Recommendation No. R (93) 7 on privatisation of public undertakings and activities

(Adopted by the Committee of Ministers on 18 October 1993 at the 500th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members,

Recommends the governments of member states to be guided in their law and administrative practice by the principles set out in the appendix to this recommendation,

Invites the Secretary General of the Council of Europe to bring the terms of this recommendation to the notice of the governments of the other European states.

Appendix to Recommendation No. R (93) 7

Scope and definitions

The present recommendation sets out certain principles by which member states should be guided in the interests of natural and legal persons (including groups of persons) in connection with privatisation.

For the purpose of this recommendation:

a. "privatisation" means:

i. the total or partial transfer from public to private ownership or control of a public undertaking so that it ceases to be a public undertaking;

ii. the transfer to a private person of an activity previously carried on by a public undertaking or public authority, whether or not accompanied by a transfer of property;

b. "public undertaking" 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. A dominant influence

on the part of the public authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking :

i. hold the major part of the undertaking's subscribed capital ; or

ii. control the majority of the votes attached to shares issued by the undertaking ; or

iii. can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body ;

c. "public authority" means :

i. any entity of public law of any kind and at any level ;

ii. any private person, when exercising prerogatives of official authority.

Section 1 : Protection of the democratic rights of citizens

Where proposed privatisation or a programme of privatisation is important, whether by reason of its scale or of the number of the public undertakings or the nature of the activities involved, the public authorities should ensure that the general public receives the information necessary for the effective exercise of democratic control. Information should be given on the reasons for the decision to privatise and the conditions under which the privatisation is to take place.

The disclosure of such information should only be limited to the extent that the general interest or requirements of confidentiality guaranteed by law render this necessary.

The public authorities should indicate the reasons which have led them not to disclose such information, unless such indication would of itself prejudice the interests which gave rise to such non-disclosure.

Section 2 : Protection of users' and consumers' rights

In the case of privatisation concerning :

– a public utility, such as the provision of public transport, telecommunications, water, gas, electricity, as well as any other activity determined by national law to be in the nature of a public utility, or

– a monopoly providing goods or services to a large public which will continue to be a monopoly after privatisation,

the conditions of the privatisation should be determined with due regard to the continuity, accessibility (including price) and quality of the service in the public interest. Consultation of consumers or users should take place where this is appropriate.

The interests taken into account pursuant to the previous paragraph should, if necessary, be safeguarded by means of a regulatory authority with effective possibilities to compel compliance on the part of the privatised undertaking or on the part of the person carrying out the privatised activity, or by other effective means including, where appropriate, the availability of speedy and inexpensive judicial or administrative remedies or arbitration.

Before proceeding to such a privatisation, the public authorities should inform, by any appropriate means, the users or consumers of the ways in which they intend to protect the interests taken into account pursuant to the two preceding paragraphs.

Section 3 : Protection of employees' rights

Where privatisation involves the transfer of employees to a new employer, particular regard should be had to the protection of the rights and interests of those employees.

In such a case, the employees' representatives should be provided with full information concerning the conditions of the privatisation which are relevant to the employees' interests.

The information mentioned in the preceding paragraph should be given in due time before privatisation so as to allow the presentation of observations concerning the effects of privatisation on employees' interests and the measures planned concerning them.

Section 4 : Protection of the environment

The conditions imposed on the privatised enterprise or on the person carrying out the privatised activity should have due regard to the necessity to protect the environment.

The privatisation should not jeopardise the possibility of obtaining compensation for damage caused to the environment by the undertaking or activity in question by reason of its operations prior to the privatisation.

Section 5 : Protection of potential purchasers

The procedures for privatisation should be established with due regard to the need for transparency and equal treatment of potential

purchasers. These aims may be achieved by a variety of means, for example, public tender or competitive sale.

Where privatisation involves, in particular, sale by public tender or competitive sale :

a. potential purchasers should receive adequate information to enable them to assess their interests in the privatisation ;

b. potential conflicts of interest involving those concerned with the privatisation should be avoided.

Explanatory memorandum

1. Introduction

1.1 Recommendation No. R (93) 7 is the result of work undertaken by the Project Group on Administrative Law (CJ-DA) under the aegis of the European Committee on Legal Co-operation (CDCJ). The work of the project group on this recommendation was carried out in fulfilment of a particular point of the terms of reference assigned to it by the CDCJ, namely, to examine problems of administrative law which lend themselves to co-operative action at European level and in particular to prepare an appropriate instrument concerning "Privatisation of public services and enterprises, particularly with respect to the question of the useful and possible extent of privatisation in the light of fundamental principles of public law and of safeguards protection the rights and interests of the users of public services."

1.2 This work is a logical sequel to earlier work of the Group (formerly known as the Committee of Experts on Administrative Law) as a result of which, in the interests of protection the individual in respect of acts of the administration, the Committee of Ministers has already adopted a number of recommendations in the administrative law sphere. These concern the protection of the individual in relation to the acts of administrative authorities (Recommendation No. R (77) 31), the exercise of discretionary powers of the administration (Recommendation No. R (80) 2), public liability (Recommendation No. R (84) 15), administrative procedures affecting a large number of persons (Recommendation No. R (87) 16), provisional court protection in administrative matters (Recommendation No. R (89) 8) and administrative sanctions (Recommendation No. R (91) 1).

1.3 The work on privatisation of the project group was undertaken in the light, in particular, of the papers submitted to the Council of Europe's XXIst Colloquy on European Law, which was devoted to the

subject of privatisation and was held in Budapest in October 1991, and of the contributions made and conclusions emanated not only from experts from the member states of the Council of Europe, but also from a large number of central and eastern European non-member states.

1.4 The remit of the project group is directed to questions of administrative law, and it was therefore not possible for the group to address the problems of a political and economic nature which arise in the sphere of privatisation. Such problems are particularly acute for the former socialist countries in the context of the fundamental transformation of their economies following the recent political changes in central and eastern Europe. The project group was solicitous of the views, not only of the experts from the former socialist states which are now full members of the Council of Europe, but also of experts from a considerable number of other non-member central and eastern European countries who attended and participated in the meetings of the group, in the interest of ensuring that the relevance of the recommendation would not be confined to those states in which the market economy is long established.

2. Structure and approach of the recommendation

2.1 The recommendation takes the form of previous recommendations in the field of administrative law adopted by the Committee of Ministers under Article 15 (b) of the Statute of the Council of Europe, that is to say, it recommends the governments of the member states to be guided in their law and administrative practice by the principles which are set out in the appendix to the recommendation. Though the recommendation does not therefore constitute an international convention or agreement having legally binding effects in international law or in domestic law, it may nonetheless be expected that it will be effective in practice in that the due adherence of the member states to the principles which it contains will, as is the normal practice in the case of such recommendations, be monitored by the Committee of Ministers at political level.

2.2 The appendix to the recommendation, containing the relevant principles, commences with a section stating the scope of the recommendation and setting out the definitions of certain key terms, and is then followed by five further sections which deal with the particular topics within the sphere of privatisation which it was considered appropriate to address, namely, protection of the democratic rights of citizens, protection of users' and consumers' rights, protection of employees' rights, protection of the environment and protection of potential purchasers

(of the undertaking or activity to be privatised). The recommendation limits itself to setting out the principles and leaves it to the member states to determine the modalities which ensure the respect of those principles.

2.3 The margin of appreciation thus accorded to member states is all the more necessary given that, even between those member states in which the market economy has long been established, there are widely differing approaches and practices regarding privatisation. The recommendation does not seek to interfere with the discretion of member states in this regard; it does however seek to ensure that, whatever policies they may wish to follow and procedures they wish to adopt regarding privatisation in their particular circumstances, due regard will be had to the need to ensure that certain important rights and interests which are liable to be affected by privatisation are given a certain minimum of protection. The manner in which such protection should be accorded is left to each member state to decide.

2.4 The recommendation has nothing to say to the question whether, in any particular case, an undertaking or activity should or should not be privatised. This is a matter entirely for each member state as it sees fit.

3. The text of the recommendation

3.1 As already stated, the instrument

> "Recommends the governments of member states to be guided in their law and administrative practice by the principles set out in the appendix to this recommendation."

3.2 The appendix to the recommendation

3.2.1 Scope and definitions

The opening paragraph of this section defines the scope of the recommendation by stating the purpose of the principles set out in the appendix. This is to ensure that the interests, by reference to the topics which are dealt with in the subsequent sections of the recommendation, of natural and legal persons (including groups of persons) in connection with privatisation are protected in the law and practice of the individual member states.

For this purpose, it is necessary in the recommendation to define the terms "privatisation", "public undertaking" and "public authority".

"Privatisation" as defined by this recommendation means either the transfer (whether total or partial) from public to private ownership or control of a public undertaking (as defined in the recommendation)

so that it ceases to be a public undertaking, or the transfer to a private person of an activity previously carried on by such an undertaking or by a public authority.

Thus, the subject matter of the privatisation may be an undertaking (effectively controlled by the public authorities in accordance with the definition of "public undertaking" – see below) which is already in existence at the time of the privatisation. The use of the expression "ownership or control" in this part of the definition of privatisation is intended to indicate that it is the transfer of the effective control of the undertaking in question which is the key consideration. This is consistent with the definition of "public undertaking" as an undertaking over which the public authorities may exercise, directly or indirectly, a dominant influence.

Alternatively, the privatisation may involve no alteration of ownership of any undertaking and no alteration of the ownership of any assets, but simply the transfer of the right or duty to carry out an activity previously performed by the public undertaking or the public authorities. Privatisation as defined by this recommendation covers also these types of case irrespective of the form they may take. Thus, on the one hand, the sub-contracting by a local authority of the task of rubbish collection within its functional area, which would mean that the local authority had not divested itself of its responsibility for this public utility but had arranged for the discharge of that function by a private person on the basis of a sub-contractual relationship, would be a "transfer of an activity", as would, on the other hand, for example, the simple transfer by the public authorities, lock, stock and barrel, of an undertaking such as the postal service to some private undertaking.

It has to be recognised that the term privatisation can be used to capture situations other than those covered by the definition in the recommendation. Thus, the withdrawal of monopoly rights guaranteed by law or the withdrawal of state financial support whereby the public undertaking is compelled to operate thenceforth in a competitive environment, to mention but two, may be regarded as forms of privatisation. In the recommendation, however, the concept of privatisation is confined to the two categories of case just described ; these appear not only to be the main categories of privatisation as that concept is commonly understood, but also to be those categories which most obviously give rise to the need for protection of the individual.

Nonetheless, it is recognised that some of the principles in this recommendation may be relevant to changes in the status of public undertakings which fall short of "privatisation" as defined in this recommendation.

Thus, member states should consider the need to apply these principles in the context of a change in the status of a public undertaking which, though not in itself constituting a privatisation as defined by the recommendation, affects the concerns to which the recommendation is addressed. Such would, for example, be the case where a public undertaking which was governed by public law was to be converted into a private corporation, the shares of which remained in the ownership of the state, but which, from the outset was intended in due course to be privatised according to the definition of the recommendation.

The definition of "public undertaking" is based on the existence of a dominant influence on the part of the public authorities over the undertaking. This dominant influence may exist by virtue of ownership, financial participation or the rules governing the undertaking. The definition is identical to that contained in the Directive of the Council of the European Communities No. 80/723/EEC of 25 June 1980 on the transparency of financial relations between the member states and public undertakings (Official Journal of 1980, No. L195, p. 35).

The definition of "public authority" is drawn from the previous recommendation of the Committee of Ministers on Public Liability (No. R (84) 15).

3.2.2 Section 1 – Protection of the democratic rights of citizens

As already stated, the question whether it is advisable that any particular public undertaking or activity should be privatised is a matter for each member state in the execution of its own national policy. However, a privatisation or programme of privatisation may, by reason of its scale, the number of undertakings involved or the nature of the activities concerned, be of such general importance as to require, in a democratic society, that the general public should be given sufficient information concerning the proposal to enable public opinion to be heard. The public may be informed in a variety of ways, for example, through the representatives of the public in parliament, or by means of a white paper or a similar publication, etc., or in the case of privatisations of local rather than national importance, through such procedures as public enquiries. The purpose of providing information is to enable the general public to make informed representations to those charged with the task of making decisions concerning the privatisation. While leaving it to each member state to decide for itself when a proposed privatisation or programme of privatisation is of such importance as to call for the protection of the democratic rights of citizens in this way, and to decide the manner in which such information should be given

to the public, the principle contained in section 1 draws attention to the fact that cases may arise which call for such protection, and recommends that when they do, member states should ensure that the general public is given the appropriate information to this end.

Such information should include a statement of the reasons for the decision to privatise and of the conditions under which the privatisation is to take place. However, it is recognised that the requirements of confidentiality guaranteed by the law, or indeed the general interest (which may, depending on the circumstances, include considerations of confidentiality which are not strictly guaranteed by the law) may call for the imposition of limitations on the disclosure of such information. In such cases it is recognised that the imposition by the authorities of limitations on the extent of such disclosure may be necessary. When this is the case, the public authorities should indicate, at least in general terms, the reasons which have led them to refrain from disclosing such information, unless the giving of such reasons would itself prejudice the interests which such non-disclosure is designed to protect.

It should be stressed that the principles contained in this section only fall to be observed in cases where the public authorities which implement the privatisation retain some discretion as regards the advisability of the privatisation as well as the conditions under which the activity in question will be carried on after privatisation.

In cases where these questions have previously been decided upon by the legislator, democratic control will normally have taken place during the parliamentary procedure and the principle contained in this section will therefore necessarily have been complied with.

3.2.3 Section 2 – Protection of users' and consumers' rights

The privatisation of certain undertakings or activities is liable to have direct implications for the interests of those members of the public who are users or consumers of the product (whether goods or services) of the undertaking or activity in question. This arises in particular where the undertaking or activity to be privatised is a "public utility". The notion of a public utility is not precise but it is traditionally related to such essential activities in the public interest as the provision of gas, electricity, water, public transport, telecommunications, etc. This is not an exhaustive list and the precise definition of the concept of public utility must ultimately be left to the national legal system. A second case in which the protection of users and consumers is of particular importance is where the undertaking or activity to be privatised is a state

monopoly providing goods or services to a large public which will retain its monopoly status after privatisation. The transfer from public into private hands of a monopoly (whether a legal monopoly or a *de facto* monopoly) in respect of the provision of goods or services to a large public is liable to call for special measures to protect the interests of users and consumers after privatisation.

This principle indicates a number of particular concerns to which the member states ought to have due regard. These are:

- the need to ensure that the continuity, accessibility (including price) and quality of the service is maintained after privatisation;
- the need, where this is appropriate, for the public authorities to consult consumers or users to this end;
- the fact that it may be necessary (a necessity which it is for the member state concerned to assess) to provide a means whereby the privatised undertaking, or those in charge of the privatised activity, can be effectively compelled to comply with those conditions of the privatisation which are directed to the protection of users and consumers. These means may, if necessary, involve the setting up of a regulatory authority, or the provision of special, speedy and inexpensive judicial or administrative remedies or arbitration; and
- the need to inform, by appropriate means, the users or consumers concerned in advance of the means by which their interests, above referred to, will be protected.

The principle contained in Section 2 nonetheless leaves it to individual member states to make their own appreciation as to when protection is necessary and as to the best means to achieve it. Thus, the first paragraph of this section calls on the member states to determine the conditions of privatisation with due regard to the interests therein set out; and, in the second paragraph, these interests should, if necessary, be safeguarded in the particular ways therein mentioned. By the words "if necessary" it is intended to recognise that the circumstances of the case, including for example, the existence of competitive conditions in relation to the activities of a public utility after privatisation, may be adequate to safeguard the interests in question without further measures of compulsion.

3.2.4 Section 3 – Protection of employees' rights

The position of employees whose employment is transferred to a new employer consequent on privatisation can be a particularly delicate

matter. The principle contained in this section of the recommendation does not attempt to resolve the difficult economic and organisational problems which may arise in this context concerning, for example, the maintenance of staff numbers and of salaries and of benefits enjoyed by employees prior to the privatisation.

However, it may be stated that the principle in section 3 seeks to encourage member states to provide, for employees, protection of the kinds afforded, for example, in the European Community by Council Directive 77/187 of 14 February 1977 on the approximation of the laws of the member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (Official Journal L61 of 5 March 1977, p. 26). That protection includes the transfer to the new employer of the transferor's rights and obligations under the employment contract as well as the obligation to inform and consult the employees' representatives in good time concerning the transfer of the undertaking to the new employer; it seems also appropriate to envisage such protection in cases of privatisation.

Accordingly, the recommendation calls on the member states to have particular regard to the protection of the legitimate rights and interests of the employees affected, and, in particular, to ensure that the employees' representatives are provided, in good time, with all the information which is relevant to the employees' interests, so as to enable the representatives to present their observations on the privatisation. Implicit in this is the principle that such observations, once furnished, will be taken into account by the public authorities without, however, binding the latter.

3.2.5 Section 4 – Protection of the environment

By this principle, the member states are asked to have due regard to the necessity for environmental protection in the conditions imposed on the privatised enterprise or on the person carrying on the privatised activity. These conditions may be laid down by law or in the contractual arrangement giving effect to the privatisation. Moreover, the transfer of assets and liabilities which frequently forms part of a privatisation, and the other conditions of the privatisation, should not produce the result that persons who, pursuant to national law, would, but for the privatisation, have had a right of action against the public undertaking or the public authorities for compensation for damage caused to the environment by acts or omissions of that undertaking or those authorities committed prior to the privatisation, are effectively deprived in practice of the possibility of obtaining effective relief. The necessity to

ensure that effective relief in such cases can still be obtained, notwithstanding the privatisation, should be addressed at the time of the privatisation.

3.2.6 Section 5 – Protection of potential purchasers

The aims to which member states are called upon to have due regard in this principle are transparency and equal treatment of potential purchasers. "Transparency" implies openness on the part of the public undertaking or public authorities with regard to the disclosure of relevant information ; equal treatment arises not only as regards the provision of information but also as regards all other aspects of the privatisation where there are a number of potential purchasers. The principle points out the usefulness of public tender or competitive sale as a means of achieving these aims but it does not seek to restrict the public undertaking or the public authorities to the choice of these procedures. Nor is it assumed that there must necessarily be a multiplicity of potential purchasers. However, the principle contained in Section 5 refers in particular to public tender or competitive sale as especially likely, in the event that there is more than one potential purchaser, to result, in practice, in the aims stated in this principle being achieved.

The question as to who should be admitted to the position of a potential purchaser, and in particular, whether foreign nationals or undertakings should be allowed to participate in the privatisation process, is a matter for the domestic law of the member states in accordance, if appropriate, with international engagements undertaken by those states, such as the EC treaties.

Where the chosen procedure is public tender or competitive sale, this principle stresses not only the necessity to give adequate information (in respect of which equal treatment is, as already stated, particularly important) to potential purchasers, but also the necessity that those concerned with the privatisation should not be in a position of potential conflict between their private interests and their public duty. In particular, care should be taken to ensure that the persons who participate in the management of the enterprise to be privatised or who are in charge of organising the privatisation are not in a position to take illicit advantage of their situation.

In some member states the concerns to which this section is directed may be addressed by the ordinary private law governing contract and commercial transactions without its being necessary to institute specific procedures.