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## **REPORT ON CORPORATE GOVERNANCE IN STATE-OWNED ENTERPRISES – THE POLISH PERSPECTIVE**

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*Since the last Polish parliamentary elections in 2015, some deep changes have been announced in the legal framework of state-owned companies. The changes are supposed to be mainly targeted at setting different rules of remuneration policy of the boards' members compared to private-owned companies. They are meant to conquer recognised abuses in management and supervision areas of state-owned companies, which have not been overcome by recent, quite liberal legal regulations, nor by self-limitation and self-control. In addition corporate governance in Polish state-owned enterprises is facing massive changes. At the beginning of 2016, former Minister of Treasury Dawid Jackiewicz announced liquidation of the Ministry of Treasury in January 2017, and the revision of State's supervision over the SOE. After liquidation of the Ministry of Treasury, ownership rights over SOEs will be exercised by sector ministries. The aim of the paper is to analyse the implementation of Chapter II of the OECD Guidelines on Corporate Governance of State-Owned Enterprises' provisions into Polish legal order governing state-owned enterprises.*

**KEYWORDS:**

state-owned enterprises, Ministry of Treasury, Polish legal order

## 1. INTRODUCTION

The aim of this paper is to analyse the implementation of Chapter II of the OECD Guidelines on Corporate Governance of State-Owned Enterprises' (hereinafter: the OECD Guidelines) provisions into Polish legal order governing state-owned enterprises (hereinafter: the SOE).

More than 25 years ago in Poland a wide and rapid transformation of state enterprises into commercial companies began, making them operate according to roughly the same economic and legal rules as private-owned companies. Their insufficient supervision by the major shareholder (the state or other public authority) as well as common lack of wise management and self-limitation of people responsible for running state-owned companies combined with repeating nominations to the boards of persons with a decent political background instead of solid experience in business led to widely acknowledged abuses in managing state-owned companies in Poland over that time. They were especially seen as a privilege of interests for certain individuals and tied to political and business connections over unquestioned goals for the companies and their major shareholder. Since the great political and economic transformation in Poland in the late '80s, state-owned companies were recognised as "spoils of war" by the winners of parliamentary elections, which was a common sin of all political parties governing Poland over that time. After the elections, state-owned companies were subject to deep personal changes, which most of the times were not entirely motivated by merits.

Several months ago, as a result of the recent elections in Poland that took place in the fall of 2015, some deep changes have been announced in the legal framework of state-owned companies. It is worth mentioning that no significant changes have been made over the last 15 years, although the legal framework was far from perfect. The changes are supposed to be mainly targeted at setting different rules of remuneration policy for the boards' members compared to private-owned companies. They are meant to conquer recognised abuses in management and supervision areas of state-owned companies, which had not been overcome by recent, quite liberal legal regulations, nor by self-limitation and self-control. Also corporate governance in Polish state-owned enterprises is facing massive changes. At the beginning of 2016, former Minister of Treasury Dawid Jackiewicz announced the liquidation of the Ministry of Treasury in January 2017, and revision of State's supervision over the SOE. On 4 October 2016, the Prime Minister announced that ownership rights over SOEs would be exercised by sector ministries.

## 2. THE SOES' LEGAL FORMS (POINT A OF THE OECD GUIDELINES)

In Poland State-owned enterprises most commonly operate in the forms of capital companies, either a limited liability company or a joint-stock company. A marginal role is played by state enterprises which are entirely owned by the Treasury and operate by virtue of the State Enterprises Act on 25 September 1981. Currently, there are only two state enterprises which

are supervised by the Ministry of Treasury.<sup>1</sup> State enterprises are separate legal persons from the Treasury, but do not constitute capital companies within the meaning of the Commercial Companies Code of 15 September, 2000.

The majority of state-owned enterprises operate in the form of capital companies, to which provisions of the Commercial Companies Code of 15 September, 2000, are generally applicable. Thus, in external relations state-owned companies are generally subject to the same legal framework as private companies. Nonetheless, there exist specific provisions of competition law and law on public aid which apply to state-owned companies.

Further differences between state-owned and private companies consist of the way state-owned companies' internal relations are conducted. However, such differences are allowed under the OECD Guidelines.

When discussing the internal relations in the SOEs, consideration must be given to the regulations and ordinances of the Minister of Treasury or Prime Minister, which supplement generally applicable legal acts but lack sanctions for non-compliance. As a result, in Poland, there is no binding corporate governance code designated to state-owned companies. However, there exist The Principles of Corporate Supervision over Companies with State Treasury Shareholding (second edition) introduced by the Ministry of Treasury in 2005, but these should be regarded as a soft-law act with a rather limited practical impact.

The Principles contain recommendations regarding corporate governance, e.g.

- aims of corporate supervision;
- functioning of supervisory boards;
- functioning of management boards;
- monitoring entities within Treasury shareholding;
- cooperation of supervisory board and shareholder's proxy with a certified auditor, monitoring company audit;
- cooperation of supervisory units with supervisory boards or shareholder's proxies;
- supervision over subsidiaries.

The Principles were introduced in accordance with regulation No. 41 of the Minister of Treasury. While drafting The Principles the Ministry of Treasury collected comments, observations and suggestions from bodies managing and supervising commercial entities within State Treasury shareholding in order to further improve, streamline and increase the effectiveness of corporate supervision.

The Principles shall be considered as a soft law, since the Minister of Treasury is not empowered to issue generally applicable legal acts which regulate corporate governance in state-owned companies. Accordingly, the Principles do not provide for any specific rules on corporate governance, but rather gather existing principles into one document and express expectations of the state authority. Those expectations are treated as a guideline for government bodies or public entities in the process of developing their own solutions.

<sup>1</sup> I.e. *Biuro Urządzania Lasu i Geodezji Leśnej* and *Kopalnie i Zakłady Przetwórcze Siarki "SIARKOPOL" w Tarnobrzegu*.

There is a good practice, that being a copy of The Principles is sent to every newly appointed member of state-owned companies' supervisory board together with the notice of appointment. However, no *comply or explain* rule applies consequently and the Principles are rarely observed.

In its report of 2009, the Supreme Audit Office noted that establishment of internal regulations (including the Principles) enabled corporate supervision over state-owned companies. However, the regulations were not observed in practice (even by the Ministry of Treasury itself) or were improperly implemented. Furthermore, the Supreme Audit Office pointed out a number of irregularities, e.g. lack of analyses of companies' financial and economic standing.

In practice, major importance for the functioning of supervisory boards have schedules in the Principles, particularly Schedule 1 in the Principles, i.e. Recommendations for the Treasury's sole-shareholder companies and Treasury's majority-shareholder companies preparing annual financial statements of the company. The financial statements which are to be presented during the general meeting are based on Recommendations. Introduction of precise rules of reporting, especially the standard forms for financial statements, is an element of corporate governance in state-owned companies.

It is worth noting that state-owned companies listed on the Warsaw Stock Exchange are subject to the Best Practice of Warsaw Stock Exchange Listed Companies. In such event state-owned companies are obliged to observe the *comply or explain* rule. Nonetheless, the Best Practice of the GPW Listed Companies is generally applicable to all companies listed, regardless of whether the companies are state-owned or not.

### 3. THE SOES' MANAGEMENT AND INDEPENDENCE (POINTS B AND C OF THE OECD GUIDELINES)

Subsequent governments continue to intervene in the SOE's management and redefine SOE objectives in a non-transparent manner.

*The difference between interest of the SOE and interest of the State – its major shareholder – is still not observed.* This is exemplified by a practice of increasing SOEs share capital from reserve capital in order to advance budget revenues due to the CIT.

However, widening control over capital companies by majority shareholders is a regular practice, it seems to be a particularly sensitive issue in the SOEs.

Currently, the burning issue is political impact on hiring decisions in SOE, which is subject to wide criticism since the boards' members are removed regularly after parliamentary elections.<sup>2</sup> The SOEs' bodies which are most commonly put in jeopardy are supervisory

2 POSTUŁA, Igor (2013): *Nadzór korporacyjny w spółkach Skarbu Państwa*. Warszawa, Wolters Kluwer Polska S.A. Source: <https://sip.lex.pl/#/monografia/369268038/3> (9 October 2016); WIATROWSKI, Piotr (2014): *Niekonstytucyjna regulacja tzw. konkursów do rad nadzorczych spółek Skarbu Państwa*. In KIDYBA, Andrzej ed.: *Skarb Państwa a działalność gospodarcza*. Warszawa, Wolters Kluwer S.A. Source: <https://sip.lex.pl/#/monografia/369301832/66> (9 October 2016)

boards, as in state-owned companies' management board members are usually appointed and removed from the office by the supervisory board.<sup>3</sup> It should also be noted, that supervisory boards not only appoint management boards' members, but also run the qualification procedure for management boards. Thus, from a political perspective supervisory boards are the first port of call.

The Commercialization and Privatization Act is silent as regards qualification requirements of members of management boards. Nevertheless, according to sec. III (1) (2) of the Principles of Corporate Supervision over Companies with State Treasury Shareholding, boards members are expected to: possess appropriate educational background and experience, combined with resourcefulness and drive to continually improve the economic and financial standing of the company as well as aim at increasing its value and competitiveness. They should also have the ability to cooperate with the rest of the company employees. Such wording is open to a wide range of interpretations.

As regards supervisory boards, the selection process is conducted through a public qualification procedure, in accordance with Ordinance No. 45 of the Minister of Treasury of 6 December, 2007, on the principles and procedures for selecting candidates for the composition of supervisory boards in state-owned commercial companies and for supervisory boards of other legal entities supervised by the Minister of Treasury. Supervisory board members are appointed and removed from the office by the general meeting. However, in former state enterprises (which existed prior to 1989, now operating as commercial companies) two-fifths of the members are elected by employees and the election made by employees binds the general meeting (Art. 14 of the Commercialization and Privatisation Act).

Furthermore, members of supervisory boards must be qualified to sit on supervisory boards, which includes passing the exam for candidates for supervisory board members (art. 12 par. 2 of the Commercialisation and Privatisation Act) or having a license exempting them from the obligation to pass this exam, i.e. having a PhD degree in economics or in law or being listed as a legal advisor, attorney, certified auditor and/or investment advisor.

In practice, the applicable legal framework is insufficient to prevent or minimize the political impact on SOE's hiring policy. Scholars point to a number of practices which allow politics to intervene in SOE's management.

Firstly, qualification procedure to supervisory boards is conducted only if it is recommended by the Director of a particular Department of the Ministry of Treasury and accepted by the Minister of Treasury. If the election is to be organised without a qualification procedure, then the Ministry is not obliged to announce the election to the public (§ 3 of the Ordinance No. 45 of the Minister of Treasury of 6 December 2007). Such regulation renders the election procedure non-transparent and allows for nominations and appointments to SOE's boards based not on candidate's competences and experience but rather on political support.

3 The rule does not apply to board members elected by employees under art. 19a of the Commercialization and Privatization Act.

According to press information,<sup>4</sup> since the last parliamentary elections around 200 new board members were appointed. According to the Supreme Audit Office report, between 2004–2008, 65% of supervisory boards' members were removed without any justification.

Recently, it turned out that Bartłomiej Misiewicz, a public relations officer in the Ministry of National Defence and a Polska Grupa Zbrojeniowa S.A. (the armaments industry) supervisory board member, did not pass the exam for candidates for supervisory board members and has no higher education. Referring to the Misiewicz case, the Minister of National Defence Antoni Macierewicz stated that: “in the armaments industry there is no need for such a requirement [of higher education and passed exam] but there is a requirement for loyalty, cooperation, competence and decisiveness. All of these features are possessed by Mr. Misiewicz”.<sup>5</sup> The case of Misiewicz is not an exception. In 2005, the Supreme Audit Office<sup>6</sup> pointed out that 46% of supervisory board members did not pass the required exams although they were bound to do so. In this case it is explicit that when it comes to political interest the law is not observed at all. Furthermore, it shall be highlighted that there are no strict legal consequences of appointing a person who does not meet the formal requirements. Especially, nobody has ever been sued or criminally accused of breach of law here.

Secondly, appointment of the Ministry of Treasury officials as board members is regarded to be a bonus for an official, paid not by the Treasury but by the SOE.<sup>7</sup> Previously, candidates to supervisory boards employed by the Ministry of Treasury or by other ministries were appointed without a qualification procedure. Although the law concerning this issue has been amended, officials are still appointed outside of the public qualification process, as the qualification process is not obligatory. Furthermore, the Ministry of Treasury provided neither code of ethics for state officials serving as supervisory board members, nor conflict of interest rules. The problem was raised by the Supreme Audit Office in 2009, which stated: “it should be highlighted that participation of state officials in supervisory boards may lead to conflicts of interest. The reason for that is that one person merges work in the entity's supervisory board with supervision over the entity in the ministry”.<sup>8</sup>

4 CIEŚLA, Wojciech – KRZYMOWSKI, Michał (2016): *Dwustu ludzi dobrej zmiany*. Source: [www.newsweek.pl/polska/lista-nominacji-pis-w-spolkach-skarbu-panstwa-i-instytucjach-panstwowych,artykuly,381794,1.html](http://www.newsweek.pl/polska/lista-nominacji-pis-w-spolkach-skarbu-panstwa-i-instytucjach-panstwowych,artykuly,381794,1.html) (26 September 2016)

5 SKARŻYŃSKI, Stanisław (2016): *Afera misiewiczowa. Macierewicz złamał prawo*. Source <https://oko.press/afera-misiewiczowa-macierewicz-lamie-prawo/> (26 September 2016)

6 Najwyższa Izba Kontroli (2005): *Informacja o wynikach kontroli wykonywania obowiązków przez przedstawicieli Skarbu Państwa w spółkach prawa handlowego*. Source: [file:///Users/kaja/Downloads/px\\_1999061%20\(1\).pdf](file:///Users/kaja/Downloads/px_1999061%20(1).pdf) (9 October 2016)

7 POSTUŁA, Igor (2011): *Problemy polityki personalnej w radach nadzorczych spółek Skarbu Państwa. Problemy Zarządzania*, Vol. 9, No. 4 (34). 226–246. Source: [http://pz.wz.uw.edu.pl/sites/default/files/artykuly/pz\\_4\\_2011-1\\_postula.pdf](http://pz.wz.uw.edu.pl/sites/default/files/artykuly/pz_4_2011-1_postula.pdf) (9 October 2016); SIEMIĄTKOWSKI, Tomasz (2014): *Spółka Skarbu Państwa to nie przedsiębiorstwo państwowe*. In KIDYBA, Andrzej ed.: *Skarb Państwa a działalność gospodarcza*. Warszawa, Wolters Kluwer S.A. Source: <https://sip.lex.pl/#/monografia/369301832/66> (9 October 2016)

8 Najwyższa Izba Kontroli (2009): *Informacja o wynikach kontroli sprawowania nadzoru właścicielskiego w spółkach z większościami udziałem skarbu państwa*. Source: [www.nik.gov.pl/plik/id,1682,vp,1900.pdf](http://www.nik.gov.pl/plik/id,1682,vp,1900.pdf) (9 October 2016)

Taking into account that state officials are subordinated to the Minister of Treasury (or other minister), appointment of the State employees in SOEs' supervisory boards clearly jeopardises the boards' independence.

Considering further the issue of supervisory board members' independence, it should be explained that there are formal requirements as to the independence for members in supervisory boards in the Treasury's *sole-shareholder* companies. Art. 13 of Commercialisation and Privatisation Act provides that as long as the State Treasury remains the sole shareholder of the company, members of the supervisory board of that company shall not:

1. remain employed by the company or provide work or services for its benefit under another legal title;
2. have shares in companies set up by the company, except shares admitted to public trading under separate provisions;
3. remain employed by the companies referred to in subparagraph 2 or provide work or services for their benefit under another legal title;
4. perform work which would be contrary to their duties or might arouse suspicions of partiality or mercenariness. Furthermore, as a member of a supervisory board cannot be a person who is employed as a member of the Polish Parliament or European Parliament members' offices; or is employed by a political party or is a member of a representative body of political party.

Defects of such regulations are quite straightforward. First of all, there is no formal limit for a supervisory board candidate to be a member of political party. However, some authors argue that there is no need to introduce such limitation on candidates to supervisory boards as it does not prevent situations in which candidates would be supported by a political party.<sup>9</sup> Thus, possibly the only way to provide factual independence of supervisory boards' members is introducing an obligatory public qualification process and precise selection criterion.

#### 4. CENTRALISATION OF OWNERSHIP RIGHTS (POINT D OF THE OECD GUIDELINES)

Up to now Poland was assessed by the OECD as a one of the countries with centralized organization of ownership rights in SOEs.<sup>10</sup> Currently, the organization of ownership function over SOEs is subject to fundamental changes.

The ownership entity in the light of point D of the OECD Guidelines is the Ministry of Treasury. The Ministry of Treasury was created in 1996, and replaced the Ministry of Ownership Transformations. The Ministry of Treasury consist of ten Departments (i.e. Department of Ownership Supervision or Department of Strategic Companies) and Offices.

9 POSTUŁA 2011.

10 The OECD (2005): *OECD Comparative Report on Corporate Governance of State-Owned Enterprises*. Source: [www.thepresidency.gov.za/electronicreport/downloads/volume\\_4/business\\_case\\_viability/BC1\\_Research\\_Material/OECD\\_Comparative\\_Analysis.pdf](http://www.thepresidency.gov.za/electronicreport/downloads/volume_4/business_case_viability/BC1_Research_Material/OECD_Comparative_Analysis.pdf) (9 October 2016)

To date, the bulk of SOEs are under the supervision of the Ministry of the Treasury. A relatively small number of SOEs is (or – taking into account the recent changes – *was*) supervised by other Ministries, in particular by the Ministry of Energy and the Ministry of Infrastructure as well as by regional authorities.

Nonetheless, the Ministry of Treasury is to be liquidated in the first quarter of 2017. When announcing liquidation of the Ministry of Treasury, the Minister of Treasury Dawid Jackiewicz stated that the Ministry of Treasury is to be replaced by an agency or holding company. It was the Minister's duty to provide government with a draft legislation on the new organisation of ownership functions over SOEs.

In the first half of 2016, a number of SOEs was transferred from the Ministry of Treasury to the Ministry of Energy, Ministry of Development, Ministry of Economy, Ministry of Maritime Economy and Inland Navigation.

Surprisingly, the Minister of Treasury was dismissed by the Prime Minister on 15 September 2016, and the final stage of liquidation of the Ministry of Treasury will be supervised by Henryk Kowalczyk – head of the government's Standing Committee. In her official statement the Prime Minister said that: "Dawid Jackiewicz met his obligation. He presented a concept and statutory solutions. Now the Government will carry on legislative procedure".<sup>11</sup> The Prime Minister also pointed out that the supervision over State-owned companies is to be the most efficient, transparent and free from any pathology (i.e. political impact on board nominations).<sup>12</sup>

During the press conference on 4<sup>th</sup> of October, 2016, the Prime Minister and Minister Kowalczyk announced that substantive supervision over the SOEs will be exercised by sector ministries, whereas the ownership supervision will be exercised by a specially constituted body within the Chancellery of the Prime Minister, and kept under direct control of the Prime Minister. Furthermore, a council for State-owned companies is to be established within the new ownership entity. The council would be responsible for nominating and appointing candidates to SOEs' boards.<sup>13</sup>

In the light of OECD Guidelines, such change in ownership policy is a step backwards. On the conference<sup>14</sup> concerning SOEs on capital market, Professor Maciej Bałtowski considered that currently the State is destroying corporate governance in SOEs rather than mending it. The consequences of establishing a decentralised model of ownership function may be different than envisaged.

The reform of ownership function is justified by the will to combine the recent model of organisation together with sector expertise. However, the tendencies among the OCED countries are the opposite, and the countries aim instead to centralise ownership function. Referring to the decentralised model the OECD noted that: "[t]he main advantages and

11 Press release, source: [www.premier.gov.pl/wydarzenia/aktualnosci/likwidacja-ministerstwa-skarbu-panstwa.html](http://www.premier.gov.pl/wydarzenia/aktualnosci/likwidacja-ministerstwa-skarbu-panstwa.html) (8 October 2016)

12 *Ibid.*

13 Press release, source: [www.premier.gov.pl/wydarzenia/aktualnosci/nowy-nowoczesny-sposob-zarzadzania-spolkami-premier-beata-szydlo-o-nadzorze.html](http://www.premier.gov.pl/wydarzenia/aktualnosci/nowy-nowoczesny-sposob-zarzadzania-spolkami-premier-beata-szydlo-o-nadzorze.html) (8 October, 2016)

14 Conference "State-owned companies on capital market", Warsaw, 6 October, 2016.



rationale for such a decentralised organisation are sector expertise and the capacity to implement a more active industrial policy. With the shift from industry specific policies to more framework-oriented and market liberalisation policies, *the advantages of such an organisation have now vanished* (emph. added). The management of state-owned assets is shifting towards an ownership view with a focus on added value, and SOE are less perceived as instruments of industrial policy than they used to be<sup>15</sup>.

Furthermore, it should be highlighted that the decentralised organisation model was used in Poland prior to the transposition to market economy, and the restoration of a decentralised model carries a risk of negative connotations.

Unfortunately, at the moment of final completion of this paper (in mid-October 2016) no further official information or drafts have been presented to the public. Thus, it is impossible to address in detail other issues, such as the creation of an ownership entity within the Chancellery of the Prime Minister or council for State-owned companies. Nevertheless, it appears that the political impact on SOEs may be even stronger after the reform.

## 5. ACCOUNTABILITY OF THE OWNERSHIP ENTITY (POINT E OF THE OECD GUIDELINES)

Due to current centralisation of ownership rights in the Ministry of Treasury, the relationships with relevant public bodies are yet clearly defined and the Minister of Treasury is accountable for the way it carries out state ownership rights before the Parliament. The Parliament may demand the Minister resign from office or to be dismissed by Prime Minister. Furthermore, members of the Parliament have a right to ask the Ministry of Treasury questions regarding exercising of state ownership rights.

Annually, the Minister of Treasury provides the Government and the Parliament with a report on the economic and financial conditions of state assets as well as with a report on economic and financial conditions of SOEs. The reports are published in the Public Information Bulletin of the Ministry of Treasury and are available to anyone.

It should be explained that the Polish Supreme Audit Office is a constitutional body which supervises government administration as well as other entities listed in the Constitution and other acts (including SOE). The Supreme Audit Office is also empowered to provide entities with post-inspection instructions and recommendations.

The Supreme Audit Office inspected SOE a number of times (e.g. in 2005, 2009 and 2013), by its own motion as well as on request of other state bodies or members of Parliament, in terms of exercise of ownership supervision over SOE. However, the recommendations of the Supreme Audit Office are not always implemented or observed.

The autonomy of the Ministry of Treasury in terms of fulfilling its responsibilities is wide. The Ministry also enjoys some degree of budgetary autonomy that safeguards its flexibility.

Taking into account liquidation of the Ministry of Treasury in 2017, it is not yet clear how these issues will be regulated in terms of holding company or state agency.

<sup>15</sup> The OECD 2005.

## 6. POLAND AS A WELL INFORMED AND ACTIVE OWNER (POINT F OF THE OECD GUIDELINES)

Previously, Poland did not act as a well informed and active owner of the SOE. This was subject to criticism and noticed by the Supreme Audit Office's reports. In reports of 2005 and 2009, the Office negatively assessed activity of the Ministry of Treasury. However, in the 2013 report the assessment was positive.

### **6.1. Representation at the general shareholders' meetings (point F(1) of the OECD Guidelines)**

The State is represented at the general shareholders' meetings by the Department of Ownership Supervision of the Ministry of Treasury. The organizational structure of the Ministry of Treasury and competences of particular departments are governed by Ordinance No. 4 of the Minister of Treasury on establishment of organization rules and regulations of the Ministry of Treasury. It should be noted that organization rules and regulations are frequently amended and reflect political changes. Furthermore, detailed procedures of state representation and conduct of ownership supervision is subject to internal regulations of the Ministry which are not publicly available.

Certain departments of the Ministry of Treasury act as communication channels between the SOEs and the Ministry of Treasury. The SOEs provide adequate departments with periodical reports, information, draft resolutions which are further analysed and processed by state officials. Some authors point to the stabilizing role of state officials in exercising ownership rights as their work positions and duties are not dependent on any political factors.<sup>16</sup>

### **6.2. Board nomination process (point F(2) of the OECD Guidelines)**

As it was considered in point 3 of the Report, nominations to the SOEs' boards are severely politically impacted, and this has not been overcome for more than 25 years. Despite the establishment of a structured qualification process, there is still a possibility for a candidate to avoid its completion and become a member of the SOEs' body. Many of the criteria for candidates are based on flexible and unclear factors, which finally make it possible to appoint any desired person.

In the SOE's which are of key importance for the Treasury, candidates are selected by an external recruiter. However, the decisive factor standing behind the appointment is still political.<sup>17</sup>

In 2010, the government proposed the establishment of a nomination committee which would be competent to select and nominate candidates to supervisory boards of the most

<sup>16</sup> POSTUŁA 2013.

<sup>17</sup> *Ibid.*

important SOEs in the Treasury's portfolio. Unfortunately, the nomination committee was never established and the idea itself vanished from the public discussion.

It should be underlined that the existing legal framework requires candidates to SOEs' boards to have both a certain level of degree and experience. The Ministry of Treasury also provides Good Practices on the selection of boards' candidates to SOEs' of key importance for the Treasury. These regulations are not always observed in practice though.

In the line with OECD Guidelines, the Ministry of Treasury runs a database of candidates, who passed the exam for supervisory board members in the SOE. Data of persons who are exempted from completing the exam are added to the database on request. The database is not publicly accessible.

As regards the OECD Recommendation on Gender Equality in Education, Employment and Entrepreneurship, in June 2015, the Ministry of Treasury established Good Practices in terms of ensuring a balanced participation of women and men in the governing bodies of companies with state treasury shareholding. According to statistics of the Ministry of State Treasury, 29,5% of the members of the supervisory boards – representatives of the State Treasury in companies with the State Treasury shareholding listed on the Warsaw Stock Exchange – are women.<sup>18</sup> Thus, women are under-represented in supervisory and managerial positions in companies with State Treasury shareholding.

The Practices aimed at achieving at least 35% average participation of women among all the members of the supervisory boards selected and appointed by the Minister of State Treasury by the year 2020.

### **6.3. Reporting duties (point F(3) and (4) of the OECD Guidelines)**

Besides annual reports required under the Companies Act, SOEs are subject to additional reporting duties.

The SOEs provide the Ministry of Treasury with detailed reports on: management board activity, report on the SOE's activity in the previous financial year and report on the examination of financial reports.

Besides the mentioned reports, the SOE provides two quarterly reports. One, giving information on financial situation, financial credibility, the remuneration of employees and potential risks, is to be accepted by the supervisory board and submitted to the Ministry of Treasury. The second report on sureties and guarantees granted is to be submitted to the Ministry of Finance.

In order to provide timely and proper exercise of SOEs' reporting duties, the Ministry of Treasury annually provides SOEs with Guidelines on financial reporting.

<sup>18</sup> Ministerstwo Skarbu Państwa (2015): *Good practices in terms of ensuring a balanced participation of women and men in the governing bodies of companies with State Treasury shareholding*. Source: [www.msp.gov.pl/en/corporate-supervision-1/good-practices/7213,Good-practices-in-terms-of-ensuring-a-balanced-participation-of-women-and-men-in.html](http://www.msp.gov.pl/en/corporate-supervision-1/good-practices/7213,Good-practices-in-terms-of-ensuring-a-balanced-participation-of-women-and-men-in.html) (9 October 2016)

#### **6.4. Transparency and disclosure (point F(5) of the OECD Guidelines)**

There is no disclosure policy applicable exclusively to the SOEs. However, the SOEs are subject to generally applicable legal norms which provide for information disclosure, e.g. in case of public companies (i.e. companies listed on stock of exchange).

#### **6.5. External auditing (point F(6) of the OECD Guidelines)**

In Poland the SOEs in the form of joint-stock companies are required to be audited by a certified and independent external auditor.<sup>19</sup> It should be noted that such a requirement is not designed especially for the needs of SOEs, but generally applicable to all joint-stock companies. It is each supervisory board's responsibility to select an external auditor, and selection should be based on auditors' experience, independence and price. The external auditor's selection procedure is provided by Ordinance No 34 of the Minister of Treasury of 29 September, 2008.

Furthermore, the SOEs may be controlled by the Supreme Audit Office on its own motion or on third-party request.<sup>20</sup>

#### **6.6. Remuneration policy**

##### **6.6.1. Regulation on boards members' remuneration between 2000–2016**

Prior to the year 2000 there were no strict regulations aimed at setting any rules or limits for remunerations of the boards' members in state-owned companies in Poland. As a result of serial abuses exposed during the decade of the '90s, a new act was introduced in 2000.<sup>21</sup> It was primarily meant to target social expectations, thus its practical role in establishing effective limitations to excessive wages has often been questioned. The act of 2000, apart from state-owned companies also covered state agencies and other legal forms of entities owned or co-owned by the state and local governments, excluding state offices and administrative bodies. It focused on setting limits to remunerations of members of the management boards, supervisory boards and main accountants of the entities in question.

The act established numerous limitations in different areas referring to benefits received by members of the boards. It indicated a monthly wage as the base of the benefits, which could be supplemented in case of executives by an annual reward and additional benefits. The remuneration of state-owned companies was to be set by a shareholder's (state) representative. Its maximum amount was indirectly set by the act of 2000, and referred to

19 Art. 64 of the Accounting Act of 10 April, 2010 (consolidated text: Journal of Laws of 2016, item 1047).

20 Art. 2 of the Supreme Audit Office Act of 23 December, 1994 (consolidated text: Journal of Laws of 2015, item 1096 amended by Journal of Laws of 2016, item 677).

21 The act of 3 March, 2000, on remuneration of executives in certain legal entities (consolidated text: Journal of Laws of 2015, item 2099).

the index of an average monthly wage in enterprises as of the last quarter of the previous year as announced by the Central Statistical Office of Poland.<sup>22</sup> Thus the maximum amount of remuneration set out by the act of 2000, varied between the index level multiplied by 1 (for supervisory board members) and the index level multiplied by 6 (for management board members).

The annual reward could have been granted by the shareholder (state) if several conditions were met, mainly related to economic effects of the company during the previous year. Its maximum amount was set to the tripled monthly remuneration of the management board member who was to be granted the reward.

Additional benefits which could have been granted to management board members comprised of items such as insurance policy, bonuses to cover costs of living and commuting, etc.<sup>23</sup> Their total annual amount could not exceed a maximum annual amount of base remuneration for management board members. Any terms of contracts between state-owned companies and their boards' members that determined their benefits in the amounts exaggerating the maximums set out by the act of 2000, were null and void.

Summing up, according to the act of 2000, management board members had an opportunity for average monthly earnings equalled to approx. 7500 € gross (approx. 6000 € net pay),<sup>24</sup> excluding indirect benefits (additional insurance etc.). Compared to private companies and taking into account satisfactory economic results achieved by the company, this was rather a modest level of income, which could not be able to attract top managers and caused demands for seeking additional profits. That has led to an introduction of several practical cheats which were used to increase a total income of executives in state-owned companies. The practices including i.e. receiving additional remunerations for being boards' members in holding companies, preparing paid reports for the company or "golden parachute" contracts, revealed serious flaws in the act of 2000, thus making it ineffective towards business reality.

#### 6.6.2. *The new regulation of 2016, on boards members' remuneration*

As the act of 2000, had been widely criticised, not only because of its flaws and ineffectiveness in fighting excessive wages of executives, but also for setting improper and anti-incentive pay, the new government established in fall 2015, was determined to pass an updated regulation

22 The index for Q4 2015, which is the base for setting remunerations in 2016, equalled to 4280,39 PLN, which can be roughly converted as 1000 € gross (approx. 810 € net pay). It is worth mentioning that between 2010 and 2015, the index – for the purpose of setting the remuneration limit in state-owned companies – was artificially equalled to Q4 2009 and amounted to 3454,58 PLN (approx. 800 € gross, 650 € net pay). Thus for 5 years remunerations of boards' members in state-owned companies were not linked with the economic growth in Poland and placed behind current trends in private enterprises.

23 TOMASZEWSKA, Monika (2013): Prawo do świadczeń dodatkowych na tle przepisów ustawy o wynagradzaniu osób kierujących niektórymi osobami prawnymi (ustawy kominowej). *Gdańsko-Łódzkie Roczniki Prawa Pracy i Prawa Socjalnego*, 2013/3. page 129 and further.

24 Calculated as a maximum allowed monthly wage (6000 €) supplemented by a maximum allowed annual reward represented as a monthly average (18 000 € / 12 = 1500 €).

which was supposed to introduce a totally renewed approach. Consequently, on 9 June 2016, the act on rules of setting remunerations of executives in certain companies<sup>25</sup> was adopted. It was not supposed to replace nor repeal the act of 2000, however the new act sets out the rules for boards members' remuneration in all state-owned and local government-owned companies, including those with state participation at a level lower than 50%, leaving the hitherto rules determined by the act of 2000, in other state-owned entities.

The act of 2016, provides different determinants of executives' remunerations in companies. Their remuneration shall consist of two parts. The first one is fixed and depends on the operational level of the company, including its assets, incomes and employment rates. The fixed part depends on the index of an average monthly wage in enterprises as of the last quarter of the previous year announced by the Central Statistical Office of Poland, which is multiplied by 1 to 3 in small companies<sup>26</sup> and by 7 to 15 in the biggest companies<sup>27</sup> (there are 5 levels defining the company size). The exact rate of remuneration for executives is to be set by supervisory board. The board may also exempt from the rules set above under "special conditions" (certain examples have been provided by the Article 4 sec. 4 of the act), however if the remuneration granted shall be higher than the limits set out by the act, the state shareholder has to announce publicly the reasons for such ruling. In publicly traded companies (co-owned by the state) the remuneration can be set accordingly to the current levels in other publicly traded companies of a comparable size and branch of business.

The second part of remuneration (annual reward) is variable and depends on successful completion of business goals of the company in the previous fiscal year. Its amount may not be higher than 50% (not higher than 100% in publicly traded companies and in the biggest companies) of the annual fixed remuneration. The business goals are set out in resolutions of the supervisory board and may include i.e. increase of net gain or net income, change of production rate, reduction of costs, change of certain economic indexes, etc. The business goals for holdings are evaluated for the entire family of companies.

Management board members cannot be paid for acting as members of the boards of subsidiaries. They may however be granted additional profits, along with the remuneration (fixed and variable). If the supervisory board's resolution provides that, the executives may use the company's assets essential for their work, such as i.e. apartment, car, computers, mobile phones etc. Secondly, a terminal wage can be provided to an executive – replacing exaggerated "golden parachutes" –, which shall not be higher than his/her total fixed remuneration for 3 months, provided that he/she has acted as management board member for at least 12 months in the company. Thirdly, compensation rate for prohibition of competition has been severely limited and cannot exceed a 6-month fixed remuneration.

25 Journal of Laws of 2016, item 1202. The new act entered into force on 9 September 2016.

26 Having up to 10 employees or annual net turnover lower than 2 millions € or assets owned were lower than 2 millions € (at least two conditions met).

27 Having over 1251 employees or annual net turnover over 250 millions € or assets owned over 215 millions € (at least two conditions met).

Remuneration of supervisory board members is limited to the amount of an index of an average monthly wage in enterprises as of the last quarter of the previous year announced by the Central Statistical Office of Poland, which is multiplied by 0.5 in small companies and by 2.75 in the biggest companies.

In state-owned and local government-owned companies with their participation of at least 50% of shares, the resolutions setting remuneration levels and their grounds are published by the dominant shareholder and available on the internet.

## 7. CONCLUSION

As the Report shows, the ownership supervision in Poland still needs development and improvement. Unfortunately, the SOEs are regarded as part of a political scenery, connecting the tempting worlds of politics and business. Although a lot of time has passed during the last 25 years and many abuses have been revealed, hardly any efforts have been taken to improve transparency, efficiency and balance in SOEs. It may be argued that such an omission, although depriving and having adverse results for the State Treasury and SOEs, was comfortable for all major political parties which governed Poland.

Nevertheless, some current developments should be assessed positively, e.g. the new remuneration policy. If we compare the new remuneration rules with the old ones and then compare them with Chapter II, letter F.7 of the OECD Guidelines on Corporate Governance of State-Owned Enterprises (2015 Edition, p. 19), we can see general progress in fulfilling the goals set out by the Guidelines, especially in setting remunerations at levels than could attract and motivate qualified professionals. However if we combine it with a general unsatisfactory level of adopting Chapter II, letter F.2 rule of the OECD Guidelines (clear nomination policy), it may be questionable if this goal – of attracting well-skilled managers – can be effectively achieved, even though the remuneration levels shall not be seen as a problem. Also a link between the economic effectiveness of a company and remuneration levels has been introduced which seems to comply with fostering long- and medium-term interests of the enterprise in the OECD Guidelines. However still a clear remuneration policy is missing, allowing the levels to be adjusted in certain range in individual cases.

The new rules of 2016, can be described as more complex, apparently rather transparent and allowing to set comparable remunerations' levels with other publicly traded companies. However, the rules are not strict, allowing adjusting remuneration levels “manually” in certain cases, which may provide for justified results on one hand and help attract successful managers by setting their wages on a comparable level to private companies. On the other hand, it may lead to arbitrary decisions on remuneration, which would be based only to a minor extent on rules which are clear and common to everyone. The Ministry of State Treasury in Poland foresees savings of about 60 Millions PLN each year due to the new regulations on remuneration levels in state-owned companies.<sup>28</sup>

<sup>28</sup> Press release, source: <http://biznes.onet.pl/praca/ustawa-kominowa-wynagrodzenia-w-spolkach-sp-9-wrzesnia-2016/>

In the authors' view the main and still unsolved problem is the political impact on SOEs' supervisory and management boards. The practice of replacing SOEs' board members after parliamentary elections seems to be a bonus for the winning party. Unfortunately, such practice is perceived as *normal* by a part of society, and SOEs are treated as the property of the governing party. Thus, it appears to be of highest importance to provide *obligatory* public qualification process and establish an independent nomination council or committee to select board's candidates to SOEs in the Treasury's portfolio. The future will show whether a council for State-owned companies by the Chancellery of the Prime Minister will be independent enough to safeguard compliance with the OECD Guidelines, Chapter II, points B and C. However, the arrangement of the council within an ownership entity, which forms part of the Chancellery of the Prime Minister raises considerable scepticism as to its independence and autonomy.

Furthermore, the reform of ownership function is contrary to recommendation covered by point D, Chapter II of the OECD Guidelines.

The general situation of corporate governance in SOEs is harmful for SOEs itself. Over the last year,<sup>29</sup> value of SOEs noted on the Warsaw Stock Exchange decreased 39 million PLN,<sup>30</sup> and significant political impact on SOEs' management (even in the minority-owned companies) renders them unattractive for private investors. Due to government's ownership policy Professor R. Czerniawski proposed to classify SOEs on the Warsaw Stock of Exchange as high-risk companies.<sup>31</sup>

Taking into account, that SOEs still play an important role on Polish capital market, their shaky position could have undesirable effects on the economy. Thus, regardless of recent reform, there is a need for a diametrical change in policy on corporate governance of SOEs.

29 The author compared the value of listed SOEs just before parliamentary elections in 2015, and after one year

30 BIEDRZYCKI, Paweł (2016), *Wartość spółek Skarbu Państwa na giełdzie spadła o 39 mld zł od zwycięstwa PiS w wyborach*. Source: <https://strefainwestorow.pl/artykuly/20160926/wartosc-spolek-skarbu-panstwa-na-gieldzie-spadla-o-39-mld-zl-od-zwyciestwa-pis-w> (9 October 2016)

31 Conference "State-owned companies on capital market", Warsaw, 6 October 2016.



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