Dr. Nebojša Jovanović

Professor
University of Belgrade Faculty of Law
nebojsaj@ius.bg.ac.rs

WHY GOING PRIVATE IS (WAS) PROHIBITED IN SERBIA?

This paper deals with the problem of permissibility of public companies' go ing private transactions in Serbia. The Securities Commission of Serbia caused that problem by an odd interpretation of the current Serbian securities law. It is of the opinion that going private of public companies in Serbia is prohibited due to a loop hole in the Securities Market Act concerning the procedure for the process. That was the ground for the Companies Register to start the practice of denying the registra tion of conversion of public companies into private ones. The courts confirmed that practice as the legal one in judicial review procedures, which stopped going private process in Serbia for a longer time in spite of the explicit statutory permission. The paper points out that such a practice is illegal, because it is not grounded on the law, but on the decision makers' arbitrariness.

Key words: *Going Private. Company. Securities.*

1. INTRODUCTION

Going private is the process of converting a public company into the private one. Unlike the going public process, in which a company introduces its shares into the public trade converting itself from private into the public one, in this process it withdraws the shares from the public market by shifting them on the private market.[1] The main consequence of

[1] Compare this definition with: T.L. Hazen, *The Law of Securities Regulation*, Thomson Co., St. Paul, Minn. 2002, 514; M.I. Steinberg, *Understanding Securities Law*, Matthew Bender, New York 1996, 298, 357; D.C. Kreymborg, *Going Private with Public Concern,* Montreal 2003, 7, *http://digitool.library.mcgill.ca/webclient/StreamGate?folder id 0&dvs 1312025028200~112*, last visited 30 July 2011; D.A. Rice, "Going Private

this process for the company's shareholders is that they may not trade their shares any more by making public offerings for selling or buying, but exclusively by private offerings, which may not be announced. Since it reduces the marketability of their shares (the possibility to sell or buy), the law usually protects dissentient shareholders from the abuse of the majority, recognizing special rights to them and regulating the procedure for that process. For that reason, the company must take a set of actions toward its shareholders (for instance, passing a decision in the general meeting, paying money to the dissentients for their shares), market professionals (for instance, notifying the stock exchange, the corporate agent), the public (announcement) and the market regulator (for instance, awarding its approval).

Going public and going private in Serbia is regulated by two statutes. One is the Commercial Companies Act from 2004 (Zakon o privrednim društvima; hereafter: Companies Act), which regulates companies[2] and the other is the Securities and Other Financial Instruments Market Act from 2006 (Zakon o tržištu harija od vrednosti i drugih finansijskih instrumenata; hereafter: Securities Market Act), which regulates securities and their trade.[3] These statutes have made a problem in regulating the going private process by explicitly allowing it, but with no explicit regulation of the procedure itself nor the protection of dissentient shareholders. That has been a ground for different interpretations in practice and arbitrary behavior of the competent authorities. The new Serbian Capital Market Act (*Zakon o tržištu kapitala*) from 2011 explicitly regulates the going private process, terminating legal uncertainty caused by the current regulations.[4]

Transactions An Overview", 2007, 1, *http://www.haynesboone.com/files/Publication line*, last visited 30 July 2011.

Some jurists distinguish going private from going dark. In their opinion, going pri vate is a *transaction* of converting a public company into the private one in which a per son (a controlling shareholder, an outsider by takeover bid or the company itself) buys out shares from the minority of dissentient shareholders, reducing their number to the level enough to satisfy legal requirements for withdrawing shares from the public market. The consequence is that the company does not have any more reporting duties to the public. In contrast to that, *going dark* is not a transaction (i.e. a contract for buying shares), but an act of a public company by which it deregisters itself from the list of public companies with the competent authority, under certain legal conditions, excluding its obligation of public disclosure. See P. Broude, T. Harman, P. Underwood, "Going private and Going Dark", 1 2/2005, *http://www.foley.com/files*, last visited 30 July 2001.

[2] Companies Act, *Official Gazette of the Republic of Serbia*, No. 125/2004 (here after in footnotes: CA).

[3] Securities and Other Financial Instruments Market Act, *Official Gazette of the Republic of Serbia*, No. 47/2006 (hereafter in footnotes: SMA).

[4] The Capital Markets Act [Zakon o tržištu kapitala], *Official Gazette of the Re public of Serbia*, No. 31/2011 (hereafter in footnotes: CMA) will enter into force on De cember 17th 2011.

2. REASONS FOR GOING PRIVATE

Both ways of carrying on business, public and private, have some advantages and disadvantages for a company and its shareholders. Basically, the advantages of a public company are the access to the public market, raising big capital from investors by public issues, which is cheaper than bank loans,[5] and a free transfer of shares for their holders. These are the main reason for the trend of going public process in the countries with market economies.[6] However, the public way of carrying on business requires from the company a regular disclosure of its financial situation to the investment public, which is connected with many formalities with supervisory authorities and big costs of producing financial reports.[7]

In the last decade there has been a wave of the going private process in many developed countries. The main reason for that is saving the company big costs that disclosure duty causes. Informing the investors implies many types of costs for the company. They are the cost of drawing reports (pays to employees, lawyers, accountants, corporate agent and auditors), fees to supervisory authorities for approving their publication, the cost of printing, publication and distribution of reports, as well as the stock exchange fees for quotation, if the shares are listed. The burden of these costs lies upon the public company not only for issuing securities for the publication of an offer and prospectus, but also after that, for reporting its economic state as long as its shares are in the public trade. These costs especially affect the company with a weak dispersion of shares among the investment public (i.e. small free float).[8] Besides, there are costs for a complex managerial structure within the company, because the law compels them to have the board of directors, executive directors, a supervisory board (in civil law system), special committees and the secretary. They all have to be paid for their functions. A private company does not have these costs, which enables it to use that part of the profit

---

[5] S. Radmilović *et al.*, *Finansijska tržišta* [Financial Markets], Financing Centar, Novi Sad 1994, 35.

[6] D. Radonjić, *Pravo privrednih društava* [Law on Companies], Pobjeda, Podgor ica 2008, 24.

[7] S.D. Girvin, S. Frisby, A. Hudson, *Charlesworth's Company Law*, Sweet & Maxwell, London 2010, 54 56; D. Keenan, J. Bisacre, *Company Law*, Pearson, Harlow 2005, 9 10; P.L. Davies, *Gower and Davies Principles of Modern Company Law*, Sweet & Maxwell, London 2003, 12 17; S.W. Mayson, D. French, C.L. Ryan, *Company Law*, Blackstone Press, London 2001, 54 56; D. Kelly, A. Holmes, R. Hayward, *Business Law*, Cavendish Publishing, London 2002, 348 350; N. Jovanović, "Otvaranje i zatvaranje privrednih društava" ["Going Public and Going Private of Companies"], *Pravo i privreda* [*Law and Economy*] 1 4/2005, 69 70.

[8] There is a saying that "the last remaining shareholder is incredibly expensive". See D. Kreymborg, 12.

for investment in business, distribution of dividends or for other purposes (reserves etc.).

Other reasons for a company to go private are: 1) flexibility and speed in adapting its structure and organization (corporate governance), as well as its business to the changed market conditions due to fewer formalities in the decision-making process,[9] 2) excluding duty to disclose sensitive business information to the public and especially to the competitors, 3) a better control of the shareholders base by controlling shareholders and directors, 4) elimination of takeover risk, 5) reducing the risk of liability of directors for contravention of fiduciary duties, 6) upholding the real market value of the shares and company's capital in case they are undervalued by investors on public market due to the insufficient demand during an economic crisis, inappropriate marketing of the company or inadequate coverage by financial analysts, 7) enabling the strategic business orientation of the company toward long-term reliable profitable plans, instead of toward a short-term profitable business policy under the pressure of the investment public, which is "hungry" for quick profit and capital gains in dealing of shares. Finally, in recent years a strong private share market has been created, which has enabled private companies to have a much easier access to capital from the investors who seek long-term profitable investments, rather than short-term capital gains in trade on the public market.[10]

Apart from these general reasons, in Serbia there are two special legal reasons for the public companies' attempts to become private ones in the last several years.[11] The first one is coercive going public process and the second one is the system of concentrated privatization of the state-owned enterprises. Both of them were imposed by the statutes which were enacted at the beginning of this century.[12] Namely, all companies in

---

[9] D. Marković Bajalović, "Upravna i nadzorna funckija u otvorenom akcionar skom društvu" ["Managerial and Supervisory Function in an Open Company Limited by Shares"], *Pravo i privreda* [*Law and Economy*] 5 8/2005, 187 197.

[10] D. Rice, 1; P. Broude, T. Hartman, P. Underwood, 2, D. Kreymborg, 12 15; V. Popović, "Otvoreno ili zatvoreno akcionarsko društvo ili neko treće društvo" ["Open or Closed Company Limited by Shares or Some Other Company"], *Pravo i privreda* [*Law and Economy*] 5 8/2005, 276 286; The above mentioned reasons, as well as differences among laws of the EU member states forced even the EU to try to regulate the form of the European Private Company. See T. Jevremović Petrović, "Evropsko zatvoreno društvo" ["Societas privata Europea"], *Pravo i privreda* [*Law and Economy*] 9 12/2009, 15 35.

[11] The experts have anticipated the wave of going private in Serbia. See A. Jovanović, "Zatvorena i otvorena privredna društva i ekonomski aspekti inicijalnog javnog otvaranja (i obrnuto)" ["Open and Closed Companies and Economic Aspects of Initial Going Public and *vice versa*"], *Pravo i privreda* [*Law and Economy*] 5 8/2005, 148; S. Bunčić, "Pretvaranje akcionarskog društva u društvo sa ograničenom odgovornošću" ["Transformation of Company Limited by Shares into the Limited Liability Company"], *Pravo i privreda* [*Law and Economy*] 5/8/2005, 253.

[12] The Securities and Other Financial Instruments Act from 2002 [Zakon o tržištu hartija od vrednosti i drugih finansijskih instrumenata], *Official Gazette of the Republic of*

Serbia which issued shares anytime in the past, especially in privatization, are considered to be public ones, irrespective of whether their issues were by private offerings. They are obliged to include their shares in the organized market, which exists in Serbia only in the Belgrade Stock Exchange. Also, the Privatization Agency of Serbia is under obligation to sell 70% of capital of every state-owned enterprise (i.e. company) just to one investor, thus concentrating the vast majority of shares in the hands of only one person. The other 30% of capital has to be distributed to the employees of the privatized company and to the citizens of Serbia. By coercive going public of companies, the government wants to create a liquid share market for domestic issuers and investors, while by concentrating the vast majority of shares in the hands of one shareholder it wants to create a strong management in the company. However, these two government's wishes are inconsistent, because a liquid share market can exist only when the capital of an issuer is well dispersed among many investors, whereby a big controlling shareholder wants to have "free hands" in managing the company. That is why going private is more appropriate for controlling shareholder.

There is another group of public companies in Serbia that are interested in becoming private ones. They are the companies which were privatized under the former privatization regimes (e.g. 1988, 1997). Those regimes were based on the employees share schemes, for which reason their shares are usually well dispersed. However, these companies are very exposed to the risk of a takeover, because they were forced to become public companies with freely transferable shares on the organized market. Also, they are usually well-off companies, which makes them interesting to tycoons. Tycoons took over many of these companies and ruined most of them, making substantial personal fortunes for themselves (e.g. Jugoremedija, Milan Blagojević, Alpis, Magnohrom, Sever).[13] That frightened the rest of the stable public companies, whose managements wanted them to go private at any cost. That caused the first applications of public companies with the Companies Register for registering them as private ones in 2006.

Serbia, No. 65/2002, Article 261; SMA, Article 262; Privatization Act from 2001 [Zakon o privatizaciji], *Official Gazette of the Republic of Serbia*, No. 38/01, 18/03, 45/05, 123/07 and 30/10, Article 25.

[13] The newspapers wrote a lot about canceling the privatization contracts by Serbian Privatization Agency. See *http://www.blic.rs/Vesti/Ekonomija/235464/Novi tender za proda ju Jugoremedije*; *http://www.naslovi.net/2011 06 18/economy/eu zatrazila proveru privatiza cija sartida nacionalne stedionice mobtela c marketa jugoremedije/ 2615742*; *http://www.novosti.rs/vesti/srbija.73.html:356851 Jugoremedija na ivici bankrota*; *http://www.sdcafe.rs/viewtopic.php?f 2&t 15255&start 0*; *http://www.kraljevo.in.rs/2011/08/15/poternica za bivim vlasnicima/*; *http://www.subotica.info/eventview.php? event id 35981*, last visited 30 July 2011.

3. SERBIA'S REGULATIONS

The applicants for going private registration grounded their applications on two articles in two statutes. The first statute is the Companies Act 2004, which explicitly regulates public and private companies limited by shares, under the names of "open company limited by shares" and "closed company limited by shares" (Art. 194). It explicitly provides that a closed company can become an open one, while an open company can become a closed one "in accordance with this act and with the statute that regulates securities market" (Art. 194, par. 5). The Companies Act also provides that converting a private company limited by shares into the public one (i.e. going public) and converting a public company into the private company limited by shares (i.e. going private) has to be done by amending the "establishment act" (i.e. the contract of association; Art. 194, par. 6). Lastly, it emphasizes that such a conversion is not a transformation of the legal form of the company (e.g. from company limited by shares into the limited liability company), because the company stays in the form limited by shares. The Companies Act regulates neither the special protection of the rights of dissentient shareholders in the going private process, nor it regulates the special procedure for it. It is strange, because its first draft contained these rules, which means that they were deleted from it in the later phase of the bill drafting process.[14]

An average jurist would understand the above-mentioned rules in the way that going private is allowed by the Companies Act, with the possibility of clarifying any ambiguities in that process by applying other rules of the same act (e.g. protection of dissentients; Arts. 444–446) and of the Securities Market Act. This interpretation is in accordance with the entrepreneur's statutory freedom of choosing the organizational form for carrying on business among the forms regulated by law. The freedom of entrepreneurship is also a constitutional freedom, which can be limited only by statute "for the protection of human health, living environment, natural resources and the security of the Republic of Serbia".[15] Thus, if a public company wants to go private by transforming itself into the organizational form which is not a private company limited by shares (e.g. into the limited liability company), it is free to do that under the rules of the Companies Act, which regulates the transformation of the legal form of the company (Arts. 421–446). If it wants to retain the form of a company limited by shares, it is also free to do that under the general rules of

[14] The Draft on Companies Act of Serbia from 17th May 2003 regulated going private in detail (Article 794) under the influence of the UK Companies Act 1985 (1989).

[15] The Constitution of Serbia from 2006, *Official Gazette of the Republic of Ser bia*, No. 1/2006, Articles 82 83.

Companies Act related to making decisions and protection of dissentient shareholders. Lastly, if there are some special rules in the Securities Market Act concerning that process (for instance, the approval of the Securities Commission, informing the public, redemption of shares from dissentients), they have to be applied as well, on the ground of the principle lex spetialis derogat legi generali.

The second statute which is relevant for the going private process is the Securities Market Act. It is relevant because that subject matter is often explicitly regulated by the statute covering securities trade in comparative law and because the Companies Act of Serbia explicitly refers to it. However, the Securities Market Act does not regulate the going private process at all. The obvious "intention" of the Act is to compel all companies limited by shares to be public ones in order to develop the public trade of securities in Serbia.[16] The Securities Market Act, however, contains just one rule about the going private process, which relates to delisting securities from the stock exchange. Under that rule, the stock exchange can exclude the securities of an issuer from the listing "when an *issuer claims* it in the case of transformation of its organizational form and in the case of its *transforming from an open company* limited by shares *into the closed company* limited by shares in accordance with the statute which regulates companies" (Art. 107, al. 6). This rule clearly allows the going private process returning the legal coverage of the matter to the Companies Act.

4. DIFFERENT INTERPRETATIONS

Serbia's regulation of the going private process raised two opposite interpretations immediately after the publication of the Companies Act in 2004. The discord even deepened after bringing the Securities Market Act in 2006. While legal theory almost unanimously assumed that the current law permits the going private process,[17] bureaucracy in the Securities Commission and governmental authorities took the opposite view. The main argument of the bureaucratic interpretation is that the Companies Act does not regulate the procedure of the going private process, but refers to the Securities Market Act. Since the Securities Market Act does not regulate that procedure either, there is a legal loophole which can be

[16] N. Jovanović, "Suzbijanje privatne trgovine vrednosnicama" ["Repression of Private Securities Trade"], Conference book of the Belgrade Stock Exchange, Belgrade 2007.

[17] N. Jovanović, (2005), 72; A. Jovanović, 139 140; M. Tasić, "Standardni i regu latorni mehanizmi inicijalne javne ponude (ne)mogućnost sprovođenja u Srbiji ["Stan dards and Regulatory Mechanisms of Initial Public Offer (Im)possibility of its Enforce ment in Serbia'], *Pravo i privreda* [*Law and Economy*] 5 8/2009, 643 644.

filled up only by the amendments to the Securities Act.[18] Until then, going private should not be allowed.

The bureaucratic interpretation is directly contrary to the Companies Act and Securities Market Act, which explicitly permit the going private process. In fact, there is no loophole, because the insufficiency of the special rules could be compensated by the application of the general provisions of the Companies Act relating to the decision-making process in companies and the protection of shareholders. The Companies Act and the Constitution recognize the right of a company to choose and amend its organizational form in carrying on business. That right cannot be terminated by insufficient statutory provisions and bureaucratic interpretations. Thus, even if there is a loophole in regulating the going private procedure, it does not mean that it is prohibited, because in democratic legal systems, all actions are allowed unless they are explicitly legally forbidden. The bureaucratic interpretation is also nonsensical due to its controversy. Namely, the Companies Act explicitly regulates the procedure for transforming a company into another organizational form (say, from a company limited by shares into a limited liability company or a partnership company) and that is a more serious process than the going private process is. The reason is that in the going private process a company stays in the same form, while in transformation a company has to change its form. Since it regulates the procedure for transformation, there is not a loophole, which means that it is permissible even in the bureaucratic interpretation, though it is just one method of the going private process. The same is with a merger, because the Companies Act regulates that procedure as well. Accepting the bureaucratic interpretation would lead to the conclusion that a public company limited by shares can go private by its transformation into the form of a company which is not limited by shares (i.e. a limited liability company, a partnership company or a limited partnership company), but not into a company which is limited by shares. Nonsensical, isn't it? How can a legally more complex and serious transaction, as the transformation of a company is, be permitted, while a less complex transaction with the same consequences for the securities market (i.e. revocation of share from the public trade) be prohibited?

Economic theory also insists that the freedom of choice of an organizational form for business is crucial for efficient business. It assumes that mandatory going public process is damageable for Serbian economy. It produces too many public companies, which is inconsistent with the domestic economic conditions. There is no demand for the publicly offered shares of the most public companies in Serbia and that causes il-

[18] See Holdings of the Securities Commission in connection with going private process, *http://www.sec.gov.rs/index.php?option co*m, last visited July 2011; first ap peared on July 14 2005.

liquid public market for them. Since public companies have considerable costs for keeping their shares in the public trade, it means that they spent that money in vain.[19]

5. PRACTICE AND CASES

5.1. Practice

In practice, the public companies interpreted the above-mentioned rules of the Companies Act and of the Securities Market Act in the way that they are free to convert themselves into the private companies if they fulfill the prescribed legal requirements. The requirements are those which are needed for the foundation of a company limited by shares under the Companies Act. To achieve this, a public company has to: 1) bring a decision of converting itself into the private company by majority of votes of the shareholders present in the general meeting (company's assembly);[20] 2) amend the act of establishment to adapt its organs and structure to the ones prescribed for the private company limited by shares; 3) provide minimum share capital in money (10,000 Euros payable in dinars); 4) reduce the number of its shareholders to 100 or less; 5) redeem the shares of dissentient shareholders under the fair market price; 6) apply to the stock exchange for delisting of its shares; 7) inform the Securities Commission (its approval is not needed); 8) register as a private company with the Company Register.

The main obstacle for going private among the prescribed conditions is the statutory limitation of the maximum number of shareholders to 100 for the private company limited by shares (or to 50 for the limited liability company), because a public company usually has several hundred or even several thousand of them.[21] Public companies in practice used to solve that problem by grouping their shareholders within several newly founded private companies, which in turn became the shareholders of the public company (i.e. its parent companies). This was the technique of doing it. A certain group of accordant shareholders (say, 50 of them) of the subject public company transferred their shares to the new private

[19] The research on the average number of quoted companies on stock exchanges per a million of inhabitants in a country showed the following results. In common law countries there are 35 quoted companies per a million of inhabitants, in Latin European countries it is 10, in Germanic countries it is 5 and in Scandinavian countries it is 27. See A. Jovanović, 140 141, 147. Since there are around 1500 public companies quoted on the organized markets of the Belgrade Stock Exchange, Serbia has around 190 quoted com panies per a million of its inhabitants (1500/8 187)! That is too many companies in the public trade for such a small and poor country.

[20] CA, Articles 293, 339, 345, 375, 390, 414, 430 and 445.

[21] CA, Articles 104 and 194.

company, which they had founded, obtaining in that way a proportionate stake of its capital. The new company was usually a limited liability company, because its foundation was cheaper (500 euros of minimum capital).[22] The shareholders left the public company by that transfer of shares and became the members of the new private company. The new company in return became a new shareholder of the public company. Dissentient shareholders used to stay in the public company or get a cash payment for their shares from some other shareholder or the public company itself.[23] The Securities Commission approval for going private is not needed, because none of the statutes prescribe that.

Following their own interpretation of the statutes and in spite of the Securities Commission's interpretation, a number of public companies fulfilled statutory requirements for going private and applied to the Company Register for registration as private ones. Surprisingly, the Companies Register used to reject their applications, explaining the rejections by the statutory loophole, just as the Commission did it.[24] Such reasoning of the Companies Register is based on substantive law, though that organ may examine only procedural law requirements (i.e. the completeness and correctness of the submitted documentation).[25] However, the Companies Register did accept the applications for the registration for going private of some "privileged" companies in the same legal situation as the majority of rejected companies. It means that the Register violated the constitutional principle of equality of all market participants.[26] The worst thing is that the Supreme Court of Serbia has created different practice in judicial review cases for nullification of the Companies Register's decisions in the going private procedures.

[22] The disadvantage of that form is the limit of maximum 50 members in a com pany, which is less than for a private company limited by shares, where the limit is 100.

[23] In that way, a public company with, say, 400 shareholders could reduce their number to less than 100 (say, 90), which is the prescribed maximum of shareholders for a private company limited by shares. Its shareholders would found six new private compa nies, each with 50 members (6 x 50 300). Supposing that, say, 16 dissentients ask for and get the cash payment for their shares, while the rest of 84 do not ask for it. There will be only 90 shareholders left in the public company, together with the six new companies as shareholders (400 300 16+6 90).

[24] See the files of the Register no. BD 144034/2007; BD 10289 1/2007; BD 66498 2/2007.

[25] Zakon o registraciji privrednih subjekata Srbije from 2004 [The Registration of Economy Entities Act], *Official Gazette of the Republic of Serbia,* No. 55/2004 and 72/2005, Articles 22 and 24.

[26] The Constitution of Serbia 2006, Article 84. Among the privileged companies were the Belgrade Stock Exchange, which went private at the end of 2006, and Vojvođanska banka [Vojvodina's Bank], which went private in 2007.

5.2. Cases

Among the majority of unprivileged companies, whose applications the Companies Register rejected, were "Vunil", "Utva Silosi" and "Mladost-Turist".

In the first case, the public company "Vunil" from Leskovac submitted the application for the registration as a private company limited by shares to the Register in 2007, with all the prescribed documentation. The Register rejected the application and the Ministry of Economy confirmed the rejection on December 7th 2007 in the second-degree administrative appeal procedure. The Supreme Court confirmed the Ministry's decision on November 19th 2008, grounding its judgment in the judicial review procedure on the above-mentioned opinion of the Securities Commission.[27]

In the second case, "Utva Silosi", a public company from Kovin, submitted the application for the registration as a private company to the Register on March 2nd 2007. The Register rejected it on March 7th 2007 in spite of the fact that the applicant submitted all the necessary documentation. The applicant complained to the Ministry of Economy, but the Ministry let the statutory time limit of 60 days for making a decision pass. That is why the applicant sued the Register on June 6th 2007 seeking a judicial review of the Supreme Court on the ground of "the administrative silence". After the commencement of the judicial review procedure, the Ministry overturned the rejection of the Register and informed the Supreme Court about that. The Register again rejected the application on July 16th 2007 for the same reasons as in the first decision, but this time with just a longer explanation. Then, on April 30th 2008 the Supreme Court ordered the company, as a plaintiff, to inform the Court, if it was satisfied with the Ministry's decision. By that time, the plaintiff was compelled to introduce the shares to the off-exchange organized market of the Belgrade Stock Exchange. The market intermediaries increased the number of the plaintiff's shareholders considerably above 100 within a week. For that reason, the plaintiff lost his interest in the judicial review and he did not respond to the Supreme Court, who stopped the procedure on April 18th 2009.[28]

The third case involved the public company "Mladost-turist" from Belgrade, which applied for the registration for going private to the Register on June 27th 2007. The Register rejected it on July 30th 2007 and the

[27] The judgement was brought by the council of judges comprising Jadranka Injac, Zoja Popović and Jelena Ivanović (U. 664/08). The most shameful part of the judgment is not the decision itself, but the reasoning behind it, because the judges ignorantly consid ered that the opinions of the Securities Commission is a source of law, whereby they are not source of law in the legal system of Serbia.

[28] Judgment no. U. 5202/07.

company appealed to the Ministry of Economy. The Ministry confirmed the Register's rejection on November 16th 2007 and the company sued the Ministry to the Supreme Court. The Court nullified the Ministry's decision on May 7th 2009, considering that the plaintiff fulfilled the legal requirements for going private process.[29]

The consequence of the above described practice is that it stopped the wave of the going private process and a vast majority of companies in Serbia was compelled to become public companies with their shares included in the organized off-exchange market, in spite of the fact that they were not ready at all for the public trading of securities, as their issuers.[30] That caused the enormous cost to them at the macro-economic level.[31] Also, the selective practice of the Register, the Ministry of Economy and the Supreme Court of Serbia caused disappointment and feeling of legal uncertainty among the public companies wanting to go private.

6. COMPARATIVE OVERVIEW

Regulating the going private process is difficult even for developed countries, because of the conflict between the aim of company law and the aim of securities law. The aim of company law is achieving business efficacy by choosing the best organizational form for the company, whereas the aim of securities law is protection of investors.[32] While it could be in the company's best interest to go private, it might not be appropriate for its shareholders, because it reduces the marketability of their shares. However, laws in all the "serious" countries allow the going private process, regulating it either by special rules, or by general rules of company and securities laws. A general presentation of several national legislations might be useful pattern for understanding the way of solving the conflict of company law and securities law aims, with no ambition to present detailed rules on method of going private.

[29] Judgment no. U 172/08.

[30] At present, there are only five issuers on the prime market (i.e. first market) and three on the standard market (i.e. second market) of the Belgrade Stock Exchange, where by all others are on the organised off exchange market (around 1500), for which no crite ria of economic stability and for dispersion of shares of issuers are required.

[31] One analyses of the Ministry of Economy of Serbia showed that every year the public companies in Serbia together spent at least 6.000.000 Euros just for publication of their financial reports, out of which at least 5.000.000 Euros is spent by the companies whose shares have been not traded at all since they have become public companies (See *http://www.srp.gov.rs/srp/*, last visited 30 July 2011). That sum should be increased with the costs of companies for the services of corporate agents, provisions of auditors, charg es of the stock exchange and charges of the Securities Commission. It means that the stated sum would be probably doubled.

[32] D. Kreymorg, 1.

The most developed is the law and practice of the *USA*. In that country, the securities law is within the competence of the federal government, while company law ("corporation law") is within the competence of the state governments. That country imposes the duty of going public to all the companies which meet certain criteria concerning the size and dispersion of shares. Thus, every issuer which is engaged in intrastate commerce (i.e. commerce through more than one member state) must be registered with the Securities Commission, as an issuer with the reporting duties ("registered issuer", i.e. public company), if it has more than $1,000,000 of total assets in one financial year with at least 750 registered shareholders. Also, the same duty has the issuer which is engaged in intrastate commerce if it has more than $1,000,000 of total assets in the two consecutive years with less than 750 registered shareholders, but with at least 500 registered shareholders. If the registered issuer wants to deregister, it has to reduce the number of shareholders under 300 and to file the proof of it with the Securities Commission. If the Commission finds that the number of shareholders is not reduced under 300, the Commission shall deny deregistration, which means that it has to continue with its reporting duties. If the Commission finds that the request of the issuer is true, it does not have to bring any formal decision, because the issuer's reporting duties terminate by expiration of the 90 days after filing the request.[33]

The US law is very detailed and strict in protecting the shareholders if the issuer goes private, especially when a takeover, a merger or redemption of shares (so called, self-tender) are used to reduce the number of shareholders. It insists on providing shareholders with detailed information about all the advantages and disadvantages of the going private process and about all the other facts which they need to bring an informed decision. If the management of the corporation initiates the going private procedure (so called, management buyout), the managers have to be completely fair toward shareholders and pay them a fair price for the shares. Otherwise, the Commission or courts can impose rigorous penalties on them and award damages in favor of the shareholders. Therefore, in order to evade trials because of their conflicts of interest, managers usually establish a committee of experts, who are independent from the management, corporation and their connected persons. The independent committee has a task to negotiate the fair price of the shares with the shareholders and other terms of a takeover, a merger or other method of going private of the corporation.[34]

---

[33] Securities Exchange Act 1934 (hereafter: SEAUS), Section 12 (g) (1) and 12 (g) (4).

[34] US SEA, Sec. 13 (e) (3) and 13 (e) (4). See M. Steinberg, 298 300; T. Hazen, 513 517; P. Broude, T. Hartman, P. Underwood, 3 8; A. Darrel, 3 8.

The United Kingdom regulates the going private process within the regime of *re-registration* of a company. Re-registration comprises both going public and going private process, either by conversion of a company's organizational form (e.g. from a public company limited by shares to the private company limited by shares or partnership company, or vice versa) or by revocation of shares from the public trade and the company's staying limited by shares. If a public company wants to go private, a special resolution for that process has to be passed in the general meeting of its shareholders by 3/4 majority of those voting. That resolution has to include the change of the company's name to emphasize that it is a private one. It also must contain all the necessary amendments to the articles of association so that the company can become a private one. After that, the company files the application for re-registration to the Registrar, which has to check if the legal requirements are satisfied. If they are satisfied, the Registrar must re-register the company and issue a certificate of incorporation. The company by virtue of the issue of the certificate becomes a private one.

Dissentient shareholders can make an application to court for the cancellation of the company's resolution to go private. If dissentients do that, the company cannot re-register herself as a private one until they withdraw the application or until the court refuses the application, confirming that re-registration is legal. The right to challenge the resolution to go private requires only shareholder(s) with at least 5% of the company's issued share capital, or a group of at least 50 shareholders. A shareholder who voted for the resolution cannot challenge it. The application must be filed to court within 28 days after passing the resolution. The court can postpone the re-registration to give the company time to reach an agreement with the dissentients, or it can amend the resolution to protect the dissentients.[35]

Germany does not have any explicit rules on going private of a public company, but it is clear that it is permissible under the general rules of company law and securities law.[36] The company law distinguishes the public companies limited by shares from the private ones. It also regulates the transformation of the company's form, a takeover, a merger and redemption of shares, which are the usual methods of going private

---

[35] UK Companies Act 2006, Sec. 97 99. See S.D. Girvin, S. Frisby, A. Hudson, 58 60; D. Keenan, 65 66.

In 2000 there were 99.1% of private companies out of all British companies. Britain was limiting the maximum number of members in a private company to 50 from 1908 to 1980, when the limitation was abolished. It reduced the minimum number of members of a private company to one in 1992, so that today almost 90% of companies have four or fewer members. See S.W. Mayson, D. French, C.L. Ryan, 56 58, 203.

[36] Since the sources which the author used for presenting German and French law date from almost a decade ago, the description of German and French law might be out dated (author's remark).

process.[37] Securities law does not regulate going private at all, but only going public and delisting.[38] Under the rules of securities law the stock exchange may revoke the shares from the listing on the issuer's request, unless it is damageable to investors' interests. After the acceptance of the issuer's request, the stock exchange publishes the revocation in at least one mandatory stock exchange newspaper of nationwide circulation at the issuer's expenses. The revocation takes effect at the latest two years after its publication, which means that trading of the revoked shares in the stock exchange may continue even after the revocation, but not longer than two years. Therefore, if a listed company wants to go private, it has to revoke its shares from the listing.[39]

France also does not have any explicit rules on the going private process, which is very similar to Germany. French law recognizes not only public companies limited by shares (*societes anonyme avec appel public a l'epargne*), but also private ones (*societes anonyme sans appel public a l'epargne*). It also provides that a private company limited by shares can be founded not only as a completely new company, but also by the conversion of an existing company if it satisfies the requirement for founding the private company.[40] It means that the going private process is allowed under the general rules of company law on making decisions, mergers, takeovers, protection of dissentient shareholders and redemption of shares (*offre publicque de rachat d'actions*) to 100.[41] It is interesting that France limits the maximum number of members of a limited liability company (*societe avec responsibilite limite*; abr. *S.A.R.L.*). If there are more than 100 members, it has to transform itself into the company limited by shares, or otherwise it will be liquidated.[42] If a public company limited by shares wants to go private by transforming itself into the simplified company limited by shares (*societe par action simplifie*), which is a special type of a private company limited by shares, the shareholders have to pass a decision about that unanimously.[43]

[37] M. Fromont, *Droit allemande des affaires*, Montchrestien 2001, 226, 242 245; Act on the Acquisition of Securities and on Takeovers, Par. 10 33; G. Apfelbacher *et al.*, *German Takeover Law*, Verlag C.H. Beck, Munchen 2002, 122 333; D. Kreymborg, 28 30, 49, 52, 54, 58, 59.

[38] Securities Prospectus Act 1998 (amended 2000), par. 1 13; Stock Exchange Act 1998 (amended 2000), par. 43.

[39] M. Sebastian, "Going Private in Germany", *http://www.foley.com/files/tbl s31Pub lications/FileUpload137/2691/NDI GoingPrivate FINAL.pdf*, last visited 30 July 2011.

[40] J. Mestre, *Droit commercial* (Alfred Jauffret), L.G.D.J., Paris 1997, 250, 338 340.

[41] H. de Vauplane, J.P. Bornet, *Droit des marches financiers*, Litec, Paris 2001, 766 768.

[42] P. Merle, *Droit Commercial Societes commerciales*, Dalloz, Paris 2005, 134, 288, 289. It is the same regime as in Serbia, with one difference regarding the maximum number of members in the company, which is 50 in Serbia.

[43] *Ibid.*, 607, 713.

Croatia does not regulate explicitly the going private process neither by company law, nor by securities law.[44] Croatian company law is almost identical to German company law concerning the questions related to the status of the company which wants to go private. Therefore, its solutions are almost the same as German in this matter. Securities law, however, does regulate the termination of the public trade of securities, but only in the sense of exclusion the securities from a regulated market. Thus, the Securities Supervisory Agency, as well as the stock exchange, can exclude the securities of an issuer from the regulated market, if it is necessary for the protection of the investors or for regular and honest functioning of the market.[45] These rules do not cover two situations. The first one is when a public issuer of securities wants to retire the securities from the public trade, which is the case in the going private process. The second situation is when the issuer's securities are in the public trade, but not on the regulated market (so-called off-exchange trade). So, the stock exchange can exclude a public issuer only from its regulated market, but not from the off-exchange market (so-called over-the-counter market). Only the Commission could do that, though it does not have an explicit statutory authorization for that. Also, if the Securities Agency excludes the securities from the regulated market, it does not have to mean that it excludes them from the public trade outside the regulated market. These situations are the loopholes in Croatian law, which can be filled up by the general rules of company law and securities law. Namely, since there is no more coercive going public for the companies in Croatia, which was provided by the old Securities Market Act, the going public process must be understood as a voluntary one.[46] Therefore, if it is not coercive any more, public companies may go private under the general rules of company law. The approval of the Securities Agency is not needed, because there is no explicit statutory rule for that.

7. METHODS

The going private process can be done by very different methods. The main problem is protecting the interest of dissentient minority of shareholders in the subject company, because it reduces the marketability

[44] Zakon o trgovačkim društvima Hrvatske from 1993 [Croatian Companies Act], *Official Gazette of the Republic of Croatia*, No. 11/93, 34/99, 52/00 and 118/03; Zakon o tržištu kapitala Hrvatske from 2009 [Croatian Capital Markets Act], *Official Gazette of the Republic of Croatia*, No. 88/09, 146/09 and 74/09.

[45] Capital Market Act, Articles 330 and 341.

[46] Securities Market Act of Croatia from 2002 [Zakon o tržištu vrijednosnih pa pira], *Official Gazette of the Republic of Croatia*, No. 84/02 and 138/06, provided that every company which has more than 100 members and capital above 30,000,000 Kunas (about 4,000,000 Euros) must become a public company limited by shares (Article 114).

of shares. Therefore, the best method is the one which enables the majority of shareholders to reduce the number of dissentients to the level which can not prevent the company from becoming a private one. There are four usual methods for going private: 1) a takeover, 2) a merger, 3) the amalgamation of shares and 4) the redemption of shares.

A takeover it is the most frequent method. It enables the bidder to convert the target public company even against the will of the management and even if at the beginning of the process the majority of shareholders are dissentient. If the bidder offers a high enough price, it is likely that majority of shareholders will accept it. After the successful bid, the number of shareholders in the target public company is reduced to the level which disables the liquid trade of its shares. Later on, the new controller of the company can make a decision to go private, squeezing out the rest of dissentients. The bidder can be: 1) any of the present shareholders of the target company or a group of them (insider bid), 2) a manager of the target company or a group of them, especially if they are also its shareholders (management buyout), 3) a person out of the target company, because it is neither the shareholder, nor the manager (outsider bid). A bidder, who is a shareholder or a member of the management or both, in practice establishes usually a new private company just for the purpose of becoming the bidder in the takeover procedure. After the successful takeover, that company merges with the target company, making it private one. The disadvantage of the takeover as a method for the going private process is the necessity to have huge resources to buy the shares and the risk of the competitive bid. The bidder can compensate the lack of resources by borrowing the money from the bank, securing his debt by mortgaging his or the company's assets.[47]

A merger is an applicable method when management and the majority of shareholders of a public company are consentient to go private by merging the company with another company, which is private one. It is usually combined with the takeover and squeeze-out, as it is explained within the takeover method.

The amalgamation of shares ("reverse stock split") is, in fact, the method for squeezing out small shareholders from the company. It is rarely used and its procedure is as follows. The controlling shareholder(s) votes in the company's general meeting to reduce the number of issued shares by increasing their nominal value. It means that every shareholder has to exchange his several outstanding shares for one or a few new shares which the company has to issue in accordance with the stated proportion. The company pays money to every shareholder, who does not have the number of outstanding shares devisable by the stated proportion,

[47] D. Kreymborg, 28 30, 49 57; P. Broude, T. Hartman, P. Underwood, 2, 7 8; D. Rice, 2.

for the indivisible fraction of the total number of his outstanding shares. The stated proportion (ratio) can be so high that only big shareholders stay in the company, because the small shareholders can not satisfy the criterion for the exchange. Say, the nominal value of a share is 100 Euros and the proportion (ratio) is 200 outstanding shares for the new one with the nominal value of 20,000 Euros. It means that every shareholder who has less than 100 shares (say, 58), receives money for his stake in the company, whereas the one who has a number of shares between the stated proportions gets only one new share for each 100 of outstanding shares, obtaining the money for the residue (say, 180 outstanding shares gives right to one new share and to money for 80 shares).[48] When the controlling shareholder(s) reduces the number of the shareholders in the company by this method, it is easy to finalize the going private process.

The redemption of shares (self-tender offer, share buy-back) is a method by which the public company buys the shares which it has issued, from its own shareholders. The common law countries consider that transaction as a type of a takeover, where the bidder is the issuer instead of a third party. Therefore, it is rather liberally regulated.[49] Conversely, the civil law countries impose considerable statutory limitations on that operation, considering it as a method of capital dilution.[50] A public company can redeem its shares to reduce the number of shareholders and after that go private, justifying it by the illiquid market for its shares.

8. SERBIA'S NEW REGULATIONS

Serbia passed two new statutes in 2011, which are relevant for the going private process. They are the Capital Market Act, which explicitly regulates the going private process, and the Companies Act, which contains general rules for the decision-making process in companies, a merger, the redemption of shares and the protection of minority shareholders.[51] Though the Capital Market Act retains the rule for coercive going public, the new Companies Act does not limit the number of members in private companies, as it was done in the current Companies Act.[52] Therefore, there is no more coercive going public for private companies limited by

[48] D. Rice, 3; D. Kreymborg, 58 59.

[49] M. Steinberg, 298 300; E. Ferran, *Priciples of Corporate Finance Law*, Oxford University Press, Oxford 2008, 203 226; I. MacNeil, *An Introduction to the Law on Fi nancial Instruments*, Hart Publishing, Oxford 2005, 243 245;

[50] D. Kreymborg, 49 57.

[51] The Companies Act [Zakon o privrednim društvima], *Official Gazette of the Republic of Serbia*, No. 36/2011 will enter into force on Febryary 1st 2012.

[52] CA, Article 194 (3).

shares, which have had more than 100 shareholders for more than a year.

Under the new regime, a public company may go private if it fulfills the prescribed requirements and within the prescribed procedure. The requirements are: 1) the public company must have fewer than 10,000 shareholders and fewer than 100 holders of publicly issued debt securities, 2) it has to redeem the shares from dissentient shareholders and 3) the Securities Commission has to deregister the company from its register of public companies. The public company may not go private in the year in which it has successfully gone public, but at the end of any of the following calendar years in which it has decreased the number of holders of debt securities under 100. However, the company may go private at any time in the following cases irrespective of the prescribed requirements: 1) when the bidder in the takeover buys out all securities which the target company has publicly issued, 2) when the controlling shareholder in the squeeze-out procedure buys all the shares which the company has publicly issued and 3) when all shares of the company are nullified due to its merger or division. These exceptions to the general requirements of going private are allowed because the protection of dissentients is covered by special regimes applicable to them.[53]

The procedure of the going private process is as follows. The company must pass the decision on revocation of its shares from the organized public market by 3/4 majority of all issued voting shares. It may increase this statutory prescribed majority by its articles of association, in which case it jeopardizes the going private process. The decision can be passed only under the following conditions: 1) the company must have less than 10,000 shareholders, 2) the total number of traded shares in the previous six months was less than 0.5% of all the shares issued by the company, 3) the monthly number of its traded shares during at least three months in the previous six months was less than 0.05% of all the shares issued by the company and 4) the decision has to contain the irrevocable statement that the company is ready to redeem all shares from the dissentient shareholders, including the ones which were not present in the general meeting when the decision was passed. The compensation in redemption has to be the highest value of the shares calculated in accordance with the company law.[54] After registering the decision on going pri-

[53] CMA, Article 70.

[54] The CA 2011 provides that the company has to pay the market, book or evalu ated value of the shares to dissentients, whichever is the highest on the day of the convo cation of the general meeting, when the resolution to go private has been passed (Article 474 475). The market value of a share of the public company is a ponder average price on the regulated market or multilateral trading platform within the period of the last six months before the establishment of the price on condition that the number of traded shares of the company is at least 0.5% of the aggregate number of shares, which it has issued,

vate with the Companies Register, the company has to inform the organized market, where its shares are traded. The Securities Commission deletes the company from its register of the public companies.[55]

In this way, the new Serbia's regulation puts the end to the controversial and illegal practice of the Securities Commission, Companies Register, Ministry of Economy and courts. It means that the common sense has won at last, because the going private process may not be prohibited any more in practice. However, the damage which that practice has produced is irreversible.

9. MOTIVES

Since the practice of prohibiting the going private process in Serbia is illegal, arbitrary and damageable, two questions arise. The first one is why the new statute was needed to terminate it, when the current (old) law explicitly allowed the going private process. The second question is why it took the state almost seven years to solve the problem in practice by passing the new statute, when the problem arose immediately after the enactment of the Companies Act in 2004. The new statute and such a long period of time were not needed in other countries, although most of them do not explicitly regulate the going private process (e.g. the USA, Germany or France). Is it possible that the creators of the Serbian practice of prohibiting the going private process really thought that a company has to stay public forever once it has gone public? The positive answer to that question is not probable, because it would mean a severe lack of intelligence on the part of the creator, which would not be a correct conclusion.

If one wants to find the answers to these two questions, one must examine the possible motives for such an obviously illegal administrative and judicial practice. There are three possible motives.

The first one, which the Government emphasizes, is the wish to protect the shareholders in public companies from the loss they would suffer by revocation of the shares from the public trade.[56] That motive really exists, but it is not the real one, because of two reasons. The first

and that at least 0.05% of the aggregate number of shares, which it has issued, is traded during any of three months within the period of the last six moths. The evaluated value of a share is the value which is established by the expert, who is officially authorized. The general meeting of shareholders has to accept that value on the basis of the explanation provided in the directors' proposal (Article 259 and 51).

[55] CMA, Article 123.

[56] See Explanation of the Securities Market Act Proposal by the Ministry of Fi nance, *http://www.zakon.co.rs/predlog zakona o trzistu kapitala html*, last visited 30 July 2011.

one is that the shareholders could be protected by amending the statute within much shorter period than seven years. Also, dissentient shareholders have the right to redemption of shares toward the subject company under the general rules of the current (old) Company Act (Arts. 444, 445), so that the new act was not needed to establish that right especially for the case of going private. The second reason is that shareholders were not protected by compelling the companies to be public, because majority of public companies did not have the liquid market of shares. The illiquid market has three causes. The first one is the system of concentrated privatization, in which the buyer of the state-owned stake in the company's capital gets the vast majority of votes (70%). Since he does not have to make a takeover bid under the current law, that majority enables him to govern the company as he wishes, disregarding the interests of minority shareholders.[57] There is no serious investor who would like to buy the shares in such a company and, consequently, minority shareholders cannot sell their shares. The second cause of the illiquid market of shares is that the shares of many companies are not attractive to investors, because the companies, as their issuers, are not economically prosperous. The third cause is that there is a number of companies with a small number of shareholders (say, between 50 and 200), where the public trade cannot be active due to such a small number of investors.

The second motive for the illegal practice of prohibiting public companies to go private is exposing the companies to takeovers in order achieve a fast change in the ownership structure of the Serbian economy. The risk of takeovers threatens mostly the economically prosperous companies, in which none of the shareholders has enough resources to take over the control in the company. This group of companies was and still is the most attractive to tycoons, who succeeded in taking over many of them as outside bidders, due to the system of coercive going public and the illegal practice of prohibiting the going private process.

The second motive is backed up by the third one and that is the high-level corruption. That is not the corruption among low-level administrative clerks, but the corruption on the top of the Serbian political structures. The corruption involves financing political parties by rich people and companies, who have to return the favour after winning the elections. The shadow financiers (tycoons) of the parties require from the top government officials (i.e. ministers, secretaries of the ministries, members of government) to fit the regulations of general economic flows to their personal business interests. One of these regulations is the retroac-

[57] Zakon o preuzimanju akcionarskih društava from 2006 [Takeover of Companies Limited by Shares Act], *Official Gazette of the Republic of Serbia*, No. 46/06 and 107/09), Article 8. See N. Jovanović, "Povlašćenost države kao akcionara u delimično privatizo vanim privrednim društvima" ["The State as a Privileged Shareholder in the Partially Privatized Companies"], *Pravo i privreda* [*Law and Economy*] 5 8/2007, 147 162.

tive coercive going public of the companies privatized under the former statutes. When the regulations do not suit the financiers' personal interests, the high-level politicians have to make the practice favourable to them by influencing the low-level clerks in the competent state organs. That is probably the case with the illegal practice of prohibiting the going private process.

When one adds to the last two motives the servile and obedient mentality of the Serbian present-day top-level politicians toward influential officials from the powerful international organisations (the IMF, the IBRD, the EBRD, the WTO, the EU) and countries (the USA, Russia, China), the appearance of the illegal administrative practice is quite understandable. It is also protected by the voluntary and selective judicial practice. One can ask why the statute terminates the practice of prohibiting going private just now. A possible explanation is that the practice no longer suits the tycoons, because they bought all the public companies which they wanted and could buy during the last decade of the regime of the coercive going public process. Nowadays, they want their companies to go private in order to run their business inconspicuously, away from the public gaze.

10. CONCLUSION

The creators of the transitional model of the Serbian economy mixed the aims of economic policy by introducing concentrated privatization and coercive going public process and by allowing the illegal prohibition of going private process in practice. The main aim of economic policy is achieving economic welfare in the society by supporting stable and prosperous companies. The achievement of this long-term aim requires the protection of the prosperous companies from unnecessary business risks (e.g. takeover) and retention of the moderate role of the state in economy. Instead of that, Serbian transitional model is based upon the neo-liberal approach, under which the free market can solve all the problems. Therefore, it accepted that the main aim of transition is the fast change of the ownership structure of the economy (from the state-owned one to privately-owned one), which is a short-term aim, with no plans for the future economic flows after the transition. That approach is the reason why some shady businessmen took over many prosperous companies, ruining them in order to make their personal fortune, which they could not achieve if the companies could protect themselves by converting them into the private ones. That is an important cause of the Serbian present-day economy crises and probably is the actual motive of the accepted transitional model of economy in Serbia.

Since the administrative practice of prohibiting going private is a direct contravention of the current statutes and since it is highly prejudicial to the companies, the question of responsibility of the creators of such illegality should be posed. The officials of the Company Register and the Ministry of Economy who created the illegal practice cannot excuse themselves by their ignorance of the illegality, because they are experts at the interpretation of the regulations. Since they were aware of their contraventions of the law, they were intentionally violating the statutes. Their intention to violate the statutes is the ground for their responsibility under the Administrative Officials Act.

Finally, a question could be posed concerning the role of the judicial practice in the Serbian legal system. Namely, if the judicial practice can prevent the application of clear statutory rules by confirming the illegal administrative decisions in judicial review procedures, it means that the judicial practice in Serbia is not only the interpreter of law, as it is stated in the Constitution (Art. 142), but also its creator. If the judges can amend the rules of the current statutes by their controversial decisions, it means that the judicial practice is a source of law in Serbia, in spite of the widespread opinion that it is not.[58] If it is a source of law, like the statutes are, the question is what is the ground for the courts' decisions? In common law countries, the ground is the judge's feeling for justice (so-called, equity), which is a highly developed concept. Since the Constitution of Serbia does not recognize justice as the ground for judgments, is it possible that the ground is the judges' ignorance of Serbian legal system or, maybe, their self-will and obedience to politicians?

[58] K. Čavoški, R. Vasić, *Uvod u pravo* [*Introduction to Law*], Službeni glasnik, Beograd 2009, 489 503; O. Stanković, V. Vodinelić, *Uvod u građansko pravo* [*Introduc tion to Civil Law*], Nomos, Belgrade 2007, 41; M. Vasiljević, *Kompanijsko pravo* [*Com pany Law*], Faculty of Law, Belgrade 2010, 31.