Michał Hałasa
Department of Commercial Law
Faculty of Law, Canon Law and Administration
Catholic University Lublin of John Paul II

Economic Interests of the State and Principles of Corporate Supervision over Companies with State Treasury Shareholding in Poland

There is no precise definition of the corporate supervision in the Polish legal system. There are two names used interchangeably in practise: "nadzór właścicielski" (literally: 'owner's supervision) and "nadzór korporacyjny" (literally: 'corporate supervision').

Most commonly, the corporate supervision over companies with state treasury shareholding in Poland is understood as the collection of internal and external control mechanisms which guarantee the successful monitoring of such subjects and minimize the conflicts of interests existing between a company's managers and its shareholders.

In the Polish legal system, regulations concerning corporate supervision are dispersed throughout many legal acts. The basic source of these regulations is the Act from the 15th of September 2000 *Code of commercial companies* [Dz.U.2000 no. 94, item 037, with later changes), according to which the direct supervision over companies is executed by supervisory boards, and to some extend by a partner's plenipotentiary. The prescriptive ground for the functioning of supervisory boards is Art 219 § 1 (as far as the limited liability companies are concerned) and Art 382 § 1 (as far as the joint-stock companies are concerned). In accordance with these regulations *Supervisory board conducts the constant supervision over a company's performance in every aspect of its activity.* Moreover, members of a supervisory board should take care of their duties resulting from the professional character of their work.

As far as companies with state treasury shareholding are concerned, the Act from the 30th of October 1996 on *commercialization and privatization* [Dz.U.2002 no. 97, item 1397, with later changes) makes these regulations more precise.

The important role in developing rules on the corporate supervision has the Act from the 30th of October 1996 on *commercialization and privatization* [Dz.U.2002 no. 97, item 1397, with later changes). This Act is

not valid anymore, but it has regulated the rules of transforming public ownership companies into commercial ones and the rules on privatisation of the companies with state treasury shareholding.

The process of commercialisation and privatisation of the public companies, lasting for 20 years, has actually come to an end, and so we can now perceive the need of implementing a unified and effective mechanism of execution the state treasury's rights in companies and privatisation of publicly co-owned companies.

The current system grants not only the state treasury minister and public organs with the supervisory and ownership competencies over trade companies with state treasury shareholding, but also other principal and central organs of the government administration, and even public agencies. We can thus observe the phenomenon of public possessions supervision dispersion, which is accompanied by functioning of the organisational units executing the same tasks on behalf of the state but acting in different procedure and organizational standards in the government administration and in public agencies.

The state treasury supervision poses many practical difficulties. As the state treasury is an anonymous body and what is more, governments and political options change so often, the supervision is always executed in isolation from the personal responsibility of responsible people. Most often, when the political option changes, the management team responsible for a company with state treasury shareholding changes. After the elections, the changes in the management team are not made due to the company's real needs, but for a political reason. It can be perceived that creating the owner's supervision is connected with the current fiscal policy of the country. The common phenomenon is thus using a position in a supervision board in the companies with state treasury shareholding as a bargaining card during negotiations with potential coalition partners, as a 'premium' granted in return of some particular support or a 'political retirement'. We can only regret though, that as a rule being a member of surveillance board in the companies with state treasury shareholding is dictated by political connections and is not connected with the factual knowledge of a person appointed.

Taking into consideration the information above, we can agree that it is necessary to develop a new supervision system which is not dependant on political factors. A solution to these problems could be the implementing regulations of a Legal Act nature providing the complex solution to this

matter. Especially, there is a need of implementing effective competition procedures so that the management board is not politically motivated and well-perceived in the eyes of the market. In order to eliminate the stipulations as to the political interference to the company, it seems useful to implement the rules of openness of the legal actions on the fixed assets.

Such an attempt was undertaken in the spring of 2011 when the Parliament was voting for the first time on the Legal Act project on the rules of performing some of the state treasury's rights. Still, the project was handed over to the parliament state Treasury commission, but there was no second voting.

At present, the state treasury ministry have tried to solve these problems and acting on behalf of the Act from the 8th of October 1996 on the rules of performing the rights by the state treasury (the unified text Dz.U. 2012 item 1224) have made a decision entitled: *Rules of the corporate surveillance over the Companies with State Treasury Shareholding in Poland* (complemented by *the Order number 3 by the State Treasury Minister from the 28th of February Rules of the corporate surveillance Companies with State Treasury Shareholding* and *Order number 6 from the 7th of March 2013,* here referred to as *Rules of surveillance)*

This order constitutes the expression of the public organ's expectations, which is responsible for the protection of the state treasury interests as far as the execution of the supervision policy by the organizational units and physical persons engaged in executing procedures connected with the activity of companies with state treasury shareholding and state treasury as a shareholder/partner. According to the order we need to separate functions of dominium and imperium of the state in the economic policy, which enables us avoiding the arguments between the public organs responsible for shaping and executing public policy with the use of public regulatory instruments and Minister responsible for the state treasury matters who represents the state treasury as the participant of the turnover which exists now. This document does not constitute a commonly binding normative act of the public administration (the legal acts does not allow the State Treasury Minister to issue such an act). It is to be treated as the basis for all the subjects engaged in the process of surveillance, for preparing unified procedures, taking into consideration the specificity of subject under surveillance.

The order implemented was primarily to improve the quality of management in the companies with the state shareholding. This goal should have been achieved especially by providing people positions of surveillance

with the needed level of knowledge, and elimination of a possibility to serve it by random people or the optimization of management costs and in consequence some saving of money for the public budget.

Taking into account the instructions in the attachment, the basic competences and tasks of the supervisory boards in companies are: control over the company's board, monitoring of the financial situation of a company and making the development strategy and later verification of its realization.

According to the instructions, the formal premise for serving the function of state treasury's representative in the surveillance organs of the subjects with the state treasury shareholding is having the entitlement to become a member of the surveillance boards achieved by passing the exam for candidates for members of the surveillance boards, of which we can read in the Article 12 Section 2 of the Act from the 30th of October 1996 on *commercialization and privatization* [Dz.U.2002 no. 97, item 1397, with later changes) or having the entitlement allowing not to pass this exam indicated in § 5 point 2 and 3 of the Government order from the 7th of September 2004 concerning the trainings and exams for candidates for the members of surveillance boards with the State Treasury as the only Shareholder (Dz. U. number 198. position 2038, with later changes), i.e. having the Doctor of Science in Law or Economics Degree, or being a certified Legal Adviser, Advocate, Auditor or Investment Advisor.

If the company is in a difficult financial situation or the size of its activity and employment constitutes an economic justification to appoint the partner's plenipotentiary, the surveillance board can be replaced by the plenipotentiary in the limited liability company by means of commercialisation. such an plenipotentiary can be appointed in the one-person limited liability companies of stated treasury ensuing from commercialization, can be appointed if: he is an micro entrepreneur or a small entrepreneur according to the article 104 or 105 of the Act on the *economic activity freedom* (Dz.U. from 2010 number 220 item 1447 with later changes) or a medium entrepreneur according to the article 106 of the Act from the 2nd of July 2004 on the *economic activity freedom* or has accomplished the growing financial loses in the last two accounting years, which has caused a decrease in equity.

The rules of appointing the plenipotentiary result from an assumed ownership policy. The state treasure minister can appoint the surveillance board instead of the partner's plenipotentiary especially in the case of termination of the premises of its functioning.

In order to eliminate abuse, commonly functioning legal regulations determine the maximum amount of surveillance board member's and partner plenipotentiary's remuneration, which cannot be higher than the average monthly remuneration and 1,4-times average monthly remuneration in the sector of companies without paying the bonuses from profits in the fourth quarter of the prior year, published by the President of the Main Statistics Office.

In order to execute the control tasks properly, surveillance boards and plenipotentiaries cooperate with auditors. The choice of the objective and independent auditor is in the competence of the surveillance board or a plenipotentiary, if the statute/contract of the company does not specify it differently.

The supervision board or plenipotentiary chooses an offer of a company's financial statement after executing preceding of providing the choice of an independent and objective auditor or a choice of an offer, of which the price includes the of work of an auditor, his position on the auditor's service market and his knowledge on the company's market sector.

A certified auditor, able to research the financial statement of the company is understood as a subject specified in the Article 47 of the Act from the 7th of May 2009 on *certified auditors and their self-management, subjects allowed to investigate the financial statements and public surveillance* (Dz.U. number 77 item 649). The surveillance board presents to the auditor its notices on the matters important for the proper functioning of the company and cooperates with his actively in all the stages of the conducted research. The opinion of the certified auditor on the given financial statement together with the report is compulsory to present to the board or the surveillance board/partner's plenipotentiary. As part of creating in the company so called *early notification system* the surveillance board can in a specific scope take advantage of the advisory service od the independent certified auditor during the financial year. The auditor cannot be a subject serving the function of a certified auditor in a company or subjects dependent on it.

According to the Surveillance Rules the link between the State Treasury Minister and the surveillance boards or the partner's plenipotentiary is the given control unit. Such units serve the organizing, administrative and controlling functions over the surveillance boards in the scope of the correctness and promptness of delivering the non-legal statutory duties. The information gathered constitute the grounds for making the proper assessment of the work of the surveillance board or partner's plenipotentiary. The employees of the proper units keep in the close contact with members

of the surveillance board or partner's plenipotentiary, especially in the special situations – demanding the quick information exchange or an opinion.

It seems though, that the rules presented above are not sufficient. Firstly, since they are only the instructions and there are no legal instruments guaranteeing the verification of its execution. Secondly, the scope of the regulations seems insufficient. As an example, we can present the choice of candidates to the surveillance board/partner's plenipotentiary giving rise to the public controversy. The order determines only a candidate's minimum competencies, and does not regulate the specific criteria of the selection. The important drawback is not taking into account the qualifications of candidates. There are many controversies over there being no limitations of being a member supervisory boards in a few companies.