Who Really Owns the State-owned Companies?

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According to conventional wisdom, the public administration serves as «role model»: The central administration and state-owned enterprises (SOE) should be social employers, conclude collective labor agreements where possible, achieve climate neutrality sooner rather than later, establish services in peripheral regions, reliably deliver dividends, pay their taxes, and pay their management a good – but please not too high – salary in the process.

This is not so much different from privately owned companies nowadays: In business schools, the faculty advocates management approaches that focus more strongly on the social or ecological dimension of entrepreneurial activity; they use labels such as the «stakeholder approach», or more recently: «CSR», «ESG» and «inclusive capitalism». Since the beginning of 2022, the law has set some basic requirements asking for more transparency on non-financial matters (Art. 964a et seq. CO). Still, there are no action items in that regard: Thus, in Swiss company law, activities that do not serve to maximize profits, at least in the short term, will continue to be «filtered» via the general assembly and the board of directors: Private limited companies therefore largely decide according to their own values and standards how they want to balance differing corporate interests that are potentially in conflict with each other.

In the case of SOEs, on the other hand, social and environmental issues are made a concern of the company from all kind of nonstate and state actors, as the strategy of these companies is constantly being renegotiated in public fora and in the political process. As a direct consequence for SOEs, stakeholder interests become blurred with shareholder interests. On the other hand, SOEs must also ascertain which authorities are actually legitimized to act as «owners», i.e. which authorities, in their role as shareholders, may legitimately ask for responses from the company regarding socio-ecological concerns.

Ensuring good governance in SOEs is therefore a complex undertaking. In legal terms, the increasing complexity manifests itself in four dimensions that the management of such companies must keep in mind:
1. requirements arising from the legal form; 2. requirements arising from different statuses of board members; 3. requirements arising from the legal organization of the ownership interests; and 4. requirements arising from the general regulatory setting.

1. Requirements arising from the legal form

Legislators may set their own governance structures for SOEs, thereby deviating from federal corporate law. SOE often have similar governance structures as private limited companies, but sometimes deviate from these in important respects. Major Swiss companies such as the public utility of the city of Zurich are legally mere offices within the city administration: anyone who concludes contracts with ewz deals directly with the city of Zurich itself. At the municipal and cantonal level, there are still many autonomous public bodies («Anstalten») that are strongly shaped by municipal and cantonal law – these bodies can also be reshaped at the discretion of the legislator: A prominent example here is Zürcher Kantonalbank. As one of the systemically important banks designated by the Swiss Central Bank, the ZKB is legally nothing more than an autonomous asset of the canton – the cantonal legislator's rights of intervention are correspondingly extensive.

Within the Confederation, the private limited company («Aktiengesellschaft») is the legal default form for federal enterprises. However, companies such as the Swiss Postal Service, Swisscom and the Swiss Federal Railways are primarily governed by special legislation and only subsidiarily by private company law («Spezialgesetzliche Aktiengesellschaft»). In addition, the confederation has established some enterprises that are entirely governed by private law. The far-reaching autonomy granted by establishing private law companies rarely remains unchallenged.

2. Requirements arising from different statuses of board members

The Board of Directors, whose election is the responsibility of the general assembly, is primarily responsible to the owners for the good management of the company. However, if there is a public interest in a private limited company, the company can also allow the state to directly appoint persons to the Board of Directors («gemischtwirtschaftliche Aktiengesellschaft», Art. 762 CO). If the shares of the company are also held by the state, it is often not clear to the members of the board whether they were elected by the general assembly or whether they were delegated by the state. However, only the delegated members of the Board of Directors are allowed to reveal the inner workings of the company to the state – to the very last detail including business secrets.

The competent state authority can directly instruct delegated board members to bring, e.g., social and ecological issues to the attention of the board of directors. To compensate for this privilege, the state will be held liable for all actions of the delegated board member. In contrast, the elected members of the Board of Directors are primarily obliged to the company, in particular if conflicts with the state arise. For elected board members, therefore, the politicians' wishes merely supplement the decision-making process within the board by a further – admittedly significant – parameter.

3. Requirements arising from the organization of ownership interests

In many cases, the relationship between the company and the state is no different to that with major shareholders or with the parent company of a larger group. In most cases, the executive branch of the government exercises the rights to which the state is entitled from its position as a shareholder of a private company: the company then has a single point of contact. From a governance perspective, however, the relationship with the state is more complex.

Legislators have a wide range of instruments at their disposal to influence the activities of the executive branch of the government. In recent years, many legislative bodies have secured rights of participation in the definition of strategic objectives for SOEs; these steering instruments now contain far more guidelines than at the time when the creation of autonomous state corporations was primarily aimed at achieving greater efficiency in the fulfillment of essential services. Legislators also provide the government with impetus through motions and questions. Such parliamentary motions and questions are, formally, often addressed to the government, but are passed on to the SOE if its activities are affected. This means that the SOE is constantly stimulated with issues that may have nothing to do with its core business. Those who are not very familiar with political processes are sometimes amazed at how effectively business associations, unions, NGOs and other interest groups can use parliamentary processes to influence SOEs.

Where a SOE is governed by sector-specific legislation, its structures are always in danger of being changed in the political process. Politically, it may make sense for legislators to make far-reaching demands of public companies: In case of success, the specific member of parliament enjoys considerable publicity. For the SOE, however, changes to its founding legislation are accompanied by deep interventions in its operational structures and processes. Usually, such parliamentary motions have a low probability of implementation, but also a high cost or damage potential for the SOE when they succeed. Consequently, the SOE needs to engage itself in the political process, which ties up resources; the risk of legislative motions becoming binding law will often appear unacceptable from a risk management perspective.

For SOEs in the legal form of a private limited company, it should be noted that cantonal and communal legislators can only regulate the way in which the state will exercise its shareholder rights. Specifically, this includes:

- To empower an authority within the state that is to exercise the shareholder rights.
- To empower an authority that appoints and instructs the delegated member of the board of directors.
- To define a procedure, by which the policy objectives to be achieved by the SOE are set.
- To bind the authority that exercises shareholder rights to certain public policy goals, that should be brought to the attention of the general assembly and the board of directors.

Therefore, such kind of legislation is concerned with defining the internal organization of the state vis-à-vis the company as an autonomous legal entity. The interface between the state and the company, however, is governed exclusively by private corporate law. The definition of strategic objectives, the formulation of an ambition regarding climate neutrality, the philosophy behind the management of human resources as well as caps for executive compensation remain the prerogative of the company's self-administration. If the board of directors of a SOE wants to be taken seriously, it must defend the company's autonomous entrepreneurial space. This is particularly the case if other public bodies and private individuals are also shareholders of such a company.

4. Requirements arising from the general regulatory setting

A strict distinction must be made between communication with the state in its function as shareholder and the state in its function as regulator. Common rules of public governance require that the roles of the owner and the regulator are strictly separated within the state. However, the same distinction must be made on the part of the SOE as to whether the company faces the state as a shareholder or as its supervisory authority. The former relationship is basically cooperative and takes place on an equal footing; the latter relationship is sovereign and takes place according to patterns of «command» and «control».

Public choice and bureaucracy theory suggest that SOEs with market power should work towards an implementation of social and environmental objectives within the general legal framework; in their own self-interest, SOEs should see public policy goals not only as an issue of good public governance. The reason is simple: The costs of new regulatory requirements are, at least in the short term, often fixed costs – these costs are easier to bear by large companies than by new market entrants or by smaller competitors.

5. Conclusions

At the end of the last century, many state-owned companies were outsourced from the central administration and transferred into formally private companies. The aim was to create scope for entrepreneurship and to increase efficiency in the provision of essential services. The far-reaching autonomy granted to state-owned companies has recently been called into question again: Politicians are reasserting their primacy. The resulting conflicts are not easy to manage and require a constant and costly use of precious management time. However, if the various players are made aware of their roles and competences, unnecessary frictions and disputes can be avoided.