Foreword

The following contributions result from a conference held in October 2016 at the National University of Public Service in Budapest, which was organized by Societas,[1] an academic network of CEE company law scholars. The conference's subjects were company law aspects of state owned enterprises (SOEs), an issue of paramount importance as the state very often – and especially in CEE countries – owns significant holdings or even all shares in core industries; therefore, inefficiencies can have major fiscal and economic impacts.

Consequently, the OECD in 2005 issued Guidelines on Corporate Governance for SOEs, which have been revised in 2015. The Guidelines assume that SOEs can be operated as efficiently as private firms and aim at providing a high bar for good corporate practice in this context. They put special emphasis on the creation of a rules-based environment on the equitable treatment of (outside) shareholders, on encompassing transparency and disclosure, and on the freedom of boards from political interference. An introduction is not the correct place to delve into all of these issues; a few words on the last subject must suffice.

The Guidelines recognize that it is for the state as the owner to set the strategic objectives for the SOE; this is in line with the public interest in the SOE's functions. However, according to the Guidelines setting the objectives must be distinguished from interference in operational issues; for the latter SOEs should have full autonomy. Supposedly, operational autonomy is a pre-condition for the efficiency to be attained. Let me make three remarks on this issue.

First, political influence on operational decision-making is hard to detect in the first place, as it generally is not public knowledge. To mitigate this problem, the Principles try to increase transparency by mandating disclosure of the areas in which instructions will be given. Provisions in the articles and the by-laws for various management bodies of the SOE help to achieve this aim. However, it would be naïve to believe that political influence necessarily or even regularly makes use of legal tools; very often it subtly works via pressure on managers (e.g. the threat of losing the job) or hidden incentives (e.g. the possibility of another, more attractive position). In this respect, transparency is much harder to achieve and possibly rather a result of critical media than legislative efforts.

Second, shareholder influence as such is not a bad thing. The Guidelines recognise this by promoting the state's role as an "active owner"; for the same reason many company laws, especially for the private company type, empower (both private and public) shareholders to give binding instructions to management. Thus, it is not the influence as such, which is problematic, but the aims politicians try to achieve by exercising their right. While this may

1 societas-cee.org.

seem a truism, its relevance becomes immediately apparent if one looks at the justification for shareholder influence under general company law: shareholders as principals should be able to protect themselves against abuse of their agent's (i.e. the management's) powers. This justification is valid in the SOE context as well with the only difference that a principal–agent relationship exists at two levels: the managers are the agents of the politicians, who in turn are agents of the people. At the end of the day, it comes down to the question which agent to distrust more: the politicians (solution: insulating management) or the managers (solution: empowering politicians). While the vox populi probably favours curbing political influence, this by no means is a foregone conclusion. Rather, the fear of undue interference and the need for management oversight have to be continuously re-balanced. Overall, the issue cannot be solved by rules on SOEs alone, but is also an issue of political accountability.

Third, the solution to these problems does not lie in legal rules on influence alone. Rather, the correct selection of managers is another core issue. As a general rule expertise in running a business and in the field the company is operating in is an important curb on improper shareholder influence (which, by the way, also happens in privately owned companies). Managers who actually realise the detrimental effects of a certain measure upon the company are less likely to cave in to political demands. Although it may be practically impossible to appoint SOE managers without political ties, the more realistic aim of appointing competent managers (if need be with political affiliations) will for this reason help immensely in mitigating the negative effects of public ownership.

The legal rules on SOEs in Austria, where I come from, have grappled with these issues for at least 60 years and the solutions have been changing over the years: sometimes increasing autonomy was the main issue, sometimes it was felt that SOEs must be put on a tighter leash. I do not feel that we have come anywhere closer to a correct solution, but rather that an increase in autonomy leads to (real or perceived) abuse by management, whereupon the pendulum swings in the opposing direction and vice versa.

Therefore, it was very interesting (and to some extent consoling) to realise during our conference that other countries encounter the same issues and are not by necessity closer to a balanced and, if at all possible, stable solution. The contributions of the present volume will hopefully help the reader in getting a picture of the issues at stake (which may be similar internationally) and the legal mechanisms in place to address these issues (which diverge widely). I sincerely hope that the results will be one, if small, stepping-stone towards a better understanding of the subject.

Prof. Dr. Martin Winner,
Vienna University of Economics and Business

Dr. Martin WINNER (Martin.Winner@wu.ac.at) is Professor of Business Law and Director of the Research Institute of Central and Eastern European Business Law at the Vienna University of Economics and Business (WU). His research interests are company law and securities regulation, intellectual property law, comparative law (esp. CEE) and general business law (including contracts and property). Since 2014 he is member of the European Commission's advisory "Informal Expert Group on Company Law (ICLEG)" and since 2015 of the European Company Law Experts (ECLE; https://europeancompanylawexperts.wordpress.com/). Since 2009, he is Chairman of the Austrian Takeover Commission, the regulator for public takeover bids. He is President of Societas – Central and Eastern European Company Law Research Network.