

The issue of the liquidation process of social enterprises during privatization process in Kosovo

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Abstract

The privatization process in Kosovo with all its difficulties, permanent dilemmas entered into the final phase. Despite a considerable number of SOEs privatized until now there has not been any study done by any governmental or non-governmental body that will reflect more comprehensively the performance and its effects in economy. This process until now had several complex problems, changes and political, social, legal interests. In retrospective the privatization process in Kosovo evaluated by academics and media is considered to be one of the most specific and complicated phenomenon for the transformation of social assets in individuals or private enterprises. Its complexity has derived from what is meant by "social ownership" and who has been in fact its official in the past and which the rights are given to working class in possess management and governance. On these bases the Kosovo Trust Agency (KTA) founded by UNMIK in 2002 and later the Privatization Agency of Kosovo (PAK) founded in 2008 by the institutions of Kosovo after the declaration of independence (2007) have continued with the privatization 15 years later after the dilemmas and institutional transformation and we can say that economy in Kosovo is in collapse. PAK with all its successes admits that the difficulties of this process never stop. At the moment PAK is not recognized by the Special Chamber of Supreme Court of Kosovo and also there are problems and gaps in the law on the liquidation of social enterprises assets. The legal basis of OVGJS and the execution of the law for the reorganization of specific enterprises and their assets by shortening and simplifying the deadlines because they are causing serious bottlenecks and unwanted delays of proceedings.

Keywords: law, privatization, transformation, privatization agency.

JEL Classification: K22, K23

1. Introduction

In the economic transformation processes that is passing our country, the privatization is conceptualized not only as an ownership change² but also as the only alternative that will ensure the effective function of acts for all "market stakeholders", private or public in order to ensure loyal competition between them. This process until now has faced several changes, political interests, and micro, macro and legal problems. In retrospective the privatization process in Kosovo evaluated by academics and media is considered to be one of the most specific and complicated phenomenon for the transformation of social assets in individuals or

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² John Bennett & Saul Estrin & James Maw & Giovanni Urga (2004), *Privatization methods and economic growth*, CEPR, Discussion papers, 4291.

private enterprises. As such, if looked in retrospective is considered a very complicated process and in legal and political field very problematic. As such maybe there will have long term influences and implications in future economic development of our country. Open economies improve their infrastructure faster, attract more foreign direct investments and usually grow faster. Through its potential for sustaining the economic growth, free trade should contribute positively to sustainable development. The higher income can be used by policy-makers for improvement measures in education, healthcare, environment protection, development of cleaner technologies etc. The key condition is the implementation of proper policies that are to be checked by a strong civil society driven by core human values and not by economic interests³. Privatization is one avenue for moving toward greater changes in theory and practice of development strategy⁴. Time has come for privatization to be an integral part of the new thinking in the design of development strategy for the country. It is a powerful economic force for setting free entrepreneurial talents which have been flourishing in the informal sector.

The negative effects are produced by the influences of many previous and actual owners and workers. Some owners or workers may benefit something and the others almost nothing. Despite this, such process carries also ethnic components, since the individuals from different communities may say that the previous or actual discrimination has influenced in their possibility to benefit from the privatization⁵.

We consider that the final aim of the government is that through the privatization process to realize the transfer of state rights to the private in all its forms through a continuous and efficient process. In this context the privatization⁶ is defined as transfer of three rights from the State to private sector: the ownership right, the right to use and the right to develop. The method of privatization in Kosovo respectively the transfer of assets of a public enterprise until now has been realized with concessionary contracts or leasing or emphyteose as a way of using right that include or not the State in financial risk, depending on the specific contracts. Through the transferring of the ownership right (selling) the State is released by any type of risk that is related with the administration of the enterprise or the company, since through transferring of using right (administration, service contracts, etc.) the State is included in monitoring the contractual conditions and

³ Basarab Gogoneață, *The Long-Run Relationship Between Commerce And Sustainable Development In Baltic And Central And Eastern European Countries*, `Amfiteatru Economic`, vol. XII, issue 27, 2010, p. 40.

⁴ Samson Paschal, *Privatization in the name of public private partnership: the case of Tanzania Breweries Ltd., an evaluation*, „Juridical Tribune-Tribuna Juridica”, Volume 5, Issue 2, December 2015, p. 85.

⁵ David Gordon, (1994), *Privatization in Eastern Europe: The Polish experience*, „Law and Policy in International Business”, Vol. 25, no. 2, p. 517 et seq.

⁶ Mark Blacksell & Karl Martin Born (2002), *Private property restitution: the geographical consequences of official government policies in Central and Eastern Europe*, „The Geographic Journal”, Vol. 168, No. 2, p. 178 et seq.

financial risk if the economic unit it comes with losses. The serious shortcoming in bankruptcy is what is impeding the completion of the process of sold enterprises. The Privatization Agency of Kosovo (PAK) in the quality of legal authority quite a bit has managed to conclude the bankruptcy of SOEs the which assets are privatized and in this way failed to accomplish the requests of potential creditors. This is due to the weak institutional and legal basis.

2. A short historical background for property and privatization

The privatization process that have emerged from the communism and centralized economy is related to the propriety. The private ownership in these countries with a communist system is entirely disappeared. In our country the meaning of the term “social propriety” is understand and perceived in different ways. According to us the social propriety under the concept of SFRY had to be a common propriety of all the citizens and had been given to the society use. In the literature the common propriety of all citizens that is given to the society usually is called “State propriety” or “public propriety”, “government propriety”, “general popular propriety” and the term “governmental” is considered as a synonymous that has given to social community. In the right of former Yugoslavia with “social propriety” is meant the propriety where the State is the owner but has been given in possess, management and governance to the labour.

In the former Yugoslavia, the process of transforming (nationalization) of the private propriety in social propriety has begun with the end of the Second World War, in the moment when the socialist forces has been factorized as dominant political forces in the country. Anyway, this process at the beginning has passed the phase of the nationalization of private propriety in State propriety and then its transformation in social propriety.

According to the United Nations Mission in Kosovo in since 1945, has been nationalized the private propriety of the “enemies” and “collaborationists” that belong to liberal and anti-communist groups. The agricultural land in private ownership was limited and for those who passed the limitation the land was taken. According to the Constitution of the Former Yugoslavia all the natural resources were of State propriety. The period after 1945 is known as a period of central economic administration, since the enterprises were forced to function under State control. The state exercised control mainly through operational plans, as well as by assigning economic targets to be reached by SOEs. The state-controlled economy, that as crucial resources have the state property, it was not ideal and ultimate goal of socialist Yugoslavia. Ideologically, the ultimate goal of socialism was the development of a society led by the workers, which will ultimately result in the disappearance of the state as such. Therefore, nationalism and the economy under state control were considered only an interim phase until reaching the final goal of full self-government by the workers. The second phase, which marks the beginning of the process towards self-government by the workers, has begun in the late 50's. The United Nations Mission in Kosovo in its report declare that in that time

through a series of legislation, companies were released from direct state administration and workers' councils were established to manage the enterprises. At the same time began the transformation of state property into social property. This process reached its culmination with the Federal Constitution of 1974, which provided that all means of production and other means of collective labor, product and income earned through collective work, the means for satisfying public needs, natural reserves and certain other assets for public use, were social property. This included, but not limited to, the construction land, agricultural land used by social enterprises, buildings and apartments built with the profits generated by the use of social property. Social property as such, is supposed to be a legal category of its own, different from private and state property. Its main feature was that no one had the right to win any kind of ownership on an asset qualified as social property. The supreme title of social property was the society.

It is on the basis of social property created in Kosovo before the war of 1999, conceived and initiated the process of privatization. The process of privatization of socially owned enterprises in Kosovo started under UNMIK - Regulation in 2002. The main objectives at the start of this process have been: consolidating macro-economic, developmental, technological and economic innovation, promoting economic activities according to the perforation of the market and increase the efficiency of entrepreneurship, construction and rounding the institutions of a market economy, elimination the consequences of the application of violence by local administration installed, building a property structure compatible with market economies, encouraging private investment in SMEs, particularly foreign direct investment, and savings mobilization potential immigrants, investment and increased budgetary revenues.

On February 2008 Kosovo declared its independence and this action brought a new juridical and political situation for the privatization process.

With the entry into force of the Constitution of the Republic of Kosovo in June 2008, the Parliament of the country, for the regulation of social and economic relations, it begins to enact legislation which amends UNMIK regulations which until then were the only acts with applicable legal effect. A similar situation happened with Law no. 03/L-067 for the Privatization Agency of Kosovo (PAK)⁷, approved in 2008 which amended the Regulation of UNMIK to the Kosovo Trust Agency no. 2002/12. On the basis of this of this law, the Privatization Agency of Kosovo is established as the successor of the Kosovo Trust Agency by transferring the responsibilities to PAK. Such action have legally special effects for the entire privatization process including the representation of the contested cases of the Special Chamber of the Supreme Court should be led by the Kosovo institutions, respectively AKP and not KTA. Despite this new legal reality, the Special Chamber of the Supreme Court still considers UNMIK Regulation 2002/12 for KTA an applicable law and does not know the Law of the Assembly for the PAK.

⁷ Privatization Agency of Kosovo is established as an independent public body, which shall carry out its functions and responsibilities with full autonomy, pursuant to the Assembly of Kosovo Law No. 04/L-034, on the PAK.

According to the Special Chamber, only KTA is competent to represent cases before the court, despite the fact that legal and economic consequences are for Kosovo. Such a position of the Special Chamber of the Supreme Court is based on a legal opinion issued by the UNMIK office in 2009, which clarified which of the applicable laws, is considered appropriate for the privatization issues. Among others UNMIK explained that only the KTA⁸ Regulation 2002/12 is the applicable law and not the law for the AKP, arguing that the Law of the Assembly cannot abolish UNMIK regulations. The complexity of this process can be seen in difficulties to be recognized as a legal authority that the Privatization Agency of Kosovo had and recognized by the Special Chamber of the Supreme Court. Besides delays and difficulties evidenced under UNMIK regulation, which deals with the reorganization of a social enterprise and the process of liquidation, AKP has taken several initiatives. KPA has the right to address a request regarding clarification of the constitutional court for dualism between the chamber and the KPA. Kosovo Privatization Agency considers that its activity until now has been successful. According to information offered so far by nearly 600 socially owned enterprises (SOEs) the most part of them has been privatized. From a social enterprise are created one or more new private enterprise, through two main methods: the method of Spin-Off and the method of liquidation or sale of assets. Until now have been held 59 privatization rounds and 23 sale of assets of SOEs in liquidation, they are involved in the privatization 406 SOEs, of which are created and tendered 834 new companies. From these privatizations so far have been collected in trust funds about 600 million euros. Workers are directly benefitting from the sale of companies and continue to receive 20% of the sales price. According to the information of PAK So far the number of beneficiary workers is about 38 thousand employees and distributed amount is around 80 million euros.

On the other hand, regardless of the attitudes that the Privatization Agency of Kosovo has for its achievements, now, 15 years later, the experts' comments and analysis of various economic issues evaluate this process as unsuccessful having very negative effects on the economy of the country. In various reports is valued that Kosovars in this process have been simply observer, while the international community has everything in their hands. According to them, the model of privatization has been a model that has failed to bring adequate results. In their consideration on the effects of privatization, when viewed over the past 15 years, this process has left potential investors, because instead of offering the opportunity to invest in the renovation of social enterprises that they needed, KTA and the AKP have given high priority to selling price, which has had a negative effect. The privatization process has not been oriented towards creating jobs and attracting investment, but more to the collection of privatization funds, which, according to them, was the main element that has been negatively affected in this process

⁸ PAK is established as the successor of the Kosovo Trust Agency regulated by UNMIK Regulation 2002/12 "on establishment of the Kosovo Trust Agency", as amended, and all assets and liabilities of the latter shall be assets and liabilities of the PAK.

3. Legal basis of the privatization and liquidation process

UNMIK in order to institutionalize the process of privatization in Kosovo, had created a special legal framework which consisted of: Regulation on governance and operation of KTA, Regulation on governance of land using, Regulation for the Special Chamber in Supreme Court, Operational Policies of KTA, Tendering Rules and procedures. This legislative framework has created opportunities and facilities for direct sales companies through regular and special spin-off. Later this process was accompanied by investment and employment obligations made by the buyer. In the meantime for the liquidation process UNMIK issued on 21 November 2005 the Regulation on the reorganization and liquidation of enterprises and their assets under the Administrative Authority of the Kosovo Trust Agency no. 2005/48⁹. With this Regulation are set the procedures for the reorganization or liquidation of enterprises and their assets, currently are under the administrative authority and management of the Kosovo Trust Agency and is not applied to public enterprises. Are also regulated the procedures of reorganization or liquidation concerning enterprises or assets within Kosovo. According to the Regulation on Reorganization or Liquidation of Enterprises and their assets any procedure of reorganization or liquidation implemented abroad, will have no impact on enterprises or assets located in Kosovo. With the entry into force of the Constitution of the Republic of Kosovo, all laws passed by the Assembly which amended UNMIK regulations are only applicable legislation. Such a situation should be even applied with the Law on Privatization Agency of Kosovo (PAK), adopted in 2008, which amended UNMIK Regulation for KTA¹⁰. Despite this new legal reality, the Special Chamber of the Supreme Court still operates under UNMIK Regulation 2002/13 and simultaneously considers KTA Regulation as applicable law by not recognizing Kosovo Assembly Law for PAK. In internal law in Kosovo the negation of KPA as a full legal entity and as a party to the proceedings is a violation of procedural rules concerning the right of party representation in civil court proceedings, but also a violation of constitutional rules regarding a right judge.

Meanwhile, the liquidation process is regulated by the Law on the reorganization of certain enterprises and their property no. 04 /-L-035. There are more than 600 SOEs under the mandate of KPA and to all would be required to undergo liquidation process since this is the only legal way available to identify creditors and owners with the right in privatization revenues and assets sold during liquidation process. KTA started the 120 liquidations but the process could not finish for several reasons but a significant cause was the lack of liquidation

⁹ Regulation on the Reorganization and Liquidation of companies and their assets with administrative authorization of Kosovo Trust Agency No. 2005/48.

¹⁰ United Nations Mission in Kosovo and the privatization of social propriety – a critical review of privatization process in Kosovo.
http://www.kipred.org/repository/docs/Misioni_i_Kombeve_t%C3%AB_Bashkuara_n%C3%AB_Kosov%C3%AB_dhe_Privatizimi_i_Pron%C3%ABs_Shoq%C3%ABrore_8282.pdf (consulted on September 10, 2016).

methodology and the essential liquidation processes management. KPA has started 59 liquidations and has begun a series of liquidation sales. It is clear that the liquidation program is at an early stage with only two liquidations realized at the time of this paper. In general, the liquidation can be divided into three components; realization of assets, claims and distribution of funds to eligible creditors and the surplus will go to the Kosovo Budget. But the part that mostly takes time claims. According to the report of KPA it is estimated that the combined effect of the changes in the Law of the KPA and the Special Chamber of the Supreme Court (SCSC) will result in a decrease of 42 months to a maximum of 20 months. AKP after issuing the Law on the reorganization of certain enterprises and their assets no. 04 / -L-035 has examined all areas of operations and compared the Law and Regulations of Kosovo to other countries in the region. This review also considered the Recommended Principles of the World Bank for Effective Creditor Rights and Insolvency Systems and a special attention is given to the processing and the payment of claims (which it is a component of all insolvency systems that mostly takes time). From this review it has become clear that deficiencies in some areas are contributing to problems in Kosovo. Firstly, the Kosovo liquidation process was designed to comply with the requirements of the Comprehensive Proposal for the Kosovo Status with special emphasis on protecting the interests of minority and human rights. Unwittingly, the legislation worked against the interests which are designed to protect, by denying the applicant the right to be paid and creating hardship for workers with entitlements under the 20%. Kosovo, towards other countries in the region, has independently appointed members of liquidation committees, review committees, the PAK Board Secretariat and three non-executive members of the Board of PAK. It became obvious, that the PAK law was inadequate to enable efficient liquidation and the Agency's ability to make distributions to workers under 20% and in irredeemably way compromised by deficiencies in the structure and functioning of the Special Chamber of Supreme Court and the non-recognition of KPA by the Court to enable the Agency the right to a correct judge. In Kosovo, the right if a claim will be accepted or rejected belongs to the Liquidation Committee (LC). The rejected complaint can be send by the applicant to the Internal Commission of KAP for Liquidation review (LR) which is leaded by a nominee of ICO. If the complainant is not satisfied with the LC decisions, the complainant has the right to presented to the SCSC and then, within it, SCSC has another complaint procedure. In other words, the complaints will go through four assessments before the final decision is taken. In comparison, most jurisdictions provide a decision that consists of two phases, the first to be made by the liquidator and the second by the Courts. Eventually, the final appeal can be sent to the Constitutional Court for issues relating to human rights.

Such a structure of LC and LRC is not working and the complainants often are not informed about decisions. In some cases, claims are rejected because they were not submitted in English language. Changes towards the acceleration of complaints, distribution of funds and the closure of liquidation cases without compromising accountability and transparency are attempted to be made possible

with the commitment of the new structures. The new law of PAK has made the LC and LC replacing structure to Liquidation Authorities¹¹ (AL) supported by a panel of professional companies that will be paid according to the results of claims processing and liquidations realization. The new nominees are selected based on their experience and ability to provide the required services. Contract Framework (CF) has been drafted to facilitate this arrangement and the contractors will report to PAK which will manage the implementation and approval of the work. The Agency with the new law for PAK will claim to be providing a legal framework that on line with the principles recommended by the World Bank for Effective Creditor Rights and Insolvency Systems. This new legal framework is intended to speed up the processing of complaints and the minimum of 42 months required to process a complaint under the old law of PAK will be reduced to a maximum of 20 months. There are not statistical data on the distribution model to creditors and owners. However, the annual World Bank analysis of Doing Business for 8 countries in the region shows that there are necessary 2 - 3.3 years to complete the liquidation process. Reducing the duration of liquidation process would be very useful for creditors, owners and the Kosovo's economy. Currently PAK holds approximately € 530 million in trust funds that are intended for legitimate applicants and this includes the Kosovo budget where the liquidation surplus will be allocated.

4. Conclusion

The privatization and liquidation undoubtedly are considered the most important bases for the economic transformation of Kosovo. Actually, the actors who have carried and still carry out the privatization process exactly the liquidation phase is not framed or operationalized and well defined in order to complete a standard transfer of ownership rights between two (or more) economic agents. In this segment are well established structures of property rights that did not exist before. In eastern countries as well as in our country, the privatization is a fundamental process of a systemic transformation of society the opposite with the cases in Western countries where privatization could be seen as a pure process of reform. The privatization process in Kosovo since its beginnings by UNMIK is built on the principle of restructuring SOEs involved in this process and towards adopting their behavior to be able to survive and successfully operate in the market economy. The general opinion is that the privatization process has been associated with previous restructuring of Socially Owned Enterprises (SOEs) and resulting in improving efficiency, productivity, profitability, innovation and the level of investments in SOEs. As such it has been particularly difficult to achieve it since

¹¹ United Nations Mission in Kosovo and the privatization of social propriety – a critical review of privatization process in Kosovo. http://www.kipred.org/repository/docs/Misioni_i_Kombeve_t%C3%AB_Bashkuara_n%C3%AB_Kosov%C3%AB_dhe_Privatizimi_i_Pron%C3%ABs_Shoq%C3%ABrore_8282.pdf (consulted on September 10, 2016), http://www.kgjk-ks.org/repository/docs/GZK-23-SHQIP_199840.pdf (consulted on September 10, 2016).

the War of the year 1998-99 had destroyed most of the big companies in Kosovo. Serbian regime had destroyed or disappeared much of the data for their establishment.

Most of expropriation and transformations had occurred in circumstances and discriminatory laws after 1989 and this legally created uncertainty that constantly reflect complications. In 2003, as part of UNMIK Pillar IV established the Kosovo Trust Agency (KTA), with a special mandate to administer and privatize social enterprises (SOEs). In the context of the Supreme Court is established the Special Chamber with the only jurisdiction to deal with issues related to KTA and social enterprises. KTA identified 700 SOEs and founded a public tendering process to sell them with the best possible value. From 2004 until the spring of 2008, the KTA has developed over 500 sales through Spin-Off method. An UNMIK regulation on land use has enabled the use of land by social enterprises converted into a 99-year lease, and this has enabled many of the privatization process. Land and other assets to a social enterprise are sold together as a whole and in some cases are only sold their parts. Thus, some SOEs are sold in part, or in several rounds of privatization. According to American Chamber of Commerce where the assets of SOEs were insignificant or where a social enterprise had the potential to be commercially sustainable, KTA occasionally sell these assets with direct liquidation. KTA stopped its operations in June 2008, after Kosovo declared the independence and the Constitution came into force. By this time KTA received more than 400 million euros from sales of which were placed in special trust accounts, for distribution to owners and creditors. 20% of sales have been obliged by law to be distributed to employees of SOEs. Since privatization resulted completed, the old social enterprise was about to be liquidated and all funds and assets were distributed to eligible creditors, owners and workers. The PAK Law, although approved by the Assembly of Kosovo and with the amended Regulation nr. 2002/12 for KTA, has not reached his goal to repeal the KTA Regulation. Therefore, it is necessary to issue a new law for the Special Chamber, to amend the Law on PAK, amend the Regulation no. 2005/48 on the reorganization and liquidation of enterprises and their assets with an administrative authorization and issuance of a new law on denationalization. The liquidation process of privatized SOEs was created to pay the debts to legitimize creditors. The liquidation process never began under the supervision of the KTA and this delayed the distribution of the funds needed in the economy. KTA ceased its operations in June 2008, by passing all the responsibilities to Privatization Agency of Kosovo (PAK). Unfortunately, the process of transition was legally and politically complicated and this temporarily slowed the privatization process. However, in early 2009, PAK recommenced the privatization process with spin-off method and after began to operate at full capacity. PAK also launched the delayed process of liquidation. So far, only a small social enterprise is liquidated, but many other liquidation processes begin and it is hoped that this process will accelerate. There are different opinions on the effects of privatization in Kosovo. About 480 million euros have been collected from buyers of SOEs. This has caused a reduction in

Kosovo economic activity. This money should be paid to the creditors who then will be able to spend it and stimulating the economy of the country. Even the relatively easy process of distribution of 20% to employees is driven by the wrong management of the program

Today, over 480 million euros were collected from privatization sales. Of these, employees are entitled to 96 million euros. However, despite the difficult economic conditions and high unemployment are distributed less than 20 million euros.

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