Transport Sector Privatisation in the Russian Federation

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I. Introduction

The upheavals currently taking place in Russia are also reflected in its legal system. Considerable legal uncertainty has arisen since the demise of the Soviet Union and still exists. On the one hand, numerous economy-controlling regulations[1] were passed by Russia in the process of

1. Some examples include: Law of the Russian Soviet Federative Socialist Republic (hereinafter "RSFSR") "On Property in the RSFSR" of 24 December 1990; Law of the RSFSR "On Businesses and Commercial Activity" of 25 December 1990; Regulation of the Council of Ministers of the RSFSR "On Joint Stock Companies" of 25 December 1990; Law of the RSFSR "On Investment in the RSFSR" of 26 June 1991; Law of the RSFSR "On the Privatisation of State and Municipal Enterprises in the RSFSR" of 7 March 1991; Law of the RSFSR "On Foreign Investment in the RSFSR" of 7 April 1991; Decree of the President of the RSFSR "On the Liberalisation of Foreign Commercial Activity in the Territory of the RSFSR" of 15 November 1991; Decree No. 721 of the President of the Russian Federation of 1 July 1992 "On Organisational Measures for the Restructuring of State Enterprises and the Voluntary Merger of State Enterprises into Joint Stock Companies" of 1 July 1992; Decree of the President of the Russian

transition to a market economy. On the other hand, laws dating back to Soviet times may still be applied. Section Two of the Resolution of the Supreme Soviet of the RSFSR[2] on the ratification of the Treaty for the Foundation of the Commonwealth of Independent States stipulates that in the territory of the RSFSR, until appropriate legislation is passed by the RSFSR, the standards of the former USSR may continue to be applied to the extent that they are compatible with the constitution, the legislation of the RSFSR and the Treaty.[3] This provision raises more questions than it answers.

Those in government are experiencing difficulties defining the direction of a self-contained legal framework due to a lack of agreement as to what direction; consequently, those who are governed find it difficult to take these regulations—some of which are only very short-lived—seriously. Additionally, any law presupposes a legal consciousness that underlies and at the same time marks the law. Russia is still a long way from the mutual influence and inter-permeation of law and legal consciousness essential to the understanding and (non-forcible) application of the law. In a society where the law was predicated on an identity of public and private interests, the enforcement of private interests was often only possible by circumventing the law. This has had a lasting impact on legal consciousness.

It is well known that economic activity, through custom and practice, creates its own laws to a certain extent. Herein lies both opportunity and danger: will the Russian sense of business develop in accordance with the Western model of the honest businessman, whose customer relations are marked by "good faith," or will business acumen be measured by how cleverly and successfully one can "pull a fast one" over a business partner? Both tendencies can currently be observed in Russia. It will be up to the legislature to focus on one of these, to incorporate it in the legal norms being created, and to permanently influence legal consciousness.

The legislature has undoubtedly already taken the first steps. As a result, for the first time in an institutionalised context, two conditions enabling commercial activity developed: encouragement of business activity in general and privatisation legislation organised on private law principles for the protagonists of the market economy. One central element,

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Federation "On the Commercialisation of State Enterprises and Simultaneous Restructuring into Open Joint Stock Companies" of 1 July 1992.

2. After the adoption of the "Law of Amendment of the Designation of the State RSFSR" of 21 December 1991; Vedomosti RSFSR, 1992, No. 2, art. 62, the former RSFSR bore the official title "Russian Federation - Russia." Since the adoption of the new constitution, "Russian Federation" and "Russia" are equally valid as official titles of the state.

3. Order of the Supreme Soviet of the RSFSR of 12 December 1991 "On the Ratification of the Treaty to Establish the Commonwealth of Independent States."

privatisation legislation in the transport sector, will be described below.[4]

II. Framework of Legal Requirements for Privatisation

A. Steps in the Process of "The Privatisation of State and Municipal Enterprises of the RSFSR"

The Privatisation Law (PrivL)[5] provides that the privatisation of state and municipal enterprises proceeds either through the sale of the business by way of tender or by auction, through the sale of interests in the capital (*i.e.* shares) of the business, through the redemption of the assets of a business wholly or partially leased from the state. The privatisation process itself is made up of a series of six complex and, in practice often protracted, individual stages involving a large number of participants.

B. Application for Privatisation

The privatisation of state and municipal enterprises may only be commenced by means of an application. The application must be submitted to the area office of the State Committee for the Administration of Russian State Property (Goscomimushtshchestvo, hereinafter "GCI") or to the Committee for the Administration of Property of Federation Member-states, national or administrative area units.[6]

C. The Right to Initiate Proceedings

Article Thirteen, Section One of the PrivL directs that the right to initiate a privatisation application belongs to, but is not limited to, the GCI or its area offices; the manager of the business; the workers' collective of the business, a production plant, production area or another division of the business; and central and local institutions of state power and the executive.[7]

D. Application Decision

Privatisation applications are registered on the day of receipt with the appropriate committee.[8] Within one month of registration of the privatisation application, the appropriate committee must decide whether

4. The laws and regulations forming the basis of this article have been made available to the authors in connection with their consulting activities. Many of these sources are not published or available; citations have been included where available.

5. Vedomosti RSFSR, 1991, No. 27, art. 927; Vedomosti RSFSR, 1992, No. 28, art. 1614.

6. *Id.* at art. 13, s. 1.

7. *Id.* at art. 13, s. 1 (first sentence).

8. *Id.* at art. 14, s. 1 (second sentence).

to permit privatisation or deny the application.[9] Normally, written notification of the decision is required within three days. The Privatisation Commission may refuse an application only if Article Nine of the PrivL prohibits an applicant from purchasing an undertaking which is to be privatised; the undertaking is subject to a statutory restriction on privatisation; or the undertaking is included in the table of properties of the relevant privatisation programme not subject to privatisation.[10]

E. Privatisation Commission

Following a decision favouring privatisation, a Privatisation Commission is formed to privatise the undertaking.[11] The Privatisation Commission consists of numerous representatives from various state organisations.[12]

F. Privatisation Plan, Examination and Voting

A privatisation plan is drawn up within a period of three months, but in exceptional circumstances the time limit may be extended for an additional three months.[13] The privatisation plan for a business establishes, *inter alia*, the method and timetable for privatisation, the starting price of the business and the amount of share capital of the joint stock company.[14] It may also include a plan for business reorganisation providing, *inter alia*, for the separation of departments into independent businesses or the sale of business assets.[15]

The Privatisation Commission examines the plan of each business and submits it to the local people's deputies or an authorised representative as well as to the workers' collective of the business for the purpose of a vote. The vote must take place within one week of receipt of the privatisation plan or the plan is deemed to be approved.[16] The approved privatisation plan is confirmed by the appropriate committee for property

9. *Id.*

10. *Id.* at art. 14, s. 2.

11. *Id.* at art. 14, s. 3.

12. *Id.* at art. 14, s. 4. These are, for example, the GCI, corresponding local property committees, and financial authorities. The people's deputies responsible for the area in which the undertaking is located, the management, the workers' collective of the undertaking, the State Committee of the Russian Federation for Competition Policy and Support for New Economic Structures have the right to send representatives to the privatisation commission. In addition, the Privatisation Commission may involve external advisors in its work (experts, specialised auditors, advisory and other organisations).

13. *Id.* at art. 14, s. 6.

14. *Id.*

15. *Id.*

16. The deadline for voting may be extended by two weeks.

administration.[17]

If the workers' collective rejects a privatisation plan, the Privatisation Commission is obliged to present an alternative plan.[18] When the collective also rejects the alternative plan, the appropriate local people's deputies or another authorised body tenders the final decision regarding plan revision and both the method and procedure for effecting privatisation.[19] However, where the Russian Federation owns the business submitting a plan rejected by the local people's deputies, the Privatisation Commission must submit an alternative version of the plan. If the privatisation plan is again rejected, the final decision falls to the property committee.[20]

G. Privatisation of the Undertaking

The PrivL provides for several privatisation methods. State and municipal enterprises may be sold and purchased by invitation to tender[21] or by auction.[22] Capital interests, or shares in open joint stock companies, may be sold in the undertaking.[23] The last method described in the PrivL allows for the redemption of assets of businesses that are either wholly or paritially leased from the state.[24]

III. The State Programme for the Privatisation of State and Municipal Enterprises of the Russian Federation

Although the 1991 Privatisation Law required an annual privatisation programme, only the Privatisation Programme for 1992[25] had been produced by December 1993. Approval of the 1993 Programme was prevented by the power struggle between the legislature and Executive. At the end of 1993, by decree of President Boris Yeltsin, a new privatisation programme was passed,[26] but this programme failed to indicate the year of applicability. However, the time limits set in the programme give rise to the presumption that a new programme will replace it in the second half of 1994.

17. Vedomosti RSFSR, 1991, No. 27, art. 14, s. 5; Vedomosti RSFSR, 1992, No. 28, art. 14, s. 5.
18. *Id.* at art. 14, s. 7.
19. *Id.*
20. *Id.* at art. 14, s. 8.
21. *Id.* at art. 20.
22. *Id.* at art. 21.
23. *Id.* at art. 22.
24. *Id.* at art. 15, s. 2.
25. Vedomosti RSFSR, 1992, No. 28, art. 1617.
26. Vedomosti RSFSR, 1994, No. 1, art. 2.

IV. The 1992 Privatisation Programme

According to its preamble, the 1992 Privatisation Programme was designed to form a stratum of private owners that encouraged the creation of a socially-geared market economy; provide for the social protection of the population and the development of a social infra-structure with income derived from privatisation; support the process of stabilising the financial situation in the Russian Federation; create a commercially competitive environment that supports demonopolisation; attract foreign investment; and create conditions and organisational structures that broaden the scope of privatisation in 1993 and 1994. To further and simplify these aims, the Programme categorised privatisation. It drew distinctions between properties and businesses where privatisation was prohibited; required a decision of the Russian Government or the governments of the Republics within the Federation (depending on the ownership situation); required a decision of the GCI, taking into account the views of the competent Minister; could only be accomplished in accord with the local privatisation programme; or was compulsory. The programme further provided that projects not within one of these categories could be privatised pursuant to local privatisation programmes or the appropriate privatisation application process.

V. The December 1993 Privatisation Programme

The aims of the December 1993 Privatisation Programme differed somewhat from those of the 1992 Programme. The 1993 Programme sought to bring together a broad sector of private owners to provide an economic basis for market relations. Further, the Programme aimed at involving the broadest possible sector of the population in the privatisation process by selling state and municipal property to be privatised, and by using privatisation cheques before, and money after, 1 July 1994. It looked to end the use of privatisation cheques and most "minor privatisation" projects, while accelerating the development of trade and services.

Fundamentally, the Programme was designed to end privatisation of large and medium-sized businesses in industry and construction through a structural reorganisation of the economy while increasing the efficiency of businesses in general and the economy as a whole. To accomplish this goal, the Programme called for the development of post-privatisation support for undertakings, the creation of a competitive environment, and development of capital markets. Attracting investment—including foreign investment—for production was also listed as a goal to be achieved by the Programme. Finally, the Programme included a provision for social protection of the population, covering private ownership rights (shareholders).

The December 1993 Programme also classified enterprises into different categories. The distinction was made between Federally-owned properties and enterprises, the privatisation of which was prohibited;[27] Federally-owned properties and enterprises requiring a decision of the Russian Government before privatisation;[28] Federally-owned properties and enterprises, the privatisation of which requires a decision of the GCI, taking into account the views of the competent Minister;[29] properties and businesses in state (municipal) ownership, whose privatisation may only proceed in accordance with the local privatisation programme;[30] and properties and businesses in federal or state (municipal) ownership subject to compulsory privatisation.[31]

27. The most important *privatisation prohibitions* related primarily to the disposal of mineral and natural resources and airspace; nature reserves and the properties located within them; state finances, gold and diamond reserves; the central bank; military installations; establishments more than 50% financed by public monies; moveable and immoveable property forming part of the historical and cultural heritage; nuclear power stations and undertakings engaged in the production of special radioactive materials; property, undertakings, systems and means of air navigation, airports of federal significance, meteorological centres; various environmental protection establishments; installations of the water industry; various infrastructural installations as well as supply and disposal installations; television and radio establishments; training centres for the ministries and authorities; undertakings which manufacture or process immuno-biological substances; civil defence installations; crematoria and cemeteries; and training centres for national teams.

28. The following institutions could only be disposed of *on the basis of a decision of the government* of the Russian Federation or a republic: Undertakings that are part of the weapons and munitions industry; institutions for civil defence and mobilisation purposes; institutions serving for storage of state reserves and mobilisation supplies; undertakings processing precious metals, precious stones, rare ores and radioactive elements; institutions of the energy industry; commercial banks (subject to a special privatisation process); undertakings and properties of railway transport; undertakings of federal significance in the maritime and air transport sector; post and telecommunications undertakings; news agencies; socio-cultural institutions in federal or republic ownership; and properties and undertakings in the gas industry of federal or interregional significance.

29. *On the basis of a decision of the GCI*, the following were to be privatised *with the agreement of the appropriate Ministry*: market-dominating undertakings (having a market share of more than 35%); undertakings having a capital base of more than one billion rubles as of 1 January 1992; undertakings in the ocean shipping and inland waterways sector; manufacturers and bottlers of alcoholic beverages; manufacturers of children's foods; undertakings and organisations serving passengers on ships and in railway stations; polygraphic undertakings and publishers; construction companies constructing strategically important and security-related projects; mechanical engineering undertakings in the nuclear power plant sector; and "Russian State Circus" companies and organisations.

30. Undertakings to be privatised through the GCI *in accordance with the local privatisation programme* included local transport services (excluding taxi services); public baths and launderettes; waste disposal plants; pharmacies; properties and institutions with socio-cultural significance, if other categories do not apply; assets included in the financial statements of local authorities; children's camps; airports of regional and local significance; and significant local and regional sea ports.

31. *Compulsory privatisation* was applied to wholesale and retail traders; undertakings in the hotel and restaurant and service sectors; institutions in the construction and construction

VI. Privatisation Options and Benefits for Employees of Businesses to be Privatised

The workforces of businesses to be capitalised have a choice of three privatisation options.[32] The first option allows all members of the workforce of the business to acquire either preferential (non-voting) shares constituting twenty-five percent of the share capital or ordinary shares up to ten percent of the share capital. The total non-voting preferential shares allocated to one employee may not exceed twenty times the statutory minimum wage fixed by legislation of the Russian Federation and is a one-time option without charge. Allocation of ordinary shares to one employee may not, however, exceed six times the statutory minimum wage fixed by legislation of the Russian Federation, with a discount of thirty percent of their nominal value. Payment of ordinary shares may be deferred by up to three years,[33] subject to an immediate payment of not less than fifteen percent[34] of the nominal value.

Officers of the management of the business being privatised (managers, their deputies, chief engineers, chief accountants) may acquire a right (or option), subject to contracts entered, to purchase ordinary shares at their nominal value.[35] The total sum of the options for all named officers may constitute up to five percent of the capital.[36]

The second option grants all members of the workforce of the business to be privatised the right to acquire ordinary (voting) shares of up to fifty-one percent of the share capital. In this case, shares are offered neither free of charge nor at a discount.

The final option allows businesses with a workforce of more than 200 employees and a basic fund with a balance sheet value of between one and fifty million rubles[37] to give a group of the workforce the option to acquire twenty percent of the share capital in the form of voting shares in the business. The group must assume responsibility for compliance with

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materials industry; undertakings in the light and food industries; frozen and incomplete building projects which overran standard schedules; assets of liquidated undertakings without legal successors; transport undertakings (if they were not privatised in accordance with the local privatisation programme); and undertakings privatised in accordance with the Yeltsin Decree No. 721.

32. *See* paragraph 5.4 of the 1992 Privatisation Programme and paragraph 5.3 of the December 1993 Privatisation Programme.

33. Up to three months in the December 1993 Programme.

34. Fifty percent under the 1993 Programme.

35. These were expanded to include managers of independent units or branches in the 1993 Programme.

36. Amended to not exceed 2000 times the statutory minimum wage fixed by legislation of the Russian Federation in the 1993 Programme.

37. This restriction was dispensed with in the December 1993 Programme. To that extent, this option is now available to workforces of all undertakings with more than 200 employees.

the privatisation plan for the business, prevent the insolvency of the business and obtain the approval of the full assembly of the workforce to complete an appropriate contract between the group and the asset fund. This contract secures the obligations of the members of the group and establishes the extent to which their personal assets must be offered as security. The value of deposited assets may not be less than 200 times the statutory monthly minimum wage of the group membership. The asset fund transfers voting rights in respect of twenty percent of the voting shares for the term of the agreement, not to exceed one year.

VII. Decree No. 721 of the President of the Russian Federation of 1 July 1992 "On Organisational Measures for Restructuring State Enterprises and Voluntary Mergers of State Enterprises into Joint Stock Companies"

President Yeltsin stated this decree was designed to create conditions to accelerate privatisation of state enterprises.[38] For this purpose, a number of the privatisation regulations were modified to prescribe to businesses with a workforce of more than 1000 employees and a basic fund with a balance sheet value of more than fifty million rubles as of 1 January 1992. These undertakings were to become open joint stock companies.

In particular, the decree established several items. The GCI and local committees administering assets must initiate the restructuring of whole state enterprises (excluding the former State-owned farms, or Sovkhosy), or of the production and scientific parts of an enterprise whose status has not yet been brought into line with the legislation of the Russian Federation (hereinafter "firms"), as well as closed joint stock companies which are more than fifty percent state-owned. Firms whose privatisation was prohibited by the State Programme for the privatisation of state and municipal enterprises in the Russian Federation in 1992 are not included. All state-owned shares of joint stock companies founded in accordance with the decree in question may be sold or transferred only through privatisation. Founders of open joint stock companies formed in accordance with the present decree are the corresponding committees for the administration of assets. The articles of these joint stock companies *must* accord with the Model Articles of an open joint stock company. These must also be compulsorily applied in the case of privatisation of state enterprises.

38. Vedomosti RSFSR, 1992, No. 28, art. 1657. This decree passed largely unnoticed in the West, possibly due to its—for Russian conditions—utopian timetable. The provisions of the decree, however, currently still apply to businesses which could not be capitalised or privatised on time.

The restructuring of firms into joint stock companies in accordance with the regulation "On the Commercialisation of State Enterprises and Simultaneous Restructuring into Open Joint Stock Companies"[39] added to the decree, must be carried out through the privatisation commissions created in each firm. Firms that participate in trans-departmental state organisations, corporations, associations and other voluntary business associations must establish the legal organisation of their association by 1 October 1992, by restructuring these as companies or joint stock companies, and at the same time establishing the extent of the founding firms' contributions to the capital fixed by the articles of association. State assets, previously allocated to such organisations by the state administration authorities, may be injected into the founding capital by the appropriate committee for administration of assets, provided the associations are restructured as open joint stock companies. A recommendation should be made to the Russian Fund of Federation Assets or the local asset funds, to transfer parcels of shares in their possession on a contractual basis, prior to their sale, on trust to such natural and legal persons recognised as purchasers under Article Nine of the law of the Russian Federation. State-owned parcels constituting more than fifty percent of the firm's capital can, with the consent of the workers' collective of the firm, be administered by a trust.

VIII. Other Important Regulations Relating to the Privatisation Process

Other important general Russian laws for the conversion of state enterprises to private units, or at least to units organised under private law, are the December 1993 Russian Federation Constitution, RSFSR Law on Business and Entrepreneurial Activity, and the Joint Stock Companies Regulation.

39. This regulation outlined, *inter alia*, the process for each undertaking. A Privatisation Working Committee was formed for each undertaking. The committee submitted the privatisation plan to the GCI by 1 October 1992, together with documentation on the valuation of assets and draft articles of association (constitution) for approval. The GCI considered and confirmed the documentation within seven days, thereby passing a resolution for the incorporation of the joint stock company. Then, the GCI produced a copy of the approved privatisation plan, the application for registration and the articles of the joint stock company to the local Soviet by 1 November 1992 for registration of the company in the state register. Thus, a joint stock company became the legal successor to the restructured business. The first shareholders' meeting of the newly-formed company was to take place not later than twelve months after registration with the workers' collective passing a resolution as to the share distribution to the employees and other persons within 15 days of registration. The resulting resolution was submitted to the GCI. Further, this regulation established a model set of Articles (constitution) for the creation of future joint stock companies.

IX. The Constitution of the Russian Federation of December 1993

The present valid constitution, which came into force on 25 December 1993[40] after the referendum of 12 December 1993, established the general framework for economic activity. The constitution regulated the free movement of goods, services and finances, promotion of competition, and freedom of economic activity;[41] right of ownership;[42] freedom of association;[43] and freedom of occupation.[44] Thus, entrepreneurial activity is directly or indirectly influenced by the constitution.

X. RSFSR Law "On Businesses and Entrepreneurial Activity"

The second important law for converting to private business is "On Businesses and Entrepreneurial Activity"[45] of 25 December 1990. It established the general legal, economic and social foundations for businesses engaged in activities with a view to making a profit. A business is a commercial entity created to produce goods, carry out work and provide services to meet the needs of society and make profits. A business carried out its activities independently, made decisions about past and future production, and projected profits.

XI. Joint Stock Companies Regulation (Order)

The third law of importance in privatising is the Joint Stock Companies Regulation.[46] It is not a statute, but a regulation confirmed by the Council of Ministers of the RSFSR.[47] The regulation applies with their

40. Rossiiskaya Gazeta, 25 December 1993, at 3 ff.

41. Article Eight, Paragraph I of the constitution provides that a single economic space, the free movement of goods, services and finances, competition as well as freedom of economic activity shall be guaranteed in the Russian Federation.

42. Article Eight, Paragraph II recognises private, state, municipal and other forms of ownership as being of equal value and equally worthy of protection. Article Nine, Paragraph II states that land and other natural resources may be in private, state, municipal and other forms of ownership. Article 36 provides further that "only" citizens of the Russian Federation, companies and associations may enjoy private ownership of property. Article 35 establishes that private ownership is protected by law: Everyone has the right to own property, to use and to dispose of it alone or together with others.

43. Article 30 grants the right to form associations, including the right to establish trade unions for the protection of own interests. The freedom of activity of social associations is guaranteed.

44. Article 34 establishes that everyone has the right to apply their own skills and property freely to entrepreneurial and other activities not prohibited by law. Article 37 provides further that everyone has the right and freedom to choose their employment and occupation, and to use their employment skills freely.

45. Vedomosti RSFSR, 1990, No. 30, art. 418; Vedomosti RSFSR, 1992, No. 34, art. 34.

46. SP RSFSR, 1991, No. 6, art. 92.

47. Confirmed by a Resolution dated 25 December 1990. In Section One, a joint stock

registered office in the territory of the Russian Federation and it is only intended to apply to joint stock companies until the adoption of the Law of the RSFSR on Joint Stock Companies.

The Joint Stock Companies Regulation created a catalogue of rules applicable to both open and closed joint stock companies. Specific sections of a small number of regulations control variations between open and closed joint stock companies. Because the articles do not provide otherwise, shares of a closed joint stock company can be transferred only with the consent of the majority of shareholders.[48]

The share capital of closed joint stock companies must be at least 10,000 rubles. By contrast, share capital of open companies requires at least 100,000 rubles.[49] Both cash and non-cash capital contributions are possible. The shareholders' general meeting may, by simple majority, increase the share capital, or decrease it by reducing the nominal value of the shares or cancelling a portion of the shares.[50]

XII. Special Features of the Privatisation of Businesses in the Transport Sector, Particularly in the Aviation Sector of the Russian Federation

A. General Remarks

Previously, the organisation of the Soviet Union's transport sector reflected the general structure of the state economy: the state was the only "business manager" in charge of what, in Western terms, were "businesses." Viewed this way, the entire Soviet Union was, in reality, a huge business of state structures. To the Western mind, there was a lack of definition of the requisite structural bodies for "administration" (in the sense of state administration), at least in the area of economic activity. The individual decisions of the state were for this reason not comparable to the term "administrative act." Rather, they were essentially managerial or commercial decisions. The classic administrative activity of issuing licenses was restricted to a form of registrations process—for example, for airports and aircraft in the aviation sector. "Licenses," in the Western sense of the word, were unnecessary because there was no assumption indicating that independent economic activity required regulation.

company is defined as an organisation founded upon voluntary agreement of legal and natural persons (including foreign nationals) whose purpose it is to meet the needs of society and to make a profit. Section Five, Paragraph Two stipulates that the activities of a joint stock company do not have to be restricted to the activities set out in the company's articles. Transactions exceeding the activities provided for in the articles are, to the extent they are compatible with applicable law, also legitimate.

48. Resolution, 25 December 1993, Sec. 7.

49. *Id.*, Sec. 37.

50. *Id.*, Sec. 39.

Therefore, the privatisation of a particular area of the economy was essentially nothing more than the privatisation of part of the state often requiring the establishment of the requisite administrative body.

B. General Considerations in the Transport Sector

The 1992 and 1993 Privatisation Programmes provided that the industries in the sectors of rail, aviation, ocean and inland shipping were among those to be capitalised and privatised only on the order of the GCI, taking into account the opinion of the respective ministry. The phrase "taking into account the opinion of the respective ministry" relates only to a duty to consult, and not the authority to veto by the respective ministry. Therefore, the Privatisation Programme also provides that "the decision about privatisation belongs to the GCI (alone)."

The 1993 Privatisation Programme provides that property, undertakings, systems and funds of flight security, of airports and of aviation businesses that guarantee a single system of flight security for lower and upper airspace, federal airports (Classes A, B, C and D under the usual airport classifications), meteorological centres and flight testing centres, and civil aviation teaching and training centres will *not* be privatised. However, regional and local airports can be privatised based on regional and local privatisation programmes.

Further, property and undertakings of the rail, ocean shipping and federal aviation sectors can be privatised now only on the order of the government of the Russian Federation.[51] The non-federal ocean and inland shipping businesses are included, as before, among the property that may be capitalised and privatised only on the order of the GCI after considering the opinion of the relevant ministry.

The GCI has the power to issue standards regulating the process of privatisation within the area of its responsibility.[52] In order to further develop and consolidate the regulations of the 1992 Privatisation Programme, the GCI issued an Order on 16 September 1992 "On the Specific Features of the Conversion of Aviation, Maritime, River, Automobile Transport and Roads Structural Enterprises into Joint Stock Companies and Their Privatisation."

This order requires the commission on privatisation of these enterprises privatisation to present plans, property value estimates and charters of joint stock companies of enterprises (or their units) that contain units subject to military mobilisation or have a dominating position on

51. This amendment is obviously connected to public transport interests which have now moved strongly into the consciousness of those responsible for privatisation.

52. Vedomosti RSFSR, 1991, No. 27, art. 4, para. 2; Vedomosti RSFSR, 1992, No. 28, art. 4, para. 2.

the federal or local markets directly to the GCI. A copy is sent to the Ministry of Transport of the Russian Federation. The Ministry of Transport examines these documents within seven days, and submits a reasoned opinion of conclusions to the GCI.

Where certain enterprises as specified in the annexes to the Order are converted into unlimited liability joint stock companies, typical additional conditions[53] reflecting features specific to the transport sector.[54] It

53. These enterprises must meet air, sea, road and transport safety requirements in full; maintain and develop the respective safety systems (supporting the operation of transport safety systems in accordance with current branch standards, including maintenance of staff numbers, offices, transport vehicles and air traffic control equipment); meet in full the ecological safety requirements for transport vehicles, the technical methods of their storage, repair and technical operation; ensure that training, further training, and certification of personnel meets the respective qualification requirements of the mode of transport; maintain and develop the respective systems of training; insure transport vehicles and personnel in accordance with the requirements of the particular mode of transport; maintain core business activities; undertake transportation of cargo and passengers, and other work and services in accordance with the validity of the respective licenses and certificates (such as those for flight operators); undertake transport of cargo and passengers, and carry out work, services and production in accordance with the charters (or codes) of the respective forms of transport, the rules of cargo, luggage and passenger transport and other legal documents; ensure equal rights of access for carriers to infrastructure and terminal facilities owned or managed by the company; ensure integrated transportation and cargo transfer technology of sub-contractors, including at transport nodes and in multi-modal transport; apply prices and tariffs in accordance with the price lists valid in the Russian Federation for works and services which are subject to regulated and fixed prices and tariffs; observe current tariffs and regulations with respect to other types of transport; and make available existing transport systems (production capacities) for government requirements and in the interest of Russian consumers (passengers, consignors and consignees).

54. According to V. Jerimov, the Transport Minister of the Russian Federation, features specific to the transport sector are the setting of tougher standards in the system to ensure safety in the transport sector, in the actions of employees as well as in the guarantee of the operation of technical equipment. One of the biggest problems is that administrative employees in Russia are used to state ownership and are not able, in such a short time, to come to terms with the administration standards in a market economy. The risk of accidents in the transport sector and of consequent ecological damage is impossible to estimate because of the use of basic assets in a poor state of repair (a characteristic of Russian transport undertakings). Examples include aircraft, ocean-going and inland ships, as well as road vehicles.

Among features specific to air, sea, internal shipping and road transport undertakings are the fact that the majority have the status of "social transport providers" and are therefore involved in the provision of socially important functions in the manufacturing and social infrastructure which presupposes a special role of society and the state in their functional administration.

The special role of the "social transport provider" in regional transport is due to territorial factors such as the unusually low level of private car ownership in Russia which is 10-15 times lower than in industrially developed countries. The possibilities of economic regulation in Russia is especially restricted by the existence of "natural monopolies" in the absolute majority of transport undertakings.

An additional feature of the transport sector in Russia is its extraterritoriality. The proposed scheme of capitalisation of the inter-regional transport undertakings will bring about a conflict of local and federal interests, a noticeable reduction in the opportunities for the government to safeguard *national* transport needs, and obligations arising from international transport agreements. A closure of existing transport links, with huge losses for the national economy, is a

is mandatory these conditions be included in the charters of such companies.

Capitalisation of aviation, maritime and river ports as well as road construction and maintenance facilities are carried out subject to special conditions that reflect the strategic interests of the Russian Federation.[55]

While joint stock companies fall under state ownership, the GCI appoints a representative, nominated by the Russian Transport Ministry, to sit on the Board of Directors of the companies.

Some specific aviation, maritime, river, road transport and road construction and maintenance enterprises and assets were not subject to privatisation in 1992. They are not included among the authorised assets and are excluded from the property lists of the enterprises.[56]

C. Special Features of the Privatisation of the Air Transport Sector

The GCI and Transport Ministry jointly produced and put into force "Special Terms of Capitalisation and Privatisation of Airports" to define the obligation to account for the strategic interests of the Russian Federation in the privatisation of transport sector undertakings. These special terms provide, *inter alia*, that airports will be privatised as independent concerns. In addition, they set out further requirements to be included in the constitutions of the airport companies.[57]

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highly probable consequence of a change in the structure and extent of transportation in the interests of economically more profitable routes and types of activity. Rebuilding these links solely with the assistance of market regulators will take a long time.

Questions of the maintenance of Russian national security interests are also fundamentally significant. These include the role played by transport undertakings in mobilisation; the role of the transport sector in fulfilling the requirements of society, the economy and the state; and coincidental and unforeseen reductions in employment in the transport sector as a source of considerable social tension.

55. To this end, for example, "Special Terms of Capitalisation and Privatisation of Seaports" and "Special Terms of Capitalisation and Privatisation of Airports" were jointly adopted by GCI and the Transport Ministry on 30 September 1992. These special terms, in the form of regulations, set out which special transportation features should be considered in drafting privatisation plans and compiling the constitutions of the companies.

56. These enterprises include, *inter alia*, the nuclear-powered fleet, and special purpose fleet (nuclear-powered icebreaker fleet, nuclear-powered transport ships); floating and dry docks of 8.5 tonnes load and higher; general purpose roads and organisations responsible for their maintenance; fire-fighting units, their buildings and facilities; riverports, airports, transport junctions and other types of transport terminals land plots; road shoulder sections; and maritime and river enterprises basins and others.

57. The charter of an airport joint stock company established at this stage provides that the appointed representative of the GCI will perform the functions of the owner of state property at shareholders meetings and meetings of the Board of Directors of the joint stock company. The representative has the right to veto decisions to change the organisational and legal form of the company, and its charter. In addition, the representative can participate in the appointment of the Director General and has a permanent seat on the Board of Directors. The charter also

D. "Main Principles of Separating Independent Airports from the Air Transport Enterprises"[58]

Duties of the enterprises are distributed. An *airline* is an integrated flight-technical and commercial facility designed to transport passengers, cargo and post by air. Using its own or leased aircraft fleet while making available and selling these respective services, the airline undertakes duties in the interests of the national economy. An airline must typically include the following structural units of the air transport enterprise: flight detachments, aviation technical base, flight attendant services, air communication agency, and parts of the personnel responsible for commercial, supply and other functions. An airline may rent or have in the airport interdependent systems for preparation of meals, passenger service, cargo and post processing, and may own or rent facilities, buildings and equipment necessary to carry out these activities. It may use its own personnel at registration counters, arrival and departures assistance for its flights and other interdependent systems and facilities. The relevant technological equipment of an airport is rented by the airline. (Other enterprise services, as a rule, are included in the airport structure.)

An *airport* is an integrated engineering and commercial facility, intended for the arrival and departure of aircraft and for serving air transport. To this end, it provides for use of the airfield and airport buildings, refuelling and storage facilities and maintenance of technical facilities such as heating, electricity, transportation and communications. It is responsible for the arrival and departure of aircraft and their technical and commercial servicing, passenger care, air traffic control within the airport vicinity, leasing of, and the granting of concessions for, facilities, buildings and equipment.

Assets of the two entities are also divided. Aircraft, aviation engines, spare parts and materials for them, facilities, buildings, structures, special transport and equipment, designated exclusively for operation of aircraft belonging to airlines are allotted to the airline. The remaining equipment is allotted to the airport. Assets on a clearing account, stocks, payments, debits and credits, loans, bank deposits and the authorised capital of joint stock companies are apportioned between the airline and the airport. Assets to pay salaries, to encourage employee activity and fund social requirements, are apportioned proportionately to the number of employees (basic salaries fund) and the remaining assets, intended for

states that within a two-year period, beginning with the establishment of a company, the airport is subject to reorganisation, which must include a sale based on the contents of the separate airport facilities to reduce the state ownership share in the joint stock company's authorised capital, and the establishment of private enterprises of production and commercial structures serving both the aircraft and passengers.

58. This provision is set out as an annex to the special terms.

production modernisation, as well as various long-term investments are apportioned proportionately to the value of capital funds.

The airline is allotted the territories of a hangar and related structures and sites for servicing aircraft near the hangar, buildings occupied or used primarily by airline personnel, and adjoining areas with site-security procedures carried out. The remaining territory, used by the aviation enterprise, is included in the airport's land plot, accounting for the perspectives development. The airport provides land, buildings, equipment and services to the airlines on an equal access basis.

There are pre-requisites for the mandatory separation of independent airports from the air transport enterprises. The airport must be capable of taking in class 1 and 2 aircraft[59] and handling over a half million people annually (as of 1991). The selection of all other airports as independent enterprises takes place prior to holding an auction based on the request of the aviation, airport or flight technical employees after a decision of GCI at the suggestion of the Ministry of Transport.[60]

The special terms further provide that the following are not to form part of an airport's share capital: equipment, assets, property of the air traffic control centres; facilities and systems structures, flight radio-technical maintenance and communication (except internal airport communication and computers); Class A, B, C, D, and E airports serving federal needs; take-off, landing, taxi, side-by and terminal safety runways, aircraft parking sites and aprons; airport fences; radio and lighting equipment facilities; and ATC energy supply systems and airport communication systems. These facilities and structures (with the exception of air traffic control structures and facilities) shall be leased by established joint stock companies on a long-term basis of between ten and fifty years.[61]

XIII. Conclusion

From a legal point of view, the privatisation of the transport sector of the Russian Federation is very complex. It involves laws and declarations of the Supreme Soviet as well as Executive Decrees, regulations of the

59. First class aircraft are characterised with a take-off weight of more than 75 tonnes (IL-96, IL-86, IL-76, TU-154); Second class aircraft have take-off weights between 30 and 75 tonnes (TU-134, AN-12, YAK-42).

60. Airports are privatised only by the way of their conversion into unlimited liability joint stock companies (*see* Article 12 of the RSFSR "On Businesses and Entrepreneurial Activity"). Airport employees are provided with benefits only in accordance with Variant One, specified in the State Programme of privatisation.

61. Several enterprises and units of the aviation industry are not subject to privatisation or capitalisation. For instance: systems and means of Air Traffic Control of airports and aviation enterprises, connected with the unified system of ATC of lower and higher air space; Independent Civil Aviation Unit (Moscow); and Meteorological centres and flight testing stations, including the meteorological centre of the "Sibavia" concern.

ministerial cabinet—the government of the Russian Federation, decisions and declarations of the State Committee for the Administration of Russian State Property, and of the Transport Ministry.

Among the unusual features of the Russian legal system, to a Western observer, is the fact that Decrees of the Executive can significantly modify the provisions of a statute.[62]

These modified outline conditions have been further amended in the transport sector, in view of the special significance of the sector in meeting the needs of public transport, so that the "actual" law is unsatisfactory if applied in isolation.

The substantive and procedural privatisation law in Russia only becomes clear to an outsider if he first familiarises himself with the individual sectors of the economy and the corresponding "exceptional rules." The transport sector illustrates this fact.

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62. An example of this is, *inter alia*, Presidential Decree No. 721, *see supra* text accompanying note 38. The aim of this law was to speed up the lengthy and cumbersome privatisation process for large undertakings promulgated in the Privatisation Act.