Attachment A

The Reform of Public Enterprises according to the EU-regulations

I. General remarks

1. Status quo

Public enterprises are the most important subjects of **public services**, which are provided to meet **public interest**. Normally, these public services generate deficits which have to be compensated for by **subsidies** and other **privileges**. This is also the way public services in Macedonia are provided by public undertakings.

Scope of this component of the project is to bring the **legal basis** for public enterprises presently existing in Macedonia **in line with EC regulations**. It is very important to recognize that the fact that public services are provided for by public enterprises does not automatically mean that they are privileged. Under the auspices of "**community competition and internal market rules"** private and public enterprises have to be treated **equally**. This means in particular that any **discrimination** referring to subsidies, public procurement and granting exclusive rights in form of licences or concessions has to be **avoided**.

Taking into consideration these principles the respective laws in Republic of Macedonia should be subject to some **amendments**. This especially concerns the general provisions of the **Law on Public Enterprises**. But also the **Law on Concessions** and the **Law on Local Self-government** resp. the **Law on Communal Activities** have to be amended.

2. Five steps to the reform of public enterprises

- For the re-enactment of the legal framework of the Public Enterprises a **five-step-procedure** is suggested:
- The **first** step should be the **harmonisation** of the Macedonian Laws which at present appear to be an inhomogeneous patchwork with a serious lack of transparency.
- The **second** step is to bring the national legal framework in line with the EU ideas, principles, primary and secondary legislation (**Macedonianisation).** In some prospective this means that public enterprises must been brought to **competition,** which includes **public procurement**, **control of state aids, liberalisation** from monopolies and other privileges. Concerning the **communal level** most of the existing public enterprises are **not subject to the "community competition and internal market rules".**
- The **third** step – which only should be mentioned here – is the co-ordination of the structures of public services in compliance with the conditions of **European Structure Fonds** to gain a maximum of **donations.**
- The **fourth** step is to maintain the **balance** between the issues of competition, freedom of services, privatisation etc. on the one hand and **Minority Protection,** which is a **fundamental principle of the Macedonian Constitution,** on the other hand.
- The **fifth** step in the future should be the **implementation** of the new framework for public enterprises. Precondition for this is that the institutions in government and on the local level as well as the involved undertakings, which are providing public services, have a clear **understanding** of the **new spirit** and dimensions of the meaning of the EC-Treaty referring to economic activities of general public interest (Art 86 para 2 EC-Treaty). It will take a great effort in **training** and **awareness campaigns** to achieve relevant results.

3. Links between Public Enterprises Reform and Decentralisation

The quality of work of the public enterprises not only means **effectiveness and efficiency** but also **accordance with the dominant ethic standards,** which constitute a **democratic society.** Furthermore, it is based on the condition of the public body in which the public enterprise is incorporated. **Weak communities generate weak public enterprises, strong communities generate strong public enterprises**. Therefore, the reform of public enterprises is closely linked to the ongoing process of **Decentralisation** in the Republic of Macedonia. **Two milestones of this process** now have been drafted in the

- **Law on Territorial Organisation of the Local Self Government in the Republic of Macedonia**
- **Law on the City of Skopje.**

Of course, this legal provisions do not solve the political, economic and social problems which stand against an effective decentralisation, as there are for example

- **Dispute about boundaries** in case of combination of municipalities (ethics and economic conflict)
- The question of **Association of Municipalities** to overtake some public services which cannot be provided by a single community.

In any case the reform of public enterprises must proceed in accordance with the results of the recent decentralisation.

4. Reform Strategy for Public Enterprises

a) Organisational co-ordination

The final issue of the reform of public enterprises in the Republic of Macedonia cannot be understood in the restrictive sense, only to make some modifications regarding the text of the relevant laws as described before. This is the goal of this Project. Besides this there must be a **coherent strategy** to connect all

- **Political** (Government)
- **Programming** (Government, Ministries)
- **Planing** (Ministries, Local Government Representatives)
- **Operating** (Civil Servants, Managers)
- **Executing** (Civil Servants) **levels,** which are involved in the political and administrative decision-making process with influence to the status of the public enterprises. Without a strong **leadership** this co-ordination cannot be successful.

b) Substantial Co-ordination

The organizational co-ordination has to cover multi-sectoral aspects, as they are partly mentioned above. The most important aspects of this substantial co-ordination are:

- **Legal** (EU-law, institutional law, national, law) **aspects**
- **Financial aspects** (definition of costs)
- **Administrative capacity** (institution building)
- **Strengthening of the Courts' capacity and procedures**
- **Managerial capacity**
- **Process of decentralisation and its consequences for public enterprises**
- **Aspects of Protection of Minorities**
- **Social Aspects**
- **Consumer Aspects**

c) Time-Frames Co-ordination

Wrapping up all these aspects in a **comprehensive multi-dimensioned strategy** one has to bear in mind that the different components of such a strategy have **different time horizons**. The elaboration of the legal framework may – based on the results of this Project – last only a **short time, the building of managerial and institutional capacity** is a **long term task.** Also, the process of **Decentralisation** may not be finished within one year as now is declared. In every case the **synchronisation of the sectorial strategies in a step by step process** with the final target of **Harmonisation of the Time-frames** of the implementation of the partial strategies is the pre condition of **a workable system of public enterprises which ensures an acceptable and sustainable quality of public services for the citizens of Macedonia in the future.**

II. Status quo: public services and public enterprises

1. The legal framework in Macedonia

a) The status quo in the field of public enterprises, respectively the Public Enterprise Law

The fundamental legal basis of the public enterprises is the **Law on Public Enterprises (LPE) of 1996**. From the point of view of the European Law it is divided into two parts:

- **Articles 1 to 4** are organising the **general structure** of public enterprises according to the system and principles of "economic activities of public interest" regarding Article 86 EC-Treaty. The harmonisation of these articles with EU-regulations regarding public enterprises is of high importance.
- **Articles 5 to 42** merely contain regulations which are not touched and affected by EU-regulations. Therefore there is no immediate need to make bigger amendments in this part of the Law.
- **Articles 43 to 48** are dealing with the performance of economic activity of public interest on the basis of **licence**. Here might also be a conflict with the general concept of public enterprises as they are legally constituted by EU-law if by means of these licences a **privilegisation** of public enterprises is provoked.

The **Law on Public Enterprises** is, as mentioned before, the **crucial fundament** but not the only law referring to aspects of public enterprises. Important laws which must be – in a systematic summary – linked with the juridical environment of public enterprises are in particular

- the **Law on Self-government**,
- the **Law on Concessions**,
- the **Law on Communal Activities** and
- the **Law on Public Administration and Public Bodies**
- Recently (December 2003) a draft concerning the "**Proposal for passage of the Law on financing of the units of Local Self-government**" was prepared which also has some impact on the capacity of the public communal utilities.

Beyond that it must be noticed that a lot of public enterprises with special issues are organised in **special laws**. So the list of economic activities of public interest which are described in Article 2 of the Law on Public Enterprises in many fields is transmitted and implemented by special laws such as

- the **Law on Energy**,
- the **Law on Macedonian Railways**,
- the **Law on Public Roads**,
- the **Law on Telecommunications**,
- the **Law on Broadcasting Activity**, etc.

These laws establish their own legal statutes for specific economic activities and must not be drawn into consideration regarding the necessity of a reform of the public enterprises.

One of the obstacles of harmonising the legal basis of public enterprises in Macedonia with the EU-framework is that the **terms** and **meanings of public enterprises** are not the same. According to EU understanding a **public enterprise** is an entity which is **owned by the state** or any public entity in which the state has a **major influence**. In the Macedonian understanding of public enterprises they are defined by **carrying out a public activity or a public interest**. This is even declared in Article 1 of the respective Law: "The public enterprises are established for the purpose of carrying out economic activities of public interest".

According to this understanding it is hard to understand for the Macedonian legislation that public enterprises are **not monopolies of the public**. Because the argumentation runs as follows:

- Activity of general economic interest
- Normally, a public service is a transaction involving a loss (deficit)
- So it is done by a public enterprise, which gets a position as a natural monopolist or exclusive rights
- Normally, also the compensation for losses is made by subsidies or by awarding a contract without public procurement.

- Or other privileges.

You con summarize this procedure in the sentence: “Protect the public enterprise and you protect the public service”.

Of course, this understanding is a remarkable **obstacle for commercialisation and privatisation** of public enterprises. This understanding of public enterprises is not in compliance with the EU-law which makes a difference between public enterprises within a private market organisation and public enterprises with a so called natural monopoly.

b) Status quo of the public utilities in the municipalities

To estimate the needs of reform it is necessary to face **the status quo of the public utilities** in the municipalities of Macedonia. There exists a big **non-profit sector** which is partly organised as **public services**, partly as **public enterprises** and partly as **public utilities**. The substantial difference between these three sectors, particularly between public enterprises and public utilities often is not clear. But in general one may say the typical aspect is the **public ownership** of public undertakings as well as of public utilities. Nevertheless, for the purposes of this project it would be useful to clarify the different terms.

The **Law on Communal Activities** of 1997 regulates the elementary conditions and the manner of performing of the communal activities, financing of the communal activities and other issues of importance for the communal activities. It has to be pointed out that the list of communal activities, which is defined in Article 3 of the Law on Communal Activities, is partly overlapping with the definition of “economic activities of public interest” of Article 2 of the Law on Public Enterprises.

In addition to these lists of communal activities further duties and rights of the municipalities are stated in Article 17 of the Law on Local Self-government, which defines the **original responsibilities of the municipalities** which also are carried out partly by public utilities.

Characteristic for all activities of the municipality is that they have to be carried out **in accordance with the law**. That means that they are limited by the laws which define the conditions and the manner of operation. Within these borders the competences of the communal services are specified by **communal orders**.

There is no doubt that the existing legal system of the communal activities partly is hindering the efficiency of their work. But it must be pointed out clearly that all these questions, which are to be resolved in the near future, do not touch the framework of the EU-law. In the praxis of the public utilities on communal level there are only two aspects which might be controversial to EC-regulations. The first is the practice of **cross-subsidies** which takes place between the branches or divisions of public utilities and which equalizes profits and losses. There is no doubt that this is **against the principle of transparency** which is stipulated in several EU-regulations.

The other problem is the way in which **concessions** are granted, which, it may be assumed, is not always in line with **open tendering procedure**. This should be a question which should be clarified also in the framework of the Macedonian Law on Concessions.

It is a fact that presently the **legal fundaments** of local self-government are undergoing a process of **great changes**. Thus, it is difficult to specify the actual necessity of a reform vis a vis the law regarding the public utilities, public enterprises and public services of the local self-government.

c) Privatisation and Minority protection

It has to be taken into consideration that nowadays there is a big **shift** from carrying out all **activities of public interest** by **municipalities by themselves** towards transferring these activities to **private entities** under the flag of **commercialisation**, **separation** and **privatisation**. The content of these terms is defined in different ways, of course. Thus, privatisation does not mean to privatise the ownership of the municipalities in the different sectors of public services but to give concessions to private entities for operating these services. However, there aren’t any obstacles based on EU-law against the idea of involving private enterprises to carry out “economic activities of public interest”.

This shift from public to private enterprises as platforms for public services, of course, leads to serious problems regarding **minority protection**. It is evident that the state can guarantee the employment of

members of a certain minority only if he is the owner of the respective enterprises. To impose this duty on a private owner will be almost impossible on the background of the principles of a free market. 'Whatever the solution of this problem will be in the future – maybe by transitional provisions – the **tension** between privatisation and minority protection has to be considered when building a new public service set-up.

d) Milestones for privatisation

It is necessary to stipulate some **legal milestones** in the Law on Public Enterprises which define the dimensions of privatisation and specify the sectors which should not be privatised in any way, such as water supply.

2. EU-Provisions for public services and enterprises

a) General remarks

aa) Definition of public services

Public services are provided for the general public, which means public services are provided for public interest. The characteristics of public services are certain specific modalities, such as

- Security,
- Continuity,
- Social prices,
- Nationwide supply,
- Transparency.

bb) Who defines the public services?

It is within the competences of the Member States to define public services. Of course, these definitions must be within the framework of EC law.

cc) A specific problem of the public services are the universal services

Universal services make sure that also during the process of liberalisation of a specific market sector the above mentioned modalities are provided, even if this is not guaranteed by the market. In this case the duties of public services are imposed on one of the service providers. Of course, adequate compensation is given. In the long run, universal services also should be submitted to competition and an open market (example: net provider).

b) Public enterprises

aa) Definition

A public enterprise is 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**" (Directive on the transparency 80/723/EEC).

bb) Equal treatment of public and private enterprises

It is very important to recognize that the provision of public services is not privileged only because it is done by public enterprises. Under the auspices of competition private and public enterprises have to be treated equally. According to Article 86, point 2 EC treaty only the public service can be the reason for a specific treatment under the viewpoint of competition.

c) Subsidies

aa) The jurisdiction of the ECJ

Generally public services are generating financial losses for the undertaking providing them. This loss has to be compensated for by the state. This financial compensation leads us to the question of subsidies. A rather comprehensive law on subsidies regarding financing (funding) of universal services (postal services,

telecommunication, public transport, railways) has been in existence already. Now a very important judgment of the European Court of Justice regarding the financing of public services in sectors which are not subjected to specific EU Directives but which are subject of competition (broadcasting, energy supply) has been published, which points out the

> Basic requirements of financing public services without need for notification (Judgement of the Court C-280/00, Altmark Trans und Regierungspräsidium Magdeburg/Nahverkehrsgesellschaft Altmark).

Four conditions have to be fulfilled:

1. First, the recipient undertaking must actually have *imposed public service obligations* to discharge, and the *obligations must be clearly defined*.
2. Second, the parameters on the basis of which the compensation is calculated must be established *in advance* in an *objective* and *transparent manner*, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings. Payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established *beforehand*, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article 87(1) of the Treaty.
3. Third, the *compensation cannot exceed what is necessary to cover* all or part of *the costs incurred in the discharge of public service obligations*, taking into account the *relevant receipts* and a *reasonable profit* for discharging those obligations. Compliance with such a condition is essential to ensure that the recipient undertaking is not given any advantage which distorts or threatens to distort competition by strengthening that undertaking's competitive position.
4. Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a *public procurement procedure* which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the *level of compensation needed must be determined on the basis* of an analysis of the costs which a *typical undertaking, well run and adequately provided* would have incurred in discharging those obligations, taking into account the *relevant receipts* and a *reasonable profit* for discharging the obligations.

It follows from the above considerations that, where public subsidies granted to undertakings expressly required to discharge public service obligations in order to compensate for the costs incurred in discharging those obligations comply with the conditions above, such subsidies do not fall within Article 87(1) of the Treaty. Conversely, a State measure which does not comply with one or more of those conditions must be regarded as State aid within the meaning of that provision (Judgment of the Court C-280/00, Altmark Trans and Regierungspräsidium Magdeburg/Nahverkehrsgesellschaft Altmark).

bb) The elements of subsidies

	Requirements	**effect**
1.	*Imposition* of public service obligations (by state act, law, licence).	Transparency
2.	*Clearly definition* of the public service obligations.	Transparency.
3.	Establishment of compensation-parameters *in advanced*	Transparency; no possibility of manipulation afterwards
4.	Establishment of compensation-parameters in an *objective and transparent* manner.	Transparency; no possibility of manipulation afterwards
5.	*Limitation of the compensation*. It must not exceed what is necessary to cover the costs incurred in the discharge of public service	Prevention of an advantage which distorts or threatens to distort competition.

	obligations; minus relevant receipts plus reasonable profit[1]	
6.	Since Case 280/00, Altmark Trans, the ojective costs („analysis of the costs which a *typical undertaking, well run and adequately provided* would have, minus relevant receipts, plus reasonable profit for discharging the obligations"9 can be compensated.	No possibility to compensate inefficient services.

Important: Where the undertaking, which is to discharge public service obligations, is chosen pursuant to a *public procurement procedure* which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, no subsidy problem exists (no subsidy but „market price").

So we may summarize:

- Funding of public services is in compliance with EC law. If the conditions, which are stipulated in the above mentioned judgement, are fulfilled such fundings are not to qualify as subsidies. They don't have to be notified. If one of these conditions is not fulfilled the subsidy is not allowed.
- If a public service contract was awarded according to a public procurement procedure only the market price has to be paid. In so far, a subsidy does not exist.

d) Public Procurement

In all cases in which the awarding of contracts in the field of public services is done according to the public procurement procedure these public services have to be provided on the basis of competition.

In house procurement: It is an open question whether and to which extend the government can award public services, which in general have to undergo a public procurement procedure, for its own units without fulfilling these conditions. According to the decision of the Court of Justice this is only possible if "in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities (Judgment of the Court C-107/98, Teckal/Comune di Viano, European Court reports 1999, I-08121, Nr. 50).

e) Exclusive rights, licences and concessions

In some cases public services only can be provided on the basis of concessions or licences. All these licences and concessions have to be in compliance with the **freedom of services** and the freedom of **establishment**. Such exclusive rights (licences or concessions) must be in accordance with the principle of proportionality, which means that the concessions and licences have to be limited and any abuse of a dominant position within the common market or in a substantial part of it is prohibited.

f) Monopolies and essential facilities

The most extensive exclusive right is a **monopoly**. Of course, the above mentioned restrictions of licences and concessions are also relevant for monopolies. Normally, monopolies are restricted and liberalised by specific provisions in the EC Directives (such as electricity, postal services, public transport, etc). If such

[1] Court of Justice Case C-53/00, *Ferring SA/ACOSS*, european court reports 2001, I-9067, Nr 27: „In like manner, provided that the tax on direct sales imposed on pharmaceutical laboratories corresponds to the additional costs actually incurred by wholesale distributors in discharging their public service obligations, not assessing wholesale distributors to the tax may be regarded as compensation for the services they provide and hence not State aid within the meaning of Article 87 of the Treaty. Moreover, provided there is the necessary equivalence between the exemption and the additional costs incurred, wholesale distributors will not be enjoying any real advantage for the purposes of Article 87(1) of the Treaty because the only effect of the tax will be to put distributors and laboratories on an equal competitive footing".

special provisions don't exist the existing positions of monopolies can be restricted and limited by the so called **essential-facilities-doctrine**. This doctrine enables competitors to get **access to essential facilities** (such as railway stations, facilities for maintenance, etc) which are necessary for them to play their role as competitors on the market (bottleneck-infrastructure).

III. Options and deliverables

1. General remaks

a) Several categories of public services

According to EU-Law the carrying out of "**economic activities of public interest**" according to the Law on Public Enterprises can be specified by four categories:

- **Public services** which are **operated by public institutions** within government or local government: These public services are **defined by EC-Law**, especially by the European Court of Justice. These public services are to open **state-aids** and can be carried out also in the form of **monopolies**. The question which public services in general can be provided by the public authorities is discussed under Z.
- **Regulated competition**: **Open tender procedure** for private and public enterprises. The winner can also receive subsidies and may have the status of a monopolist. Normally **universal services** are described by specific modalities such as transparency, sustainability, etc.
- **Regulatory bodies**: If **public** and **private enterprises** are **competitors** regulatory bodies have to be set up.
- The last sector is the **private sector**, where private companies carry out public services on the basis of market rules, competition and profit. Here, of course, state subsidies are not allowed.

b) New law or amendments?

The question is whether all these aspects should be summoned up in **a new law on public enterprises** or whether it is sufficient to make some **amendments** to the existing Law on Public Enterprises and also to the Laws which constitute the activities of the municipalities as mentioned above.

To draft **a new law** might not only be beyond the capacity of this project. There are also substantial reasons not to move in this direction. In general it must be stressed that the **existing legal framework** for public utilities in Macedonia is more or less a **sufficient** basis for operating within the framework of the EC-law. It gives **space to privatisation** and **generates separate units**, such as a public utility for parking now to be found in Skopje. To replace the already existing legal basis in favour of a new law cuts of the existing practice of **implementation**. For a new law it would take quite some time to get roots in practical live. This **lack of implementation** bears not only the danger of weakening the existing capacity of public utilities but also – of course – is not of any help in promoting the harmonisation of Macedonian law with EU-law. Thus, the drafting of a new law would generate only **fictive solutions without impact to practice**.

So the options of the present project are clear: On the background of the principles of EC-law as defined above it should be demonstrated which detailed amendments should be taken into consideration covering the different laws which the Macedonian framework for public utilities

According to these comments the next steps of the mission should focus on the elaboration of **guidelines** and **principles of the necessary amendments** of the laws regarding public utilities, particularly the Law on Public Enterprises and the Law on Communal Activities. **Guidelines** and principles, however, should be **simple**, **coherent** and –possibly – **fit for implementation**. Bearing in mind that the national legislation is in a transition period the guidelines must be flexible in order to be adapted and harmonised during the process of implementation. Under these premises it should be avoided that the local drafting machine generates laws which **cannot be implemented** in Macedonia's everyday practice, either because of their **technical complexity** or **lack of political awareness**.

According to these comments the following amendments have to be implemented in the Macedonian Law, especially in the Law on Public Enterprises, to ensure its accordance with EC law:

- Law on Public Enterprises

- The Concession Law
- Law on Local Self-government
- Law on Communal Activities

2. Which public services can be provided by public authorities and which have to be liberalized?

In conclusion of these remarks the following principles for the provision of public services under the auspices of the EU-law can be pointed out:

- In **general**, **all services** which cannot be defined as "**economic activities**" may be provided by **public (local) authorities** (i.e. public bodies or public enterprises). They are not subject to the "**Community competition and internal market rules**". Consequently, the Commission gives the following remarks:

  "More generally, many **activities** conducted by organisations performing largely **social functions**, which are **not profit-oriented** will normally be excluded from the Community competition and internal market rules. This takes into account several non-economic activities of organisations such as **trade unions, political parties, churches and religious societies, consumer associations, learned societies, charities as well as relief and aid organisations**. However, whenever such organisation, in performing a general interest task, engages in economic activities, application of Community rules to these economic activities will be guided by the principles in this Communication respecting in particular the social and cultural environment in which the relevant activities take place."

  State acts like air traffic control, imprisonment, education, etc are no "economic activities" either.

- The same principle is applicable if the relevant public service does not have a **border crossing dimension**. **Local and regional services are not subject to the market rules**.
- Economic activities which are **liberalized by EU secondary law** such as **electricity**, **gas**, **telecommunication**, **railways**, **postal services**, **public transport**, etc are, of course, subject to competition and market rules. In particular, this means the necessity of a **public procurement procedure**.
- In all cases in which the public authority **concludes a contract with a private enterprise** in order to **provide a public service** the **EU-regulations** regarding **public procurement** have to be obeyed. In all other cases the service can be provided by the authority itself (administration) or by its public enterprises (according to the rules of **inhouse-procurement**).

3. Law on Public Enterprises

As we have agreed upon in the extensive discussions of the working group the existing Macedonian Law on Public Enterprises in general consists of provisions regarding the **internal structure and functioning** of the public enterprises. These provisions normally are not touched by EC law. Thus, amendments of the respective law are to be done only in the general provisions of this law in order to bring it in agreement with EC regulations,. Therefore, the following amendments are suggested:

According to the title of the law, a **definition** of the public enterprises should stand at its beginning. This definition should correspond to the EC-definition. Therefore, Art 1 Para 1 should be formulated as follows:

> **"A public enterprise is any undertaking over which the government of the Republic of Macedonia may exercise directly or indirectly a dominant influence by virtue of its ownership of it, their financial participation therein or the rules which govern it".**

Para 2 of Art 1 is misleading and should be deleted.

Article 2

In Art 2 the public enterprises should be linked to the public services. On this occasion it should be clarified that public services not only may be provided by public enterprises but also by private enterprises. Instead of

a definition of public services, which is hardly possible, the law, according to EC-regulations, should give the **modalities** for providing public services.

Although the definition of public services, within the framework of the EC law, of course, is a competence of the Member States it is not advisable to do so because it may limit the competences of the government. Therefore Para 1 of Art 2 should be deleted.

Having considered this Art 2 should be amended as follows:

> **"Public services are economic activities of public interest, which are provided for the public. Providing public services the following modalities should be imposed (granted): security, continuity, social prises, nationwide supply, transparency".**

The conditions and manners of carrying out the public services shall be regulated by a law.

Article 3

The existing Art 3 does not touch EC-regulations. Whether it can be maintained or whether it must be amended depends on the development of the Macedonian Law, particularly of the new Law on Local Government.

Article 4

This Article may also be maintained. According to EC law it should be considered if the **private investors criteria** should not be imposed for funding public enterprises.

Article 5 new

The public service obligations have to be **imposed by law** or a **licence** granted by the competent authority. In this licence the **obligations (modalities)**, which are linked to the public service, must be **defined clearly**. If the financial loss which is generated by carrying out the public service is compensated for by the state, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner.

The compensation cannot exceed what is necessary to cover all or part of the costs incurred in this charge of public service, including a reasonable profit. Only these costs can be compensated for, which a **typical undertaking**, well run and adequately provided, would have incurred.

Article 6 new

One of the most important principles of EC law is the **equal treatment of public and private enterprises**. It is very important to recognize that the provision of public services is not privileged only because it is done by public enterprises. Under the auspices of competition private and public enterprises have to be treated equally. Facing this principle it seems to be necessary to draft a new Article 6, which stresses the equality of private and public enterprises, particularly in the field of public procurement. In addition to this principle the exception of the so called "in house procurement" should be described also.

Art 6 new should be drafted as follows:

> **"Public enterprises are also subject to the provisions of the Law on Public Procurement. The government may award public services, which in general have to undergo a public procurement procedure, for its own units without fulfilling these conditions in case where it exercises a control which is similar to that which it exercises over its own departments (in house procurement)."**

Article 7 new

If public services are provided on the basis of **licences** all these licences have to be in compliance with the **freedom of services and the freedom of establishment**. According to the **principle of proportionality** the licences have to be limited and any **abuse of a dominant position** within the Common Market or in a

substantial part of it is prohibited. The conditions of enabling competitors to get access to **essential facilities** which are necessary for them to play the role as competitors shall be regulated by the Law.

4. The Concession Law

a) General remarks

The Concession Law is linked very closely to the Law of Public Enterprises. Therefore, the harmonisation of these two laws is necessary in order to achieve a homogenous legal basis for operating of the public entities. Bearing this in mind the present quality and constitution of the Concession Law has serious defects, due to the fact that there is considerable confusion about the crucial points of the law, particularly concerning the terms of **concession** and **licence**, the difference between concession **act** and concession **contract**, the provisions for public procurement regarding the concession and also the subject matter of the Concession Law, i.d. public property (note: the translation "property of general interest" is totally misleading and leads only to confusion.) In order to do something against these defects it is not enough to make some amendments of the Concession Law but this law has to be **re-enacted**.

For this re-enactment the following remarks and guidelines should be considered.

b)The term of concession

For drafting a new law it is necessary to have a clear idea what the term "**concession**" means. On the one side it is a permit to perform a **certain activity** and insofar it has the same content as the term "licence". On the other hand "concession" means a permit to **use public property**. Concerning the existing Concession Law it uses the term "concession" according to the second meaning and describes it wrongly – as said above – as "property of general interest".

c) Concession as an state act or as a contract

There must be clear **distinction** between a **concession based on an act of an authority** designated by the law and a **concession which is based on a contract**. In the first case the conditions for granting a concession have to be described in the law. This is what Art 3 of the Concession Law means. But it **does not make sense** to **combine** this concession act with a concession contract and, insofar, **generating a two-step-procedure** with more or less the same issues. (Compare the content of the Concession Act under Art 3 and the content of a concession contract under Art 16). If the conditions for granting a concession are defined by law it is not necessary to determine these conditions by a contract.

d) Licences, Concessions, Permits

Another question which has to be faced on the occasion of re-enacting the Concession Law is the relation between **licences** and **concessions**. Concessions in the sense of permits to us public property often are linked to concessions in the sense of **permits** to perform a certain activity. It does not make sense and, hence, contradicts the principle of homogeneity of administration if somebody gets a permit for the use of land but the permit for a certain activity is denied. Water supply, for instance, is a communal activity in accordance with the Law on Communal Activities and should be carried out on the basis of a licence issued by the local self-government unit, whereas the exploitation of water as natural wealth shall be done on the basis of a concession issued by the government. It is evident that there must be a coordination between these two acts. One solution might be that the performer of an activity for which he applies the licence has been granted **in advance** the right of usage of the public property. So he cannot get a concession without a licence. The other solution might be an **integrated permit** including both, the concession and the licence. Consequently it is necessary to solve the problem of competences involving different administrative units.

If the licence is granted by a state act based on the law the applicant has to fulfil all conditions described in the law. If he has done so he has a right to obtain the concession. If there are more applicants than one, but only one of them can get the concession, the authority has to make its judgement by stating which applicant best fulfils the conditions described in the law. Of course, none of the applicants must be discriminated.

e) Concession and public procurement

As pointed out above a distinction must be made between a **concession based on a state act and a concession on the basis of a contract**. For these concession contracts, of course, the provisions regarding **public procurement** have to be observed. Particularly, there exists a specific Directive for such concessions. Anyway, it is not advisable to make regulations for public procurement also in the Concession Law. The organic place regarding provisions for concluding concession contracts in compliance with the competition aspects is the **Public Procurement Law**. Double provisions only may lead to **intransparency** and higher **bureaucratic efforts**. Maybe in the Public Procurement Law some specific provisions have to be made regarding the concession contracts to bring them in line with EC Directives.

f) Public Private Partnership

Public Private Partnership: In modern administration the granting of a concession normally is not initiated by an applicant but also by the administrative bodies themselves. This is because the administration needs the **cooperation** of private entities for performing special activities successfully. This new form of cooperation between the administrative bodies and natural private persons is called **Public Private Partnership**. A modern law on concession should also have some provisions for this occasion. As a minimum the provisions should refer to the question of the object of a Public Private Partnership. On the one hand the public administrative unit only gives the **concession for the use of public property** to a private person which makes the **investment**, bears the **risks** and – of course – also takes the **profit**.

The alternative to this concept is that the investment is done by the public and the private partnership exists only in **operating or managing the respective activity**. (**facility management** e.g.) Which of these two alternatives should be chosen depends on the issues the public entity is following. If it shares and delegates the risks and investments its **influence decreases** and also the possibility of taking account of its public responsibility. The second version has the contrary effect, namely more risks and efforts but also more **political influence**. However, this modern form of performing public services in any case should be regulated in a modern concession law.

5. The Law on Local Self-government

a) General remarks

The Law on Local Self-government regulates the structure, the functions and the decision making process of the municipalities. Regarding public enterprises the Law on Local Self-government is defective and inadequate. Art 2 defines "Public Agencies" as Non-Profit Organisations for carrying out public services as "public enterprises for the performance of public services …." . Under the title "Public Agencies" also "other types of public services determined by law" are mentioned. In the Law on Local Self-government there are no other provisions which could implement this definition. So, one may say the Law on Local Self-government does not really regulate the existence, institution, functioning and decision making process, financing, etc. of the public enterprises on the level of the municipalities. Facing this lack of guidance it is understandable that the public enterprises of the municipalities cannot work properly. To improve this situation, the principles of public enterprises, formulated by the EC Law, have to be also implemented on the level of the local self-government. This means primarily to correct the present understanding of public enterprises as "Public Agencies", which dominates the definition of Art 2.

b) Roadmap to the Reform of the Public Communal Enterprises

For the enactment of the Law on Local Self-government regarding its provisions for public enterprises the following guidelines should be followed:

- **Harmonisation** of the Law on Local Self-government with the provisions regarding the internal structure, characteristics, establishment, organization, etc which are set up in the Law on Public Enterprises.
- **Definition** of the public enterprises on the local level according to the general definition, which means that this enterprises are not defined by carrying out public services but by their ownership by the communities.

- **Make clear** that the performance of public services is not only a monopoly "of the public enterprises of the local government but also can be performed by private enterprises."
- **Identification** of those provisions regarding public enterprises which have – beyond the provisions in the Law on Public Enterprises – to be specified in the Law on Local Self-government to guarantee a legal basis for proper operation.

c) Core topics

Particular regulations should be drafted for the following topics:
- Establishment of the public enterprise by the municipality
- Organization and management (board) of the public enterprise
- General goals (modalities) of the public enterprises (profit-making, non-profit, loss-making)
- Form and manner in which the municipality 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" (EC-Directive on the transparency 80/723/EEC).
- Financing
- Control of the managerial operations by the political bodies.

c) The Law on Communal Activities

The Law on Communal Activities is the most important law for realisation of the activities of public interest which in most direct way tackle the interest of the citizens. All, that has been said about public enterprises on local level is also incident for the Law on Communal Activities. In the long run the Law on Communal Activities should become part of the Law on Local Self-government because the provisions regarding the public services and public enterprises on local level, which are now spread on two laws, should be **unified** to improve **homogeneity** and **transparency** of the legal basis.

28/01/2004 Norbert Wimmer