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OECD GUIDELINES ON CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES FROM HUNGARIAN STATE-OWNED ENTERPRISES' POINT OF VIEW

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The OECD regularly monitors and analyses the activities of economic operators and draws up recommendations in order to provide the OECD Member States with existing suggestions based on several decades of experience.

The OECD developed recommendations on the issue of responsible corporate governance systems and suggested some principles for the effective, transparent and responsible operation of state-owned enterprises for the first time in 2005. In these principles, the OECD made suggestions on how the state should conduct itself as regards the exercise of state proprietary rights in order to make it the most appropriate.¹

KEYWORDS:

company law, business law, corporate governance, state-owned company

¹ OECD Guidelines on Corporate Governance of State-Owned Enterprises. Source: www.oecd.org/corporate/guidelines-corporate-governance-SOEs.htm 3. (25 October 2016)

1. GENERAL CHARACTERISTICS OF HUNGARIAN STATE-OWNED ENTERPRISES

Prior to the regime change of 1989–1990 the companies were almost exclusively owned by the state in Hungary, and as a result of the privatization carried out in several steps private ownership became dominant and the number of state-owned enterprises significantly decreased.

Nowadays, the Hungarian State has ownership interest in more than six hundred business entities. It is a general asset policy goal that the uniform supervision of state-owned enterprises shall be implemented, however, in some cases if it is needed by the professional supervision of the enterprise, proprietary rights over the enterprises are not exercised in line with the general rules (see below). According to the general rules² the proprietary rights and obligations are exercised and fulfilled by the Hungarian National Asset Management Ltd. (hereinafter: MNV Zrt.) as owner over the state asset entrusted thereto,³ unless otherwise stipulated by law⁴ or ministerial decree,⁵ whereas the state shareholder's rights of the MNV Zrt. are exercised by the Minister of National Development responsible for state assets with the exemption defined in CVI of 2007 on State Assets (Vtv.).⁶

General provisions concerning domestic business entities are laid down in Act V of 2013 on the Civil Code (hereinafter referred to as Civil Code), which provides that business entities are incorporated enterprises established with the financial contribution of their members in order to engage in joint professional economic activities, and whose profit or loss are shared by members.

At the same time, Article 29(1) of Vtv. sets out a restrictive condition with regard to the State, providing that the State shall only participate, through a body acting as its legal representative, in a business entity or shall primarily establish a business entity in which its liability does not exceed the amount of its financial contribution. Therefore, a State-owned company may only be established as a limited liability company or a private limited company.

Pursuant to Act CXXII of 2009 on the more economical functioning of business entities in public ownership (Act CXXII of 2009), business entities in public ownership are business entities in which the Hungarian State, a local government, an incorporated partnership of the local government with legal personality, a multi-purpose micro-regional association, a development council, an ethnic minority self-government, a partnership of an ethnic

2 See Act CVI of 2007 on State Assets (hereinafter referred to as Vtv.)

3 Article 3(1) of Vtv.

4 For example the proprietary rights are exercised by the Ministry of National Development (NFM) over VPE Rail Capacity Allocation Office based on Article 67/U (1–2) of Act CLXXXIII of 2005 on Rail Transportation, or over the HungaroControl Zrt. based on Article 61/A (1–2(d)) of Act XCVII of 1995 on Air Transportation, or the above mentioned Act on the Hungarian Development Bank is also an act of this type.

5 The minister responsible for the supervision of state assets exercises proprietary rights over eighteen strategic priority business entities on the basis of the NFM Decree 77/2012 (XII. 22) on the designation of the organization exercising all state proprietary rights and obligations.

6 Article 19(1) of Vtv.

minority local government with legal personality, a budgetary body or a public foundation exercise, individually or collectively, majority influence. Majority influence, however, means a relationship through which the influential party owns, directly or through the voting rights of another incorporated entity (intermediary) having voting rights in the incorporated entity concerned, more than fifty percent of votes in an incorporated entity, provided that, on identifying indirect influence, the share of votes of another incorporated entity (intermediary) having voting rights in the incorporated entity shall be multiplied with the share of votes of the influential party in the intermediary or intermediaries; where, however, its share of votes in the intermediary is more than fifty percent, it shall be taken into account as a single whole. On calculating influence, indirect influence below twenty-five percent needs not be taken into consideration.

In other words, the concept of a business entity in public ownership is defined by the law in a manner to ensure that companies under the majority influence of incorporated entities associated with the State or with local or ethnic minority self-governments fall into that group. That solution ensures that subsidiaries are also included in the scope of the system of rules to ensure transparency and economy.

On the basis of the Civil Code, a limited liability company is established with an authorised capital consisting of capital contributions of a prescribed amount, while members are obliged vis-à-vis the company to provide their capital contributions and other services of a pecuniary value as provided for in the articles of association. Unless the Civil Code otherwise provides, members shall not be responsible for the liabilities of the company.

A company limited by shares operates with a share capital consisting of shares of a prescribed number and nominal value, while shareholders are obliged vis-à-vis the company to provide an amount equivalent to the nominal value or issue value of their shares. Unless the Civil Code otherwise provides, shareholders shall not be responsible for the liabilities of the company. Companies limited by share, whose shares have been listed on a stock exchange are public limited companies (hereinafter referred to as PLC), while those whose shares are not listed on a stock exchange are private limited companies (hereinafter referred to as Ltd.).

Based on the regulation of the inheritance act, i.e., in the absence of other heir the state, without the right of refusal, shall act as a necessary heir, business shares of other corporate forms, mostly limited partnerships, are temporarily also added to the ownership of the Hungarian State.

The State inherits business shares in a range of businesses, where the activities of these companies do not fall under the role of the State in any aspect.

Within the properties entrusted to MNV Zrt., there are currently 237 business shares inherited by the State. On average, 100 to 120 shares of varying value and representing a varying ratio of ownership are inherited by the State each year; the owner's rights over these shares are exercised by MNV Zrt.

The distribution of companies within the total properties entrusted to MNV Zrt. is as follows:

Companies, total	498
majority ownership	306
minority ownership	192
Directly managed	424
majority ownership	237
minority ownership	187
Active	261
majority ownership	133
minority ownership	128
liquidation pending	72
majority ownership	41
minority ownership	31
forced deletion pending	74
majority ownership	51
minority ownership	23
procedure for the declaration of being defunct	2
majority ownership	1
minority ownership	1
final settlement pending	15
majority ownership	11
minority ownership	4
Conferred on commission (functioning)	71
majority ownership	69
minority ownership	2
Conferred for property management (functioning)	1
minority ownership	1
Under its property management (functioning)	2
minority ownership	2
Type of company	
Agricultural co-operative	2
minority ownership	2
State-owned company	6
majority ownership	6
Limited partnership	10
majority ownership	1
minority ownership	9
Other co-operative	4

	majority ownership	1
	minority ownership	3
Limited liability company		264
	majority ownership	167
	minority ownership	97
Public benefit company		2
	majority ownership	2
Non-profit limited liability company		92
	majority ownership	75
	minority ownership	17
Non-profit joint stock company		5
	majority ownership	4
	minority ownership	1
Joint stock company		112
	majority ownership	50
	minority ownership	62

Source: data provision of MNV Zrt. (2 November 2016)

The Ministry of National Development supervises twenty-five business entities directly and more than five hundred entities indirectly through the MNV Zrt. Out of the twenty-five business entities directly supervised by the Minister of National Development the companies related to the financial service system, such as the MFB Group, the Magyar Posta and the public utility companies are managed by a government commissioner.

From among the further twenty-one business entities the MNV Zrt., the Magyar Államvasutak Zrt., the Győr–Sopron–Ebenfurt Vasút Zrt., the Antenna Hungária Hungarian Broadcasting and Radio Telecommunications Ltd., the Magyar Közút Nonprofit Zrt., the Hungaroring Sport Zrt., the HungaroControl Zrt., or the MAHART PassNave Személyhajózási Kft. are the best-known.

From among the more than five hundred entities included in the portfolio of the MNV Zrt. and supervised indirectly by the Minister of National Development three hundred and thirty-seven are in operation, the largest of them are the MVM Hungarian Electricity Ltd., the Szerencsejáték Zrt., the Volán companies, the water utility companies⁷ and the waste-management holding.⁸

Aggregated data of the composition of company shares included in the portfolio of the MNV Zrt.

7 ÉRV Északmagyarországi Regionális Vízművek Zártkörűen Működő Részvénytársaság, ÉDV Északdunántúli Vízmű Zártkörűen Működő Részvénytársaság, TRV Tiszamenti Regionális Vízművek Zrt., DMRV Duna Menti Regionális Vízmű Zrt., DRV Dunántúli Regionális Vízmű Zrt.

8 The NHKV Nemzeti Hulladékgazdálkodási Koordináló és Vagyonkezelő Zrt. is the waste-management holding The NHKV Zrt. has qualified sixteen companies as its subsidiaries.

Company shares	The amount of company shares (pcs)	The amount of company shares (%)
The total amount of company shares included in the portfolio of the MNV Zrt.	498 pcs	100,00%
The total amount of shares directly managed by the MNV Zrt.	424 pcs	85,14%
The total amount of shares transferred for entrustment or asset management	71 pcs	14,25%
The total amount of shares of majority state-owned (50%+1 votes) companies directly managed by the MNV Zrt.	237 pcs	47,59%
The total amount of shares of minority state-owned companies directly managed by the MNV Zrt.	187 pcs	37,55%
The total amount of shares of operating companies directly managed by the MNV Zrt.	261 pcs	52,40%
The total amount of shares of non-operating (v.a, f.a, kt.a) companies directly managed by the MNV Zrt.	163 pcs	32,73%

Source: data provision by the MNV Zrt. (2 November 2016)

The business entities directly and indirectly supervised by the Minister of National Development employ nearly a hundred thousand employees.

The above-mentioned companies show a rather heterogenic picture regarding the tasks (e.g. public service companies, or market oriented companies), the internal operation (e.g. of holding system, independent or business entities having one or two subsidiaries), the business operation and management (e.g. companies operating purely from budgetary resources, or their own turnover/profit). Therefore different organizing principles have been formulated considering which business entities are supervised by the Ministry of National Development and which by the MNV Zrt. Regarding this issue, of course, the effective legal regulations are the most determinant, since in principle those who are exercising proprietary rights are designated on the basis of legislation.⁹

The MNV Zrt. exercising general proprietary rights is responsible for providing the structure of exercising effective proprietary rights as regards the wide range state-owned company assets.

Besides this, central budgetary institutions or other entities can exercise ownership (membership or shareholders') rights on behalf of the state in state-owned business entities on the basis of a contract concluded with the MNV Zrt.¹⁰ In this case another entity may

⁹ See Article 3 of Vtv.

¹⁰ According to Article 29(5) of Vtv. 29.

proceed in the name and on behalf of the entity, who exercises proprietary rights according to the shares in the company, as agent while exercising the specified parts of the proprietary rights. In accordance with the agency agreement, the agent is limited in exercising the proprietary rights, which are stipulated in the agency agreement, over the business entity, for example the agent shall ask for the principal's prior agreement to the exercise of the voting rights related to the shares in certain issues defined in the agency agreement.

In addition to the general exercise of proprietary rights (MNV Zrt.) the exercise of proprietary rights based on an agency agreement is an exemption; most of the ministries manage the business entities on this ground.

Regarding the determination of the person exercising proprietary rights we shall consider the characteristics of the operation, structure and task fulfilment of the business entities as well, for example there are business entities whose task can be fulfilled and the ownership control related thereto can be carried out in a more effective way if the owner also has regional/territorial agencies (e.g. water utility companies, or the VOLÁN companies). It is expedient to have these business entities supervised by the MNV Zrt., i.e. to let the principle prevail regarding the exercise of proprietary rights. There are also areas where the fulfilment of public task can be supported more effectively under the direct supervision of the minister since the competent ministries have separate state secretariats related to these areas, thereby the ownership and professional supervision can be more effective. For example, the Minister of National Development responsible for transport policy exercises proprietary rights over the Magyar Államvasutak Zrt. and the Magyar Közút Zrt., or the Minister of Agriculture responsible for agricultural policy exercises proprietary rights over the Agrármarketing Centrum Kft.

2. RESPONSIBLE CORPORATE GOVERNANCE AND THE GOVERNING BODIES OF STATE-OWNED ENTERPRISES

2.1. State-owned business entities from ownership point of view

The effective supervision of the state-owned business entities requires that each business entity shall operate according to the same principles and corporate regulations while considering the characteristics due to the special situations of the certain entities. The normative and other standard thereof shall primarily be provided by those who exercise proprietary rights. According to this, the tasks of the state secretariat responsible for asset policy are the professional support of state-owned enterprises, the elaboration of a uniform standard and to provide the operation thereof. In the course of our company management not only do we make efforts to enforce uniform company management principles but we also provide strategic support as a party exercising proprietary rights by conveying the business entities' individual requests for direction to the minister exercising proprietary rights.

Regular and effective management and operation are accompanied by the establishment of effective ownership control. We know several tools thereof, especially the control of the

business entities' operation and measures through the governing bodies and primarily through the supervisory boards.

In addition to the ownership control the Ministry of National Development has a major role in the elaboration of the appropriate sectoral business strategy for business entities, and enhances the cooperation of entities in several fields through the rationalization of tasks (e.g. joint fulfilment of functional tasks) and the joint improvement of conditions necessary for the operation (e.g. joint procurement procedures). The governance of asset management also means the recovery of these common platforms and the appropriate use thereof, so that the business entities working in different sectors can operate more effectively through harmonized activities.

In some cases the state-owned enterprises have two-tier boards that separate the supervisory and management function into two different bodies. Others only have one-tier boards, which may or may not include executive (managing) directors. In the context of the EOCED Recommendation, "board" refers to the corporate body charged with the functions of governing the enterprise and monitoring management. Many governments include "independent" members in the boards of SOEs, but the scope and definition of independence varies considerably according to the national legal context and acts on corporate governance. A CEO is the enterprise's highest-ranking executive officer, responsible for managing its operations and implementing corporate strategy. The CEO is accountable to the board.

The Hungarian Civil Code enables both governance models. While in the Anglo-Saxon legal system, corporate management and supervision by the owner are carried out by a single body, in continental legal systems, management and executive functions are carried out by the management body whereas supervision by the owner is carried out by another corporate body, the supervisory board, which is independent of the management body.

In the case of LLCs, the management and supervisory functions are carried out respectively by the managing director and the supervisory board; in Ltds, the management function is carried out by the board of directors. Since, however, management is not necessarily carried out by a board, the Civil Code allows that, instead of a board of at least three members, a single person is appointed to carry out the management functions. That person is called the general manager (*vezérigazgató*). His function and legal position, however, are different from those of other employees, also called general managers, who are responsible for the management of the work organisation of the company yet do not carry out management functions in that capacity. While a number of companies have both a board of directors and a general manager, their general managers are leaders of the organisation rather than directors.

In the case of public limited companies, the Hungarian corporate laws enable shareholders to choose from the two alternative systems of governance.

As a model, the Civil Code, following its traditions, provides for a divided system of corporate governance, i.e. unless the parties agree otherwise, the traditional Hungarian system is adopted, i.e. separate managing (board) and supervisory (supervisory board) boards are set up. If, however, in the statutes, the shareholders stipulate that, in lieu of the two bodies, they will set up a single body in a manner that such single body, i.e. the board of directors should

carry out both management and supervisory functions, the company will be operated under single governance and its operation shall be governed by the relevant rules.

Since, in such cases, the board is charged with two functions at the same time, the law provides that the minimum number of its members shall be five. Where a single system of governance is adopted, it may be a problem for the board to efficiently perform both management and the supervision of management, i.e. to supervise its own activities.

This problem is solved by the Civil Code by specifying that the majority of the members of the board shall be elected out of persons qualifying as independent, who can be reasonably expected to critically observe the activity of the company. Since their independence is a crucial factor in ensuring efficiency, the Civil Code provides that the requirement concerning independent members is a cogent requirement.

In some cases it is obligatory to ensure employer participation in the control of the companies (typically in the case of companies employing at least 200 people) by providing membership in the supervisory board. Where a Ltd. functions under a single system of governance, i.e. without a supervisory board, yet the conditions for electing a workers' delegate are fulfilled, the board and the works council shall agree on the method the workers' delegate should participate in the board.

In Hungary, Article 3:289 of the Civil Code provides for the rules governing the responsible corporate governance report. On the basis of the above, the Boards of Directors of all public limited companies are required to submit to the annual general meeting a report presenting the corporate governance practices of the public limited company, drawn up in the manner prescribed for participants on the stock exchange concerned. The report is adopted by the general meeting. The decision of the general meeting and the approved report must be published on the website of the company. Any provision of the statutes contrary to such provision shall be void.

Only public limited companies ("PLCs") are required to draw up a report, including, as a matter of course, both PLCs with a minority public interest, such as MOL Plc. and PLCs with a majority public interest, such as RÁBA Plc.

The Boards of Directors of public limited companies are required by the Civil Code to draw up and submit to the general meeting a corporate governance report in the form prescribed by participants of the stock exchange concerned.

Public limited companies are typically large organisations, important for the national economy or even by international standards, whose activities may affect entire markets or entire sectors of the national economy and, therefore, the consequences of their activities may go far beyond their shareholders. That is why a requirement has emerged vis-à-vis such companies that, in carrying out their activities, they should keep in view the interests of their immediate and broader social environment in addition to those of their shareholders. That system of expectations includes requirements that, rather than being strict legal standards, i.e. orders of conduct that can be enforced by the State administration, demonstrate the responsible behaviour and the commitment of these companies vis-à-vis the society. These requirements of conduct are institutionalised in different ways. There are codes of

conduct collated by groups of theoretical experts of high reputation, there are collections of rules published by specialised institutes, while similar rules are published by economic interest representation bodies and stock exchanges will also publish such requirements vis-à-vis companies whose shares are listed.

In the case of public limited companies, information to the public includes a statement concerning the extent and the method of the company complying with the applicable requirements of corporate governance. To that end, a corporate governance report is drawn up and adopted each year by public limited companies, simultaneously with the annual financial statements.

The Civil Code provides for the corporate governance report based on the assumption that since a joint stock company is considered to operate as a public limited company if its shares have been offered on a regulated market presumably regulated by rules for corporate governance, the legislation may be private in most cases.

The majority of Hungarian public limited companies will presumably be in that status since their shares have been listed on the Budapest Stock Exchange. The Budapest Stock Exchange has implemented Recommendations on Corporate Governance. Listed companies are required to submit an annual report on compliance with the Recommendations, i.e. to inform the general public of their compliance. Where a company fails to comply with the Recommendations, it does not necessarily imply sanctions. Rather than full compliance, the stock exchange requires that where a company deviates from the Recommendations, its conduct must be made public and its reasons must be explained. Regulation based on the “comply or explain” principle is partly the result of the fact that the stock exchange is not a legislative body. In a legal sense, its recommendations are therefore not enforceable and statutory norms; also, with regard to the individual characteristics of these companies, a deviation from a recommendation may have valid reasons for the company concerned, the awareness of which may be important for investors without the need to impose sanctions against the company.

The rule concerning the corporate governance report is cogent as it serves the purpose of informing the public, satisfying a social need. Therefore, it would not be acceptable if partners in a company were able to evade that obligation to their liking.

The RÁBA Járműipari Holding Részvénytársaság, whose legal predecessor was established in 1896, must be highlighted in the current corporate portfolio system. The Company’s initial public offering took place on 17 December 1997. Rába’s shares are publicly traded on the Budapest Stock Exchange. Accordingly, Rába is required to comply with the Hungarian corporate governance principles and the related statutory legislation.

Based on the (estimated) shareholding and ownership structure of **MOL Magyar Olaj- és Gázipari Nyrt.** as of 31 March 2016, the Hungarian State (MNV Zrt.) owns a business share of 24.74%.

MOL Nyrt. has always been committed to implementing the highest standards of corporate governance structures and practices. In addition to compliance with Hungarian requirements, MOL has also been adhering to the constantly evolving norms of international corporate governance.

Among others, the Company's commitment was demonstrated by the adoption by MOL's general meeting of a declaration on the Recommendations on Corporate Governance of the Budapest Stock Exchange in 2006, ahead of the statutory time limit. Moreover, prior to the launch of its shares on the Warsaw Stock Exchange in December 2004, the Company issued a declaration on the adoption of the recommendations on corporate governance of the Warsaw Stock Exchange. The Company submits an annual statement on the subject to both stock exchanges. MOL's corporate governance practices are in accordance with the requirements of the Budapest Stock Exchange and the applicable capital market legislation. Moreover, MOL has regularly reviewed its policies with a view to ensuring compliance with the constantly evolving best international practices also in that area. First adopted in 2006, MOL's Code on Corporate Governance, setting out the Company's corporate governance principles, was last updated in 2015. Setting out the rights of MOL's shareholders and the functioning of its main managing bodies, the document also discusses issues regarding remuneration and ethical conduct. MOL's Code of Corporate Governance has been published on the Company's website.¹¹

2.2. The exercise of state proprietary rights from ownership entity point of view

The OECD guidelines also include the ownership entity. The ownership entity is the public body responsible for the ownership function, or the exercise of proprietary rights in state-owned enterprises. In understanding the Recommendation "Ownership entity" can mean either a single State ownership agency, a co-ordinating agency or a government ministry responsible for exercising State ownership.

As we have already mentioned, in Hungary the rules for exercising proprietary rights regarding the state-owned enterprises are provided for in the Vtv.

In addition, the Act CXCVI of 2011 on National Assets (hereinafter referred to as Nvtv.) shall also be highlighted, which stipulates that the entity who is entitled to exercise all proprietary rights and obligations vested in the state or local government over the national assets entrusted thereto is considered the party exercising proprietary rights.¹²

In the meaning of the Nvtv., the persons who may exercise proprietary rights may be as follows: ministers, central budgetary bodies, business entities in 100% State ownership, or business entities in the 100% collective ownership of the State and a business entity in 100% State ownership.¹³

A more limited group of persons is provided for by the Nvtv. with regard to business shares qualifying as national property of key importance for the national economy, as the exercising of proprietary rights is limited to the minister specified by the law, central budgetary bodies, or business entities in 100% State ownership.¹⁴

¹¹ See <https://molgroup.info/hu/befektetoi-kapcsolatok/tarsasagiranyitas/mol-iranyelvek> (15 September 2016)

¹² Article 3(1) (17) of Nvtv.

¹³ Article 7/A(1) of Nvtv.

¹⁴ Article 7/A(3) of Nvtv.

Regarding the state-owned enterprises, the responsibility of bodies and the relationship between the companies and the owner have a key role. However, state-owned enterprises differ from non-state-owned enterprises in several aspects: a) the organizations of these business entities are often limited by the fact that the entity exercising proprietary rights favours a single decision maker (e.g. executive), or the decision-making by a board (e.g. board of directors). It cannot be stated either that state-owned enterprises have the same organizational structure in each corporate form. There are differences also between public limited liability companies and limited liability companies: in certain cases, of course, organizational requirements are stipulated by relevant legal regulations (e.g. in the case of the MNV Zrt.), but it also occurs that a business entity of strategic importance has a supervisory board instead of a directorate based on the decision of the entity exercising proprietary rights (e.g. in the cases of the National Infrastructure Development Ltd. or the Magyar Közút Zrt.); b) decisions made by the owner of state-owned enterprises take longer than by business entities in the market. This is due to the fact that in cases of certain business transactions (e.g. significant investment, or risky investments or acquisitions) the Government's decision is also necessary; c) in cases of state-owned enterprises it is also a problem that as a result of the controls at several levels the organizations are complex, of several tiers, thereby the internal decision making process is sometimes more time consuming than in other cases; d) the financial control of the state-owned business entities is not only a process of the internal audit of the companies and the auditor regarded as external auditor, but the management of the companies is subject to the agencies monitoring the efficient and economical use of public funds, especially to the State Audit Office; e) it is a principle of major importance that the business plan of the state-owned enterprises shall be prepared according to the same, so called ownership premises every year, and the different bodies shall operate according to the same ownership directives and principles. Therefore, a uniform rules of procedure have been established for the supervisory boards of the business entities subject to direct and indirect proprietary rights exercised by the Ministry of National Development, and continuous trainings are organized for the supervisory board members.

We think that it has primary importance because our experience shows that the monitoring role of the supervisory board was mostly limited to the mandatory duties determined by legislation.¹⁵

As we have already mentioned, the MNV Zrt. plays a major role in the management of state assets and in the supervision of a significant part of state-owned enterprises.

The MNV Zrt. is a one-man company limited by shares, founded by the State, whose shares are non-negotiable. The Minister for National Development is responsible for the approval and amendment of its deed of foundation. The MNV Zrt. shall not be transformed,

15 See: DOMOKOS László – VÁRPALOTAI Viktor – JAKOVÁC Katalin – NÉMETH Erzsébet – MAKKAI Mária – HORVÁTH Margit (2016): Szempontok az állammenedzsment megújításához. Fókuszban az állami és önkormányzati tulajdonú-gazdasági társaságok irányítása. (Aspects for the reform of state management. State and municipal owned enterprises in focus.) *Pénzügyi Szemle*, 2016/2. 198.

demerged, or merged with any other company. It may be wound up by an Act of Parliament. In MNV Zrt., the shareholder's rights of the State are exercised by the Minister. The MNV Zrt. is managed by a Board of Directors consisting of up to 7 members. The Chair and members of the Board are appointed and recalled by the Minister. The Chair and members of the Board are appointed for a term of five years and may be recalled from their position at any time.¹⁶ In addition to the functions provided for by the Civil Code, the Board is responsible, among others,¹⁷ for submitting proposals to the Minister concerning guidelines related to the development, utilisation and disposal of State property, adopting decisions on disposing of State property, including property swaps, where the available value of the property concerned (audited property value, value assessment), net of VAT, is HUF 500 million or more, adopting decisions on developing a position to be represented at the general meetings and partners' meetings of State-owned business entities and, for business entities in one-man State ownership, issuing the founder's decision where

- the company is in exclusive State ownership,
- the company's shares grant any additional right with regard to additional rights,
- the State's share in the company's equity is HUF 200 million or more,

founding, acquiring a business share in, reorganising or winding up a business entity, providing State property to such business entity as non-pecuniary contribution, if the value of such contribution is more than HUF 200 million, submitting a proposal to decision-makers for the gratuitous transfer of property, subject to the provisions of the annual law on the budget, adopting decisions on borrowing and the issue of bonds, adopting decisions on the work organisation of MNV Zrt., approving the company's internal rules of procedure, drawing up the MNV Zrt's business plan, its report according to the Accounting Act, its annual statement on the property entrusted to it and its property management plan and drawing up reports to the supervisory board.

The members of the Board of Directors are only subject to legislation, the deed of foundation and the resolutions of the minister exercising shareholder's rights over the MNV Zrt. In exceptional cases the minister exercising shareholder's rights may give the Board of Directors a written instruction, which it shall execute but in this case the members are exempt from the responsibility defined by the Vtv.

The members of the Board of Directors shall proceed in their tasks with due care and in the primary interest of the State. The members of the Board of Directors, according to the Civil Code on the rules of tort, have unlimited and joint and several liability to the State and the MNV Zrt. for the damage caused by the breach of laws, the deed of foundation, and the resolutions made by the minister exercising shareholder's rights, and for the damage caused by the imputable failure to comply with their obligations. If the damage was caused by a board resolution the member is only exempt from liability if he/she has not participated in the decision, or voted against the resolution.¹⁸

¹⁶ Article (1)–(2) of Vtv.

¹⁷ Article 20(4) of Vtv.

¹⁸ See detailed in Article 22(5)–(12) of Vtv.

The operation of MNV Zrt. and its management of State property are supervised by the Supervisory Board, which consists of five members. The Chair and members of the Supervisory Board are appointed and recalled by the Minister. The Chair and members of the Supervisory Board are appointed for a term of five years and may be recalled from their position at any time. Members of the Supervisory Board shall carry out their activities with the care reasonably expected of persons fulfilling such positions, on the basis of the primacy of the interests of the State. In accordance with the provisions of the Civil Code concerning the causing of collective damage, members shall have joint and several responsibility vis-à-vis the State and MNV Zrt. for damages caused due to the breaching of their control obligations for reasons within their control. Where such damage has been caused by a collective decision, members not having participated in making the collective decision or having voted against it shall be relieved of their responsibility. The Supervisory Board shall submit to the Minister a report on its operation each year by 31 August of the year following the year under review. Such report shall also be forwarded by the Supervisory Board to the State Audit Office.¹⁹

According to the OECD guidelines the State should act as an informed and active owner, ensuring that the governance of state-owned enterprises is carried out in a transparent and accountable manner, with a high degree of professionalism and effectiveness.

In order to ensure that the proprietary rights of the State are exercised in an informed and active manner, the primary tools are a clear and unambiguous ownership policy, broad mandates and objectives.

In accordance with the provisions of the Civil Code and the specific features of particular state-owned enterprises, the deeds of foundation of state-owned enterprises clearly specify the areas of decision-making competence of the State as the owner.

The Ministry of National Development has acted in accordance with the OECD guidelines in its exercising of its proprietary rights on behalf of the State, has limited its powers of instructing state-owned enterprises to strategic issues and public policy objectives, including in particular the approval of state-owned enterprises' business plans and statements. Interventions in the operational decisions of state-owned enterprises, such as the hiring of personnel, are uncommon.

2.3. The exercise of state proprietary rights and competencies for monitoring

The exercise of proprietary rights is effective if the systemic monitoring of those determined by the party exercising proprietary rights is carried out. The Ministry of National Development, as the party exercising proprietary rights, has felt a need for developing and introducing a Corporate Monitoring system to enable the monitoring of the operation of companies. That project was launched in the spring of 2015. The monitoring system implemented is based on the quarterly reporting of data, where information is requested by the owner concerning the profit, balance sheet, investment, staff number, earnings, accounts payable

¹⁹ See detailed in Article 20/A of Vtv.

and accounts receivable of each company. Within the Project, in addition to general financial and other indicators, company-specific KPIs are developed and analysed.

Regarding the Hungarian liability clauses Article 3:287 of the Civil Code shall be highlighted, which defines the concept of “independence” with regard to the boards of public limited companies. The definition guarantees the requirement of objectivity and essentially intends to define a system of conditions to ensure that board members should be capable of monitoring the activities of the company and, in particular, of the management of the company independently and free of any influence. The rules governing the definition of independence are cogent rules.

Section (1) provides for the conditions at which a person is considered to be independent. A board member is thus independent if he does not have a contract with the company other than the ones concerning his board membership and based on transactions to satisfy the needs of board members as part of the normal activities of the company.

Section (2) provides for the conditions at which a person cannot be considered to be independent.

A member of the Board shall not be independent if he

- (a) is an employee or a former employee of the company, for a period of five years from the termination of his employment;
- (b) carries out any activity under a contract as an expert or in any other capacity for and to the benefit of the company or its senior officials for a fee;
- (c) is a shareholder in the company, directly or indirectly owning thirty percent or more of votes or is next of kin to or POSSLQ of the former;
- (d) is next of kin to or POSSLQ of a non-independent senior official or manager of the company;
- (e) is entitled to remuneration on the basis of his board membership if the company generates profit, or receives any kind of remuneration from the company or an affiliated company in addition to the fee due to board members;
- (f) is under a contractual relation with a non-independent board member in another business entity, such contract granting rights of management and control to the non-independent board member;
- (g) is the auditor of the company or a member or employee of the auditing company, for a period of three years from the termination of his employment;
- (h) is a senior official of or holds a management position in a business entity where an independent board member is a senior official of the public limited company.

The State exercises the ownership of state-owned enterprises in the interest of the general public, therefore it should carefully evaluate and disclose the objectives that justify State ownership and subject these to a recurrent review.

On the basis of the mandate vested in it by the Fundamental Law, the Nvtv. sets out an itemised list of economic activities that are reserved for central or local government entities (i.e. subject to a concession as the main rule).

Among the exclusive economic activities reserved for the State, Section 12(1) of the Nvtv. lists the passenger and goods transport on the main national railway network. The law provides that the railway network including railway tracks that are part of the main national network and their accessories or a railway network that includes a railway track that is part of the main national network or its accessories shall only be operated by the State or a business entity in which the State is the sole member or shareholder or which is, directly or indirectly, in the majority ownership of the State.

Since it was established, for example the State has been present in the ownership structure of MÁV Zrt. since the Group's two core activities are public duties, which are of primary importance, and on the other hand cannot be financed solely from revenues generated on the market. As both the maintenance of the rail network and passenger transport require participation by the State under Hungarian conditions (length and condition of the rail network, the needs of passengers, fares and schedules in passenger transport).

Under the Nvtv., economic activities related to the organisation and operation of gambling are reserved for the State. Due to the risks it involves for society, gambling is not a normal commercial product, while the organisation of gambling is a special type of economic activity that is governed by Act XXXIV of 1991 and Decree No. 32/2005 of 21 October 2005 of the Minister for Finance. The purpose of legislation on gambling is to protect the society, including in particular public order, public health and public security. Szerencsejáték Zrt. is the business entity authorised to exploit the State monopoly specified in Section 3(1) of Act XXXIV of 1991 on the organisation of gambling. In Annex 2 to the Nvtv., it is listed among State-owned business shares qualifying as a national property of key importance for the national economy, which is in 100% State ownership. According to Act CVI of 2007 on State property and to the Nvtv., maintaining long-term State ownership is necessary in order to carry out State functions, satisfy the needs of society and to facilitate the implementation of the Government's economic policy. Consequently, there are profitable state-owned enterprises which, on the one hand, contribute to the domestic budget by significant dividend income, on the other hand they fulfil a task (e.g. the HungaroControl Zrt. in the field of air traffic management) which makes the strengthening of the market position of the company and thereby the involvement of the State in these market segments expedient.

3. REQUIREMENTS IMPOSED ON DOMESTIC STATE-OWNED ENTERPRISES

A significant part of our business entities fulfil some kind of public duty, therefore the most important requirement imposed thereon is to increase the efficiency of the public duty. The party exercising proprietary rights provides several tools thereto, but I think that the commonalities between the business entities belonging to similar sectoral public administration (e.g. transport companies, the energy sector or even public utilities) shall be found so that the synergies between the business entities can be exploited, the cooperation

can be increased and the efficiency of company operation can be enhanced.²⁰ The efficiency of cooperation affects the standard of the services provided by the business entities, for example the integrated timetable search system developed by the MÁV-START Zrt. and the VOLÁN Egyesülés in the spring of 2016 shall be highlighted, whereby the national, regional and suburban services are available on one surface.

In case of a minority of state-owned enterprises it is not the fulfilled public duty that is dominant but the achievement of the best possible result in a certain market segment, thereby increasing their business results. The HungaroControl Hungarian Air Navigation Services Pte. Ltd. Co., the ANTENNA HUNGÁRIA Hungarian Broadcasting and Radio Telecommunications Ltd., the MAHART PassNave Személyhajózási Kft., the MVM Hungarian Electricity Ltd. and the Szerencsejáték Zrt. can be listed in this group, for example.

In addition we also have business enterprises carrying out tasks in the field of development policy, which aim at targeting the increase of state involvement in certain areas (for example the NIPÜF Nemzeti Ipari Park Üzemeltető és Fejlesztő Zrt.), or develop facilities which later significantly determine the improvement of the standard of public duty (for example the NIF National Infrastructure Development Ltd., which carries out transport infrastructure (road and rail) network development tasks, or the BMSK Beruházási, Műszaki Fejlesztési, Sportüzemeltetési és Közbeszerzési Zrt., which engages in, among others, the development of sport facilities and the complex implementation of sport investment projects). The most important requirement imposed on these business enterprises is that the facilities are finished in time by using the available funds cost effectively and in the best quality.

In addition, we also have state-owned enterprises which carry out tasks that previously proved to be imperfect. The Magyar Fejlesztési Központ Nonprofit Kft., whose primary task is to elaborate the effective system of the harmonisation of the direct public funds usage, or our business entities (for example the Nemzeti Fejlesztési és Stratégiai Intézet Non-profit Kft., the Nemzeti Fejlesztési Programiroda Nonprofit Kft.) that act as consortium leaders in important fields related to certain EU obligations (e.g. the projects funded by the Environment and Energy Efficiency Operational Programme targeting the increase of energy efficiency and the application of renewable energy sources, which affects the distant heating sector) are of this type.

4. THE MNV ZRT. RECOMMENDATION FOR STATE-OWNED ENTERPRISES

In addition to the above mentioned OECD guidelines the MNV Zrt. has elaborated a manual including around two hundred recommendations (in this chapter referred to as Recommendation),²¹ which aim that the MNV Zrt. promotes the compliance with the

20 See: AUER Ádám: *Corporate Governance. Állami részvétellel működő gazdálkodó szervezetek*. Budapest, NKE. 18–21.

21 See detailed: www.mnv.hu/felso_menu/tarsasagi_portfolio/eljarasi_dokumentumok/vallalatiranyitasi_ajanlasok/ajanlas_allami_tulajdonu_tarsasagok_szamara.html (15 September 2016).

requirements of responsible state asset management regarding the state-owned enterprises included in the portfolio of the MNV Zrt. through the Recommendation. It is a public expectation from the entities that the defence of assets as lasting value and the responsible, transparent and effective asset management to keep the value thereof shall be more effective, successful and cost-effective.

The update of the Recommendation and its extension to the full company portfolio under the supervision of the Minister of National Development is currently in progress.

It has been determined in the introductory provisions of the Recommendation that

- the State as the owner and the state-owned enterprise shall cooperate with the stakeholders of the state-owned enterprises;
- a state-owned enterprise applies a system where the competence and responsibility of the management is transparent and dedicated;
- state-owned enterprises shall focus on the increase of value in the course of their management;
- in the course of state asset management efforts shall be made not to violate the interests of the minority shareholders,
- state-owned enterprises shall be operated publicly so that publicity is provided without violating the company's business interests;
- owners shall be provided with all the information by the company management which is necessary for the exercise of proprietary rights;
- the decision making process of the state-owned enterprises shall be created so that the protection of the company assets against abuse, negligent or unintentional tort is provided proportionately to the risk capacity of the entities;
- in the course of state asset management the creation of value shall be aimed at;
- in the decision making process the state-owned enterprises shall particularly focus on the social and environmental sustainability.

The Recommendation also includes detailed guidelines on the operation and decision making system of the state-owned enterprises:

- the responsible and ethical decision making system of the state-owned enterprises shall be built up so that it provides the increase of the entity's value and the management appropriate for ownership interests (individual decisions and strategic guidelines);
- the requirement of safeguarding state assets and keeping the ownership investments safe in cases of mixed ownership companies is an objective;
- the decision making system, on the one hand, shall provide for the protection of the entity's value, on the other hand the effective usage thereof. The optimal decision making system has to provide for the effective use of the tools and the consistency of the business activities with the legal and ethical requirements;
- the decision making system shall be based on the unequivocal share of responsibilities and tasks thereby providing accountability.

In addition the Recommendation includes detailed suggestions related to the management issue concerning the State as a non-single owner, for the relevant entities as follows:

- general rules for the development of competences;
- the ownership involvement of the State – the rules on exercising proprietary rights, convening and arranging general meetings/assemblies of members and exercising proprietary rights;
- the operation and the rules of procedure of the directorate, and the provisions on the senior manager (chief executive) and the executive;
- the role of the management, the internal coordination of the entity;
- supervision and monitoring agencies;
- the monitoring role of the Supervisory Board in cases of business entities without a directorate;
- the independent internal audit of the entities;
- monitoring – informing function of the Directorate/chief executive/management;
- the monitoring system;
- auditors;
- human resources policy and the rules on conflict of interest;
- the composition of the directorates, conflict of interest;
- remuneration rules and policy;
- professional preparedness of the senior manager;
- the regulation of the conflict of interest, individual declarations – the elaboration of immunity procedures;
- dealing with “Related parties”,²²
- the appointment of the chair person and the members of the Supervisory Board;
- internal monitoring and risk management;
- risk management of contracts;
- the determination of the sphere of public information.

²² See Section 149 of the Recommendation: The business entities are recommended to regulate on the rules of procedure for making deals where a conflict of interest may occur.

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