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ANALYSIS OF THE NEW LAW ON CORPORATE GOVERNANCE IN STATE-OWNED ENTERPRISES IN SERBIA IN THE LIGHT OF OECD GUIDELINES

Summary

In this paper the authors analyse some questions pertaining to the reform of state-owned enterprises in Serbia regarding the compatibility of the new legal regulation of corporate governance in the public sector with the OECD Guidelines. The analysis focuses on the principles and recommendations for more efficient implementation of reforms in state-owned business entities as outlined in the OECD Guidelines, as well as on the provisions of the new Law on the Management of Companies Owned by the Republic of Serbia. The analysis aims to determine whether the new solutions have helped in achieving a uniform legal framework and to what extent these new solutions contribute to the realization of the state's ownership interests, value creation in the public sector, and the public good.

Keywords: state-owned enterprises, corporate governance, capital companies owned by the state, centralized ownership, public interest, OECD Guidelines.

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ANALIZA NOVOG ZAKONA O KORPORATIVNOM UPRAVLJANJU U DRŽAVNIM PREDUZEĆIMA U SRBIJI U SVETLU SMERNICA OECD-A

Sažetak

Autorke razmatraju pitanja vezana za reformu državnih preduzeća u Srbiji kroz analizu usklađenosti novog regulatornog okvira korporativnog upravljanja u javnom sektoru sa Smernicama OECD-a. Predmet razmatranja su principi i preporuke za efikasnije sprovođenje reforme privrednih subjekata u vlasništvu države sadržani u Smernicama OECD-a i odredbe novog Zakona o upravljanju privrednim društvima koja su u vlasništvu Republike Srbije. Analiza treba da pokaže da li je novim rešenjima postignuta jedinstvenost pravnog okvira, kao i u kojoj meri nova rešenja doprinose ostvarenju vlasničkih interesa države, kreiranju vrednosti u javnom sektoru i opštem dobru.

Ključne reči: državna preduzeća, korporativno upravljanje, društvo kapitala čiji je vlasnik država, centralizovano vlasničko upravljanje, opšti interes, Smernice OECD-a.

1. Introduction

The reform of the public sector in Serbia is necessary due to the participation of state-owned enterprises in the creation of GDP, the increase in employment, the level of market capitalization, as well as the uneven legal framework for the operation of state-owned enterprises. The article discusses issues related to defining the concept of corporate governance in state-owned enterprises, the nature of state-owned enterprise management regulations, as well as some problems in business operations and the realization of business goals of these enterprises in market economies. The central part of the work is devoted to the analysis of the compliance of the new Law on the Management of Companies Owned by the Republic of Serbia with the OECD Guidelines.

The theoretical debates regarding the conflict between the market and the state are losing significance as the invisible hand of the market, although still potent, is not sufficient to ensure economic prosperity (Mankiw, 2006, pp. 212-217). Today, the spotlight is on an efficient, modern organized corporate state that becomes a partner to the private sector. Regardless of whether the state figures as the owner of capital or as an entity which exercises control and supervision,

its role must be confined to establishing rules and market procedures that provide security to all participants in market activities, and allowing free operation of supply and demand with free formation of market prices.

Although corporate governance is not a new topic, it still attracts attention of legal and economic theory, and has its own ethical dimension. This ethical dimension gains particular significance in contemporary capitalism, where high economic growth, technological advancement, and the transfer of new technologies and knowledge are accompanied by endangering the environment and the threat to the survival of the human species on the planet Earth. This is the result of the attempts to harness natural forces and ecosystems for the profit of multinational companies and the pursuit of political goals of the world powers (Todorović, 2021, p. 658).

In such business environment, investors are becoming increasingly aware of the financial value of information pertaining to managerial, environmental, and social performance (sustainability performance) of an enterprise (Williams, 2021, p. 97), be it from the private or the public sector. In turbulent times such as ours, the investors, whose net worth is significant, show the inclination to invest in companies with a high sustainability index and efficient mechanisms of corporate social responsibility. For powerful companies, climate change presents not just a risk but also an opportunity to invest in the environment and the well-being of the entire community.

2. Definition of corporate governance in state-owned enterprises

In law and economics literature, there is no universally accepted, general definition of corporate governance, including corporate governance in public enterprises. Some definitions of this concept emphasize legal aspects, others focus on its economic aspects, while broader definitions combine these two inseparable dimensions of corporate governance.

One of the first widely accepted definitions of corporate governance appears in the Cadbury Report, where it is defined as "the system by which companies are managed and controlled" (Matei & Drumasu, 2015, p. 497). The OECD Principles from 2004, which established a framework for corporate governance, regard corporate governance as a set of relationships between the management and supervisory bodies of companies, their partners, and other shareholders, and stakeholders, a set of the company's objectives and the means of achieving them, as well as indicators for determining the company's performance. The OECD defines a state-owned enterprise as "economic entity in which the state has a full, majority, or significant share in the votes" (Miazek, 2021, p. 3).

In contemporary literature, corporate governance is frequently reduced to the study of the distribution of power, the norms which regulate this distribution, and the mechanisms recommended to enable exercising that power (Hagen, 2011, p. 123).

Some definitions emphasize the economic aspect of corporate governance, so that according to Andrei Shleifer and Robert Vishny, "Corporate Governance refers to the way a company's funding providers ensure that they will receive the due benefits of their investment" (Matei & Drumasu, 2015, p. 497).

In Serbian literature, definitions of corporate governance focus on legal and economic aspects. Thus, according to Vasiljević (2013, p. 27) "In the legal sense, corporate governance could be defined as a specific agency relationship between management and a joint-stock company, established on the basis of contracts and laws…". The economic aspect of corporate governance is reduced to internal and external control mechanisms that protect the interests of shareholders (capital owners) and result in profit appropriation and the increase of wealth at microeconomic, macroeconomic, and global levels (Todorović, 2009, p. 130).

The aforementioned definitions have paved the way for a more thorough approach to corporate governance, including the governance of state-owned enterprises, according to which corporate governance is "the way in which an organization (public or private) is lead and controlled, with the purpose of getting performance/accomplishing its responsibilities successfully and bringing added value, as well as using financial, human, material and informational resources efficiently, while respecting the rights and obligations of all involved parties (shareholders/investors, Administration Board, managers, employees, state, suppliers, clients, and other people with a direct interest)" (Matei & Drumasu, 2015, p. 497). The definitions of corporate governance in state-owned enterprises suggest that a broader concept of corporate governance should be applied so as to include corporate social responsibility, which unites social and business values.

3. Some open questions regarding the operation of state-owned enterprises in market economies

3.1. General overview of the regulation on the management of state-owned enterprises

The general framework of corporate governance was established by means of the OECD Principles of Corporate Governance, and later supplemented by the principles of corporate governance pertaining to state-owned enterprises (OECD

Principles of Corporate Governance, 2004; OECD Guidelines on Corporate Governance of State-Owned Enterprises - OECD Guidelines, 2005, ed. 2015).

Global economic processes have reshaped the world's economic landscape. International economic entities and powerful multinational companies, extensions of their home countries, play a dominant role in establishing the new international economic order. OECD, as an international organization comprising 30 countries across the world, attempted to address new challenges posed by the corporate environment in the public sector by issuing Guidelines on Corporate Governance of State-Owned Enterprises. These guidelines apply to a whole range of enterprises owned by the state and include enterprises in which the state holds either majority or minority ownership, state-owned enterprises with publicly traded shares, as well as those not listed on the stock exchange. Although these principles are not binding, as they serve as guidance for member states, their practical significance is evident from the fact that even non-OECD member countries have adopted them as a general framework (Stefanović, 2020, p. 111). The guidelines cover the following areas: establishing an effective legal and regulatory framework for state-owned enterprises, state as the owner, just treatment of shareholders, relationships with stakeholders, transparency and openness, responsibilities of boards in state-owned enterprises (OECD Guidelines, 2005, ed. 2015, pp. 10-11). The general guidelines for each area are further elaborated by additional explanations.

In addition to guidelines, state-owned enterprises are subject to national company and corporate legislation, as well as certain alternative forms of regulation. The regulatory landscape of corporate governance, which includes state-owned enterprises organized as companies, has changed over the past decades. State regulation rectifies market imperfections and mitigates its shortcomings, but this comes at a cost. The question of harmonization of corporate governance regulation at the EU level is still open: how much harmonization is necessary and how much space should be left for national legislators. There is a growing practical need for more flexible secondary (subordinate) legislation in the public sector, especially when it comes to the privatization of state-owned enterprises in transitional economies (such as Serbian) and in public-private partnership projects, a form of long-term collaboration between the public and private sectors (Vasiljević, 2013, p. 19). State-owned enterprises are predominantly engaged in providing utilities such as water, gas and electricity supply, telecommunications, and transportation (railway and aviation). The state is present in the public sector not only as the owner of enterprises which produce public goods and provide public services, but also as a price regulator in the private sector and as a watchdog against monopolistic behaviour of private companies. Recent trends indicate that

the public sector production is getting shifted to the regulated private sector. The wave of privatization has affected state-owned enterprises in Europe and Japan, particularly those operating as natural monopolies.[1] State-owned enterprises are being replaced by private sector production which is subject to state regulation, such as price limits on services provided by private companies or subsidies to companies providing services of public interest (Stiglitz, 2008, pp. 191-192).

The lack of efficiency in providing services similar to those of private enterprises is cited as the argument for the privatization of state-owned enterprises. The causes of inefficiency of state-owned enterprises include soft budget constraints, limited competition, bureaucratic procedures, procurement limitations, and agency problems in corporate governance.

While these causes do exist and to some extent hinder the operations of state-owned enterprises, they must be viewed in light of the objectives of these enterprises. Moreover, there are examples of state-owned enterprises that challenge the views about their inefficiency which prevail in legal and economic literature.[2] Privatization of state-owned enterprises remains an open question with conflicting arguments for and against it. In today's global business landscape, there seems to be a high level of agreement that the state should not engage in the production of private goods, yet privatization should not extend to certain strategic areas, as that could jeopardize the achievement of some social and national goals.[3]

3.2. Problems in applying the rules and standards of corporate governance in state-owned enterprises

Certain problems encountered by state-owned enterprises stem from corporate legislation that has not provided answers regarding the delineation of corporate authority and the distribution of corporate power in state-owned enterprises. Corporate governance standards for state-owned enterprises do exist, and corporate regulation is integral part of the legal systems of European countries. The

[1] Natural monopolies are industries in which it is more efficient to have only one entity to supply the goods or provide services at lower cost than to have two or more operators. It pertains to the production of private goods by the state.

[2] French public enterprises were an example of efficient public production since they built nuclear power plants in entire country using the same project, which resulted in significantly lower production cost than that of American nuclear power plants built by the private sector using different projects (Stiglitz, 2008, p. 201).

[3] The privatization that presented a threat to national security, which is the primary public good in the USA, was the privatization of the state-owned US Enrichment Corporation, approved in 1997. It caused the conflict between the privatization company and national security (Stiglitz, 2008, p. 12).

troubles with the operations of state-owned enterprises arise in practice when corporate governance rules and standards are to be applied.

Recent studies and the analysis of research results pertaining to economies operating within the European Bank for Reconstruction and Development show that a limited number of state-owned enterprises has the corporate structure that includes a governing body responsible for strategic oversight of the state-owned company.

It is undeniable that regulations exist and that a significant portion of corporate governance standards is dedicated to the board[4] as the governing body. Legal regulations explicitly explain the mandate of the boards in state-owned enterprises. However, in practice, this body fails to fulfil its primary corporate function, which is the strategic oversight of the state-owned enterprise. Comprehensive strategic powers of the board would include determining strategy, approving budgets, supervising management, appointing and dismissing directors, risk management, approving capital expenditures, and determining management compensation (Cigna *et al.*, 2021, p. 54).

This assertion is supported by recent data. Less than 20% of economies conducting business within the European Bank for Reconstruction and Development entrust the boards of state-owned enterprises with these strategic tasks, and even then, there are certain limitations. It should be noted that in nearly half of the observed jurisdictions (in the sample of approximately 37 countries) the authority of state-owned enterprise boards to approve strategy or budgets is excluded, which is unacceptable as this is a strategic function of the board as the governing body. The alarming fact is that the authority of state-owned enterprise boards in relation to managing risks associated with company operations (environmental, social risks) is recorded in only 6 countries (Cigna *et al.*, 2021, p. 54). This data leads to the conclusion that state-owned enterprises of today are not prepared to address the risks posed by challenging business conditions and that they are yet to incorporate risk management into their business strategies, particularly management of risks associated with climate change, environment, society and governance.

Problems have also been identified in relation to the nomination of board members and the board's functioning. The composition of boards of state-owned enterprises is such that it does not allow for the board's independence. Some countries whose economies operate within the framework of the European Bank for Reconstruction and Development have included in their corporate regulations the stipulation that all directors of state-owned enterprises should be

[4] In literature, the board denotes a management body entrusted with strategic and supervisory functions. It does not refer to operative management on a day to day basis.

independent, but more than a third of legal systems (13 countries) have not introduced this condition which is meant to ensure efficient and unbiased supervision of state-owned enterprises (Cigna *et al.*, 2021, p. 55). The greatest progress in implementing corporate governance standards is observed in committee forming, especially audit committees, which exist in most legal systems and economies operating within the framework of the European Bank for Reconstruction and Development.

The findings of the empirical research indicate that it is necessary to produce an efficient model of corporate governance of state-owned enterprises. In law and economics literature, both foreign and domestic, analyses of well-known corporate governance models are prevalent. Without disputing these models, or the need to adapt them to the challenging business conditions, and fully respecting the validity of these analyses, it still seems that in the search for a more efficient model of corporate governance of state-owned enterprises should start from the stakeholder theory (Vasiljević, 2013, pp. 125-128), which focuses on the multi-interest concept of corporate governance.

State-owned enterprises are a specific form of organization, and it is necessary to consider the legal and economic nature of their operations. The establishment and operations of state-owned enterprises are subject to detailed legal regulation which must be in line with international corporate governance standards. The difference between state-owned and private enterprises lies in business objectives, the level of regulation, and stakeholders. In developed market economies, state-owned enterprises secure capital inflow through financial markets, hence they have a fiduciary duty to the owners of capital, i.e. shareholders (Raval, 2020, p. 211). Stakeholders in state-owned enterprises are employees and the general public, since they, as taxpayers, enable the establishment of these enterprises. By definition, a state-owned enterprise is a specific form of an economic entity with the status of a legal person established by the state for the purpose of performing activities of public interest (Jovanović, Radović & Radović, 2020, p. 676). Consequently, the state-owned enterprise belongs to the public sector and can be entrusted with certain tasks to be performed in public interest and for the benefit of general public. This organizational form of state-owned enterprises is present in our current Law on Public Enterprises of 2016, amended in 2019. The state can establish and acquire a stake (majority or minority) in capital companies, as is the case in developed market economies, where state-owned enterprises are organized as companies.

The legitimate business objective for state-owned enterprises is profit generation, hence they struggle to strike a balance between profit-oriented and non-profit goals. State-owned enterprises organized as companies (capital companies)

must compete on the market on an equal footing with other participants (private companies) and pay the economic price of market competition. This comprises bankruptcy, which often bypasses state-owned enterprises, and hostile takeovers as a measure that disciplines and professionalizes the management of state-owned enterprises. When seeking for a solution for an efficient model of corporate governance in state-owned enterprises, we should start with the Hilb's model of corporate governance (Hilb, 2008, pp. 569-581) known as the KISS model. The model is complex and consists of multiple dimensions: situational, strategic, integrative and that of control (Čeliković, 2017, p. 66). Theoretically, the model is well-conceived, as it seeks to combine previous sets of values with current corporate governance models (shareholder and stakeholder value orientations).

The starting point of the model is the situational dimension, which examines the external context consisting of the legal framework, tradition, culture, and historical legacy. The internal context encompasses central questions, such as ownership structure, boards, and the degree of independence of board members. The strategic positioning of the board, its diversification, transparency in appointing board members, the rules for determining compensation and performance measurement, are part of the strategic and integrative dimensions of the Hilb's model of corporate governance for state-owned enterprises. The dimension of control mitigates agency problems in corporate governance of state-owned enterprises through the establishment of company's internal audit and risk assessment committees (Čeliković, 2017, p. 66).

Corporate governance as a system for controlling and managing companies is present not just in domestic theory, but also in regulatory framework, and practice, and it is accompanied by an attempt to adopt globally accepted corporate governance standards and best practices. The segment of corporate governance which relates to Serbian public enterprises has proved to be seriously deficient, so there is a need to improve the corporate governance capacity in the public sector. Therefore, the state has recently taken legislative steps to enhance the situational dimension of the aforementioned model by creating an adequate normative framework to ensure effective corporate governance.

4. Improving corporate governance in the state-owned enterprises through the new regulatory framework

The cornerstone for the new corporate legal framework is the OECD Guidelines, which serve to support the countries undergoing reform implementation. Recognizing that the crucial challenge is to strike a fine balance between

exercising state ownership rights in public enterprises and performing political functions, the Republic of Serbia has embarked on the development of a new legal regulatory framework for corporate governance in the public sector (Opačić & Marinković, 2022, p. 82). The basis of effective corporate governance in state-owned enterprises is the integral legislative and regulatory framework, which should encourage market competition and prevent the interference of economic and other functions of the state (Dedeić & Gasmi, 2015. p. 47).

The aim of enacting this new legislation (Law on the Management of Companies Owned by the Republic of Serbia, 2023 – Law) is to improve corporate governance in state-owned enterprises, address the existing problems and enhance the performance monitoring mechanisms. To achieve full alignment of the legal framework, the introduction of the new law shall be accompanied by the harmonization of the existing laws, especially the Law on Public Enterprises, which is why the implementation of the newly enacted Law has been postponed. Adhering to the OECD Guidelines and following recommendations from international practice, the Republic of Serbia has adopted certain solutions and elevated them to the level of legal regulations while respecting domestic economic priorities and goals.

The first chapter of the OECD Guidelines emphasizes the need to establish an effective legal and regulatory framework for state-owned enterprises, ensuring equal treatment of economic entities in the public and private sectors while preventing market disruptions (OECD Guidelines, 2005, ed. 2015, p. 12). In addition to the unified approach, the legal framework should be characterized by simplicity, consistency in implementation and compliance with European and international regulations, which can be achieved through the adoption of the new Law.

Capital companies owned by the Republic of Serbia into which public enterprises will be transformed (Law, 2023, Art. 40) are established by the Republic of Serbia to generate profit or to serve some other interest, and these capital companies can expressly engage in operations of public interest (Law, 2023, Art. 2). According to the provisions of the Law, a capital company is a joint-stock company, or a limited liability company in which the Republic of Serbia holds the position of a shareholder or of a member with a majority capital participation (50% or more), as well as a business company in which the Republic of Serbia acquires controlling ownership on another basis (Law, 2023, Art. 3). Exceptionally, the new legislation may apply to capital companies in which the state's ownership share is less than 50%, but the Law does not specify in which situations this provision shall apply. In order to achieve an efficient market and prepare economic entities to quickly adapt to possible market fluctuations, the OECD Guidelines place special emphasis on the obligation not to exempt state-owned enterprises from the application of regulations that apply to privately owned economic

entities. This includes a particular emphasis on the requirement to apply competition protection rules, which the domestic legislator has adopted and incorporated into the new legal framework. The solution regarding the clear legal form of state-owned enterprises, recommended by the OECD, is justified by the fact that in certain countries, the legal form of state-owned enterprises can be very specific, unique to economic entities owned by the state. Despite that, we maintain that the legislator, guided by the international recommendations, changes the legal form of state-owned enterprises to facilitate market operations, enhance and protect competition, and enable external financing.

4.1. Centralized ownership management

A crucial issue that needed to be addressed was the separation of the state's ownership and political functions (OECD Guidelines, 2005, ed. 2015, p. 12). The second chapter of the OECD Guidelines provides recommendations for regulating the state's position as an owner. The crucial novelty introduced by this law with the aim to resolve a whole range of issues is the function of centralized ownership (OECD Guidelines, 2005, ed. 2015, p. 13). This system of ownership organization and the role of the state in management are in line with the OECD recommendations (Law, 2023, Art. 4). Centralized ownership shall be carried out through the Ministry of Economy in accordance with the tenets and principles envisaged in the Law, while centralized ownership of those capital companies engaged in the production and distribution of electricity and natural gas will be conducted through the Ministry of Energy. By adopting such measures, the legislator has aligned the regulations of the Republic of Serbia with the requirements of the OECD Guidelines, which stipulate that centralized management should be carried out by a single entity designated by the state, whether it is a ministry or other entity under the ministry's jurisdiction and control (OECD Guidelines, 2005, ed. 2015, p. 13). The decision to entrust the Ministry of Economy with this role has also been influenced by the international practice and experience of other countries in the region. To be precise, the approaches to centralizing ownership functions adopted in Slovenia, Croatia and Hungary were taken into consideration. In Slovenia, centralized ownership management was initially realized through the establishment of the Agency for Capital Investments Management, which later transformed into the Slovenian State Holding. In Croatia, it was managed through the State Property Management Agency and then through the State Office for Managing State Property, the successor of which is the Ministry of State Property. In Hungary, it is implemented through the Hungarian State Holding Company (Explanation of the Law, 2023, p. 38). Apart from the

centralized ownership management, which has become dominant lately, global corporate practice recognized other governance models such as the decentralized model, dual model, two-tier model and the agency for coordination (Government of the Republic of Serbia, 2021, p. 12).

The Ministry of Economy shall monitor the operations of business companies owned by the Republic of Serbia primarily by receiving reports, yet for most important reports and legal documents the approvals of the government and the National Assembly are required, so as to achieve more adequate control of business operations, and this is completely in line with the OECD Guidelines. Article 18 of the Law presents a whole range of situations in which a business company owned by the Republic of Serbia is obliged to obtain the government's consent through the Ministry of Economy before undertaking certain actions. The framework outlined in the second chapter of the OECD Guidelines mandates that the state must establish a clear ownership policy and act as an informed, active and engaged owner. Management must be transparent and efficient, and the domestic legislator respected this recommendation (OECD Guidelines, 2005, ed. 2015, p. 13). To strike a balance between the state's ownership functions and its public functions, as well as to overcome numerous issues affecting the efficiency of state-owned enterprises and the satisfaction of the general public's interest, centralized ownership management has proven to be the most effective solution. Centralized ownership management reduces the potential for conflicts of interests arising from the fact that the state holds various roles. It also diminishes political influence when managing state-owned enterprises ensures consistency in the application of corporate standards, enhances transparency in management, facilitates accountability determination, and most importantly, enables timely and effective oversight and monitoring of the company's operations.

4.2. Corporate governance in the light of the new law

A separate part of the Law is dedicated to corporate governance. The provisions of the Law stipulate that the corporate structure in a capital company can be organized as a single-tier or two-tier system (Law, 2023, Art. 19). The internal corporate structure is determined by the founding act or articles of association, and capital companies owned by the Republic of Serbia are not free to choose between a single- and two-tier system as this is determined by specific criteria. Specifically, a capital company owned by the Republic of Serbia shall apply the two-tier system if it is categorized as a large or medium capital company, and a single-tier system if it is a small or micro capital company (Law, 2023, Art. 19). The OECD Guidelines do not propose a specific corporate governance model,

meaning they do not endorse any of the listed models as the most efficient. Such an approach is in the line with the need to preserve national interests, the country's economic policies, and the needs of the business community. The Guidelines only suggest that public authorities should be excluded from day-to-day management in state-owned enterprises and thus leave the management of operations to the entities within these enterprises (OECD Guidelines, 2005, ed. 2015, p. 13). On the other hand, by retaining the ownership rights, the state remains the owner of the resources, enabling their rational use and preservation.

According to the Law, the representatives of the state shall participate in the work of the assembly of capital companies owned by the Republic of Serbia, and they shall represent the interests of the Republic of Serbia in a professional and conscientious manner, with due diligence of a good entrepreneur (Law, 2023, Art. 20). Since the Republic of Serbia is the owner, and in most cases the majority owner, the representative of the Republic of Serbia is obliged to represent the interests of the Republic of Serbia when casting their vote, during discussions and in making decisions regarding the operations of the capital company owned by the Republic of Serbia. The total share or share capital of the state determines the power of the state representative in decision-making. The representative of the Republic of Serbia in the assembly is appointed for the period of four years, and appointment and dismissal are carried out by the act of the relevant Minister with the consent of the government. Such a legal solution falls within the framework of the second chapter of the OECD Guidelines, which envisions that in a state-owned enterprise, the state's representative should be an equal participant in the work of the Shareholders' meeting (OECD Guidelines, 2005, ed. 2015, p. 13).

Memorandum of association of a capital company owned by the Republic of Serbia determines the number and mandate of members of the Shareholders' meeting and the Supervisory Board, respecting the criteria specified in the Law, and taking into account the complexity of the operations of the state-owned enterprise. If a capital company is organized under the two-tier governance model, where the supervisory board is a strategically important body, the Law stipulates that at least one of its members must be independent of the company. The provisions regarding the legal status of such an independent member will be subject to the same rules applied to independent members of the supervisory board of a public joint-stock company (Law, 2023, Art. 21). Except for the general provisions, the Law contains no other detailed regulations concerning the procedure for nominating members of the supervisory board and the scope of their responsibilities, which is crucial for a body that makes strategic business decisions.

The director of the company is appointed and dismissed by the Assembly in the single-tier system or by the Supervisory Board in the two-tier system, after a

public contest (Law, 2023, Art. 23). The Law prescribes the criteria that the representative of the Republic of Serbia, the director, and the interim director must meet, and these do not differ from those stipulated by the current legislation on companies. The OECD Guidelines envisage that the state should allow the boards and bodies within a state-owned enterprise to carry out their own responsibilities, which are more elaborately regulated by the internal acts of the state-owned enterprise (OECD Guidelines, 2005, ed. 2015, p. 13). In line with this recommendation, the Law does not specify the scope of tasks to be carried out by the boards within the company; instead, these responsibilities are governed by the company's internal acts. The OECD Guidelines require that the mandate of the board should be clear, which is not explicitly highlighted in the Law. However, it can be inferred from the interpretation that the mandate of the members of the Shareholders' meeting and the board is time-limited. Still, the legal text does not stipulate that the board shall be accountable to the owners or that it is obliged to act in the best interest of the business entity (OECD Guidelines, 2005, ed. 2015, p. 17). Although this is a legal standard that stems from the general law regulating the operation of business entities, it would have been useful, and in the spirit of legislative amendments, to emphasize this further and create a sense of greater obligation and responsibility of the board members towards the company. Additionally, the provisions of the Law do not provide for a clear procedure for appointing board members in state-owned enterprises, which is among the key recommendations of the OECD Guidelines (OECD Guidelines, 2005, ed. 2015, p. 13). Specifying a clear and well-known procedure for appointing board members enhances the objectivity of those selected, their impartiality, and reduces the potential for corruption which is one of the major issues in the operation of state-owned enterprises. There is also a lack of emphasis on the composition of the board, which must ensure objective and independent decision-making by increasing the number of independent board members and specifying the conditions that independent members must meet (OECD Guidelines, 2005, ed. 2015, p. 17). The Law does not foresee the establishment of committees within the board for more effective work or the engagement of specialized experts in specific fields. We consider this legal gap significant because, under the new regulatory framework, the primary driving force of state-owned enterprises should be the ability to gather and organize experts in specific areas, which professionalizes management.

Capital companies owned by the Republic of Serbia must form an Audit Commission, whose role is defined by regulations pertaining to the operations of business companies. The Law also envisages the Internal Audit, and presents the principles and guidelines that must be applied (Law, 2023, Art. 28). Since internal control is one of the crucial mechanisms for improving corporate governance in

capital companies owned by the Republic of Serbia, its activities shall constantly contribute to the improvement of organizational and managerial processes (Vukolić, 2019, p. 72). This approach of the legislator is in line with the OECD Guidelines, which address the issue of audit in the fifth chapter (OECD Guidelines, 2005, ed. 2015, p. 16). Compliance with the OECD Guidelines is also observable in the part that obliges the company to make the following publicly available: the company's goals and their achievement, ownership and voting structure of the company, all risk factors and measures taken to mitigate them, any type of financial assistance, and all significant transactions with related entities (OECD Guidelines, 2005, ed. 2015, p. 16). The law specifies what a state-owned enterprise must publish on its website (Law, 2023, Art. 31). To ensure impartiality of entities involved in management, governance, and representation of capital companies owned by the Republic of Serbia, the Law obliges them to adopt an Ethical Code. The legislator operates within the framework of the OECD Guidelines, which, in their fourth chapter, regulate the relationship between a state-owned enterprise and stakeholders. This chapter also anticipates the creation and publication of ethical codes based on domestic norms and in compliance with international obligations (OECD Guidelines, 2005, ed. 2015, p. 15).

A significant change concerns the adoption of the Corporate Governance Code. The authority to adopt the Code has been transferred from the Chamber of Commerce of Serbia to the Government (Law, 2023, Art. 31). Naturally, the Code applies exclusively to capital companies owned by the Republic of Serbia. In the public debate during the proposal phase, the Chamber of Commerce raised an objection that the adoption of the Code should remain within its competence. However, this suggestion was not accepted, and this part of the Law was not altered after the public debate (Ministry of Economy, 2023, p. 4).

After the new law comes into effect, the business success of capital companies owned by the Republic of Serbia will be the best indicator of the effectiveness of the reforms of corporate governance in the public sector. The initial goal of achieving a uniform legal framework has been realized by enacting the new law. Through the transformation of public enterprises into capital companies, the same legal regime will apply to all companies participating in the realization of the general interest. Now, in all capital companies in which the state has the ownership, this function will be exercised through centralized ownership management. The state will be represented in Shareholders' meeting assemblies as an equal member through its representatives, and the supervision and control of the company's management will become simpler, although provisions emphasizing that the company's management is accountable to the state as the owner are missing. Greater impartiality and independence in work can be achieved through

additional provisions of the law which would provide for and make transparent the system of remuneration for members of the governing bodies. The OECD Guidelines include the provision that the board members' compensation plans should support the long-term interests of the company and attract and motivate qualified professionals (OECD Guidelines, 2005, ed. 2015, p. 13). The new law does not contain provisions that regulate the issue of board members compensation.

The OECD Guidelines also provide, in the third chapter, for the fair treatment of shareholders. The Law does not regulate the protection of minority shareholders. The principle of responsibility is envisaged to provide protection for minority shareholders through its implementation, but there are no detailed provisions in this regard, although this is a very sensitive and important issue. By interpolation, one might conclude that, for the purpose of protecting the rights of minority shareholders, the provisions of the Company Law will be applied, which does not enable minority shareholders to participate in making fundamental corporate decisions as envisaged by the OECD Guidelines.

5. Conclusion

Serbia initiated corporate reform of strategic state-owned enterprises after certain practical shortcomings in corporate governance of public enterprises had been identified. The comparative analysis of the relevant international and European corporate standards and the new legal solutions reveals several important findings. It is evident that the state intends to adjust the organizational form of the state-owned enterprises to better suit its interests. The state-owned enterprises are organized as capital companies, which is the customary solution in market economies. The ownership rights shall be exercised as centralized ownership through the Ministry of Economy. The legal form prescribed for the state-owned enterprises makes these companies equal to private companies in the market. This implies that state-owned companies must be prepared to pay the price of market competition (bankruptcy), which was not the case before. This is compatible with the envisaged purpose of companies owned by the state, as the Law expressly states that they are established to acquire profit and can perform an activity of public interest, as defined in a separate law. In this manner, the proposed legal framework puts the goal of obtaining profit in the foreground, while public interests come in the second place, which is contrary to the provisions of Law on Public Enterprises. Consequently, it is evident and justified that the state should aim to own profitable enterprises and to introduce corporate, business and financial discipline in this area. That implies that the role of the state as the owner must be separated from its other

roles (i.e. its regulatory and supervisory function). It remains to be seen whether it is advisable in some areas of strategic national interest to put the public interest and the well-being of entire society ahead of profit.

Despite the effective solutions of the Law, some of its provisions are still not completely in line with the OECD Guidelines. This primarily pertains to stipulations on the transparency of Supervisory Board members' appointment procedure, on independence of the Supervisory Board members and on publicly proclaimed political aims of state-owned enterprises. The Law obliges capital companies to enact their Ethical Code, but does not prescribe that state-owned enterprises should submit reports on their relations with stakeholders, as suggested in the OECD Guidelines. The question of Corporate Governance Code also requires further consideration. The ownership rights of the state cannot be threatened by the opinion of the Chamber of Commerce, which represents organizations of employers. The aims of centralized ownership listed in the Law may prove to be conflicting in practice, for instance sustainable management of environment and sustainable use of natural resources of the state may prove incompatible with predominantly profit-oriented business operations.

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