



*Document prepared by
Evis Gjebrea, Financial Modernization Program
Draft Document for PWG discussion*

SPI Albania Project on Revising the Debt Contracting Regulatory Framework

July 2009

International Experience in Regulating Procurement Environment for Advisory, Technical and Other Supporting Services related to Debt Borrowing

This section describes the experiences of other countries in dealing with advisory, technical and other supporting services in connection with debt borrowing. The aim of analysis of the international experience is to understand if the said services related to debt contracting are part of public procurement procedures and if not how other countries have solved the issue.

The countries analyzed are: Bulgaria, Former Yugoslav Republic of Macedonia, Italy¹, Romania, Slovenia, Turkey and Serbia².

¹ The experiences of Bulgaria, Former Yugoslav Republic of Macedonia were prepared through interaction with the Ministries of Finances of the respective countries. The experience of Italy was prepared through interaction the Italian Banking Association.

² The experiences for Romania, Slovenia, Turkey and Serbia were extracted from the Memo prepared by the Albanian Legal Studio Kalo & Associates for SPI Albania.

**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, OECD.	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	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	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
		Development, OECD.	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 Republic of Macedonia	Regulated by Public Debt Law Not subject to public procurement rules	The Minister of Finance prescribes the manner and procedures	The Minister of Finance prescribes the manner and procedures	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
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 (ii) Public procurement act	Regulated by Internal Guideline adopted by the Minister of Finance Not subject to public procurement rules	Regulated by Internal Guideline adopted by the Minister of Finance Not subject to public procurement rules	Regulated by Internal Guideline adopted by the Minister of Finance 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
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
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	

1.1 EU Legislation³

According to the research, the European Community *acquis* does not seem to have regulated the procedure of borrowing domestic or international loans from the Member States. Neither is there any guideline deriving from the Organization for Economic Cooperation and Development, OECD.

1.2 Bulgaria

In Bulgaria issuing state debt and the state loans are regulated through the Government Debt Act⁴. According to this Act the issuing state debt and the state loans are not subject to public procurement rules.

When the State needs to borrow from abroad the Minister of Finance has the right to conduct direct negotiations with potential foreign lenders. In his task the Minister of Finance is supported by a directorate in the Ministry of Finance and sometimes external consultants may be hired.

In Bulgaria there is not a formal procedure similar to that of public procurement for selection of international lenders. The Ministry of Finance decides with which International Financial Institution (IFI) to conduct negotiations based on current needs and long-term development strategies. IFI-s are in constant interaction with the Government of Bulgaria, and in this way they are familiar with the socio-economic situation of the country. Based on the facts that IFI-s know for Bulgaria and also on their experience they offer all the time various financial products for different sectors. When there is a specific need the Ministry of Finance knows whom investor to contact in order to start negotiations. From the technical point of view the Minister of Finance will sign the loan agreements on behalf of the Government which then is approved by the Council of Ministers in accordance with the Act of International Treaties of the Republic of Bulgaria.

1.3 Former Yugoslav Republic of Macedonia

In Former Yugoslav Republic of Macedonia (FYROM) the issuing of state debt and state loans are regulated by the Public Debt Law⁵. Even in this case as in the case of Bulgaria obtaining external debt is not subject to public procurement law. According to article 18

³ This reference has been provided by the Legal Studio Kalo & Associates

⁴ Law on Government Debt Act in the Republic of Bulgaria, Promulgated, State Gazette No. 93/1.10.2002, amended SG No. 34/19.04.2005, effective 1.06.2005, amended and supplemented, SG No. 52/29.06.2007, effective 1.11.2007

⁵ Law on Public debt in Former Yugoslav Republic of Macedonia, published in the Official Gazette no. 62/05, 88/08, July 2008, http://www.finance.gov.mk/files/u4/public_debt_law_cleared_version.pdf

of the public debt law, point 5 for borrowing by issuance of government securities the Minister of Finance prescribes the manner and the procedure for issuance and payment of government securities. Meanwhile according to same article point 6, the Minister of Finance shall make the selection of settlement institution and determine the primary issue of government securities traded on an international financial market.

1.4 Italy

In Italian framework in the public procurement field is regulated by the “Code of Public Contracts no.163 dated 12.04.2006 related to works, services and furniture in light of the Directives 2004/17/EC and 2004/18/EC.

The law applies to all public contracts including the public service contracts having as object the execution of services in Annex 2 of the Directive. In the Annex A in Part II there are specifically mentioned the services of great interest to the banking sector, being called "Financial Services".

Article 19 of the code on "contract for services excluded" specifies (Article 1 letters d) that the code does not include, among other things, public contracts related to financial services related to the issuance, purchase, sale and transfer of titles or other financial instruments, in particular operations to supply money and services offered by the Italian Central Bank.

Following operational consequences on excluded services contracts reference should be made to Article 27 of the Code taking into account the relevant principles of contracts excluded. The article determines that credibility should be based on the principles of efficacy, efficiency, equality, equal treatment, transparency, proportionality, continuity and must be preceded by inviting at least 5 competitors if compatible with the object of the contract.

1.5 Romania

The Romanian framework in the public procurement field is mainly regulated by Government Emergency Ordinance no.34/2006 for the award of public procurement contracts, public works concession and services concession contracts (GEO 34/2006) which transposes the two European Directives in the field.

As a rule, under GEO 34/2006, selection of a creditor by a contracting authority is subject to public procurement procedures, if the loan exceeds the thresholds of 15,000 Euro with certain exemptions such as the cases in which the public procurement contract is awarded based on:

(i) an international agreement concluded in conformity with the Treaty with one or more States that are not members of European Union, and covering supplies or works intended

for implementing or exploiting a joint project with the signatory States, and only if through the respective agreement a specific procedure for awarding this contract was mentioned;

(ii) the application of a procedure specific to certain international bodies and institutions (e.g. IMF, EBRD, World Bank);

(iii) the application of a specific procedure provided by the Community regulations, within the programs and projects concerning the territorial cooperation

The award of the legal consultancy contracts related directly with contracting the credit is also included in the scope of public procurement procedures, subject to certain thresholds.

1.6 Slovenia

The Public Finance Act regulates the state debt-related transactions in the following manner: decisions regarding transactions in relation to public borrowing, public debt management and securities market interventions shall be adopted by the minister responsible for finance on the basis of the annual budget financing programme adopted by the Government. When exercising his duties under the Public Finance Act, the minister of finance is bound by the provisions of the Public Procurement Act-in cases when the states wishes to raise money directly (i.e. by a loan or financial leasing). In such cases, the public procurement procedure as prescribed by the Public Finance Act has to be observed for both the procurement of a loan and the procurement of directly related financial services and other supplementary services (i.e. legal consultancy).

In case that the state acquires money or capital by issuing, selling or buying or transferring securities or other financial instruments, the exemption clause of Public Procurement shall apply. Namely, the Public Procurement Act shall not be used for the procurement related to the above financial instruments (i.e. the minister of finance shall not be bound by the provisions of the Public Procurement Act when acquiring money or capital with securities or other financial instruments). This type of procurement is the most common in Slovenia. According to the information provided the procurement for the directly related financial services and other supplementary services (e.g. legal consultancy) is also exempted in this case.

According to the Ministry of Finance, the procurement for obtaining state loans with securities or other financial instruments is regulated by the government guidelines and the procurement for the related financial services and other supplementary services (i.e. legal consultancy) is regulated by an internal guideline adopted by the minister of finance.

1.7 Turkey

Credit relationships of public authorities, including loans to be obtained from abroad, are not subject to the Public Procurement Law and the Public Procurement Contracts Law.

The Law regulating public finance and management of debts states that all the negotiations and dealings in relation to obtaining all kinds of foreign financing from foreign sources by any of the public authority or entity with a treasury guarantee from UT are conducted and finalized by UT itself. For the loan transactions made by the Public Authorities or Entities without a treasury guarantee the preliminary permission of UT is required to be obtained.

Therefore, it is safe to say that UT has the influence or at least the final saying on the terms of the loan agreement as it conducts the negotiations or has to give its permission, depending on the loan being with or without a treasury guarantee.

1.8 Serbia

Financial services as defined by the Procurement Law do not include issuance, trading and purchasing of securities or other financial instruments, as well as services provided by the National Bank of Serbia. Consequently, the public procurement rules and procedures are applicable in situations when the state selects financial creditor and/or procure financial services related directly with such selection (depending of variety of cases, the sole procedure of selection could differ from case to case).

However, the Procurement Law does make a list of exemptions when the provisions of this law are not applicable to certain cases. Among others, the Procurement Law is not applicable in those situations when the international agreement that Serbia has entered into predicts differently. Finally, and most importantly, Serbia is not allowed to borrow on commercial terms and conditions (commercial financial market) due to the last arrangement concluded with the International Monetary Fund. Therefore, the loans could be obtained only under non-commercial terms and conditions (so called: soft-loans), provided by various development finance organizations such as EBRD, EIB, WB and others (e.g. KfW). In those situations, no public procurement or any other competitive procedure is applicable in practice. Technically, the crucial role is on the Serbian Finance Ministry who forms a team for negotiations, thus representing the Government against the creditors' side.

Bibliography

Law no. 9643 dated 20.11.2006 on “Public Procurement in the Republic of Albania”

Law no. 9665 dated 18.12.2006 on “State borrowing, state debt and state guarantee loans in the Republic of Albania”

Law no. 28 dated 6.04.2004 on “Public Procurement Act in the Republic of Bulgaria”

Law on Government Debt Act in the Republic of Bulgaria, Promulgated, State Gazette No. 93/1.10.2002, amended SG No. 34/19.04.2005, effective 1.06.2005, amended and supplemented, SG No. 52/29.06.2007, effective 1.11.2007

Law on Public debt in Former Yugoslav Republic of Macedonia, published in the Official Gazette no. 62/05, 88/08, July 2008, http://www.finance.gov.mk/files/u4/public_debt__law__cleared_version.pdf

Memo on State Borrowing and Public Procurement Procedures prepared by the Legal Studio Kalo and Associates-Tirana Office on 19 June 2009