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"National Champions" between Corporate and Political Governance

Institutional Analysis of the Forms of Protectionism in the Strategic Sectors in EU Law

Abstract: *The concept of the so called "national champions" refers to the companies which are perceived as of vital importance for national interest. Generally there are two sources of their particular importance. Firstly, the companies may have an access to unique resources relevant for economic and security considerations. Secondly, the lack of control over a given company may result with externality effect for the national economy. Typically the situation results from the so called spin-off effect in terms of specific assets such as infrastructure. Both situations usually lead to a form of protectionism and state control. The paper aims at scrutinizing the ways in which the control is exercised by the state. It seems that at least in Europe the corporate ownership structure is still used by the governments, whereas some new forms of the alleged control and state influence are emerging. In some states such as France, Germany or Poland special administrative procedures have been implemented as a response to the evolution of the EU Law. Secondly, the question remains which of these two strategies, based on private or public law respectively is more effective and leads to less inefficiency. We intend to apply a wider concept of dynamic efficiency, taking the potential systemic effects into account. The third dimension concerns the impact of the "national champions" strategy upon political systems, democratic control, transparency and other public choice considerations such as agency problem.*

I. The evolution of corporate governance and the rise of national champions: from the "the end of history" to "the end of free market"

In their intriguing paper from 2001 entitled *The End of History for Corporate Law,* Henry Hansmann and Rainier Kraakman observed that due to the common agreement pertaining to corporate form and the model of corporation has already achieved a high degree of uniformity, and in the long run the model will become a common denominator for different legal systems and economies reflecting the

normative assumption and priorities reflecting the need for protection of shareholders who are residual claimants and real principals controlling managers. Meanwhile the authors put forward a claim according to which the other models were going to die out in a process of natural selection, observing that the other models were simply inefficient. Thus the end of history would mark the evolution of the models of corporate control, where the competitive models such as the manager-oriented model, the labour-oriented and the state-oriented model would become subject of investigation for historians rather than plausible institutional alternative for the market oriented shareholder protecting corporate ownership. They concluded on the fall of the state ownership model as losing its' normative appeal, claiming that:

> "(b)oth before and after the Second World War, there was widespread support for a corporate system in which the government would play a strong direct role in the affairs of large business firms to provide some assurance that private enterprise would serve the public interest. Technocratic governmental bureaucrats, the theory went, would help to avoid the deficiencies of the market through the direct exercise of influence in corporate affairs. This approach was most extensively realized in post-war France and Japan. (…) But the state-oriented model, too, has now lost most of its attraction.(…) Today, few would argue that giving the state a strong direct hand in corporate affairs has much normative appeal".

Meanwhile they observed that the standard shareholder oriented model superseded the other institutional alternatives. Two questions remain. Firstly, is the assessment and evaluation of driving force of the evolution of company law really correct? Is this true that the history came to an end ? Obviously further development of corporate ownership in different parts of global economy does not prove their predictions. It seems that the Hansmann's and Kraakman's narrative of the end of history may usefully be confronted with a more recent and challenging narrative of the end of

free market hypothesis put forward by Ian Bremmer, which refers to the growing phenomenon of state capitalism (Bremmer 2010). State capitalism seems to be a real thread not only for dispersed ownership and shareholder oriented corporate governance but for the existence of free market economy. This jeopardy is strongly correlated with the curious phenomenon of state control over the economy, so interestingly described by Ronald Coase in his *Nature of the Firm* (Coase 1937). The rise of state capitalism is truly discernible as governments seems to control economies in some countries through ownership of market-dominant companies and capital, under the assumption that either market fails or strategic consideration has to superseded typical shareholder oriented myopia and short-termism, enabling states to invest in the long run projects and focusing on social values. In fact states are apt to use their economic power just transforming it into short time oriented political gains. At least Ian Bremer believes so and warns against this process as a real jeopardy for the existence of free market based global economy. The process is marked by the rise of state-owned and state controlled enterprises in countries such as emerging powers (Brasil, Russia, India, China and South Africa), authoritarian oil based regimes (the Arab states, Iran, Venezuela), and other places, not excluding Europe. He demonstrates the growing challenge that state capitalism will pose for the entire global economy- a narrative strikingly different from the optimistic prophesies endorsed by Fukuyama, Hansmann and Kraakman (Fukuyama 1992, Hansmann and Kraakman 2001).

As for them, the point of departure for Bremer's narrative seems to be located in 1990's and the alternative paths of development adopted by different states after the collapse of communism. Almost all of them seemed to adopt market economy, but the structure of market, the approach to privatization and relations between public and private seemed to be dramatically different. Whereas many South American and European states have actually adopted privatization strategy and attempted to create strong private ownership, some regimes such as China decided to create market based capitalism with serious limitations and active control by the state, expecting to maximize control over wealth and political assets alike. As I. Bremmer observes, in China, Russia, Saud Arabia and other non-democratic authoritarian regimes, state-

owned companies and privately owned national champions alike play sufficiently important role in political game, meanwhile dominating core sectors of national economy ranging from energy and military production to aviation and telecommunications. Those enterprises in fact became key players on global market in different branches, especially in energy sector. However participating in the active industrial economic policy those states do not remain benevolent organizers and promoters of social development trough wealth, but rather political decision-makers transferring economic gains into political assets. The ultimate goal of this strategy is not economic, but rather political, consisting in maximizing political dominance and influence alike. Hence the rise of state capitalism becomes appealing as an alternative model and sometimes leads to economic nationalism even in countries still maintaining free market and democratic institution, where politicians remain under constant pressure. On the other hand Bremer observes that in fact state capitalism is driven by the world's fastest growing emerging market powerhouse and many of the world's largest energy exporters, and moreover the global economy needs these countries to succeed. At the same time the process of empowerment of those enteprises undermines free markets in several ways. Firstly, many state-owned companies and investment funds are in fact inefficient, since political motives become more important than economic goals in their decision-making. Besides companies and investors operating inside China, Russia and other state capitalist countries discover that once they develop the technical, management and marketing expertise and they are ready to compete with outsiders, their governments can use a variety of legal and administrative tools supporting their position on the market. Finally the doubt arises whether the driving forces shaping the institutional structure of contemporary corporate law are still limited to the factors indicated by Hansmann and Kraakman, namely the alleged failure of alternative models and the competitive pressures of global commerce. It seems however that the alternative explanation potentially adds additional dimension and brings political dynamics into picture. As Mark Roe observed, policy may well influence the structure of corporate law, in direct or indirect way (Roe 2003). For example the strong support of social democracy leads to the wider gap between shareholders and management due to the

influence of different stakeholders on the managerial strategies (Roe 2000). Moreover, the causality of the process leading to the establishment of any model of corporate control has to be broader, encapsulating political, social and cultural conditions (cf. Bebchuk and Roe 1999). Thus it seems that political structure and political governance plays an important role in shaping the face of present state capitalism in general and the strategic enterprises supported by the governments and often called national champions. The term embraces different types of firms supported by states. In general those state interventions may take different forms such as various institutional mechanisms by which states exercise control. We propose a conceptual framework based on functional approach in order to understand state capitalism in a more nuanced and detailed way. The urgent need for analytical and conceptual framework means that the concept of national champions should be analyzed from the perspective of state and market as institutional alternatives albeit encapsulating some intermediary hybrid institutional forms as well as paradigmatic concept such as public vs. private ownership.

II. Towards conceptualization of the national champions

The question what are those firms about and how should they be different seems to be the most adequate one. It has to be recalled that the theory of the firm is deeply rooted in this kind of considerations, since R. Coase contemplated on why don't we have one firm rather than a multitude of different firms immersed into the ocean of transactions on different markets (Coase 1937). But the form of state capitalism prevailing in the twenty-first century seems to be slightly different from what was present in the second half of the twentieth century. Then, state involvement in enterprises took the form of centrally managed command economies or mixed economies in which governments owned a large number of state owned enterprises directly controlling the allocation of strategic resources. It seems however that the privatization and liberalization wave of the 1980s and 1990s, mentioned by Hansmann and Kraakman, led to creation of a new form of hybrid capitalism where the government influences the investment decisions of private companies largely

through minority capital. In fact we observe both models, with the dominating state majority ownership in courtiers such as China, Russia and some Asian Countries and state minority ownership in Europe and South America. These observations are reflected by the growing interest in national champions end state capitalism in contemporary world. Facts and figures suggest that Haansman's and Kraakman's conclusions on the malaise of state capitalism and the corporate governance as normative model are no longer true. However it does not mean that the prosperity of the state capitalism may be safeguarded in the long run. Firstly, the policy aspect mentioned by Roe plays an important role, but not necessarily favours state owned enterprises as a stable institutional equilibrium. The more interdisciplinary approach to the evolution of state owned enterprises may well disclose some economic and policy based determinants which actually confine further expansion of state capitalism.

From theoretical perspective there are three sets of constrains which should be taken into account.

Firstly, the limits of the long run economic policy and the economic limitation of state owned corporation as limited to relatively narrow scope of strategic sectors, where market failures generally justify at least tentatively the idea of regulatory means and industrial policy as some remedies against those market failures. In first part of the paper we simply review such situations which *prima facie* call for intervention and justify state intervention.

Secondly the question arises if and under which conditions market failures may be cured by state intervention. Three potential institutional models could be analyzed in this respect. Firstly, the majority state ownership, secondly minority state ownership and thirdly the external regulatory interim solution.

Thirdly, the question arises, which of those institutional frameworks is the most appropriate from the perspective of both, corporate governance and policy governance perspectives. In particular the question should be asked about the long term efficiency within the context of the agency problem, which seems to be the most significant issue from both corporate governance and political governance perspectives. The first one concentrates on three different institutional solution to the

agency problem, depending on the how the problem could be solved in case of; majority state ownership, minority state ownership and external administrative interventionism. Secondly, the agency problem will also be analyzed form the perspective of wider policy oriented perspective, taking into accounts not only the divergence of incentives between private and public organizations, but also the specific difference between private agents acting on behalf of shareholders and public agents acting on behalf multiple political principles: departments and the ruling party. The last comparison leads to the conclusion that patronage and multiplication of principals may effectively block the extension of state ownership and result with the comparative advantage of the third model, namely the external administrative regulation supervised by court.

Following the debate on state owned model of enterprises, which for Hansmann and Kraakman lost its' normative appeal whereas for I. Bremmer regained its significance especially in form of national champions, we propose a functional approach to the state control over firms. It has to be observed that those enterprises primarily seem to poses a vital importance not only for economic activity, but also for security and long run development of states. It could be suggested that there are two potential source of anxiety about the existence of companies performing some special function related with security and prosperity. It could rightly be claim that in some sectors market failures seem to large loom, especially if we take some potential problems of a free market oriented model of dispersed ownership into account. The rise and growth of the so called national champions may result from two potential sources, namely market imperfections and the governance failure in form of the so called missing ownership. From this perspective it seems that the concept of the so called "National champions" refers to the companies which are perceived as of vital importance for national interest. Thus we define national champions by the fact that they poses special assets rather than by the forms of state intervention such as those in firms which are intentionally influenced by the government in the economy, either by owning majority or minority equity positions in companies or through the other means such as protection against takeover (poisonous pills), special rights of the government (golden share). Generally

there are two sources of their particular importance. Firstly, the companies may have an access to unique resources relevant for economic and security considerations. These resources are generally vaguely defined and protected in different ways by national regulations securing essential influence of the government upon the company's decisions and structure. However the question remains whether the state control trough property rights in form of either majority ownership or minority owner ship with some special rights (eg. golden share) is the most appropriate institutional response to the problem of strategic resources. It seems that the separation of ownership and control over those assets is possible trough extensive administrative regulation which could potentially be superior over state ownership. This however requires considering two decisive institutional factors, namely the disadvantages of public vs. private ownership and the mode of separation between internal and external control over those assets. In order to analyze the whole bunch of different strategies we propose to take a look at the European landscape, where the state capitalism also marked its trace on the practices of governments and the responses of the EU institutions alike.

III. National champions in the EU context

The so-called "national champions" doctrine is the bedrock of Polish state policy with respect to the supervision of the biggest companies in which the state holds a controlling interest. Pursuant to the doctrine, the experience of the financial crash of 2009 has proved that the state should keep its controlling stake in strategic economic industries (banks, insurance, oil and gas extraction and processing, power generation and transmission, ports, noble metal extraction). The mass privatization of state-owned businesses (not only in the energy, but also in banking and insurance sectors) has weakened the economies of a number of states and significantly hindered the process of solving financial problems. In extreme cases, the state had to intervene anyway to protect the entire economy against the adverse impact of the uncontrolled bankruptcy of large entities (e.g. the renationalization of a portion of *Citi* in the United States). As a result, belief in free market dogma assuming the superiority of

private ownership over state ownership has been shaken. This shift has been reinforced by positive stories of companies which remained state-owned and continued to develop dynamically (e.g. the Norwegian showcase company, *Statoil*). What is more, in the Polish context the biggest state-supervised companies have also managed to significantly increase their share value (e.g. PKO BP, PZU, KGHM). However, the weakness of state-appointed management lied in its lack of stability when it comes to the composition of company authorities and in appointments[1] motivated by political reasons rather than merit. To eliminate these negative factors, the competence to appoint members of company authorities was to be delegated by the political authority (the Minister of State Treasury) to independent experts serving on a newly established Appointments Committee.

These assumptions were codified in the draft act laying down the rules for the exercising of certain State Treasury rights submitted by the government to the 6th Sejm[2]. The draft contained a new, comprehensive solution concerning proprietary oversight by the State Treasury, but most importantly it stipulated the establishment of the Appointments Committee referred to above (Article 20-23 of the draft). The tasks of the Committee were to involve recommending candidates to the supervisory boards of companies classified as enterprises of key importance to the State Treasury and evaluating motions for the dismissal of members serving on the supervisory boards of such companies (Article 20(2)(1) and 20(2)(3) of the draft). The Committee was to be composed of ten members appointed by the President of the Council of Ministers for a five year term, whose preterm dismissal would be substantially impossible. Article 45(1) of the draft introduced a crucial provision that only a person holding the Committee's recommendation could be appointed by the State Treasury to serve on the supervisory board of a company classified as an enterprise of key importance. The draft act codified the "national champions" political-economic policy, introducing – in Section II – a category of "entities of key importance for the State Treasury". Pursuant to the definition from Article 44(1) of the draft, this

[1] The number of changes to the supervisory and management boards of PKO Orlen in the period 1998-2008 (105) as compared to its Hungarian - MOL (19) and Austrian - OMV (12) equivalent companies.
[2] Sejm publication no. 3580, 6th Sejm. Available at: http://orka.sejm.gov.pl/Druki6ka.nsf/0/029DA30B8BEAF88CC12577DD00479FC6/$file/3580.pdf [accessed on 14.05.14].

category was to include companies with a State Treasury interest having special importance to the economic interests of the State Treasury or a special influence on the stability and security of the infrastructure necessary for the correct functioning of the national economy.

There is a lot of controversy when it comes to depriving political authorities of influence on significant elements of state powers (e.g. prosecution). It has been argued that the political mandate of ministers stems from the intent of the majority of citizens expressed in democratic elections and in consequence such persons bear political (with respect to the representatives of such a majority), and in extreme cases also constitutional and criminal liability. Meanwhile, had the act come into force, ten persons would be entrusted with full control of the assets regularly generating as much as two hundred and fifty billion zloty in revenue per year, without any liability for their decisions (apart from potential damage to their reputation). These doubts have ultimately caused work on the draft to be abandoned. It is hard to assess the effects of a law which has never come into force. However, in my opinion, the arguments which could be considered reasonable when it comes to the prosecution do not necessarily apply to company management. The only way to develop an efficient model of managing state-owned assets is to ensure that it is based on competence and merit rather than on political criteria. To date, the draft of 2010 was the boldest attempt at such a change.

Further a point has to be made with respect to coherence of abovementioned doctrine with EU law, and especially with the case law of the Court of Justice of the European Union ('the ECJ') with Treaty freedoms, notably free movement of capital. According to the established judicial practice of the Court, the "restrictions" in the meaning of Article 63(1) of the Treaty on functioning of the European Union ('TFEU') include such provisions of domestic law which may pose a barrier or limit the acquisition of shares in specific companies or which may discourage investments from other members states from investing in the capital of such companies. The proceedings pending before the European Commission in the context of Article 258 TFEU and subsequent judgments of the Tribunal have pertained to the various provisions which grant benefits to a state. Examples included voting restrictions (so-called

voting caps), personally awarded rights with respect to the appointment and dismissal of the members of a company's authorities, and various forms of shares carrying multiple voting rights or veto powers. In general the ECJ concluded that such privileges violate the TFUE. It is noteworthy that the ECJ has not differentiated between external influence of the State in the form of administrative actions and internal exercise of State's power as one of the shareholders of the company. The Court has rather focused on the merits of the State's action and whether it discourage investments from investors from other members states from investing in the capital of such companies. It has to be noted also that the term 'discouragement' was construed objectively, and, the ECJ has repeatedly ignored empirical data with respect to changes to the volume of trade in shares following the introduction of specific restrictions, that have clearly shown no measurable deterrence on the part of investors. Finally it has to be ask whether the State can do less than the private investor? Making use of company law instruments enhancing corporate position of private (in the sense: non-State) investor has never been a cause to infringement proceedings by the European Commission. Questions that require elaboration:

- do the experiences of the recent years force us to assume a different perspective on the dogma of the superiority of private ownership, and if so, what experiences are they?
- what has the bigger value: the stabilisation and professionalization of company authorities or the democratic mandate to appoint such authorities? Are these values necessarily mutually conflicting? How about the political and constitutional liability of the government for the supervision of the property entrusted to it?
- are the specific, empirical examples underpinning the national champions doctrine indeed evidence supporting the argument in support of which they are used? Would PKO BP or PZU have a lower share value today if they were privately-owned? Doesn't the strength of the companies (and also, e.g. PKO Orlen) come from their dominant position on their respective markets?

IV. National champions as a response to missing ownership problem

It has already been observed that the lack of control over a given company may result with externality effect for national economy. This refers particularly to some special added value for particular economy, not reflected in the shareholder's value. Some countries could be sensitive to the takeover of a national champion by a foreign enterprise, regardless of whether this enterprise is privately or publicly owned, however the situation in which sector investors are foreign public companies seems to be especially intriguing, leading to the illusive privatization and real impact of one government on the sensitive sector of the other. Thus privatization which consists in offering equities of formerly public enterprises for sale seems to lead to further empowerment of state owned or controlled monopolies from other countries. As an effect the rise of potentially capable public investor in one state may well lead to protectionism in other states, protecting their markets against this kind of political dependence and in the long run leading to the spill-over effect, spreading economic nationalism and justifications for interventionism. Additionally the problem of externalities may also be taken into consideration. It should be pointed out that if a company is perceived as more valuable to the economy that to its shareholders because of the spinoff of the positive external effect not reflected in the value of its' shares such as human capital or good will, then the purchase through a foreign state-controlled entity may be regarded as internalizing these effects or appropriate them for the domestic state owned enterprises in the home economy. It seems however that national champions and state interventionism seem to be perceived also as a response to the failures and shortcomings of the market oriented corporate control, especially in form of the dispersed ownership of strategic companies which require a long term strategy.

It is a real perspective of the corporate governance agenda swinging around consecutive financial scandals beginning with Great Depression which resulted with the first analysis in corporate governance, namely *The Modern Corporation and Private Property* by A. A Berle and G. C Means (1932). In economic activity as very often elsewhere we don't see the problem until hitting the wall. But does it mean that corporate governance is just a precarious response to the financial scandals ? To address the problem of the essence of corporate governance whether it is only a

matter of managers' accountability to shareholders it is useful to point out the context of the above statement.(The above statement refers to agency model- the economic and legal concept of agency is a principal rationale for Anglo-Saxon company law and structure of corporations. What is the point of reference for the model of ideal corporate governance? The two criteria of corporate governance are dynamism understood as the system which permits the management of the enterprise to drive it forward without undue fear of governmental interference and accountability which enables ensuring that in exercising its freedom management is effectively accountable for its decisions and actions and the appropriate remedial action can be taken by shareholders dissatisfied with management. The relation between dynamism and accountability is thus essential for good corporate governance. The proposed standards and recommendations however should not be limited only to the accountability of managers to directors. The broader scope of corporate governance does not necessarily indicate the paradigm shift from shareholder to stakeholder theory- but to discuss the issue of such possibility broader methodological perspective is necessary. But even taking into account the so called *narrow approach* i.e. relation between directors and shareholders focused on the economic theory of agency and minimising agency costs, the problem of accountability is not the crucial issue- the system of accountability seems to be a result of wider legal, economic, financial or just interpersonal relations. To some extend the impression that corporate governance is a contingent response to real market failures and financial scandals is justified. On the other hand several styles of corporate governance should be mentioned; German and Japan approach concentrated on co-operation and long term thinking. The opposite strategy of conflict and competition is adopted by British and American systems. This rough generalisation discloses the pluralistic nature of corporate governance. Although according to authors of Hampel Report (1998): "Corporate structures and governance arrangements vary widely from country to country [but] the underlying issues of managerial accountability are the same everywhere" If it were the case, there would be perfectly feasible to provide universal recommendations for good corporate governance. The problem is that corporate governance is not only the matter of

governance as a structure of the firm perceived as an economic institution. The economic theories of the firm are based on the model of agency. It is believed that managers as agents of shareholders are likely to act in their self-interest and not necessarily on behalf of principal- the shareholders. The problem of agency costs is addressed in 2 ways; by virtue of monitoring ensuring transparency and accountability and due to the link between shareholder's risk and the risk of agent. It is achieved by implementation of whole set of constrains, checks and balances as well as the system of incentives for manager's loyalty. The economic model of agency however does not solve many problems of corporate governance, such as lack or weakness of ownership and the lack of interest of managers to increase long-term strategy or just to behave not only honestly and loyal, but actively increasing shareholder value.(c.f. Monks R. Monks, N. Minnow, *Corporate Governance*, 1995). According to Anglo-Saxon model of corporate governance shareholders as residual claimants and ultimate risk bearers are regarded as real owners, since the capital delivered by them and the risk they bear gives them priority and the company law with its "legal conferring" rules enables them with power. There are many justification for this solution. According to the contractarian theory of the company (Easterbrook and Fischel, Fama and Jensen), the company is just a nexus of contracts. Because shareholders are residual claimants, they are principals. The theory does not however answer the question, why the contract of agency between shareholders (as owners) and managers (as control) bestows the power upon shareholders. Referring to this issue Olivier Williamson claims that shareholders cannot recover their investment and "have more at stake". It is however also not entirely convincing, since one may claim that some stakeholders have also invested in firm. This aspect is especially significant in a wide context of transition from central to market oriented economy, where firms have been created as an output of political process and industrial economy engaging the whole groups rather than shareholders alone. Finally according to Hansmann "the governance costs are least for shareholders since their interest are more homogeneous". It is believed that owners of the company will be the best group in whose interest, which seems to be homogeneous, the company is to operate. But this theory assumes that shareholders are active and use their rights

to control and to ensure efficiency in terms of earnings and shareholders' value. The crucial issue here is whether shareholders really are capable to provide to enforce their right. It seems that in reality shareholders who posses minor proportions of shares are likely to sell those shares rather than to enforce their rights. Hence the problem of the dispersed ownership model consist in a fact that there is no real long term owner who is really interested in the long term prospect of the form rather than on the short term value. As it has been observed by Robert A G Monks and Allen Sykes (Monks and Sykes 2002)"the missing ownership" becomes a real problem and results with the disproportion of power between ownership and control. But this is not the problem of accountability only- this is a wider structural problem of the Anglo-Saxon model of the company. There is another explanation of the division of ownership and control with the arm – length system (UK model). The evolutionary path dependant origins of the UK company and UK company law. Ltd regarded as a firm where at least some shareholders are directors. The link between shareholders and directors used to be closer. Than companies became to grow, the link weakened and the whole system ended up with the present model of dispersed ownership diluted power of shareholders conferred to managers. The institution of the company reminding continental company based on the "organic" legal fiction changed into overlapping sets of markets linked by power and hierarchy based on agency model with the central position of the board of directors. Thus the horizontal integration is focused in agency relationship, whereas the firm seems to be just a nexus of contracts made on different markets in different terms; the most flexible market (capital market) is at the same time the most "short-term" market. The market of control limited eg. to 3 years etc. is medium term market, the labour market is more long-term oriented. The market of creditors is also more flexible. As a result, the flexibility of capital market reduces the risk of shareholders and shifts the risk on other groups. The model of corporate governance focused solely on accountability does not take into account the other part of the agency relation- the agent. The principal is of course exposed to the risk of manager's misbehaviour. But managers have also a lot at stake- their human capital. The limits of the market of control and its relatively less flexibility that this of capital market – there seems to be inequality between the

position of the owner who risks flexible and relatively easier to recover financial capital and the manager who loses the human capital. The same on the other stage of the agency relationship between directors, especially CEO as an employer and employees occurs. (c.f. J. Common's remark that the investment of employee is vested upon his loyalty and rejecting other alternatives at the moment). The problem is solved in different ways- due to the system of incentives and binding agents with principal. It is nevertheless very difficult to implement if the principal is unstable and short-term oriented. (Monks & Sykes again). In this remark, the link between legal framework and economic theory is emphasised. It seems, that bare analysis of accountability is to narrow even if we take into account only the shareholder theory. The problem of agency depends both on principal and agent. The accountability alone is not capable to solve complex problems such as ensuring efficiency and productivity of the firm. The notion of corporate governance from economic perspective includes the whole variety of factors determining productivity and efficiency. This approach embraces the set of different factors; economic, legal, social, financial etc.; As Zingales states; "*corporate governance is the complex set of constraints that shape the ex post bargaining over the quasi-rents generated by the firm*" (Zingales).

To some extend the corporate governance is the function of the theory of firm. The theory of the firm seems to detect the constituencies and groups between which the "bargaining over quasi-rents" takes place. The economic theory of the firm; as internal organisational power (Williamson) or just as a unite of production being a result of what may be called just as a nexus of contracts (Demsetz). Both approaches refer to the economic activity of the firm and have to respect basic axioms of welfare economics such as the necessity of enhancing efficiency, competitiveness, productivity and so on. It is perhaps just a kind of microeconomics implemented to analyse economic institution from internal point of view. As an example it may be mentioned the notion of "X efficiency" purported by Lebenstein and referred to the ability to adopt to changing environment (market)- the kind of flexibility of the firm and productivity at the same time. On the other hand some principles of good governance may be just characterised as business practices or customs. The economic theory depends on institutional and legal framework which is path dependant. The

realistic corporate governance is interdisciplinary and takes into account the differences between states and economies- hence different models of corporate governance. Finally the corporate governance depends on the recognition and evaluation of differed groups and different interests and incentives to co-operate. Such approach I would call "dynamic"- different groups and different forms of ownership seems to determine the institutional environment of the system of corporate governance. The claim that "Good Corporate Governance is about ensuring that managers are accountable to shareholders" seems to be just an oversimplification based on fixed UK/US model of agency and "static" approach omitting the evolution and dynamism of both; the company and its market environment. Corporate governance solves the problem of information asymmetry by differentiating the code into the *default* and *mandatory* rules. As the name itself suggests, the courts and regulatory agencies interpret transactions according to the default rules unless otherwise declared. Opting-out from the default rules is often cheap; parties have incentives to reveal their preferences and the relevant information in order to reach a modified agreement (Kraakman et al. 2001). Unlike the mandatory rules, enforcement and monitoring costs of the default rules are rather small. Furthermore, the default rules as a whole act as a public good, providing the starting point and guideline for negotiations and thereby creating positive externalities. When the gains from concealing information are still greater than the benefits from opting-out under the default system, the mandatory rules are imposed. Dynamic efficiency, however, does not necessarily illustrate efficient allocation of costs and risks. Especially when multiple players engage in the chain of transactions, principal-agent problems occur. In the area of corporate governance, Kraakman et al. (2001) identify three fundamental principal-agent problems: shareholders v. managers, non-controlling shareholders v. controlling shareholders, and stakeholders (e.g. employees and creditors) v. the firm itself. As managers still hold autonomy in variety of policy areas, opportunism of agents (Williamson 1985) may lead to inefficiencies in both private and public firms. However the structure of incentive is different. In private companies, including the companies with minority

state ownership, the agency problems refers to monitoring and control of the Board by the shareholders.

V. National champions and illusive power of the state capitalism

Public companies are different in this respect. Representatives of the state are not just agents of the state, but they have many different principals, such as senior government officials, junior officials directly supervising firms, and policy leaders on different level of governance within the ruling party. Jean Blondel convincingly puts forward the claim that patronage of political parties is one of the key factors shaping the structure of incentives and the influence of party leaders (Blondel 2002). He defined party patronage as an exchange relationship in which a variety of political assets may be traded between the two parties to the political transaction, namely the patron and the client. The nature of patronage as a basic unit of political transaction is more or less the same, notwithstanding the differences between particular types of assets, which generally may be identified with some goods and services such as expertise, legislation, jobs, contributions, information and last but not least appointments in both administrative agencies and state owned enterprises. The most important aspect of patronage as confronted with national champions and state owned enterprises is the right to appoint some managers as representative of the state agency or department. This appointments range from public tenders (public management) to the appointments of party loyalists to managerial boards in state-owned corporations (cronyism). Thus the relationship between management and shareholders in case of state owned enterprises seems to be simply transformed into the relation between the patron (party official) and the client or between state and its representatives in a given board of management, thus constituting the typical agency problem. However there is a significant difference between shareholder model of corporate governance and the state oriented model applied in national champions. Whereas in case of the corporate control of private company principal is unified albeit probably weak in front of management acting as it's agent, patronage seems to reflect a much more complex network of dependencies from different principals

located in different places and institutions, such as party representatives in government (usually ministers), but also junior ministers and department directors in case of party coalition, party representatives in parliament and local party institutional structures such as circuits, municipalities or regions. Political scientists underline the fact that patronage is shaped by four different elements, namely the characteristics of the two actors involved (patron and client) and the nature of the two goods to be exchanged (from patron to client and vice versa). In context of national champions managements the patrons study are political parties, and the clients are party loyalists and sometimes also hired experts. Parties in fact award their clients positions on managerial boards in state-owned enterprises on basis of their loyalty and commitment rather than expertise. This obviously looms large on the quality of management in state owned companies. The lack of knowledge and professional experience is however not the most pernicious effect of state controlled firms (Shleifer, A., Vishny 2004). The other side of the coin, namely the service or asset received by the party in exchange seems to be even more problematic, since in fact what actually parties receive from their clients in return is entirely dependent on the purpose of the appointment itself. I. Bremmer suggests that parties simply intend to transform economic assets into political assets exerting a control over management, whereas a more precise characteristic presented by other authors include reward and control (Kopecký et al., 2012) or influence over some area of public policy (Ennser-Jedenastik L. (2014). This observations on the more general aspect of loyalty leads to the problem of multi principality, as there are typically many different, sometimes competing centres of power within a political party or within different segments such as party in government, parliament and local structure (Blondel 2002). Mediating between different competing expectations of different political actors seem to be at least in Europe much more common than the alleged interdependence between the state and managers pictured by I. Bremmer, when he attempted to characterise rising state capitalism in such countries as China, Russia or Arabian authoritarian regimes form Persian Gulf (Müller 2002). Moreover, this distinction provides an important insight into the different characteristic of patronage and state capitalism in democratic and authoritarian states. Although in

general it could be stated that the reward for control transactional paradigm is clearly related to the notions of office seeking and policy seeking that drive theories of rational party behaviour, it must be admitted that party patronage also involves the distribution of appointments, it is even more apt to equate reward and control with the concepts of intrinsic and instrumental office seeking under the conditions of government coalition (Müller 2002) or at least the so called multifaceted party which plays different functions in different segments of administration or branches (Blondel 2002).

Additionally some party leaders may use patronage as means to safeguarding support from other party activists, especially regional or local leaders as to prevent the potential for intra-party rebellion in case of electoral defeat or unpopular decisions taken up by the government.

In general however patronage could be regarded as a price paid for relative political stability and control. Thus Blondel put forward the claim about the intrinsic nature of patronage as a tool for obtiaining smoothly functioning party based political system. Moreover, as Blondel suggested patronage as a kind of shock absorber seemed to be even more significant and indispensable in democracy, where political cycles create additional source of instability and short-termism (Blondel 2002). Party patronage is thus one of the most important chains between the party in government, the party in parliament and the party in its' regional and local structures, reflecting the need for delegation between voters, parties and the political party apparatus (Blondel 2002, pp. 240–5). The concept of patronage as medium between parties and different segments of government become important heuristic device which could also be useful in context of institutional and transaction cost analysis applied to political exchanges on political market. Multi actor games and dispersed political power- remain subject of transaction economics. As Olivier Williamson suggested, transaction cost may explain economic and political institutional structures alike (Williamson 1999). It seems though, that treating R. Coase seriously one can no longer believe in centralized political decision-making system, since if political cost of administration exist, decentralization of decision-making process seems to be inevitable (Dixit 1996). However the scope of this process seems to be conditioned

and depends on particular contingences. A simple comparison of corporate governance deficiencies and political governance weakness leads to suggestion that both structures seem to be seriously challenged with agency problem. However, whereas the corporate control in an free market oriented model of dispersed ownership suffers from the problem of missing ownership and indeed a missing principal, as suggested by Monks and Sykes (Monks and Sykes 2002), the state oriented model seems to be affected by the problem of multiplicity of principals representing different segments of elements of ruling party (Williamson 1999). Thus going back to the theory of agency as analytical tool enabling a proper institutional analysis of different forms of corporate control, it should be emphasized that the standard models of agency, incentives of the agents are linking the agent's compensation to his or her performance. Thus as Holmström and Milgrom observe the reward schemes are linear functions of performance, where the output is at least discernible and the value of the output serves as benchmark for evaluation of the agent's effort. However it has also been suggested that if the agent's performance depends on some random conditions or contingencies, the principal is no longer able to evaluate the agent's effort precisely and eventually in cases where the agent is risk averse, the optimal scheme involves smooth incentives rather than progressive once (Holmström and Milgrom 1987). Applying the standard agency to politicians and their clients means that one has to depart from many of the core assumptions of this theory.

Firstly, the incentive scheme for public institutions and politically motivated agents appointed and monitored by party officials are strikingly different form the regular incentive schemes for managers, who are able to diversify risk of underperformance in a much more efficient way. Analysing the difference between public and private incentives Avinash Dixit observed that in fact step functions encapsulating minimum standard and different degrees of extra performance may be preferred by politicians to linear contracts suggested by Holmström and Milgrom, because politicians seem to be very risk averse. Moreover, their risk aversion results from the fact that they simply cannot diversify the risk of bad outcomes of public policies, not mentioning lost electoral campaigns. Therefore in public agencies and

state controlled agencies the remuneration including both a minimum standard of performance and a bonus for extraordinary performance are much more common, however at the same time such incentive schemes are more sensitive to manipulation by the agents (Dixit 2002).

Secondly, one of the key features of the public sector is that agents have to serve many principals. As it has been suggested by many authors, delivering incentives in these circumstances is more complex if not hardly possible, because those principals are usually interested only in some very narrow dimensions of outputs and different interests of many different political actors are not perfectly aligned. As an example we can think of the representatives of the party in government such as ministers who are focused on strategic parameters in some sectors of national economy, junior or deputy ministers who are more interested in medium term goals and local party leaders who rely on short term effects translated into political support for local party leaders. As it has been demonstrated by Dixit (1996, 1997) who extends their analysis to a multi-principals setting, in these settings each principal generally offers a positive coefficient on the element he or she is interested in and negative coefficients on the other dimensions, which at the end creates a negative externality on the other principals who have to face lower efforts in those dimensions. Eventually this process of burification and splitting strategic goals leads to the situation in which aggregate marginal incentive coefficient is decreasing for each outcome in regard to the number of principals. Assuming that the agent's efforts for the different principals are substitutes, obviously each agent is more willing to offer his or her efforts to those principals who pay higher coefficients. This situation will result with reinforcement of the effect of the negative externality and hence will further weaken the aggregate marginal incentives eventually causing the race to the bottom and spiral effects. However as Dixit demonstrated even in the context of public incentive schemes the negative externality created by the interaction among the different principals may be at least to some extent internalised by separating the information regarding each outcome or by grouping together those principals whose interests are aligned (Dixit 1997). The question remains how to apply this solution to the specific context of national champions. It seems that such a separation of principals seems to

highly unrealistic and contradictory with the double nature of party officials who at the same time work in government (Blondel and Cotta 2000, Hurwicz 2008). There are some natural limits of both strategies enabling to overcome the multi-agency problem. It has to be pointed out that in some political context such as the legislature or the executive it seems to be impractical and unrealistic to restrain the actions of the involved political principals from outside (Dixit 2002). This unfortunately seems to apply to the principals who monitor the economic performance and exert the control over the managers in national champions either in for of majority or minority state owned companies, which however still are supposed to be influenced by different political actors.

Hence it has to be concluded that the multi-agency problem looms large and leads to inevitable underperformance of state owned enterprises or, those enterprises where the government exerts its control. The patronage leads inevitably to the multi-agency problem and finally to underperformance. Thus it seems that the cure in form of state intervention trough ownership rights and quasi political appointments of managements does not seem to be much better than the illness in form of the missing shareholder's ownership. Against this background yet another solution could be tested, namely the private ordering trough market oriented corporate governance model of relatively dispersed ownership over the strategic firms based on the separation of strategic control and day to day management. It has already been stated that the EU Council Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection aims at constituting the framework in which governments may exert some power in order to protect critical infrastructures by virtue of external regulatory means rather than by the ownership control. Such a critical infrastructure coincides with the concept of strategic assets which generally refer to unique resources relevant for economic and security considerations or the lack of control over a given company may result with externality effect for national economy. Typically the situation results from the so called spin-off effect in terms of specific assets such as infrastructure. The directive specifies that "critical infrastructure means an asset, system or part thereof located in Member States which

is essential for the main-tenance of vital societal functions, health, safety, security, economic or social well-being of people, and the disruption or destruction of which would have a significant impact in a Member State as a result of the failure to maintain those functions". In other words the specific externality or spin off effects resulting with market failure have been addressed in a purely functional manner, where the regulation concentrates on assets rather than on the companies. Than the assets themselves became the subject to special administrative legal rules. The concentration on asset specificity seems to be interesting from the perspective of the neoinstitutional economic analysis. In particular asset specificity has been identified by Olivier Williamson as a key factor determining the institutional structure of market and the level of transaction cost (Williamson 1985).

<table>
<tr><td></td><td>Non-Specific</td><td>Mixed Specificity</td><td>Idiosyncratic</td></tr>
<tr><td>Low Frequency</td><td rowspan="2">Market
(No-Integration)</td><td>Market with Trilateral private law system (company law based judicial arbitration)</td><td>Trilateral public law based (administrati ve decisions with judicial control)</td></tr>
<tr><td>High Frequency</td><td>Bilateral
(State minority ownership with additional powers)</td><td>Unified
(State majority ownership)</td></tr>
</table>

Fig. 1. Institutional alternatives reflecting types of asset specificity and frequency of interaction.

From this perspective it seems that the governance structure may be comparatively evaluated through the lens of institutional analysis and policies taking three factors into account: (1) incentive-giving mechanisms to solve information asymmetry, (2) cost-benefit analyses on both static transaction and dynamic transition, and (3) governance strategies to solve multi-layer principal-agent problems. It aims to establish the 'best practices' for EU governance, and international organisations management at large. In addition, based on the 'critical dimensions' – i.e. frequency, specificity and costs of transaction – Williamson (1979) identifies efficient mechanisms for (corporate) governance among market oriented external governance,

trilateral governance with third party arbitration, bilateral governance with mutual arbitration, and unified hierarchical governance. Translated into governance of National Champions, market governance refers to the absence of integration (i.e. national authorization), trilateral governance refers to contracts (company law) alongside with third party arbitrator (e.g. external regulation on strategic infrastructure or assets, supervised by the administrative courts), bilateral governance refers to minority-majority ownership relations within publicly held (listed) company, unified governance refers to majority state ownership . The 'best practices' apply the 'critical dimensions' to address some of the aforementioned principal-agent problems. From the dynamic efficiency point of view, the combination of these governance mechanisms preserves competitiveness of national economies particularly in the area where market governance is preferred.

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