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Contracts for the management of state-owned enterprises in the Ministry of Transport in the 1990s

Abstract: A significant change was introduced to the legislation regulating the state-owned enterprises in the last decade of the 20th century. The change made it possible to transfer companies under control of different managerial entities on the basis of the so-called management contracts. In the following paper the author will give an account of the practices related to management contracts as concluded by the Ministry of Transport during the relevant period.

Keywords: State-owned enterprise; Management contract; Transport

On July 19, 1991, an extensive amendment [16] to the law on state-owned enterprises [14] was adopted by the parliament. Among other things, a completely new chapter 8a "Business management contract", Art. 45a - 45d.

Until now, a state-owned enterprise was treated as an entity - a legal person managed by a director and a works council. In Chapter 8a of the Act, the enterprise has become both the subject and the subject of regulation. By the way, it can be noted that this dualism continues to this day, because the Act on state enterprises - legal entities treated subjectively, is still in force, and at the same time the meaning of the term "enterprise", previously established in the Commercial Code (Article 771) [13], functions, currently in Art. 551 k. C. [15], according to which the enterprise is an organized group of intangible and tangible assets intended for running a business, including, inter alia, personalizing designation, ownership, and other rights in rem, receivables, rights from securities and cash, concessions, licenses, permits and patents.

The Supreme Court described the contracts for the management of state-owned enterprises as contracts concluded by the State Treasury with managers concerning the property of these enterprises [24] and [25]. But the enterprise, the property of which is the subject of a contract of third parties, still retains its subjectivity (legal personality).

The initiative to conclude a management contract (also often colloquially referred to as a management contract) belonged to the crew's organs. According to the statutory requirement, the company's works council, with the consent of the general meeting of employees (delegates), applied to the founding body to entrust the management of the company to a natural or legal person. The entrustment of management took place by way of an agreement concluded for a specified period, not shorter than three years, between the State Treasury, represented by the founding body, and the manager. The enterprise management contract was to specify, inter alia, the manager's responsibilities in the field of day-to-day management as well as changes and improvements in the enterprise, principles of its remuneration, including the right to participate in the enterprise's profit, criteria for assessing management effectiveness and responsibility for the enterprise entrusted to it.

When the manager assumed duties, the crew self-government bodies were dissolved by operation of law, the founding body recalled the director and the manager took over almost all

the competencies of the crew self-government bodies and the director. Almost all of them, because it did not take over the right to object to the decision of the founding body (Article 63 of the Act on state-owned enterprises, allowing for a dispute in a commercial court with the funding body), and the power to accept and approve financial statements and distribute the profit generated by the enterprise into funds (enterprises, founders), and did not assume the competence to determine the rules for using these funds. The tasks that were not entrusted to the administrator were taken over by the founding body. The Supreme Court did not rule out further, contractual limitation of the administrator's powers beyond what is stipulated in the Act [23].

In a state-owned enterprise entrusted with management, the founding body established a supervisory board and entrusted it with permanent supervision over the company's operations. The company's employees elected one-third of the board (not necessarily from among themselves). The board was neither an organ of the company nor its representative, but merely a structure to which the founding organ had delegated some of its powers.

The founding organ could terminate the enterprise management contract with immediate effect, if the manager, while implementing it, committed a gross violation of the law, materially violated the provisions of the contract, or the enterprise for at least 3 consecutive months failed to fulfill its obligations towards the State Treasury due to taxes or dividends. The Supreme Court indicated that the possible change of the manager does not require the request of the crew [22]. Given this judgment, an isolated opinion, contrary to the practice, appeared that it would be unacceptable, for example, to extend the management contract for another period without the consent of the crew's authorities [1]. In fact, such renewals have taken place.

The Minister of Transport and Maritime Economy was one of the first funding bodies entrusting the management of state-owned enterprises that he supervised. It was a kind of experiment. For these reasons, being responsible for contracts, as the deputy director of the then Department of Ownership Transformations and MTiGM Supervision, I prepared the first operational analysis as of November 20, 1993 [7].

At the moment, 10 such contracts were performed in the ministry; five concluded for 5 years, one - for four years, and four more were to bind the parties for three years. The possibility of entrusting the management board to a legal person was not used, nor was the choice of the manager selected by competition, although the act allowed for both of these variants. Nota bene, the first of them, i.e. entrusting a legal entity with management, has become a rule in national investment funds (for more see [17] and discussion in [4]). Meanwhile, in the transport ministry, in all ten cases of contracts concluded by the end of 1993, the previous director of the enterprise became the manager, in accordance with the recommendations of the works councils. It proved the considerable trust that directors enjoyed in the crews and the correct selection of arguments used by these directors to convince their crews. It should be emphasized that formally speaking, the crew's self-government bodies do not have the power to approve the choice or change of the manager [26] - the role of the crew ended with the initiation of entrusting the company to the management. Until the contract was signed, the directors were employees of the enterprises they managed (within the meaning of the Labor Code), employed based on an appointment (cf. specific provisions on the employment of directors in [14] - Art. 33 et seq.). The conclusion of the management contract meant a change of status - the manager ceased to be an employee and became an entrepreneur, conducting - as a natural person - economic activity consisting in the provision of management services [8], to which, according to the jurisprudence, the provisions of the Civil Code apply. on the order (under Art. 750 of the Civil Code in connection with Art. 734 § 1 of the Civil Code) by the contract of mandate, the party accepting the order undertakes to perform a specific legal action for the principal - the management contract included the

obligation to perform numerous legal and factual actions). Although the manager assumes the obligations of obtaining specific substantive and economic effects, it is not a result agreement, but only due diligence. A result contract (e.g. similar to a specific work contract) cannot be concluded due to numerous factors, external and independent of the administrator, affecting the management effects (cf. [2]).

Candidates for managers were required to submit to the ministry for approval, before the conclusion of the contract, a restructuring plan (program), which was later treated as an integral part (appendix) of the contract. What did such a plan include? Of course, it was a presentation of the management board's goals and a program of achieving the assumed results. It was usually an improvement in the economic condition of an enterprise defined by, for example, an annual increase in profitability by a certain percentage, an increase in profit. The plan also included numerous substantive changes - e.g. building a new depot, launching an additional production line, improving punctuality of connections - these specific plans were of course adapted to the specifics of a specific enterprise. It was also often indicated directly as the goal - preparation for privatization.

In 1993, the Minister of Transport and Maritime Economy supervised several hundred state-owned enterprises, and in the office, only a dozen or so people dealt with ownership supervision. This limited the possibilities of a deeper, substantive evaluation of the programs and subsequent verification of their implementation. Let us recall that in 1990 the PKP 76 organizational units of technical, construction, and railway service facilities [7]. In addition, the Prime Minister transformed the branches of the domestic PKS and two regional companies into independent state enterprises: 167 passenger and passenger-goods transport enterprises, for which the Minister of Transport and Maritime Economy was the founding body, 18 freight PKS transferred under the supervision of voivodes and presidents of Warsaw, Łódź and Krakow, 18 procurement companies, 13 repair companies, two construction companies, and one design office [21].

The beginning of the nineties was difficult for state-owned enterprises, also due to the unequivocal policy of the then government, consciously creating conditions that forced them to transform. Years later this emphasis was recognized in the literature as the reason for the unsatisfactory financial effects of privatization (cf. [3]). In the period covered by the analysis [7], the total profitability in the national economy from January to August 1993 was 3.5% [12] and among the departmental MTiGM enterprises it was even worse - the average profitability was minus 1.1% [11]. The performance of our ten management companies was between these two values. In most companies, profitability at the end of 1993 was slightly better than at the time of signing the contract. But let us remember that the contracts were implemented too shortly then to draw far-reaching conclusions. Until November 1993, no significant economic benefits could be seen from the conclusion of management contracts, but it probably was not yet possible. The first of them, concerning Zakłady Budownictwa Mostowego in Warsaw, was in force only from May 1, 1992. The next two - concerning the management of Przedsiębiorstwo Górniczo-Produkcyjne "Bazalt" in Wilków near Złotoryja and Biuro Projektów Kolejowych in Poznań - from 1 August 1992. The next three were concluded with effect from December 1, 1992 - they concerned the management board of PKS in Głogów, Kolejowe Zakłady Automatyki in Zielonka and the Polish Ship Rescue in Gdynia. In the first half of 1993, the management board was entrusted to Zakłady Naprawcze Taboru Kolejowego in Bydgoszcz, Przedsiębiorstwo Budownictwa Kolejowego in Lublin and Gdańska Stocznia Remontowa, later a little bit - Cieszyn PKS.

At the end of 1993, we also checked two parameters characterizing the social results of the implementation of contracts - changes in employment and remuneration. In most of the surveyed enterprises, employment decreased during the term of the contract (on average by a few percent) and the remuneration increased (by over 30% on average). In one case, the

decrease in employment reached as much as a quarter of the workforce, but at the same time this company, despite a significant drop in profitability, recorded a high, nominal increase in wages by as much as 63%. However, it should be remembered that it was 1993 - a period of significant inflation - 35.3% [27].

In state-owned enterprises entrusted with management, the minister appointed supervisory boards. As in the case of State Treasury companies, appointing to such a council was also a way of rewarding officials. The Ministry of Transport adopted the principle that the remuneration of members of supervisory boards of enterprises entrusted to management was calculated in proportion to the remuneration in the supervised company. This mechanism aroused opposition from members of supervisory boards of enterprises because as a rule, it was an amount lower than the remuneration of a supervisory board member of a sole-shareholder company of the State Treasury. However, there were strong arguments in favor of the solution we adopted - most of all the fact that - unlike state-owned companies, which were subject to the regime of the then binding commercial code [13] - members of supervisory boards of companies did not bear significant responsibility for their actions and board meetings were held usually only once every two months.

In November 1993, an analysis of the composition of supervisory boards (at that time, mostly six people - [7]) was also carried out. By law, one-third of the council was to represent the company's staff. Most - 80% - of the staff representatives held managerial positions in these companies. Among the remaining two-thirds of supervisory board members, already elected by the ministry, department directors and heads of department heads of the ministry dominated (33%), while the second group was representatives of banks that provide services to companies (24%). In terms of work, engineers (51%) outnumbered economists - 27% - and lawyers - 7%.

Following the exams for supervisory boards of State Treasury companies, we conducted our exam for employees of the Ministry of MTiGM, and the people who did the best in it were included in such boards.

The management contracts were part of the rivalry between the ministers of economic ministries and the minister of the treasury, who would preferably concentrate all state-owned companies under his supervision. It should be remembered here that in 1990 two main ways of privatization of state-owned enterprises were created: capital (later called - indirect) and liquidation (direct). The first way consisted of two stages: transforming a state-owned enterprise into a company and providing third parties with participation titles (shares) in this company. This second stage could take place with a significant delay, and some companies were by definition excluded from privatization, i.e. stopped at the commercialization stage. The second way, direct privatization (liquidation), is the sale of the enterprise in its entirety, bringing it into the company or leasing its assets [19]. The main difference was that the capital privatization was carried out by the Treasury, and the liquidation - by the founding bodies. If the company met the conditions for capital privatization, the funding body had no way of stopping it.

The Ministry of Transport treated enterprises as tools for the implementation of substantive tasks, the Ministry of the Treasury - as a source of revenues, even for the sale price below the real value (cf. sharp rating in [3]). Staying under the control of the minister of transport, the backup companies of PKP, raw materials, or PKSs remained in the departmental structure which was shaped and known to them for decades. For example, Zakłady Naprawy Taboru Kolejowego, ca. 90% of the production was performed for PKP, and the inclusion of seventeen ZNTK [20] in the National Investment Funds [17] meant a collapse for a significant part of these enterprises, being a simple consequence of breaking the existing economic ties and the lack of new ones. Let us recall the objective assessment of this program made by the Supreme Audit Office [9]: six years of operation of the NFI, covering 8% of the State

Treasury's assets; a decrease in the value of assets from the end of 1996 to June 2000 by over 40%, which was accompanied by the remuneration of management companies in the amount of 15.2% of funds' assets (PLN 526.1 million) and a decrease in employment in companies contributed to funds by almost 60%.

Directors and staff decided to "escape into contracts" even before qualifying for the National Investment Funds or capital privatization.

Although, as I have already mentioned, signing a management contract required the consent of the crew's bodies, so the very fact of concluding such a contract proved that the director was working well with the works council, undoubtedly the manager's taking over its competencies made management much easier. It is better to be released from the reconciliation obligation, even if the consultant is benevolent. The conclusion of the contract containing the restructuring plan allowed to operate with a fixed, rational perspective (3 or 5 years) and under the agreed, accepted plan - these are privileges not known in "ordinary" enterprises with active self-government of the workforce, where attempts to appeal could appear at any time director, such an effect was also achieved by violating the regulations on excessively increasing remuneration.

Management contracts were also considered as preparation for privatization carried out at a favorable time for the company. After all, the structure of the management board - the supervisory board was similar to the structure of companies. On the other hand, let us not forget that the transformation of a state-owned enterprise into a sole-shareholder company of the State Treasury means strengthening supervision over the company, then definitely more dependent on the owner under commercial law than a self-governing, independent state-owned enterprise. Only privatization made it independent of the state economic administration. It is also important that in enterprises entrusted with management, the high remuneration of the manager allowed him to accumulate funds allowing for significant participation in privatization. Moreover, in a company without self-government, the manager himself could initiate privatization processes at the most favorable moment.

Unfortunately, a comprehensive assessment of contracts for the management of state-owned enterprises in the Ministry of Transport cannot be made, because the experiment was quickly stopped. The Minister of Transport has already concluded a dozen or so management contracts, incl. with ten bus stations. Only until 1996, the ministers of economic ministries supervise state-owned enterprises in their sectors; the reform of the government's economic center changed this state of affairs by concentrating the supervisory functions in the Ministry of the Treasury and handing it over to voivodes (I wrote more about this reform in [6]; cf. also [18]).

Nevertheless, some cases confirm the rightness of choosing the path of the managerial contract. The best-known company in Poland, which started gaining a market position from such a contract, is PESA from Bydgoszcz, former ZNTK, today, after spectacular development and equally spectacular difficulties ... nationalized through the Polish Development Fund [28]. But numerous ZNTK covered by NFI met a worse fate… (they are no longer there after liquidations and bankruptcies).

Two raw materials companies from Lower Silesia - PGP Bazalt in Wilków and ŁKB in Lubań - also made good use of this form of management. In the early 1990s, the lack of investment meant a reduction in orders for the basalt mine, which made the threat of cheap acquisition of resource control real in the event of liquidation or bankruptcy. Management contracts made it possible to maintain Polish control over these enterprises until the development of infrastructure investments. Both companies have grown; PGP Bazalt SA launched the second, next to Wilków, mine in Kośmin and the production of precast concrete [29], the Łużyckie Mines of Basalt at the time of acquisition by Eurovia, producing up to 3 million tons of aggregate per year in three mines; Księginki, Józef and Zaręba [10].

Management contracts have also proved successful in the maritime economy - in the Gdańsk Repair Shipyard, in the Polish Ship Rescue Service. Unfortunately, there are also negative cases. The first of PKS in the management board, in Cieszyn, no longer exists. But the fate of such enterprises, the raison d'être of which is public service (utility) (such as PKS), is a derivative of the state's policy towards them ...

From the formal point of view, the contracts for the management of state-owned enterprises were an attempt to make their system similar to commercial companies. The paradox is that the regime of the trading companies themselves was also to some extent inspired by commercial law. In fact, we are in a circle of similar legal solutions.

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