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CRIMINAL ANALYSIS OF THE OFFENSE – ABUSE IN THE PRIVATIZATION PROCESS

ABSTRACT: Compatibility with the standards of the European Union in terms of the criminal law regulation of all offenses that disrupt economic flows and values in a country, greatly affects, among the other things, the stability of economy as a basic social activity. The consequences of all individual criminal acts can have a very strong impact on certain aspects of economic relations. Comprehensive criminal regulation does a lot in the field of economic stability. Bearing in mind the topic of this paper, after a brief theoretical overview of the concept of privatization, the paper provides a criminological overview of the causes and forms of criminal behavior in the privatization process, as well as a criminal law analysis of the criminal act of Abuse in the privatization process. Abuse in the privatization process is a criminal offense regulated by the Article 228a of the Criminal Code of Republic of Serbia (2005), and it is classified in the twenty-second chapter entitled "Criminal offenses against economy". The criminal act of Abuse in the privatization process belongs to criminal acts violating the rules of legal business operations.

Keywords: *privatization, business operations, Privatization Law, the Criminal Code, criminal offense, Republic of Serbia.*

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1. Introduction

At the end of the twentieth century, "socialism as a social system and economic model ceased to be an alternative to the capitalist economic model. The main cause of its collapse was the inefficiency of the system and lack of motivation among workers. Although official statistics showed growth in economic activity that used to exceed the growth rates of developed market economies, it was not a healthy growth. It was not growth that creates, but the one that destroys enterprise value" (Cvijanović, Mihailović & Simonović, 2009, p. 7).

Privatization, in the sense of the Privatization Law (2014), is "the change of ownership of capital and property of legal entities operating with social and public capital. Privatization is also: the sale of shares, that is, stakes that were transferred and recorded in the Shareholders Register after the termination of the contracts that had been concluded in the privatization process; sale of property in companies where the contract on the sale of capital has been terminated; sale of shares, i.e. stakes of the Shareholder Fund, as well as the Fund for the Development of the Republic of Serbia and the Pension and Disability Insurance Fund of the Republic of Serbia".

Changes in "property relations structure have always had and continue to have a special significance" (Lakićević & Popović, 2022, p. 25). According to Šoškić (1995), "the primary goal of the transformation of social property was to achieve greater efficiency in economic activity" (p. 93). In the broadest sense, "privatization refers to the transfer of assets or capital from public (state) to private ownership, with the expectation of more efficient use of that property" (Zdravković, Nikolić, & Bradić-Martinović, 2010, p. 279; Radišić et al., 2010, p. 690).

According to Kecman Šušnjar (2012), "the development of the private sector in the economy is called the privatization process, which can be defined in a narrower and broader sense. Privatization, in Western literature, in its narrow sense, refers to the transfer of resources that were once in state ownership into the hands of the private sector. The state and social ownership structure was common and had far more forms in former socialist countries than in Western countries, so the task of returning companies to their original ownership structure is more demanding and characteristically different than in Western European countries, and for that reason, a broader definition of privatization must be introduced" (Estrin, 1994; cited in: Kecman Šušnjar, 2012, p. 18). The broader concept of privatization "encompasses ownership relations throughout the economy and explains privatization as the growth of the private sector

until private ownership becomes the dominant form of ownership at a certain point" (Kornai, 1991, p. 5). In a broader sense, "privatization means the sale of state or social property, but also the abandonment of any state control and the abolition of state monopolies in certain economic sectors, the return of unlawfully seized property to its rightful owners, the promotion of private enterprise and efforts to attract foreign investment" (Mayor, 1993, p. 10).

The privatization process "enabled the economy to acquire organizational forms that correspond to market operations, and thus created conditions for efficient business operations, as well as quality management and leadership" (Milosavljević & Milošević, 2019, p. 102). The basic and most important goal of privatization is "to create an efficient economy based on the dominance of private property, instead of an irrational one relying on inefficient social and state ownership" (Kecman Šušnjar, 2012, p. 18).

Given the long-standing essence and significance of the privatization process, it is not surprising that there are opportunities for numerous fraudulent activities in this field.

Banović (2002) notes that "the basic sources of criminal activity in privatization processes lie in the position of state officials who, to a greater or lesser extent, influence the process of changing ownership rights over certain property, and in this way, by selecting certain privileged individuals (or groups), provide themselves or them with significant financial means" (p. 116).

Considering the topic of the paper, the following subsections will provide a brief criminological overview of the causes and manifestations of criminal behavior in the privatization process, as well as a criminal-legal analysis of the criminal offense of Abuse in the Privatization Process.

2. Causes and forms of criminal behavior in the privatization process

When discussing the causes of criminal behavior in the privatization process, we should always start with the type and scope of the powers of state officials that enable them to influence the process of property transformation. According to Banović (2002), patterns of criminal behavior in the privatization process are also related to "the influence of bureaucracy in blocking the privatization process, leaving the possibility for privileged individuals and groups to illegally transfer capital from state and social enterprises to those under private ownership. Therefore, discretionary powers of bureaucracy are essential. Any segment of the privatization program that requires someone's official signature represents a potential hotspot for criminal activity. The

greater the discretionary powers of state officials and other officials who operationally implement the privatization process (and decide on property transfers), the greater their decision-making power, and therefore, the greater the possibilities for corruption and abuse" (pp. 116-117).

What can also lead to the emergence of various criminal behaviors in the process of property transformation "is the insufficient transparency, i.e. the inadequate availability of certain information about the privatization process to the wider public, frequent changes in regulations governing the field of privatization, as well as inadequate control of the privatization process that is being carried out" (Carić & Matijašević Obradović, 2017, p. 150).

According to Bošković (2009), "certain forms of economic crime in the field of property transformation can include the following activities:

- Private property owners can exploit the difficult economic situation and infiltrate their private capital into the social sector by securing strategic raw materials and supplies. Such privately directed funds lead to a situation where, in collusion with appropriate managers of social enterprises, they are valued as shareholder capital, which forms the basis for the privatization of social enterprises contrary to legal provisions. The value of such invested private capital (raw materials, supplies) is not commensurate with the value of social property that is illegally transformed into private property;
- Legal provisions require that a final account be prepared before the ownership transformation. Practice shows that in many cases this was not done, or that final accounts do not correspond to the actual factual situation, contain inaccurate information or even do not contain some information significant for the objective assessment of the value of social capital entering the transformation process. It is not uncommon for the value of the capital being transformed to be reduced, which clearly indicates a certain prior agreement and intention for the new owner to acquire property at a lower price."
- Various malpractices are possible in the assessment of capital value regarding what a realistic assessment encompasses, i.e., what the actual value of the transforming capital is.
- There are cases where social assets are reduced by accumulating liabilities, thereby inaccurately representing the value of that asset during sale, and certain individuals are given a privileged position by the management of the privatized company. The reduction of assets is usually carried out in one of the following ways: by not including the entire assets of the company during the assessment of its value;

by fictitiously increasing liabilities; by reducing the assets to a level where it prevents the free subscription of shares to individuals outside the company; by preventing share subscription in another way, such as not publishing advertisements, providing an incorrect address, not respecting priorities, not respecting working hours, and there are cases where certain individuals are allowed to subscribe to a greater number of shares than permitted or even individuals who do not have the right to subscribe to shares are allowed to do so.

– During the privatization process, there are instances of illegal activities conducted by certain interest groups who collude as different entities with the aim of influencing the competitive participants. It has also been observed that such groups exert pressure, intimidation, and even threats towards other entities involved in the transformation of social property (pp. 62-64).

3. Criminal law analysis of the criminal offense Abuse in the process of privatization

The criminal offense of Abuse in the process of privatization falls under "criminal offenses that violate the rules of lawful economic operations" (Mrvić Petrović, 2019, p. 226).

Abuse in the process of privatization is a criminal offense regulated by Article 228a of the Criminal Code of the Republic of Serbia (2005) and is classified in the twenty-second chapter entitled "Criminal Offenses against Economy".

According to the provisions of Article 228a, paragraph 1, the offense is committed by "a person who influences the course of the process or the decision of the organization competent for conducting the privatization process, by submitting an offer based on false information, or by unlawfully colluding with other participants in the privatization process, or by taking other unlawful actions". This is the basic form of the offense for which a prison sentence of six months to five years is prescribed.

As can be seen from the legal formulation of the basic form of the criminal offense, the act of commission can be carried out alternatively in the following ways: 1) submitting an offer based on false information, or 2) making agreements with other participants in the privatization process contrary to the law, or 3) taking other unlawful actions that affect the course of the privatization process or 4) making decisions of the organization in charge of implementing the privatization process.

This criminal offense and its act of commission "are somewhat of a blanket nature, so its legal description must be brought into relation with laws and other regulations, especially the Privatization Law (2014)" (Stojanović et al., 2017, p. 77).

The consequence of this form of criminal offense "is an impact on the course of the procedure or on the decision of the organization responsible for carrying out the privatization procedure. There must be a causal link between the action taken and the course of the procedure or the decision made. Attempting to commit the offense is possible and punishable given the prescribed penalty. The perpetrator of this form of offense may be a participant in the privatization procedure. A participant, according to the mentioned law, is a person who has submitted an application to participate in the privatization procedure" (Stojanović et al., 2017, p. 77).

The subjective element of this type of criminal offense is intent, which "must encompass both the action, i.e. the consciousness and will to submit an offer based on false information, or to unlawfully agree with other participants in the privatization process, or to undertake some other unlawful act, as well as the consequence" (Stojanović et al., 2017, p. 78).

It should be emphasized that "in addition to intent, what is also required is the perpetrator's intention to influence the course of the privatization process or the decision of the organization responsible for conducting the privatization process, which constitutes the consequence of the first basic form of the criminal offense of abuse in the privatization process" (Carić & Matijašević, 2017, p. 274).

The actus reus consists of committing the offense (submitting an offer based on false information, unlawfully agreeing with other participants in the privatization process, undertaking some other unlawful act).

According to Article 228a, paragraph 2, "a public official who violates the law or other regulations on privatization and thereby causes damage to capital or reduces the property that is the subject of privatization, by taking advantage of their position or authority, exceeding the limits of their authority, or failing to perform their duties, shall be punished with imprisonment for a term of six months to five years."

This is the second basic form of the offense, and the perpetrator can be a public official who alternatively commits the following acts: 1) violates the law or other regulations on privatization by taking advantage of their position or authority, 2) violates the law or other regulations on privatization by exceeding the limits of their authority, or 3) violates the law or other regulations on privatization by failing to perform their duties. The condition

that must be fulfilled in this regard is that these activities cause damage to capital or reduce the property that is the subject of privatization.

In accordance with Article 112, paragraph 1, item 3 of the Criminal Code (2005), a "public official" is considered to be: "1) a person who performs official duties in a state body; 2) an elected, appointed, or employed person in a state body or local self-government body, or a person who performs official duties or official functions in these bodies on a permanent or occasional basis; 3) a notary public, an enforcement agent, and an arbitrator, as well as a person in an institution, enterprise, or other entity who is entrusted with the exercise of public powers and who decides on the rights, obligations, or interests of natural or legal persons or on the public interest; 4) a person who is factually entrusted with the performance of certain official duties or tasks; 5) a military person."

For the completed criminal offense, "the occurrence of a consequence is necessary, i.e. damage to capital or a decrease in the value of property that is the subject of privatization. In this form, attempt is also possible and punishable" (Stojanović et al., 2017, p. 78).

For the existence of this form of criminal offense, "intent relating both to the action taken and to the consequence of the criminal offense is necessary" (Stojanović et al., 2017, p. 78).

According to Article 228a, paragraph 3, "if the offense from both previous paragraphs is committed in connection with the privatization of capital or property whose assessed value exceeds three hundred million dinars, the perpetrator shall be punished with imprisonment for one to ten years." Therefore, paragraph 3 regulates the most severe form of the criminal offense of Abuse in the Privatization Process.

In this case, the qualifying circumstance of the criminal offense is the assessed value of the capital or property subject to privatization. Therefore, the condition is that the assessed value of the capital or property subject to privatization exceeds three hundred million dinars.

The assessment of the value of capital or property "is carried out based on sublegal acts and must be done before the start of the privatization process because the initial price depends on it (it cannot be lower than half of the assessed value, and the new initial price in the second collection of bids cannot be lower than one-third of the assessed value)" (Stojanović et al., 2017, p. 78).

Article 85 of the Privatization Law (2014) stipulates a criminal offense that can only be committed by a responsible person in a privatization subject.

Namely, according to these provisions, "a responsible person in a privatization subject from Article 20 para. 1 and 3 of this Act who fails to provide data within the prescribed deadline, as well as a responsible person in

a privatization subject from Article 24 para. 4, Article 49 para. 1 and Article 57 para. 4 of this Act who provides false or incomplete data on the assets and obligations of the privatization subject to the Ministry responsible for economic affairs, or submits inaccurate or incomplete documentation, shall be punished with imprisonment from three months to five years and a fine ranging from 100,000 to 1,000,000 dinars."

According to Stojanović et al. (2017), "1) This criminal offense incriminates the failure to provide data within the prescribed deadline concerning the inventory and market value assessment of the total assets, liabilities, and capital of the subject of privatization in accordance with the law. The deadline is 30 days from the date of the public call for expressions of interest. The data is provided to the ministry responsible for economic affairs (Article 20, paragraph 1 of the Privatization Law). If 12 months have passed since the inventory and assessment, the privatization subject is obliged, upon request of that ministry, to provide a new inventory (Article 20, paragraph 3 of the Law); 2) The act of execution also includes providing the ministry with untrue or incomplete data on the assets and obligations of the subject of privatization (Article 49 of the Law) or providing inaccurate and incomplete documentation (Article 57 of the Law). Although the offense is blanket in nature, the act of execution is not precisely defined, even when brought into connection with the provisions of the Privatization Law referred to in Article 85. Among other things, it is not entirely clear whether there is a criminal offense in the case of failure to provide documentation from Articles 24, 49, and 57 of the Privatization Law; 3) The perpetrator of the criminal offense is the responsible person in the subject of privatization. The Privatization Law speaks of a person "authorized to represent the subject of privatization"; 4.) The criminal offense can only be committed with intent. Negligently failing to provide or providing inaccurate and incomplete documentation is not incriminated" (p. 201).

4. Conclusion

The globalization of markets and the internationalization of business operations have a significant impact on regional and national business practices, economic trends, and balances, as well as on competitive positions in the global markets of knowledge and capital.

Adequate coverage, continuity in development, and compatibility with European Union standards regarding criminal law regulations of all offenses that disrupt economic flows and values in a country, greatly influence, among other things, the stability of the economy as the fundamental social activity.

Analyzing the importance of criminal legislation in the field of economic crime, it can be concluded that adequate and timely criminal regulation with the economy and all its aspects as the primary protective object can act preventively against potential new criminal offenses against the economy, and thus be a significant factor in overall economic stability.

The consequences of all individual criminal offenses can strongly affect certain aspects of economic relations. Substantive criminal regulation seems to play a crucial role in economic stability.

Given the topic of the paper, after a brief theoretical overview of the concept of privatization, a criminological review was conducted in the paper on the causes and manifestations of criminal behavior in the privatization process, as well as a criminal law analysis of the criminal offense of Abuse of office in the privatization process.

Abuse in the privatization process is a criminal offense regulated by Article 228a of the Criminal Code of the Republic of Serbia (2005), and is classified in the twenty-second chapter entitled "Criminal offenses against the economy". The criminal offense of Abuse in the privatization process falls under criminal offenses that violate the rules of lawful economic transactions, and therefore it is necessary to be adequately prescribed in criminal legislation and applied in practice by the relevant judicial authorities.

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KRIVIČNOPRAVNA ANALIZA DELA – ZLOUPOTREBA U POSTUPKU PRIVATIZACIJE

REZIME: Kompatibilnost sa standardima Evropske unije u pogledu krivičnopravne regulative svih delikata kojima se narušavaju privredni tokovi i vrednosti u jednoj državi, u velikoj meri utiču, između ostalog, i na stabilnost privrede kao osnovne društvene delatnosti. Posledice svih pojedinačnih krivičnih dela mogu veoma snažno uticati na određene aspekte privrednih odnosa. Sadržajnom krivičnom regulativom, čini se

veoma mnogo na polju privredne stabilnosti. Imajući u vidu temu rada, nakon kraćeg teorijskog osvrta na koncept privatizacije, u radu je učinjen kriminološki osvrt na uzroke i pojavne oblike kriminalnih ponašanja u postupku privatizacije, kao i krivičnopravna analiza krivičnog dela zloupotreba u postupku privatizacije. Zloupotreba u postupku privatizacije je krivično delo uređeno članom 228a Krivičnog zakonika Republike Srbije (2005), i svrstano u dvadeset drugo poglavlje pod nazivom „Krivična dela protiv privrede". Krivično delo zloupotreba u postupku privatizacije spada u krivična dela kojima se krše pravila zakonitog privrednog poslovanja.

***Ključne reči**: privatizacija, privredno poslovanje, Zakon o privatizaciji, Krivični zakonik, krivično delo, Republika Srbija.*

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