

The privatization system in Kosovo.
Rising towards an uncertain future

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“In 2003, Kosovo is the only country in the world that has self-governing socialism as a legal basis, despite the fact that it has died a long time ago (...) even at a time when after four years of government by the United Nations there are four economic models for Kosovo”.

Veton Surroi*
(*Koha Ditore* editorialist)

Introduction. New methods, old troubles

The present report reproduces several issues arisen by examining the topic of the privatization in Kosovo in the last papers drafted for the *Italian Liaison Office in Pristina*. The work is the result of the past studies on the matter, the further developments, and the interviews with experts of the sector.

The report will try to compare the different economic reforms actuated in Serbia with the current developments of the privatization in Kosovo, attempting to offer a possible “*legal and workable*”¹ solution to the current stalemate.

First the paper will seek to offer a general but a long and complete background of the privatization history in Serbia, which affected, at least until 1999, also Kosovo. Then the analysis will move towards the current system applied, also showing the progresses and maybe the lacks to fill. Before the conclusions, the author will summarize the present developments in the relations between the international administration, the local political class and the economic substrate through the examination of the facts occurred daily. Just those details will be significant in the achievement of the possible final solution, because they illustrate the requirements and, following, the interventions needed.

The conclusions represent the ending point of a study occurred for about three months, which embodies all the experience matured in researches, meeting with high rank international officials and consequent analysis. The suggestions proposed would be interpreted in offering a possible solution to the deadlock affecting the privatization process that could respect the existing legal framework, the rights of the owners and the workers, as well as capable to enhance the economic growth.

The paper will consider the choices made by the international competent authorities in Kosovo, drawing a gloomy scenario in which different forces act inside the international administration in order to keep the privatization suspended, looking for *personal immunity* or *liability insurance*. Worrying signs for those who expect the full respect of the procedures, in line with the “*reconstruction of key infrastructure and other economic reconstruction*”², that should lead to the cessation of any threats to peace and security (that remains the only valid legal background for the UNMIK authority). Clarity and accountability could in fact represent the best way to improve the growth of a

* UNMIK Division of Public Information Media Monitoring, Media Analysis, 8 October 2003 (on file with UNMIK DPI).

¹ Among the different slogans created by the Administration at every political, economic, legal difficulty encountered, this one seems to be the most recent to show how UNMIK Pillar IV will find a solution to the present impasse in the process. See UNMIK/PR/1064, Friday, 28 November 2003.

² UNSC Res. 1244 (1999), of 10 June 1999, 11 (g).

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sustainable institutional framework capable to enhance the success of a local and autonomous self government.

How it has worked before

1. The first relevant private property

Private property is not a UN invention in Kosovo. Under the Law on Basic Property Relations of the 1980, legal or physical persons were allowed to hold property rights³. However, the possibility to hold real estates or material objects suffered limits imposed by law. First of all, property rights under social ownership could not change their status, together with the general indication that the private property over houses could serve to cover the essential needs of the persons such as the private interests or the alimentary necessities⁴. Over those boundaries provided by law, one could hold a property right over lands used for agriculture, business building, and means of work in order to gain personal income⁵. A national legal person, as an enterprise, could also be the holder of property right over any properties that serve to realize the common interest of its members, including the property of separate parts of the buildings owned that served the workers to live in⁶. Foreign physical persons (indirectly excluding legal persons) could hold property rights over any objects under the same conditions with locals⁷.

What it misses in the provisions of the law is the possibility to generate speculation or a rapid capitalistic growth, due to massive foreign investments. The legislator seems afraid to liberalize the market too fast, creating a legal framework in which the private property results the instrument to provide basic needs for the citizens, not with the aim of a rapid development of the Country.

Apart of those interesting considerations, the Law on Basic Property Relations admitted the property of means of work, a real revolution in a Nation in which the communism was still ruling the internal ordainment. As a consequence, the property could be acquired⁸ in several ways and protected⁹ by normal means one can find in all western civil law legal systems¹⁰. The property can be also normally encumbered by mortgages¹¹ or subject to easements¹².

Only the real property had specific rules for its transfer, provided by the Law on Transfer of Real Property¹³. Those transfers could not regard real properties in social ownership, that were allowed to be transmitted only among social legal persons, with or without any compensation¹⁴, and at the end of a public tendering or by collecting written

³ Law on Basic Property Relations, Official Gazette SFRY, No. 6/80, art. 1 (Kosovo Law Centre Compilation III, Pristina, December 2000).

⁴ Id., art. 9.

⁵ Id., art. 10.

⁶ Id., art. 11.

⁷ Id., art. 82.

⁸ Id., art. 20 – 36.

⁹ Id., art. 37 – 43.

¹⁰ I.e. in the Italian Civil Code one can find all the provisions referred to the protection or acquisition of the property previously reported.

¹¹ Ibid., art. 61 – 69.

¹² Id., art. 49 – 60.

¹³ Law on Transfer of Real Property, Official Gazette of SAP Kosova, No. 45/81 (Kosovo Law Centre Compilation III, Pristina, December 2000).

¹⁴ Id., art. 4.

offers¹⁵. On the other hand, a social legal person could acquire buildings, apartments, business premises, or particular parts of buildings from the holder of the ownership rights¹⁶. Other limits invested the owners of agricultural lands, obliged to send a previous request for selling their own properties to the local Organization of Associated Labour and Municipality, so offering the possibility to the owners of the neighboring lands to exercise their right of pre – emption¹⁷. The same would have been with the transfer of socially owned apartments or apartment buildings, with regard to the holders of an occupancy right interested in the properties to be transmitted¹⁸. Moreover, a subsequent law amending the previous dispositions established the prohibition of any real estate transfer between citizens and civil legal persons, if it regarded an object in the territory of Kosovo transferred to a foreign contractor¹⁹.

All the real properties, as lands or buildings, were subjected to registration in public registers²⁰. In the case of socially owned properties, they were registered on behalf of the communities or organizations which had acquired the rights to real property in social ownership, with the specification of the persons who benefited of the usage rights²¹. If not possible to determine the exact holder, it would have been the local Municipality to be registered as the legal holder of the usage rights²².

The acquisition of a co – ownership of an apartment could be obtained by an investment of personal or social resources in its construction, through the purchase of an ideal part of the apartment or an improvement of the housing conditions²³. The contract of co – ownership, regulating the rapports between the social legal person and the entry owner, should also specify *ad substantiam* the sale, the use or lease, the major repairs carried out²⁴, and could not regard a part of the apartment minor of 10 % of the total value²⁵. The possibility to lease part of an apartment in social property has explicitly mentioned for a person who used an apartment but did not own it entirely²⁶; so envisaging a double side right for the occupant: a first right of occupancy in front of the social owners, a second right of lease in front of the leaser. The property did not change, but the occupier was entitled to limit the exercise of the property right.

This first round of privatization attributed the possibility for the citizens to realize a little income to provide to personal necessities, establishing a complex and difficult mechanism of property transfer. The laws enacted focalize on the possibility for the

¹⁵ Id., art. 9.

¹⁶ Id., art. 7.

¹⁷ Id., art. 19.

¹⁸ Id., art. 21 – a.

¹⁹ Law on Changes and Supplements to the Law on Transfer of Real Property, Official Gazette of SAP Kosova, No. 29/86 (Kosovo Law Centre Compilation III, Pristina, December 2000).

²⁰ Law on Registration of Real Properties in Social Ownership, Official Gazette of SAP Kosova, No. 37/71 (Kosovo Law Centre Compilation III, Pristina, December 2000), art. 1.1.

²¹ Id., art. 1.2.

²² Id., art. 4.2.

²³ Law on Co – Ownership of an Apartment, Official Gazette of SAPK Kosova, No. 43/80 (Kosovo Law Centre Compilation III, Pristina, December 2000), art. 2.

²⁴ Id., art. 3.

²⁵ The value of the apartment was determined by a commission established by the local Municipal Assembly. Id., art. 7.

²⁶ Id., art. 18.

citizens to create new private property, so starting from the basic real estates, as business or residential buildings. The law still does not offer the possibility to privatize the assets in social property, neither to open the new internal private market to foreign entities, due to the lack of authorization for foreign legal persons to hold property rights in the territory of the Republic.

2. From the State to the market

In the recent history of Serbia, just few dates can be considered relevant in its economic evolution. The first date is 1945, the end of WW II; the second is 1974, with the establishment of the Federal Constitution; the third is 1992, with new Constitution and the definitive opening to the market. In regard to those periods, past studies drawn a comprehensive view of the developments occurred.

As of 1945, the private property of “enemies” and “collaborators” who belonged mainly to liberal and anti-communist groups was nationalized²⁷. In addition, private ownership of agricultural land was limited with the land exceeding the limitation being nationalized²⁸. The Constitution of the People’s Federal Republic of Yugoslavia also provided that all natural resources were state property. Enterprises were obliged to operate under state control. The state exercised its control mainly through operational plans and by setting out economic objectives to be reached by the enterprises²⁹.

...(In the late 50’s, (t)hrough a series of legislation, enterprises were released from direct State administration and workers’ councils were put in place to manage the enterprises. At the same time, the transformation of nationalized property into social property began. This process reached its peak with the Federal Constitution of 1974, which provided that all means of production and other means of collective labour, the output of collective labour and the income earned through collective labour, the means required for satisfying public needs, natural resources as well as other assets designated for public use were social property. Social property as such was meant to be a legal category of its own, different from private and State property. The main feature of social property was that nobody was entitled to acquire any kind of ownership on an asset qualified as social property. The supreme title-holder of social property was the society as such. Private persons were only entitled to acquire a right of use of social property.

Since the society as such is an abstract being, there must be an organ acting as the agent of the society for the purposes of administering social property. (...) With due regard to that situation, the majority of the arguments are in favour of the municipalities for qualifying them as the agents of the society with regard to the authority to administer socially-owned property for and on behalf of the society. The municipalities were the entities, which had the right to dispose of the right of use by granting it to private persons or SOEs (e.g. in the case of agricultural and construction land)³⁰. It were also the municipalities, which were entitled to transfer – in the very limited cases as prescribed by law – social property into private property (permitted for buildings and apartments but expressly forbidden for construction land). (...) The municipality had to intervene, if an SOE was not using social property in a proper way, if it was not maintaining and increasing the value of the social property, or if the SOE was using the social property in violation of the law or the relevant grant-contract³¹. In such a case, the municipality had the authority to dismiss the executive board, to dissolve the workers’ council, to

²⁷ Official Gazette of the Democratic Federal Yugoslavia, No. 2/45; Official Gazette of the People’s Federal Republic of Yugoslavia, No. 63/46, 105/46.

²⁸ Official Gazette of the People’s Federal Republic of Yugoslavia, No. 64/1945.

²⁹ Muharremi R., *The United Nations Mission In Kosovo and the Privatization of Socially Owned Property*, Policy Research Series: Paper #1, Kosovar Institute for Policy Research and Development (KIPRED), Prishtina, August 2002, p. 8, available at <http://www.alb-net.com/pipermail/alpsa-info/attachments/20021213/6c53f4a6/Privatization.pdf>.

³⁰ Kosovo Law on Construction Land, Official Gazette of Kosovo, No. 44/76, art. 38,39.

³¹ *Supra*, note 29., p. 9.

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*appoint temporarily a new management and to limit the self-administration rights of the workers*³². It should also be noticed that in case of a liquidation of a socially owned enterprise, land and buildings belonging to that SOE were given back to the relevant municipality once all creditors' claims have been satisfied³³.

*The municipalities were acting for and on behalf of the society as far as the administration of social property is concerned*³⁴.

Then it comes to the early '90s and new transformations arise in the system.

*The Federal government led by Ante Markovic passed in 1988 Law on Enterprises*³⁵, then in 1989 *Act on financial Operations and Laws on Social Capital*. The laws enabled firms' reorganization, their insolvency and bankruptcy. It also permitted Employee Assemblies of the firms to sell the wished amount of enterprises' capital. The shares of the enterprise were sold at a 30% discount a rate to the present and former employees of the company. For each year of the employment the workers were given 1% discount up to a maximum of 70% of the nominal value of the shares. The hopes in the successful beginning of privatization, just like the hopes in economic reforms in general, were squashed by the conservative Milosevic government and the political conflict that was speeding up in the beginning of 1990 when the first multiparty elections were held in all six republics. The breakup of the country was inevitable and with it the breakdown of the announced economic reform in SFR Yugoslavia.

*The federal laws from 1989 continued to have some effects during the first half of the 1990s. The federal privatization law was followed by a law regulating privatization in Serbia. In 1991, the Serbian parliament adopted the Law on conditions and procedures to transform collective property into other forms of property*³⁶. This law permitted only the transformation of so-called collective property (*drustvena svojina*), forbidding the transformation of state-owned property. The transformation did not cover public or collective enterprises that were owned by the state or local authorities. Privatization was not mandatory. Between 1989 and 1994 some 60% of Serbian firms were privatized. But since it was an insider privatization, it did not do anything to change the corporate governance within the firms. Firms essentially continued to behave the same, accumulating arrears, receiving direct subsidies and soft credits. 'Banks often preferred to write loans off rather than put firms into bankruptcy; there was little incentive to foreclose on loans, since bankruptcy and liquidation procedures were heavily weighted in favor of the indebted. On top of all this, there came the 1992 Serbian Constitution that mandated the equality of all types of ownership'³⁷.

The new Constitution finally recognizes private property as an inviolable right of the citizen³⁸, as well as the protection of the intellectual property³⁹. Under its provisions "no one may be deprived of his property, nor may it be restricted, except when so required by the public interest, as determined by law, subject to fair compensation which may not be below its market value"⁴⁰. The right of the alien to engage business and own properties in the federal territory is also granted, with the express restriction for immovable property of

³² Federal Law on Companies, Official Gazette of FRY, No. 77/88, art. 75 – 79.

³³ Federal Law on Compulsory Settlement, Bankruptcy and Liquidation, Official Gazette of FRY, No. 84/89, art. 135.

³⁴ Supra, note 29, p. 10.

³⁵ Law on Socially-owned Capital, The Official Gazette of the SFRY, No. 84/89 and 46/90.

³⁶ Law on the Conditions and Procedure of the Socially-owned Property Transformation into Other Forms of Property, The Official Gazette of the Republic of Serbia, No. 48/91, 75/91, 48/94 and 51/94.

³⁷ Pavlovic D., *Privatization in Serbia, The Second Run*, G17 Institute, Belgrade, March 2003, p. 9, available at http://www.policy.hu/pavlovic/Privatization_Policy_in_2003.pdf.

³⁸ Art. 51 of the Constitution of the Federal Republic of Yugoslavia affirms: "The right to own property and the right of inheritance shall be guaranteed, in conformity with the Constitution and law". Art. 69 (2): "Property shall be inviolable".

³⁹ Id., art. 53.

⁴⁰ Id., art. 69.

cultural significance⁴¹. The property right for private citizens can be extended to agricultural lands, forests and some properties in the public domain and municipal building sites, with the exclusion of natural resources, which remain state property⁴². Finally, the Constitution also contains the right to compensation for anyone who has suffered damages as a result of unlawful or improper actions of an official or state agency or organization which exercises public power⁴³.

Due to huge inflation that culminated in December 1993 and the failure to re-value the assets to account for this inflation, the privatization carried out between 1990- 1993 resulted in the sale of firms for unreasonably low prices. This is why in 1994 the Serbian parliament, in a move pushed for by the Democratic Party, annulled the results of privatization by amending the 1991 Privatization law. As early as 1994, the Agency for privatization revised most of the deals made between 1991-1993, and reversed the results of the 1991 privatization law. The reevaluation was so-called ex post revaluation of the shares which were privatized prior to 1993. It meant that all the shares which were extremely cheap in 1993, suddenly became very expensive. This forced most of the shareholders to give up on the subscribed shares due to their high price. As a result, less than 10% remained privately owned⁴⁴.

Then, in 1996, the Federal Parliament passed a new law on the transformation of the socially owned capital⁴⁵ into other forms of organization. The law provides that the enterprises themselves, through authorized appraisers, shall identify the value of their own capital. The Privatization Agency shall certificate it and check the conformity of the procedure to the law⁴⁶. The alternative on transformation remains a voluntary decision of the competent body of the enterprise, which also chooses a model or a combination of diverse models among the sale of shares (for the different purposes of selling social owned capital or expanding the total capital of the enterprise), the transfer of shares to funds, or the sale of the whole enterprise⁴⁷. The currencies raised by the sale (naturally excluding the sale for recapitalization) shall be transferred to funds and invested by them, also placing the same funds in the stock market⁴⁸. As it will be foreseen by the further laws of the 2000s, after composed a privatization program, the enterprise shall submit it to the Agency and to the labour union of the enterprise, informing its employees about it⁴⁹.

In conclusion, under this law the privatization is still suffering too broad restrictions in the use of the sale profits. It also does not provide any centralized procedure, leaving the initiative directly to the enterprise, which, without the protection shield offered by a centralized governmental body, and in absence of a well trained management, could be often preyed by influent investors.

⁴¹ Id., art. 70.

⁴² Id., art. 73.

⁴³ Id., art. 123.

⁴⁴ Supra, note 37, p. 10.

⁴⁵ Law on the Basic Principles of Socially Owned Capital Ownership Transformation (Revised Text), The Official Gazette of the Republic of Serbia, No. 29/96, 29/97. The law does not apply to enterprises' housing stocks (id., art. 2).

⁴⁶ Id., art. 2 – 4.

⁴⁷ Id., art. 5, 6.

⁴⁸ Id., art. 12, 13.

⁴⁹ The program should also include the value of the whole capital, the objective of the enterprise intends to achieve by transformation and the settlement of the employees issue (id., art. 8).

A year later, another law was enacted⁵⁰. That law did not change the enterprise's autonomous choice to carry out the privatization by its governing body upon a specific program. It also reduced the transformation models to three possibilities, indicated in the sale of shares for selling capital, for raising capital, and the conversion of debt into creditors' equity⁵¹. All of them could be implemented autonomously, according to a special program or by enterprise's founders⁵². The most interesting was naturally the sale of shares for selling capital autonomously decided. Under this process, the sale provided a preferential right of purchase for current and former employees (also retired) and for insured (beneficiary of an obligatory disability pension) or and uninsured farmers⁵³. The law also specified the one – year term of the special offer and the maximum percentage of the capital to be offered by such procedure, fixed at 60%, as well as the total value attributed to each beneficiary, in proportion to the years spent into the enterprise⁵⁴. The remaining shares should be sold by public calls, published in the State Official Gazette⁵⁵. If shares still lied unsold also after that phase, was a new – established state share fund to own and dispose of them, also putting them in circulation by means of public offerings and/or through the stock exchange⁵⁶.

It is interesting to note that, except the case of a transformation due to the founders' will (in which case the proceeds from the sale belong to them⁵⁷), cash proceeds from the sale of the socially owned enterprises should belong to the Development Fund of the Republic of Serbia (50%), the Labour Market Bureau (25%), the Republic Employee Pension and Disability Insurance Fund (25%)⁵⁸. In one word: to the State. So the shares acquired by the employees free of charges should represent the fair compensation for the labour spent into the company, while the State practically did not recognize any previous collective right of property for the social owners, anyway also beneficiary of the proceeds of the sale. This principle would be also applied in the further privatization process.

One problem was, however, that not too many employed got the full 60%. (...)The usual outcome was that workers and the director got about 20-30%, whereas the rest was transferred to a share fund managed by the state. In practice, the share fund managers took no interest in governing the firm at all, whereas the workers were under the threat of the director of the firm to vote the way he suggested. The proportion of the shares given out to the employees was not high enough, and the managers could happily retain the control in the privatized companies. This also created the phenomenon known as 'tunneling', although in much smaller extent than in the Czech Republic.

⁵⁰ Ownership Transformation Law (translated by the Ministry of Economic and Ownership Transformation of Serbia), The Official Gazette of the Republic of Serbia, No. 32/97. The law does not apply to banks, insurance companies, other financial or non-profit organizations (id., art. 1).

⁵¹ Id., art. 6, 7. The law also states that, in the case of insolvency, the decision on ownership transformation may be also taken by creditors, major claimants on such an enterprise, and/or the Government of the Republic of Serbia (id., art. 10).

⁵² Id., art. 6.

⁵³ Id., art. 11.

⁵⁴ Id., art. 12, 13, 15.

⁵⁵ Id., art. 17.

⁵⁶ Id., art. 24, 27.

⁵⁷ Id., art. 37 (3).

⁵⁸ Id., art. 23.

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As a result, the restructuring of corporate governance under the 1997 law never occurred. This Serbian version of a MEBO⁵⁹ simply did not motivate management and workers to restructure. If restructuring implies downsizing, as it does, workers owning shares are rarely interested in restructuring the enterprise. (...) One novelty of the 1997 law was that, although preferring MEBO model, it did foresee special tender procedure for 75 enterprises that were seen as potentially lucrative. The 49% of the shares of the Serbian Telecom were sold by this law, although the government had to amend the Law on Foreign Investment, for this Law saw the Telekom as a strategic company that cannot be sold to foreign investors⁶⁰.

At the beginning of 1997, a modest share of collective capital had been privatized, whereas state ownership remained untouched. In total, under the 1997 law on privatization, only 10% of the capital was privatized by the end of 2000. The share of this 10% in the GDP was around 2%. Only smaller firms were privatized under the 1997 law. The sum of the emitted shares was estimated at 12 billion dinars (€ 200 million). The only big enterprise that was privatized was Telekom Srbija, in which 49% of shares were sold to the Greek OTI and the Italian STET. All in all, privatization policy prior to 2001 was flawed in that: a) it did not really make privatization possible; b) the few enterprises that went through the process did not become more efficient; and c) it was not just and fair. Besides, state owned enterprises become more and more to be seen as a source of political power due to the very close ties between economics and politics. It was estimated that leading politicians were directors of about 30 largest companies. A political party, called JUL headed by Milosevic's wife Mira Markovic, started to gather such people. One of the most important goals of any future privatization policy that had to break with the past was to destroy this economic-political link⁶¹.

⁵⁹ Management-Employee Buyout Method (MEBO). It means the transfer of shares to employees, through giveaways or sales at low prices.

⁶⁰ Supra, note 37, p. 10.

⁶¹ Id., art. 11.

How it is working in Serbia

1. The road to the last privatization

The road towards a real market economy in Serbia begins in 2000. At that date a working group (hereinafter *group*) was formed in the Ministry of the Economy and Privatization to prepare a legal foundation and institutional support, based on the previous experience of privatizations in Serbia and in post communist – transition Countries⁶². In preparing the system, the group pursued different aims, such as creating an open economy and ownership structure, maximizing investments in the real term sector, performing the social and political acceptability, and establishing a clear ownership structure and mechanisms of corporate administration based on this.

On the basis of the lessons learned in the past, the group confirmed that the privatization should have been mandatory and has a deadline, as the market should have been the sole factor of arbitration in evaluating the capital of a company, i.e. applying the competitive principle in the sale. That could avoid the direct bargains of the past, which produced episodes of corruption⁶³. The process of privatization should have been also public and transparent in order to establish and maintain the credibility of the institution that carries out privatization. On this point the Serbian Government, through its Ministry of Economy and Privatization should have appointed a Tender Committee with the aim to organize the tender, evaluate the bids, and participate in all stages of the bidding process⁶⁴. On its side should operate the new established Assembly Monitoring Committee and the Privatization Agency (hereinafter also *Agency*), according with a tripartite authority system. The risk to introduce into the market companies in an operational crisis should have been avoided in prior financial and organizational restructuring, not excluding liquidation⁶⁵. Moreover privatization should have been socially acceptable, in regard to the position of employees before and after the transformation, as to the possibility that a part of the capital could remain to them (in SOEs), and to all adult citizens of the State (in POEs). The law introducing the new privatization couldn't have contained retroactive solutions, in order to validate the rights or entitlements acquired during the past privatization system⁶⁶.

At that date, the existing economic situation did not allow the market to arise from years of isolation and slow past privatization, due to the models applied as well as the distribution of gratis shares in accordance with a diversified distribution pattern that also imposed limitations on their trading. A further mechanism upset the first, fragile internal market in the past. Insurance companies and insolvent banks issued shares in recapitalization purposes to cover their losses. Those shares were acquired by their clients, the SOEs, and not repaid. In consequence the same SOEs started to issue new

⁶² *The New Concept of Privatisation in Serbia*, par. 1.2.1, available at <http://www.priv.yu>.

⁶³ As referred to the Serbian Parliament by Minister Vlahovic at the opening of parliamentary debate of the new legislation on privatization, par. 5, available at <http://www.mpriv.sr.gov.yu/eng/statistika1/statistika.asp>.

⁶⁴ *Id.*, par. 8.

⁶⁵ *Id.*, par. 6.

⁶⁶ *Id.*, par. 8.

shares and bonds, creating a circle finally ended up in deals with domestic or foreign parties known in advance⁶⁷.

Other reasons why the Serbian Government chose the latter between the free distribution and the sale of capital were the shortening the time span of the company's structural adjustment, as the possibility to attract credible partners on the market, raising the technical and technological level of the economy by means of investments in new equipment and the transfer of technology⁶⁸.

The high level of the local management induced the Serbian authorities to choose a decentralized mechanism, based on the social consensus achieved directly inside the enterprises, upon an agreement with the investor or/and the Agency. To better respond to the selling exigencies, the privatization process knew a division in two large areas, one organized through public tenders (for POEs and for larger SOEs), and the other through private auctions (for Small and Medium SOEs - SMEs).

2. The legal framework

The group's output was a collection of new laws and ordinances on privatization⁶⁹, enacted in the late July 2001. Among them we can distinguish a *Privatization Law* (Službeni glasnik RS, No. 38 of 29 June 2001, came into force on 7 July 2001), a *Privatization Agency Law* (Službeni glasnik RS, No. 38 of 29 June 2001, came into force on 7 July 2001), and a *Share Fund Law* (Službeni glasnik RS, No. 38 of 29 June 2001, came into force on 7 July 2001). They provide for the basic legal framework for the new entry market wave.

The key document of the new economic concept is therefore entitled "Law on Privatisation". In the context of comprehensive reform, the new law institutionally eliminates socially owned property, which is the main channel of non-institutional privatisation. The basic premise of the new economic concept is that non-ownership (socially owned) companies cannot function in conditions of real-term exchange and interest rates and liberal foreign trade, because they are accustomed to preferential treatment by the state (tax evasion) and credit infusions⁷⁰. In the first article the law reports the main goals and the entities responsible for the implementation of the process⁷¹, as well as the definition of *Share Fund*, *Privatization Agency*, *Central Registry for Securities and Privatization Registry*⁷². The law outlines the two different models of privatization seen before, the sale of capital and its transfer free of charge; the first executed by public tenders or by public auctions, the latter by a transfer of shares to employees or citizens⁷³. Finally it is also⁷⁴ provided the possibility for foreign legal persons to vest the quality of purchasers, enjoying the same rights of the domestic

⁶⁷ Privatization Agency, *A Guide Through Capital Market*, p. 4, available at <http://www.priv.yu>.

⁶⁸ Supra, note 27, par. 1.2.2.

⁶⁹ For a full list, see Privatization Agency, *Public Tender as a Method for Selling Capital*, p. 15, available at <http://www.priv.yu>.

⁷⁰ Vlahovic A., *Introductory Commentary on the Law on Privatisation*, p. 1, available at <http://www.priv.yu>.

⁷¹ *Privatization Law* (Službeni glasnik RS, No. 38 of 29 June 2001), art. 1 – 3.

⁷² Id., art. 4 – 8.

⁷³ Id., art. 9 – 11.

⁷⁴ Id., art. 12.

investors. The privatization system shall include all the SOEs, obliged to carry out the procedure within a maximum of four years from the effective date of the law, on the contrary submitted to the final authority of the Privatization Agency, competent to their privatization in the case they exceed that term⁷⁵.

The preliminary phase sees the formation of the “initiative” by the enterprise, an act of the enterprise’s competent body which expresses the intention to implement privatization (in a written form), and follows with the drafting of the prospectus (a description of the main data of the enterprise⁷⁶), both to be presented to the Agency within five days. The initiative is also submitted to the workers' union of the entity to be privatized, also informing all the employees. The privatization procedure may also be initiated by the ministry in charge of privatization affairs and interested purchasers. In this case, the entity to be privatized is obliged to deliver to the Agency the prospectus within seven days from the date on which it receives the initiative⁷⁷.

Within 5 days after the expiration of the deadline for collecting data on the number of potential buyers, the Agency shall notify the enterprise about the method of privatization chosen or on need for restructuring⁷⁸.

3. The restructuring phase

Several authorities are involved in this phase of the process, consisting in giving to the enterprises to privatize an acceptable internal framework capable to attract future investors. In particular, the restructuring takes place when it is not possible to privatize the company due to its existing statutory and organizational form or to its existing capital structure, when the liabilities and the losses of the company exceed the value of total assets, and there aren’t any potential buyers of the company within a reasonable term⁷⁹. The reorganization proceeds through three different stages, requesting time and high expertise. It begins with a “due diligence” analysis, followed by the preparation – adoption – implementation of the program, finally driving the process towards the sale⁸⁰.

The “due diligence” analysis should identify companies in which the corporate restructuring should be initiated, select consultants and, according with them, prepare a diagnostic study⁸¹. This phase is held by a team of consultants at the Corporate Restructuring Center, within the Agency. Once completed, the diagnostic study is

⁷⁵ Id., art. 14.

⁷⁶ Id., art. 18.

⁷⁷ Id., art. 16.

⁷⁸ Id., art. 18.

⁷⁹ Privatization Agency, *A Guide to the Restructuring Process*, p. 5, available at <http://www.priv.yu>. All the information provided in the paragraph is also reported in the Decree on the Procedure and Manner of Restructuring of Enterprises and other Legal Entities, pursuant to art. 20 of the Privatization Law. As a subsidiary legal mean it represent the right legal font to consult. To better summarize its survey, because the main goal of the report is to confront the Kosovar and Serb privatization procedures and not giving a full explanation of the law’s content, the author has chosen to report in the notes the official governmental documents related to the laws enacted. Obviously, all notes have been confronted with the laws and decrees’ provisions.

⁸⁰ Id., p. 6.

⁸¹ Id., p. 7.

presented to the Agency, management of the company and labour union representatives for a prior valuation⁸².

Then it comes to the privatization initiative and publication of the restructuring plan⁸³, also notifying the restructure to the competent commercial court and publishing invitation to creditors to file their claims within 30 days. After that, a list of creditors is compiled, comparing those who have sent claims with those reported in the company's book. The listed creditors will decide whether accept the restructuring plan or not. They are not the only who shall submit the plan, as the same company under exam will be to approve it before the program can be said ready to be implemented⁸⁴. Creditors with a majority of state owned capital may convert their money claims into capital of the entity to be privatized⁸⁵. Once the plan has been endorsed, the company shall be able to undertake just ordinary affairs, to compromise not the capital, and, before adopting extraordinary decisions, presenting them to prior Agency's approval⁸⁶.

The restructure is split in two stages, relating to organization and finance. The first affects organizational and statutory changes (and their presentation to the public), carried out for the purpose of improving the prospects for successful privatization of the company, while the latter concerns the formation of the creditor list, the identification of questionable claims, the request for debt – equity swap, and the activities undertaken in the case that the creditors do not accept the restructuring program⁸⁷. The organizational changes may arrive till the merger of subsidiaries by taking over or spinning off, other than splitting off the entity into more legal entities and selling them, or transferring the assets or parts of the assets into another legal entity. The exchange of the entity legal form or any of its subsidiaries is also possible, such as a change in its internal organization by closing the commercially non-profitable business units⁸⁸. The restructure reaches the culminating point as the restructuring plan is adopted. That happens when the creditors representing more than 50 % of the total amount of the claims approve the program. Immediately after the positive vote of the assembly of the creditors, the new independent legal entities are registered within competent commercial court, not

⁸² Id., p. 8.

⁸³ The corporate restructuring program of the company is basically a document in a form of a plan dealing with financial, organizational, social and ecological obstructions. The corporate restructuring program shall include the data relating to: company undergoing restructuring and its operations; the value of its capital and assets, as the amounts and mode of debt payments; the prospects of successful corporate restructuring; the program regarding the social consequences; the privatization plan and the other information of importance for corporate restructuring (Id., p. 11; *Privatization Law*, art. 23).

⁸⁴ Id., p. 10.

⁸⁵ *Privatization Law*, art. 20.

⁸⁶ In particular, the company undergoing restructuring may not make any decisions relating to: disposal of movable and immovable assets; taking credits or loans; granting credits or loans; issuing guarantees for other entities; taking over the liabilities of another entity; acquiring, increasing or decreasing shares in the capital of another entity; paying dividends to shareholders; issuing shares or taking other steps doing that would change the existing structure of its capital; changes of its internal organization or its status; increase or decrease of the company's capital; investing in fixed assets; increasing the number of employees in excess of the required number.

⁸⁷ *Supra*, note 79, p. 12.

⁸⁸ Id., p. 13.

including the non – operating assets, sold to satisfy the creditors’ claims or on social program’s benefit⁸⁹.

The interests of the companies’ workers are protected by a social program within the whole restructuring plan. The social program is the result of the interaction of separate actors, working at the same objective of guaranteeing the future labour status after the comprehensive reform. The Ministry of Economy and Privatization, together with the Ministry of Labour, the Republic Labour Market Institute and the same company to privatize do perform the plan under Agency’s supervision, and the participation of the Ministry of Natural Resources and Environment, if the reorganization can affect the environment, causing a sensitive detriment. A team formed inside the company’s staff shall gather and present information to the representatives of the institutions in charge in order to establish the total number and structure of redundant employees and to adopt plans for their professional future⁹⁰.

The whole process described is supervised by the Agency, which has the power at every stage of the system to take steps to implement the correct corporate restructuring procedure, as suggesting a new program or single amendments within it⁹¹.

4. Tenders and Auctions

The central part of the procedure consists in the sale of capital. The entity to be privatized normally shall sell up to 70 % of the capital, if the purchaser accepts⁹². It is sold by to different procedures: public tender in the case of a POE or big SOE; public auction for SMEs⁹³. The tender shall be used generally when it is difficult to set the opening price or there is a need for a strategic partner and criteria other than financial ones also exist; public auction shall be better employed when it is possible and preferable to set the opening price, or when there is demand for the whole block of shares⁹⁴.

a. Tenders

Tender sale is organized and conducted by the Agency⁹⁵. It includes several phases, starting with the preparation for sale in different steps, going on with selection of consultants, appointing a tender commission, preparing a tender documentation for public announcement. Consultants (a consultancy firm, an investment bank or a law firm) are selected by competitive tender. They are expected to perform duties relating to the organization of sale by public tender, as collecting and analyzing the data of the company, selecting of the best bid and negotiations for the sale contract. They also prepare the tender documentation, in co-operation with the company concerned and experts from the Privatization Agency⁹⁶.

⁸⁹ Id., p. 14.

⁹⁰ Id., p. 12.

⁹¹ Id., p. 14.

⁹² *Privatization Law*, art. 25.

⁹³ *Supra*, note 63, par. 6.

⁹⁴ *Supra*, note 67, p. 10.

⁹⁵ *Privatization Law*, art. 26.

⁹⁶ *Supra*, note 69, p. 7. All the information provided in the paragraph is also reported in the Decree on Sale of Capital and Property by Public Tender, based on article 33 of the Law on Privatization. For the consideration of the author’s choice to do not report entirely the articles of the decree, please see note 44.

On the contrary the tender commission is appointed by the Ministry of Privatization. It is in charge to approve results of the tender sale and produce a report of its activity to the Agency and the Ministry within 15 days⁹⁷. Causes of exclusion for being a member in the commission are provided for persons who have ownership rights in the company put up for sale as well as if direct relations up to third degree are bidding in the tender⁹⁸. The bids are evaluated on the basis of continued operations or investments of the company, the social welfare program quality, the environmental protection and finally the price offered for the company capital tender⁹⁹.

The law also contains the possibility of legal objection for the loosing bidders. They have to present their objection to the Ministry within the term of 8 days since the notification of the tender's result. In the following 8 days, the Ministry shall respond to the claim with a decision that is considered final¹⁰⁰.

Finally the contract is signed by the buyer, a representative of the company and a representative of the Agency¹⁰¹.

b. Auctions

The procedure of auction is not very different from the tender's one. After a preparatory phase, the Agency shall announce public invitation for participation in auction at least 15 days earlier. The invitation is normally published via Internet or in foreign and local mass media¹⁰². The same Agency appoints the five elements (four members and a president) of the Auction Commission¹⁰³, responsible for the conduction of the auction, the registration of the participants, the declaration of the winner and other relevant actions¹⁰⁴. The Privatization Agency draws up the draft sale contract in accordance with the privatization program. The bidders should sign the draft before the auction takes place, thus confirming their acceptance of the contract terms. The draft does not include the sale price. After entering the price and other necessary data the draft becomes the sales contract, providing that the bidder is declared the buyer¹⁰⁵. In the event of the buyer's failure to sign the contract, or effect payment within the set term, it loses the status of buyer and the right to bid in future auctions concerning that entity, as well as the right to be refunded the bid bond. Then, the contract is concluded with the next best bidder with the condition that if even it fails to sign the sales contract or does not effect payment within the set term, the auction is announced unsuccessful¹⁰⁶.

⁹⁷ *Privatization Law*, art. 29.

⁹⁸ *Supra*, note 69, p. 10.

⁹⁹ *Id.*, p. 13.

¹⁰⁰ *Privatization Law*, art. 32.

¹⁰¹ *Supra*, note 69, p. 14.

¹⁰² *Privatization Law*, art. 38.

¹⁰³ Provided inside the Decree on Sale of Capital and Property by Public Auction, art. 2.

¹⁰⁴ *Id.*, art. 36 – 37.

¹⁰⁵ Privatization Agency, *A Guide Through Auction Procedure*, p. 12, available at <http://www.priv.yu>. All the information provided in the paragraph is also reported in the Decree on Sale of Capital and Property by Public Auction, based on article 40 of the Law on Privatization.

¹⁰⁶ *Id.*, p. 16.

Within eight days from the date of the auction and payment of the sale price, the company's board of directors should convene the general assembly to adopt the new statute and appoint the new members of the administrative bodies from a list previously presented by the buyer, as the majority owner¹⁰⁷. By reading the legal sources it is not clear the real importance of such list. Even envisaging a qualified majority, the new owner anyway holds 70 % of the capital and so he should be able to appoint directly the board and the managers.

Rules are provided to grant the old social owners, now minority shareholders. Practically the buyer decides about the profit distribution, because for such decision it is provided a two third majority vote, but he has to pay dividends amounting to at least 10% of the profits accrued in the first two years (unless otherwise provided in the sale contract). Measures are also taken to protect the capital: in the period in which the buyer has undertaken to make capital investments in the enterprise, he is not legally capable to transfer or in any other way dispose of the purchased capital or the new shares acquired on the basis of recapitalization¹⁰⁸. In the same period he cannot encumber the purchased capital by pledges and/or sureties (except for recapitalization purposes) or transfer the assets of the company for more than 10% of its capital. Moreover, the business destination of the enterprise cannot be changed within two years from the date of the auction¹⁰⁹.

Other obligations regard the buyer. They have been drafted probably to offer a minimum of protection for the workers and Agency against speculations. The new owner shall invest in the company in one or two years from the date of auction (depending on the size of the investment) and will not be able to dismiss redundant workers within a year. However, after that period he shall confer them the ordinary severance pay, and in general he shall respect or adopt a new employee training program. Moreover, the buyer is to provide an unconditional bank guarantee payable at first call, issued in favor of the Agency and covering the amount of undertaken investments¹¹⁰.

5. The other 30 %

What happen to the remaining 30 % of the capital? The answer to this question is different for tenders and auctions.

a. Tenders

A maximum of 15 % of the capital is acquired free of charge by employees¹¹¹ of the entity to be privatized in the total nominal value of 400 DEM¹¹² for each full year of employment but for no more than 35 years of employment, regardless of the period in which the entity is privatized. The shares remaining after the completion of the sale

¹⁰⁷ Id., p.17.

¹⁰⁸ Id., p.18.

¹⁰⁹ Id., p.19.

¹¹⁰ Id., p.20.

¹¹¹ Current employees, or those who had previously been employed in the entity to be privatize, pensioners; employees of a parent enterprise or subsidiary if the entity to be privatized is a subsidiary or parent enterprise (Privatization Law, art. 42).

¹¹² Using the official exchange rate with Dinar on the date of announcing the public invitation.

by public tender, as well as after the free shares transfer, shall be recorded in the Privatization Registry¹¹³. In the same registry shall be recorded the remaining shares amounting to a maximum of 15 % of the capital¹¹⁴. Those shares will be further transferred within two years to all the adult Serbian citizens who have not received before free shares under the provisions of the Privatization Law¹¹⁵.

b. Auctions

For public auctions a mechanism to stimulate a fast privatization is provided. In fact the value of the capital to be privatized which shall be acquired free of charge by the employers will change in respect to the date of the auction. The more time the privatization takes, the less portion of capital will be available for free acquisition. In particular 30 % of the value of the capital to be privatized, if the sale by public auction is completed within 18 months from the effective date of the law, 20 % if completed in 30 months, 10% if completed later¹¹⁶. The same principle is used in regard to the calculation of the portion of capital possible to acquire free of charge, based on a nominal value that diminishes the more the privatization takes. So the employers shall be entitle to acquire shares equivalent of 400 DEM (about € 200)¹¹⁷ for each full year of employment, if the sale by public auction is completed within 18 months from the effective date of the law, 300 DEM if completed in 30 months, 150 DEM if completed later¹¹⁸. The shares remaining after the sale shall be transferred to the Share Fund for sale¹¹⁹.

Art. 61 of the Privatization Law further explains how the revenues from the process shall be distributed: 75% goes directly to the Serbian budget, 5% to the restitution fund, 10% to the pension fund and another 10% to the infrastructure fund.

6. Registers and Funds

Two registers and a fund regulate the procedure. The Central Securities Register contains a unified database on the status of all issued shares. Its work is governed by federal regulations¹²⁰. It was founded as a joint stock company before January 1, 2004. Until its establishment, the National Bank of Yugoslavia should conduct all operations regarding registration, depositing, clearing and balancing of securities. Otherwise, as soon as the registry had been constituted, it would have taken over (as of the day of its establishment) securities register and depot as well as documentation related registration, depositing, clearing and balancing of securities, equipment and information system used to conduct such activities¹²¹.

The Privatization Register, which is kept in the Ministry in charge of privatization, is the register which contains data about the part of the privatization subject's capital

¹¹³ *Privatization Law*, art. 49.

¹¹⁴ *Id.*, art. 52.

¹¹⁵ *Id.*, art. 54.

¹¹⁶ *Id.*, art. 45.

¹¹⁷ Using the official exchange rate with Dinar on the date of the publication of the public invitation.

¹¹⁸ *Id.*, art. 46.

¹¹⁹ *Id.*, art. 48.

¹²⁰ Vlahovic A., *Introductory Commentary on the Law on Privatisation*, available at <http://www.priv.yu>.

¹²¹ Law on Securities and Other Financial Instruments Market (Official Gazette of FRY, No. 65/2002), art. 260.

expressed in shares, which will later be issued free of charge to citizens, who have not taken part in the free distribution of shares¹²².

Then it comes to the Share Fund. The Share Fund is another important body in the institutional structure of privatization policy. Its activities are defined by articles 67-74 of the Privatization Law and by the Share Fund Law. The major activity of the fund is to manage and sell the shares that remained undistributed by the privatization process set by the previous law¹²³. In fact, Privatization Law provides how the remaining part of enterprises previously privatized should be treated in accordance with the ordinary procedures, while all the shares of enterprises that should have been privatized before under the previous laws, but that have stopped due to payment reasons or that have not gone to the public invitation yet, shall be transferred to the share fund (hereinafter also fund)¹²⁴. The fund shall sell, within six years, the shares transferred by public auction or at the stock market, but also, as an exception, by public offer or tender, if so decided by the Ministry in charge¹²⁵. To harmonize the different disciplines, the trading of shares acquired during the past privatizations can be freely traded through the stock exchange as ordinary shares, while the data about the state of shares in the enterprise shall be adjourned and submitted to the Central Registry¹²⁶.

The Share Fund law is identified as a limited liability body constituted by the Federal Government¹²⁷. Its main bodies are the Board of Directors, the Supervisory Board, and the Manager. All the members in the bodies are appointed and dismissed by the Federal Government¹²⁸. The Board of Directors, responsible for the overall management of the fund¹²⁹, is composed by five members: two representatives of the Government of the Republic of Serbia, one representative from the administrative body of territorial autonomy and a representative each of the Republic's Fund for Retirement and Disability Insurance of Employees and the Privatization Agency¹³⁰. Instead the Supervisory Board, committed with surveillance tasks¹³¹, includes a representative each of the Republic's Fund for Retirement and Disability Insurance of Employees, the Ministry of Finance and the Ministry of Privatizations¹³². However, the office charged of the main responsibilities

¹²² Supra, note 120.

¹²³ Supra, note 72, p. 16.

¹²⁴ *Privatization Law*, art. 66 – 68. *Share Fund Law* (Službeni glasnik RS, No. 38 of 29 June 2001, came into force on 7 July 2001), art. 8.

¹²⁵ Id., art. 69, 71.

¹²⁶ Id., art. 73.

¹²⁷ *Share Fund Law*, art. 4, 5.

¹²⁸ Id., art. 6.

¹²⁹ The field of activity of the Board is entirely specified in the Fund's statute, regarding the adoption of the following acts: the share fund program, the financial plan, the operating report, the annual financial statements, the general regulations, and the internal rules of procedure. The Board is also responsible for defining the guidelines for the Manager, for the purpose of carrying out activities within the competence of the Share Fund (*Statute of the Share Fund*, adopted by the Board of Directors at the end of the meeting held on November 27, 2001, art. 15).

¹³⁰ *Share Fund Law*, art. 6.

¹³¹ The responsibilities of the Supervisory Board are drawn in the same Fund's Statute. The members of the Board review the annual financial statements, the operating reports, business records and ascertain their compliance with the regulations, supervising the performance legality of the Share Fund Management (*Statute of the Share Fund*, art. 19).

¹³² *Share Fund Law*, art. 6.

lies in the Manager. In fact he is the one having received the legal representation¹³³ of the Fund in transactions, as well as the accountability for performance legality and the management of the Fund's assets¹³⁴, embodying all the executive and organizational powers of the Fund.

The Share Fund Law also foresees the applicability of the general provisions on conflict of interest for Fund's bodies or employees¹³⁵, as the prohibition on the abuse of privileged information, that could badly influence the market if spread before the public invitation¹³⁶. The supervision over the legality of operations and the removal of presumptive legal violations shall be carried out by the competent ministry within the term of 30 days from the violation's discovering¹³⁷. After a first financing by the Serbian budget, the Fund will survive on the revenues provided by the fees for costs and commissions in the sale of shares, dividends paid by enterprises not privatized yet, and residually, the same national budget¹³⁸.

The provisions of relevant fines for employees and bodies' violations included in the process of shares' sale¹³⁹ result very important, giving a particular character to the matter with special penalties and speeding up the terms and procedures for the ascertainment of the liabilities and the losses in case of abuses or embezzlements.

7. Present situation

The present situation represents the picture of a model that, while working, is finding a strong resistance by the workers and the trade unions. This could mean that the privatization model in Serbia hasn't accepted yet by all the social and productive classes and could be the reason of an increasing of the social tense. With this remark, the process has also accomplished several goals, and probably it will end before the planned 4 years.

In fact, in the past two years about 940 companies have been sold while in Hungary, considered to be the most successful country in transition, just about 1,850 companies were privatized over 12 years. In a report presented to the Serbian Parliament Committee for privatization, the Director of the Privatization Agency Mirko Cvetkovic recently announced the additional 74 auctions scheduled for October, 88 for November and 80 for December 2003, while adding that the three larger transactions in September (two tobacco industries and Beopetrol) brought in over 36 billion dinars (about € 526 million) from tenders, and various auctions brought in additional 38 billion (about € 555 million)¹⁴⁰. Since the beginning of the process, those 940 companies produced an income that has exceeded € 1.2 billion. The buyers' obligation to invest into the purchased companies amounts to € 667.5 million, and the buyers are due to invest another € 261 million into the social program. At the same time, the Stock Fund sold 150 companies,

¹³³ *Statute of the Share Fund*, art. 24.

¹³⁴ *Id.*, art. 22.

¹³⁵ *Share Fund Law*, art. 20.

¹³⁶ *Id.*, art. 21.

¹³⁷ *Id.*, art. 23, 24.

¹³⁸ *Id.*, art. 25.

¹³⁹ *Id.*, art. 27 – 30.

¹⁴⁰ *Tanjug Daily News*, Belgrade, Tuesday, October, 14, 2003.

realizing an income of 150 million euros¹⁴¹. In the words of the competent Minister, the privatizations have helped the stabilization of the budget, ending this year with a 3.5 % deficit, 1 % less than planned¹⁴². Following the mentioned data, foreign countries seemed to believe in the Serbian model, planning to invest in the new founded enterprises. Just to cite some of them, China, Hungary, Italy and Austria¹⁴³.

Although those triumphant declarations, the economic strategy of the Serbian Government – aiming to increase of total number of small and medium size private firms from present cca 270.000 to cca 400.000 and opening of over one million new jobs until the year 2008¹⁴⁴ – clashes with the reality of the declarations stated by the same Minister of Economy and Privatization Aleksandar Vlahovic, who affirmed to aspect not significant income from privatization in the year 2004 unless some sections of the Serbian Petrol Oil Industry (in Nis) or a section of Mobtel, which is owned by the state, are going to be privatized¹⁴⁵. Others pointed out the danger represented by the possibility that, thanks to the bank guarantees foreseen by the law, the credit institutes could become soon the real owners of the new Serbian corporations. To avoid the risk, the Serbian Parliament's Privatization Board recommended to the Privatization Ministry to incorporate a clause into the Privatization Law specifying that bank guarantees may be issued only to buyers that do not pledge companies they intend to acquire¹⁴⁶.

Turning on the political debate, the opposition criticized the Government to sell enterprises for amounts lower than their estimated value and to use the money received for public consumption, rather than investments¹⁴⁷. Moreover some experts assessed that, in the process of transition, *“there have been no drastic changes in the labor market, which means that privatization could be speeded up”*, examining and balancing the number of expected redundancies¹⁴⁸. Others stressed the low general level of direct investments in Serbia as the consequence of the Government to breach not the monopoly coming from the past socialist regime¹⁴⁹. Another indication of this tendency is the allegations against the Serbian Minister of Interior Dusan Mihajlovic for presumed

¹⁴¹ Minister of Economy and Privatization Aleksandar Vlahovic, quoted in Tanjug Daily News, Belgrade, Wednesday, November, 5, 2003.

¹⁴² Minister Aleksandar Vlahovic, quoted in Beta News and Press Reviews, No. 1748, Belgrade, Wednesday, November 5, 2003.

¹⁴³ In particular, Italy has recently sent a delegation from Friuli Venezia Giulia region to visit Vojvodina, bringing an Italian Foreign Ministry donation at the value of € 376,000 for the development of small and medium-sized enterprises (Beta News and Press Reviews, No. 1754 Belgrade, Thursday, November 13, 2003), meanwhile the local branch office of the Austrian firm S-Leasing this year approved € 3.7 million for equipment leasing for about 80 corporate bodies in Serbia and expects to approve a total of € 6 million by the end of the year (Austria's Immorent Holding Board of Managers President Franz Kerber, quoted in Tanjug Daily News, Belgrade, Friday, November, 17, 2003).

¹⁴⁴ *Weekly Economic Bulletin*, V.I.P. News Services, No. 376, Friday, October 31, 2003.

¹⁴⁵ V.I.P. Daily News, No. 2678, Monday, October 20, 2003.

¹⁴⁶ Serbian Parliament's Privatization Board President Dragisa Marinkovic, quoted in *Weekly Economic Bulletin*, V.I.P. News Services, No. 374, Thursday, October 16, 2003.

¹⁴⁷ Gordana Pop Lazic (Serbian Radical Party), quoted in Tanjug Daily News, Belgrade, Friday, November, 7, 2003.

¹⁴⁸ Dusan Pavlovic, fellow at the G17 Institute in Belgrade, quoted in Beta News and Press Reviews, No. 1750 Belgrade, Friday, November 7, 2003.

¹⁴⁹ *BlicNews*, quoted in V.I.P. Daily News Report, No. 2691, Thursday, November 6, 2003.

arrangements in favor of some of his 15 firms during public tenders¹⁵⁰, and the conflict of interest raised against the former Serbian Minister for Traffic and Telecommunications Marija Raseta Vukosavljevic, accused, together with a former secretary-general of her ministry, Dejan Sotirov, of having established a company which is registered for transport business¹⁵¹.

In the aftermath of those events, serious protests occurred in the Country, also resolved in riots between the demonstrators and the police. This happened when the Alliance of Independent Trade Unions of Serbia staged protests in several towns in Serbia on November 12, and set up road blocks at the main highway near Cacak¹⁵².

To conclude, official statistics released by the Republican Bureau of Statistic have been criticized for not possessing all the necessary data, primarily for a lack of a complete insight into the output of privately-owned small and medium-sized enterprises. The main criticism is that the calculation of these data does not include small enterprises, while the inclusion of medium – sized enterprises is insufficient, and that their inclusion would lead to a considerable change in the value of the presented indicators. On the basis of such disapproval, the output growth rate of small and medium – sized companies passes from 15 % to 4 %¹⁵³.

¹⁵⁰ G 17 Plus political party accused Mihajlovic of having helped his company Arius to win the tender for the acquisition of computer equipment, with the company thus earning € 2,420,500. Several Belgrade newspapers published the statement of the Arius Company saying that Mihajlovic had withdrawn from the company on April 17, 2001. The tender for the purchase of computer equipment was called by Ministry of Interior (MUP) in August 2001, and the government adopted the decision on the approval of the equipment in February 2002 (V.I.P. Daily News Report, No. 2687, Friday, October 31, 2003).

¹⁵¹ In August, G17 Plus accused the Minister of using her position on the board of the Development Fund to secure a loan for her husband, Vladimir Vukosavljevic, a claim which both denied. The Development Fund approved a loan of 3.1 million dinars (about 50,000 euros) in June last year to a company jointly owned by Vladimir Vukosavljevic's father and cousin. Raseta-Vukosavljevic subsequently stood down from the board (*Zivkovic moves to sack scandal-dogged Minister*, Beta News Agency, available at http://www.invest-in-serbia.com/archive/2003/2003_11/2003_11_03_05.htm).

¹⁵² Protests were also held in Nis, Krusevac and Zrenjanin. At all the rallies, the unions demanded the dismissal of the Government, the scheduling of legislature elections and a moratorium on the privatization process. In front of 3,000 workers, organizers of the protest, at the central square in Nis, demanded that the new government form an agency to review all privatization contracts. Around 6,000 workers from socially-owned companies from the town and its vicinity, gathered at the protest rally in Krusevac. Around 300 union activists blocked the main road near Cacak for one hour, only letting an ambulance pass. Protests continued on November 13 in several towns throughout Serbia (Beta News and Press Reviews, No. 1754 Belgrade, Thursday, November 13, 2003).

¹⁵³ *Politika*, November 4, 2003, quoted in *Weekly Economic Bulletin*, V.I.P. News Services, No. 378, Thursday, November 13, 2003.

How it isn't working in Kosovo

“A major deficiency identified by the Panel is the lack of accountability for the decisions and positions taken by UN managers (...). The United Nations needs a new culture of accountability”^{*}.

The present work, as an addendum to the previous, will not duplicate the information released in the past reports submitted to the Office. The conclusions arisen at the end of the last written indicated a stagnant phase, in which the privatization process was suspended, due to several reasons, the most important of which was the question of the immunity for the KTA's bodies or personnel. The main concerns, in the opinion of the author, have been previously expressed and will be renewed in the following section. So the current section will analyze the present development of the relevant facts, with the advice that the report could lack of the last events, due to the tight actuality of the topic.

The discussions occurred with several UN senior legal advisors indicates that the main problem to be resolved before starting again with the third round of privatizations lies in the solution to the problem of immunity. The situation is still not clear for the moment, having received different answers to the same question regarding the UN official position on the matter. The official position expressed by the spokesperson of the EU pillar IV component is that “(they) should wait for the UN to provide immunity to KTA officials during the process of privatization”¹⁵⁴.

The privatization process has been officially resumed after a two week stoppage¹⁵⁵, while practically it is still suspended, because the next round has not started yet. The Office of the Legal Advisor in New York (hereinafter OLA), after a first supporting position, specified KTA should be regarded as a UN founded body but an independent one on the basis of chapter 11 of the Constitutional Framework, not enjoying the privileges and immunities provided for the UN bodies and personnel¹⁵⁶. The same OLA further pushed for a reopening of the process, sending a letter to the SRSJ Holkeri with a precise invitation¹⁵⁷.

Making a step back in the recent history of privatization, on October 11 the second annual Kosovo Investment Conference (KICO) was organized by the Department of Non-Residential Affairs of the Ministry of Culture, Sports, and Youth of Kosovo

* Report of the Independent Panel on the Safety and Security of the UN Personnel in Iraq, 20 October 2003, executive summary, available at <http://www.un.org/News/dh/iraq/safety-security-un-personnel-iraq.pdf>.

¹⁵⁴ De Groot M., quoted in *Koha Ditore*, UNMIK Division of Public Information Media Monitoring, Media Analysis, 14 October 2003.

¹⁵⁵ Monitor Final Edition Pristina Media Highlights, OSCE Mission in Kosovo, Office of Press and Public Information, 23 October 2003.

¹⁵⁶ Private discussion held with Mr. Alexander Borg Olivier, Director of the UNMIK Legal Advisor Office, UNMIK H.Q., Pristina, November 4, 2003. See also *Koha Ditore*, in Monitor Final Edition Pristina Media Highlights, OSCE Mission in Kosovo, Office of Press and Public Information, 10 October 2003.

¹⁵⁷ Monitor Final Edition Pristina Media Highlights, OSCE Mission in Kosovo, Office of Press and Public Information, 14 October 2003.

(DONRA) in New York with foreign businessmen¹⁵⁸, try to boost the privatizations¹⁵⁹. The same conference was preceded by another one held in Dramstad (Germany) on September 29, 2003. The conclusions of the meeting are still unclear, but upon our correspondence with UNMIK officials it has been possible to obtain two different reports of the event: one provided by the same DONRA, the other by the U.S. Liaison Office in Pristina¹⁶⁰. Standing the absence of any further news on the developments of the issue on the local media, we suppose the reports received could figure a comprehensive picture of the meeting. The main concerns drawn at the convention obviously were “*the suspension of the privatization process, along with the need for transparent and equitable trade conditions with Kosovo’s neighbors and the simplification of the process required to obtain governmental permission for investments*”¹⁶¹. In further statements the Kosovar – Albanian representatives in foreign countries (the “*Diaspora*”) asked for “*opening of Kosovo or UNMIK Offices*” in the places hosting their domiciles, and reservation of “*six seats in Kosovo Parliament for the representatives from Diaspora for the next elections*”¹⁶².

In the meantime, an unknown font finally advised media about the indictment filed in New York Supreme Court by the Wood Industries, so focusing the newspapers’ attention on this question, leaving behind all the presumptive reasons previously indicated as main fundamentals of the stoppage¹⁶³. After the spreading of the information, UNMIK pillar IV admitted the existence of the indictment¹⁶⁴, declaring to refuse the allegations for the EU to have stopped the privatizations alone¹⁶⁵.

¹⁵⁸ The main American participants were: Mr. Kirk McBride (U.S. Liaison Office in Pristina), Jennifer Gothard (Central and Eastern Europe Business Information Center, CEEBIC), Debra Wahelberg (Kosovo Business Support, KBS), Cheryl Conlyn (Import –Export Bank), Scott Greenip, (Trade and Development Agency, TDA), John Moran (Overseas Private Investment Cooperation, OPIC); together with Kosovar representatives of the various branches interested in privatization: Harry Bajraktari (wood factory in Pec), Florent Krasniqi (energy), John Andrea (winery), Rrustem Gecaj (mines), Xhevdet Rugova (hotel managing), Rexhe Xhakli (hydro-energy and tourism). The Albanian-American Civil League led by Joseph Dioguardi and Albanian American National Council led by Martin Vula, also took part in conference with their presentations. The Kosovar delegation included, together with three ministers, 30 Kosovar companies, along with representatives of the Kosovo Trust Agency, Kosovo Chamber of Commerce, Kosovo Business Support, and Stability Pact Kosovo Office.

¹⁵⁹ Rexhepi I., quoted in *Koha Ditore*, UNMIK Division of Public Information Media Monitoring, Media Analysis, 15 October 2003. At the meeting also participated Robert Sorensen, Deputy of the Chief of the American Mission in Kosovo, and the Kosovar ministers Behxhet Brajshori, Ali Jakupi and Zef Morina (Monitor Final Edition Pristina Media Highlights, OSCE Mission in Kosovo, Office of Press and Public Information, 13 October 2003).

¹⁶⁰ A further reply to our questions was provided by Mr. Juozas Kazlas, international official in charge at the Department.

¹⁶¹ U.S. Liaison Office report, on file with Mr. Kazlas.

¹⁶² DONRA report, on file with Mr. Kazlas.

¹⁶³ One of those was the Serbian opposition to the process and the possibility of indictments sued by Serbian lawyers (see i.e. Monitor Final Edition Pristina Media Highlights, OSCE Mission in Kosovo, Office of Press and Public Information, 09 October 2003).

¹⁶⁴ Monique De Groot, quoted in *Zëri*, KFOR Public Information Office, Pristina, Media Summary, 09 October 2003.

¹⁶⁵ Quoted in *Koha Ditore*, Monitor Final Edition Pristina Media Highlights, OSCE Mission in Kosovo, Office of Press and Public Information, 09 October 2003.

The local politicians and officials quickly reacted to those statements, repeatedly declaring their contrariety to any form of suspension¹⁶⁶ and deserting the KTA Board's meetings to protest against the decision to halt the process, taken without their assessment¹⁶⁷. On the other side, the Serbian authorities celebrated the suspension as a direct effect of their opposition to the international bodies vested with the economic changes in Kosovo¹⁶⁸, also suggesting that the privatization model applied in Serbia was also applied in Kosovo as this model was described as transparent and the best one in the Eastern Europe¹⁶⁹. Moreover, statements released by Goran Bogdanovic, member of the Kosovo Trust Agency and minister in the Kosovo Government, included the concerns over the non – respect of the principle of denationalization in privatization¹⁷⁰ and economic principles in general, because the holders of the liabilities still remained the trustees (as the KTA acts as a trustee administrator), while the companies, without loans, were sold according to the spin – off mechanism¹⁷¹. However many observers seemed the Serbian pressure against KTA not directed to stop the privatization process, but aimed to halt privatization of big enterprises through the spin off method and to delay privatization of the enterprises that lie in the Serbian enclaves. In fact Serbia on one side seems to insist on the SOEs located in the Serbian enclaves not being sold; on the other hand it has created an emergency fund to assist local Serbs to buy these SOEs. So far, only two companies, which are located in the enclaves where the Serbs live, have been put up for bidding. First Company is Mladost, bought by Albanians, and the second is Trojka Motel, included in the third privatization round currently cancelled¹⁷².

Following, a KTA Board meeting, scheduled for Wednesday, October 15 was postponed for the lack of the three Albanian representatives to the subsequent Friday¹⁷³, claiming an UNMIK transparency shortage¹⁷⁴. At that time, bearing in mind the event would be transformed into another failure, it was decided to adjourn it to the next October

¹⁶⁶ I.e. Kosovo Minister of Economy and Finances Ali Sadriu defined the decision by the Chairman of the KTA Board, Nicolaus Lambsdorff, to annul the third round of privatization tenders, as an hasty and unjust step (Monitor Final Edition Pristina Media Highlights, OSCE Mission in Kosovo, Office of Press and Public Information, 10 October 2003). Kosovo Prime Minister Rexhepi affirmed to have written to Mr. Lambsdorff stating that the Government did not accept halting the privatization process (UNMIK Division of Public Information Media Monitoring, Media Analysis, 8 October 2003), while Nagip Skender, world economy and politics professor at the Pristina University, declared that the stoppage was a consequence of the hesitation of the Kosovars to participate in the Vienna talks. Bahri Shabani, Trade Union representative, agreed with this position (Monitor Final Edition Pristina Media Highlights, OSCE Mission in Kosovo, Office of Press and Public Information, 09 October 2003).

¹⁶⁷ Quoted in *RTK*, Monitor Final Edition Pristina Media Highlights, OSCE Mission in Kosovo, Office of Press and Public Information, 09 October 2003.

¹⁶⁸ Nebojsa Covic, Serbia and Montenegro Coordination Center for Kosovo and Metohija President, quoted in V.I.P. Daily News Report, No. 2671, Thursday, October 9, 2003.

¹⁶⁹ KFOR Public Information Office, Pristina, Media Summary, 09 October 2003.

¹⁷⁰ UNMIK Division of Public Information Media Monitoring, Main Stories, 14 October 2003.

¹⁷¹ UNMIK Division of Public Information Media Monitoring, Headlines, 13 October 2003.

¹⁷² *Koha Ditore*, in UNMIK Division of Public Information Media Monitoring, Media Analysis, 15 October 2003.

¹⁷³ *Koha Ditore*, in UNMIK Division of Public Information Media Monitoring, Headlines, 16 October 2003.

¹⁷⁴ *Kosova Sot*, in Monitor Final Edition Pristina Media Highlights, OSCE Mission in Kosovo, Office of Press and Public Information, 17 October 2003.

22¹⁷⁵. In the meantime, the idea that the situation could be handed over just by the Secretary General Kofi Annan and the SRSG Holkeri had been diffusing¹⁷⁶. Together with that issue confusion had been spreading through the local commentators about the real reasons of the suspension, also identified in the new KTA personnel coming from former communist Eastern Europe Countries¹⁷⁷.

Finally, on October 22 it was decided that the privatization would have been resumed in seven days, following a combined declaration by Marie Fucci, managing director in KTA, and by Szabolcs Szekers, deputy director of KTA for SOEs. Both the managers had been previously elected just without the votes of the local personnel in the Board¹⁷⁸. The decision to restart the process was badly taken by the Serbian authorities, which argued against the “illegal privatization” carried on by UNMIK¹⁷⁹.

But UNMIK rising up was just at the beginning. On the stage appeared new actors, as Dr. Henri Perritt Jr., professor at Chicago Kent College, who held a press conference in Pristina in which he offered to defend the KTA immunity from the U.S. courts, presenting to the Supreme Court of New York (the one before which the case is pending) a report stating the exclusive jurisdiction of the Special Chamber of the Supreme Court of Kosovo¹⁸⁰. Strangely, in a further interview, the Head of Pillar IV Lambsdorff argued on the contrary that “*this case (had) shown that KTA can be sued in other courts apart from the Special Chamber of the Kosovo Supreme Court*”¹⁸¹.

The further delay in the effective resumption of the process caused frictions among the locals¹⁸², while the Albanian members of the Board released harsh interviews in

¹⁷⁵ UNMIK Division of Public Information Media Monitoring, Headlines, 18 October 2003.

¹⁷⁶ *Zëri*, in Monitor Final Edition Pristina Media Highlights, OSCE Mission in Kosovo, Office of Press and Public Information, 20 October 2003.

¹⁷⁷ *Zëri*, in Monitor Final Edition Pristina Media Highlights, OSCE Mission in Kosovo, Office of Press and Public Information, 21 October 2003. The new staff members are Szabolcs Szekers of Hungarian nationality who is acting as deputy director of the management of SOE, Paul Csiszar, Director of Legal Department who also comes from Hungary, Branko Jurisić, head of complaints unit, from Croatia, Florin Pasnicu (Rumanian) head of the Office for Public Relations and Dimo Dimov, a lawyer from Bulgaria. Jurisić is retained by the locals in regular touch with the Serbian CCK legal office (*Zëri*, in UNMIK Division of Public Information Media Monitoring, Media Analysis, 4 November 2003; *Kosova Sot*, in Monitor Final Edition Pristina Media Highlights, OSCE Mission in Kosovo, Office of Press and Public Information, 11 November 2003), while Csiszar, after releasing a speech on September 18 at KTA Board meeting on the needing for suspension of privatization, has voiced as the main obstacle to the resumption of privatization (*Zëri*, in UNMIK Division of Public Information Media Monitoring, Media Analysis, 21 October 2003).

¹⁷⁸ Monitor Final Edition Pristina Media Highlights, OSCE Mission in Kosovo, Office of Press and Public Information, 23 October 2003.

¹⁷⁹ Declaration released by Milena Vasic, Head of the Kosovo-Metohija Coordination Center Department for Economic Growth and Reconstruction on October 23 (quoted in KFOR Public Information Office, Pristina, Media Summary, 30 October 2003).

¹⁸⁰ *Koha Ditore*, in UNMIK Division of Public Information Media Monitoring, Headlines, 3 November 2003.

¹⁸¹ *Bota Sot*, in UNMIK Division of Public Information Media Monitoring, Headlines, 1 November 2003.

¹⁸² I.e. complaints arrived from Isa Mustafa, Head of Riinvest (an academic think tank active in Pristina since 1995), and from the same Prime Minister Bajram Rexhepi (Monitor Final Edition Pristina Media Highlights, OSCE Mission in Kosovo, Office of Press and Public Information, 4 November 2003; *Koha Ditore*, in UNMIK Division of Public Information Media Monitoring, Media Analysis, 4 November 2003).

which they stated the vote at the Board had been violated by the internationals¹⁸³. In a following declaration, Dale Pfeiffer, head of the USAID Mission in Kosovo, joined that unsatisfactory position¹⁸⁴, announcing the need for changes in the Land Use Regulation¹⁸⁵, as mentioning directly in the law the word “privatization”, instead “leasehold”¹⁸⁶. Meanwhile new clouds were covering the privatization sky again: Lambsdorff was asking the banks providing guarantees for bidders, the provenience of the purchasers’ money, probably for reasons connected with the money laundering¹⁸⁷. The local experts reacted again accusing UNMIK to delay the recommencement of the privatizations¹⁸⁸.

To resolve the impasse, a well composed UNMIK team (with, among the others, Harri Holkeri, Borg Olivier, Csiszar) traveled to New York on November 10¹⁸⁹ and had several meetings with UN top legal and political authorities, such as Kofi Annan, Jean Marie Guehenno (Under Secretary General for Peacekeeping Operations), and with Assistant Secretary General for Legal Affairs, Hans Korel¹⁹⁰. SRSJ Holkeri also met with the UN vice-representatives of the countries composing the Contact Group (USA, UK, Germany, France, Italy and Russia)¹⁹¹. As said before, the main object of the discussion had been the issue of immunity for the KTA and its personnel, as well as the possibility to repeal the previous laws enacted by the Serbian Government on the Transformation of the Social Property¹⁹².

What the delegation brought back from New York was a document called “*Note for the Record – The Privatisation Programme in Kosovo*”, dated November 13 and more commonly called “*Guidance*”. Its content remains unclear also if, attending a briefing

¹⁸³ I.e. Trade and Industry Minister Ali Jakupi and BSPK (Bashkimi Sindikate Pavarura Kosova, Independent Kosovar Trade Union) Chairman Bahri Shabani, both members of the KTA Board of Directors (*Zëri*, in UNMIK Division of Public Information Media Monitoring, Media Analysis, 4 November 2003).

¹⁸⁴ Interview for *Zëri*, in UNMIK Division of Public Information Media Monitoring, Headlines, 5 November 2003.

¹⁸⁵ UNMIK Regulation 2002/12, of 13 June 2002, the one providing the new privatization system.

¹⁸⁶ As mentioned in the previous report (see Tondini M., *Il sistema di privatizzazioni in Kosovo. Fondamenti sviluppo e limiti*, Sezione Distaccata dell’Ambasciata d’Italia in Belgrado, ottobre 2003, p. 13), the privatization system in Kosovo does not transfer a property right, but a 99 years leasehold. Consequently, the purchaser is retained a leaseholder, not an owner.

¹⁸⁷ Ibrahim Rexhepi, *Koha Ditore* editorialist, in UNMIK Division of Public Information Media Monitoring, Media Analysis, 5 November 2003.

¹⁸⁸ I.e. Iljaz Ramalji (lawyer and former President of the Assembly) affirmed that KTA should be retained responsible for purchasers that had signed contracts but still hadn’t paid for them by compensating them with interests at the ordinary rate for the period when their money had been withdrawn from the bank. Bahri Shabani (BSPK Chairman and member of the KTA Board) threatened to file suits against internationals acting in breach of the regulations issued (*Koha Ditore* and *Epoke e Re*, in UNMIK Division of Public Information Media Monitoring, Media Analysis, 6 November 2003).

¹⁸⁹ Quoted in all dailies, UNMIK Division of Public Information Media Monitoring, Media Analysis, 11 November 2003.

¹⁹⁰ *Bota Sot*, in UNMIK Division of Public Information Media Monitoring, Headlines, 13 November 2003.

¹⁹¹ *Zëri*, in KFOR Public Information Office, Pristina, Media Summary, 13 November 2003.

¹⁹² *Zëri*, in UNMIK Division of Public Information Media Monitoring, Media Analysis, 13 November 2003. On the issue of repealing the past Serbian laws it seems important to focus on the declaration stated by President of Kosovo Chamber of Commerce Ismail Kastrati, on the basis of which, the economic and political problems in Kosovo will become even bigger unless the Serbian laws are declared null and void (Tanjug Daily News, Belgrade, Tuesday, November, 11, 2003).

conducted with all the EU Countries Liaison Offices and representatives from the EU Commission at the end of the STM (the EU Stabilization and Association Tracking Mechanism for Kosovo) meeting, held in Pristina on November 27, all the participants have received a summary provided by Caroline Silfverstolpe, from the Office of the Deputy SRSR Pillar IV (hereinafter Summary). By reading the Summary it also emerges a past notification to KTA, launched by a Counsel of a trust association for Serbian creditors and owners. The notice, dated mid-September, advised KTA that legal “challenges would have been filed against it at the Special Chamber within 60 days (deadline: Friday, November 28)” if the process had continued. “These claims not only assert(ed) ownership over the subject SOEs, but also include(ed) challenges that the process of privatization (...) falls outside the scope of the UNSCR 1244”¹⁹³. The following contents of the Summary may also describe well the aims of the Guidance received in New York.

*The outcome of the discussion was that there indeed is a legal basis to privatize the SOEs and a needed clarification was given as to the applicable law. No changes are needed in the KTA regulation but modifications are required in its operational policies (...). Moreover it was recommended that “immediately KTA undertake the review of the 135 enterprises that were determined between December 2002 and July 2003 to be SOEs”, determining whether any transformation or merger of an SOE was in conformity with the applicable law. This last point has sparked strong reactions from the local Board members, as they view these last laws as discriminatory*¹⁹⁴.

*In this context, the UN Legal Adviser has maintained that the KTA is not afforded the privileges and the immunities enjoyed by other structures of UNMIK¹⁹⁵ (...). The failure to affirmatively state that the KTA is a part of UNMIK (and thereby the UN) will in effect mean that the anticipated sole jurisdiction in the Special Chamber in Kosovo cannot be achieved, effectively rendering both the KTA, as well as the individual staff and Board members, open to suits wherever a potential claimant chooses to sue*¹⁹⁶.

*On 21 November, the KTA Board of Directors met to discuss the outcome of the (...) meetings (...). Prior to the Board meeting, the Chairman of the Board had briefed the Board in a separate meeting about the legal guidelines received (...). The KTA management also reported back to the Board (...). They proposed that (...) the Board could vote on the ratification of the sales contracts signed by the KTA Chairman in September from the first wave, the signing of sale contracts for four enterprises of the second wave and the re-launch of the third wave before the end of the year*¹⁹⁷.

*However, local members of the Board adopt(ed) a “all or nothing approach”. In their view, the consideration of every SOE in the light of the post – 1989 is unacceptable as they deem all laws implemented after 1989 to be discriminatory*¹⁹⁸.

In this regard, the Government asked the Assembly (through the Presidency) to declare null and void the Serbian privatization laws adopted in the ‘90s, especially the “Markovic laws”¹⁹⁹. The Presidency decided this request preliminarily to be discussed by

¹⁹³ Summary, par. 3.

¹⁹⁴ Id., par. 6.

¹⁹⁵ Id., par. 2.

¹⁹⁶ Id., par. 7.

¹⁹⁷ Id., par. 8.

¹⁹⁸ Id., par. 9.

¹⁹⁹ Zëri, UNMIK Division of Public Information Media Monitoring, Media Analysis, 24 November 2003.

the Committee on Legislation and Constitution, and afterwards to be discussed at the Assembly²⁰⁰.

The vote of the Board was postponed to further meetings, but the debate on the privatization was still ongoing. In this regard, paper *Zëri* published on December 2 the full text of the document presented by Mr. Lambsdorff to the Board. By reading the paper one can observe that the document also contains different and interesting issues, in respect to those included in the Summary, as the recurrent referring to liability insurance for the KTA personnel for any liability which may lawfully be insured.

In relation to this, the Chairman of the Board Nikolaus Lambsdorff proposed that (...) the KTA indemnify and hold harmless its directors, officers and other personnel working at the KTA from all damages, costs, expenses and attorneys fees (and provide for legal defence) that such persons may suffer arising out of the performance of their duties at the KTA, and obtain liability insurance against such risks for the benefit of such persons²⁰¹.

It is therefore proposed that the Board adopts the following resolutions: (...) (i) The KTA shall fully indemnify and keep indemnified all directors, officers and staff members of the KTA (collectively each, a "Staff Member"), whether such Staff Member is performing services for the KTA as an employee or is seconded to the KTA from UNMIK, PISG or any other organisation, against all actions, claims, proceedings, costs and damages (including any damages or compensation paid by the Staff Member on the advice of his/her legal advisers to compromise or settle any claim) and all legal costs or other expenses arising out of any actions of the Staff Member in furtherance of the goals and activities of the KTA; (ii) the KTA shall further provide the Staff Member with separate legal defence by internationally recognized counsel at the KTA's expense in any such actions and proceedings, actual or threatened, against the Staff Member; and (iii) the KTA management is hereby instructed to purchase and maintain insurance for the benefit of persons who are a director, officer or key Staff Member, or a former director, officer or key Staff Member, of the KTA, indemnifying him/her against liability for negligence, default, breach of duty or breach of trust or another liability which may lawfully be insured²⁰².

Those facts produced hostility also among the Serbian authorities, decided to stop privatizations or continue them with their prior approval. They went till the point to ask for an international arbitration on the matter²⁰³, while denouncing the contribution to the Kosovo budget by the Serbs – owned SOEs²⁰⁴. Moreover, in several statements also Kosovar Serbs reacted declaring the impossibility for the Assembly to cancel the Markovic laws, on the contrary claiming the cancellation of the present UNMIK privatization regulations²⁰⁵.

²⁰⁰ Monitor Final Edition Pristina Media Highlights, OSCE Mission in Kosovo, Office of Press and Public Information, 3 December 2003.

²⁰¹ *Zëri*, Tuesday, December 2, p. 4; par. (iii).

²⁰² *Id.*, par. (d).

²⁰³ Nebojsa Covic (Head of the Coordinating Centre for Kosovo-Metohija), quoted by *Zëri*, in Monitor Final Edition Pristina Media Highlights, OSCE Mission in Kosovo, Office of Press and Public Information, 11 November 2003.

²⁰⁴ Milena Vasic (Head of the Coordinating Centre for Kosovo-Metohija Economic Development and Reconstruction Department), quoted by *Politika*, in UNMIK Division of Public Information Media Monitoring, Headlines, 12 November 2003.

²⁰⁵ Statements released by MP Oliver Ivanovic (*Vecernje Novosti/Beta*, in UNMIK Division of Public Information Media Monitoring, Headlines, 3 December 2003) and the Head of the CCK Nebojsa Covic, in *Danas*, December 2, 2003, p. 1.

Comparing the systems: how it could work

"In the history of the world no one has ever washed a rented car"

Lawrence Summers*
(President of Harvard University)

"Declaring null and void all the laws enacted since 1989 would produce an unprecedented legal vacuum. What would you expect to apply instead...Dukagjini code?!"

MP Oliver Ivanovic'
(Leader of the Political Party "Koalition Povratak")

"Those who don't pay their bills live on other's people backs"
SRSJ Harri Holkeri#

The paper presented a general view of the Serbian privatization model, the history of the Serbian/Kosovar one, and the last developments in Kosovo regarding privatization. A comparison of the lacks and the unquestionable positive results is unavoidable.

Speaking "very frankly", as it seems to be the most frequent expression heard at high level meetings, the present situation is simply *unacceptable*. It results unacceptable for a chain of reasons related to different fields: economical, social, moral and legal. As a jurist, I will try to explain my concerns just on the latter point, leaving the occasion and the pleasure to illustrate the others to other scholars.

The mechanism has been implemented without the firm legal basis on which it should be built: the owners' consensus. The Administration chose to start the procedures of privatization without a prior consensus of the owners, and even without clearly identifying them. Has the U.N. enough authority and a firm clear legal basis to change property status in order to cease threats to peace and security? I believe also the Office of the Legal Advisor had refrained from this position since the beginning and so adopted a "legally correct" procedure, in which the property can be transferred without admit it, freezing the proceedings from the sales waiting for the political situation to stabilize.. That caused several consequences:

- First, it created a new and unknown (in this region) right, that will be able to circulate at least for 99 years (returning at the end in the hands of the same unidentified holders);
- Second (and most serious), the problem has not been resolved, and so its sins will finally be found out.

* Quoted by Friedman T. L., *To stop the violence nudge Iraq to elections*, in *International Herald Tribune*, Friday, November 7, 2003, p. 11.

' Assembly of Kosovo, Thursday, 11 December 2003. Debate on the decision of the Assembly to declare null and void in Kosovo all the Serbian laws enacted after 1989.

UNMIK/PR/1086, Wednesday, 17 December 2003.

We could not challenge the legality of the procedure, because, as an administrator, and generally backed by international customary law²⁰⁶, UNMIK is legally capable to change the economic system of a region, acting under Chapter VII of the U.N. Chart, but *without jeopardizing the right of the people that in that region live* (or, according with the UNSC Res. 1244 “should return and live”²⁰⁷). We can challenge the *opportunity* of such choices. We can challenge the right time and reasons that have not been chosen.

What we have at the moment? A privatization stopped by the same who are asking for personal immunity or personal liability insurance. The Assembly of Kosovo that unilaterally decides to repeal all the norms enacted in Belgrade to be applied in Kosovo²⁰⁸, and the following statement of the SRSG who states that it is “*beyond the competence of the Assembly of Kosovo and is without validity and effect*”²⁰⁹: Serbian authorities are privatizing, through the Share Fund, part of the same companies object of the precedent privatization under the “Markovic” laws (the same that the Assembly would repeal) and asking for their legal claims over the companies; the winning bidders are threatening suits against the KTA?

Moreover one should consider the effectiveness of the privatization method in Serbia. From a single (mere) economic point of view, the privatization in Serbia is working. The consideration that the Country is receiving on the international stage reflects the good auspices that the international community is attributing at it. The problem the system is facing is more related to the precarious conditions of the rights of the workers, maintained untouched for a really short period (one year), and recognized in a very thin part of the capital of the company. But those are political choices: legitimate political choices. Serbia would be responsible for instituting the right forum for workers to challenge the method and offering a possible solution. But it remains an internal question.

On the contrary, what it is an international question is the possibility for international officers to be immune before any courts, denied by the LEGAD Office in New York and confirmed by UNMIK. Just reading the papers, one could be shocked by the assertion for personal liability insurance stated by Mr. Lambsdorff. That insurance would not cover just the cost of the suits (i.e. attorney or legal fees), but should also embrace the possibility to cover “*any damages or compensation paid by the Staff Member on the advice of his/her legal advisers to compromise or settle any claim and all legal costs or other expenses arising out of any actions of the Staff Member in furtherance of the goals and activities of the KTA*”. That would mean guaranteeing indemnifications for any personal liability, also if it refers to an action performed against the rules established in the relevant regulation. The further question would regard the possible conflict between that *unacceptable* approach and the policy of transparency and accountability for UNMIK and UNMIK related bodies’ officers, that envisages civil, penal and administrative liability for staff before UNMIK courts and administrative bodies.

Furthermore, in keeping the privatization process suspended while defending so hard the request for avoiding the economic consequences of personal liability, suspicions

²⁰⁶ As seen in previous reports written for the Italian Liaison Office.

²⁰⁷ UNSC Res. 1244 (1999), of 10 June 1999, 9 (c).

²⁰⁸ Assembly of Kosovo, Agenda of the session, 11 December 2003, point 4 of the debate. Decision adopted with 73 votes in favor and 13 contrary.

²⁰⁹ UNMIK/PR/1083, Thursday, 11 December 2003.

could arise that someone, especially inside the international staff, is afraid to be retained accountable for personal actions. In all the ordinary legal systems, the case would be resolved very easily: if any liability is stated by a court by a final judgment against a legal person for any action performed by its own staff, the legal person (the KTA) would be liable in front of the claimant, then it would claim back the damages by the personnel who performed it.

What do the locals want? The answer is very easy again, by reading the requests contained in a letter sent by Office of the Prime Minister Rexhepi to all the major actors involved in the privatization process²¹⁰:

- (a) Unblocking of the privatization process.
- (b) Ratification of the first and second wave of tenders, with the reopening of the third.
- (c) The possibility for the Special Chamber (as the only competent forum to solve disputes related to privatization in Kosovo) to review the status of the enterprises, only on account of eventual complaints that has been sued before it.
- (d) The repeal of all the company transactions concluded after 22 March 1989, as drafted and implemented in a discriminatory way for the K-Albanese part.
- (e) The declaration of invalidity in the territory of Kosovo for all the laws enacted in Serbia after 22 March 1989, by deleting section 1.2 of UNMIK Regulation 1999/24²¹¹.

As it seems, also the locals would unblock the process. So, who is keeping suspended? As I pointed out before, the responsibilities lie both on internationals and locals, but, due to the fact that the locals have been practically excluded from the major decisions²¹², is to be more likely that the internationals are the ones who represent the major problem. And so the theme of their accountability arises. UNMIK is a fair example of U.N. accountability: it provides possibility to make review of the U.N. personnel's activities, revealing civil, criminal, and administrative liabilities²¹³. A full range transparency simply could help the rebuilding of a stable economic environment.

We know about Marković laws just what we heard from the political debate. A jurist could deem it not sufficient. The paper has drawn a different scenario, in which the laws

²¹⁰ Letter quoted by *Koha Ditore*, in UNMIK Division of Public Information Media Monitoring, Media Analysis, 5 December, 2003.

²¹¹ The one stating: “*If a court of competent jurisdiction or a body or person required to implement a provision of the law determines that a subject matter or situation is not covered by the laws set out in section 1.1 of the present regulation but is covered by another law in force in Kosovo after 22 March 1989 which is not discriminatory and which complies with section 1.3 of the present regulation, the court, body or person shall, as an exception, apply that law*”.

²¹² I.e. the actual Managing Director Marie Fucci has been appointed by the Head of the IV Pillar, with a further ratification of the SRSG, but without the vote of the Board (that is the only competent body to take such decision – UNMIK Reg. 2002/12, sec. 16.3). The same privatization has been suspended by the IV Pillar, without considering the vote of the Board.

²¹³ Some good questions would be: “who is in charge to sign contracts?”, “who signed the previous contracts?”, “when and by whom, was signed the first contract?”

in word are absolutely not discriminatory in the text they present. They could have been discriminatory in the application, and so UNMIK choice to review the “history” of the companies subjected to tender procedures, could represent the best (and a brilliant) way to avoid further stalls in the future and granting equity to the people unfairly removed from their property by the Serbian authorities. Moreover, as reported above, due to the inefficiency of such laws, most of the capital of the companies privatized has not privatized at all, and it is been privatizing at the moment in Serbia, through the sale of the shares contained in the Share Fund. What we should do? Selling shares someone else is putting on tender? Has UNMIK the legitimate capacity to repeal laws that apply also on the territory of the Republic of Serbia?

Once again we can not keep the state authority’s distance, as it represent the only source of positive law, constituting a solid base on which making the changes requested by the mission’s mandate.

Concluding the long trip which has taken us to this final point, I would suggest some issues to be considered:

- The process can be resumed in a long-lasting and legal dimension only by consensus. And that means looking for Serbian consensus. First trying to compare the privatization procedures with the Serbian ones, and then reaching agreements on the final destiny of the company privatized through the Markovic laws, as well as for the companies still belonging to the Serbian authorities. How? It is an open secret that all the companies are covered by loans contracted during the ‘90s: so the privatization could represent a fast and viable way to fill the financial gaps of the companies.

- In applying something close to the Serbian privatization method, the winning bidder would receive up to 70% of the value of a company capital: so the former workers would get a maximum of 30% (most of times, less). In that way, the former Serbian workers/owners would get just a minimum part of the capital with no possibility to appoint management. A further establishment of better conditions for the sale of the shares held by them (i.e. by offering a special revaluation of the shares by UNMIK, to buy itself with the aim to subsequently sell through normal tender procedure), to induce them to finally sell the property.

All the issue reported could be met alongside with a deep analysis on the international personnel’s activities which represent the only way to finally move out all the hidden threats and the shadows occurred in the history of the Kosovar privatization process; at last *rising towards a more certain future*.

Pristina, 16 December 2003

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