

LAW ON PRIVATIZATION OF STATE-OWNED ENTERPRISES IN POLAND

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I

Privatization of a post-communist State economy because of its unprecedented scope and nature requires the establishment of a proper legal and organizational framework. A legal framework has been established in Poland by a series of Acts passed by the Parliament in 1990. They comprise:

a) the Privatization of State-Owned Enterprises Act of 13 July, 1990 (hereinafter "Privatization Act")¹,

b) the Act of 9 November, 1990 on the Extension of Operation of the Privatization of State-Owned Enterprises Act (hereinafter "Privatization Extension Act")²,

c) the Act of 13 July, 1990 on the Establishment of the Office of the Minister for Ownership Transformation (hereinafter "Minister of Ownership Transformation Act")³,

These Acts have been adopted after long parliamentary debates during which deeply rooted political, economic and social controversies came out into the open. Powerful social-reformists groups pressed for a workers' participation in ownership oriented law. They represented workers' claimable attitudes supported by various pro-social (socialist) ideologies.

The government's draft although different from radical promarketeers programme was characterized by a pluralistic towards privatization of the State-owned enterprises (SOEs) attitude, permitting various privatization ways and methods.

Finally, a compromise solution providing for a State controlled privatization concept admitting various methods of its implementation and taking into consideration SOE's employees' interests was agreed.

II

The implementation of privatization of 8,000 SOEs has required the esta-

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¹ *Dziennik Ustaw (Journal of Laws — J. of L.)*, No. 51, item 298.

² *J. of L.*, No. 85, item 498.

³ *J. of L.*, No. 51, item 299.

again some political controversies had to be resolved (Parliament's versus government's directed privatization). Finally, a repartition of tasks between the Parliament and the government was agreed.

The Sejm establishes annually the fundamental directions of privatization operations and determines the distribution of revenues collected therefrom. Its decision to that effect is to be taken, however, in a form of resolution undertaken on the motion of the Council of Ministers (Art. 2 p. 1 of the Privatization Act). Thus the government's responsibility is to prepare appropriate proposals and justify their merits. The Sejm supervises government's privatization activity. A special permanent Sejm's commission (Commission on Ownership Transformation) has been instituted to that effect.

The office of the Minister for Ownership Transformation has been established. The Minister shall in particular:

- 1) prepare guidelines on State policy on privatization of the SOEs;
- 2) prepare, in collaboration with the Minister for International Economic Cooperation, guidelines on State policy on capital cooperation with foreign investors;
- 3) make analysis of ownership changes;
- 4) cooperate with trade unions, associations, chambers of commerce and other civic (social) organizations as well as with regional public administration bodies and local government in the field of formation and development of private enterprises;
- 5) initiate personnel training and improvement in the fields of privatization activity, capital markets and development of private enterprises and dissemination of experience and information in these fields;
- 6) carry out tasks specified in the Privatization Act as well as those arising out of other provisions of law (Art. 2 p. 1 of the Minister for Ownership Transformation Act).

The Council of Ministers has determined by way of a regulation of 14 November, 1990⁴ the detailed scope of operation of the Minister. The Council of Ministers has also issued the statute of the Ministry for Ownership Transformation which envisage, among other things, the establishment of regional offices of the Ministry.

A special Ownership Transformation Council has been created as an advisory body of the President of the Council of Ministers on matters concerning the privatization of the SOEs. The Council is composed of the President, a Vice-President and seven members appointed by the Prime Minister after consulting the Parliamentary Ownership Transformations Commission.

III

The Privatization Act provides for two main methods of privatization of the SOEs. The first one consists in transforming a SOE into a commercial company (limited liability company or joint stock company) in order to sell its shares to third persons. The second one provides for a liquidation of a SOE in

⁴ J. of L., No. 82, item 476.

order to sell its assets to third persons, to contribute these assets to the capital of a company or to offer them for use against payment.

The Privatization Act does not concern ownership changes effectuated by the existing SOEs in the scope of the rights to dispose their assets. Such acts of disposition e.g. sale of assets or assets contributions to the capital of a company are subject to the provisions of the State Enterprises Act of 25 September, 1981⁵ (with subsequent amendments — hereinafter SOEs Act). The Privatization Act does not concern the SOEs which are not subject to the SOEs Act, namely Polish State Railways, Polish Airports, Polish Airlines LOT, State-owned banks and State forest enterprises.

Privatization of the first three of the above SOEs which were created by an Act of Parliament, requires also an Act of Parliament. Such an act was passed in respect of Polish Airlines LOT on June 1991.

IV

A SOE may be transformed either into a joint stock company or a limited liability company. The transformation is being made on a case by case basis on the ground of a decision taken by the Minister for Ownership Transformation. The procedure may be initiated either by the SOE itself (acting through its bodies) or by the founding body (the competent minister or the local government). According to Art. 5 of the Privatization Act the Minister for Ownership Transformation may transform a SOE into a commercial company provided that:

1) the joint application of the director of the SOE and the employee's council is submitted after obtaining the opinion of the general assembly of the employees (or their delegates) as well as the opinion of its founding body:

2) the application of the founding body is submitted with the consent of the director of the SOE and the employees council after obtaining the opinion of the general assembly of the employees (or their delegates).

The initiation of the privatization process of the SOEs listed in the Regulation of the Council of Ministers of 29 October, 1991 concerning the determination of the SOEs of particular importance for the national economy the privatisation of which requires the consent of the Council of Ministers⁶ may be started only after having obtained such consent.

The Minister for Ownership Transformation examines every case on its own merits. He may, however, refuse the transformation of a SOE into a commercial company only because of its economic or financial situation or because of an important interest of the State (Art. 5 p. 3 of the Privatization Act).

The refusal must be made known within three months from the date of submission of the request and, apart from the grounds, include a list of conditions upon whose fulfilment the transformation of the SOE will be possible or the time-period in which the issue of transformation may be reconsidered. The

⁵ Unified text in J. of L. 1987, No. 35, item 201. Further amendments in J. of L. 1989, No. 10, item 57 and No. 20, item 107; 1990, No. 17, item 99 and No. 51, item 298; 1991, No. 2, item 6.

⁶ J. of L., No. 99, item 441.

body which presented the application is granted the right to file an objection to the refusal according to the procedure provided for by Art. 61 of the SOEs Act.

The Privatization Act has also granted the Prime Minister the right to decide on the transformation of a SOE on his own initiative i.e. without or even against the will of the SOEs bodies or their founding bodies. His decision to that effect has to be made upon the request of the Minister for Ownership Transformation (Art. 6 p. 1 of the Privatization Act) after having obtained the opinion of the Ownership Transformation Council (Art. 5 p. 2.2 of the Minister for Ownership Transformation Act). The Minister for Ownership Transformation before submitting a request to the Prime Minister should consult the director, employees council and the founding body of the SOE he is seeking to transform. If no such opinion is received within one month, this is deemed as having no objective (Art. 6 p. 2 of the Privatization Act).

V

The transformation of a SOE leads to the establishment of a commercial company of which the State Treasury is the sole shareholder. The company acquires juridical personality at the moment of entry to the Commercial Register. In the same moment the transformed SOE is automatically deleted from the Register of the SOEs (Art. 12 p. 2 of the Privatization Act). The State Treasury Company established by transformation of a SOE is submitted to the proper rules of the Commercial Code of 1933 unless the Privatization Act provides otherwise (Art. 7). The company as a legal successor of the transformed SOE acquires all rights and liabilities of the latter (Art. 8).

The articles of incorporation (called "statute") for joint stock companies and the founding act for limited liability companies are established by the Minister for Ownership Transformation who acts in this respect on behalf of the State Treasury (Art. 10).

The management board of the successor company is under a duty to file immediately after the establishment of the founding act the application for the entry of the company into the Commercial Register (Art. 12).

A very important modification of the Commercial Code's provisions on commercial companies has been introduced by Art. 17 of the Privatization Act which makes compulsory the establishment of a supervisory board in each company. It provides further that one-third of the members of the supervisory council are to be elected by the employees of the company. The company's articles of incorporation or founding act stipulations concerning the election of the members of the supervisory council by the employees cannot be repealed or amended while more than one half of the shares remain in the hands of the State Treasury, unless consent is given by the majority of the members of the supervisory council elected by the employees.

VI

The State Treasury company established by transformation of a SOE may cease to be a one shareholder company by alienation of its shares to third parties and/or by the increase of stated capital and its acquisition by third

parties. A proper decision to that effect is to be taken by the Minister for Ownership Transformation.

The alienation of all shares should be accomplished within two years from the date of recording of the company in the Commercial Register, unless the Council of Ministers provides for a longer period of time (Art. 19 p. 1 of the Privatization Act).

The Minister for Ownership Transformation is under a duty to order, before offering shares to third parties, an economic and financial study be prepared for the purposes of valuation of the assets of the enterprise and the need of implementation of organizational, economic and technical changes. He may resign to order such study only if the above analysis had been done before the SOEs transformation and the offering of shares of the successor company is to be done immediately after transformation (Art. 20 p. 1 and p. 2). The Minister may also order the analysis to determine the legal status of the company's assets, in particular regarding claims of third parties against company's assets (Art. 20. p. 3). The Regulation of the Minister for Ownership Transformation of 20 November, 1990 concerning conducting legal as well as economic and financial analysis of the company's enterprise, their financing and qualifications required from persons doing them ⁷ adopted on the grounds of Act. 20 p. 4 of the Privatization Act has established detailed rules concerning these issues.

Where it results from such analysis that some changes should be introduced in the enterprise concerned, the Minister may subject offering of the shares of the company to third persons upon implementation of these changes (Art. 21). The Minister may with the consent of the Minister of Finance and acting on behalf of the State Treasury, prior to the alienation of the shares to third parties, assume without recompensation part or all of the debts of the company. He should announce his intention to assume company's debts in the manner determined for announcements concerning company's activities, calling on the creditors to bring forth their possible objections within at least two months from the announcement date. Creditors, who in the designated time do not agree to the assumption of their debts, must be satisfied or otherwise secured prior to the assumption.

The decision on the assumption of the debts of the company must be announced by the Minister for Ownership Transformation in the manner required for company announcements (Art. 22 p. 3).

The State Treasury's shares should be sold in one of the following ways:

- 1) through an auction type mechanism,
- 2) through a public offer,
- 3) through negotiations entered into on the grounds of a public invitation to negotiate.

The Council of Ministers on motion of the Minister for Ownership Transformation may, in specific cases, permit the State Treasury shares to be sold in a different manner (Art. 23).

⁷ J. of L. of 1991, No. 2, item 10.

The shares which have not been sold within three months from the lapse of the time during which they are to be offered according to Art. 19 p. 1 of the Act are to be transferred by the Minister for Ownership Transformation to a bank or another financial institution on the grounds of a contract concluded with it. The bank (or another financial institution) exercises according to the contract rights deriving from ownership of transferred shares. All revenues earned are transferred to the State Treasury (Art. 28).

The Act does not define the nature of the above contract in spite of the fact that it can not be allocated to any category of the contracts for which specific rules of reference have been provided by law (*contractus nominatus*). It may be recognized as a specific type of agency contract close to Anglo-American concept of the trust unknown to Polish law.

VII

The Privatization Act contains specific rules concerning the employees participation in the capital of privatized SOEs.

The employees of a SOE transformed into a commercial company have been granted a right to purchase up to 20 per cent of the total amount of shares held by the State Treasury on preferential terms retaining the right to acquire additional shares according to general terms (Art. 24 p. 1). The preferences consist in a purchase of shares “on a fifty percent of discount compared to the prices of non-preferential transfer offered to other natural persons who are Polish citizens on the first day of offering” (Art. 24 p. 4). The price may not be changed within a period of one year from the date shares have been offered to them i.e. the period of time within which they have to exercise their rights to acquire shares on preferential terms (Art. 24 p. 3).

The total amount of the discount given to the employees may not, however, exceed the average 12 months salary per employee in the state economic sector during the period prior to the date of registration of the company in the commercial register multiplied by the number of employees acquiring the shares (Art. 24 p. 5).

Offering shares to the employees on preferential terms may take place no later than two months from the date the shares have been offered according to general i.e. non-preferential terms (Art. 24 p. 3).

The number of shares to be sold on preferential terms to particular groups of employees as well as the conditions and time-limits for payment for such shares are to be determined in the company’s founding acts (Art. 24 p. 6). The Minister for Ownership Transformation taking his decision to that effect should take into account the proposed scope of preferences for the employees contained in the document which should be attached to the application for the transformation of the SOE into a commercial company (Art. 5 p. 2).

The Act has also granted “the agricultural producers” a right to a preferential acquisition of shares in the privatized SOEs with which they were “permanently linked on the grounds of delivery of agricultural produce or cooperation” (Art. 24 p. 7). The discussed above rules concerning the preferential acquisition of shares to the employees are to be applied here correspondingly.

VIII

The Privatization Act has also introduced a specific concept of the so-called civic shareholding providing for a gratuitous distribution among all citizens of rights to a part of privatized State property. It has been based upon a principle according to which the so-called privatization vouchers will be distributed free of charge in equal amounts to all citizens of the Republic of Poland domiciled in the country (Art. 25 p. 2).

The decision on the issue and value of the privatization vouchers is to be taken by the Sejm on the motion of the Council of Ministers.

The vouchers might be used only as payment for:

- 1) acquisition of shares of companies established by transformation of the SOEs;
- 2) acquisition of rights in financial funds (mutual funds) holding shares of companies established by the transformation of the SOEs;
- 3) acquisition of all or (integrated) parts of assets of the liquidated SOEs (Art. 25 p. 1).

A different concept of mass privatisation is, however, examined by the Parliament. The draft Act on Mass Privatisation and National Investment Funds provides for the establishment of the National Investment Funds created by the State Treasury in the form of joint stock companies. The State Treasury will make non-monetary contributions to these Funds in the form of shares of joint stock companies and limited liability companies (the programme will cover some 400 state-owned companies). The purpose of the Funds is to increase the value of their assets, in particular by enhancing the value of shares of companies held by the Funds. All adult Polish citizens who are permanent residents of Poland will be entitled to receive an equal number of share certificates per person of the Funds. The share certificates will be subsequently exchanged for the shares of the Funds. The Act provides also for possibility of issuing privatization vouchers distributed against payments on credit terms. A decision to that effect should be taken by the Council of Ministers by way of a regulation (Art. 26).

IX

The Privatization Act provides also for de-statization of the property by way of liquidation for some SOEs in order to privatize their assets. The liquidation has to be decided by the founding body of a SOE after having obtained the consent of the Minister of Ownership Transformation. The decision of the founding body may be taken on its own initiative or upon the request of the employees council of the SOE.

The director and the employees council of the SOE to be liquidated may challenge the liquidation decision in accordance with the procedure specified in Art. 61 of the SOEs Act (Art. 37 p. 2 and 3 of the Privatization Act).

The liquidation of a SOE may be decided for the purposes of:

- 1) sale of the whole enterprise or integrated parts of its assets;⁸

⁸ An integrated parts of assets of a SOE in the sense of the Privatization Act means "an aggregate of material and non-material components (tangible and intangible assets) which could constitute a separate enterprise, specifically a plant, a store or a service shop" (Art. 4 p. 3).

- 2) contributing the enterprises assets as a whole or integrated parts of its assets to a commercial company;
- 3) transfer of the enterprise assets as a whole or integrated parts of these assets for a specified period of time for use against payment (Art. 33 p. 1 of the Privatization Act).

The sale of the enterprise of a liquidated SOE as a whole or integrated parts of its assets is submitted to the specific rules of the Privatization Act (see Arts. 41 and 43) as well as to the appropriate provisions of the Civil Code. Thus it should be made in open and transparent procedure (competitive bidding, public offering, public invitation to negotiate). In specific circumstances the Council of Ministers may on the motion of the Minister for Ownership Transformation permit another way of the above sale. The liquidated SOEs assets may be used as a State Treasury's contribution in kind to the capital of a commercial company either an existing one or to be created (e.g. domestic or foreign capital contributions).

The State Treasury may also establish in this way its own company. The foundation act of a company of which the State Treasury is a sole shareholder has to be established by the Minister for Ownership Transformation (Art. 41). The foundation act of a company established with other founding partners is to be established by the founding body of the liquidated SOE jointly with other partners. The liquidation of a SOE in order to transfer its assets for use against payment to persons willing to carry own business on their own account may be decided only on the application of the employees council adopted after obtaining the opinion of the general assembly of the employees (or their delegates). The Act grants to the employees a priority to obtain a right of use of the enterprise's assets provided they create either a limited liability company or joint stock company to that effect joined by the majority of the employees. The shareholders of the company should be exclusively natural persons unless the Minister for Ownership Transformation decides otherwise. The amount of the share capital of the company should be lower than 20 per cent of the joint value of the founding fund and the fund of the liquidated enterprise (Art. 39 p.1).

The right to use the liquidated SOEs assets may be transferred to another company only when the employees have not succeeded in constituting their own company within two months from the date of the employees council application for liquidation of the SOE or upon the general assembly of the employees (or their delegates) prior approval (Art. 38 p. 2).

The transfer of assets for use against payment is made on the grounds of a contract concluded by the founding body in the name of the State Treasury (Art. 39 p. 1). The parties are free to choose type of contract which suits the best their needs. They may conclude either one of the types of contracts provided for by the Civil Code (e.g. lease or tenancy) or create a specific one which can not be allocated to any category of named contracts.

The contract sets forth the terms and conditions under which the leasee may operate the assets. The order of the Minister of Finance of 10 November, 1990⁹ contains detailed rules concerning the dues for the use of State Treasury assets. Art. 39 p. 2 of the Act states expressly that the parties may stipulate in

⁹ *Monitor Polski*, No. 43, item 333.

the contract that after a specified period of time "the user has the right to purchase the assets which he has been using." In determining the price, the value of hitherto paid prestations for use of assets against payment is to be taken into account. This solution has been based upon a concept of a leasing contract which has not been regulated in Polish law.

X

According to Art. 45 p. 1 of the Privatization Act, its provisions are to be applied correspondingly to the privatization of the communal enterprises. The competences provided for by the Act to the Minister for Ownership Transformation and founding body are exercised in these cases by the local administration of commune or the association of communes (Art. 45 p. 2). Taking into consideration the fact that the local administration is lacking both expertise and competent personnel in this domain, the Act states that it may transfer the conduct of all activities connected with the privatization of a communal enterprise to the Minister for Ownership Transformation.

This should be made on the grounds of an agreement concluded with the Minister. The conclusion of such agreement requires a resolution of the Communal Council or the Council of Association of Communes (Art. 45 p. 3).

XI

The adoption of the law on privatization of State-owned enterprises is an important step towards the progressive development of market economy in Poland. Thus a legal framework has been established which enables to develop a privatization policy adjusted to political, economic and social circumstances. The task of privatization of the economy nationalized to the extreme extent is with no precedent in the contemporary history. Its progressive realisation has started even though the necessary market conditions have not yet been created. On 16 April, 1991, the Warsaw Stock Exchange (officially opened on 2 July, 1991) began trading in the shares of the first five privatized companies.

The Act on Public Trading in Securities and Trust Funds was adopted on 22 March 1991.

The privatization law is being verified in practice which will certainly contribute to its further improvement.