Comments on the Macedonian Law on Public enterprises

(Prof. Lucien Rapp)

Memo concerning the compliance of the Macedonian Bill on public enterprises with the EU legislation

Two series of provisions must be considered in this respect.

The first series are the article 86 of the EEC Treaty providing that EU competition law is applicable under conditions to public enterprises. This principle to apply required however specific provisions. This is why the EU Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (thereafter "the Directive") was adopted. As the title of the Directive suggests it, transparency is the core principle applicable to public enterprises under EU legislation.

This principle and its implications will be firstly presented in order to give an overview of the EU legislation applicable to public enterprises. (I). This presentation will therefore entitle to determine whether the Bill, if passed, is in compliance with EU legislation applicable to public enterprises (II).

1. The principle of transparency and its implications under the EU legislation applicable to public enterprises

In terms of the Directive, transparency applies to the financial relations between public authorities and public undertakings. It is therefore necessary to remind the definitions of these three terms in regard to the Directive (1.1.), before determining the scope of transparency in terms of the Directive (1.2.).

1.1. The scope of the Directive

In terms of article 2, public authorities means "*the State and regional or local authorities*" and public undertakings means "*any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it*". The compliance of this definition with the one stated in the Bill will be discussed in part 2 of the present memo.

Article 3 provides a non-exhaustive list of "*aspects of financial relations between public authorities and public undertakings : (a) the setting-off operating losses; (b) the provision of the capital; (c) non-refundable grants, or loans on privileged terms; (d) the granting of financial advantages by forgoing profits or the recovery of sums due; (e) the forgoing of a normal return on public funds used; (f) compensation for financial burdens imposed by the public authorities*".

In terms of article 1, the financial relations of public authorities and public undertakings are subjected to transparency. The scope of this principle must be therefore discussed.

1.2. The scope of transparency

Article 1 of the Directive provides that "*The Member States shall ensure that financial relations between public authorities and public undertakings are transparent as provided in this Directive, so that the following emerge clearly: (a) public funds made available directly by public authorities to the public undertakings concerned; (b) public funds made available by public authorities through the intermediary of public undertakings or financial institutions; (c) the use to which these public funds are actually put*". Transparency is consequently divided into three sub-principles.

This means in practice that public enterprises must set up separate accounts that notably enable the European Commission to determine accurately the enterprises' sources of revenues, that is, whether and to what extent they come directly (a) or indirectly (b) from the State or their own activities, and how these revenues are allocated to public or commercial activities (c). The setting up of separate accounts for public enterprises is subsequently the major legal consequence of transparency.

It indeed enables the European Commission to control notably whether Member States circumvent the EU legislation on State aids. Thus, any legal provisions that would not expressly set up a separate accounts system for public enterprises would be regarded as an infringement of EU legislation.

This brief presentation of the principles stated in the Directive enables to determine whether the Bill, if passed, is in compliance with EU legislation.

2. The compliance of the Bill with the EU legislation applicable to public enterprises

The compliance of the Bill with EU legislation must be drawn in two points. The first point concerns the applicability of the Directive to public enterprises in terms of the Bill (2.1.). The second point aims to determine whether and to what extent the provisions of the Bill would be considered, if passed, as a violation of the EU legislation applicable to public enterprises (2.2.).

2.1. The applicability of the Directive to public enterprises in terms of the Bill

As aforementioned, article 1 of the Directive provides that public authorities means : "*the State and regional or local authorities*".

Article 2 of the Directive states that public undertakings means : "*any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it*".

Public enterprises in terms of the Bill are in accordance with EU legislation in this respect. Article 3 of the Bill indeed provides that public enterprises are established either by the Government of the Republic of Macedonia or municipalities and by the Cities of Skopje. Subsequently there exist in terms of the Bill a relation, that is an influence, between public authorities and public enterprises. The nature of this relation must be however determined in regard to the Directive.

As far as the nature of the influence is concerned, paragraph 2 of article 2 of the Directive provides, as follows : "*A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly in relation to an undertaking: (a) hold the major part of the undertaking's subscribed capital ; or (b) control the majority of the votes attaching to shares issued by the undertakings ; or (c) can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body*". Articles 4 and 17 of the Bill organise the control of public authorities on public enterprises as it is set forth in the Directive.

Consequently the Bill, if passed, would be subjected to the provisions of the EU legislation applicable to public enterprises.

2.2. The insufficient transparency of financial relations between public authorities and public enterprises

As it mentioned above in 1.2., any legal provisions that would not expressly set up a separate accounts system for public enterprises would be regarded as an infringement of EU legislation. It then appears that some provisions of the Bill, if passed, may violate the EU legislation applicable to public enterprises.

The three sub-principles of article 1 of the Directive must be born in mind in order to determine to what extent the Bill, if passed as such, may infringe the EU legislation on public enterprises.

The first sub-principle concerns "*(a) public funds made available directly by public authorities to the public undertakings concerned*". If paragraph 1 of article 5 of the Bill set out the sources of revenues of public enterprises, it gives however no further information, nor even principles concerning the conditions to obtain them. The expression of "*other sources*" is, for instance, to vague in regard to the EU legislation requirements. Similar remarks could be made as to paragraphs 2 and 3. More specifically, it must be noticed that the conditions for the compensation of "*the costs incurred from the performance of such special obligations*" are not even referred to further legal provisions.

The second sub-principle deals with "*(b) public funds made available by public authorities through the intermediary of public undertakings or financial institutions*". Two provisions of the Bill can be particularly considered as an infringement of the Directive. Article 14 indeed provides that the subsidiaries of public enterprises *"are not legal entities*". Similarly, article 15 of the Bill allow public enterprises to "*associate into groups of enterprises*" in which they "*can carry out activities related to development and investment, management, marketing, foreign trade operations, scientific-research and information*". Such provisions prevent to determine accurately the sources of revenues to the extent that no separate accounts are set up between the public enterprises and their subsidiaries or groups. Transparency in terms of the Directive is subsequently not guaranteed.

The third sub-principle concerns "*(c) the use to which these public funds are actually put*". Article 30 of the Bill may violate this provision of the Directive to the extent that the use of these revenues is not enough accurately determined. Besides the "*covering of losses in other public enterprises*" is only set out, but without further conditions, nor reference to other legal provisions. This could be regarded as an infringement of the EU legislation on State aids.

Another remark must be drawn concerning the bankruptcy procedure set forth in article 8. If such a procedure cannot be opened, it seems that a similar procedure can apply. However no accurate conditions of this "second" procedure" are stated in the Bill.

It appears finally that transparency in the sense of the Directive is not sufficiently guaranteed by the Bill. Specific provisions concerning the organisation of the financial relations between public enterprises their subsidiaries and groups must be added in order to make the Macedonian legislation in accordance with the EU legislation on public enterprises. Specific provisions must also be adopted as far as the compensation of the costs of economic activities of public interest is concerned.