СУЧАСНА НАУКА ІНОЗЕМНИМИ МОВАМИ

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ECONOMIC SECURITY OF THE STATE AND THE POWERS OF THE MINISTER OF TREASURY WITH REGARD TO STRATEGIC ENTERPRISES – POLISH EXPERIENCE

Problem Setting. The problem of security of the state in many spheres of its operation related, directly or indirectly, to the economic activity is both a critical and sensitive matter in Poland. The justifiable desire of the state to ensure stability and proper functioning of the key industries, whether crucial for the needs of the population or for the strategic directions of the economic policy (infrastructure, energy generation, mining, trade in fuels and gas, defence industry), must be in fact restrained and dovetailed with the provisions of the 2 April 1997 Constitution of the Republic of Poland[1] and binding European law[2].

The principle of limited state interference underlying the liberal free market economy strips the state, in principle, of the direct and exclusive competence in the sphere of the *dominium.* Privatization of industry, financial institutions and other sectors of the economy initiated back in the 1980s has led to a situation in which the total ownership of enterprises by the State Treasury (hereinafter also «Treasury») – as a civil-law personification of the state itself – is a rarity. Also in the realm of the *imperium*, public authorities responsible for the economic condition of the country are anything but omnipotent in selecting the means (methods) of achieving the aforesaid objectives. The solutions adopted for that purpose cannot, for example, result in

[1] Journal of Laws of 1997, No. 78, item 483 as amended.

[2] See, mainly the Treaty on the Functioning of the European Union (consolidated version, providing for the amendments introduced by the Treaty of Lisbon; OJ UE 2010/C 83, hereinafter TFEU), in particular Article 49, Article 55, Article 63 and Article 65.

the so-called actual re-nationalization of certain industries, nor can they distort the basic principles governing the internal market (uniform, common market), especially the freedom of movement of capital and the freedom of establishment[1].

The aim of the article is to present instruments of control so-called «strategic enterprises», which are at the disposal of the Polish Minister of Treasury. The text shows the evolution of legal solutions adopted in this sphere, made mainly under the influence of European law. The author tries to analyse and systemize currently applicable legal regulations and take critical view on their efficiency.

The state of the problem solving. 1. Three separate and basic stages can be isolated in the development of adjustment mechanisms intended for safeguarding the economic security of the state in relation to strategic enterprises. The first stage marked a continuous withdrawal of the state from direct economic involvement; yet, the process was exceedingly slow and limited, thus enabling the Treasury, as a founder or majority shareholder of companies operating in some relevant fields, to maintain – under the general terms – the power of directly or indirectly influencing the business decisions taken in these entities. This mechanism became impracticable after their privatization and the acquisition of the controlling stake or interest by private owners (usually over 50%)[2].

[1] Case-law of the ECJ (now CJEU) is quite restrictive in this regard as it challenges, in most cases, the specific provisions granting the state a voting advantage or the right to object to the corporate decision of the company governing bodies. Cf. ECJ judgements: of 23 May 2000 in Case C-58/99, CEC v. Italian Republic; of 4 June 2002 in Case C-367/98, CEC v. Republic of Portugal; of 4 June 2002 in Case C-483/99, CEC v. French Republic; of 4 June 2002 in Case C-503/99, CEC v. Kingdom of Belgium; of 13 May 2003 in Case C-463/00, CEC v. Kingdom of Spain; of 13 May 2003 in Case C-98/01, CEC v. United Kingdom of Great Britain and Northern Ireland; of 2 June 2005 in Case C-174/04, CEC v. Italian Republic; of 28 September 2004 in joined Cases C-282/04 and C-283/04, CEC v. Kingdom of the Netherlands; of 23 October 2007 in Case C-112/05, CEC v. Federal Republic of Germany; of 17 July 2008 in Case C-207/07, CEC v. Kingdom of Spain, or one of the recent judgements on this matter – the CJEU judgement of 8 November 2012 in Case C–244/11, CEC v. Greece; www.curia.eu.

[2] What still remains after that period are some specific provisions – still effective in some industries - ruling out the option of sale by the State Treasury of more than 50% of shares, or laying down special requirements for any privatization to go ahead.

2. The next stage opened with the adoption of the Act of 3 June 2005 on Special Powers of the Treasury and their Exercise in Companies of Special Importance for Public Order or Public Security[1] which entered into force on 19 July 2005 and was aimed to introduce into domestic law a number of instruments entrenching the position of the Treasury (regardless of the power of vote resulting from the size of shareholding) in companies of strategic importance to public order and security[2]. These companies were listed in a regulation of the Council of Ministers[3]. The law of 19 July 2005 was the *lex specialis* for the laws universally regulating both the system of organization and the rules of operation of companies[4] and the general rules governing the exercise of powers of the Treasury in corporate entities having the Treasury as a shareholder[5]. The funds allocated under the law to the Ministry of Treasury were referred to as the «golden veto» or –

[1] Journal of Laws of 2005, No. 132, item 1108 as amended, hereinafter «the ASP».

[2] This law has been extensively investigated and commented upon. See, for example, Bodnar, A. Sześciło, D. «Złote weto Skarbu Państwa a prawo wspólnotowe.» *Europejski Przegląd Sądowy* 5(2008), 11ff; Gordon-Trybus, M. *Złota akcja i złoty akcjonariusz w świetle prawa polskiego na tle wybranych systemów prawnych państw obcych i prawa wspólnotowego*. Toruń 2006; Grzesiok, P. «Złote weto Skarbu Państwa w polskich regulacjach prawnych.» *Przegląd Prawa Handlowego* 6(2007), 25ff; Katner, W. J. «Pozakodeksowe uprzywilejowanie akcji – konstrukcja „złotej akcji» Skarbu Państwa według ustawy z 2005 r.» In *Kodeks spółek handlowych po pięciu latach*. Ed. Frąckowiak, J. Wrocław 2006, 526ff; Mataczyński, M. «Złote weto w prawie polski na tle ustawy z 3 czerwca 2005 r.» *Przegląd Prawa Handlowego* 11(2005), 16ff; Przychodzki, M. «Szczególne kompetencje państwa w stosunku do spółek kapitałowych – analiza rządowego projektu ustawy o złotej akcji.» *Przegląd Prawa Handlowego* 4(2005), 31ff.

[3] See successive regulations of the Council of Ministers addressing the list of companies of special importance for public order or public security dated: 13 December 2005 (Journal of Laws of 2005, No. 260, item 2174); 4 September 2007 (Journal of Laws of 2007, No. 178, item 1251) and 30 September 2008 (Journal of Laws of 2008, No. 192, item 1184).

[4] See the Act of 15 September 2000 – the Code of Commercial Partnerships and Companies (Journal of Laws of 2000, No. 94, item 1037 as amended; hereinafter «the CCPC»).

[5] See, in the first place, the Act of 8 August 1996 on the Principles of Exercise of Powers resting with the State Treasury (Journal of Laws of 2012, item 1224).

less precisely – «golden share» held by the Treasury. On the other hand, that law revealed a number of drawbacks such as: the use of unclear and ambiguous statutory criteria defining the company activities to be obligatory reported to the Minister of Treasury (hereinafter: «the MT») for consent, the sanction of invalidity of action in the absence of prior notification, a significant number of sectors falling under the statutory regulation without a convincing rationale for them being related to public order and security, the establishment of the cost-generating institution of observers, appointed and paid by the MST.

Considering the foregoing, on 15 December 2006, the European Commission (hereinafter: «the EC»), by referring to the procedure laid down in Article 226 of the Treaty establishing the European Community (hereinafter: «the ECT»), instituted formal proceedings against Poland for the alleged violation of Article 56 ECT (free movement of capital, now Article 63 TFEU) and Article 43 ECT (freedom of establishment, now Article 49 TFEU)[1]. The direct incentive for the Commission's action was the inclusion in the list of companies of strategic importance of KGHM Polska Miedź S.A., one of the most profitable Polish companies of the time. To prevent the threat of referring the matter to the European Court of Justice (hereinafter: «the ECJ» and currently «the CJEU»), in December 2007, the Polish Ministry of Treasury took steps to adjust the regulation in question to European law[2].

3. Therefore, the problem referred to in the title is currently regulated by the Act of 18 March 2010 on the Special Powers of the Minister Competent in Matters of State Treasury and their Exercise in Certain Companies or Capital Groups Operating in the Sectors of Electricity, Oil and Gas Fuels[3]; it entered into force after a very short *vacatio legis* on 1 April 2010, thus supplanting the ASP challenged by the European Commission. This legal instrument adheres to a completely different philosophy than the solutions applicable so far.

The provisions of the Act of 18 March 2010 are not the *lex specialis* for the provisions of the system-making body of law (especially the CCPC) but are complementary (supplementary) to the Act of 26 April 2007

[1] Violation 2006/2432.

[2] The information about the shift in Polish stance was accepted by the European Committee of the Council of Ministers in January 2008.

[3] Journal of Laws of 2010, No. 65, item 404; hereinafter: «the SPMST» or the law of 18 March 2010.

on Crisis Management[1], thus relying on the provisions of Council Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection[2].

Paper main body. The purpose of the Act of 18 March 2010 was to ensure the proper management of the property including facilities, installations, equipment and services embedded in the critical infrastructure of the energy sector, i.e. of companies operating in the electricity, oil or gas fuel segments, considering the special importance of this sector for the energy security of the state and citizens.

Importantly, the provisions of the act apply regardless of the ownership structure in a given company, thus regardless of whether the Treasury holds even a single share or interest in that company[3]. What determines the application of the act is only whether any assets of the company are the property shown in the list prepared by the director of the Government Centre for Security (hereinafter: «the GCS») comprising facilities, installations, equipment and services being part of the critical infrastructure,[4] as referred

[1] Journal of laws of 2007, No. 89, item 590 as amended; hereinafter: «the ACM».

[2] OJ EU L 345/75.

[3] Undoubtedly, the drawing up of the new law gained momentum as a result of the privatization process within the Polish energy sector, including such companies as ENEA S.A., Polska Grupa Energetyczna S.A. or TAURON Polska Energie S.A.

[4] Hereinafter: the uniform list of critical infrastructures. In accordance with Article 3(2) ACM, whenever the act refers to critical infrastructure, it means systems and their constituent and functionally connected objects, including structures, equipment, installations, services of significance for the security of the state and citizens and ensuring the effective operation of the public administration, institutions and enterprises. The critical infrastructure is made up of the following systems: a) energy supply, energy resources and fuels; b) communications; c) ICT networks; d) financial; e) food supply; f) water supply; g) healthcare; h) transport; i) rescue; j) continuity of operation of the public administration; k) manufacture, storage, handling and use of chemicals and radioactive substances, including the pipelines for the transmission of hazardous substances.

The above list is drawn up by the director of the Government Centre for Security when implementing the programme of protection of critical infrastructure proposed by the Council of Ministers and updated at least every two years. See the Regulation of the Council of Ministers of 30 April 2010 on the National Critical Infrastructure Protection Programme (Journal of Laws of 2010, No. 83, item 541).

to in Article 5b(8)(1) ACM[1], which is communicated to the company by the MST (Article 4(2) SPMST).

Specific powers exercised by the Ministry of Treasury under the Act of 18 March 2010

1. Strategic companies operating in the energy sector and covered by the provisions of the Act of 18 March 2010 appoint a proxy for the protection of critical infrastructure. The proxy is an employee of the company, appointed by the management board in liaison with the MST and the director of the GCS (Article 5(1) and (3) SPMST). Among his or her responsibilities there is to monitor the status of property covered by the uniform list of critical infrastructures, maintain contacts with the relevant public authorities, notify such authorities of any changes (Article 5(2), (5) and (6) SPMST) and draw up a report on the condition of critical infrastructures in the enterprise (Article 6 SPMST).

2. Among the key powers conferred to the MST[2] with regard to strategic companies operating in the energy sector, there is the right to veto certain act at law undertaken by the company's management. The MST may voice such an objection to: a resolution or other legal action taken by the management board[3], which concerns the disposal of assets includ-

[1] In accordance with the provisions of the SPMST, the property of companies assembled in the uniform list includes:

1) in the electricity sector: infrastructure for the generation or transmission of electricity;

2) in the oil sector: infrastructure for extraction, refining, processing, storage and transmission of oil by pipelines and port terminals for the transshipment of oil;

3) in the sector of gas fuels: infrastructure for the production, extraction, refining, processing, storage and transmission of gas fuels by pipelines and liquefied natural gas (LNG) terminals.

[2] In accordance with Article 8 SPMST, with regard to companies in which the rights related to shares or interest held by the State Treasury are exercised by another minister, the powers of the minister competent in the matters of the Treasury, as set out in the act, are exercised by that other minister.

[3] The opinion of F. Grzegorczyk in *Charakter prawny*…, 50, seems questionable as his interpretation of the language used in the cited regulation demonstrates that the action be taken by all the members of the management board *in gremio*. On the other hand, the author is right in pointing to the difficulties of invalidating the activities of the proxy or attorney under the same regulation; the seemingly applicable construction of circumventing the law does not seem to duly safeguard the public interest.

ed in the uniform list of critical infrastructures, as well as to certain limited set of resolutions of the company's governance[1] on: the dissolution of the company, the change of the intended use or failure to use an asset included in the list, the change of the scope of business, sale or lease of the company or its organized part and the establishment for it of a limited property right, the acceptance of a property and financial plan, the adoption of an investment or long-term strategic plan or the transfer of the registered office abroad - if such acts pose (or their execution poses) a real threat to the operation, continuity and integrity of critical infrastructures (Article 2(1) and (2) SPMST)[2]. Also, currently, this right is named «the golden veto» of the Treasury; still, in view of the applicable laws, there should be no doubt that it is not of a corporate character (under civil law) but falls under administrative law[3].

3. The objection is voiced in the form of an administrative decision, within 14 days as of the notification of the MST by the proxy for the protection of critical infrastructures of adopting a given resolution or performing an act at law, but no later than within 30 days of its adoption or performance (Article 2(3) SPMST).

[1] In most case, it is the meeting of partners or the general meeting of shareholders.

[2] It is worth stressing that in its judgement of 26 March 2009 in Case C-326/07, CEC v. Italian Republic, the CJEU underlined that the powers of member state to intervene are contrary to the principle of free movement of capital, in particular the powers of opposition when the criteria of their exercise refer to the protection of national interests, formulated in general terms and without any indication of the specific objective circumstances in which those powers are to be exercised. It means that even if the analysed criteria concern different kinds of public interests, in particular, the minimum supply of energy resources, the continuity of public service, the security of installations used in critical public services, national defence, the protection of public order and public security, they are formulated in a general and imprecise manner.

[3] Similarly in the previously binding act, see Pawłowicz, K. «Złota akcja Skarbu Państwa jako instytucja prawa publicznego.» *Państwo i Prawo* 2(2007), 35–37, and now Grzegorczyk, F. «Charakter prawny i skutki złotego weta w nowej ustawie o szczególnych uprawnieniach Ministra Skarbu Państwa.» *Przegląd Prawa Handlowego* 3(2011), 48ff. For more on the subject, see also Mataczyński, M. «Złota akcja Skarbu Państwa a swoboda przepływu kapitału – glosa do wyroku ETS z 23.10.2007 r. w sprawie C-112/05 Komisja Europejska przeciwko Niemcom.» *Europejski Przegląd Sądowy* 8(2008), 49.

In the period in which the MST has the right to object, or in the period in which the party is entitled to appeal against the decision, the resolutions of the management board or of the shareholders' meeting referred to above are not enforceable, and acts at law of the management board do not entail any legal effects (Article 2(4) SPMST). In addition, in order to shorten the period of legal uncertainty, the act provides for a relatively tight – too tight, it seems[1] – deadlines for the examination of parties' applications and their possible submission to the voivodeship administrative court (Article 2(5) and (6) SPMST).

However, should the complaint be rejected by the court or after the expiry of the date of its reporting, the final decision expressing the MST's objection causes invalidity of the resolution or legal action *ex tunc*.

4. If the decision of the MST to oppose an act at law of a corporate body is legal and results in damage to the company, the provisions of the Act of 22 November 2002 on the compensation for loss of property resulting from the reduction during the state emergency of freedoms and rights of men and citizens[2].

Such damages cover only the compensation for loss of property *(damnum emergens)* without the benefits that the company could accomplish if no loss occurred *(lucrum cessans).* If the decision of the MST was unlawful, damages should be paid in accordance with the general terms and in line with the principle of full compensation of damages.

Conclusions. The assessment of law in force over the analysed period is ambivalent. An obvious advantage is their compatibility with European law and the limited scope of legal uncertainty associated with the conditions triggering the MST's intervention against the backdrop of the previously applicable law. An interesting solution is, as indicated above, the shift in the pattern of updating the list of companies of strategic importance for the domestic energy infrastructure.

At the same time, however, it is, I reckon, the weakest point of the new regulation.

Ex definitione, the exercise of powers of the MST, as set out in the SPMST, is not tantamount to the capacity to determine the directions of business activity of an enterprise[3].

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[1] See doubts raised by F. Grzegorczyk in *Charakter prawny…*, 49.

[2] Journal of Laws No. 233, item 1955.

[3] See Article 2(1)(3) of the Act of 22 September 2006 on the transparency of financial relations between public authorities and public entrepreneurs and on

Legislator's focus on protecting the assets of companies covered by the uniform list of critical infrastructures renders the MST incapable of actively influencing strategic decisions concerning, for example, the development and specifications of the business;[1] exercising effective control is also impeded by the imprecision and fragmentation («taking out of context») of the regulations defining the subjective scope of the MST's opposition. In practice, a satisfactory level of state control over this and similar industries of importance for the economic policy of the state can be achieved through the accumulation of remedies provided for in the Act of 18 March 2010 and the corporate powers arising from the holding by the Treasury of the controlling interest[2].

Only with regard to the latter sphere, it is also possible to protect key domestic companies against attempted «hostile takeovers» by foreign entities aiming to monopolize the regional market by crippling or eliminating local competitive enterprises[3].

Summary. The article presents instruments of control so-called «strategic enterprises», which are at the disposal of the Polish Minister of Treasury. The text shows the evolution of legal solutions adopted in this sphere, made mainly under the influence of European law. The author tries to analyse and systemize currently applicable legal regulations and take critical view on their efficiency.

Герберт А. Економічна безпека держави і повноваження Міністра казначейства щодо стратегічних підприємств: досвід Польщі.

Проаналізовано організаційно-правові інструменти контролю так званих «стратегічних підприємств», які є в розпорядженні польського міністра фінансів. Відображено еволюцію правових рішень, ухвалених у цій сфері в ос-

financial transparency of certain entrepreneurs (Journal of Laws of 2006, No. 191, item 1411 as amended).

[1] An example is the so-called stand still approach which consists in refraining from taking business decisions on the company's development, thus leading to its economic marginalization against the competition or even bankruptcy.

[2] This is a paradox. In practice, holding a controlling interest in a company makes any recourse to the «golden share», «golden veto» or the like unnecessary. As a matter of fact, the MST in Poland has never exercised the powers vested with it under either the ASP or the SPMST.

[3] An example of this is an attempt to take control over Azoty Tarnów S.A. by Russian Acron in mid-2012.

новному під впливом європейського права. Здійснено спробу аналізу й систематизації чинних законодавчих положень, окреслення критичного погляду щодо їх ефективності. У розвитку механізмів коригування можна виокремити три окремі і основні етапи, що призначені для забезпечення економічної безпеки держави щодо стратегічних підприємств.

Перший етап охарактеризовано безперервним відходом держави від прямої економічної участі, що дозволяло казначейству як засновнику або мажоритарному акціонеру компаній прямо або опосередковано впливати на бізнес-рішення.

Наступний етап, що розпочався з прийняттям Закону від 3 червня 2005 року про спеціальні повноваження казначейства і їхнє здійснення у компаніях особливого значення для громадського порядку або громадської безпеки, і набрав чинності 19 липня 2005 року, був спрямований на введення в національне законодавство низки інструментів, які закріплюють позиції казначейства в компаніях стратегічного значення для громадського порядку і безпеки.

Розвиток механізмів забезпечення економічної безпеки нині регулюється Законом від 18 березня 2010 року щодо спеціальних обов'язків міністра, уповноваженого в питаннях державного казначейства, та їх здійснення в окремих компаніях і групах, що діють у галузях електроенергетики, нафти і палива. Серед основних повноважень державного казначейства щодо стратегічних компаній, що працюють в енергетичному секторі, є право на вето певних дій згідно із законами, прийнятими керівництвом компаній. Нині це право окреслюється як «золоте вето» казначейства і, з огляду на законодавство, не має корпоративного характеру (в рамках цивільного права), а стосується адміністративного порядку.

Герберт А. Экономическая безопасность государства и полномочия Министра казначейства относительно стратегических предприятий: опыт Польши.

Проанализировано организационно-правовые инструменты контроля так называемых «стратегических предприятий», которые есть в распоряжении польского министра финансов. Показана эволюция правовых решений, принятых в этой сфере, сделанных в основном под влиянием европейского права.