STRENGTHENING THE PRINCIPLES OF POLITICAL NEUTRALITY AND IMPARTIALITY AS THE PRINCIPLES OF THE CORPORATE GOVERNANCE OF NATIONAL AND LOCAL GOVERNMENT ENTITIES. EXAMPLE OF POLAND

1Robert Lizak, 2Sebastian Skuza
1PhD Student Master of Law, Student at Polish Academy of Sciences
2PhD, Assistant Professor at University of Warsaw, Faculty of Management
Email: 1robertpol25@wp.pl, 2sskuza@wz.uw.edu.pl

Abstract

After 1989, Poland started to establish a democratic system based on free market economy. This process encompassed a number of legal regulations which aimed to distance the civil service from any kinds of political influences and pressure which could raise suspicions as to partial actions, and also to limit the impact of politics on business.

Although the transformation began 25 years ago, it seems that the issue of insufficient political neutrality and impartiality is still with us. Therefore, the Authors believe that it may be worthwhile to improve the situation through changes to certain regulatory solutions. The goal of this paper is to point out certain defects or inconsistencies in the Act of 30 August 1996 on Commercialization and Privatization, as well as the Act of 21 August 1997 on Restricting Business Activity by Persons in Public Offices. Further, the Authors present their own proposals of legal solutions, which in their opinion would foster neutrality and impartiality on the national and local level.

In order to improve the distances between civil service and politics, the Authors believe that legal changes are necessary. The above proposals should not raise any doubts as they only lead to the increase of social trust.

Keywords: political neutrality and influences, business, person in public offices, state and local government

INTRODUCTION

After 1989, Poland started to establish a democratic system based on free market economy. This process encompassed a number of legal regulations which aimed to distance the civil service from any kinds of political influences and pressure which could raise suspicions as to partial actions, and also to limit the impact of politics on business. Such regulations were followed by the introduction of basic ethical principles, in particular the principle of political and official neutrality and impartiality. Impartiality means an independence from any external and non-substantive factors, in particular those which are personal, political or related to economic benefits [8]. In turn, political neutrality consists in loyalty and reliability in performing professional tasks, openly distancing from any political influences and pressure and refraining from any actions which could benefit political parties [7] [9]. Although the transformation began 25 years ago, it seems that the issue of insufficient political neutrality and impartiality is still with us. Therefore, the Authors believe that it may be worthwhile to improve the situation through changes to certain regulatory solutions. The goal of this paper is to point out certain defects or inconsistencies in the Act of 30 August 1996 on Commercialization and Privatization, as well as the Act of 21 August 1997 on Restricting Business Activity by Persons in Public Offices. Further, the Authors present their own proposals of legal solutions, which in their opinion would foster neutrality and impartiality on the national and local level.

I. GOVERNANCE OF NATIONAL AND LOCAL GOVERNMENT ENTITIES

Doing business is always related to the institution of corporate governance. This applies also to
entities under the control of the Treasury and to local government units. Therefore, the Act on Commercialization and Privatization concerns the requirements of functioning of supervisory bodies for national and local government legal entities (mainly commercialized capital companies of the Treasury in direct privatization). The specific nature of relations which concern entities under the control of the Treasury calls for certain restrictions or even bans as to the function of a member of the supervisory bodies of such entities. Above, pursuant to Article 12(2) of the Act on Commercialization and Privatization, a member of a supervisory board of a company with a majority stock held by the Treasury may only be a person entered into the data base operated by the Ministry of Treasury - for the persons who achieved qualifications through passing the examinations or hold licenses which exempt from the need to take such examination (e.g. license of a chartered auditor, legal counsel or a PhD in economy or law). However, the above specific nature of relations in companies with the capital of the Treasury requires certain restrictions as to the capacities of persons who may be members of supervisory boards. Such actions are taken to ensure professional work free from any pressures or other actions which are political in nature. For this purpose, on 6 December 2007 the Minister of Treasury issued the Ordinance No. 45 on the principles and manner of recruiting candidates to supervisory boards of commercial companies with the share of the Treasury and supervisory boards of other legal entities supervised by the Minister of Treasury.

II. THE CRITISISM OF THE SOLUTIONS ADOPTED IN THE ACT ON COMMERCIALISATION AND PRIVATISATION AND PROPOSALS OF CHANGES BY THE AUTHORS

The Authors start their discussion with the analysis of Article 15a of the Act on Commercialization and Privatization. This Article includes the ban on assuming the office of a member of a supervisory board in Treasury companies by persons indicated by the Treasury or other state-owned legal entities following persons:

1) persons employed in MP, senator, MP-senator MEP offices under an employment contract, contract of mandate or any such similar contract;
2) persons in bodies of political parties which represent such parties outside and are entitled to bind them;
3) persons employed by political parties under an employment contract.

Prima facie it appears that the scope of the above list is sufficient. The concept of introducing this exclusion seems fully justified, however the Authors believe that the list of exclusions should be expanded. A thorough analysis leads to different conclusions in the opinion of the Authors. According to the Authors, Article 15a of the Act on Commercialization and Privatization should include a specific list of entities which may not be a member of a supervisory board by state and local government employees whose offices are related to "life terms" of certain persons who hold management government and local government offices.

The most important thing here would be to expand the scope of Article 15a of the Act on Commercialization and Privatization by persons employed in the manner and under the rules defined in Article 47 of the Act of 16 September 1982 on Employees of State Offices. This Article indicates that the employment of:

1) an employee in the political office of the Prime Minister, the Deputy Prime Minister or any other Minister;
2) employees of the State, Local Government, and Municipalities, the Deputy Prime Minister, the Prime Minister, the Deputy Prime Minister, and local government employees;
3) employees of the State, Local Government, and Municipalities, the Deputy Prime Minister, the Prime Minister, the Deputy Prime Minister, and local government employees;
4) employees of the State, Local Government, and Municipalities, the Deputy Prime Minister, the Prime Minister, the Deputy Prime Minister, and local government employees.

It should be pointed out that this ban was introduced not that long time ago, in 2006. The ratio legis of the ban is to make supervisory boards less political by appointing persons who are competent and free from improper and direct political pressure. Pursuant to Article 15a of the Act on Commercialization and Privatization, persons indicated by the Treasury or other state-owned legal entities to assume the office of a member of a supervisory board of a company established by commercialization, may not be the following persons:

1 We should point out that pursuant to Article 69a(4) of the Act on Commercialization and Privatization, the ban defined in Article 15a applies also to companies established under the separate law and in the manner different than the one defined in this Act, whose shares are owned by the Treasury or any other state-owned legal entity, and to companies referred to in Article 1a, i.e. national enterprises and single-member Treasury companies of particular importance to the national economy. Moreover, pursuant to Article 68(1), the Act on Commercialization and Privatization and secondary legislation apply to the commercialization and privatization of municipal enterprises, respectively [17].
2 Cf. Section VI (C) and (D) of OECD Guidelines on Corporate Governance of State-Owned Enterprises [14].
2) advisors or persons with advisory functions who hold management state offices other than those listed in (1)

- takes place under an employment contract concluded for the term of the management state office. Any earlier termination of the employment contract may be done with a two-week notice.

As pointed out by M. Mazuryk, establishing and terminating an employment relationship with the persons indicated in Article 47¹ of the Act of 16 September 1982 on Employees of State Offices takes place in this way as their employment status depends on political factor [4]. Political cabinets appeared in Poland as a part of actions which aim to separate politics and civil service. According to J. Czaputowicz, the starting point was the belief that in order for administration to work properly, it is important to separate the function of the political administration ("for ruling") and executive administration [2]. This separation was expressed in Article 39(1)(3) of the Act of 8 August 1996 on the Organization and Manner of Activities of the Council of Ministers and on the Scope of Activities of Ministers. Pursuant to this Article, a political cabinet of the Minister should be a separate organizational unit in each Ministry. Such a unit should be a basic place of preparing programme decisions for the Minister and main political directions of their performance, while keeping them in line with the Government's policy. It should be also added that the political cabinet in essence does not operate "outwards", i.e. it does not administer or supervise anything, does not issue any professional orders or decisions. The only recipient of the cabinet's works is the Minister himself, who has a final word on programme decisions and bears responsibility for them [2]. The intention of establishing the above units in Ministries was to ensure the coordination of actions of individual Ministries with political goals set by the top officials of political parties represented by the Ministers. We should also answer the question about who are the members of the political cabinet. Some authors even suggest that mostly these are political friends of Ministers who did not get into the Parliament or sometimes even personal friends. These authors indicate that the activity of political cabinets is criticized for their overexpansion, participation in secret financing of political parties, mixing their roles and tasks with those of substantive units, or interfering with civil service [2]. M. Mazuryk pointed to the fact that employees of political cabinets are not subject to the rules of the operations of administration, which means that they do not have disciplinary responsibility like civil servants; such practice may lead to corruption, especially as the employees of political cabinets maintain numerous contacts with lobbyists, trade unions or entrepreneurs [3] [4].

The above considerations lead to a conclusion that the employees of political cabinets are obviously dependent on political factors. Therefore, it is reasonable to say that there are serious doubts as to the independence of members of supervisory boards who are at the same time employees of political cabinets. According to I. Postuła, the impact of political factors on supervisory boards is the most important problem related to the functioning of supervisory boards of Treasury companies, as the recruitment of members to such boards depends on political factors and also, there is political pressure on such members [12]. Moreover, I. Postuła pointed out that it is impossible to ensure the political independence of members of supervisory boards. He indicated that even a total ban on membership in political parties for members of supervisory boards, which is not in place in Poland, would not guarantee that members of such boards would be only persons unaffiliated with political parties [12]. According to the Authors, the above opinion may be accepted only in part, as the goal of the ban defined in Article 15a of the Act on Commercialization and Privatization is not the ban on membership in supervisory boards for persons affiliated with political parties in any way, but only for those who have direct contact with MPs or other prominent politicians. Therefore, it is justified to differentiate between a member of a political party who does not conduct direct political activity from a party member employed e.g. in an MP office. The latter is much more politically dependent than the former. The very fact of dealing with issues strictly related to the implementation of political programmers may raise serious concerns as to the possible impartiality and the conflict of interests between different goals set between the activity of business entities and the activity of political cabinets. According to the Authors, a much bigger conflict of interests may be raised by appointing a person to the supervisory board of a company with the majority stock held by the Treasury if such a person is a member of a political cabinet - member of a political party, than a person who is not a member of a political party and is employed by such a party e.g. as an accountant.

Moreover, the Authors believe it is justified to expand the list of persons indicated in Article 15a of the Act on Commercialization and Privatization...
by a certain category of local government employees, namely advisors and assistants. Pursuant to Article 4(2) of the Act of 21 November 2008 on Local Government Employees, such employees are employed as:

1) civil servants, including managers;
2) advisors and assistants;
3) support employees.

Pursuant to Article 17 of the Act on Local Government Employees, the commune head (mayor, city president), staroste and marshal of voivodeship may employ people as advisors and assistants in the commune office, poviate staroste office and marshal office, respectively. The above persons are employed for the term of office of the commune head (mayor, city president), staroste or marshal, respectively. Any earlier termination of the employment contract may be done with a two-week notice. The number of employed advisors and assistants may not exceed:

1) in communes up to 20,000 inhabitants - 3 persons;
2) in communes up to 100,000 inhabitants and poviates - 5 persons;
3) in other communes and voivodeships - 7 persons.

Considering the above, it is justified to raise the de lege ferenda issue about the expansion of the ban on holding the office of a member of a supervisory board of a Treasury company to persons whose employment is related to employment of other persons who were appointed or chose to assume high state or local government offices. The amendment would consist in adding (1a) and (1b) to Article 15a of the Act on Commercialization and Privatization.

Below is the Author's amendment proposal:

Article 1. In Article 15a of the Act of 30 August 1996 on Commercialization and Privatization (Journal of Laws of 2013, item 216, as amended), after (1), points (1a) and (1b) are added in the following wording:

"1a) employed under an employment contract concluded for the term of the person who holds the management state office;
1b) employed for the term of office of the commune head (mayor, city president), staroste or marshal, respectively."

Article 2. Combining the office of a member of a supervisory board with the employment covered by the ban set forth in Article 15a(1a) and (1b) of the Act referred to in Article 1 shall result in the expiry of the mandate of the member of a supervisory board 3 months after the effective date of this Act, unless the employment of the member of a supervisory board set forth in Article 15a(1a) and (1b) of the Act referred to in Article 1 is terminated.

III. THE CRITISIM OF THE SOLUTIONS ADOPTED IN THE ACT ON RESTRICTING BUSINESS ACTIVITY BY PERSONS IN PUBLIC OFFICES AND PROPOSALS OF CHANGES BY THE AUTHORS

In the case of the Act of 21 August 1997 on Restricting Business Activity by Persons in Public Offices (the "Anti-Corruption Act"), the Authors believe it is necessary to change its scope of persons affected. Firstly, the list of persons for which the Anti-Corruption Act introduces a restriction in running business activity should include persons employed under an employment contract concluded for the term of the person who holds the management state office, i.e. persons referred to in Article 47¹ of the Act on Employees of State Offices and persons listed in Article 17(2) of the Act on Local Government Employees. It seems that this proposal does not require further justification, taking into account the above considerations on proposals of amendments to the Act on Commercialization and Privatization. The above amendment would consists in adding (2b) and (2c) to Article 2 of the Anti-Corruption Act. Although obviously the vast majority of employees of political cabinets - due to the amount of their remunerations - is subject to the Anti-Corruption Act due to Article 2(2) of this Act (i.e. it covers the groups of employees of state offices, including civil servants, who hold positions equal in terms of remuneration to the employees of state offices on management positions), in the opinions of the Authors it would be reasonable to isolate this group and impose on it a total ban on participating in supervisory boards.

Below is the Author's amendment proposal:

In Article 2 of the Act of 21 August 1997 on Restricting Business Activity by Persons in Public Offices (Journal of Laws of 2006, No 216, item 1584, as amended), after (2a), points (2b) and (2c) are added in the following wording:
2b) employees of state offices employed under an employment contract concluded for the term of the person who holds the management state office;

2c) local government employees employed for the term of office of the commune head (mayor, city president), staroste or marshal, respectively;”.

Moreover, according to the Authors, the list defined in Article 2 of the Anti-Corruption Act should include civil servants employed in the office which provides assistance for the minister competent for the Treasury. Currently, the Anti-Corruption Act includes - out of employees of all Ministries - only civil servants employed in the office which provides assistance for the minister competent for public finance. Such entities were included in the restrictions of the Anti-Corruption Act in 2004. Back then it was argued that the goal of the amendment which consisted in including the above mentioned civil servants in the Anti-Corruption Act was to make the regulations tighter. Although the justification for that amendment was not precise, it seems that including such civil servants in the Anti-Corruption Act was a result of the nature of tasks of individual organizational units of the office. It seems that the simultaneous running of business activity and performing professional tasks by civil servants employed in the office which provides assistance for the minister competent for public finance may raise doubts as to their impartiality, and therefore reduce trust for a state office. Similar conclusions may concern civil servants employed in the office which provides assistance for the minister competent for the Treasury, considering the simultaneous running of business activity and performing professional tasks related for example to the process of privatization or performing ownership supervision in Treasury companies. Especially since such tasks are determined by political factors. Hence, the amendment of the Anti-Corruption Act which consists in including the employees of the Ministry of Treasury in the Anti-Corruption Act is well-grounded in the opinion of the Authors. In the case of introducing this amendment it should be also remembered that civil servants employed in the office which provides assistance for the minister competent for the Treasury should be excluded from the ban to assume the office or perform the functions of members of management boards, supervisory boards or auditing committees in commercial companies referred to in Article 4(1) of the Anti-Corruption Act. This may be done by adding (2a) to Article 6(1) of this Act.

Below is the Author's amendment proposal:

In Article 2 of the Act of 21 August 1997 on Restricting Business Activity by Persons in Public Offices (Journal Laws of 2006, No. 216, item 1584, as amended), (2a) receives the following wording:

“2a) other than those listed in (1) and (2) civil servants employed in the office which provides assistance for the minister competent for public finance and the minister competent for the Treasury;”.

The analysis of Article 6(1) of the Anti-Corruption Act suggest that it needs one more amendment. Considering the institution of preference shares as to votes, which operates in the Polish legal system, we suggest adding to Article 6(1) of the Anti-Corruption Act the words "or 50% of the total number of votes". This amendment means that the ban on assuming the office or perform the functions of members of management boards, supervisory boards or auditing committees in commercial companies will not apply to certain persons listed in Article 2 of the Anti-Corruption Act, if they are appointed to such offices or functions by companies in which the interest of the Treasury exceeds 50% of the share capital, 50% of number of shares or 50% of the total number of votes. It should be pointed out that the total number of votes means the sum of votes assigned to all shares of the company in question. The literature widely accepts the division of rights resulting from shares between property rights and corporate (organizational) rights which is based on the criterion of interest represented by such right. The corporate rights granted to the share owner in particular includes the voting right at the General Meetings, which is considered one of the most important rights. At the same time, it is stressed that in the corporate law there is the general rules "one share - one vote". Pursuant to Article 411 § 1 of the Act of 15 September 2000 - the Code of Commercial Companies and Partnerships gives the right to one vote at the general meeting. In this case, purchasing

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3 Article 2(2a) of the Act on Restricting Business Activity by Persons in Public Offices was added through Article 19 of the Act of 27 June 2003 on Establishing Voivodeship Treasury Boards and Changes to Certain Acts Which Regulate Tasks and Competences of Authorities and the Organization of Organizational Units Subject to the Minister Competent for Public Finance [20].

the majority stock in a company is in theory equivalent to acquiring control over such a company. For in theory there may be a situation in which a shareholder with the interest which exceeds 50% of the share capital or who holds 50% of the number of shares will not have a decisive say in the company. In the corporate practice of many countries, including Poland, it is acceptable to waive the rules "one share - one vote" [13]. Pursuant to Article 351 § 1 of the Act - the Code of Commercial Companies and Partnerships, a company may issue shares with special rights, which should be defined in its articles of association (preference shares). The preference may concern in particular the voting right, the right to dividend or the right to the division of property in the case of the liquidation of the company. Shares with preference as to votes grant the right to two votes. It should be pointed out that the preference as to the voting right does not apply to a public company. Therefore, holding an interest which exceeds 50% of the share capital or 50% of the number of shares does not always mean that an entity has a decisive say in the company. This takes place in particular in the case of shares with preference as to the voting right. Shares with preference as to the voting right may affect the legal status of a shareholder who holds less than 50% of the number of shares in such a way that his real say in the company will increase and in some cases may be decisive. As pointed out by M. Michalski, the criterion of the capital participation expressed in holding an interest which exceeds a half of the share capital is not a fully transparent indicator of relations between companies (shareholders) as shaping the stance of a company controlled under the corporate procedures takes place through using the power of votes granted by shares [10]. A similar opinion was presented by W. Olejnik, who claimed that a share which authorized to execute more votes at a general meeting allows the meeting to make decisions against the will of shareholders who represent the majority of stock. Such a right runs contrary to the principle of the rule of majority, which defines the nature of such a company [11]. To sum up, it should be pointed out that holding an interest which exceeds 50% of the share capital or 50% of the number of shares does not automatically grant a decisive say on the company's business. Articles of association, by granting voting preferences, in some cases make it possible for one entity to acquire control over the company without the concentration of shares held by him. If at the company there are shares with preference as to votes, this may have a significant impact on the corporate mechanisms of a joint-stock company, including the say on the company's business or even controlling such a company. Considering the above, the Authors believe that the wording of Article 6(1) of the Anti-Corruption Act should be supplemented by the phrase "or 50% of the total number of votes". In consequence, i.e. by adding the phrase "or 50% of the total number of votes", amendments should be made also to Article 2(9) of the Anti-Corruption Act, which states that this Act applies of employees of single-member Treasury companies and companies in which the interest of the Treasury exceeds the 50% of the share capital or 50% of the total number of shares, who hold the offices of: the president, vice-president and member of the management board.

Moreover, the Authors point out to certain doubt in Article 6(2) of the Anti-Corruption Act, whose wording suggests that persons included the Anti-Corruption Act but who may hold offices in supervisory boards of certain companies may also receive a separate remuneration for performing functions in a commercial company to which they were appointed as representatives of the Treasury under the rules set forth in the Act of 3 March 2000 on Remuneration for Persons Who Manage Certain Legal Entities ("the Cap Act"). According to the Authors, entities covered for determining remunerations by the Cap Act are subject to separate regulations, and remuneration in corporate bodies should not differ depending on whose representative you are. Moreover, it should be pointed out that this rule applies only to the representatives of the Treasury and not to representatives of e.g. state-owned legal entities or local governments. In conclusion, the Authors suggest deleting the above clause.

Below is the Author's amendment proposal:

In the Act of 21 August 1997 on Restricting Business Activity by Persons in Public Offices (Journal Laws of 2006, No. 216, item 1584, as amended), the following amendments are introduced:

1) Article 2(9) receives the following wording:

"9) employees of single-member Treasury companies and companies in which the interest of the Treasury exceeds the 50% of the share capital or 50% of the total number of votes, who hold the offices of: the president, vice-president and member of the management board.

2) Article 6 receives the following wording:
Article 6. The ban on holding offices in bodies of the companies referred to Article 4(1), does not apply to persons listed in Article 2 (1), (2), (2a) and (6)-(10), unless they are appointed to such offices in a commercial company by: the Treasury, other state-owned legal entities, companies in which the interest of Treasury exceeds 50% of the share capital, 50% of the number of shares or 50% of the total number of votes, local government entities, their associations or other legal entities of local government units; such persons may not be appointed to more than two commercial companies with the interest of the entities which appoint such persons.

Conclusion

To sum up, in order to improve the distances between civil service and politics, the Authors believe that legal changes are necessary. The goal of this article is to raise the de lege ferenda issue as to "tightening" of the functioning of governance principles (in terms both to subject and object) in entities controlled by the Treasury and local government units. The above proposals should not raise any doubts as they only lead to the increase of social trust. Considering the above, it is reasonable to expand the current statutory bans and treat them as an effective way to mitigate pathologies in public life.
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