

SCOPE OF THE TERM „PUBLIC ENTERPRISE“ UNDER THE PUBLIC ENTERPRISES ACT

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Abstract: *The term “public enterprise” includes several types of traders: in the first place: commercial companies with more than 50 percent state / municipal participation in the capital, or in which the state / municipality otherwise exercises a dominant influence; secondly: the subsidiaries of the commercial companies with over 50 per cent state / municipal participation in the capital and the state enterprises, established by special laws on the grounds of art. 62, para 3 of the Commercial Law, if through them the state / the municipality controls more than 50 per cent of the voting shares or otherwise exercises control and, thirdly: the state enterprises, established by special laws on the grounds of art. 62, para 3 of the Commercial Law.*

Keywords: *Reform of state-owned enterprises; state-owned enterprises; public enterprises; commercial companies with more than 50 percent state / municipal participation in the capital; dominant influence; the subsidiaries of the commercial companies with over 50 per cent state / municipal participation in the capital and the state enterprises, established by special laws on the grounds of art. 62, para 3 of the Commercial Law; the state enterprises, established by special laws on the grounds of art. 62, para 3 of the Commercial Law; Organization for Economic Cooperation and Development (OECD); Guidelines on Corporate Governance of State-Owned Enterprises, edition 2015, Law on Public Enterprises of 2019.*

INTRODUCTION

Different countries have different scopes of institutions that are considered public enterprises¹⁴. Public enterprises are the basis of the public sector, which is a system of state and municipal institutions that manage public property, carry out taxation, produce and offer public goods for use by members of society. The public sector is also considered as a certain part of the economy of the state, producing and offering public goods to the population. In this case, the public sector covers only public organizations producing consumer goods - for example: the military-industrial complex, etc. Each country determines the scope of the concept of "public sector", taking into account some national specifics in its content. For example, in the United States of America (US), the public sector is referred to as the "public sector" and covers all areas of the economy except the private sector. The public sector includes federal property, state-owned property, and municipal property. Unlike the countries in Western Europe and Japan, the US public sector does not include large industrial enterprises (sites) from the mining and processing industries, transportation companies, etc. Even energy and telecommunications, i.e. industries that many economists see as natural monopolies in the United States are private companies.

Abroad, state-owned enterprises are most often referred to as: "State-owned enterprise" (SOE) or "Government-owned enterprise" (GOE), or can be found as: "Public enterprise", etc., which means public / state enterprises. There is no single definition for public enterprises, and each country uses its own. The different definitions differ from each other mainly in the purposes of legal regulation from the different national legislations and serve to distinguish one economic ownership structure from another in the application of legal requirements. The following definitions of state-owned enterprises can be given as examples:

- a business organization wholly or partly owned by the state and a public body controlled by it¹⁵;

¹⁴ OECD, 2015, p.17-19.

¹⁵ Internet source: <https://www.britannica.com/topic/public-enterprise>

- state-owned or state-controlled economic entities that generate the majority of their revenues from the sale of goods and services¹⁶;
- an enterprise in which the state has significant control through full, majority or significant minority participation¹⁷;
- any legal entity (LE) recognized by national law as an undertaking and in which the state exerts ownership¹⁸.

The scope of these definitions expands after 2015, when they include both joint stock companies (JSCs) and limited liability companies (Ltd), as well as legal entities established by special laws, if their purpose and activities or parts of their activity are largely economic in nature¹⁹.

For the purposes of the Organization for Economic Cooperation and Development's (OECD)²⁰ Corporate Governance Guidelines⁶ (OECD Guidelines)²¹, the term "state-owned enterprise" is defined as "any LE recognized by national law as an undertaking in which the State exercises ownership should be considered a state-owned enterprise. This includes the legal organizational forms JSC, Ltd and limited partnerships with shares (KDA). In addition, corporations established by law with their legal personality, established by specific legislation, should be considered as state-owned enterprises if their purpose and activities or parts of their activities are predominantly economic²².

With the adoption of the Public Enterprises Act (PEA)²³ in 2019 and the Regulations for the Implementation of the Public Enterprises Act (RIPEA)²⁴ in 2020, the aim is to create a harmonized legal framework in which public enterprises can operate and in which the rules for corporate governance and disclosure will be the same for all state-owned enterprises, regardless of which body exerts the rights of the state.

PEA determines the scope of public enterprises in the provision of Article 2, paragraph 1, according to which public enterprises are:

1. trading companies (TC) with over 50 per cent state / municipal participation in the capital or in which the state / municipality otherwise exercises a dominant influence;
2. the subsidiaries of TC under item 1 and the enterprises under item 3, if through them the state / municipality controls more than 50 per cent of the units / shares with voting right or otherwise exerts a dominant influence;
3. the state enterprises, established by special laws on the grounds of art. 62, para 3 of the Commercial Law.

According to Paragraph 1, item 2 of the Additional Provision (AP) of the PEA, "dominant influence" is assumed in cases where the state directly or indirectly owns more than 50 percent of

¹⁶ The World Bank, 1995: Bureaucrats in Business: The Economics and Politics of Government Ownership, Report Number 15037

¹⁷ OECD, 2005: OECD Guidelines on Corporate Governance of State-Owned Enterprises, Paris: OECD Publishing.

¹⁸ OECD, 2015a: OECD Guidelines on Corporate Governance of State-Owned Enterprises, Paris: OECD Publishing.

¹⁹ Final report: "Foreign experience in the field of corporate governance of state-owned enterprises", prepared by the club "Economy 2000" under Project BG05SFOP001-2.009-0021 "For effective, transparent and responsible corporate governance of state-owned enterprises", July 2019 r., p.11.

Internet source:

<http://club2000.org/uf/%D0%94%D0%BE%D0%BA%D0%BB%D0%B0%D0%B4%201-%D1%87%D1%83%D0%B6%D0%B4.%20%D0%BE%D0%BF%D0%B8%D1%82-%D1%84%D0%B8%D0%BD%D0%B0%D0%BB.pdf>

²⁰ The Organization for Economic Cooperation and Development (OECD) is an authoritative international economic organization representing the democracies, uniting the developed nations. The main goal is to stimulate economic progress and world trade by comparing political experience, seeking answers to common problems, identifying good practices and coordinating the domestic and international policies of its members.

²¹ OECD Guidelines on Corporate Governance of State-Owned Enterprises 2015.

²² OECD, 2015, p.17-19.

²³ Public Enterprises Act, prom., DV, 79/08.10.2019, ch., DV, 100/20.12.2019, ch., DV, 85/02.10.2020, ch., DV, 96/10.11.2020

²⁴ Regulations for application of the Public Enterprises Act, prom., DV., 40/05.05.2020

the subscribed capital of the enterprise, controls the majority of votes related to shares / units issued by the enterprise, or may appoint more than half of the members of the management or supervisory body of the enterprise.

Public enterprises of the first type (Art. 2, para. 1, item 1 of the PEA) include capital commercial companies (CCC), which are characterized according to two criteria: direct majority participation of the state / municipality in the capital or exertion of dominance. EOOD and EAD with state and municipal participation in the capital are not separated as a separate type of public enterprises, but are assigned to this category according to the first criterion - direct majority participation of the state / municipality in the capital.

The second type of public enterprises (Art. 2, para. 1, item 2 of the PEA) are the subsidiaries of commercial company with over 50 per cent state / municipal participation in the capital and the state enterprises established by special laws on the grounds of Art.62 , para 3 of the Commercial Law²⁵ (CL). The subsidiary is defined in the CL according to two criteria - participation (in the capital) or the possibility to exert control over it^{26,27}, and the PEA defines the subsidiary - the public enterprise through the criteria: control of more than 50 percent of the shares / stocks with the right to vote or to exert a dominant influence in any other way.

The third type of public enterprises (art. 2, para. 1, item 3 of the PEA) are the state enterprises established by special laws on the grounds of art. 62, para. 3 of the CL. This provision of the CL stipulates that state-owned enterprises, which are not commercial companies, may be established by law. The criterion for determining them as public enterprises is associated only with the special status of this type of trader - public enterprise.

Therefore, it is not by the will of the sole owner of the capital, respectively of the partners or shareholders in the multi-member commercial companies, but by virtue of the law (ex lege) it is determined when a trader is a public enterprise. Only entities that possess any of the characteristics referred to in Article 2, paragraph 1 of the PEA may be designated as "public enterprises" or with the variants of this term: "state-owned enterprises", "sole proprietorships" (which is used only in Article 15, paragraph 1 of the PEA) and "municipal public enterprises". According to Article 5 of the PEA, only legal entities can be public enterprises. Individuals or impersonal entities (for example: civil society, municipal enterprise) cannot be defined as public enterprises. The purpose of the PEA is not to create a new legal entity - a public enterprise. It complements the legal personality already recognized on another ground and the acquired commercial quality of a certain category of traders with the additional characteristic (quality) - "public enterprise". As soon as the prerequisites of Art.2, para 1 of the PEA are met, the traders automatically acquire the characteristic "public enterprise". The PEA does not provide for this quality to be reflected in any way in the commercial registration. There is no requirement to add the word "public undertaking" to the trader's company as part of its mandatory content. On the other hand, there is no obstacle for it (or its variants) to be included in its optional content, in compliance with the requirements of Article 7, paragraph 2 of the CL²⁸. *De lege ferenda* in the law may provide for a restriction as "public enterprises" to mean only the entities under Article 2, paragraph 1 of the PEA. The most significant consequence associated with the acquisition of this quality is a change in the applicable legal regime. For traders who are characterized as "public enterprises", it changes and the special rules of the PEA and RIPEA apply to them. Pursuant to Art.11, para 2 of the Law on Normative Acts²⁹ (LNA)³⁰, when a general regulation of a certain matter is given, a special law may provide for deviations from it only if this is required by the

²⁵ prom., DV, 48/18.06.1991 г., ch., ..., DV, 64/18.07.2020

²⁶ Buzeva, T., Holding, Sofia, Sibi Publishing House, 2006, pp.167-187

²⁷ Stefanov, G., "Commercial Company Law", commercial companies general provisions, certain types of commercial companies, second updated edition, Veliko Tarnovo: ed. Abagar, 2018, p.227.

²⁸ Regarding the concept of "company" and the requirements for its mandatory and optional content, see: Nikolova, A., "Requirements for the content of the commercial company", Sofia: magazine "Commercial and contract law", book 7/2019, pp.5-8.

²⁹ Prom., DV., 27/03.04.1973 г.

³⁰ Decision № 7811 / 09.06.2014 of the SAC

nature of the public relations regulated by that law. The loss of the characteristic automatically leads to the opposite change - the PEA and the RIPEA will not apply to the trader, but the general normative regime.

From the moment of entry into force, the PEA acts for the future and in the same way towards all addressees of its provisions³¹. With regard to the existing enterprises, the composition of the management and control bodies of the public enterprises must be brought in compliance with the requirements of the law within 16 months from its entry into force (compare: § 3, para 4 of the TFP of PEA).

Since according to Article 9, paragraph 1 of the PEA, the main legal form of commercial company with state participation in the capital is AD, and the legal form OOD is admissible for “micro-”, “small” and “medium” enterprises, the existing commercial company - public enterprises of the category “large”, which are entered in the commercial register and the register of non-profit legal entities (CRRNLE) at the Registry Agency under the Minister of Justice (RA) as OOD, should be transformed into JSC, by changing of the legal form under the CL. *De lege ferenda*, it is necessary to provide for this obligation explicitly in the PEA, as well as to determine the term for the transformation.

Public enterprises under the PEA must be separated from public companies under the Public Offering of Securities Act³² (POSA). The public company is only a joint-stock company, which meets the requirements of art.110, para 1 and para 2 of POSA. Unlike public enterprises, which can be formed as a commercial company with more than 50 percent state or municipal participation in the capital (i.e. they can be sole proprietors), the public company cannot be sole proprietorship. The legal regime of these companies is different, which determines the type of interest in need of protection. In the case of a public company, the legislator protects the interests of investors, while in the case of a public company the subject of protection is the interest of the state and the municipality³³. On the other hand, in case a public company meets at the same time the conditions under Art. 2, para 1 of the PEA, it may also be referred to as a public enterprise. The two characteristics are different, but not mutually exclusive, but can be complementary.

Pursuant to Art.2, para 2 of the PEA, its requirements do not apply to the “Bulgarian Development Bank”, and according to Art.3 of the PEA the bodies of local self-government and municipal public enterprises apply the provisions of the following chapters: second (principles of exertion of state ownership over public enterprises), fifth (requirements to the management and control bodies), sixth (accounting and auditing) and seventh (public disclosure) of PEA. The limited application of the PEA to municipal public enterprises aims not to violate the rights of the municipality and the municipal council as a body of local self-government³⁴.

CONCLUSIONS

PEA introduces the concept of “public enterprise” and defines its scope in the provision of Article 2, paragraph 1. Due to the unchanged provisions of Art.61 and Art.62 of the CL from 1991, the possibility for mixing the different legal organizational forms for carrying out economic activity by the state and the municipality has not been overcome. The outdated provisions of Title Two “State and Municipal Enterprises”, Chapter Nine “Trader-Public Enterprise” of the CL do not correspond to the current normative permits of the PEA and RIPEA, as well as other normative acts: Law on State Property, Law on State Property³⁵ (LSP), Law on Municipal Property³⁶ (LMP),

³¹ The provision of § 10 of the RIPEA stipulates that the contracts for assignment of management and control concluded before the entry into force of the regulations, as well as the approved business programs / plans of public enterprises shall remain in force until the procedures provided by law and regulations.

³² prom., DV, 114/30.12.1999.

³³ Kalaydzhev, A., Joint Stock Company, Sofia: Sibi Publishing House, 2019, p.314.

³⁴ Reasons of the Council of Ministers to the draft of the PEA.

Internet source:

<https://www.parliament.bg/bg/bills/ID/157027>

³⁵ prom., DV, 44/21.05.1996, ch., ..., DV, 44/13.05.2020

³⁶ prom., DV, 44/21.05.1996, ch., ..., DV, 94/29.11.2019

Law on Public Procurement³⁷ (LPP), etc. State and municipal enterprises (public traders) - sole proprietorships (ETD) - EOOD and EAD; commercial company with state and municipal participation in the capital and the state enterprises, established by special laws on the grounds of art. 62, para 3 of the CL are private law subjects and not public law subjects. Their public character is presupposed by the peculiarities of the state / municipality as a special subject of civil law and a principal of capital, which at the same time expresses a public interest. The scope of the term "public enterprise", according to Article 2, paragraph 1 of the PEA, includes. Commercial company with more than 50 percent state / municipal participation in the capital or in which the state / municipality otherwise exercises a dominant influence; the state enterprises, established by special laws on the grounds of art. 62, para 3 of the CL and; the subsidiaries of the said commercial companies and state-owned enterprises, if through them the state / municipality controls more than 50 per cent of the voting shares or otherwise exercises a dominant influence. PEA fully extends its effect to state-owned enterprises and is applied with restrictions to the municipal public enterprises (compare: Article 3 of the PEA).

On the other hand, as provided for in Article 7, paragraph 1 of the PEA, public enterprises may be assigned obligations to perform a public service or to fulfil public policy objectives by the bodies exercising the rights of the state / municipality, within their competences or in accordance with the procedure established by law. According to § 1, item 5 of the Additional Provisions of the PEA, "public services" are educational, health, water supply, sewage, heat supply, electricity supply, gas supply, telecommunication, postal or other similar services provided to satisfy public needs. "Public policy objectives", according to § 1, item 12 of the Additional Provisions of the PEA, are those that benefit the general public within the specific competence of public enterprises, other than achieving maximum profits and value for shareholders, such as providing of public services - postal, transport, as well as other special obligations undertaken in the public interest'. Therefore, if the function (activity) performed by the enterprise is used as an auxiliary criterion for determining the scope of public enterprises, and not only the subject-holder of the capital (the state / municipality), the amount of the capital participation and the possibility of exercising dominant influence, then only state-owned enterprises, which are established by special laws, on the basis of Article 62, paragraph 3 of the CL and enterprises that are entrusted with the implementation of public policy objectives, can be referred to as "public undertakings". In other cases, where undertakings are assigned as public service obligations, their objectives and nature are more accurately reflected by the term "public undertakings" or "public service undertakings" which are linked to the object of activity of legal entities. These concepts are not introduced in the PEA as legal terms. According to Article 4 of the PEA, public enterprises are further divided into categories: "micro-", "small", "medium" and "large" on the basis of the criteria described in Chapter Two, Section I and Section II of the Accounting Act³⁸ (AA), which are: book value of assets; net sales revenue and average number of staff for the reporting period.

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³⁷ prom., DV.,13/16.02.2016, ch., ..., DV, 23/14.03.2020

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