SUMMARY

The legal status of a management board member of a state-owned enterprise (SOE) under Polish Law – PhD thesis by Filip Ostrowski, prepared under the supervision of Professor Andrzej Szumański.

The contemporary importance of this topic rests on the following factors. Firstly, the state still has control over a significant amount of country's overall economy. These state-controlled companies number more than 350 companies, among which 12 are out of the 20 largest listed companies, and six are out of the 10 largest taxpayers in the country. These companies are responsible for 7% of Poland's domestic output and 15% of the country's overall employment. This puts the Polish state owned sector among the largest within OECD countries.

Secondly, in 2016, new legislation was introduced to regulate SOEs. The reform included a major shift in Poland's regulatory model, whereby an imperative legislation applicable directly to the company was replaced with an indirect implementation of the rules. Under the new model, legislation obliges those exercising shareholders rights on behalf of the state to put in place specified measures relating to the governance of the SOEs and the remuneration of their board members.

Thirdly, the legislative ban on selling state-owned shares in a number of companies as well as the recent decisions of the state to acquire several companies (including two major banks and a ski lift operator) indicate that the state-owned sector is to remain significant in Poland for the years to come.

This should be seen in the context of a number of other major jurisdictions which also have a significant state-owned sector, among which are the BRIC countries (Brazil, Russia, India and China).

Against this background this thesis aims to answer if there is a special legal regime applicable to the management boards of SOEs and if so are the measures adopted in this regime adequate (i.e. fit for the purpose for which they have been introduced and proportionate).

The number of publications available on this topic remains limited despite its pressing nature and significance.

This thesis adopts several research methods. In line with most legal research, a legal-dogmatic method is the main one used in this work. Grammatical, logical, teleological and systematic interpretations are applied throughout, which are supplemented by historic and comparative methods. The work also utilizes empirical methods as the author has experience in the operations of SOEs.

The thesis consists of seven substantive chapters. Chapter One "Basic Terms and Classification" defines key concepts such as the "company with state share" and "state-owned enterprise". The former includes all companies that have the state as a shareholder (i.e. even when the level of this shareholding is marginal). Meanwhile, the latter is limited to those companies over which the state is able to exercise a sufficient level of control. This level is defined as the capacity to implement the rules derived from the Act on Rules of Managing State Owned Assets and the Act on Remunerating of People Managing Certain Companies. Other companies with state shareholding are also considered SOEs if there are dedicated pieces of legislation that regulate their corporate governance. Under this definition single and majority companies held by the state fall within the class of SOEs. This is also the case for some minority-held companies – for example if the shareholding is dispersed or if control-enhancing mechanisms to the benefit of the state have been introduced in the company. Other key definitions adopted in those two pieces of legislation are also discussed in this chapter.

Chapter Two "The General Concepts" elaborates on the sources of law applicable to the SOEs as well as certain sub-regimes that are applicable to those companies. The underlying principles of the contemporary model include the unification of norms applicable to state and private companies, the indirect method of intervention, and the contractual (as opposed to the *ex lege*) nature of most of the restrictions imposed under the contemporary regime.

Chapter Three "Historic and Legal-Economic Determinants of a State's Involvement in the Economy" is designed to provide context to the operations of SOEs. The role of the state in the economy, as well as the evolution thereof is discussed here. This chapter elaborates on the purpose of SOEs as well as on the certain specific economic features that they possess (such as the enhanced agency problem and the problem of the so-called soft budget constrains). Also presented is the role that SOEs can play in the rising field of corporate social responsibility. One particular observation that can be derived out of this chapter is that state involvement in this regard has risen and fallen throughout history, thus this should also be expected in the future.

Chapter Four "State-Owned Enterprises in Selected Other Jurisdictions" discusses the laws applicable in France and Norway. Those jurisdictions have been selected because both of their economies have a significant state sector. They also appear to have in place highly regarded legislation in that regard. Certain measures that can be observed in those countries – such as the separation of ownership and the regulatory role or principle of the state using primarily corporate measures to influence the companies to which it is the shareholder – can either be seen in the contemporary Polish regime or as a source of inspiration in adopting future measures in Poland. A number of problems that SOEs encounter have been seen in those countries, among which is a tendency to overregulate day-to-day operations and in effect to distract the supervisory authority from monitoring strategic issues.

Chapter Five "The Appointment and Dismissal of Members of the Management Board of State-Owned Enterprise" discusses specific regulations applicable to this class of managers. Here, the chapter discusses recent changes to the Commercial Companies Code –introduced in order to facilitate the use of tools traditionally used by the SOEs. In addition, the size of the management board, and the authority to appoint and to dismiss its members are described. The chapter then proceeds to discuss the minimum requirements (positive and negative) for candidates and the selection process. Also outlined are the consequences of a breach to either of those. Finally, the institution of an employee's participation, which in Poland is specific to SOEs, and the laws applicable thereto are described.

Chapter Six "The Powers of the Management Board" discusses the major differences between the model that applies to private companies and that to SOEs. For instance, the management board of the latter has significantly less authority than that of the former. In particular, the disposition of fixed assets, the execution of certain types of contract (including those applicable to services) and donations/waiving of debts by the management board may require the consent of either the shareholders meeting or the supervisory board. The chapter also discusses the obligation of SOEs to sell fixed assets in tender. The author's view on some of the major problems, encountered by the management boards of SOEs will be provided.

Chapter Seven provides an overview of one of the most widely discussed subjects in contemporary corporate governance, namely the "Remunerations of the Members of the Management Boards". After years of operation of an old piece of legislation that was often criticized on both legal and economic grounds, a new model was put in place. In the requirements imposed under this new model, the elements of compensation that can be awarded to the management board member as well as a number of other practical issues are presented.

The work concludes with an observation that the differences between private and state-owned companies are significant enough to justify regulating them differently. This includes among other things the notion of limiting political interference, the fact that the (public) goals that are served by SOEs are different to those of private companies which are predominantly profit seeking. The role of individualized owners, as well as the absence of a market for company control may also cause certain operational problems.

At the same time, the legal regime of companies (being a private law category) should remain uniform. The 2016 laws follow this rationale.

The aforementioned laws introduce specific regulations in respect of the following: appointments and dismissal of management board members, powers of the management board and in the remuneration of management board members of SOEs. Those specific measures are introduced indirectly, by way of public bodies thus discharging the obligation that the law imposes upon them.

As a result, a broad group of companies controlled by the state will operate under a similar legal regime. This class will not only include those companies in which the state is the majority shareholder, but also such minority-owned companies that are effectively under its control.

The uniformity of the regulation and the spectrum of its application prove that SOEs are a specific group of companies, as it is very unlikely for a privately owned company to operate under an identical regime.

Accordingly, this thesis concludes that SOEs are subjected to a separate legal regime. In so far as the individual tools are concerned, the work notes that some are adequate, while others may be considered populist and thus unfit for purpose.

Filip Ostrowski

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