

The Legal Regime of State – Owned Enterprises in Poland

Ovidiu-Horia Maican

*University Lecturer, Ph. D, Academy of Economic Studies, Law Department,
Bucharest, Romania, ovidiuszm@yahoo.com*

Abstract

The function of SOEs must be a source of concern, as each the simple evaluation of simple warning signs and research opinions point out that State Owned Enterprises (SOE) are less productive than private companies. The reluctance of both the contemporary and previous Polish governments to privatize SOEs skill that they will proceed to play an necessary function in the economy.

Public corporations (state – owned enterprises) are normally neglected through normal measures of the government.

Measures such as government expenditures to GDP or public consumption concentrate on governmental units providing non-market services and transfers, but fail to consider market actors controlled by the government.

Keywords: *State – owned enterprises, privatization, commercial companies, Poland, European Union*

Introduction

More than 25 years in the past in Poland a extensive and rapid transformation of country enterprises into commercial companies began, making them function according to roughly the equal economic and legal guidelines as private-owned companies. Since the first-rate political and monetary transformation in Poland in the late '80s, state-owned agencies had been known as “spoils of war” by using the winners of parliamentary elections, which was once a frequent sin of all political parties governing Poland over that time¹.

After the elections, state-owned groups had been difficulty to deep changes, which most of the times had been not absolutely inspired by means of merits. As a result of the elections that took vicinity in the fall of 2015, some deep adjustments have been introduced in the felony framework of state-owned

¹ See, B. Gliniecki – K, Zaleska-Korziuk, Report on Corporate Governance in State-owned Enterprises – the Polish Perspective, p. 99.

companies. It is really worth bringing up that no good sized modifications have been made over the closing 15 years, although the prison framework was a long way from perfect².

1. Historical aspects

A marginal position is played through country enterprises which are entirely owned by way of the Treasury and function with the aid of advantage of the State Enterprises Act on 25 September 1981.

The majority of state-owned corporations function in the structure of capital companies, to which provisions of the Commercial Companies Code of 15 September, 2000, are typically applicable. Thus, in exterior family members state-owned agencies are normally problem to the same legal framework as personal companies. Nonetheless, there exist precise provisions of competition regulation and law on public resource which apply to stated-owned companies. Further variations between state-owned and private agencies consist of the way state-owned companies' internal family members are conducted. However, such differences are allowed beneath the OECD Guidelines³.

By the end of the communist era, Polish economic system was once an incoherent mixture of command and market or quasi-market mechanisms. At the end of 1970s, the lack of ability of central planning to meet the development dreams became obvious after the fall down of the technocratic reforms primarily based on access to Western capital and technology. In the 1980s, most types of discrimination against non-state types of ownership were abolished. In 1988, the Law on Economic Activity formally declared the freedom of entrepreneurship introducing the free-market principle "everything is allowed aside from what is forbidden by way of law." In the identical year, restrictions on FDI have been lifted. The scale of centrally regulated prices used to be regularly declining and in 1989, the remaining selection of the last communist government used to be partial liberalization of prices⁴.

Retreat from the direct management over the key parts of the economic system such as business enterprise sector besides introduction of regular adjustments into the system, consisting of institutional ones, made things even worse breaking the integrity of the system. It created base for abusing the economy by using more than a few rent-seeking corporations both in the agency sector and the nation paperwork which "privatized" earnings from financial exercise (sometimes literally, thru "nomenklatura privatization" - tunneling the

² See, B. Gliniecki - K, Zaleska-Korziuk, *op. cit.*, p. 99.

³ See, B. Gliniecki - K, Zaleska-Korziuk, *op. cit.*, p. 100.

⁴ See, P. Kozarzewski, M, Bałtowski, Return of State-owned Enterprises in Poland, p. 7.

SOEs assets through their managers to personal groups centered with the aid of them) and get entry to to resources, whilst transferring the prices to the society.

Comparing to the other communist states, the dimension of the private sector in economy in the People's Republic of Poland was quite big (18.8% of the Gross National Product - GNP in 1988), specifically in non-industrial sectors. In 1988, the share of private entities (enterprises) in industry used to be 8.6% of the GNP in industry (mainly small craftsman's businesses), 26.8% in construction and as high as 79.1% in agriculture⁵.

It be referred to on the other hand that non-public companies were, on the one hand, underneath a tight control of the government, but on the different hand, very excessive entry costs, which were imposed via the communist state, to a large extent protected them from competition.

Unlike many others nations in the region, Poland renounced from a vast use of wholesale strategies of SOEs privatization and usually from attempts to acquire the best possible speed of privatization, mainly of medium and massive enterprises. It was believed that fantastic of privatization offers was once imperative in order to meet their financial and social goals⁶.

Additionally a favorable institutional surroundings for enterprise pastime must be created, together with monetary markets. It was once believed that when SOEs are challenge to challenging budget constraints and devoid other privileges, inclusive of their monopolistic positions, their speedy privatization seized to be urgent. Since the very starting of the transition, possession coverage of the state was centred on privatization.

The government looked for efficient strategic traders for the massive and most vital medium-size agencies which due to the fact of the lack of domestic non-public capital and particularly favorable investment local weather contributed to huge influx of FDI (Foreign Direct Investments). It created a FDI-led development path. At the identical time, little was once achieved to consolidate corporate governance of the kingdom - partially due to the faith that the SOEs trouble would in the end "solve through itself" in the direction of privatization⁷.

2. Legal aspects

After in 2006 the European Commission banned golden share regulations in the EU guidelines as they constituted restrictions on the free motion of capital, the In July 2015 the Parliament adopted the regulation "On Control of Certain

⁵ See, P. Kozarzewski, M, Bałtowski, *op. cit.*, p. 8.

⁶ See, P. Kozarzewski, M, Bałtowski, *op. cit.*, p. 8.

⁷ See, P. Kozarzewski, M, Bałtowski, *op. cit.*, p. 10.

Investments” which provides the authorities the proper to, as the regulation places it, “protect a enterprise entity,” to block acquisition of shares of a number of companies which have strategic significance for the economic system by means of a new controlling investor – even if the agency is completely private. This regulation made viable to block a variety of transactions between private traders and ultimately led to nationalization of countless power plants, where the state was the solely client the authorities didn’t object⁸.

In the case of the Polish stock market, characterized usually by a small extent of free flow and a vital position of institutional shareholders, maintaining 30-40% of shares is ample to exercise this kind of control. Such a situation happens in the case of the biggest and the most necessary listed corporations with minority state’s shareholding. Under unique circumstances, when a excessive wide variety of private shareholders declare their presence at the general meeting, the govern ment has to are looking for allies to gain a required number of votes amongst some institutional inves tors, e.g., funding funds. The latter used to be the case, at a few accepted meetings of PKN Orlen SA, the place the nation workouts true manage no matter maintaining solely 27.5% of shares⁹.

These are statute provisions favoring the state owner. These provisions most regularly take a structure of voting caps, limiting the voting rights of some non-state shareholders. It is commonly referred to that none of the shareholders have vote casting rights to exercise extra than 10% (or 20%) of votes, regardless of the variety of shares they hold. This difficulty does not follow solely to the state. Such provisions have been blanketed in the statutes of all vital listed businesses in Poland with minority country shareholding. In some groups in which the kingdom is a minority shareholder (PKN Orlen SA) as properly as a majority shareholder (PGE SA), different provisions are added extending of the rights of the state shareholder, such as, the Minister of the Treasury’s proper to appoint one member of the Supervisory Board directly¹⁰.

Another peculiarity of the present kingdom is that SOEs, are predominantly giant and very massive corporations with sizeable influence on the market. The privatization of the largest and most important Polish state-owned organizations used to be carried out from the last years of the twentieth century until as late as 2012 the use of the capital market. There have been two procedural paths in place. Either the authorities would promote a controlling stake to a chosen foreign investor. Or the shares had been, barring a strategic investor, and the authorities kept its majority or even the minority stake, yet allowing, via the equipment of “reluctant privatization,” to continue the state’s company control.

⁸ See, P. Kozarzewski, M, Bałtowski, *op. cit.*, p. 11.

⁹ See, P. Kozarzewski, M, Bałtowski, *op. cit.*, p. 11.

¹⁰ See, P. Kozarzewski, M, Bałtowski, *op. cit.*, p. 12.

At the same time, some massive state-owned agencies had been excluded from privatization¹¹.

The Polish Code of Commercial Partnerships and Companies ("the Polish Commercial Code"), first introduced on September 15, 2000, affords the legislative framework for company governance in Poland. Best practices are delineated in the Code of Best Practice for WSE Listed Companies ("the Code"), a comply or explain code, first issued with the aid of the Warsaw Stock Exchange ("WSE") in 2007 and updated most recently in 2016. The Act of October 16, 2019 on amending the Act on Public Offerings will transpose Directive (EU) 2017/828 of the European Parliament ("SRD II") into law. In line with the revised Act, corporations will be required to prepare an annual remuneration file for a shareholder vote of advisory nature, while a remuneration policy must be submitted to a binding vote each 4 years¹².

Under Polish law, public companies are governed with the aid of a two-tier board system, with the supervisory board presiding over the administration board. The supervisory board consists of non-executive directors (and may additionally consist of worker representatives), whilst the administration board is composed entirely of government directors. The administration board is accountable for the everyday running of the company, whereas the supervisory board is accountable for monitoring the administration board. In Poland, shareholders may be requested to decide on supervisory board members, or to extra commonly approve the general modifications to the composition of the supervisory board¹³.

However, new supervisory board members are often nominated at once by using shareholders, not the board, throughout the accepted meeting. As a result, most businesses do not grant records related to the proposed composition of the board in increase of the meeting, leaving shareholders vote casting via proxy with insufficient records to make an knowledgeable decision¹⁴.

In Poland, the directors are divided into three classes based totally on an examination of the kind of relationship they have with the company: Independent Supervisory Board Member – An impartial supervisory board member has no material, financial, familial or different modern-day relationships with the company, its executives, or other board members, except for board service and standard expenses paid for that service. An individual who has been employed by the company within the past 5 years is no longer considered to be independent¹⁵.

¹¹ See, P. Kozarzewski, M. Bałtowski, *op. cit.*, p. 12.

¹² See, Glass Lewis, , 2020 Proxy Paper. Guidelines§ An overview Of the Glass Lewis approach to proxy advice. Poland, p. 1.

¹³ See, Glass Lewis, *op. cit.*, p. 1.

¹⁴ See, Glass Lewis, *op. cit.*, p. 2.

¹⁵ See, Glass Lewis, *op. cit.*, p. 2.

A supervisory board member is an affiliate if the character has a family member who is employed via the company. However, Polish regulation does now not require corporations to divulge details of affiliation. Polish regulation stipulates that personnel be represented on the supervisory boards of state-owned and partly privatised companies. Employee representatives are now not elected with the aid of shareholders. A cloth relationship is one in which the value exceeds PLN 200,000 (or 50% of the total remuneration paid to a board member, or where no amount is disclosed) for board participants. This limit would also observe to cases in which a consulting company that is owned by way of or appears to be owned by way of a board member receives charges directly¹⁶.

This limit would additionally apply to charitable contributions to schools the place a board member is a professor, or charities the place a board member serves on the board or is an executive, or any other commercial dealings between the agency and the board member or the board member's firm. Articles 12.1 and 14.1 of the Act on Commercialization and Privatization of State Enterprises, delivered on August 30, 1996, stipulate that, if the kingdom holds 50% or more of the company's share capital, employee representatives are entitled to constitute two-fifths of the supervisory board seats¹⁷.

Further, if the state's stake is much less than 50% of the company's share capital, employee representatives are entitled to: (i) two seats on boards consisting of up to six members; (ii) three seats on boards consisting of between seven and ten members; and (iii) 4 seats on boards consisting of eleven or more members. Voting Recommendations on the Basis of Board Independence A supervisory board will be most fantastic in protecting shareholders' interests when at least half of of the shareholder-elected supervisory board members are independent of the company, and when at least two contributors are independent of shareholders owning 5% or greater of the company's complete voting shares¹⁸.

Where the board's composition does not meet these independence thresholds, we will typically advise vote casting in opposition to some of the affiliated members. However, we be given the presence of representatives of extensive shareholders in share to their equity or vote casting stake in the company. The majority of shareholder-elected supervisory board contributors serving on a company's audit and remuneration committees ought to be independent of the business enterprise and its giant shareholders. The chair of the audit committee ought to be independent. We believe a majority of the

¹⁶ See, Glass Lewis, *op. cit.*, p. 3.

¹⁷ See, Glass Lewis, *op. cit.*, p. 4.

¹⁸ See, Glass Lewis, *op. cit.*, p. 4.

shareholder-elected members of the nominating committee should be unbiased of organization administration and different associated parties.

Under Polish law, public corporations are required to set up an audit committee which is composed of at least three members, majority of which are independent, such as chair¹⁹.

Although the audit committee is the solely board committee required by way of law, the Code also recommends the creation of a nominating and remuneration committee. In Poland, shareholders are requested to vote on a range of proposals involving the audited monetary statements, the appointment of auditor and dividends. Polish corporation law requires that shareholders approve a company's audited annual economic statements, inside the six months following the shut of the fiscal 12 months in order for them to be valid. Polish enterprise law requires public organizations to put up the allocation of earnings or the insurance of losses for shareholder approval. In accordance with Polish employer law, prior to the distribution of dividends, companies are required to allocate at least 8% of their profits to a criminal reserve, until this reserve amounts to at least one-third of the company's share capital (the nominal cost of all agency issued shares)²⁰.

Under Polish law, public groups should rotate their auditor each and every 5 years. The auditor need to be accredited by using shareholders upon rotation. An entity that has served as a company's external auditor for five years in a row may also once more serve as the company's auditor after a hiatus of three years. Upon the signing into law of the revised Act on Public Offerings, companies will be required to submit an advisory vote on remuneration reports annually and a binding vote on remuneration insurance policies at least each and every four years. Shareholders of Polish companies are often asked to approve modifications to supervisory board fees. The Code recommends that these fees now not be linked to agency performance or any other variable components²¹.

On July 26, 2016, the President of the Republic of Poland signed the Act on Rules of Remunerating Persons Who Manage Certain Companies of June 9th, 2016 ("the Act"), which got here into force 30 days after its announcement. The Act governs the workout by the State Treasury of its rights connected to shares held in industrial companies, with appreciate to identifying remuneration of participants of administration and supervisory bodies. It stipulates that entities entitled to workout rights connected to shares in state-owned corporations are obligated to make certain that the company's remuneration policy is fashioned and carried out in accordance with the provisions set forth in the Act. In particular, performance of this duty entails making sure that draft resolutions on

¹⁹ See, Glass Lewis, *op. cit.*, p. 4.

²⁰ See, Glass Lewis, *op. cit.*, p. 6.

²¹ See, Glass Lewis, *op. cit.*, p. 6.

policies of remunerating individuals of the supervisory physique are voted on by using the well-known assembly in accordance with the Act. Article 392.1 of the Polish Commercial Code states that supervisory board costs may also be determined in the company's articles of association or through resolution at the general meeting²².

Polish groups have to submit the actions of the administration board and supervisory board for the duration of the yr for shareholder approval. While discharging the board may additionally limit shareholders' rights to take prison action in opposition to the board and/or its members, it does not launch directors from their fiduciary responsibilities owed to the enterprise and its shareholders. Because shareholders are not given the probability to vote on the election of man or woman board participants often, the ratification can be the nice way to voice issues about the performance of an person board member. As such, we may also advise voting in opposition to the ratification of an character board member when we have serious worries concerning the board member's performance.

Polish companies, when proposing amendments to the articles of affiliation at the meeting²³, will often submit a separate concept to replace the uniform textual content of its articles of association. While we typically regard this additional idea as largely activities in nature, we may additionally recommend that shareholders vote towards such a suggestion have to it enforce amendments to the articles of association which we do not trust to be in shareholders' interests. Polish regulation requires a supermajority vote to exchange the articles of association, decrease shareholders' equity, liquidate shares, promote an operational subsidiary or liquidate the company; In certain instances, amendments to balloting requirements may additionally have a deleterious impact on shareholders rights where a business enterprise has a large or controlling shareholder²⁴.

Under Polish law, shareholders keeping at least 5% of a company's share capital may also put up the following requests (convocation of an exceptional meeting, addition of objects to the agenda of the universal meeting already convened; or submission of draft resolutions concerning items on the agenda, or to be put on the agenda, of a regular meeting already convened)²⁵.

3. Institutional aspects

An essential truth about Polish SOEs is that they are "self-governing" under the path of a workers' council that hires and fires the manager, determines

²² See, Glass Lewis, *op. cit.*, p. 8.

²³ See, Glass Lewis, *op. cit.*, p. 8.

²⁴ See, Glass Lewis, *op. cit.*, p. 8.

²⁵ See, Glass Lewis, *op. cit.*, p. 9.

managers' compensation, and clears all essential strategic and even operating decisions.

Commercialized organizations vary in three respects from SOEs.

First, the workers' council is dissolved and replaced through a supervisory board. Four members are nominated by way of the Ministry of Privatization (MOP) and two by using the employees.

Second, the agency is transferred to the control of the Ministry and should be privatized inside two years.

Third, commercialized firms were at first to be exempt from the constant dividend and as an alternative pay a percentage of after-tax profits to the Treasury. They additionally get hold of a tax wreck of 20 percent on extra wage tax payments²⁶.

Thus after two years, the Polish Sejm (parliament) rejected the mass privatization program on March 18, 1993. However, the program was correctly resubmitted through the authorities and accredited on April 30, 1993.

In Poland's mass privatization program, 15-20 corporations were managed by using countrywide investment cash to be run through well-known investment banks. These banks were compensated partly through a success fee linked to the extend in the companies' value. Potential traders did not desire to discuss to workers' councils or deal with corporations burdened with social assets, extra employment, and unmarketable products. Interestingly, managers of commercialized SOEs were more apt to stress multiplied managerial compensation, while all managers assessed job steadiness about equally. It is also noteworthy that barring exception managers underlined the want for restructuring earlier than privatizing, specially in view of the problems of social assets, excess labor, business enterprise division, and in many cases, debt overhang. Managers expressed skepticism about mass privatization for countless reasons²⁷.

They cited lack of readability about the role of national funding cash (NIFs) in relation to a particular firm, and the division of responsibility and authority between company administration and NIFs. They mentioned the trouble of the firm's property being "given" to the NIFs, even though the NIFs would no longer put their very own money at risk.

Finally, managers mentioned the understanding that the main intention of the mass privatization application is to clear up budgetary problems, not restructure firms. Managerial Compensation The device of managerial compensation remains unchanged in the SOEs, at least on paper²⁸.

²⁶ See, B. Pinto, M. Belka, S. Krajewski, *Transforming State Enterprises in Poland: Evidence on Adjustment by Manufacturing Firms*, p. 216.

²⁷ See, B. Pinto, M. Belka, S. Krajewski, *op. cit.*, p. 250.

²⁸ See, B. Pinto, M. Belka, S. Krajewski, *op. cit.*, p. 252.

As a result, the scope of “statism” in economy has been increasing in many international locations in recent years. It is very without a doubt seen in Poland, where the country owns 30 enterprises, while 40% of the largest agencies are also beneath state manage - this is genuinely more than in other countries of Central and Eastern Europe, which have a pretty similar monetary structure. State-owned businesses State-owned organisation (SOE) is the one that is solely owned via the state. The foremost criminal act regulating the manner of establishing, liquidating, business enterprise and operation of state owned agencies in Poland is the Act on State-Owned Enterprises of 1981 (with subsequent amendments)²⁹.

State-owned companies may additionally be set up by means of the supreme, central or nearby country administration bodies, as properly as with the aid of the National Bank of Poland and state-owned banks. SOEs are installed as corporations running on frequent standards or as public utility enterprises. The latter are exceptionally aimed at fulfilling the needs of ordinary citizens (public interest). In particular, these enterprises goal to supply offerings in the field of sanitary engineering, public transport, gas, electricity and heat, management of country green areas, management of spas and cultural services.

According to the records published in September 2020 by the Polish government, there are presently 30 SOEs in Poland³⁰.

Most of them are in the area of activity of ministries (thirteen state-owned organizations are coordinated by the Ministry of Justice, two SOEs belong to Ministry of Climate, and one every to Ministry of Infrastructure and Ministry of Maritime Economy and Inland Navigation. The remaining corporations are at the disposal of the voivodes (representatives of the government in the region/voivodship)

Nevertheless, the above referred to class of state-owned company doesn't include the state-controlled enterprises (SCEs), which are a kind of groups set up as a result of a commercialization process, carried out through the Minister of Treasury, at the request of director and employee council of a state-owned enterprise.

Their existence and operation are described in the 1996 Act on Commercialization of State Enterprises.

They are described as groups in which the State Treasury holds the biggest shares function in industries regarded strategic from the factor of view of the state's interests. Among them there are energy, fuel, insurance, mining, transport, real property companies, as nicely as representatives of the chemical and banking industries. The most recent listing of businesses with the Treasury shareholding consists of a listing of 417.

²⁹ See, J. Ciesielska-Klikowska, , Poland economy briefing: Status quo of Poland's state-owned enterprises, p. 1.

³⁰ See, J. Ciesielska-Klikowska, *op. cit.*, p. 2.

Among 50 largest Polish corporations in terms of running revenues, as many as 20 are controlled by the state, meaning 40%. This is truly more than in any of the other nations in the region.

For comparison: in Slovakia this proportion is 28%, in Hungary 24%, in Czech Republic 16%, and in Romania 14%. Significantly, Polish state-controlled organisations generate greater than 1/2 of the revenues of the entire group of the 50 biggest organisations - 53.5% in complete (EUR 88.5 billion per year). This is 20% more than in Hungary, 29% more than in Czech Republic, 34% greater than in Slovakia and 43% extra than in Romania³¹.

Importantly, the crew of 20 greatest Polish state-owned organizations employs over 1/2 (56.3%) of people working in all 50 largest organizations in Poland. Though, what may additionally be even greater noteworthy, is that in contrast to other CEE countries, the share of employment in the biggest state-owned businesses in the total employment in the group of the biggest organisations has now not diminished over the year.

This indicator has remained at the level of over 50% for at least a decade³².

In Hungary it is 33.8%, in Czech Republic - 26.1%, in Slovakia - 22.6%, and in Romania - 18.4%. Summing up it must be mentioned that in the Polish economy, the full-size majority of instances of the state manipulate in companies, is the end result of the phenomenon described in the literature as "reluctant privatization". All such entities have been as soon as state-owned and their privatization processes carried out via the capital market in many cases have been not completed. The state nevertheless maintains significant blocks of shares in these organizations and a disproportionately higher scope of company control. The benefit is the profits that SOEs and SCEs generate - even if there are more difficult periods, in the lengthy run the nation earns on nationalized firms³³.

Conclusion

2014 is the last year for which data are available from the Ministry of Treasury (MoT) that provides reports on state-owned companies.

The government in power since 2015 openly declared that no further privatization will be made and abolished the MoT.

SOEs play an important role in the Polish economy. Their relatively large size is similarly improved by the relatively small sector of large companies. One in six employees of large companies is working in an SOE. Big empirical proof indicates that, on average, SOEs are less efficient than private companies and

³¹ See, J. Ciesielska-Klikowska, *op. cit.*, p. 4.

³² See, J. Ciesielska-Klikowska, *op. cit.*, p. 5.

³³ See, J. Ciesielska-Klikowska, *op. cit.*, p. 5.

their presence has as effect several market distortions, limiting the efficiency of the economy.

The current government is not only reluctant to privatize SOEs, but actively increase their market share at the expense of private sector.

Over time, such a policy will lead to less effectivity and slower economic growth.

REFERENCES

[1] J. Ciesielska-Klikowska, , (2021) *Poland economy briefing: Status quo of Poland's state-owned enterprises*, China - CEE Institute, Vol 37, Nr. 2

[2] Glass Lewis, (2020) Proxy Paper. *Guidelines An overview Of the Glass Lewis approach to proxy advice. Poland*

[3] P. Kozarzewski, M, Bałtowski, (2019) *Return of State-owned Enterprises in Poland* Seventh Annual Conference of the Leibniz Institute for East and Southeast European Studies "Firms and Social Change in Eastern and South-Eastern Europe. Historical, Political and Economic Perspectives," Regensburg, May 23-25, 2019.

[4] B. Gliniecki - K, Zaleska-Korziuk, (2017) *Report on Corporate Governance in State-owned Enterprises - the Polish Perspective* PRO PUBLICO BONO - Public Administration, 2017/ Special edition 1, 98-115.

[5] B. Pinto, M. Belka, S. Krajewski, , (1993) *Transforming State Enterprises in Poland: Evidence on Adjustment by Manufacturing Firms 1993*, Brookings Papers on Economic Activity, 1:1993