Serbia: New Privatisation Act

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No summer for the Serbian Parliament – the new Privatisation Act is one of many outputs of the prolific 2014 summer session.

The deadline for mandatory privatisation of the relict called ‘socially-owned capital’ is prolonged for the nth time, until the end of 2015. Privatisation of state-owned capital (now called ‘public capital’) remains discretionary.

The law introduces ‘strategic partnership’ and transfer of shares free of charge as new privatisation models, besides sale of equity, asset sale and sale of shares at the stock exchange or via takeover offer. A combination of different models is also possible.

‘Strategic partnership’ can take form of a corporate joint venture between the state and a Serbian or foreign legal entity (investor), whereby the state invests the assets acquired from the company with state-owned or socially-owned capital in satisfaction of claims held by state creditors against such company, while the joint venture partner makes a contribution in cash or in kind. Joint venture partner is selected following a public invitation setting out qualification criteria. All joint venture agreements will have to be published.

Another form of ‘strategic partnership’ is acquisition of shares in the company undergoing privatisation, by virtue of capital increase in exchange for fresh contributions or debt to equity swap. Further details on this form of ‘strategic partnership’ are to be regulated by a governmental decree.

Privatisation by sale of equity is performed by concluding an adhesion contract following a two-stage auction, to be further regulated by a decree. If any assets of the company transpire after the closing of the transaction, which assets were not on the company’s balance sheet or otherwise disclosed in the privatisation documents, the buyer will be obliged to top up the price or such assets will be transferred to the state. The Privatisation Agency acquires statutory lien on the sold capital, which persists until all post-closing obligations are fulfilled by the buyer. If the buyer fails to fulfill its post-closing obligations within additional deadline, the privatisation contract is terminated *ex lege* and the privatised capital reverts to the Privatisation Agency, without the right of the buyer to be refunded the purchase price.

Similar rules apply when a company is privatised by sale of its assets. If the assets are encumbered, the pledge will not survive the sale but the secured creditors shall have priority with respect to the proceeds of the sale. If the entire assets of a company are sold, the remaining shell will be put into bankruptcy or, as the case may be, liquidation.

The government may compel state creditors to convert their claims against the company to be privatised into equity or forgive the debts of such company, in case the company is privatised by sale of equity or by capital increase in favour of 'strategic partner'.

Transfer of shares free of charge to a strategic investor is supposed to be regulated by separate regulations.

The Privatisation Act no longer refers to privatisation "restructuring', a measure used under the previous law to shield companies from creditors until they become sellable. However, the transitory provisions of the new Privatisation Act provide that the moratorium on enforcement of creditors' claims shall continue with respect to those companies that were put into 'restructuring' under the previous legislation. This in spite of the fact that the Serbian Constitutional Court declared the moratorium unconstitutional with the effect from November 2013.

BDK Serbia
Majke Jevrosime 23
11000 Belgrade
Tel: +381 11 3284 212
Fax: +381 11 3284 213
office@bdkadvokati.com

BDK Montenegro
Cetinjska 11, The Capital Plaza
81000 Podgorica
Tel: +382 20 230 396
Fax: +382 20 230 396
office.cg@bdkadvokati.com

BDK Bosnia and Herzegovina (Advokat Dijana Pejić u saradnji sa BDK Advokati AOD)
Gundulićeva 6
78000 Banja Luka
Tel: +387 51 250 641
Fax: +387 51 250 642
office.banjaluka@bdkadvokati.com