REPUBLIC OF BULGARIA
COUNCIL OF MINISTERS
CENTER FOR PREVENTION AND COUNTERING
CORRUPTION AND ORGANIZED CRIME

TO
MR. PLAMEN ORESHARSKI
PRIME-MISTER OF
REPUBLIC OF BULGARIA

REPORT

from

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ON: *ANALYSIS OF THE CONCESSIONS ACT, SUBSURFACE RESOURCES ACT, BLACK SEA COAST DEVELOPMENT ACT, WATER ACT AND PROPOSALS FOR MEASURES FOR PREVENTION OF CORRUPTION*

DEAR MISTER ORESHARSKI,

I hereby notify you of the following:

In CPCCOC was conducted an in-depth analysis of the concessioning as an area with high corruption risk given the disposition with public and in particular natural resources. In this regard were reviewed and analyzed primarily the Concessions Act and the associated with it Subsurface Resources Act, Black Sea Coast Development Act, and in particular the Water Act. The in-depth analyses of the quoted laws are presented in a report comprised of 5 chapters, expanded on 182 pages in detail. With this report we are presenting to you a synopsis of the summarized findings on the 4 laws, as well as our motivated proposals for measures for prevention of corruption.

CONCESSIONS ACT

I. Summarized findings and weak points

The following weak points are found based on analysis conducted on the CA:

1.Lack of competition for the choice of the private partner, due to a permitted legal opportunity as well as lack of clear distinction of activities, related to the privatization and the concession subjects, due to an inconsecutive historical development of the legislation:

The Constitution of the Republic of Bulgaria /1991/ marks the beginning of the institute of concession in the new Bulgarian history. It (the institute) is perceived as the highest form of protection for the facilities that are exclusive property of the state /art. 18, para. 1/, as well as for the facilities on which the state exercises sovereign rights /art. 18, para. 2 and para. 3/, and those on which there is an established state monopoly /art. 18, para. 4 from CRB/. The inconsecutive historical development of the legislation subsequently causes a variety of discrepancies, contradictions and gaps between CA and the other laws in this area. The fact that the Commerce Act /LT-1991/ and The Transformation and Privatization of State-Owned and Municipal-Owned Enterprises Act /TPSOMOEA -1992/ predate CA /1995/, and CA predates the appearance of the State Property Act /SPA-1996/, the Regulation for application of the State Property Act /RASPA/, the Municipal property Act /MPA/ and the Rules and

Regulations on the Implementation of the Municipal property Act /RRIMPA/, as well as the tacit extension of the range of subject of CA, given in the interpretative decisions of the Constitutional Court, and the much later arrangement of the concession in the special laws /SRA-1999/, leads to occurrence of corruption practices in the selection of the private partner-concessioner, who has to build and manage the facilities that are state owned for public benefit. **By amending legal provisions of the CA /1997/, 7 exceptions are allowed, which suggest direct selection of a private partner without tender or competition. Special attention should be paid to the possible legal opportunity for the owners of separate parts of the privatized companies to declare their rights to the respective authority within a given period and to acquire without tender or competition the right over mineral resources and assets directly related to their activity.** Thus concessions have been granted without tender and competition for about 400-500 deposits sites, including also for exploitation of natural resources which are important for the national economy, particularly in mining activities, such as Medet, Chelopech, Elatsite, the coastal line of the national tourism resorts "Rusalka", "Elenite", "Dyunite", part of the campsites in the Southern Black Sea Coast and others. **For some of them concession contracts were signed over the years, but it was found, that to date are present 67 concessions for extraction of subsurface natural resources, occurred under privatization deal, which regardless of the two deadlines set in TPSOMOEA and PPCA / Privatization and Post-privatization Control Act /, do not have signed contracts for concession up to this moment. In these cases the enterprises extract the subsurface natural resource until the concession contract is signed, but do not pay concession fee to the state and no control is exercised over them. Until 2008 the enterprises were paying only a payroll fee under the Local Taxes and Fees Act /LTFA/ which is equal to the minimum concession wage. After this up until now they do not pay the state, which leads to financial loses and lack of an instrument for the realization of an adequate control over their activity. Given the fact that the other special laws were not subjected to an in-depth analysis it is not known if there are other unsettled concession contracts.**

2. Lack of a unified, coherent and consistent approach to regulation of the concession in CA and the special laws, which leads to an expansion of separate laws without a global link and thus to gaps and contradictions, allowing occurrence of corruption behaviour.

CA in some cases is a basic common framework law and special laws are applied subsidiary, in other cases, special laws are fundamental and the norms of CA are subsidiary applied. For example, CA is partially applied on certain stages / performance and control / on SRA, on BSCDA a special procedure for granting concessions of coastal beaches is created, and CA is applied subsidiary. The concessions for mineral water sources are granted by a procedure of CA, as far as in the special WA is not provided otherwise. In a number of other special laws - Cultural Heritage Act /CHA/, Physical Education and Sports Act /PESA/, Rail Transport Act /RTA/, Roads Act /RA/, Maritime Space, Inland Waterways and Ports of the Republic of Bulgaria Act /MSIWPRBA/, Civil Aviation Act /CAA/ special rules are provided for granting a concession /period, special requirements/, the concession procedure, the contents of the contract and the control of concession contracts, again in case of a different approach in the legal regulation as a whole. **This unsystematic, inconsistent approach is a reason for the appearance of gaps, which represent a weak point, prerequisite for the occurrence of corrupt behavior.** For example, in the SRA the spending of finances from the municipalities, which are ceded state revenue, is not regulated. The regulation of control is also a problem. In the SRA and WA granting a concession by right is allowed without a tender and in the Maritime Space, Inland Waterways and Ports of the Republic of Bulgaria Act /MSIWPRBA/ with a decision of the Constitutional Court № 3 published SG. Issue 24 from 2014), the establishment "without tender or competition" in favor of a person under art. 112g, para. 1, respectively under art. 112d, para. 1, is declared unconstitutional because of the lack of adversarial (audi alteram partem). Analogical

inconsistent and unsystematic approach is present in the regulation of the secondary legislation - in CA and RACA there is lack of secondary legislation - ordinances, methods, tariffs, etc., which to detail fundamental legal institutes, SRA has a secondary legislation developed in detail, BSCDA has even two methods under different principles – granting a concession and renting, the WA does not have a developed method because the main procedure for granting concessions is under CA /art.5/.

3. Lack of unified, centralized, focused and coordinated state policy determined by:

- the existing fragmented institutional organization between the central, regional and local authorities with different in volume and content authority over concessions;
- lack of clarity and concretization about the number of possible authorities referred in art. 19 of the CA that have the right to grant concessions / example: there is no list of bodies governed by public law that are also authorities under art. 19 of CA /;
- lack of legal requirement for planning and developing of a strategy about the concessioning, which results in the lack of a whole program for the concessioning including planning;
- failure to execute the goals and objectives laid down in the only NATIONAL STRATEGY FOR DEVELOPMENT OF PUBLIC PROCUREMENT AND CONCESSIONS SECTOR FOR 2005-2007 about concessions;
- **on some sectoral laws is accounted the existence of sectoral strategies, most of them existing only formally, not developed or developed but not approved, or partially regulating the matter**. **It has not been established whether they are in sync, unity and consistency. Most often these strategies are prepared by external experts selected under the PPA.** In SRA there is a requirement for preparation of a Strategy for the management of mining waste, but there is none adopted. There is no legal requirement in the SRA to develop a comprehensive strategy for the management, use and conservation of all natural resources under SRA, resp. there is none adopted, therefore there is no comprehensive unified state policy in the area of subsurface natural resources. There is no legal requirement for the preparation of a strategy for management of the beaches and there is no strategy. The prepared and adopted National Strategy for Integrated Development of Infrastructure of the Republic of Bulgaria, National Strategy for the Development of the Transport System of the Republic of Bulgaria up to 2020 are formal, and the project Strategy For The Development Of The Transport Infrastructure Of The Republic Of Bulgaria Through Concession Mechanisms is not adopted. In 2012 was adopted the first National strategy for development and management of the Water sector in RB, which has been drafted up since 2010, but on this stage there is no data whether its implementation has begun and whether it only exists on paper. With the repeal of the Public-private partnerships Act the legal requirement for planning and preparing of a National program for implementation of projects through public-private partnerships was removed.

4. Lack of sufficient transparency and accountability, which creates distrust between the parties, because of:

- lack of legal requirement, fastened with a sanction for the creation and maintenance of the public records on the websites of the authorities under art.19 of CA, for the purpose of accountability and control in the granting of concessions;
- the lack of created and maintained such public registers on the websites of the authorities under art.19 of CA, which is a prerequisite for incomplete and insufficient reliable information and insufficient control over this information;
- insufficiency and poor reliability of the information maintained by the National Concessions Register / NCR /: a discrepancy was found between the separate rubrics of NCR, because of failure of the contracting entities to submit the information on time and insufficient control over the submitted information

5. Lack of sufficient legal regulation on a statutory and sublegislative level regarding:

- **basic principles and legal institutions of the concession:** Towards the CA itself and the Rules and Regulations on the Implementation of the Concession Act (RRICA)

there are some missing secondary legislation acts / fees, methods etc./ which should describe in detail the separate legal institutions with higher complexity including method and time for the assessment of the concession, the concession payment, the method for the assessment of the compensation, the structure of the different types concession analyses, the content of the financial module. These most important elements are commonly assessed by external experts who are chosen in compliance with the Public Procurement Act. In addition, according to the current version of art.10 from RRICA they are assigned and approved by a team for preliminary actions, whereas there are no requirements for the professional competence of the team and after art. 19 the relevant authority can assess and make a decision about the composition of the team, its rights and duties**.**

- the obligatory minimum standards for the services included in the management as well as maintenance of the concession object with the purpose of insuring a continuity and a quality level or regulation of basic principles, requirements, criteria for creating and maintaining of the quality level. In this way every institution that offers a concession is allowed to choose the package of services included in the range of the concession, which does not lead to a full accomplishment of the concession goals

- a lack of unification and standardization is present and regarding the documentation about granting the concession there is a lack of approved model agreements, lack of sufficient methodical instructions with the purpose of equalizing the practice and unified implementing of the CA on the territory of the whole country.

- lack of regulation regarding basic principles in the CA as well: for example, **„the objects of public interest which can be granted as a concession". There is no legislatively arranged, clear criterion for the distinction between them and the other objects that are managed,** which leads to a high number of cases and financial losses, and this is especially true for the municipalities, as it was stated in the conducted analysis of the court practice. Very serious is the problem with granting of aquaculture facilities as a concession – reservoirs, water tanks, which are the most common concessions, granted by the municipalities. Due to their unspecified ownership and a change of the function of the reservoirs after the conclusion of the concession agreement, the concessions are often been stopped before the term set, which is a reason for court proceedings. Also a specification regarding separate unclear legal regulations is lacking – socially acceptable price, economic balance, irresistible force, economic unbearableness, which leads to diverse practice.

- lack of clearly formulated substantive criteria for validation of the concession and protection of the public interest as well as for assessment of potential risks, floating charges and execution of certain activities according to the concession object /e.g. the term „social necessity" can be seen 6 times, but without objective criteria to prove./

- **mixture of substantive and procedural rules, which causes inconformity and inequality in the regulation of separate stages** – e.g. there is no conformity regarding the rules, the conditions and the necessary activities as well as no details about the public partner's decision to start the preparatory stage in compliance with the initiative of the concerned stakeholder, which is a precondition for a different internal regulation, especially in the municipalities.

6. Lack of sufficient administrative, technical and financial resources: The administrative capacity in the departments that execute concession functions is insufficient with respect to number and professional competence. The lack of resources hinders the work, especially in the specific branches /SRA, BSCDA/. In practice, the employees of the administration carry out the organization of the concession activities, whereas in most of the cases the state strategy itself as well as the definition of the most important elements in the concession contracts – period, payment, compensation – are executed by external experts who are chosen in compliance with the PPA, without the presence of any secondary legislation that specifies basic principles regarding the determination of the elements according to CA.

This results in a diverse practice and when incompetence and/or unconscientiousness exist it is a precondition for emergence of corruptive behavior.

7. Lack of effective active control, which includes:

- lack of sufficient reliable expert preliminary control, because of the fragmented institutional structure and sufficient legal regulation. CM cannot cover the weaknesses, identified on all concession stages– planning, programming, preparation of documentation, regardless of the directions given by directorate "Economic and social policy"/ESP/. Practically, the preliminary expert control provided in CA, concerns only the authorities at central level, and from the municipalities control over the granting of concessions is exercised only by the governors, i.e. there is a lack of reliable expert insight, which is a prerequisite for lower quality and too diverse practice. There is also a lack of a provided control mechanism on concessions that are granted by bodies governed by public law. This is the reason for the identification of a great number of lawsuits for breaching the principle of equality and inclusion of requirements, which unreasonably restrict the rights or are targeted at a particular type of entity. This leads to the conclusion that the proclamation of the principles in CA is for the sake of appearances and unsecured without a regulated preliminary control and possibility for imposing sanctions on contracting entities under art. 19 when identifying guiding or restricting requirements.

- lack of sufficient effective control over the implementation of the contracts due to lack of legally regulated principles and requirements for the implementation of each step from the performance of the agreement and lack of reliable administrative and technical resource, exercising control.

8. The compliance of the terms in CA with these in the European legislation is only a mere form – in the Bulgarian CA only the open procedure is covered with a single criterion - the most economically advantageous tender, the term "public interest" is not defined at every stage of the concession, a list of bodies governed by public law is missing.

The identified weak points appear to be a prerequisite for subjective attitude towards the process, and hence to corrupt practices under CA.

II. Proposals for measures for prevention:

In order to eliminate the identified weak points, as well as to create a unified approach and standard and harmonization of the terms for granting concessions in the Bulgarian legislation in compliance with the program document "Europe 2020" and Directive 2014/0437, we propose to be done reassessment and inspection of the existing legal regime when grating the types of subjects of concession, based on the following pillars:

1. Comprehensive and radically new regulation in the area of concessions in order to establish a unified state policy and planning in the area of public procurement and concessions with national significance.
2. Improvement of institutional organization - institutional strengthening and development of the administrative capacity.
3. Improvement of the secondary legislation in the area of the public procurement and concessions and its alignment with the EU legal framework through the development and adoption of secondary legislation on public procurement and concessions.
4. Implementation of a unified practice, standards and concepts in the area of public procurement and concessions.

We believe that the implementation of these proposals will ensure in practice the proclaimed principles of publicity, transparency and equal treatment of all parties involved in public procurement and granting concessions.

I. We make the following proposals on a new regulation in the area of public procurement and concessions:

1.We believe that the differences between the terms "concession" and "procurement" which are indicated in the current legislation are not a reasonable basis for the regulation with separate laws /Concessions act and Public procurement act/. Given the specific regulation in the EC law of the public procurement and concessions, as well as taking into account the regulations of the new Directive 2014/0437, we propose to be considered the idea of creation of a codification law regarding the two forms of PPP - public procurement and concessions in the terms of clear distinction between them. In case of a political solution for regulation and of the institutional public-private partnerships could be given thought to the idea of their inclusion in this codification law, given the fact that they are also a type of PPP.

Reasons: We believe that this will ensure the right assessment and decision of the contracting entity of the most suitable decision for him - whether the execution of a service through a public procurement at the expense of the state or municipal budget is advantageous or a concession for this service at a slightly longer period, but under better conditions. The right decision will ensure a better governance and more efficient use of public resources and taxpayers' money. At the same time a unified approach will be ensured, which will prevent gaps and ambiguities in the legislation and will help for the creation of a unified, purposeful state policy in these areas.

II. Regarding the improvement of institutional organization - institutional strengthening and development of the administrative capacity.

In order to improve the institutional framework for concessions we propose the development of a comprehensive concept that includes the following activities:

1. On political level – creation of a Interministerial Council with Chairman - Deputy Prime Minister and the Deputy Minister of Economy and Energy for realization of public-private partnership /understood in a broader context concessions and public procurement/ with the participation of representatives of National Association of Municipalities. It could be considered the members and the procedure for the operations of the Interministerial Council to be determined by the Council of in analogy to the Interministerial Council on defense industry and security of supplies at the Council of Ministers.

We propose the structure to have the following FUNCTIONS:

- To adopt a draft of mid-term /for example 7 year/ National program for implementation of projects of national significance through public procurement and concessions, as well as IPPP, in case of decision for their regulation, based on planned partnerships and in coordination and synchronization with sectoral strategies with main goal of improving the economic development of the regions of the country.
- To propose to the Minister of finance with the procedure for the adoption of the annual State Budget Procedures list of projects which can be realized through public works concession and concession services and the necessary for that purpose government expenditure /on central and local level/ .
- To review and approve an Annual Report on the implementation of the Program for realization of the projects through concessions and public procurement and IPPP, in case of a decision for their regulation, which to include an assessment of the public benefits /or negatives/.
- Based on information collected from the contracting authorities to adopt a report on the socio - economic results from the concession activity for the respective calendar year and to propose measures for their improvement

2. Expert provision of the operations of the Interministerial Council /Secretariat/- by determining an administrative structure for a permanent secretariat to perform functions of administering the operations of the

Interministerial Council and to aid the organization, monitoring and accountability of concessions and public procurement for facilities of national significance and public-private partnerships, in case of a decision for their regulation such as:

- ensures the preparation of the draft of the a Mid-term /for example 7 year / National program National program for implementation of projects of national significance through public procurement and concessions / and IPPP, in case of decision for their regulation/ based on planned partnerships and in coordination and synchronization with sectoral strategies, by offering the Interministerial Council its approval.
- prepares the draft of a Annual report on the realization of the Program, for the implementation of the projects through concessions and public procurement, which to include an assessment of the public benefits /or negatives/.
- Based on information collected from the contracting authorities prepares a draft report on the socio - economic results from the concession activity for the respective calendar year and a proposal for measures to improve them, which are presented for review and approval by the council.

We propose the expert provision of the operations of the Interministerial Council /Secretariat/ to be performed by directorate "Economic and Social Policy" at CM, in view of the functions of directorate "Economic and Social Policy" at CM, in accordance with the Rules of procedure of CM and its administration and/or from a directorate at MEE.

3. Institutional provision and improvement of the concession activities – Determining an administrative structure for a central authority for the organization, monitoring and reporting activities on concessions, public procurement and IPPP, in case of a decision for their regulation.

Given the fact, that according to the new directive a legal regime on concessions is regulated identical to the one in public procurement, as well as due to the functions previously performed by PPA as an auxiliary body to the Minister of Economy and Energy on the implementation of state policy in the field of public procurement and for reasons of efficiency and effectiveness, **we propose to be considered MEE/PPA to assume the functions of a central authority for organization, monitoring and reporting activities on public-private partnerships, procurements and concessions /and/or institutional public-private partnerships in case of a legal regulation of IPPP/. According to the political decision on the scope of the competences could be given thought to the existence of territorial units by regions.**

For reasons of efficiency and effectiveness could be brought forward the idea this central authority to take over and to also perform the functions of permanent secretariat of the Interministerial Council.

We propose the structure to fulfill the following FUNCTIONS:

- To develop drafts of legal acts and to take a stand on international agreements in the domain of public procurement and concessions; to harmonize the legal framework in compliance with the directives and regulations of the EU in the domain of public procurement and concessions;
- To develop secondary legislation acts, methodical instructions, handbooks, rates etc. in favor of the entitled subjects according the law.
- To develop practical handbooks on specific questions about the performance of contracts regarding the different types of concessions and IPPP, in case of a decision about their regulation (competitive dialogue, analysis of operational risks, methods for calculating the cumulative value /construction price and estimated price of the services / of the project implementation etc.;
- To introduce a uniform practice, standards and terms in the domain of public procurement and concessions, through publishing of methodical instructions about unification of the practice of implementing the law and the connected secondary

legislation acts; including to develop methodical instructions and handbooks in favor of the municipal concessions.

- To develop standard documents and forms for public procurement procedures and concessions in order to implement the best practices.
- To maintain the Register for public procurement. With regard to effectiveness and efficiency we suggest that department "Economic and social policy" at CM continues maintaining the National concession register as it has done so far.
- To collect and summarize the practice of implementing the law and to carry out a monitoring of the public procurement procedures and concessions;
- To inform the European Commission about legal and factual problems on the execution of public procurement procedures and concession procedures and to provide the European Commission with information upon request;
- To maintain a list of external experts who can conduct different types concessions analyses and participate in the executions of the procedures for granting concessions as well as in the public procurement procedures.
- To analyze the activity and the implemented practices of realizing PPP /public procurement and concessions/ on local level in coordination with the National Association of Municipalities and to develop draft suggestions for the improvement of the activity.
- To carry out an assessment of the educational needs of the personnel and to participate in the educational programs.

The education – qualification of the specialists should be directed to:

- Assistance for the creation of specialized educational programs with focus on improving the qualification of the experts who work in the public institutions;
- Stimulation of the private sector's interest towards the forms of PPP;
- Exchange and popularization of best practices in the domain of public procurement and concessions.

At the stage of planning and preparation:

- To collect information about the intentions of the entitled subjects with regard to granting tenders for public works and construction services and public works concessions or service concessions and to compose and publish an Annual plan of the public procurement procedures and an Annual plan of the concessions and PPP. With respect to expedience it could be considered that the investment intentions of the contracting entities for public procurement procedures and concessions about implementing nationally significant projects at conceptual stage with value over the specified limit in the directive /over 5 160 000 euro/, or projects with national importance should be separated in an independent register for the offers.
- To carry out a preliminary control over tenders and public works concessions or service concessions which exceed a certain value and in the case of an opportunity to appeal at the Commission for protection of competition /CPC/ against the decisions of the contracting entities that allowed violations in the conduction of concession procedures and respectively public procurement procedures.
- To approach the competent authorities in order to control the observation of law in case of identified violations and integrated guiding requirements.

At the stage of conduction:

- To guarantee support for the preparation and the negotiations on the partnership contracts;
- To give an opinion on requests from the contracting entities;
- To support the conduction through maintenance of the lists of external experts.

At the stage of contract conclusion:

- To follow and to control the time limits for the performance of the obligation to provide information about a concluded agreement for a tender and granting a concession.
- To summarize the financial analyses of the contracting entities for concessions in a complete financial-economic analysis for the

corresponding calendar year on the basis of the collected information, whereas the analysis should be presented to the secretariat of the Interministerial Council in order to compose the report.

4. Improvement of the Control over implementation of the concession agreement: We propose in order to ensure an effective control over implementation of the concession agreement to be regulated a requirement, by law or regulation, for exertion of control over every stage of the preparation and implementation of agreements, as follows:

- Implementation stage /construction/ - compliance with the technical specifications, deadlines agreed upon, assuming the operational risks by the contracting parties and their recording;
- Operational stage – quality control over the provided service according to the agreed standards; operational expenditure control, control over the schedules for provision of the service/location/.
- Control over accounting of the incurred government expenditure / formation of government debt when allowing additional payments by the state – for example to achieve a certain socially acceptable levels of the service / ;
- Control over the termination of the contract, including the cases before the expiry of the agreed period, which may give rise to obligations to concessionaire in terms of the constructed part of the facility.
- **Independent audit**

We propose in the control to be included and the activity of the bodies governed by law.

We propose a few options concerning the quality exercising of control and execution of the aforementioned functions in order to significantly improve the activity:

1. **Strengthening the administrative capacity of the authorities which exercise control under PPA and CA.**
2. **The control over the implementation of the concession agreements under CA, WA, SRA and BSCDA and other special laws could be organized and governed by internal rules of the respective authority under the specified procedure or way of implementation as follows:**

a/ creation of a permanent administrative structure to the central executive authority;

b/ supervisory authority, under contract by the public partner;

c/ establishment of a committee with variable expertise - appointed with an order of the public authority for each specific contract.

5. For the purpose of publicity, transparency and accountability we propose in the SG to be published all reports of the authorized by law inspecting institutions, including the inspections of the Audit Office and the Public Financial Inspection Agency, oversight committees, etc.

We believe that through the proposed measures for the improvement and strengthening of administrative resources will be ensured the provision of a sufficient regulatory base for the most important elements of the concession, standardization of documents for the award providing effective control of preliminary, current and final stage, which in turn will contribute to the effective compliance with the principles of publicity, transparency and legality.

III. Regarding proposals for improving the legal and regulatory framework for the application of the law and improving the national law implementation:

1. Regarding the definition of the term "concession", we propose a legal concept "operational risk" to be introduced in order to have a clear distinction between public procurement and concessions.
Reasons: The Directive specifically recommends introducing the concept of "operational risk". It includes the possibility that the concessionaire could not regain the investments and operating costs of the awarded works or services under normal operating conditions even if part of the risk remains with the contracting authority or contracting entity. We believe that in addition to a clear distinction between public procurement and concessions, it will prevent unreasonable demands for amendment of the agreement and claims for damages on the part of the concessionaires.

2. Regarding the types of concessions, we propose alignment with the regime in the Directive, namely the regulation of two types of concessions: for works and for service.
Reasons: Given the explicit regulation in the Directive of only two types of concession - works and services, but not extraction, as well as due to the explicit exceptions / Recital / 15 and 40 and art. 12 / concerning water and wastewater, we propose to be considered regulation of the granting of concessions for extraction of mineral waters and natural resources only under the special laws while assuming the basic principles and objectives of the concessioning. We believe that this will remove loopholes in the rules that have been established /SRA/, which will lead to the prevention of corruption practices. In case of another decision we think that a reference from the term "extraction" to the terms used in the European directive - "works" and "services" should be made.

3.As far as concessions under the other special laws are concerned, we propose to approach them in a unified consistent way for adoption of the corresponding amendments to all laws, in order to create a standard, including regarding the concepts.

Reasons: The lack of a unified approach to law implementation leads to a conflict of interest, inefficiency, neglect of public interest, lack of transparency and adversarial (audi alteram partem). The disparity between the concepts of Bulgarian and European legislation creates an opportunity for granting a concession based on special laws, which are not harmonized with each other, and this practically favors some natural or legal persons.

4. When introducing the exceptions from the scope of the concession, according the requirements of the Directive – particularly when granting concessions awarded to an affiliated undertaking /art. 13/ concessions awarded to a joint undertaking or to a contracting entity who is a part of a joint undertaking /art.14/, concessions between public sector entities /art. 17/, we propose to establish a mechanism for competition. We propose to be provided and to be clearly defined the criteria by which the contracting entity will chose the affiliated undertaking which will perform the respective service, works and how will be determined the price in these cases given the fact that these companies are created to serve contracting authority respectively associated with it companies, and therefore their profit should be lower. In these cases it is necessary to be provided a control mechanism.

5. In order to establish a clear criterion for distinguishing between concessions and other forms of PPP, we propose in the law to be defined the term "public interest", whilst ensuring its interdependence with the rest of the other legal institutions and concepts in the law, and not only a formal compliance.
Reasons: The public interest should be brought to the fore at all stages of the concession. CA should set itself the objective to protect the public interest in the implementation of a certain activity related to public works, supplies and services.

This will lead to an impact on the standard of the service – the services offered by the concessionaire, their quality and especially the lower price for the citizens.

6. For reasons of clarity in the regulation of the subject, we propose the services that are subject to concessioning to be listed in an Annex to the law.

7. In order to avoid lawsuits, we propose to be established a clear criterion for distinguishing between facilities of public interest, which can be granted of concession and the other facilities that are public and public-private or municipal property.

8. For reasons of clarity, publicity, transparency and accountability, we propose creation and maintenance of a public register of the facilities of public interest by the authorities under art. 19 of the CA that can be a subject of concession. The register should contain electronic records with a database and circumstances for each subject in order to provide quick access to the concession files and execution of effective control. We consider it necessary that this register is maintained as a part of the National concessional register, as well as on the websites of the respective authorities. This proposal also applies to water facilities, for reasons of clarity about their purpose. With a view to completeness it is appropriate such public register to be maintained and for the other facilities, and this is particularly relevant for the municipalities.

9. The clarity in the regulation of the concession should also include clarity regarding the subjects which have assigned functions under this law:

- In CA is given a definition of the term "concessionaire", but a definition of the term "concession granting authority" is missing. In art. 15 of CA there is only a list of the concession granting authorities. We propose to be defined the term "concession granting authority" in view of a unified and a consistent approach in the outlining of the range of the subjects and a clear outlining of the scope of their competences.
- We propose in addition to the new draft-law to be compiled a comprehensive list of bodies governed by public law, empowered by a law to grant procurements or to grant facilities of public interest under concession, which to be updated regularly. The goal is to achieve full compliance of the concept with the EC law, which to refer to a way of indication, and not only to a formal general definition.
- We consider that in the regulation of the term "bodies governed by public law" it is appropriate to be made differentiations in the legal regime concerning the competence of bodies governed by public law and the competences of the central and local authorities in the area of granting concessions.

10. Introduction of national value thresholds for the types of concessions, in accordance with those on public procurement. We propose in the draft law also to be made and a differentiation of the public works concession and the service concession while taking into account the estimated value of the concession.
Reasons: The introduction of national value thresholds will lead to a different regime of granting and consequently to flexibility and this in turn will allow access to more companies and mostly access for SMEs.

11. We propose the assessment of the types of procedures for granting concessions in order to achieve compliance with the new Directive while preventing corrupt practices.

12. We propose in the law to be created a legal obligation for establishing a unified, purposeful and coordinated state policy on concessioning in three stages: planning, conduction and control:

- Introduction of a legal obligation for the entities, granting concessions to annually provide, within a specified period, information on upcoming intentions for granting concessions of public interest, by analogy with the disclosure requirements of public procurement.
- We propose on the basis of a summarized annual plan for the upcoming concessions preparation of general Annual plan for PPP /procurement, concessions and PPP/ in order to support the preparation of the National Program for the implementation of PPPs.
- Development of a National program /strategy/ - long-term or short-term for concessions, on the basis of summarization, coordination and synchronization with the sectoral strategies.
- Preparation of a report on the performed activities. We propose in the cases when PPP is of national significance to be considered its approval to be executed by the NA, and not by CM, to ensure sustainability of the results.

13. Introduction of ex ante control over documentation for granting concessions above a certain value.

Reasons: This will improve the implementation of the law and will ensure equality, non-discrimination and uniform practice under this law. In addition this will cover the currently lacking in CA expert control over municipal concessions. According to art. 103 of CA, control over the decisions of the mayors has the municipal council, the governor and the Minister of defense, Minister of Interior and the Chairman of State Agency "National Security", regarding the circumstances under art. 12, para. 2 of CA; **i.e. the control is insufficient in order to ensure uniform practice in the application of the CA.**

14. In order to effectively ensure the proclaimed principles of equality of all participants and non-discrimination **in addition to ex-ante control, we also propose introducing sanctions for contracting authorities, for which it was found to have included guiding or discriminatory requirements in the documentation.**

Reasons: In themselves the principles of equality and non-discrimination laid down in Art. 1 cannot guarantee observance by contracting authorities due to the lack of effective guarantees for their securement. Besides the introduction of ex-ante control is appropriate also to be considered introduction of sanctions for authority under art. 19 in the case of a permitted and identified violation of the principles.

15. Compilation of a public list of experts who can assist in the concession analyses and/or financial model and/or to participate in the conduct of assessment procedures and choice of the contracting authorities.

Reasons: This will lead to reduction of the period of preparation of the documentation and / or conduction of the procedures and in particular the documents justifying the concession.

16. To be created legal norms or regulations, with which can be detailed and clearly regulated substantive criteria to substantiate concessions for a real protection of the public interest. We consider it necessary to be developed secondary legislation which to arrange:

- The basic principles and methods of calculating the amount of investments in long-term contracts for works concessions and / or mixed contracts for works concessions and service concessions;
- The methods for determination and allocation of operational risk of exploitation;
- The mandatory indicators and methods / models / for calculating the maximum concession period.
- The procedure and manner for determination of the concession payment.

Reasons: According to art. 8 of the current CA, the possibility to provide compensation and to pay a concession royalty shall be determined by the decision to initiate a concession granting procedure, depending on the economic effectiveness of the exploitation of the subject of the concession, as defined on the basis of: **the period of the concession and the estimated costs of building, maintenance**

and management of the subject or management of the service and exploitation revenue. There is a lack of regulation indicating the basic principles and methods for calculating the period of the concession, which is a precondition for various practices and opportunity for corrupt behavior when unconscientiousness is present.

17. To be developed legal and/or subsidiary regulation for reasons of clarity upon determining the compensation /additional payment to the concessionaire/, the conditions under which there should be such, the acceptable forms and methods /financial instruments/ for the determination of the compensation. To be defined the terms "socially acceptable price" of the services and to be introduced clear criteria for when there is "public necessity" present and how that should be proved.

Reasons: The determination of the compensation is extremely vague under the current regulations. According to art. 6, para. 2, item 1 of the CA, the compensation under art. 1 shall not excuse the concessionaire from assuming the risk associated with the building and/ or management of the subject and with the management of the service and shall be allowed where it **is necessary to**: attain a socially acceptable price of the service of general interest, or restoration of the subject of the concession after occurrence of a force majeure. **The meaning of the term "socially acceptable price" is unclear due to the lack definition in CA, as well as in RRICA. The norm is declarative and unclear and allows each subject of CA to subjectively decide on what is a socially acceptable price, which can lead to diverse practices including corruption. There is a lack of legal regulation concerning the additional legally laid down criteria for the definition of the term "socially acceptable price" of services and for determination of the procedure, manner and conditions for this.** With the abolition of the words "when the price is determined by a regulatory" in 2012, the norm becomes even more vague and loose. **This is proved also by art. 8 and art. 28, para. 1 item "h" of the CA. In addition,** the interpretation of the term "necessity" in terms of achieving socially affordable price of services implies clarity and certainty in the decision to open the procedure, but at the same time CA has not defined how and with what will be undoubtedly proven that there is a necessity for compensation. The assessment of whether any compensation is necessary will be subjective. **The lack of legal or subsidiary regulation about the principles and manner for the determination of the period of the concessions, as well as the fact that practically these elements /period, compensation, concession payment/ are determined by the analyses, conducted by external PPA experts and are adopted from the experts of the team for preparatory activities, for which there is no requirement of professional competence,** is a precondition for corrupt behavior.

18. **Assessment of the documents, grounding the concession – types analyses and /or financial model, content and related requirements with a view to a full replaceability between them and an identical approach to the regulation. Introduction of a secondary regulation of the structure, the content and the requirements towards the analyses and the financial model as well as concerning the procedure and the way of defining the size of the return rate.**

Reasons: Currently a contradiction and incompleteness regarding these documents are present in the working CA. According to art. 21, para. 2 of the CA, the argumentation can be based on concession analyses and/or on a financial model. From 2011 requirements towards the different types analyses are enclosed to RRICA, whereas the requirements towards their structure fell away from RRICA. A secondary regulation of the financial model, content, form and structure is missing. A prepared sample of a financial model exists; however, it is a supplement to the Public-private Partnerships Act which is under abolition process in the NA. There is a lack of logic concerning the use of the words „and /or" which allow the simultaneous or alternative usage of the documents. A regulation of the difference between them in case of a cumulative implementation does not exist. It is also unclear if the financial model contains legal, technical, ecological or another type of analysis and if it can replace

entirely the diverse analytical approaches. In addition, according to art. 65, para. 4 of the CA, the financial model is an unseparated part of the offer, but there is no requirement for the inclusion of the types of concession analyses as an obligatory matter to the agreement. According to art. 67, para. 2, item 21 of the working CA the agreement should contain the size of the return rate of the concessionaire which is defined by the financial-economic model together with the approach for its calculation, accounting and control, which requires an obligatory development of a financial model, but at the same time art.21 allows it to be not obligatory. It is not anticipated that the types of analyses are also supplements to the agreement with a view to uniformity and guarantee of effective control. A secondary regulation of the **order and approach to define the size of the return rate is missing.**

19. To introduce a training for the employees in order to conduct the analyses and to prepare the documents from the experts of the public partner. In this respect we consider the introduction of an obligatory requirement for the qualification and professional competence of the team members for preparatory actions necessary and appropriate.

20. We suggest that in the new law the term "economic balance" should be clarified in order to prevent diverse practice and to remove the vagueness.
Reasons: We believe that in the current regulation the term "economic interest" is a general formal norm that is in a certain contradiction to the subject matter of art. 70 and 71 of CA, so a collision between the two norms is apparent, which is an occasion for proceedings in court, according to the researched practice of the municipalities. In art. 11 of the current CA it is stated that the concession shall maintain an economic balance which represents the balance between the benefits and risks under the terms and conditions of the concession agreement. The logic leads to the conclusion that the violation of the economic balance is a reason for a change of the agreement, which expands the range of art. 70 that regulates the grounds for an amendment of the concession agreement. There is a discrepancy between the subject matter of the norm in art. 11 and art. 70 and art. 71, respectively a collision between both norms.

In addition, in art.10 of RRICA it is stated that the preparatory actions start with the publication of an ordinance from the respective authority according art. 19 and not with a decision according the statements in art.20 of CA. In this respect we believe that the meaning of the terms should be clear and should not allow hesitation. With regard to this observation the removal of the term contradiction in the current CA and art. 10 of RRICA is appropriate.

21. We suggest an estimation of the periods for submission of applications and offers as well as their shortening.
Reasons: The directive also foresees a shortening of the time periods for submission of an application. According art. 39 of the directive the contracting authorities or entities take into consideration the complexity of the concession and the time needed for the preparation of offers or applications when defining the terms for the submission of applications or offers, and it cannot be less than 30 days from the date of the tender announcement or a minimum period of 22 days in the cases when the procedure is conducted at consecutive stages from the date of the invitation receipt.
22. Assessment of the selection criteria - suitability for pursuing professional activities and technical capabilities and / or professional qualification.
Reasons: According to art. 26, para. 1 of the CA, The Commission for the procedure selects the tenderers eligible to participate in the concession granting procedure, as one of the criteria is "suitability to pursue professional activity", which is proven by enrolment in a professional or trade register where such enrolment is required pursuant to the legislation of the state in which the tenderer is established. Given that in the trade register are registered all traders this criterion is not sufficient to prove pursuance of professional activities. Furthermore, there is a partial overlap of this criterion with the criterion „ technical capacity and professional qualification ".

23. We propose legal or secondary legislation in order to create standard of the service.

Reasons: According to art. 3, para. 4 of CA and art. 4, para. 3, The management and maintenance of the subject of the concession shall include the maintenance of the availability of the subject and of the services and economic activities which are performed therethrough, and the ensuring of an uninterruptability and a level of quality of the services provided in accordance with the clauses of the concession agreement. **There is a lack of legal standard of the service – there is a lack of legal or secondary regulation concerning the services included in the management and maintenance of the subject of the concession in order to ensure uninterruptability and a level of quality. Thus making it possible every authority that grants concession to set on its own the package of services, included in the concession,** which is a precondition for the occurrence of corrupt practices related to incompetence and poor performance of the service.

24. Assessment of the remaining documentation on granting concession, development of unified /standardized templates/ of the separate types of documents by the type of concession and public disclosure.

Reasons: The new legislation can lead to a necessity of new document or to modification of the existing ones. The objective is to relieve the contracting entities, particularly municipalities and shortening of the period of preparation of the concession.

25. We propose inclusion of special requirements to the contracts according to the type of concessions and approval of model documentation, in particular model contracts. **This will supplement the standard of the service. We propose in the cases of works concessions an introduction of individualization of the territory, on which will be built or expanded the subject of concession, reference to the subject and subprojects that will be constructed and/or reconstructed and/or rehabilitated at the concessionaire's own risk.** We believe that the standardization of documents and in particular the creation of a standard contract and framework, as well as setting uniform requirements, will lead to the prevention of malpractices, such as the ones identified in the analysis of cases on audit reports of the Audit Office.

Reasons: Under art. 65, para. 3 of CA is regulated, that in compliance with the notice the concession agreement shall state the conditions determining the economic balance and any factual or legal circumstances relating to the subject of the concession and/or the service of general interest, whose occurrence or change may lead to disturbing the balance. The norm is general and vague, which makes its implementation difficult or leads to formal or poor performance of various contracting authorities, which is proven by analysis of cases.

26. We propose in the new law to be specified the moment from which the public partner can dispose with the part that should be its belonging in the case of works concession.

Reasons: In the current provision of art. 15, is specified that until the concession agreement is terminated the state, the municipality and the body governed by public law may not dispose of the subject of the concession or part thereof, including any of its accessories. There is a lack of norm specifying the moment from which the public partner can dispose with the part, that should be his belonging, in the case of works concession, which is not in his interest.

27. We propose the ownership of accretions and improvements to be approached in the same manner, regardless of the ownership of the facilities in order to protect municipal property.

Reasons: There is a difference in the regime concerning any accretions and improvements of the subject of a concession, including any of its accessories, which are public state or municipal property, shall become property of the state, respectively of the municipality, as of their materialization. The ownership of the accretions and

improvements of the subject of the concession, including any of its accessories, which are public property become property of the state from the moment of their as of their materialization, and those which are private state or municipal property or property of a body governed by public law, will be provided for in the concession agreement, which is detrimental of the municipal budget.

28. We propose to be regulated clear and objective criteria for determining and proving the necessity of partial expansion, partial reconstruction, partial rehabilitation or repair of the subject of concession, as well as to be regulated differentiating criteria in order to distinguish the works concessions from service concessions, when they include performing partial construction and assembly works.
Reasons: In art. 4, para. 4 of the current CA, is stated that a service concession may include the performance of partial building and erection works where there is a need of partial extension, partial reconstruction, partial rehabilitation or repair of the subject of the concession.
29. We propose in the new law explicitly to be regulated a maturity, after which the non-fulfilment of the obligations by the concessionaire to be paid off or the contracting authority is entitled to uniliterally terminate the contract without notice.
Reasons: In art. 76 the concession granting authority is given the possibility to terminate the agreement without allowing a time limit for performance if the concessionaire fails to fulfil a condition for implementation of the concession or of a principal obligation defined by the decision to initiate the concession granting procedure. **The lack of specified in the law maturity, during which is ascertained non-fulfilment, allows various practices of the different contracting authorities, chicaning of rights and manifestation of corrupt behavior.**

30. In order to ensure fulfillment of the obligations we propose to foresee a mechanism for joint responsibility between subcontractors and concessionaire in case of failure of the concessionaire to fulfil the agreement.
31. We propose clear unambiguous regulation concerning reasons for amending the contracts including a clear indication under what conditions should be performed a new procedure. In this regard we propose in the model contract to be defined the term "unforeseen circumstances", to eliminate the possibility of subjective broad interpretation of the parties on the necessity, which requires the award of additional works, unforeseen in the contract or alteration of the volume and type of construction included in the contract. **When reviewing concession contracts in NCR it was found a broad and diverse practice, including the ability to transfer the concession to a third party in case of unforeseen circumstances.**
Reasons: In art.70 from CA are specified the grounds for amendment of contracts. The statutory possibility of extension of the agreement is regulated under two vague conditions. With the words "including as regarding the subject " is allowed opportunity to expand the facility, which should be done with a new concession, but **in CA is not specified under what conditions should be conducted a new procedure.** The definition of the term "unforeseen circumstances" is missing, which leads to a possibility for subjective broad interpretation of the parties regarding the meaning of the term and regarding the necessity, which requires the award of additional works, unforeseen in the contract or modification of the volume and type of construction included in the contract.

32. We are proposing in the regulation of the preparatory stage a statutory or sublegislative level to have uniformity and equality regarding terms, conditions, and the necessary actions requisites of the documents for launching, as well as in the cases of an initiative by the Authority under art. 19, and in the case of initiative of the interested person.

Reason: In chapter 3 "Preparatory steps ", art. 20 from CA, are regulated the conditions, under which begin and are conducted preparatory actions, in case that there is an initiative of the interested person. There are no set requirements in CA and in PPCA regarding the content of the decision of the competent authority under Art. 19 of the CA, given the fact that the initiative of a third party is aligned in art. 20 to the decision of the authority, **resp. there is a lack of uniformity and equality regarding terms, conditions and required actions and requisites of the documents for launching pre-preparatory stage.** The lack of norms in PPCA or other regulation, which to regulate the conditions for launching in these cases, the requirements to the decision for launching of the relevant authority and milestones, leads to possibility of subjective decision of the various contracting authorities on the conditions, actions and stages in these cases, as proved by the practice of municipalities.

33. We propose in the new law to be distinguished between the substantive norms and the procedural rules, whereas in CA the main focus should be on the substantive norms.
Reasons: In PPCA there is a mixture between the substantive and the procedural rules. The systematic and logical interpretation of the text leads to the conclusion, that art. 33 of PPCA /concerning a requirement necessary education and qualification of the member of the committee for the procedure for granting concession/ and art.36 of PPCA, should be in CA /art. 46/, where are stipulated the substantive conditions for the committee and not in PPCA. Analogously this applies to art. 52 of PPCA which governs the presentation of the affidavit of participant-foreign entity and its legal value. The systematic place of the text in art. 52 of PPCA is in art. 26 of the CA.

34. We propose to be regulated the rights and obligations of the team for the preparatory actions and requirements for professional qualification of the team members.
Reasons: In art. 10 of PPCA are specified the requisites of the decision for initiation of the preparatory actions. There is no requirement towards the education and professional qualification of the team members, and it is not clear what are their rights and obligations. We believe that the lack of sufficient professional competence would have a negative effect on the fulfilment of functional obligations, because thereby is reduced the risk of detection of the violation and from possible consequences and sanctions for the perpetrator. Given the complex nature of the concession is appropriate to be included experts with professional qualification, which allows proper preparation of the documentation and identification of the most important elements: period, concession payment. **If the people included in the team are competent, it will not be necessary to attract consultants or external experts.**

SUBSURFACE RESOURCES ACT

I. Concluded statements and weak points:
On the basis of the conducted analyses of SRA the following weak points were identified:

1. Lack of competition for the choice of the private partner due to a permitted legal opportunity as well as lack of clear distinction between activities related to the privatization and the concession objects due to an inconsecutive historical development of the legislation and proved by the following facts and circumstances:

- The owners of autonomous parts of the privatized associations acquired entitlement to the subsurface resources and assets which are directly connected with the activity without a tender and a competitive tendering procedure. **To date it was found that regardless of the two given time periods in PPCA / §17a of the transitional and conclusive**

provisions (TCP) - deadline 30.09.2004/ and in CA /§4, para. 2 of the TCP - 31.03.2007/ 67 concessions with contracts outstanding exist, which results in financial losses for the public budget and the relevant local authority/. Until 2008 the associations have only paid a **payroll tax** according to LTFA that equals the minimum concession wage/ and this exemplifies **a lack of control over the exploitation of the corresponding deposit sites.**

- The lack of competition for the choice of the private partner is also apparent in the statutory regulated opportunity for a **direct granting of a permit for prospecting and exploration and concession for extraction.**

2. Lack of a uniform, centralized, result-oriented and coordinated public policy, proved by the following facts and circumstances:

- **Lack of a normative obligation to develop a Strategy for the exploitation and protection of all groups subsurface resources/SR/, not only of the mining SR.** art. 7, para. 2, item 1 of SRA regulates an obligation of the minister for economy and energy to prepare and coordinate a strategy for the development of the mining industry. This proves that **SRA is created as a "mining law" and is not** related to and effective for all subsurface resources, in line with their significance for the economy.
- **Lack of an approved strategy for the development of the mining industry, according art. 7 of SRA:** It has been established that in compliance with SRA the MEE together with the Mining University Leoben, Austria, the University of Mining and Geology "St. Ivan Rilski" developed and presented for a public discussion a draft of a **National strategy for the development of the mining industry** which was coordinated according art. 32 of the Rules of procedure of the Council of ministers and its administration (RPCMIA), but the draft is not yet approved. In 2012 the Chamber of Mining has developed a new draft of a Strategy for the development of the mining industry, but this draft is not elaborated by the government, respectively there is no government policy regarding the subsurface resources. **Until the present moment the strategy has not been approved.**
- **Formally existing regulations of art. 8 and 9 require that geological research in the Republic of Bulgaria which is funded by public means should be conducted in accordance with the procedure of PPA,** *whereas MEE develops and finances the priority themes* and the related annual tasks in the domain of geology. The reason for this is that there is no strategy for the management of mining waste approved by CM and there is also not a strategy for the exploitation, management and protection of subsurface resources as a whole. There are no geological examinations funded by public means because of the lack of financial means. This proves that a government policy in the domain of using and protecting all natural resources is missing.
- **An ineffective, irrelevant and unprofitable for the state methodology for defining the concession wages according SRA – the methodology dates back to 2007 and should be updated with a view to the public interest.**
- **The interest in the topic concessions for extraction of subsurface resources is high. /It has been established that** at this moment on the territory of the country 236 permits for prospecting and/or exploration and 495 working concessions for extraction of subsurface resources exist, putting into operation through the granting of concessions over new deposit sites awaits, an investor interest has been shown with 478 submitted applications for the granting of concessions for extraction. There are no granted concessions and permits for mining waste./ **Due to the lack of planning, strategy and uniform government policy in the domain of using and protecting the**

natural resources a violation of basic ecological requirements as well as other consequences with great significance can be expected.

3. Lack of sufficient administrative, technical and financial resources - The functions of the minister for economy and energy are currently carried out by department "Natural resources and concessions" where 48 experts are employed. In general, they execute 29 duties. The employees are extremely embarrassed and overloaded. A sufficient administrative capacity for the fulfillment of the functions is lacking, in particular for the monitoring of the concession agreements when taking into consideration the necessity of specific knowledge /mine surveyors, coordination of rational designs etc./. There are no sufficient financial means to buy technic that could be used for the different types of measurements which give an account of the performance of the agreements, also financial means for the conduction of geological examinations are lacking.

4. Deficits in the statutory regulation regarding:
4.1.The procedure in art.29 of SRA for acquiring a concession for extraction by right .

It has been established that up to the present moment in MEE there are around 190 pending legal procedures for direct granting of concessions for extraction of subsurface resources according art. 29 of SRA. Some of the quoted administrative proceedings started with applications submitted back in 2001. A series of the submitted applications are not set in accordance with the legal requirements and some of the enclosed materials have to be specified with a view to the executed coordination under art. 26 of SRA of the concession area covered. In these cases letters are been send to the applying concessionaires where the deadlines for submission of documents are defined, considering the time needed for their creation and submission. However, despite of the repeatedly send notifications a lot of the candidates do not submit the necessary documents in order to continue the procedure. In most of the cases the applicants do not have an economic interest in developing the deposit sites anymore, because of meanwhile occurred changes in the investment environment. As a result, the administration cannot close the procedures which remain in the category "pending" for years, whereas the state cannot make arrangements with the deposit sites registered in the National balance of supplies and resources since the applicants have formally complied with the requirements according art. 29 of SRA.

4.2. **A legally regulated opportunity for termination of the concession agreement due to a proved objective impossibility to extract within the defined deadline or introduction of specific terms in order to guarantee the economic balance of the contracting parties.**

It has been established that the concessions on which extraction activities are not going to be pursued are 72 for the first quarter of 2014 and among the reasons are existing problems with the land use above the deposit sites /change of the ownership and the use, e.g. change of the use of agricultural land, change of detailed spatial plans, property expropriation/. According to the SRA the concessionaires should pay a concession wage regardless if a real extraction is taking place. In the cases when they do not have the opportunity for a real extraction because of prosecuted cases in court or procedures for change of the use of agricultural land, they pay and practically set up a claim against the state right after that /resp. against MEE/ because of a impossibility to pursue extraction. **In practice, an objective impossibility to realize extraction is at hand and in SRA there is no foreseen reason for termination of the concession agreement because of this, meaning that a liquidation of the concession is not possible in case that the concession is not exercised in a specific period of time, e.g. in a period of 5 years after the conclusion of the concession agreement. Regulated and specific terms are missing by analogy with Directive** 2014/0437 or with the **commercial law such**

as „operational risk", „economic unbearableness" etc. which could equilibrate the economic balance of the contracting parties.

4.3.**The purposeful expenditure of the collected financial means from the municipalities in case of a transfer of the government income**.

Deficits in SRA are apparent because of the partial regulation in CA and SRA. For example, in SRA there is no explicit line for the expenditure of the collected financial means from the municipalities according SRA and the corresponding sanctions in case of a violation of this order, by analogy with CA.

4.4. Because of the partial regulation in CA and SRA the regulation of the monitoring is also a problem.

5. Lack of standards of the service. One-sided and biased contracts and risks have been found, which is a precondition for various violations by the concessionaire, gaps in negotiating and forfeits for restrictive conditions for observing the Spatial Planning Act, Environmental Impact Assessment Act, Obligations and Contracts Act etc. **It was found that currently MEE prepares standardized model contracts.**

6. Ineffective control due to:

- Lack of sufficient and relevant legal regulation of the control given the specifics of the matter. **Regulation for the overall organization of the monitoring is also missing. SRA refers to CA regarding the implementation of concession agreement, which is insufficient given the specificity of subsurface resources /UR/.**
- Lack of sufficient administrative and technical resources to implement the functions of control under SRA, which causes an inability or difficulty to implement specific actions, incompetence, inefficiency - there is lack of resources to carry out inspections. / Measurements are made by specialists selected under the PPA/. The illegal extraction is also a problem. The appeals are related to violations of environmental law.
- **Lack of effective monitoring by public authorities.** During the period from 1999 until 2014, an audit of the concession agreement for "Chelopech" have not been conducted. The agreement is included in the audit program of the Audit Office in 2014, as the audited period is 01.01.2011 - 31.12.2013

7. Lack of sufficient transparency and accountability, which creates distrust between the parties, because:

- the absence of a legal requirement creation and maintenance of public records on the website of MEE, for the purpose of accountability and control over granting concessions;

- insufficiency and poor reliability of the information maintained by the National Concessions Register / NCR /: a discrepancy was found between the separate rubrics of NCR, because of failure of the contracting entities to submit the information on time and insufficient control over the submitted information.

II. Proposals for measures for prevention:

We propose to be made reassessment and inspection of the existing legal regime on granting subsurface resources, which to be based on the following pillars:

1. New framework in the area of extraction of subsurface resources, in compliance with the law of the European Union, and particularly with the main principles of the Concessions Act, with the following accents:

1.1. New Subsurface resources act, regulating the activities of prospecting, exploration and extraction of subsurface resources, **which to completely reinvent the government policy on implementation of the aforementioned activities**;

to change the functional competence in this area and to put exceptionally high requirements of the investors in terms of protecting the environment. In this regard should be regulated an obligation for comprehensive state policy and national strategy regarding natural resources which shall include mining industry strategy, permits strategy, mining waste strategy, etc. We present specific proposals below.

1.2. Given that the new directive on concession award of contracts regulates two types of concessions: for works and for service, as well as due to explicit exclusions /recital / 15 and 40/ and because of gaps identified in the legal regulation that are essential, different procedures, criteria for evaluation of tenders in SRA, **we propose to be considered the regulation of concessions for extraction of subsurface resources to be fully under the special law SRA, in adopting the basic principles and objectives of the concessioning.** We believe that thus will be removed the loopholes in the rules, which will lead to the prevention of corruption practices. In the case of another solution, we believe that should be done referencing of the term "extraction" to the terms used in the European directive - "construction" and "services".

1.3. Assessment and thorough analysis of the methodology for determining the exact amount of concession payments due under SRA, adopted in 2007 in order to establish the protection of state interest in the calculation of the due payments and preparation of a new methodology, respectively updating the existing one.

1.4. Explicit regulation of the obligation to renegotiate all the contractual clauses upon a modification / extension of the concession period/. It was found that during the annexation of the existing contracts, their clauses have not been modified, regardless of the fact that some of them date back to 1997.

1.5. Explicit regulation of grounds for amending contracts and renegotiation of their clauses and upon a modification of the methodology and/or other laws and regulations under SRA, and renegotiation of all clauses during an expansion of the concession area, in case that this legal opportunity remains.

1.6. Strengthening of the administrative capacity and expanding the scope and content of the control exercised by the Minister of Economy and Energy in terms of contracts and illegal extraction. Detailed statement on the matter is covered in item 21. of the proposals listed below.

1.7. Creation and maintenance of public records on the website of MEE, for the given permits and concessions for extraction and also for the controls carried out on the contracts.

2. Until the drafting of a new law to be considered amendments and supplements to current SRA.

We believe that there should be amendments in the following areas:

- Government policy
- Terms for the candidates
- Maximum admissible size of the area subject to prospecting and exploration
- Rights and obligations of the holders of permits for prospecting and exploration
- Concession area and rights of the concessionaires
- Concession period
- Procedure for issuing permits
- Composition of Commission
- Prohibitions for issuing permits

- Concession payments and methodology
- Economic balance of the parties
- Planning and accountability
- Accountability and control
- Intentions to improve control

We present specific proposals on SRA in several major directions:

1. We propose the groups of mineral resources, set forth in art. 2 of SRA by the criterion significance for the national economy, to be put up for discussion and reassessment. We propose the mineral resources under art. 2, para. 1, item 1/metalliferous mineral resources/, item 3/industrial minerals/, item 4/oil and gas/, as well as mining waste /item 7/, to be separated into a group that would receive the status of higher protection for their exploration and exploitation.
Reasons: Metalliferous minerals, industrial materials, oil and gas and mining waste are exhaustible and have strategic importance for the national economy. They are energy resources. In this sense they are significant for the national security. **Additionally, the metalliferous mineral resources that are usually polymetalic resources may prove to be an important resource for the future development of economic activities and sectors, as well as for new technologies.**

2. We propose in SRA to be regulated development and adoption of National strategy for the use and protection of the subsurface resources with a view to sustainable development and national security, with which to be determined unified state policy on management of all subsurface resources and not only the development of the mining industry. We believe that such a comprehensive strategy is necessary in order to set a framework of the government policy regarding the exploration, exploitation and protection of certain resources - for example. shale gas, radioactive metals. **In this sense, it should include a strategy for the development of the different groups subsurface resources, permits strategy, etc.** We propose in it to be regulated enhanced protection status concerning the study and use of strategic energy resources-metalliferous minerals, industrial materials, oil, gas and mining waste. **Given the importance of the resources we deem it necessary and appropriate, the Strategy and the report on the implementation of the objectives to be adopted by the National Assembly and not by CM.**

Reasons: In art. 7, par.1 of SRA is stipulated that The Council of Ministers determines the state policy for management of the subsurface resources aimed at sustainable development of the country, the national security and the attraction of investors and adopts the National Mining Industry Development Strategy, developed by the Minister of Economy and Energy**. At the same time the development strategy of the mining industry is part of the unified government policy on the management of SR. The development of this strategy alone also does not meet the requirements of art.1 of SRA, i.e. it has a narrow scope and regarding to the subject of the law. The development of a comprehensive government policy regarding all subsurface resources, given their importance to the economy of the country requires legislative change also in the way of the developing, adopting and accounting of the achieved objectives.**

3. We propose to be reassessed art. 8 of SRA. The norm is dead. We believe that should be answered the question – is it necessary enhanced status of the strategic resources. We believe that subsurface resources should be a priority of the government policy.

Reasons: According to art. 8 and 9, government-funded geological examinations in the Republic of Bulgaria shall be carried out under the procedure of the Public

Procurement Act and on the grounds of the **strategy under art. 7 para. 1, whereas MEE** *develops and finances the priority themes* and the related annual tasks in the domain of geology. It was found that there is no adopted strategy of the mining industry, there is no legal obligation and there is no developed Strategy for the use and protection of natural resources in general, respectively there is no unified government policy in the field of natural resources. Geological studies are not done due to a lack of financial resources. The financing of geological studies as government policy will lead to a change in SRA, repealing the requirement for permissions for the search and registration of geological discoveries and conducting only a competitive procedure for the extraction of mineral resources.

4. We propose in art. 20 to provided that the Strategy and the report on the implementation of the objectives, including the report on the National Balance of reserves and resources of subsurface resources which are strategic energy resources / under art. 2, para. 1, Items 1, 3, 4 and 7 / will be approved by the National Assembly.

Reasons: In art. 20 is provided that the minister of economy and energy compiles and keeps national balance of reserves and the subsurface resources, reflecting annually on the basis of data for the status and changes of the reserves and the resources, specialized maps and a register of deposits of subsurface resources and a register of finds. According to art. 20, para. 3, The reserves of subsurface resources included in the National Balance are accounted for in compliance with endorsed by the Council of Ministers classifications of reserves of subsurface resources. In relation with the aforesaid proposals for setting up a framework of the government policy regarding the exploration, exploitation and protection of certain resources /for example shale gas, radioactive metals/ and given the importance of certain groups of subsurface resources for the national security and the economy of the country, we propose the Strategy and the report on the implementation of the objectives, including the report on the National Balance of reserves and resources of subsurface resources, which are strategic energy resources / under art. 2, para. 1, Items 1, 3, 4 and 7 /to be approved by the National Assembly.

5. We propose to be provided sanctions for the operators of mining waste facilities for failure to comply with the obligation under art. 22c, para. 5 of the SRA.

Reasons: In art. 22c, para. 5, is regulated that the operators of mining waste facilities are obliged to notify the Minister of Environment and Waters and the Minister of Economy, Energy and Tourism immediately, as well as in writing, but not later than 48 hours following the events placing at risk the stability of mining waste facilities and/or human health and environment. The proposal is formal, as it is not bound with sanctions.

6.We propose art. 23, para. 1 to be supplemented in order to clarify the meaning of the term "the required management and financial capacity to pursue the relevant activities", because it is vague and unrestricting. This allows for subjective interpretation, which can lead to corrupt practices. In this context, we propose clear regulation of the requirements, which should be met by the applicants for permits, by analogy with the requirements which should be met by a candidate or a participant in PPA, as well as regulation of objective criteria for proving the existence of financial and technical means.

7. We propose the provision of art. 23, para. 2, also to be subject to an assessment in order to protect the state interest.

Reasons: According to art. 23, para. 2, concerning a specific area, more than one license for prospecting and exploration or for exploration and more than one

concession for extraction can be granted provided they are issued for different types of subsurface resources, the activities under a license or a concession shall not obstruct the activities under another license or concession and the consent has been obtained of every operating holder of license or concessionaire. Given the size of the areas regulated in art. 32 from SRA, we believe that the provision is too expansive and protects the interests of the concessionaires, respectively of the holders, without taking into account the state interest. It is unclear what will happen if it is established that in "the given area the state interest demands a natural resource to be extracted, but the existing license holders and concessionaires have not given their consent We believe that in these cases it is necessary the rights of the country to be defined more clearly, which should be in accordance with the adopted government policy and the Strategy for the use and protection of the subsurface resources. Additionally, given the ascertained **great interest in the subsurface resources and the lack of planning, strategy and unified state policy on use and protection of natural resources may result in violation of basic environmental requirements and other consequences of great significance. In these cases, we suggest to be considered and regulated the possibility of limiting the granting of permits for a certain period upon intensity on the territory, by defining the term intensity.**

8. We suggest conducting an assessment of art.25 concerning the existing legal opportunity for a complete or partial transfer of the holders' rights for granted permission for prospecting and exploration or for exploration only.

Reasons: According to art. 25, para.1, the rights and duties, resulting from a granted permission for prospecting and exploration or for exploration, **can be transferred completely or partially to others who correspond to the requirements of** art. 23, para. 1 only with a permit from the authority that issued the permission. We believe that the opportunity to transfer the rights and duties of a permission for prospecting and exploration can be used for trading of rights by people who do not have the intention or the capacity to fulfill this kind of activity, taking into consideration the subjective opportunity for an assessment of the authority which issued the permission. For this reason we propose that the right of the titular to transfer rights on permissions for prospecting and exploration should be dropped out. In case that this measure is not accepted, we suggest updating the requirements towards the candidates at the stage of competition and tender as well as removing the opportunity for transfer of rights only in cases when the permission has been granted by a sole authority. We believe that this approach will restrict the bad practice of selling rights.

9. We suggest removing the legal opportunity regulated in art. 31, para. 2 about the prolongation of the permits for prospecting and exploration or for exploration.

Reasons: In art. 31 the time period for which permission for prospecting and exploration or for exploration only has been granted is indicated, respectively 5 years for oil and gas, 3 years for metal and non-metal mineral resources, 2 years for facing-stone materials and for mining waste and 1 year for building materials. With the regulation of para. 2 a legal opportunity for prolongation of the permits with two extensions up to two years is given, whereas each extension is executed under the conditions and regulations defined in the concluded agreement and the sole condition is the initially determined deadline for the performance of the work program. We believe that this norm creates the possibility for natural resources to be extracted and sold without any control. This refers mostly to the facing-stone and the building materials. We think that the removal of the regulation will restrict the bad practices.

10. We propose that the maximum size of the granted areas concerning the diverse subsurface resources /art. 31, para. 1/ should be assessed and analyzed on the basis of the gained experience with a view to the development of a uniform government policy regarding the management of subsurface resources. We suggest specifying art. 32, para. 2, in order to introduce clear criteria for the extension of the area and indicate a maximum limit for the extension of the area when renegotiating the agreement clauses.

Reasons: Art. 32 regulates the maximum size of the areas which are been granted with permits for prospecting and exploration. We believe that the definition of the maximum size of the areas is a matter of government policy regarding the use and protection of the subsurface resources and it depends on the strategic goals as well as on the adopted regulation mechanisms. In order to develop a new SRA and a complete government policy we suggest specifying the granted maximum size of the areas on the basis of the gained experience between 1999 and 2013 while considering the different types subsurface resources.

Art. 32, para. 2 describes the opportunity to provide a right of extension of the area when geological finds are registered on the boundary of the area granted. The regulation allows a broad interpretation. Clear criteria for the specification of the term "on the boundary of the area granted" as well as of a maximum limit of the extension are missing.

11. Art.36 regulates the period of the concessions for extraction which can be up to 35 years with the possibility for prolongation up to 15 years, under the conditions of the concluded agreement. The regulation does not balance the interests of the contracting parties. In addition, it provides the opportunity for a subjective decision depending on the „concluded agreement". In case that the period of the concession has to be extended, the conditions under which this should happen have to be defined in the law and not in the agreement since it is a consequence. We believe that in these cases the conditions of the already concluded agreement have to be obligatory renegotiated.

12. We suggest removing the text in art. 37, para. 3 of SRA with a view to the opportunity to expand the activity through the extension of the initial area for extraction or depicting the requisites and conditions of the „justified request" to the Minister of economy and energy, while obligatory foreseeing a renegotiation of all clauses in the agreement.

Reasons: In art. 37 it is stated that the concession area can be modified on the grounds of a justified request on the part of the concessionaire to the Minister of economy and energy after coordination under art. 23 and art. 26 and an approval by the CM. The regulation is unprecise because it creates preconditions for an additional seizure of natural resources by the concessionaires and an expansion of their activity when enlarging the initially requested area for extraction. A foreseen opportunity to renegotiate the clauses of the agreement is missing.

13.We propose to relate the non-fulfilment of the obligation under art.35 of SRA with a sanction, because otherwise it is just formal.

Reasons: In art. 35 of SRA it is foreseen that the concessionaire should notify the Minister of economy and energy and the Minister of culture within 7 days in the event of finding unique mineral formations or movable cultural values. There is no foreseen sanction which could guarantee the execution of the regulation.

14. We propose to be repealed the legal opportunity in art. 39, para. 1, item 3 from SRA for granting license for prospecting and exploration or for exploration of subsurface resources by right / without competition or tender /.

Reasons: According to art. 39, the licenses for prospecting and exploration or for exploration of subsurface resources under art. 2, para. 1 are granted by a competition /item 1/, by a tender /item 2/, by right of application in cases of single applicant after expiry of a one-month terms from the date of the announcement for forthcoming granting of a license published in the State Gazette and on the website of the MEE. Given the lack of adversarial of the procedure we propose to be repealed item 3. Otherwise, we believe that the principle of publicity and transparency is not ensured, and it remains only formal. In that case should also be repealed art. s 51-53. We also recommend to be taken into account the specificity of the process when it is conducted a procedure for granting license for prospecting and exploration and exploration only.

15. According to art. 39, para. 2 of SRA, concessions for extraction of subsurface resources can be granted by right of a holder of license for prospecting and exploration or for exploration under the terms of art. 29 /item 3/. We believe that the first hypothesis is characterized by a lack of adversarial. That is why practical problems have arisen with the 67 companies that have not yet settled their concession contracts. Moreover the privatization process has already been completed and the regulation is pointless. A special hypothesis is the case of art. 29, item 3 of SRA. In these cases, the competitive procedure have been carried out at a previous stage. It is a matter of government policy whether the state to carry out through its own company or by other means the prospecting and exploration and then to announce tenders for extraction or to leave this possibility in this way. In this regard, we recommend considering the possibility of repealing those legal opportunities or considering tendering procedures, which will eliminate the lack of adversarial. In order to eliminate the consequences of the current provision we propose:

- **In art. 39, para. 2 of the SRA to be repealed the possibility of obtaining by right concessions for extraction of subsurface resources pursuant to privatization deal.**

- **In view of the final liquidation of the case of the 67 companies, acquired by right concession for extraction pursuant to privatization deal and currently not entered into contract we propose in SRA to be regulated** explicit preclusive period for signing of concession contracts, and after it the rights of those companies for which there are no signed concession contracts to be considered settled

- In the Art.29 of the SRA to be regulated the period for the statement of the Minister of Economy and Energy regarding the submitted written requests by the concessionaire and the preclusive period in the TCP of the law, after which the pending proceedings to be considered terminated.

16. We propose art. 43, art. 44, para. 7, and art. 45, para. 6 of the SRA to be supplemented in order a representative of the regional governor /s/ to be included in the composition of the committee which organizes and conducts the tender.

Reasons: In art. 43 is regulated the composition of the commission, which organizes and holds the competition or tender. According to the provision, the commission

consists of uneven number of members and includes representatives of the Ministry of Economy, Energy and Tourism, the Ministry of Finance and the administration of the Council of Ministers. We propose the composition of the commission under art. 43 for organizing and holding the competition or tender to be supplemented by a representative of the regional governor /governors/, in whose region will be carried out the activities, as well as by experts from the Mining and geology institute. Thus would increase the expertise at the very stage of the competition and tenders. At the same time the norm will be supplemented in accordance with the requirements of CA /art. 103/. **Our proposal is also analogous with art. 44, para. 7, and art. 45, para. 6 of the SRA.**

17. We propose to be clarified the meaning of art. 56, para. 2 and the norm to become imperative.

Reasons: In art. 56, para. 2 is regulated the possibility of limiting the intensity on the territory of the country with mining activities with a decision by CM. There is a lack of definition of the meaning of the term "intensity on the territory". We propose the norm to become imperative in order to protect the state interest.

18. We propose the principles underlying the methodology for determining the concession payment to be regulated by law, and the methodology alone to be by an act of CM. We propose to be renegotiated the clauses of the contracts in accordance with the update of the methodology.
Reasons: In art. 61 is provided that the principles and methodology for determining the concession payment and limits of the maximum and minimum for the different types payments are determined with an act of CM. In view of the sustainability of the methodology and at the same time flexibility, we propose the principles on which the methodology will be based to be defined in the law, and the methodology alone to be regulated with an act of CM. We believe that thereby we be prevented the subjective opportunity for resolving important issues of political importance. In this regard, we find it necessary to point out that according to a inquiry by survey conducted to municipalities in RB, is pointed out that regarding subsurface resources there is a lack of clear and unified methodology for determining the concession payments for non-metallic minerals /facing-stone materials/, and the extraction of inert materials /ballast/ under the Water Act does not contribute financially to the municipal budgets. It has been expressed an opinion, that the determination of the concession payment should be based on extracted rock /m3 or ton/ or inert material of the dynamic reserves of the water bodies.

The following proposal has been made by the National association of municipalities in the Republic of Bulgaria /NAMRB/:
When determining the concession payment for each of the municipalities, by location of the concession area, the percentage distribution to be differentiated in view the concession area concerning:
1. size of the deposit or individual parts necessary for extraction;
2. areas needed for the implementation of concession activities beyond extraction.
When determining the portion of the concession payment for the cases where the deposit is located on the territory of two or more municipalities to be applied in a fair principle of redistribution, namely the proportion of remuneration to be greater for the municipalities in which are located areas of the deposit or its individual parts necessary for extraction and the percentage allocated for municipalties on which there are areas necessary for the implementation of concession activities beyond extraction, to be smaller. We believe that this approach is fair, given the different negative impact on the relevant territories by the primary and supporting activities of the production.

19. We propose art. 63 of the SRA to be discussed and assessed in order to establish balance of the relations. We believe that at the moment the norm is not in interest of the public partner.

Reasons: According to art. 63 of the SRA, In the event of changes in the Bulgarian legislation that may restrict the rights or may cause material damage to the holder of license for prospecting and exploration or for exploration or to the concessionaire, upon request thereby the terms and conditions of the concluded contract shall be amended so as to restore his rights and interests in conformity with the initially concluded contract.

20. We propose art. 86 to be supplemented in order to specify the content of the reports and the way of interaction with the competent ministers - minister of environment and water and the minister of labor and social policy. Also it is not clear how will be verified the veracity of the data in these reports.

Reasons: In art. 86 is provisioned that the holders of licenses for prospecting and exploration and for exploration and the concessionaires should report the implementation of the rational designs under art. s 83 and 84 annually via a written report to the minister of economy and energy. It is unclear whether the reports under art. 86 contain data under art. 83, item 3 and item 4 and whether the minister of environment and water and the minister of labor and social policy are familiar with them. In this regard, we propose these issues to be clarified. It is not clear how will be verified the veracity of the data in these reports.

21. In art. 90 is regulated the control over concessions for extraction of subsurface resources. The control is scattered over the minister of economy and energy minister of environment and water, minister of culture, the mayor of the respective municipality. We believe that control is an important and necessary factor for achievement of the objectives of the SRA. **In view of the above we propose more detailed regulation of the control in a new chapter "Control" in the SRA with a concentration of the control results and actions in a single competent authority**.

In this regard we have the following proposals, which we think are necessary in view of preventing corruption:

1. We propose the Minister of Economy and Energy to carry out a comprehensive control over:

- Performance of contracts for prospecting and exploration, exploration and extraction of subsurface resources, including regarding the content and implementation of the comprehensive and annual rational designs, projects for conservation, liquidation and recultivation;
- The performance of illegal extraction of subsurface resources without an issued permit or granted concession or with terminated permits.

2. We propose the scope of control to include:

2.1. Verification within a specified period of the submitted by permit holders and concessionaires reports under art. 66a. with a view of operability.

2.2.Inspection of the performed extraction in the context of the concessions for extraction, including:

- Determining the volume of extracted subsurface riches of overburden and of the mining waste;
- Determining the conduct of extraction of subsurface resources within the boundaries of deposit;
- Determining metal content in the produced quantity of ore /subsurface resources under art. 2, para. 1, item 1/
    - **We propose the identification of metal content to be carried out periodically through control samples, taken in the presence of representatives of the concessionaire, of one or more officials appointed by the Minister of Economy and Energy, and representatives of independent accredited laboratory designated by**

the Minister of Economy and Energy under the Public Procurement Act. The results of the markscheiders measurements and from the control samples shall serve to verify the basis for calculating the amount of the due concession payment.

- **In case of identification of new metals we propose a legal opportunity for updating of the agreement clauses to be introduced, especially the concession payment**.

2.3. Planned inspections on schedule at least about the following circumstances:

- the compliance of the reports submitted by the permit holder or the concessionaire under art. 66c the documents and the factual circumstances of the place of performance of respective contract;
- the technical parameters of the subject of the permit or concession;
- the technology used for prospecting and exploration or exploration or extraction;
- the implementation of coordinated rational designs;
- fulfillment of the obligation for the fee for and area or concession payment and other financial obligations under the contract;
- the fulfilment of undertaken commitments for providing employment and qualification for the professionals;
- the fulfillment of the other obligations under the contract;

2.4.Exceptional inspections in cases of received information, containing data on breach of contract or for the performance of illegal extraction of subsurface resources, prospecting and exploration or exploration for or extraction of subsurface resources without a permit or granted concession, or with a permit or concessions, whose operation is stopped under the terms of art. 68, or under the terms and conditions of the contract.

3.We propose the authorities with competence over the implementation and control of SRA /minister of environment and water, minister of culture, minister of labor and social policy, ministry of agriculture and food, the mayor of the respective municipality/ **within 14 days of the inspections in accordance with the provisions of the specific laws to notify the Minister of Economy and Energy of the results by providing information on established during the inspection circumstances and data, the findings and prescriptions and/or the imposed sanctions with a view to feedback and/or sanctioning.**

In cases where the competent authority for exercising control on concessions for the extraction of subsurface resources of the respective territory is the mayor of municipality, we propose to be regulated an obligation for the mayor to immediately notify the minister of economy and energy when it is found illegal extraction outside the concession area and extraction without appropriately granted concessions or a concession stopped with a sanction by the minister. We propose this obligation of the mayors to be strengthened with a sanction, in order to be ensured its implementation.

With regard to the qualitative performance of control mentioned above, we propose the following options for selection by Minister of Economy and Energy, according to the specifics of the subject and the scope of control:

1. Strengthening of the administrative capacity of the authorities exercising control over SRA at MEE.
2. The control over the implementation of concession contracts can be organized and regulated by internal regulations of the respective authority in the specified below manner of realization:

a/ creation of a permanent administrative structure to the central body of executive power;

b/ supervisory authority appointed under contract by the public partner;

c/ creating a commission with varying expertise, appointed with an order of the public authority for each specific contract.

22. In relation to resolving the issue with the 72 concessions, in which extraction has not been performed due to problems with the status of land that is covering the deposit, delay in the change of ownership and of the purpose, we are making the following proposals:

1. In SRA to be introduced the concept of "operational risk" in order to prevent the possibility of any claims from the concessioranes against the state in case of inability and delay of expropriation of the land on which territory will be performed the extraction. Directive 2014/0437 of the European Parliament and of the Council on the award of concession contracts specifically recommends introducing **the concept of "operational risk".** It includes the possibility that the concessionaire may not regain the investments and operating costs of the assigned works or services under normal operating conditions, even if some of the risk remains with the contracting authority or entity. We believe that unless for a clear distinction between public procurement and concessions, it will prevent unreasonable demands for amendment of the contract and claims for damages brought by the concessionaires.

2. It could be also be considered introduction of a concept analogous with the concept „economic unbearableness" established in the Commerce art, which under very strict conditions could allow the concessionaire to be free of concession payment, when objective impossibility for extraction is present and under decision of the CM.

3. We propose to be considered and introduced statutory period within which if the right for extraction has not been exercised, the right to be lapsed. This period could be analogous to the general limitation period 5 years. or special limitation period 3 years.

23. We propose art. 61 to be supplemented with the explicit specification for what exactly are going to be spent the funds analogous with CA and BSCDA. In order to ensure the appropriate spending we propose also to be regulated sanctions in case of non-targeted spending by the municipalities.

Reasons: In art. 61, para. 3 is provided that the amount, terms and conditions and procedure for effecting concession payment are set forth in the concession contract. A portion of the concession payment amounting to 50 percent is transferred to the budgets of the municipalities, where the areas under art. 37, para. 1, items 1 and 2 are located under the terms and according to the procedure of art. 81 of the Concessions act. It is not stated for what should be spent the funds analogous with CA and BSCDA and what sanctions should follow in case of non-targeted spending. That is the result of the partial framework of CA and SRA.

24. We propose to be considered the regulation of granting a license for prospecting and exploration under SRA.

Reasons: Presently in the Ordinance on competitions and tenders for granting permits for prospecting and/or exploration and concessions for extraction of subsurface resources under SRA, are regulated the terms and procedure for the conduct of the two procedures, under which are granted permits and concessions. We believe that with a view of sustainability their place is in SRA and not in an ordinance.

25. In order to ensure publicity, transparency and accountability, we propose a regular /annual/ publishing of information regarding the control exercised over each contract for prospecting and exploration and for exploration or for extraction of subsurface resources, on the website of MEE in the register of the permits for prospecting and exploration or for exploration or for extraction of subsurface resources.

BLACK SEA COAST DEVELOPMENT ACT

1. Summarized findings and weak points

On the basis of the conducted analyses of BSCDA the following weak points were identified:

1. Lack of competition for the choice of the private partner due to a permitted legal opportunity as well as lack of clear distinction between activities related to the privatization and the concession objects. It was found that among the concessions awarded without tender or competition due to the illogical historical development of the legislation are the beach strips of the national tourist complexes "Rusalka", "Elenite", "Dyunite", part of the campsites at the Southern Black Sea coast and others.

2. Lack of unified state policy on management and preservation of the beaches:

2.1. There is no legal requirement for the preparation of a program for comprehensive management and preservation of the beaches, incl. planning, strategy, principles, measures and report on the concession of the beaches. The legal opportunity for empowerment of the respective regional governor by the minister for leasing beaches **(art. 7, para. s 5 and 6, art. 8, para. s 5 and 6, Cion prop. 2 BSCDA) is a precondition for shortcomings in the management and control of the beaches due to the lack of a requirement unified state policy on management and preservation of the beaches, as exclusive state property. Furthermore, given the fact that the beaches are public state property /exclusive state property/ the norm creates a special procedure, which amends the general procedure for leasing**, set forth in art. 16, respectively art. 19 of SPA, but in SPA this exception is missing.

2.2. Presence of two approaches for management of the beaches - - concession under special order through competition for a period up to 15 years and leasing /by tender pursuant to SPA and RRSPA for a period of 5 years/ and in the presence of two methodologies for determining the concession payment and the leasing price. the different approach in leasing and granting concessions implies inequality between the concessionaires and the lessees. Leasing is renting a unit of area, and the subject of concessioning is the service and the accompanying services. Enough substantial differences in the procedure for granting beaches under concession are not present to differ from the general procedure set out in CA.

2.3. The management of beaches by leasing goes against the imperative requirement of art. 18 of the CRB the management of objects that are exclusive state property to be done only by concession.

2.4. Irrelevance and ineffectiveness of the existing methodology for determining the concession payment. According to it, the price is determined per area unit and not by the service as a package of proposed activities. Nor is there binding of outstanding remuneration by the concessionaires with the beach category and the services which they offer.

2.5. There is a lack of proved methodology for calculation of the concession period, in accordance with the specific of the subject, which leads to irrelevance and ineffectiveness in the determination of the concession periods / up to 15 years. / in order to compare them with the period when leasing / 5 years. /.

2.6. There is no clear criterion regarding the assessment of the decision if a beach should be subject to a concession or lease. The simplified procedure for leasing, the shorter procedure and periods, the fewer conditions to the candidates, lead to a preference for leasing the beaches. It was found that there are currently 58 existing concession contracts, of which 7 are in the old CA and have not been renewed. The fact is that over the last four years there is not granted concessions for beaches. It is present only leasing of the beaches under the procedure of BSCDA.

2.7. Annually there are around 60 beaches, which are unguarded, but are not being

leased because they are non-urbanized, **but there is no prepared analysis by the state on the costs of security in order to be provided guards.**

3. Presence of gaps and ambiguities in BSCDA in the regulation of the procedure for concession of the beaches.
It is not clear how the minister of regional development attracts experts from others ministries, given the fact that an order by the prime-minister is needed for it. It is not clear if the external consultants are chosen under PPA. The justification has different content than that established by CA, as one of its elements is an analysis of the effectiveness from the point of view of the concession granting authority. There is no regulation on the content, the structure and the requirements to this type of analysis. There is a lack of obligation for preparation of the other concessions analyses according to CA, and it is not clear whether they should be drafted and who draws them up them. Meanwhile art. 8d refers to subsidiary annex to art.39 of CA which regulates the requisites of the decision on selection of a concessionaire, including the 4 kinds of concession analyzes and / or the financial model. The ambiguity and contradiction are intensified with art. 8k which regulates the obligatory content of the competition documentation. It is unclear who draws up the tender documentation, the administration of the MRD /Ministry of regional development/ or the inter-ministerial committee. Additionally, pursuant to art. 8K Items 3, 4 and 5, it must contain information about the financial, economic, technological, environmental and other parameters of the object or activity - subject of the concession legal analysis of the use of the site or the performance of the activity, but they are not included as mandatory content of the justification. This raises the question does the analysis of effectiveness includes the parameters under art. 8k, 3 and 4, or not. The criteria for evaluation of tenders and guarantees are stated in the decision by the CM, and not in BSCDA, but under TCP CA is applied subsidiary. The competition procedure is in general the same as the open procedure under CA.

4. There is a lack of secondary legislation that sets a quality standard of the services for use of beaches. According to art. 7, para. s 1, 2 and 7, art. 8a, para. 4, art. 8b of BSCDA, conditions and procedures for the implementation of the mandatory activities at the beaches are determined by ordinance of the Minister of Regional Development, which has not been issued. **The lack of legally settled opportunity for laying down special conditions makes it impossible to provide standards to the quality of service.**

5. Lack of model contracts, according to the specifics of the subject, respectively lack of unification and standardization of services.

6. **Lack of effective control due to lack of regulation of the legal or regulatory level, which to set out the basic principles in the conduct of supervision over the execution of contracts,** absence of sufficient administrative and technical resources / inspections are carried out by experts of the MRD, along with external experts, selected under the PPA / and **lack of or insufficient criteria for the inspection and control.**

7. Lack of publicity and transparency regarding the activities of granting concessions and leasing – lack of maintained on the website of MRD records for leased and granted on concession beaches and the control that has been exercised over them.

2. Proposals for measures for prevention:

Based on the aforementioned statements and identified weak points, as well as taking into account the suggestions of Directive 2014/0437 of EP and the Council on the award of concession contracts, we have the following proposals regarding BSCDA:
I.

1. We propose to be made reassessment and inspection of the existing legal regime of BSCDA regarding grating a service concession for maintenance and management of beaches and leasing in order to create a unified approach and standards and harmonization of the concepts of granting concessions in compliance with Directive 2014/0437.

Given that the new Directive regulates two types of service concessions and works and considering that the granting of service concession for maintaining and managing the beaches is a type of service, and whereas there are no significant differences in the procedure under CA, it is appropriate to be considered unification of the regime and harmonization of concepts. We believe that the existing regime for leasing the beaches should also be reevaluated, given the imperative requirement of the Constitution of RB, art. 18.

Reasons: The lack of a unified approach to law implementation leads to a conflict of interest, inefficiency, neglect of public interest, lack of transparency and adversarial (audi alteram partem). The disparity between the concepts of Bulgarian and European legislation creates an opportunity for granting a concession based on special laws, which are not harmonized with each other, and this practically favors some natural or legal persons.

2. We propose in the law to be created a legal obligation for establishing a unified, purposeful and coordinated state policy on management, use and protection of seaside beaches as exclusive state property, including establishing a program for overall management, use and protection of seaside beaches, incl. planning, strategy, principles, measures and report on the implementation, in coordination with the regional governors of the respective regions.

3. Improvement of the secondary legislation in order:

3.1. Regulation of standard of the service - developing an ordinance for the terms and conditions of the implementation of mandatory activities at seaside beaches, as required by art. 7, para. 9 of BSCDA. In respect of concessioning of the beaches we propose to be laid down additional specific conditions regarding: the organization of the activity, the workspace, the investments, newly created jobs, environmental requirements, strengthening landslides, etc., which to guarantee in general a certain quality and standard of the service and at the same time the preservation of the beaches.
3.2. Development of a new methodology for the procedure and ways to determine concession payment which to be appropriate and relevant to the service and not to the area. We propose the concession payment to be bound with the beach category and the package of services, in view of unification and standardization of services.
3.3. We propose the concession period to be reevaluated, in order to harmonize its manner of calculation with **Directive 2014/0437 and taking into account the current practice for concessions and leasing. We propose to be developed** mandatory indicators and methods / models / for calculating the maximum period of the concession.
4. Introduction of a unified practice, standards and concepts through development and approval of model concession agreements.

5. Regarding the quality realization of control, we propose:

- Regulation of the scope of control on legislative or regulatory level on the various stages of execution of the contract, by analogy with CA.

- Regulation on legal or regulatory level for notification of the competent authority – the minister of regional development for carried out inspections, findings and sanctions imposed on them.
- In relation to the aforementioned quality realization of control, we propose the following options to the minister of regional development, according to the specifics of the subject and scope of control:

1. Strengthening the administrative capacity
2. The control over the implementation of concession contracts can be organized and regulated by internal regulations of the respective authority in the specified below manner of realization:

a/ creation of a permanent administrative structure of the central body of executive power;

b/ supervisory authority appointed under contract by the public partner;

c/ creation of a commission with varying expert staff, appointed by order of the public authority for each specific contract.

6.To be prepared an analysis on the costs for security of unguarded beaches in order for the state to provide guards.

7. Creation and maintenance of public records on the website of the MRD for leased and granted on concession beaches, in which also to be recorded information for the control that has been exercised.

II. In case the proposal in I.1. is not accepted, we propose amendments and supplements to BSCDA in the following directions:

1.1. Introduction of regulatory obligation to provide a program for comprehensive management, use and preservation of the seaside beaches, including planning, strategy, principles, measures and report on the implementation, coordinated with the regional governors of the respective regions.

1.2. In art. 7, para. 5 a clear objective criterion should be introduced for the distinction whether a beach will be subject to concession or leased.

1.3. To be reevaluated the 5 year period of leasing in view of compliance with art. 16, para. 1 of SPA, or in SPA /10 years) to be amended the respective norms in order to achieve equality between concessionaires and renters.

1.4. We propose art. 8 d to be supplemented in order to clarify the procedure for attracting the experts from other departments and the external consultants.

In art. 8 d regarding the choice of experts from other ministries and departments, according to their competence and / or external consultants to be specified what is the procedure of their selection and attracting /PPA/. **It is not clear how experts from other ministries are attracted, given the fact that for this is required an order by the prime-minister. It is not clear if the external consultants are selected under PPA.**

1.5. We propose art. 8 d, para. 3, item 3 to be amended in order to establish relation and compliance with the specific concession for which the order is issued.

Art. 8 d, para. 3, item 3 requires as a mandatory requisite the indication of the maximum amount of funds for development of the justification, which is spent from the approved expenditure for concessions for the corresponding year, which is irrelevant to respective particular concession. The maximum amount of the justification for the respective concession should be noted.

1.6. To be removed the discrepancy between art. 8, para. 4, item 5 and art. 8e of BSCDA.

In Art.8, para. 4, item 5. is stated that the justification should include an analysis of the effectiveness of the concession in terms of the concession granting authority. There is no regulation regarding the content, structure and requirements for this type of analysis. It is not clear how this analysis is determined without financial economic analysis or financial model. There is a lack of obligation for the preparation of the other concession analyses, under CA, it is also not clear if they should be prepared and who prepares them. At the same time art. 8e forwards for subsidiary annex to art. 39 of the CA, which regulates the requisites of the decision for selection of a concessionaire, including the 4 kinds of concession analyses and / or financial model.

1.7. To be indicated who prepares the competition documentation the requisites of which are set out in art. 8k. To be eliminated its discrepancy with a view of the content of the justification under art. 8, para. 4.

It is unclear who prepares the competition documentation, the administration of the MRD or the interministerial committee. According to art. 8k, items 3, 4 and 5, it must contain information about the financial, economic, technological, environmental and other parameters of the object or activity - subject of the concession and legal analysis of the use of the site or the performance of the activity, but they are not included as mandatory content of the justification. This raises the question does the analysis of effectiveness include the parameters of art. 8k, items 3 and 4, or not.

1.8. The criterion for evaluation should be indicated in BSCDA.

2. Improvement of the secondary legislation, as specified in I.3.

When determining the period of the concession and leasing and in order to ensure equality between concession and leasing, could be taken into account the provision of art. 16 of SPA, according to which, the properties can be leased up to 10 years which is also the usual period for granting concessions as it was found in practice.

3. Establishing a unified practice, standards and terms through the development and approval of model contracts for concessions and leasing.

4. Creation and maintenance of public records on the website of the MRD for leased and granted on concession beaches, on which also to be recorded information for the control that has been exercised. We believe that this measure will ensure publicity, transparency and accountability.

5. In order to ensure effective control, as proposed in I.5.

6. To be prepared an analysis on the costs for security of unguarded beaches in order for the state to provide guards.

WATER ACT

1. Summarized findings and weak points

On the basis of the conducted analyses the following weak points were identified:

1. Incongruity and inapplicability of the Concessions Act to the water sector. The fragmentation of the legal framework of concessions for extraction of mineral waters and their partial regulation in CA and WA, the strict conditions on granting concessions for extraction of mineral waters and the regulated licensing regime in WA, the additional conditions concerning the concessionaires /there are no specific conditions in the selection of beneficial owner in the licensing regime (ownership or right of use is sufficient), it is possible to terminate the licenses even when explicitly rejected/, the longer periods for processing of the application and the conduction of the procedure by the competent authority, the higher initial investments which are necessary for the concessionaires, the longer period of the concession - up to 35 years, contrary to the permitted in the licensing regime /up to 20 years/, indicate that the implementation of the concession as a method for exploitation of mineral deposit sites has a more limited application than the licensing regime. What is apparent from

the data of the granted concessions in the National concessions register is that the number of the concluded concession agreements for extraction of mineral waters has declined throughout the years. This leads to the conclusion that the granting of water concessions under the procedure of the general law CA is not a purposeful approach for achieving a positive impact and they are in need of a special legal regulation.

2. Lack of adversarial-transfer of the concession to a third party without tender due to a permitted legal opportunity.
3. Lack of secondary legislation on the methodology for calculating the periods of contracts in the water sector, absence of any such in CA and WA.
4. Lack of standards of the service due to lack of legal or regulatory requirements to the contracts, according to their specificity.
5. Missing or insufficient guarantees or collaterals in the conclusion of contracts, lack or insufficient observance of the risk, leading to one-sided and biased contracts disadvantageous to the state.
6. Ineffective control due to missing or insufficient criteria for inspection and control.
7. Lack of adequate publicity and transparency. There is a register on the website of MEW /Ministry of environment and water/ for granting water concessions, exclusive state property, but not for the other mineral waters – insufficient publicity and transparency.

3. Proposals for measures for prevention:

According to Directive 2014/0437 of the EP and of the Council on the award of concession contracts, recital 40, „concessions in the water sector are often subject to specific and complex arrangements which require a particular consideration given the importance of water as a public good of fundamental value to all Union citizens. According to art. 12 /Specific exclusions/, the Directive does not apply to:
1. concessions, awarded in order to:
a) provide or operate fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water;
b) supply drinking water to such networks.
2. This Directive is also not applied to concessions with one, or both of the following subject-matters when they are connected with an activity referred to in para. 1:
a) hydraulic engineering projects, irrigation or land drainage, provided that the volume of water to be used for the supply of drinking water represents more than 20 % of the total volume of water made available by such projects or irrigation or drainage installations; or
b) the disposal or treatment of sewage.

In view of the aforementioned, we propose:

1. In WA to be regulated a special regime for concessions of mineral waters, as well as for works concessions and services for provision or operation of fixed networks intended to provide services to the public in relation to the production, transport or distribution of drinking water or to supply such networks with drinking water.

2. To be regulated unified state policy and planning of concessioning of water.

3. To be developed secondary legislation regarding a methodoly for calculating the price of water, according to the specifics of the subject and ways of determining the period of concessions in order to create a uniform practice in the country.

4. To be introduced a legal obligation for creating and maintaining a public register on the website of the MEW and the respective municipalities on whose territories are located the deposits of mineral waters, as well as waters, exclusive state property, and for other mineral waters. To be created a public register of aquaculture facilities intended for irrigation in order differentiate them with objects that are subject to concession.

5. To be regulated by law or regulation the requirements to the contracts for the extraction of mineral water and to the other types concessions, requirements in order to create a standard of service and ensuring a level of quality.

6. To be approved model contracts for concessions for mineral waters in order to prevent one-sided and biased conditions of the contracts.

7. On legal or regulatory level to be regulated the control exercised over the implementation of the various stages as follows:

- Stage of execution /works/ - in compliance with the technical specifications;
- Stage of exploitation – control over the quality of the provide service according to the agreed standards; operational control over expenditures, control of the schedules for providing services /availability/.
- Control over accounting for government expenditure /formation of government debt when allowing supplementary payments by the state- for example to achieve a certain socially acceptable levels of service/ ;
- Control over termination of the contract including in cases before the expiration of the agreed period, which may give rise to liabilities to the concessionaire in terms of the constructed part of the site
- Independent audit

Regarding the quality realization of control, outlined above, we propose the following options to the minister of environment and water, according to the specifics of the subject and scope of control:

1.Strengthening the administrative capacity

2. The control over the implementation of concession contracts can be organized and regulated by internal regulations of the respective authority in the specified below manner of realization:

a/ creation of a permanent administrative structure of the central body of executive power;

b/ supervisory authority appointed under contract by the public partner;

c/ creation of a commission with varying expert staff, appointed by order of the public authority for each specific contract.

Respectfully,

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