Shortcomings of the proposed amendment

The Anti-Corruption Council has always been mindful of problems inciting corruption in privatization procedures. Regarding the large number of complaints submitted to the Council, including the well-known public cases, privatization is nowadays, without any doubt, the major generator of large-scale corruption in Serbia.

The Council has analyzed a large number of typical cases, developed relevant reports and submitted them to the Government. Each and every case revealed violation of laws and prescribed procedures. Besides, almost each case revealed the existence of conflict of interest among those responsible for decision-making. These facts certainly indicate corrupt behaviour of government representatives.

Most of the identified problems were linked with the work of the Privatization Agency, the Ministry of Economy, and the commercial courts. The Council has not noticed that the Government has taken any actions to eradicate these problems, even though it was well informed about all the particulars. Taking into consideration the fact that this Government started its term of office nearly a year ago, it is clear that pushing for the adherence to laws and curbing corruption did not rank high on its priorities list, an attitude that in no way can be approved of by the Council.

As the same problems have been repeated in the majority of the cases, it was clear that, besides the change of the Government's attitude, the system changes are indispensable as well. The Council has analyzed the privatization legislation and, together with the OSCE experts, identified certain shortcomings, contradictions and irregularities in the legislation, which enable the existence of corruption. The Council and the OSCE forwarded their findings to the Government by the end of June 2004, and shortly thereafter received assurances from the Government representatives that the proposed solutions would be incorporated in the amendments to the Law on Privatization being prepared.

In the report forwarded to the Government and later on to the Parliament Privatization Committee of the National Assembly the problems were identified by phases (the pre-privatization phase, the privatization preparation phase, the privatization phase, and the post-privatization phase). Measures were proposed for each of the analyzed phases, intended to downsize the discretionary powers of government representatives, and to institute precise rules and procedures transparent to all participants in the privatization process.

The Council expected the announced amendments to the law to be in conformity with the proposed principles, even if they might differ in details from the recommended solutions. The Government, however, forwarded a proposal to the National Assembly to adopt as a matter of urgency amendments to the law directly opposite to the principles the Council and the OSCE have been advocating. This is reflected by the following facts:

1. Broad powers of the Privatization Agency, and the Director of the Agency – the Director of the Agency has the discretionary power to make decisions regarding restructuring, tenders and auctions without a prescribed procedure or objective decision-making standards;
2. Non-existence of criteria determining the method of sale, i.e. privatization;
3. Lack of transparency in decision-making;
4. One-instance decision-making, i.e. the absence of a legal remedy – the Law does not envisage that interested parties may receive adequate legal remedy with respect to decisions made by the Director of the Agency (which are not prescribed to be brought in writing), or initiate court proceedings aiming to control administrative decisions;
5. The role of the Shares Fund – The Shares Fund has been given a much more important role than it used to have. The shares held by the Shares Fund secure it the right of control - they have become ordinary shares. However, in reality they have become much more than ordinary shares, for in the future, enterprises will have to obtain a licence from the Shares Fund for a whole series of activities (eight cases are defined by the Proposal, even though the point 9 reads "as in other cases of acquiring assets and using them" – which, practically, means always), regardless of the percentage of shares held by the Shares Fund! Even in cases, which are not so rare, when the Fund holds only two percent of shares, the enterprise has to request (and obtain) a licence for investments.

   As the Shares Fund holds shares of a large number of enterprises, it is clear that the Fund will exercise its right only in some cases, which will fully depend on the discretion of the Director of the Fund. This absurd situation is contrary to the provisions of the recently adopted Enterprise Act, which gives the Fund greater rights than the ones enjoyed by ordinary shareholders;
6. Bankruptcy procedure – The Law on Bankruptcy was adopted last year (2004), and it entered into force in February this year (2005). The reason for such a long period between the adoption and coming into force of the Law is the fact that the accompanying Law on Licencing of Bankruptcy Trustees was to create conditions for the enforcement of the Law on Bankruptcy. Moreover, the Government failed to take the necessary steps to ensure that bankruptcy trustees obtain the licence and assume the role assigned to them by the Law on Bankruptcy. That is why the amendments to the Law on Privatization now assign the role of bankruptcy trustees to the Agency. Besides extremely large powers in the privatization process, the Agency is now entitled to decide, quite arbitrarily, whether an enterprise is to be liquidated or reorganized, which are practically two ways of

conducting the bankruptcy procedure. As the Agency itself is not capable to prepare a proposal for the reorganization process, it will assign this task to legal and financial counsels. The Council has already warned on a number of occasions that the way of engaging counsels was disputable as their reports were accepted without any assessment by the Agency, and the amount of the fee for their service is questionable as well as;

7. Writing off debts – If the Agency chooses, state bodies and public enterprises "are obliged to write off debts of an enterprise undergoing the privatization process. According to this concept, the Tax Office, the Pension Fund, the Health Insurance Fund, the Development Fund, public enterprises, which are in our case major creditors, allow the sale of the enterprise and proportionally charge their claims from the sales price. As such enterprises have often failed to pay the pension contribution, which practically means that in many cases their employees will not be in position to "bridge their length of service" and the Fund will not be able to approve their regular retirement. It should be mentioned, moreover, that writing off debts is contrary to the Law on Bankruptcy, which envisages the creation of payment lists, and the settlement of the pension and social contributions rank high on the priority payment list. Writing off debts endangers enforcement, not only of the bankruptcy procedures, but mortgages as well. In spite of the fact that the creditor has secured his claims by mortgage, he cannot enforce the implementation of the procedure because of the writing off of debts (not even two years upon the bringing of the Agency's decision). If a creditor chooses not to accept the writing off of the debts, then, pursuant to the amendments to the Law on Privatization, he is to make an arrangement with the buyer, challenging thus the debtor-creditor relations;
8. Arbitration – The amount of the claims of state-owned creditors is determined by an arbitration presided by the Minister of Finance, and if the arbitration does not pass a decision, the amount of claims is considered to be established by a restructuring programme (imposed on the privatized enterprise by the Privatization Agency). An institution like this enables the executive bodies to decide on debtor-creditor relations, which betrays the democratic principles of the distribution of power and disables the enforcement of the Law on Bankruptcy;
9. Success fee – According to the proposed amendments, the Minister of Economy is expected to determine quite arbitrarily the amount of the success fee due to the financial and legal counsels. Once they have been paid for their services; they can also be given a reward, and on top of that a special fee may be paid to them as well. This fee is usually determined as a percentage amount, but the proposal offers no criteria for calculating it. It is very important to determine whether the fee is to be paid as a certain percentage of the sales price, or as a percentage of the total promised amount (price + social programme + investments). In both cases, the fee may be paid out only from the sales price, which may lead, besides arbitrary decision-making, to a significant decrease in the Government income.

Moreover, proposed amendments to the privatization legislation do not tackle some of the problems identified by the Council, which were referred to the Government on a number of occasions in connection with specific cases or as a matter of principle, i.e.:

1. Privatization of natural monopolies, which in practice has boiled down to the situation that a privatized enterprise uses natural resources or its monopolistic position free of charge;
2. Privatization of public enterprises, subsidiaries of public enterprises and state-owned shares;
3. Privatization of state property, or discrepancies between the privatization regulations and the Law on Assets Owned by the Republic of Serbia;
4. Privatization of enterprises established abroad by socially-owned enterprises, formally converted into private property during the nineties (as encumbrance-free transactions);
5. Privatization of nationalized property – This problem has been constantly escalating because of the delay in the adoption of the Law on Restitution on one hand and the enforcement of the privatization at the same time on the other hand;
6. Privatization of socially-owned capital in cooperatives and privatization of city/town building land;
7. Privatization of enterprises that operated in ex Yugoslav republics and the property of Serbian enterprises in these republics.

Considering all this, the Council believes that the proposed amendments to the Law on Privatization will, not only fail to resolve many identified problems, but they may create new problems as well, primarily in terms of the increase of corruption in the country. The Council, therefore, calls upon the Government to withdraw the proposed amendments to the Law on Privatization.

If the Government declines to do that, the Council calls upon all the members of the Parliament to abstain from voting in favor of the proposed amendments, and we urge the President of the Republic to refuse to sign such a law should the National Assembly adopt it anyway.

We recommend the professionals and the general public to get acquainted with the detrimental consequences of the enforcement of the new legislation.

Belgrade
February, 3th 2005

President,
Ms Verica Barać