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## CURRENT ISSUES IN THE STATE-OWNED COMPANIES IN FEDERATION OF BOSNIA AND HERZEGOVINA

### Short Introduction to the Legal System of Bosnia and Herzegovina

Bosnia and Herzegovina is relatively young state. It has been independent from Yugoslavia since 1992. Bosnia and Herzegovina is composed of two Entities — Federation of Bosnia and Herzegovina (decentralized, composed of 11 cantons) and Republika Srpska (centralized), plus District of Brčko. The constitutional structure is asymmetric and quite complex, it means not only one, or at least three, but 13 constitutions. At the same time, such a decentralized structure means huge administrative machinery comprises of 149 ministers.<sup>1</sup> Most matters are the responsibilities of the entities and very few on the state level. The following matters are the responsibilities of the institutions of Bosnia and Herzegovina: foreign policy, foreign trade policy, customs policy, monetary policy, finances of the institutions and for the international obligations of Bosnia and Herzegovina, immigration, refugee, and asylum policy and regulation, international and inter-Entity criminal law enforcement, including relations with Interpol, establishment and operation of common and international communications facilities, regulation of inter-Entity transportation and air traffic control.<sup>2</sup> All governmental functions and powers not expressly assigned in the Constitution of Bosnia and Herzegovina to its institutions shall be those of the Entities.<sup>3</sup>

### A Notion of a Public Company

The state (and other administrative units) is interested in performing economic functions. He institutionalizes this function through special entities — public companies and companies with state capital participation. The special position of public companies and companies with a share of state capital in relation to other companies is determined by the nature of the activity they can, or must performed, by the way of incorporation, the ownership of the founding capital, the manner of concluding individual contracts and the control of management, as segments of state interventionism emanating from special legal entities regulations. Determined by an interest in carrying out certain activities, the state appears as the founder or owner (of the part part) of the capital of the business entity, over which it exercises control. The basic function of this control is to ensure their functioning as subjects of trade (private) rather than administrative law

<sup>1</sup> Council of Ministers of Bosnia and Herzegovina 10 ministers, Reuplic of Srpska Government 17 ministers, Federation of Bosnia and Herzegovina 17 ministers, 10 Cantons in Federation of Bosnia and Herzegovina 99 ministers and District Brčko Government 6 ministers.

<sup>2</sup> Constitution of Bosnia and Herzegovina, Art 3 (1).

<sup>3</sup> Constitution of Bosnia and Herzegovina, Art 3 (3).

(the state as the holder of dominium, not imperium).<sup>4</sup> These companies are set up for profit and in this respect are equal in the market with other participants, subject to the restrictions prescribed by law<sup>5</sup> related to the conclusion of certain legal transactions.

A public company is a specific type of company. The legal framework for public companies in Federation of Bosnia and Herzegovina consists of a special regulation, the Law on Public Enterprises in the Federation of Bosnia and Herzegovina (LPE), which is in relation to the Company Law (CL) *lex specialis*.

By legal definition,<sup>6</sup> a public company is a legal entity registered in the court register as a company and performs an activity of public social interest (energy, communications, utilities, management of public goods and other activities of public social interest) or a legal entity defined as a public company by special regulation. No matter which administrative unit, although in most cases the Federation of Bosnia and Herzegovina, appears as a (majority) owner of a public company, its founding capital is defined as state-owned. In addition to the administrative units, the owners of the capital may be other natural and legal persons. A public company does not represent a special organizational and legal form within the meaning of the Company Law and may be established in the form of a joint stock company or a limited liability company. The business name, along with the form mark (JSC or LLC), must also contain the heading (mark) public company (PC).

A special category of companies in which the founding capital is, partly or entirely, state-owned is the so-called state-owned companies. These entities are in a similar legal regime to all (private) companies, and although the designation of their firm (business name) does not identify the origin of the founding capital, this fact determines their specific status. The difference between public companies and companies with a share of state capital is not determined by the percentage of state capital share in the total capital of the company, but by the basic regulation governing their status. In this sense, public limited companies are not subject to the LPE, but to the CL.

The activities performed by these companies are, as in the case of public companies, of importance to the public interest, that is, under the control of the so-called "public hands".<sup>7</sup> This control for both types of companies owned by the Government of the Federation of Bosnia and Herzegovina is legally governed by the Decree/Law on Exercise of Authorization in Companies with State Capital Shares falling within the jurisdiction of the Federation of Bosnia and Herzegovina. As public companies and companies with state capital participation are founded according to the normative system of establishment or system of administrative act, for each individual entity, a specific founding act (memorandum of association) is also positioned as a source of their legal regulation. Apart from the mentioned legal regulations, their articles of association, which regulate in detail the relations in the company, the manner of management, the competences of the governing bodies, etc., are an indispensable legal source of

<sup>4</sup> Vasiljević, M. S. Kompanijsko pravo - Pravo privrednih društava, Udruženje pravника u privredi Srbije, Beograd, 2015, p. 458.

<sup>5</sup> Public Procurement Law

<sup>6</sup> LPE, Art.2

<sup>7</sup> Čović, Š. Poslovno pravo - Statusno pravo i pravo privrednih društava, Pravni fakultet Univerziteta u Sarajevu, 2003, p. 421.



regulation of the status of these companies and which must be harmonized with the CL or the LPE. The procedure for the election and appointment of governing bodies in both types of companies is governed by the Decree on Exercise of Authorization and the Decree and the Law on Ministerial, Governmental and Other Appointments of the Federation of Bosnia and Herzegovina.

### **Public Company Management Bodies**

In accordance with the LPE, public company bodies are the assembly, the supervisory board and the management, as management bodies, and the audit committee. In addition to the competencies of the governing bodies established by the CL, the LPE establishes additional competencies for each individual body.

In accordance with Art 6 LPE assembly of a public company shall also make decisions on: - Rules of Procedure or Rules of Procedure at the proposal of the Supervisory Board; - Code of Ethics at the proposal of the Supervisory Board and - business plan or revised business plan.

The Assembly submits to the Municipal Council, the Cantonal Assembly and the Parliament of the Federation of Bosnia and Herzegovina at least once a year. The Supervisory Board has an odd number of members, at least three. A member of the supervisory board of one public company or company with state capital participation may not simultaneously be the president or member of the supervisory board of another public company or company with state capital participation. In addition to the competencies set out in the Companies Act, the supervisory board of a public company has the following competencies:

- supervise the work of the Management Board;
- prepares the Rules of Procedure and proposes them to the Assembly;
- prepares the code of ethics and proposes it to the assembly;
- selects candidates for the Audit Committee and submits a proposal for its appointment to the Assembly;
- review the implementing regulation for the procurement process and monitor its implementation;
- give opinion to the Assembly on the proposal of the Management Board for profit distribution;
- appoints and dismisses members of the Management Board in accordance with the procedures laid down in the Rules of Procedure or Rules of Procedure and applicable regulations;
- authorizes activities that are restricted under the PPA provisions and
- Instructs the Director to conduct investigations regarding irregularities identified.

The management of a public company consists of a director (president of the management board) and executive directors. Management board is elected, appointed and dismissed in accordance with the procedure laid down in the article of association of a public company. In addition to the competences set out in the CA, the administration is also responsible for:

- reporting to the Supervisory Board at the request of the Supervisory Board;
- implementation of the code of ethics;

- drafting and monitoring the implementation of business plans;
- development of implementing regulations for the procurement procedure and implementation of applicable laws and regulations on the procurement procedure; preparing proposals for profit sharing and hiring and firing employees in accordance with the procedures laid down in the Rules of Procedure or Rules of Procedure and applicable laws.

The Audit Committee shall:

- appoint an external auditor;
- appoint the director of the internal audit department;
- consider the annual risk strategy and audit plan detailing the risk areas and audits to be carried out and ensure that reported issues are promptly and properly adjusted;
- consider the said risk strategy and audit plan and reach an agreement with the Chief Auditor on processing, solely when the Auditor General has appointed the Director of the Public Company Internal Audit Department;
- ensure that the internal audit department does its job in accordance with the audit plan;
- ensure that internal controls in a public company are adequate and function as intended;
- submit to the Supervisory Board summary monthly reports on its meetings each month;
- consult with the Auditor General with respect to an independent audit organization or expert group that conducts an internal professional evaluation of the internal audit department every two to three years;
- ensure that the internal audit department performs its duties in accordance with international auditing standards.

Conflict of Interest in Public Companies

The LPE prescribes the prohibition of conflicts of interest for a certain group of persons, the so-called related parties to a public company in a personal or professional relationship. Conflict of interest occurs when the personal or professional interest of a related party impedes, possibly disables either the interest, or the business of the public company or the ability of the related party to fulfill its obligations and responsibilities.

A public company, when doing business, is not allowed to offer more favorable terms to related parties than it offers to other persons not affiliated with a public company. In this context, the following are considered related parties:

- members of a close family of related persons up to the third degree of a blood relationship or ancestry, or persons living in the same household with related persons;
- legal entities that have voting rights in a public company;
- legal entities in which a public company has a share of at least 10% of the total amount of voting rights;
- legal entities in which a public company holds at least 10% of the voting shares;
- legal entities in which a related person or immediate family member, member of the supervisory board or board of directors.

The above prohibition does not apply to transactions between a public company and companies with which a public company, based on the concluded contract on business management united by unified management of business.



Exercise of Authorization in Public Companies and Companies with the Participation of State Capital of the Federation of Bosnia and Herzegovina

Exercise of authorization in public companies and companies with state capital participation implies a method of control exercised by the owner (of the part) of the capital, that is, the founder over the operations of state-owned companies, including public companies, with the aim of protecting the public interest.

In companies with state capital participation under the jurisdiction of the Federation of Bosnia and Herzegovina, authorizations based on state capital participation are exercised by the Government of the Federation of Bosnia and Herzegovina directly or through federal administrative bodies (federal ministries and federal administrations) and federal administrative organizations.

The powers that the Government directly exercises are reflected in the interventionism in the work of the Assembly and the election of members of the Management Board and the Supervisory Board. That are:

- participation in the work and decision-making of the Assembly, which is accomplished by the Government of the Federation of Bosnia and Herzegovina through a proxy, who is obliged to act in all respects in accordance with the binding instructions of the Government of the Federation of Bosnia and Herzegovina;
- selection and nomination of candidates for appointment of members of supervisory boards and removal of duties of members of supervisory boards before the end of their term of office. The election procedure shall be initiated by the Government of the Federation of Bosnia and Herzegovina by a Decision to call for competition in accordance with the provisions of the Law on Ministerial, Governmental and Other Appointments of the Federation of Bosnia and Herzegovina, and
- giving consent for the appointment of members of the boards and dismissing the members of the boards before the expiration of their term of office. The selection of candidates for the members of the management board of companies with majority state capital participation shall be made by the body determined by the statute of that company based on the announced public competition, in accordance with the general and special conditions established by law and the statute of the company.

Indirect exercise of authority implies that the Government of the Federation of Bosnia and Herzegovina, through federal administrative bodies and federal administrative organizations, performs the tasks of recording, administrative control and supervision of general acts, monitoring of work and monitoring, with the obligation to submit reports of federal administrative bodies and federal administrative organizations to the Government of the Federation of Bosnia and Herzegovina.

### Current Issues

As stated above, a public company is a specific type of company. The legal framework for public companies consists of a special regulation, the Law on Public Enterprises in the Federation of Bosnia and Herzegovina (LPE), which is in relation to the *CA lex specialis*.

By legal definition, a public company is a legal entity registered in the court register as a company and performs an activity/industry of public social interest (energy,

communications, utilities, management of public goods and other activities of public social interest) or a legal entity defined as a public company special regulation. According to the existing definition, the determinants for determining the status of a public company, cumulatively stated, are the fact of the listing of a company as a public company in the Register of Economic Entities and types of activities of public social interest. In doing so, exemplars of this type of activity are indicated, and it follows that it is possible to determine on an ad hoc basis whether an activity is of public social interest.

According to the LPE, the constituent element for the existence of a public company does not represent the origin of (founding) capital. In practice, public companies in the Federation of Bosnia and Herzegovina are also committed to ownership of the founding capital, that is, the legal status of the founder (public or private law entity). Ownership of founding capital entitles the management of a company, which is the case in practice (in this sense, the Decree on Execution is a source of rights). It is this fact, or such a legislative definition that constitutes a deficiency in the normative framework, since it formally allows each person to set up a public company, and it is questionable whether this would be feasible in practice. Such a definition is contrary to the regulations in the European Union, according to which a public company is "any enterprise over which the authorities can directly or indirectly exercise a dominant influence on the basis of (their) ownership of it, their financial participation therein, or the rules governing it". The degree of participation of the state in the management of a company should define that company as a public company.

The dominant and determining, constituting, element in the definition of a public company is the exercise of influence, that is, control in such companies, regardless of what it is conditioned by — financial participation wholly or partly in the founding capital, or special rules. It is evident that the type of activity is not a determining and / or eliminating element. In this sense, an acceptable definition of a public company should include both the state (hereinafter referred to as the Federation) as the founder, regardless of the activities the company is engaged in, as well as the rights of the state arising from its ownership — managerial and property. This is supported by the provisions of the Decree, since they standardize the control of public authorities over the management of all companies (co) founded by the Federation of Bosnia and Herzegovina, regardless of their activities, i.e. they are engaged in various activities. *Ratio legis* is determined by a political decision — do public companies want to monopolize certain activities (specifically, which ones?), Or is it the essence of public companies opting for equity ownership regardless of activities. The assumption is that the issue of control over a company (public company) is crucial. In today's business environment, it can only stem from ownership of shares. Bearing in mind the trend of liberalization of activities that have traditionally been under the "public hand" and Bosnia and Herzegovina's commitment to joining the European Union in the definition of the term public company, it should be omitted. The definition of a public company in the Republika Srpska's Law on Public Enterprises has reconciled both requests — both ownership and activity — and is more acceptable in this respect.

In that sense, the proposal for a definition in the Federation of Bosnia and Herzegovina Federation would be: "A public enterprise is a company established by the Government of Federation of Bosnia and Herzegovina, which performs activities/indus-





tries (of public social interest, if it is a political option), which is established as a JSC or LSC and to which the company is obligatory added the designation "public company".

A special category of companies in which the founding capital is, partly or entirely, state-owned is the so-called state-owned companies. These entities are in a similar legal regime to all (private) companies, and although the designation of their business names does not identify the origin of the founding capital, this fact determines their specific status. The difference between public companies and companies with a share of state capital is not determined by the percentage of state capital share in the total capital of the company, but by the basic regulation governing their status. In this sense, public limited companies are not subject to the LPE, but to the CA.

Management control for both types of companies owned by the Government of the Federation of Bosnia and Herzegovina is legally governed by the Decree / Law on Exercise of Authorization in Companies with State Capital Shares falling within the jurisdiction of the Federation of Bosnia and Herzegovina. The procedure for the election and appointment of governing bodies for both types of companies is governed by the Decree on Exercise of Authorization (and the Decree and the Law on Ministerial, Governmental and Other Appointments of the Federation of Bosnia and Herzegovina). The regulation is more in line with the PPA in compliance with European Union regulations, since it foresees state control over companies regardless of their activities/industries.

These companies, public companies, are set up for profit and in this respect are equal in the market with other participants, with any restrictions prescribed by law related to the conclusion of certain legal transactions, as well as the fact that in many cases they represent monopolies. The existing legislation governing the area of public enterprises is definitely not in line with the OECD principles of corporate governance. One of the basic principles of corporate governance is to separate management / management from ownership, that is, to establish autonomy that is immune to political movements. This would, inter alia, ensure legal continuity, that is, legal certainty for a company. Although the Regulation formally resolved this issue by establishing procedures and mechanisms for appointing managing authorities, in practice the situation is quite different. The basic function of state control is to ensure the functioning of public enterprises as subjects of trade (private) rather than administrative or public law (in this case, the state appears as the holder of the *jus dominium* and not as the holder of the *jus imperium*). An institute that would be necessary to foreseen for public companies, as well, modeled on the CA, refers to fiduciary duties, that is, persons with special duties to the company.