

Monitoring Mechanisms for Privatisation Audit and Building Public Awareness against Corruption

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I. INTRODUCTION

The following presentation is a summary of the Program on Monitoring BTC Privatisation Transaction in Terms of Transparency, Anti-corruption measures and Compliance with the Law.

The expert paper provides practical information for the Civil Society Organizations how to involve the Public at large or the "Representatives" of the public in improving the legislation on contracting so that the processes and decisions of the institutions can be monitored, reviewed and influenced by the public.

By reviewing the way the goals of the program are achieved, the expert is focused on the enumeration of the fundamental steps and activities.

The program-topic of the presentation, was launched by "Transparency without borders" - the Bulgarian National Chapter of Transparency International - in January 1999. It was designed as a follow-up of the first in-depth study "Corruption in Contemporary Bulgaria", conducted by TI - Bulgaria's experts in the fall of 1998.

The basic goals of the Program were to generate and implement a system of routine procedures of preventive civil expertise on the law, corruption-generating provisions as well as to increase the transparency of the entire privatisation process by reducing the opportunity for abuse and manipulation in the bidding and contracting procedures.

By means of that brief-paper, Transparency International – Bulgaria presents a catalogue of suggestions toward the issue, which was tasted in the TI Bulgaria monitoring project. The envisaged outcome is the institutionalisation of adequate techniques for monitoring on Privatisation process and binding "Principal" and bidders for specific rules to abstain from bribery and disclose all transactions of Privatisation.

II. BACKGROUND

Privatisation in Bulgaria has been a pressing device issue in the society for more than seven years. Its fulfilment is of an extreme importance to the country and would have a serious impact on the economy. Privatisation completion is indicative not only of the willingness of the Bulgarian government to meet its commitments undertaken within the framework of negotiations with the WTO, but also of its policy towards meeting the criteria for EU accession.

Privatisation procedure influences the liberalization of the Bulgarian stock and financial markets. As a part of the Bulgarian Privatisation, BTC privatisation proceedings concerned mainly the liberalisation of Bulgaria's telecommunications market. Bulgarian Telecommunication Company is the only one monopolist of phone services market and its privatisation is one of the main objectives of the post-communist governments.

As a non-government organization focused on monitoring the existence of corruptive practices and the possibility for such practices to unfold in the Bulgarian society, "Transparency International - Bulgaria" considers Bulgarian Privatisation and particularly BTC transaction as an Event that would have material economic, strategic military and political significance for Bulgaria. This is why the transaction's negotiation proceedings involved in making the deal had to be sufficiently clear, transparent and in legal compliance.

TI Bulgaria claimed in any privatization transaction that the price does matter, but strategy is always by far more important! The cash price achieved in BTC privatisation will inevitably be negligible when compared to the huge potential impact of the way in which this privatisation is carried out on the rest of the economy and on the future of the country in the information age. A **clear and realistic strategy** for the development of the Bulgarian telecommunications industry, as well as its proper implementation, **is very likely to bring in the desired turnaround of the entire Bulgarian economy** and pull the country out of the post-communist Depression State.

III. Monitoring Principals of a key importance for disclosing the privatisation procedure

A well-elaborate monitoring on Privatisation requires both clarity and transparency of the selected criteria as well as compliance of the bidding process and bidding documents with the Law. In order to draw up the monitoring principals of privatisation it is necessary to clarify the term of "Transparency".

"Transparency" means that the institutions, processes and decisions are made accessible to **the public at large** or to the **"representatives"** of the public so that the process and the decisions can be monitored, reviewed and influenced by the public. It is essential that transparency be established from the very beginning so that potentially every step in the long decision-making process could be influenced in a timely manner, if necessary.

"Transparency" requires voluntarily and proactively provision of full disclosure of information to the public through the print and electronic media about the potential options, privatisation plans, document designs and negotiation procedures.

"Transparency" means that all the stakeholders of a major investment are fully informed and consulted about all aspects of the Privatisation Deal. Privatisation transactions which were prepared in secrecy, or with severely limited information turned out to be tainted by corruption and were held up for years.

The process of privatisation monitoring may appear time-consuming and costly but it proves to be irreplaceable and will in the long run save time as well as costs.

Accounting the above Transparency International – Bulgaria enumerated the fundamental steps and activities required to provide monitoring of the entire privatisation process. They can be exposed in the following consistency:

1. **Examining the efficiency and the quality of the Privatisation, documentation and decision-making process**
2. **Compliance of bidding, evaluation and award process with the government policies, legislative mechanisms and legal agreements**
3. **Conformity of final contract with bidding documents**
4. **Clarity and transparency of selection criteria**
5. **Validity of change orders and other contract modifications during execution**
6. **Verification of privatisation execution and its conformity with contractual requirements**
7. **Assessment of the transaction price**

During the process of monitoring on the BTC transaction, TI Bulgaria experts found out the following breaches of the above-mentioned principles.

- **The Transformation and Privatisation of State-Owned and Municipal Enterprises Act provides a legal definition of the term “privatisation”;** it establishes the status of participants in the privatisation, the bodies competent to effect the transfer of ownership from the state or municipalities to private persons (“**natural or legal persons with less than 50% state or municipal participation**”, according to the text of Article 1 paragraph 3), entities subject to privatisation, and the methods for effecting their privatisation. The procedure envisaged in the Act precludes the possibility for overtaking competence falling within the jurisdiction of another government body, which is a trend observed in BTC negotiations. With its actions, the Council of Ministers definitely takes over the scope of authority delegated to the Privatisation Agency by the law, to carry out negotiations with potential buyers. The Involvement of the Council of Ministers or its members in the negotiations constituted a classic example of conflict of interest where **the Government parted with yet another independent control body**, envisaged by the law.
- In performance of the contract for monitoring the BTC privatisation process, the Association expressed the opinion that, with the expiration of the required earnest money deposit, **continuing the negotiations** with the consortium was a **legal irregularity** because such negotiations are in contravention with the pre-selection criteria for entry into the tender and for purchasing tender documents. The earnest money deposit required for participation in negotiations with potential buyers in a privatisation deal is intended to serve as a **guarantee** for the *bona fide* participation in negotiations of the potential investor, and to **secure** the performance under the obligation to close the deal. It should be noted that **the earnest money deposit is a prerequisite for participating in the negotiations**, and it is not something recommendable or desirable. The failure to fulfil this prerequisite **is a material violation of the procedure for carrying out negotiations with potential buyers**. In

that case the deal has to be terminated until such time as the required earnest money deposit is set up, within a time period specified by the Working Group.

- From the very beginning of the privatisation proceedings for BTC, Consortium **associated the success of negotiations with a future, comprehensive acceptance of changes to the law as proposed by it. *Transparency International, Bulgaria is obliged to point out that the process of making and updating the law is not subject to negotiations between the legislative branch of the Government of Republic of Bulgaria and a third, private party.*** The Consortium required a deposit, in an escrow account, of **an amount of money, to be used as indemnity if either certain law is not passed or it is pronounced legally irregular by the Constitutional Court** Through the contractual documentation, the Consortium was practically trying to obtain legislative initiative, a right which by Constitution, is held only by the Council of Ministers and members of Parliament.
- The Consortium supported the idea of introducing a monopoly on two-way telecommunications through cable networks designed for radio and television signals, i.e. the introduction of a monopoly on Internet services provision through cable networks. Introduction of such a monopoly would be **“a particularly severe violation of the rules of free competition”**. **Establishment and existence of a monopoly position is allowed only in ordinary telecommunication services.**
- Contrary to the established rules of international commercial law whereby **anybody is held liable for any damages caused by non-performance**, the Consortium aimed to avoid any possibility to pay damages in cases of non-performance under its obligations under the Contract for the purchase of 51% of BTC.
- From the very beginning of negotiations, the Consortium maintained the position that **its investment commitments (which stood at the basis of the decision to open privatisation proceedings for BTC) ought to be extinguished, should an indemnity claim be filed** under the Indemnification and Guarantees Agreement, i.e., the investment commitments of KPN/OTE were tied up with the emergence and filing of a claim for damages.
- The obligatory condition for investments posed by the Government of the Republic of Bulgaria as a primary prerequisite among the preliminary requirements for participation in the privatisation deal for BTC was transformed by the Dutch – Greek Consortium into a possibility to invest an amount borrowed from international institutions, and not from own funds of the future owners of BTC. Such a transformation of the investment strategy for BTC did not correspond to the main philosophy in privatising the company, which was to privatise it in order to find a strategic investor for BTC that would prepare the company for a smooth transition to the next step in the liberalisation of telecommunications in the Republic of Bulgaria after the end of 2002.
- **The contract for the purchase of BTC restricted the possibilities of the Republic of Bulgaria to hold negotiations, undertake and meet commitments to the WTO, EU and NATO.** The Republic of Bulgaria should **“co-ordinate”** with the Investor and the Consortium all aspects of the negotiations **prior to undertaking any**

commitments to the World Trade Organisation, the European Union and NATO. **A private person cannot determine or approve the national priorities and commitments of a sovereign country.** Any legal person **doing business** in Bulgaria ought to run it **in compliance and in observation of the effective domestic and international regulations to which Bulgaria is signatory or that have been ratified by it.**

- It was also unacceptable to agree with the proposal of the Consortium to entitle it (grant it the privilege) to assign a management contract without any tender or competitive bidding, to a company related to it. Throughout our law, there is the permeating idea of intolerance to contracts between related parties. They provide for a worrisome possibility for a **lack of transparency** in the actions of such related parties, **significantly infringe upon the abilities to engage in normal commercial activity and create the prerequisites for unfair competition** and unlawful gains for **related parties** at the expense of **lost revenues for the state treasury.**
- **The sale of BTC would have created a concentration of capital on the Bulgarian market. Had the deal taken place in this form, the Commission for Protection of Competition would have been in its full legal right to rule against the establishment of such a monopoly position that would promote unfair competition and not protect consumer interests.**

The findings of legal non-compliance and lack of transparency in the deal are based on non-confidential information, which the Association is entitled to disclose, under the Monitoring Agreement for the privatisation of BTC, but it was enough for the sound judgment that BTC privatisation deal has been handled in the worst possible way:

- a) Its beginning was delayed by several years.
- b) The deal itself has dragged on for years – this is absolutely unacceptable. Much larger and more complicated deals elsewhere in the world were finished in the meantime, while Bulgaria has not been able to sell one of its largest and best assets.
- c) The lack of any decisiveness and vision on behalf of the Bulgarian authorities has put at stake the image of the country and the investors' confidence in the whole process of reforms. Frankly, investors are not interested in the details and do not want to bother spending time to hear the explanations.
- d) The periodic announcements that an agreement has been reached and then the deal being delayed again and again have been very unproductive.
- e) Uncertainty about the future of the telecom has hampered investments in the Bulgarian telecommunications infrastructure and, as a consequence of this, most of the fixed network is still out-of-date.
- f) There is a general belief in the country and in the investment community abroad that other legitimate bidders have been pushed away by unfair means, that massive bribes might have been taken, and that the whole process has not been transparent. It is not important whether this is true or not. The image has been tarred.

Political pressures with regard to the **pricing policy** have been and still are an obstacle to the development of the telecom operations and the market as a whole as they create a

vague idea about the future. The "hands-on" approach that has been followed by the state authorities so far has to be reconsidered, whether BTC is privatised or not. Thanks to TI-Bulgaria efforts the transaction was terminated and all irregularities were revised from the government of Bulgaria. The successful execution of the project was necessary for increasing Public awareness and strengthening civic control on the Executive and its actions in the Bulgarian Privatization.