

April 6th 2005

Report on "Mobtel"

On the basis of very extensive documentation, it can be concluded with certainty that the Company «Mobtel» was established with serious violation of the law and that it has operated in privileged conditions owing to the close ties with the regime. The use of political influence and patronage of the Government for profit making falls within one of the categories of corruption. Such corruption influence has not stopped even after 2000.

The Report of an inter-ministerial working group, adopted by the Government on 24 June 2004, had major shortcomings and the Government should not have accepted it as a basis for decision-making and its strategy in the field of telecommunications. The very Commission concluded that it did not have the necessary information available and consequently it could not finish the Report.

The Commission was not enabled to inspect the equipment in the field; «Mobtel» did not submit the required documentation and refused to cooperate with the Working Group established by the Government. Mr. Bogoljub Lazic, then Deputy Minister for Capital Projects, participated in the work of the Working Group and was dismissed later on because of conflict of interest, for he was, at the same time, the Deputy Director of «Mobtel». He participated in the elaboration of the Report which should be also revised because of conflict of interest, for his position as a man from the relevant ministry, but actually a representative of an interested party, could make significant influence on the nature of the Report.

According to the information acquired by the Council, Mr. Lazic made crucial influence on the other members of the Working Group and their respective attitudes, which were presented in the Report. Besides, Mr. Lazic was a member of the Commission of the Minister for Capital Projects, which, on 24 March 2004, determined that the foreign founder owned 51 %, and the Public Enterprise PTT «Srbija» 49% of «Mobtel» shares.

The purpose of the Report was to determine the stakes in «Mobtel», which could not be done without a detailed economic analysis. This task was the one least addressed by the Working Group. It mainly dealt with the legal aspects of the association and the technical aspects of the implementation of the Memorandum of Association of the Company. Indications of an economic analysis given in the Report may be used only as a basis for a serious economic analysis.

Although the Working Group concluded that it did not have all necessary or relevant information available and that it had not made an economic analysis of the association and the ten-years' work of this Company, it concluded that the stakes were 58.76% for the State versus 41.24% for the foreign investor. However, such a ratio is not in conformity with the analysis from the Report, which was also confirmed later on by the President of the Working Group in his public statements.

A member of the Working Group wrote a separate report and presented it to the Government and to the public, claiming, on the basis of the documentation also available to the other members of the Working Group and which was primarily referring to the value of the imported equipment, that the stake of the State was over 70%. The Government took no notice of this separate report when it adopted the Report on «Mobtel», so that it is not clear whether the Government rejected it completely or chose to disregard it, without explaining the reasons for such an attitude.

There are discrepancies, especially in the evaluation of the equipment imported from the Company «Ericsson» and, therefore, it was essential to agree on the facts before adopting any report. The amount acknowledged to the foreign investor due to the increased expenses for the import of equipment in the period of the sanctions must have been agreed on as well.

Neither the Working Group, nor the separate Report has given an answer to the question how the equipment was bought. The documents show that the Company «Mobtel» bought a part of the equipment on hire purchase, and therefore, this amount could not be considered as an investment by the foreign partner.

Without reconciling the existing equipment in the field with the equipment shown in the invoices, it is not possible to conclude what was purchased for the needs of «Mobtel», as many of the invoices include equipment that was not purchased for the requirements of the mobile telephony.

The Report undoubtedly shows that the foreign investor did not honour the agreed time schedule of investing in the development of the mobile telephone network nor his obligation to increase the number of subscribers, or the income-expense time schedule.

Because of a slow development due to investment delays by the foreign partner, the Company «Mobtel» did not achieve the projected income, while, on the other hand, the expenses grew faster than planned, leaving the founders without planned income. The data on the services provided for the Company «Mobtel» by legal entities related to «BK Trade» and the «BK Company» under privileged conditions, call for an analysis of the contracts with related persons during the whole business operation period from 1994 to 2005. If proved that the expenses grew due to the conclusion of bad contracts, that would be an additional reason for the review of the stakes in the Company «Mobtel».

I HOW THE COMPANY WAS FOUNDED

The Company «Mobtel» was founded by a memorandum of association between the Public Enterprise PTT «Srbija» Beograd and "BK Trade" Moscow, as a joint-venture company to introduce a public mobile telephony system in the Republic of Serbia, under the name Mobilne telekomunikacije «Srbija» BK-PTT, d.o.o. /Mobile Telecommunications BK-PTT Co. Ltd./, hereinafter referred to as «Mobtel».

By its decision of 13 April 1994 the Government of the Republic of Serbia approved the decision of the Management Board of the Public Enterprise PTT of 1 April 1994 on the foundation of «Mobtel». The Government of Serbia did not give its consent to the Memorandum of Association of the joint venture, although, according to Point VI of the Decision of the Management Board of the Public Enterprise PTT «Srbija» and Article 16 of the Memorandum of Association of «Mobtel», it was a condition for the Contract to become legally valid.

The Decision of the Government of the Republic of Serbia was not published in the Official Gazette of the Republic of Serbia.

The Decision of the Government on approving the conclusion of the Contract was based on the following:

- Article 20, Paragraph 2 of the Law on Telecommunications (The Official Gazette of the Republic of Serbia 38/91) prescribes that decisions of the management boards on long and medium-term development plans, annual business programme and the pricelist for the use of TT channels are subject to the Government approval. None of the mentioned responsibilities of the PTT Management Board to which the Government gives its approval refers to the foundation of a new company, which means that the mentioned provision could not be a basis for bringing the Government's decision. According to Articles 12 and 14, Paragraph 2 of the same Law, the Government was in position to give its approval to the Decision on the foundation of «Mobtel», but in that case the stipulation from Paragraph 3 of Article 14 of the same Law provides for that the share of the state capital could not be less than 51 % would have to be applied;

- Article 12 of the Law on General Conditions for Awarding Concessions to Foreign Persons in the Republic of Serbia (Official Gazette of the Republic of Serbia 6/90). The decision of the PTT Management Board on the establishment of a joint venture for the purpose of introducing a public mobile telephony system and the use of connection capacities for radio-telephony was approved by the Government of the Republic of Serbia on 13 April 1994 contrary to the provision of Article 12 of the Law on General Conditions for Awarding Concessions to Foreign Persons in the Republic of Serbia. According to the mentioned provision, facilities used for the performance of business activities of public interest carried out by public enterprises cannot be transferred, or leased without an approval by the Government and a potential approval would

have to include the conditions under which the transfer or lease would be carried out.

The Government gave its approval for the use of the PTT capacities and facilities. The law does not use this term, which means that the Government regulated the relations beyond the legally specified competence, i.e. it acted contrary to the law. The law also provides for that transfer or lease of facilities used for the performance of business activities of public interest carried out by public enterprises, is to be carried out under certain conditions. The Government Decision does not stipulate these terms and, therefore, Article 13 of the same Law, which specifies that all contracts on concession and lease concluded contrary to the provisions of the law are ineffective and legally void, should be applied.

Article 12 of the mentioned Law was proclaimed unconstitutional by the Decision of the Federal Constitutional Court (Official Gazette of the Federal Republic of Yugoslavia 15/96), so that the Government decision giving the approval was based on an unconstitutional provision and an application for the revocation of the Government decision could have been submitted within a period of one year.

At the moment of the conclusion of the Contract, «Mobtel», holding 51% of the foreign capital, could not have been awarded the concession for telecommunication activities. Article 3, Paragraph 1, of the Law on General Conditions for Awarding Concessions to Foreign Persons in the Republic of Serbia stipulates: «Foreign persons cannot be awarded concessions for activities for which a foreign entity is not allowed to establish an independent enterprise under the prevailing regulations». The regulation in force was the Law on Foreign Investments (Official Gazette of the Federal Socialist Republic of Yugoslavia 77/88), namely Article 21, Paragraph 2, banning foreign investors to establish their own enterprises for «communications and telecommunication» activities. According to the Law a joint venture with more than 51% of foreign capital is also a foreign person.

In order to get around the ban prescribed by the Law, PTT awarded a licence to «Mobtel» by a contract, defined as the right to upgrade, use and exploit the existing PTT telecommunication network and the radio-telephone system in the Republic of Serbia. The said right included the right to use the radio frequencies, which are, according to the law prevailing then and now, unrestorable natural resources for which a concession must be obtained. According to Article 3, Paragraph 1, of the Law on General Conditions for Awarding Concessions to Foreign Persons, foreign persons cannot be awarded concessions for those activities for which they are not allowed to establish their own enterprise. Moreover, Article 14 of the Law on Telecommunications (Official Gazette 38/91) prescribes a limit of 49% for the privatization of state-owned PTT capital, so that the 51 % share of the System «Braca Karic-BK Trade» in «Mobtel» is contrary to the mentioned provision.

Based on the Decision of 6 May 1994, the Federal Ministry for International Economic Relations registered the Memorandum of Association of «Mobtel» in the Register of this Ministry. It was determined by the Decision of the Ministry that the Memorandum of Association of the Joint-venture Company fulfilled the conditions of Article 22 of the Law on Foreign Investments, and the Joint Stock Company 'BK -Trade» Moscow was registered as the foreign founder instead of the System «Braca Karic – BK Trade» as written in the Memorandum of Association approved by the Government.

On 10 May, the Commercial Court of Belgrade registered the Company in the Court Register. The System «Braca Karic – BK Trade», Ltd. was shown as a founder in the Decision of the Court of registration. The submission of the Commercial Court of Belgrade, dated 15 July 2004, received by the Council with the documentation for the registration in the Court Register shows that the collection of the court documentation 1-71907-00, No. 356/94 gives no proof that the foreign company is registered in the Register of Foreign Entities, although a transcript from a Foreign Register – a certified translation is designated in the list of documents, under ordinal number 9.

Before the conclusion of this Contract another contract had been terminated, with the American Company CGI as this Company could not fulfill its contractual obligations because of the sanctions imposed on Serbia. The American Company was selected from among 17 foreign companies following a public tender.

Prior to the conclusion of the Contract with the System «Braca Karic – BK Trade» no public tender for the election of a joint-venture partner for the mobile telephony had been announced.

The Republic Public Attorney, the Ministry of Transport and Communications, and the Republic Secretariat for Legislation objected the proposed draft of the Memorandum of Association of «Mobtel». According to the then-prevailing regulations, a company could be founded provided that the majority capital was state-owned, i.e. not less than 51%. The Government of Serbia did not accept any of the objections.

The documentation on the association shows that the Public Enterprise PTT Srbija» concluded the Memorandum of Association of the Joint-venture for Mobile Telephony with a non-existing subject, i.e. with a subject without legal or business competence to undertake legal transactions. Moreover, the statement from the Moscow Registry Chamber shows that only a joint stock company of a closed type «BK Trade» INC, with the main office in Moscow, was registered under registration number MTP 052.632 of 9 March 1993, and not the System «Braca Karic- BK Trade».

Due to the mentioned fact, this Contract is absolutely null and void and the procedure for determining the nullity of this Contract may be initiated at any time. Three names are mentioned

in the text of the Memorandum of Association of «Mobtel»; the System «Braca Karic BK-Trade» is stated in the Introduction of the Memorandum, where the contractual parties are identified, «Braca Karic-BK-Trade» below the signature of Mr. Bogoljub Karic, and the seal bears the inscription A/O «BK-TRADE» Inc. So far it has been unknown who the other contractual party is, whether it has a legitimate existence and who is responsible for its obligations under this Contract.

The Memorandum of Association of «Mobtel» was concluded two times. First time it was concluded with the Company «Braca Karic» in Belgrade, Majke Jevrosime 16a and the second time with the foreign partner, the System «Braca Karic – BK Trade». This was probably done to avoid the payment of the customs duty, both for the equipment for «Mobtel», and for the import of other equipment. In this way, the Company appears under different names, as a foreign entity when it has to pay the customs duty, and as a domestic legal entity when it has to win a concession for telecommunications.

II INVESTMENTS

It is provided for by the Memorandum that, during the first three years, the System «Braca Karic – BK- Trade» should invest, in money and in equipment, as follows:

Appendix A

First year US\$ 18,721,408
Second year US\$ 25,906,623
Third year US\$ 22,721,969

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Total US\$ 67,350,000

In the first year the foreign partner did not meet even a part of its obligations, and in the second year less than a half, and it was only during the third year that the foreign partner fulfilled the obligations from Appendix A to the Memorandum.

Due to such unjustified delay PTT has sustained enormous damage, because the contractual obligation of investing in design, installation and exploitation of the public mobile radio-telephony system was not fulfilled according to the contracted time schedule:

At the end of the first year, till 6 May 1995

Number of prospective subscribers	12.500
Built capacities	0
Coverage of 063 network subscribers	0

At the end of the second year, till 6 May 1996

Number of prospective subscribers	30.000
Built capacities	11.000
Coverage of 063 network subscribers	1. 546

At the end of the third year, till 6 May 1997

Number of prospective subscribers	50.000
Built capacities	28.000
Coverage of 063 network subscribers	15.490

Because of the delay with the import of the equipment, the contractual obligation regarding the mobile network coverage in Serbia was not fulfilled according to the contracted time schedule, so that on 27 November 1997 the network coverage was 25% less than contracted; this contracted obligation should have been fulfilled by 31 December 1995 (Data source: Report by the Public Enterprise PTT «Srbija», dated March 1997)

The failure to fulfill the Business Plan had negative financial effects:

1. Loss of revenues according to Article 2.10 of the Memorandum – the obligation of the Company to pay the 2-US\$ monthly fee to PTT per each cell phone subscriber, and to pay for the long distance and trunk calls at the same rate as for fixed telephone subscribers, deducting 10% or 20 % respectively for personal expenses;
2. Loss of profit in the course of the first three years; and
3. Loss of income according to Point 2.06 – «Mobtel's» obligation to pay 3% of its net profit to a special PTT fund for the development of telecommunications.

Amount of Investments

According to the official data, besides the initial and additional founding capital invested in the Company «Mobtel», the System «Braca Karic –BK- Trade» also invested US\$ 65,350,000 in equipment. According to the supplier's, Ericsson Co., invoices, this amount was US\$ 43,744,132.89 which is US\$ 21,606,867.11 less than the acknowledged amount. (Data source: Report by the Working Group). If the official amount is reduced by the value of the imported goods not intended for the mobile telephony (Xerox, mobile phones and similar) and by the value of the goods per invoices not accompanied with the due customs clearance documents, then the value of the investments in the imported goods is even less, or precisely US\$ 31,198,867.97 (Data source: The Separate Report by Mr. T. Zivanovic). The discrepancies in the value invested in the purchase of equipment are very significant and call for additional check up.

It is necessary to make a detailed analysis of the invoices for the procurement of the equipment submitted by the System «Braca Karic – BK Trade» on the basis of which they acquired the right to be exempted from the customs duty and a review of the Contract with Ericsson for the delivery of equipment (one from 1996, and two from 1997), especially regarding the credit arrangement which, under the practice prevailing at the time, was applied to 70 % of the delivered goods. If it is true that «Mobtel» paid a part of the equipment out of its income under the credit arrangement, then the investments of the foreign founder is even smaller.

III LICENCE

According to the Memorandum of Association of «Mobtel», Article 3, «Mobtel» has an exclusive and non-transferable right (a licence) to upgrade the existing telecommunication network of the PTT mobile radio-telephony system. The licence also includes the right to use exclusively defined frequencies in the ranges of 150, 450 and/or 800/900 MHz as well as other frequency rights enjoyed by PTT according to the regulations, i.e. only the rights that can be provided by PTT.

The Memorandum stipulates that the licence right includes only the rights that can be provided by PTT. It goes without saying that PTT had neither the right to carry out the mobile telephony activities nor to use the frequencies granted for that purpose, which means that PTT could not transfer more rights than it had. To rectify this problem, «Mobtel» managed to get the licence from the Government of Serbia in 1998. It was foreseen by an Annex to the Memorandum of Association of «Mobtel» of April 1998, Article 5, that the Government would award a licence to «Mobtel» regardless of the previously given approval (noteworthy is the information that the Management Board of PTT «Srbija» did not bring a decision on the conclusion of the Annex to the original Memorandum of Association of «Mobtel» and that the Government of the Republic of Serbia did not approve the conclusion of this Annex, but the Director of PTT signed the Annex without the decision of the Management Board).

All mobile telephone operators paid the state one-off fees for the awarded right to pursue this activity and use the frequencies as restricted natural resources. In 1997, a part of the sales price of the Telecom Srbija shares, amounting to DEM 125,000,000 was paid as the licence fee.

Instead of paying the fee, the Memorandum stipulates an obligation of allocating 3% of net profit into the fund for the development of the telecommunications, a monthly payment of US\$ 2 per a mobile telephone network subscriber, a fee of 90% of the current price for international calls (calls routed abroad through the fixed network) and for all calls rerouted from the «Mobtel» mobile to the fixed telephone network and 80% of the current price of the trunk calls (calls ending within the national network).

According to the twenty-year Company plan, which is an integral part of the Memorandum of Association, «Mobtel» is to pay US\$ 90,000,000. «Mobtel» was not granted the right to charge the fixed network calls ending within its network (the right to charge a price for interconnection from the fixed network).

One should differentiate the licence right from the share in the capital of «Mobtel». PTT has acquired its share by converting the right of connection to the fixed network and the right to use the space for the installation of the connection equipment. The licence right includes the installation and exploitation of the mobile telephone system and the use of the natural resource (a frequency). The Memorandum does not mention the second natural resource, namely the conferral of telephone numbers, which means that «Mobtel» does not base the use of the codes on the Memorandum of Association.

Sometimes the licence right and the capital share are mixed up. This confusion stems from the definition of the Memorandum of Association according to which «Mobtel» can acquire the licence right only through the connection to the fixed network. The licence right could have been defined without this provision, allowing «Mobtel» the possibility not to connect its network to the PTT fixed network. Due to the above mentioned provision, «Mobtel» was forced to connect to the PTT network and pay a fee for its use.

It is worth mentioning that «Mobtel» got the right to the conferral of telephone numbers (area codes 061, 063) from the Union of the Public Enterprise PTT, and used all other advantages as if it were a member of the Union (technical inspection, standard quality procedure, coordination opinions) without financing the work of the PTT Services. For the sake of comparison, from 2001 to 2004, Telekom Srbija paid approximately CSD 200,000,000 for these services.

The contracted «Mobtel» licence was transferred by PTT, and not by the Government. In spite of the fact that it included only the rights that could be provided by PTT, it was qualified as “exclusive”. Such a qualification makes it null and void on the basis of the Law on Commerce (Official Gazette of the Federal Republic of Yugoslavia No. 32/93). Article 15 of the Law stipulates that an agreement on closing a market is null and void. By contracting the exclusiveness of the licence right, the mobile telecommunication market was closed for competition. The exclusiveness of the licence was secured by the PTT obligation not to perform mobile telephony activities, and not to conclude contracts which would enable other subjects to become competitors in the field.

On the basis of the above mentioned licence and its exclusiveness, otherwise null and void, in April 1998, the System «Braca Karic – BK Trade» concluded an Annex to the Memorandum of Association of «Mobtel» with PTT, which stipulates in Article 1 that in case of the failure to comply with the Memorandum of Association and the launching of a new mobile operator without the consent of “BK – Trade» and the denial to «BK – Trade» the licence exclusiveness,

PTT would concede 13% of its profit from the mobile telephony of Telekom Srbija. According to the same Article, PTT agreed that «BK –Trade» be entitled to a 13% share in the capital of the new legal subject instead of sharing the profit it is entitled to as a founder of Telekom Srbija as a special legal subject for mobile telephony.

With this Annex «BK-Trade» was given a compensation for the violation of the void provision of the Memorandum. Since this was the cause for the conclusion of the above mentioned Annex and since Article 52 of the Code of Obligations stipulates that if the cause is not permitted or null and void, then the Memorandum either does not exist or it is null and void and the Annex to the Memorandum of Association of «Mobtel» is null and void, which must be proved in court proceedings. It has already been mentioned that the Director of PTT signed the Annex without a decision of the Management Board and without an approval by the Government.

IV CONCLUSION OF THE ANNEX TO THE MEMORANDUM OF ASSOCIATION OF «MOBTTEL»

Significant changes in the work of «Mobtel» occurred after the foundation of Telekom in 1997 and the conclusion of the Annex to the Memorandum of Association of the Joint-venture Company for Launching Mobile Telephony in the Republic of Serbia. The Annex was concluded on 2 April 1998, between the Public Enterprise PTT and the Moscow based System «Braca Karic – BK Trade». The Annex makes significant changes of the provisions of the original Memorandum, particularly:

- Because of the introduction of a new operator (Telekom) without the consent of «BK Trade» and «Mobtel», as well as because of the giving up of the exclusive right of «Mobtel» to perform public mobile telephony activities, PTT commits itself to compensate «BK –Trade» for the loss of profit by conceding 13 % of its profit made in the mobile telephony of Telekom. The amount of the Telekom profit is to be determined by a joint PTT, Telekom and «BK – Trade» commission. PTT also commits itself to award 13 % of the associative and management rights in the newly-founded Company to «BK-Trade», instead of participating in the income, once Telekom becomes «a separate legal subject»;
- PTT commits itself to ensuring that the Federal Ministry of Telecommunications issues «Mobtel» a decision:

- 1) on awarding a frequency range for the operation of an HMT system range 2x3,8 MHz at 900 MHz frequencies; for the operation of a GSM network range 2x9,6 MHz at 900 MHz frequencies, with accurately defined marginal values;
- 2) on awarding a frequency range for the operation of the GSM network – 1800 public mobile telephony in Europe in the range of 2x20 MHz at 1800 MHz frequencies when and to the extent in which the 900 MHz range becomes busy;

- 3) on awarding a frequency range for the operation of radio-relay communication systems for speech and data transmission between the base stations, base station controllers and switchboards in ranges of 6 GHz, 7 GHz, 13 GHz, 15 GHz, and 23 GHz.

-PTT commits itself to ensure that the Federal Administration Authorities issue the above-mentioned licences and decisions to «Mobtel» free of charge;

-PTT also undertakes to ensure that the Government of Serbia issues «Mobtel» a licence free of charge, which would remain valid as long as the Company exists;

-PTT also binds itself that, without the consent of the «BK –Trade» and «Mobtel», it cannot introduce a third mobile telephony operator until the expiry of a period of eight years.

The mentioned Annex changes the contracted jurisdiction of a domestic court from the original Memorandum. The Annex provides for the jurisdiction of the Arbitration Court of the Chamber of Commerce in Zurich.

The mentioned Annex, which significantly alters the original Memorandum of Association of «Mobtel», stipulates the obligations of only one contractual party, the Public Enterprise PTT «Srbija», which has, by this Annex, also accepted some obligations it is unable to fulfill and which are beyond the competence of this public enterprise. The provisions of this Annex resemble penalty provisions of an act of an administrative body, acting as an executive body. As this Memorandum was concluded between a public company, a state company and a foreign company, it deserved the attention of the public prosecutor and verification whether it really was a free-will agreement of the contractual parties or whether the Memorandum was concluded because of potential threats, extortion or corruption. Does a public enterprise have any interest to accept these obligations? This Annex also has attributes of a bad contract, which can be proved by the amount of profit obtained by one party only.

The Annex to the Memorandum introduces «BK-Trade» as the other party, which is contrary to the original Memorandum concluded with the System «Braca Karic- BK Trade».

Attention should be paid to the fact that the obligations PTT accepted by the Annex have been fulfilled and free of charge:

- The Government of the Republic of Serbia signed with «Mobtel» agreement on licence terms No. 4350-04-905/98 dated 12 August 1998. This act confirmed the licence as a free previously acquired right.
- The Federal Ministry of Telecommunications issued decision on the frequency range No. ZP6/1-01-008, dated 25 August 1998.

- The Federal Ministry of Defence gave «Mobtel» approval to use the frequencies for the mobile telephony system No. 02- 120, dated 12 June 1998. The approval was given following the request of «Mobtel», a company with the majority of foreign capital, while the condition was that the company must be free of foreign capital.

«Mobtel» fully exploited the privileges of the original licence and till August 1998 had a total monopoly. Even after the foundation of Telekom, the management of this Company encouraged and tolerated the «Mobtel» monopoly, which can be seen from the following facts:

- Until mid 2001, the 50 % discount was applied to the mobile network incoming calls, and because of that the fixed telephony network collected only a half of the fees due it from its subscribers, and paid «Mobtel» 185 dinars for each minute of the traffic. In this way the state was damaged by about EUR 81,000,000.
- Until the end of 1999, Telekom did not have its own traffic monitoring system, and it had to rely on the data provided by the other party. «Mobtel» took advantage of this and showed an increased traffic by about EUR 2,000,000 in its own favour;
- The Interconnection Contract from 1998 departs from standard contracts and places «Mobtel» in a privileged position, where «Mobtel» pays only 86 two-megabit access points out of 252 ones it uses, because its switchboard is in the same building with the transit switchboards of Telekom, which was the common knowledge after the conclusion of the Memorandum. Besides, «Mobtel» was “allowed” to build its own transport network, connecting the mobile network switchboards, thus as a mobile operator it also operates fixed telephony (by building an infrastructure) and violates the exclusive right of the state company. «Mobtel» has no right to carry on fixed telecommunication activities, but PTT and the Government do not respond to the damaging behaviour of this Company.

Upon concluding the Interconnection Contract, «Mobtel» stopped paying the compensation to the fixed network for forwarded calls and thus stopped paying the licence fee to PTT, which, according to the Memorandum of Association it is obliged to pay for a period of 20 years, in an amount of US\$ 90,000,000. At the same time, «Mobtel» secured a very high price for the interconnection to its own benefit. Thus, owing to this arrangement, it received, only by October 2003, US\$ 68,000,000 of the state money. By concluding an agreement on the interim method of compensation of the loss of profit because of the connection of the other operator, the PTT profit share in «Mobtel» was reduced from 49% to 36%. An estimated profit of «Mobtel» for the first nine years was approximately US\$ 478,000,000, out of which a half would go to PTT; this amount is to be reduced on this ground by approximately US\$ 30,000,000. Besides, «Mobtel» has not paid PTT the US\$ 2 fee per subscriber since the end of 2000, which is to be paid on monthly basis according to the Memorandum of Association. As a result of this fee payment default over the period from 2001 to 2004, the debt of «Mobtel» to PTT, i.e. to the State, rose to dozens of millions of dollars. Instead of settling this debt, «Mobtel» filed a suit against PTT

claiming approximately US\$ 6,000,000 on account of allegedly paying a groundless fee (Data source: PTT - Telekom).

V BUSINESS OPERATION OF «MOBTTEL»

In the Financial Statement for 1997 «Mobtel» for the first time showed profit, out of which CSD 47,019,000 was to belong to PTT. However, the Company did not collect this profit; it was used to ensure the liquidity of the Company. According to the Financial Statements for 1998 and 1999, «Mobtel» showed a profit of CSD 382,811,000 and 682,457,000 respectively. In order to prevent automatic reinvestment, the Management Board of PTT brought decision No. 21966/98 approving reinvestment in the form of a loan under the same terms and conditions granted to Telekom. The loan contract was never realized nor did the public enterprise collect the profit. It is obvious that the basic provisions of the original Memorandum were violated, as according to it decisions on reinvestment or other strategic decisions are to be brought by the Management Board unanimously or by a qualified majority.

The way «Mobtel» runs its business, PTT is incurred «indirect» losses as well. In 1998, «Mobtel» founded company named «SIM – PAID» without a decision of the Management Board and transferred the sale of pre-paid cards to it. In this way, «Mobtel» records all the expenses of the Company in its business books, but not the profit, and thus drastically decreases the shown profit of the Company and the actual profit of the State.

In 2003, «Mobtel», with several hundred employees, made an income of approximately 15 billion dinars, and operative expenses of about 3 billion. The amount according to the invoices for the interconnection, submitted to Telekom, not based on the Contract, of about 2 billion, made a positive result possible; without this amount the profit would be zero. The positive business result was enabled by the return of the extra profit in an amount of 2.4 billion; otherwise «Mobtel» would have made a loss. The losses of a company, with such a large income and a small number of employees, could be incurred only by high expenses. Through the operation expenses of the BK Group companies, money was transferred from «Mobtel» to the following companies: «Evropa» Osiguranje, «Astra Simit», «BK Telekom», and to the building companies from which flats and business premises were bought. In this way PTT and the State were deprived of their expected dividends.

VI CONCLUSION

A short analysis of the business operation of the Company «Mobtel» clearly indicates that the interest ratio of the parties-founders contracted by the Memorandum has been fully upset. The Government has to put an end to the funnelling of State and PTT monies to the private Company and establish relations that will be based on the will of the contractual parties expressed in the Memorandum of Association.

The foundation and business operation of «Mobtel», in which the State holds 49% of the stakes, have been characterized by some significant facts:

- The Memorandum was concluded by the violation of the law; primarily by the acceptance of the ownership ratio of 51% versus 49% at the expense of the State, which predetermined the distribution of the management offices and incurred large damages to the state-owned property. The violation of the law by founding the Company and the Contract on Investment in Equipment and a whole series of harmful and illegal activities caused no response of the public enterprise, or relevant Government bodies. PTT allowed that no supervisory board be instituted for years and to be inoperative later on;

- Yet three years after the foundation, there were sufficient relevant data to determine that the investments by the foreign founder, per amount and per time schedule, failed to meet the proportions set by the Memorandum and that the ownership ratios had to be changed according to the actual indicators. The Memorandum set the proportion which was not realized and this had to be sufficient reason to determine the ownership ratios realistically and establish what the majority ownership percentage of PTT or the State was.

The Memorandum of Association was not the only reason why the relations of the parties to the Contract were so confused that it seemed that the Company operated as if it had only one founder; another reason was corruption on a large scale. The other founder, the public enterprise PTT had at its disposal a number of legal instruments, which it did not use to protect its interest. There was no justified reason to recognize to the foreign investor the compensation of damages for the violation of a null and void provision of the Memorandum and conclude the Annex to the Memorandum of Association, to allow it not to pay its contractual obligations, to confirm the licence even though it had not been paid.

The current sale of «BK-Trade» presents a particular problem, and the statements made by relevant ministers that they were not familiar with the Memorandum, as well as the statement of Minister for Capital projects, saying that everything would be clear after the court registration of the Memorandum. The obligation of ministers to take measures foreseen by the law in order to protect public interests cannot depend on the information of the other party, but on their active role and responsibility. The sale of «BK-Trade» changes the co-owner of «Mobtel», and in this case the Memorandum stipulates that the other founder has a pre-emptive right of purchase, and that such a sale is subject to previously obtained approvals from the Government of Serbia and the Ministry for International Economic Relation. If a sales contract is concluded without obtaining such approvals, such a contract is null and void, but a claim for the protection of these rights has to be initiated by an interested party within a period of 60 days. Considering previous examples of the protection of the state-owned property, the confusion pumped up by the ministers may be just a way to miss the deadline for the protection of the rights.

The Council recommends the following to the Government:

- To rescind the Conclusion on the Adoption of the Report of the Inter-ministerial Working Group of 24 June 2004;
- To establish property rights in the Company, taking into account the facts and making an economic analysis of the foundation and business operation of the Company. To set a reasonable and short deadline for these measures. To inform the public, after the completion of these analyses, on the estimated material damages sustained by the State because of the violation of the law and the Memorandum of Association and the business operation of this Company. It is of vital importance that the members of the public get relevant data from the Government on the corruption-related losses, and become aware of the significance of combating corruption;
- To initiate procedures for establishing the responsibility of all participants in this corruption case, because of which the State has sustained enormous damages;
- To establish the responsibility of the PTT management, the members of the PTT Management Board and the Management Board of «Mobtel», first of all because they have done nothing to prevent the plundering of the State property or to initiate court proceedings for the rescission or alteration of these, obviously null and void contracts;
- To institute proceedings, at least for the political responsibility of the relevant bodies of the executive power for not taking the legally foreseen measures to protect the state-owned property;
- To investigate the public statements regarding the foundation and business operation of «Morikis», as well as regarding the Contract on Business-technical Cooperation between «Mobtel» and «Morikis» of 8 December 2003.

Belgrade,
April, 6th 2005

The Anti-Corruption Council
President
Ms Vrica Barac