

**ON THE IMPLEMENTATION OF OECD GUIDELINES FOR CORPORATE
GOVERNANCE OF STATE-OWNED ENTERPRISES
IN THE LEGISLATION OF UKRAINE**

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**ПРО ІМПЛЕМЕНТАЦІЮ У ЗАКОНОДАВСТВО УКРАЇНИ КЕРІВНИХ
ПРИНЦИПІВ ОРГАНІЗАЦІЇ ЕКОНОМІЧНОГО СПІВРОБІТНИЦТВА ТА
РОЗВИТКУ ЩОДО КОРПОРАТИВНОГО УПРАВЛІННЯ ДЛЯ ПІДПРИЄМСТВ
З ДЕРЖАВНОЮ УЧАСТЮ**

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***Summary.** The article deals with the development and substantiation of proposals for further implementation of the OECD Guidelines in the legislation of Ukraine. Based on the analysis of the legislation and practical activity of state-owned enterprises (SOE) in different countries, the following methods are proposed to improve the state of corporate governance in the public sector of Ukraine and harmonizing it with the OECD standards: strengthening the centralized management of state-owned commercial enterprises, as well as delimiting the functions of the state as a founder (shareholder) of enterprises and as a regulator of economic activity by establishing a State-Owned Holding Company with a gradual transfer of only asset package of SOEs and shares in the authorized capital of the economic partnerships operating mainly for commercial purposes and will not be subject to privatization in the short term into its management (to its authorized capital) and in the sphere of management (to authorized capital) of its corporate enterprises; broadening the powers of supervisory boards of SOEs to the extent recommended by the OECD Guidelines; – ensuring a clear division of powers between supervisory boards of business entities of the public sector of the economy and other agencies involved in the management of the activities of such entities; holding general meetings and (or) meetings of supervisory councils in the course of the adoption by the state authorities of decisions on state-controlled economic partnerships, in which, in addition to the state, there are other participants (shareholders); ensuring the publication of the most relevant information about the purpose and state of the SOE on a single specialized web-portal, as well as specifying the requirements regarding the content and scope of each type of information to be made public.*

***Key words:** OECD Guidelines, Corporate Governance, State-Owned Enterprises, Holding Companies, Authorized Capital, Shareholders.*

***Анотація.** Статтю присвячено розробці та обґрунтуванню пропозицій щодо подальшої імплементації у законодавство України Керівних принципів Організації економічного співробітництва та розвитку щодо корпоративного управління для підприємств з державною участю. На основі аналізу зазначених Керівних принципів, законодавства і практики діяльності підприємств з державною участю запропоновано комплекс заходів стосовно наближення корпоративного управління у державному секторі економіки України до стандартів ОЕСР.*

***Ключові слова:** Керівні принципи ОЕСР, корпоративне управління, державні підприємства, холдингові компанії, статутний капітал, акціонери.*

Introduction. Over the past decade, the privatization of state property and other market reforms in Ukraine have caused a significant reduction in the share of the public sector in the economy of this country, but it remains rather significant. Thus, there are about 3.5 thousand public sector enterprises with different organizational and legal forms in Ukraine. The total value of assets of such enterprises is almost UAH 1.5 trillion (excluding state-owned assets), and the number of their employees is about 1 million [1]. Meanwhile, about half of the registered public

sector enterprises are in the process of winding up or do not actually carry out economic activity. Every third enterprise is unprofitable. Due to ineffective governance and poor transparency, SOEs are a source of corruption risks [2].

In this regard, a management reform concerning economic entities of the public sector was initiated in 2015 in Ukraine with the support of international financial institutions and donors [3]. The initiated reform is based on the implementation of the recommendations set forth in the OECD Guidelines on Corporate Governance of State-Owned Enterprises (hereinafter referred to as the OECD Guidelines), a document considered to be an international standard for the best implementation of public functions as a founder (participant, shareholder) of business entities [4]. These OECD Guidelines are partially taken into account in the Law of Ukraine dated June 2, 2016 “On Amendments to Certain Legislative Acts of Ukraine on the Management of State and Municipal Property Objects” [5], as well as in the subordinate legal acts adopted pursuant to this Law. However, these legislative acts are not devoid of some disadvantages, which complicates the law-enforcement practice. In general, implementation of the OECD Guidelines in the Ukrainian legislation is still incomplete, and representatives of various public agencies do not share an opinion on further action in this area.

Various aspects of the improvement of the legislation regarding the management of the activities of SOEs, as well as their activities in different countries worldwide were considered in scientific works.

A. Kumar carried out a complex monographic study in which he considered the activities of large state-owned business entities in different countries [6, Kumar, 1993]. However, this study was conducted in the last century. At the same time, a significant number of other studies analyzed the legal status and specific areas of activity of SOEs, in particular, by such authors as Pryke [7, Pryke, 1971], Lindsay [8, Lindsay, 1976], Vernon [9, Vernon, 1979], Kaldor [10, Kaldor, 1980], Aharoni [11, Aharoni, 1982], Trebat [12, Trebat, 1985], Aharoni [13, Aharoni, 1986], Levy [14, Levy, 1987], and Lawson [15, Lawson, 1994].

P. Stevens investigated the activities of state oil companies in the Middle East [16, Stevens, 2008]. Arocena & Oliveros investigated various aspects of the functioning of state-owned and privatized firms [17, Arocena & Oliveros, 2012]. A. Cuervo-Cazurra, A. Inkpen, A. Musacchio and K. Ramaswamy investigated the activities of state-owned multinational companies [18, Cuervo-Cazurra, Inkpen, Musacchio, 2014].

Studies were conducted by other researchers. At the same time, a number of controversial issues regarding the implementation of the OECD Guidelines in the national legislation remain beyond the attention of scholars.

The above shows the relevance of the stated topic of research, which is aimed at substantiating the proposals for further implementation of the above-mentioned OECD Guidelines in the legislation of Ukraine.

1. Issues of the Implementation of the OECD Guidelines for the Centralized Management of State-Owned Enterprises, as well as the Delineation of Functions of the State as the Founder (Shareholder) of Enterprises and as a Regulator of Economic Activity.

One of the provisions of the OECD Guidelines (paragraph II.D) states that the exercise of ownership rights (control of state-owned enterprises) should be clearly identified within the state administration. The exercise of ownership rights should be centralized in a single ownership entity, or, if this is not possible, carried out by a co-ordinating body. This “ownership entity” should have the capacity and competencies to effectively carry out its duties. In addition, the OECD Guidelines (paragraph III.A) emphasize that there should be a clear separation between the state’s ownership function and other state functions that may influence the conditions for state-owned enterprises, particularly with regard to market regulation.

The need for the practical implementation of these recommendations is recognized by the Government of Ukraine, but so far this task has not been properly implemented. In Ukraine, the function of the state as a founder (participant, shareholder) of enterprises is carried out according

to a decentralized (sectoral) model. Within this framework of such model, more than 85 different management actors, acting as representatives of the state-founder (shareholder) in relations with enterprises of the public sector, are involved in the implementation of this function. The overwhelming majority of these actors are state authorities (the Cabinet of Ministers of Ukraine, various ministries, public services, agencies, and other state agencies). At the same time, public agencies managing the majority of state enterprises, apart from the implementation of the aforementioned functions, simultaneously carry out the state regulation of economic activity in certain branches of the economy by establishing rules of conduct for state and non-state enterprises and by applying other means of regulation (issuance of licenses, other permits in the field of management, etc.).

This situation creates a conflict of interest when government agencies interfere with current activities of SOEs, when various government agencies usually seek to achieve short-term departmental goals, including using SOEs to maximize budget revenues or serve different political or vested interests. Moreover, this leads to a distortion of competition in the markets [19].

When dealing with various options for solving these problems by the Government of Ukraine, it is taken into account that if centralization is used as an approach to differentiating the functions of the state-owner and the regulator, one of two alternative models may be used: 1) centralized management of economic entities through one state agency; 2) centralized management by business entities through a special holding company [3]. However, the decision to select any of these models has not been adopted yet.

In connection with the above, the option, which provides for centralized management of economic entities through a special holding company, is more acceptable under the existing conditions. If such a holding company is established, the formation of a group of enterprises controlled by it may take place through the gradual transfer to its authorized capital and authorized capital of its corporate enterprises (sectoral sub-holding companies) of shares (stakes) in the authorized capital of SOEs that are managed by public agencies and meet such criteria: 1) act to achieve predominantly commercial goals (profit making); 2) are not subject to privatization in the short term. Moreover, the organizational and legal form of the holding company does not exclude the possibility of management of state unitary commercial enterprises, which transformation into economic societies for various reasons is inappropriate. Under this approach, the state controlling holding company will act as an economic structure that ensures an increase in the value of assets owned by the owner-state and commercial organizations under its control, thereby indirectly addressing a number of other tasks of socio-economic development.

The benefits of incorporating the state holding company into the management system of SOEs are that in the presence of proper organizational and legal conditions, such an economic structure can improve the quality and effectiveness of management of state assets by bringing it closer to those approaches applied by the subjects of large business in private the economy sector. Indeed, practice shows that the development of such entities is ensured by economic partnerships, which, by their legal or factual status, are holding companies, which is an additional confirmation of the efficiency of the use of these economic structures for the purposes of corporate governance [20, Zakharchenko, 2017].

The experience of other countries indicates the possibility of securing successful state-owned holding companies. In particular, one of the most famous such companies is the state-owned investment holding company Temasek Holdings (Singapore) established in 1974 to provide centralized management of all the major enterprises of the country, which shares were originally owned by the Ministry of Finance of Singapore. When creating this company, the government set the following goals: distancing from the operational management of companies and participating only in developing a strategy for their development using corporate governance procedures; the opportunity to invest in priority industries and projects both in Singapore and abroad; creating a mechanism that allowed the government to act as an investor in those industries that could not invest private capital due to high commercial and other risks or the lack of necessary financial

resources. Currently, the holding is the owner of shares of both public and private companies, while some have a minority stake. The companies associated with the holding occupy leading positions in various fields: management of sea and airports, transportation by these modes of transport, power engineering, telecommunications, mass media, banking and financial services, engineering, etc. [21; 22].

The functioning of the state-owned (managing) holding company in one of the post-Soviet countries – the Republic of Kazakhstan – deserves particular attention. Thus, in 2008, the state-owned joint-stock company Samruk-Kazyna National Welfare Fund was established in this country. It acts to increase the value of equity capital and promote the competitiveness and development of the national economy. The group consists of 545 companies in key sectors of the economy, including oil and gas, electricity, transport, telecommunication, etc. [23].

Other well-known foreign state-owned holding companies include Khazanah Nasional (Malaysia) [24], MNV Zrt. (Hungary) [25; 26], Solidium Oy (Finland) [27] etc.

Taking into account the foregoing, recognizing the feasibility of gradual transition of Ukraine to the centralized implementation of the function of managing state-controlled state-owned enterprises through a special holding company, it should be noted that the implementation of such an approach will require the introduction of appropriate changes to the Economic Code of Ukraine, the Laws of Ukraine “On the Management of State-Owned Objects”, “On Holding Companies in Ukraine”, as well as the adoption of a number of subordinate legal acts and individual legal acts aimed at introducing the proposed model of management of these enterprises.

2. Issues of Implementation of the OECD Guidelines for the Establishment and Maintenance of Boards of Directors of SOEs.

Among other things, the OECD Guidelines stipulate that the government should allow SOEs full operational autonomy to achieve their defined objectives and refrain from intervening in SOE management. The government as a shareholder should avoid redefining SOE objectives in a non-transparent manner (paragraph II.B). The state should let SOE boards exercise their responsibilities and should respect their independence (paragraph II.C). In the context of this document, the term “board of directors” means a corporate body entrusted with enterprise management functions and management supervision. The board should be fully accountable to the owners, act in the best interest of the enterprise and treat all shareholders equitably (paragraph VII.A). SOE boards should effectively carry out their functions of setting strategy and supervising management, based on broad mandates and objectives set by the government. They should have the power to appoint and remove the CEO. (Paragraph VII.B).

Implementation of these provisions in the legislation of Ukraine required changes that stipulate the mandatory creation of supervisory boards in the largest enterprises of the public sector with the introduction of state and independent members and the provision of supervisory boards with a number of important powers to manage these entities [28]. In accordance with the updated rules, the state has formed supervisory boards of such strategic enterprises as public joint-stock companies National Joint Stock Company “Naftogaz of Ukraine”, Main Gas Pipelines of Ukraine, Ukrainian Railway, Ukrposhta, International Airport “Boryspil”, etc.

The introduction of such innovations improves, to some extent, the efficiency of SOEs [29]. However, the implementation of the relevant provisions of the OECD Guidelines cannot be considered complete now in the legislation of Ukraine. The extent of participation of the state-shareholder in the current management of state-owned enterprises remains large enough and goes beyond the recommendations of the OECD Best Practice Guidelines. In particular, unlike the common corporate practice, according to the current legislation of Ukraine, adoption of the corporate strategy of public enterprises, annual financial plans, financial statements are not exclusive competence of the supervisory board of the enterprise but are the competence of the state agencies representing the state as a founder (shareholder). In addition, the updated legislation of Ukraine failed to ensure a clear distinction between the competence of the supervisory boards and other management bodies of SOEs, as is stated, in particular, in one of the OECD analytical reports [19].

Along with this, it has to be noted that the Ukrainian state authorities were not prepared to consistently adhere to previously approved rules on limiting their participation in corporate governance. An example of this thesis is, in particular, the decision of the Government of Ukraine regarding the management of the largest state-owned company in Ukraine – the National Joint-Stock Company “Naftogaz of Ukraine”. Thus, in March 2019, the Government of Ukraine approved changes to the Statute of this company, according to which the Supervisory Board was deprived of its previously granted powers to submit to the Government for the formation of the Board of Directors (although this approach does not comply with the OECD Guidelines), as well as the possibility of solving the issues of the highest body of the company that fall under the exclusive competence of the supervisory board [30].

Some provisions aimed at clarifying and extending the powers of supervisory boards of state-owned enterprises are stipulated by the draft Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine on Improvement of Corporate Governance of Legal Entities, the Long-Term Shareholder (Founder, Participant)” that is being considered by the Verkhovna Rada of Ukraine, but has not been adopted yet [31]. Some of the regulations provided for by this bill are quite feasible, but it is not deprived of a number of significant disadvantages. In particular, they raise comments on the provisions of the bill, which deals with the division of powers between supervisory boards and general meeting of joint-stock companies. Thus, the draft law stipulates that the exclusive competence of the general meeting shall include the election of the company’s auditor and the definition of the terms of the contract, setting the amount of payment for its services, unless otherwise specified by the charter. At the same time, the same powers are foreseen to be attributed to the exclusive competence of the supervisory board with the same condition – “unless otherwise provided by the charter”. Under such an approach, the designation of the above powers as belonging to the exclusive competence of the general meeting (supervisory board) is to some extent meaningless.

The foregoing shows that the existing approaches in Ukraine regarding the degree of state participation in the management of enterprises of the public sector are still situational and need to be finalized. In this context, the Law of Ukraine “On the Management of State-Owned State Property Objects” proposes to determine the scope of the powers of the supervisory boards, which cannot be narrowed down when approving the statutes of certain economic entities (including the powers referred to in the OECD Guidelines), as well as to establish a rule according to which issues which belong to the exclusive competence of the supervisory board of the economic entity of the public sector cannot be resolved by other bodies. This will prevent the interference of state authorities in the management of the current activities of the said economic organizations, and at the same time does not deprive the state of its ability to protect its interests in relations with these economic entities, their duties.

3. The Issue of the Implementation of the OECD Guidelines on Equitable Treatment of Shareholders and Other Investors of State-Owned Enterprises.

A separate part of the OECD Guidelines deals with the issue of fair treatment of shareholders and other investors of SOEs. In particular, it is provided that when a state enterprise is a public company or otherwise, non-state investors are among the owners of a state enterprise, and the state and state enterprises should recognize the rights of all shareholders and ensure fair treatment of all shareholders. The participation of minority shareholders in shareholder meetings should be facilitated so they can take part in fundamental corporate decisions such as board election (paragraph IV.A).

The comparison of these provisions of the OECD Guidelines with Ukrainian legislation gives grounds to state that these provisions have not been fully implemented. By establishing legal rules on the management of the activities of economic partnerships, in which the state is not the only participant, but has more than 50 percent in the authorized capital, the state has entrenched an additional right to take individually decisions binding on the company on some issues of such activities without consideration of these issues at the general meeting of the company. In particular, the above refers to decisions of entities managing state property objects

in relation to: 1) approval of annual financial plans of these companies; 2) approval of the involvement of such societies in loans, the provision of guarantees for these obligations; 3) approval of conclusion of agreements on joint activity, commission agreements, orders and management of property, changes to them (Part 4 Article 67, Part 3 of Article 89 of the Economic Code of Ukraine [32]; paragraph 4, Part 20 of Article 6, paragraph 3 of Part 1 of Article 9 of the Law of Ukraine “On the Management of State Property Objects” [33]).

The need to preserve the leading role of the state as the controlling shareholder in solving the most important issues of the above-mentioned economic partnerships is uncertain, but the individual decision-making by the state authorities of these decisions without general meeting contradicts the basic provisions regarding the status of the general meeting as the supreme body of the economic partnerships.

In this regard, it is expedient for state authorities of Ukraine to abandon the practice of unilaterally adopting management decisions on state-controlled economic partnerships, which, in addition to the state, have other participants. The implementation of this proposal will require the introduction of appropriate changes to the above laws and subordinate legal acts.

4. Issues of the Implementation of the OECD Guidelines on Transparency and Disclosure Measures for State-Owned Companies.

A number of important recommendations defined in the OECD Guidelines relate to transparency and public disclosure of information by state-owned enterprises. In particular, it is envisaged that SOEs should report material financial and non-financial information on the enterprise in line with high quality internationally recognized standards of corporate disclosure, and including areas of significant concern for the state as an owner and the general public. Given the capacity of the enterprise and its size, such information should include, in particular, a clear statement to the public of enterprise objectives and their fulfilment, and the financial and operating results of the enterprise, including where relevant the costs and funding arrangements pertaining to public policy objectives, as well as other significant information (Guideline VI.A.).

Taking into account such recommendations of the OECD, amendments were introduced to the legislation of Ukraine in 2016 that require the mandatory disclosure of the most significant information about the purpose and state of the activity of the specified SOEs. By establishing a list of information that is subject to mandatory disclosure, the law provides that an enterprise (economic society) of the public sector of the economy publishes this information by placing the relevant documents and materials on its website, and in the absence of its own website, the information should be placed on the official website of the entity managing the state property objects, which manages an enterprise or corporate rights of the state to the society (Part 8 of Article 73, part 3 of Article 90 of the Economic Code of Ukraine, Resolution of the Cabinet of Ministers of Ukraine No. 1067 dated November 9, 2016 [34]).

At the same time, as practice shows, the state of implementation of the legislation on this issue is unsatisfactory today. Random acquaintance with the websites of SOEs and relevant state authorities gives grounds to state that, contrary to the requirements of the legislation, the vast majority of these entities either do not place the necessary information at all or place it not in full.

Within the legal framework, one of the main reasons is the lack of adequate control on the part of the state for compliance with the above requirements. At the same time, even in the presence of such control, its implementation under the existing conditions would be significantly complicated due to the dispersion of relevant information and the need for periodic review of many web resources of various economic entities of the public sector of the economy and management entities.

Thus, the solution to this problem might be centralized collection and mandatory disclosure of information on the activities of state-owned enterprises on a single specialized website. This website may be the Portal of State Enterprises of Ukraine, which was launched in July 2019 upon an initiative of the Ministry of Economic Development and Trade of Ukraine [29]. In this case, one can foresee that SOEs are obliged to provide information within the

established time frames and in the prescribed form to the relevant entities managing the state-owned objects, and the latter are obliged to ensure the collection of such information and transfer it to the Ministry of Economic Development and Trade of Ukraine for publication on the specified website. In turn, this Ministry should be empowered with special monitoring of the implementation by all management entities of such a duty (within the framework of a single monitoring of the efficiency of management of SOEs) and informing the Cabinet of Ministers of Ukraine on the state of such implementation for the further adoption of the necessary measures.

The introduction of the proposed rule will, to some extent, hinder the disregard of the obligation to disclose relevant information, greatly simplify its search and access to a wide range of users. At the same time, such a proposal does not exclude the possibility of additional disclosure of this information on websites of certain SOEs and state agencies based on their decision.

It should be noted that the analysis of information that has already been published by individual state enterprises indicates that they differently approach the issue of the content and scope of certain types of information that, according to the requirements of the legislation, should be made public, and a number of cases of disclosure is of a formal nature. Thus, some business entities indicate that the state of achievement of the objectives is satisfactory, and the structure, principles of formation and remuneration of the CEO are limited to reproducing the provisions of the legislation on these issues.

In this regard, the unification of approaches to the publication of information on the activities of enterprises of the public sector of the economy may contribute to the specification of the requirements regarding the content and volume of each type of information to be made public at the level of a separate instruction that may be approved by the order of the Ministry of Economic Development and Trade of Ukraine.

Issues need to be further elaborated on the range of economic entities of the public sector of the economy, information about their activities to be made public. In particular, it is expedient to include the state economic associations as a group of such entities, along with state enterprises and state-controlled economic partnerships, because, given the importance of the role of such associations in the public sector of the Ukrainian economy, their activities should be carried out based on the transparency and openness.

The above proposals for updating the relevant legislation will contribute to the achievement of the goals set by the state for improving the efficiency of economic activity in the public sector of the economy.

Conclusions. This study allows concluding that a range of important steps has been taken recently by the Ukrainian authorities to implement the OECD Corporate Governance Guidelines for State-Owned Enterprises in national legislation. Along with this, solutions may be proposed at the state level for the following tasks to further ensure such implementation:

1) centralized management of state-owned commercial enterprises, as well as delimiting the functions of the state as a founder (shareholder) of enterprises and as a regulator of economic activity by establishing a state-owned holding company with a gradual transfer of only asset package of SOEs and shares in the authorized capital of the economic partnerships operating mainly for commercial purposes and will not be subject to privatization in the short term into its management (to its authorized capital) and in the sphere of management (to authorized capital) of its corporate enterprises;

2) broadening the powers of supervisory boards of state-owned enterprises to the extent recommended by the OECD Guidelines; ensuring a clear division of powers between supervisory boards of business entities of the public sector of the economy and other agencies involved in the management of the activities of such entities;

3) holding general meetings and (or) meetings of supervisory councils in the course of the adoption by the state authorities of decisions on state-controlled economic partnerships, in which, in addition to the state, there are other participants (shareholders);

4) ensuring the publication of the most relevant information about the purpose and state

of the enterprises with state participation on a single specialized web-portal, as well as specifying the requirements regarding the content and scope of each type of information to be made public.

Implementation of the above proposals requires appropriate amendments to the Economic Code of Ukraine, the Laws of Ukraine “On the Management of State-Owned Objects of State Property”, “On Holding Companies in Ukraine”, “On Joint Stock Companies”, as well as the adoption of subordinate legislation for implementation the relevant legal provisions. This will contribute to improving the state of corporate governance in the public sector of Ukraine’s economy and will bring it closer to the OECD standards, which is one of the components of ensuring Ukraine’s integration into the European economic space.

At the same time, the above analysis does not cover all the problematic issues of implementation of the OECD Guidelines in national legislation, and these issues should be the subject of further research.

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