for decisions and actions – there is minimal compliance to these principles in Kenya's Eurobond issuances.

Whereas the Constitution Article 232 provides the values and principles of public service such as involvement of the people in the process of policy making, accountability for administrative acts and transparency and provision to the public of timely, accurate information, there is minimal compliance to these principles in Kenya's Eurobond issuances.

Intervention

[12] https://www.internationalbudget.org/wp-content/uploads/how-can-government-foreign-debt-be-made-more-transparent-ibp-brief-2017.pdf

TISA under the *Okoa Uchumi Campaign* seeks inform Kenya's policy and legal framework to seal loopholes in Kenya's commercial borrowing through bond issuance in foreign currency, and push for political accountability around violations that may have occurred between 2014 to 2021. The process will entail reviews to identify gaps in the policy and legal framework; develop recommendations to inform legal reforms and reporting standards and seal loopholes for future borrowing; advocate for measures for transparency and accountability in borrowing decisions.

Objectives

1. To strengthen transparency in future Eurobond issuance process and use of funds.
2. To advocate for transparency and accountability in Kenya's present Eurobond issuances.
3. To demand for political accountability around violations that may have occurred in Kenya's Eurobond issuance between 2014 to 2021

TISA seeks to engage consultant(s) to generate evidence to achieve the abovementioned objectives. The consultant(s) should have knowledge of the law, ability to track Eurobond process and funds, identify gaps, loopholes, violations and make recommendations for action. The process will generate evidence to support actions for political accountability and strengthening of the public debt management system.

Scope of Work

1. Interpretation of terms of reference.
2. Design of research approach, methodology, tools, work plan outlining process, timeframes, and budget.
3. Undertake data generation, literature review and analysis of information gathered.
4. Prepare study report of the findings written in clear, coherent, concise manner, and provide recommendations for action.
5. Validation of findings: The Consultant will develop a power point presentation of the process, analysis, findings, and recommendations to be presented during the validation meeting and stakeholder engagements.
6. Prepare policy and advocacy briefs based on major findings and recommendations for action.

Proposed study approach

The process should take a participatory, capacity building and advocacy approach. It may require a team of consultants.

Timelines for the engagement

The assignment will be for a period of 24 days spread over the month of September and October 2021. The final report must be submitted to TISA before 30th October 2021.

Experience Needed

1. Demonstratable knowledge and experience in public debt analysis, public expenditure tracking and/or budget and policy analysis for evidence-based advocacy in the Kenyan context.
2. Over 8 years' experience in data analysis. Strong analytical skills both qualitatively and quantitatively with samples of reports provided from previous consultancies.
3. Degree in Law, Economics, or a Social Science. Monitoring and Evaluation work experience and understanding of research design and data analysis for social transformation through governance programs. Master's degree will be an added advantage.
4. Demonstrate high level of professional integrity, ability to work independently within strict timelines, and availability during engagement period.

Key Deliverables

1. Interpretation of the terms of reference including research approach, method, tools, workplan.
2. Draft report.
3. Facilitation of validation meeting and stakeholder engagements.
4. Policy and advocacy brief based on study findings with recommendations for action.

Workplan and Submission of Application

Your application must include:

1. CV highlighting work relevant to this call.
2. Proposed methodology and workplan outlining process and timeframes.
3. Financial proposal providing estimates for services being provided including daily consultancy fees related to the successful undertaking of the assignment.
4. The application should be sent to christine.akinyi@tisa.or.ke and copy both emily.ngolo@tisa.or.ke and elsie.onyango@tisa.or.ke on or before 24th September 2021.
5. The application subject line should clearly indicate "Eurobond Engagement"