PhD Dissertation

Legal Aspects of Privatization of State-owned Enterprises: A Comparative Study of Vietnam and Hungary

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Supervisor's Recommendation for Public Defense

As the supervisor of the dissertation entitled *"Legal Aspects of Privatization of State-owned Enterprises: A Comparative Study of Vietnam and Hungary"*, submitted by PhD candidate **An T. Chu**, I, **Prof. Dr. Emőd Veress**, recommend that the dissertation, in its present revised form, be admitted to **public defense**.

The dissertation addresses a highly relevant and complex subject: the comparative legal frameworks governing the privatization of state-owned enterprises (SOEs) in Vietnam and Hungary. This topic is of significant academic and practical importance, given the central role of SOE privatization in the economic transformation of post-socialist countries and the ongoing policy debates in both jurisdictions. The candidate's research is distinguished by its comprehensive approach, integrating legal, economic, and policy perspectives to analyze the evolution, rationale, and outcomes of SOE privatization.

The dissertation demonstrates originality and fills a gap in the literature by focusing on the comparative legal aspects of SOE privatization, an area often overshadowed by economic or political analyses. By examining the Vietnamese and Hungarian experiences, the candidate provides insights into how different legal and institutional contexts shape privatization strategies and outcomes. The research employs a strong comparative law methodology, systematically analyzing primary legal sources, policy documents, and relevant case law from both countries. The candidate's use of both desk research and qualitative analysis ensures a context-sensitive understanding of the subject matter.

The structure of the dissertation is logical and well-organized, progressing from conceptual foundations to country-specific case studies and culminating in a comparative synthesis and policy recommendations. The analysis covers foundational legal norms (including constitutional and property law), the laws governing the privatization process, and supporting legislation such as company and investment law. The findings and recommendations are particularly valuable for policymakers and legal scholars concerned with ongoing and future SOE reforms. The candidate identifies both best practices and pitfalls, drawing lessons from Hungary's experience that are directly applicable to Vietnam's current phase of economic integration and SOE restructuring.

The dissertation is clearly written, demonstrates academic rigor, and shows the candidate's independence in research and analytical complexity. In its revised form, the work meets the high standards required for doctoral research and makes a substantive contribution to the field of comparative law.

In light of the above, I recommend that the dissertation be admitted to the **public defense** stage.

Date: 24/11/2025

Prof. Dr. Emőd Veress
Supervisor

List of Abbreviations

CMSC	Commission for the Management of State Capital at Enterprises (Vietnam)
CPV	Communist Party of Vietnam
GDP	Gross domestic product
EGEs	Economic government entities
EU	European Union
FDI	Foreign Direct Investment
Ft	Forint (Hungary's currency)
HPSHC	Hungarian Privatization and State Holding Company
HNAM	Hungarian National Asset Management Inc.
IMF	International Monetary Fund
IPOs	Initial public offerings
OECD	Organization for Economic Co-operation and Development
SCIC	State Capital and Investment Corporation (Vietnam)
SHC	State Holding Company (Hungary)
SOE(s)	State-owned enterprise(s)
SPA	State Property Agency (Hungary)
USD	United States dollar
VND	Vietnamese Dong (Vietnam's currency)
WTO	World Trade Organization

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CHAPTER 1

Introduction

1.1. Background of the Research

State-owned enterprises (**SOEs**) acquire a unique status: (i) they pursue non-commercial objectives while also participating in commercial activities akin to those of private sector enterprises; (ii) they are owned or controlled by the government but enjoy some degree of operational autonomy. It was not until the aftermath of World War II that many developed economies experienced an enormous expansion of the state-owned sector for various reasons. Three major motives for the establishment of SOEs or the nationalization of private enterprises include: (i) the political or ideological motives to facilitate the power redistribution within society by enlarging the public sphere, to enhance the power of labor, and to make enterprises be responsible to the whole community for their decisions; (ii) the social motives to guarantee employment, to improve working conditions of laborers, and to pursue reconstruction objectives; and (iii) the economic motives to address market failure in case of natural monopoly, to rescue economic sectors in financial distress, and to promote economic growth in underdeveloped regions or sectors.[1] At that time, the share of gross national product accounted for by SOEs was often over 10%, placing them in a prominent position in several critical economic sectors, such as public transportation, communications, energy, steel production, and financial institutions.[2] Similarly, SOEs in developing countries played an equally important or even a larger role in the national economy before the wave of privatization that occurred between the 1980s and 1990s.[3] Especially, governments of developing countries were frequently impacted by the propagation of socialist ideology in the years following World War II, dictating that the state should exercise control over the 'commanding heights of the economy'.[4] During the 1970s, the GDP share of non-financial SOEs in most developing countries ranged between 7% and 15%, whereas that of some countries in Eastern Europe approached 65%.[5] These SOEs

[1] Pier Angelo Toninelli, 'The Rise and Fall of Public Enterprises: The Framework' in Pier Angelo Toninelli (ed), *The Rise and Fall of State-Owned Enterprise in the Western World* (Cambridge University Press 2000) 5–9.
[2] Yair Aharoni, *The Evolution and Management of State-Owned Enterprises* (Ballinger 1986) 1–2.
[3] The emergence of SOEs in developing countries was a fairly similar mix of political, ideological, and economic motives. *See* Michael Trebilcock, 'State-Owned Enterprises' in Alain Marciano and Giovanni Battista Ramello (eds), *Encyclopedia of Law and Economics* (Springer 2020) 1950.
[4] The term 'commanding heights of the economy' was used by Lenin to refer to vital economic sectors such as electricity generation, mining, transport, heavy manufacturing. *See* Mehdi Haririan, *State-Owned Enterprises In A Mixed Economy: Micro Versus Macro Economic Objectives* (Routledge 1990) 10; Malcolm Gillis, 'The Role of State Enterprises in Economic Development' (1980) 47 Social Research 248, 263; Rong Wang, 'The Commanding Heights: The State and Higher Education in China' in Shenggen Fan and others (eds), *The Oxford Companion to the Economics of China* (Oxford University Press 2014); John Gillespie, 'Is Vietnam Transitioning Out of Socialism or Transforming Socialism?: Searching for Answers in Commercial Regulation' in Hualing Fu and others (eds), *Socialist Law in Socialist East Asia* (Cambridge University Press 2018).
[5] Aharoni (n 2) 17–25.

were typically financed by government budget allocations, supplier credits, directed credits from state-owned development banks, or development partners.[6]

Despite their prominent role and position in the economy, SOEs have been criticized for poor economic performance and inefficiency as compared to their private counterparts due to two major problems. First, the governance structure of SOEs and the market have little impact on their managerial performance because the appointment of managerial personnel is often made on the basis of politics rather than merit, and they are not exposed to market risks such as takeovers or bankruptcy.[7] Moreover, SOEs are often expected to achieve multiple, sometimes even conflicting, economic and non-economic objectives, thus it is difficult to hold SOE managers responsible for poor financial performance of the enterprise. Second, it is the fact that, in the absence of natural monopoly, the private sector encourages competition, whereas state ownership is likely to uplift monopoly.[8] In comparison with enterprises in the private sector, SOEs frequently enjoy exclusive preferential regulatory treatment in the form of government subsidies, tax preferences or exemptions, fixed-price inputs, and concessional financing. Such exclusive benefits create an unlevel playing field between SOEs and private enterprises, which may negatively impact competition across the value chain.[9] The demerits of SOEs were especially evident in many emerging and developing economies due to their contribution to the national debt crises. For example, countries in Latin America and Eastern Europe urged for SOE reform and performance improvement so as to restructure and reschedule their national debt in the 1980s. The breakup of the Soviet Union in 1991, leading to the transition of the former command economies in Central and Western Asia, and Eastern Europe, along with the rise of state capitalism[10], principally in the Russia Federation, China, and Vietnam, has further driven SOE reforms. All these have prompted SOE privatization on a global scale.

The privatization of SOEs has been a key element of the new market structure[11] in which the greater role of the private sector contributes to the more dynamic growth, providing that resources will be used more productively by the private sector. The launch of the 1979 reformatory policy under Margaret Thatcher's administration in the United Kingdom marked a historical milestone as the most thoroughgoing privatization program, which aimed to privatize

[6] ADB Independent Evaluation Department, *State-Owned Enterprise Engagement and Reform* (ADB Independent Evaluation Department 2018) 8.
[7] Trebilcock (n 3) 1951–1952.
[8] ibid 1952.
[9] Melissa L Knutson, 'State-Owned Enterprises: Understanding Their Market Effects and the Need for Competitive Neutrality' (World Bank 2020).
[10] State capitalism denotes an economic system wherein the state engages in profit-driven economic activity, and the means of production are structured and managed as state-owned or state-controlled enterprises. The state has gotten more proficient at leveraging market forces to advance its development goals. *See* Raymond Williams, *Keywords: A Vocabulary of Culture and Society* (Oxford University Press 1985) 52; Mike Wright and others, 'State Capitalism in International Context: Varieties and Variations' (2021) 56 Journal of World Business.
[11] Lawrence Bouton and Mariusz A Sumlinski, 'Trends in Private Investment in Developing Countries: Statistics for 1970-95' (World Bank 1997) Discussion Paper 31.

SOEs across various industrial sectors, including cable and wireless communications, coal, steel, energy, water, airline and airport industries, the automotive industry, railways, shipbuilding, and public housing. Beginning in the mid-1980s, privatization began to proliferate in mainland Europe. Countries such as Italy, Portugal, and Turkey launched their first large-scale sales in 1993, meanwhile Belgium, Greece, and Ireland also participated in the privatization process during the 1990s. The privatization wave during this time was called the 'golden age of privatization'.[12] The privatization movement, advocated as part of 'the Washington Consensus' by the World Bank and the International Monetary Fund, has been disseminated to developing countries. This trend has led to a global wave of SOE privatization, significantly reducing governmental involvement in most developing economies. By 2003, the private sector share of GDP in 22 former communist countries in Central Asia and Europe exceeded 50%, a jump from only 9% in 1994.[13] Data gathered from both industrialized and developing countries in the period of 1989 and 2003 showed that SOE privatization had a generally positive impact in terms of increasing competition, efficiency, and consumer protection.[14]

Hungary, a former socialist country, did not stay out of the SOE privatization trend as it advocated the creation of a new mechanism so as to function the market economy, gradual reduction of the state's intervention in business activities, and attraction of foreign investment in the late 1980s. The privatization in Hungary commenced in earnest in the early 1990s, with over half of the country's 1,880 SOEs having begun the privatization process by 1992.[15] After the privatization of small and medium-sized enterprises in the early stage of the privatization process, Hungary made considerable effort in privatizing large SOEs in strategic sectors, including energy, transport, chemicals, and pharmaceuticals. The state sector had divested itself of about 70% of the book value of its original holdings by mid-1997.[16] Following its accession to the EU, Hungary announced the completion of broad-scale privatization in 2008. However, the substantial privatization, particularly of enterprises in strategic sectors, made the Hungarian economy vulnerable to external shocks. This led to the re-consideration of state-led capitalist model after the Global Financial Crisis between 2008 and 2009. Between the period of 2010

[12] William L Megginson, 'Privatization, State Capitalism, and State Ownership of Business in the 21st Century' (2017) 11 Foundations and Trends in Finance 1.
[13] Operations Evaluation Department, *Economies in Transition: An OED Evaluation of World Bank Assistance* (World Bank 2004) 7.
[14] OECD, *A Policy Maker's Guide to Privatisation* (Organisation for Economic Co-operation and Development 2019) 17.
[15] Katherine Ashton and Roger I Cohen, 'Hungary' [1992] International Financial Law Review 24.
[16] Rachel Elkan, 'VIII. Privatization', *Hungary: Economic Policies for Sustainable Growth* (International Monetary Fund 1998) 63.

and 2020, the book value of state-owned assets rose by 52%.[17] Privatization strategies thus have been more regulated, with an emphasis on state asset management.

Vietnam also experienced post-socialist transformation by undertaking SOE reforms in the late 1980s and early 1990s, after the *Doi Moi* (the economic renovation) initiative in 1986. Privatization[18] has been seen as a momentous strategic solution to the reform of Vietnamese SOEs. However, the implementation of privatization has been characterized by modest beginnings and persistent delays in achieving government-set targets. Moreover, the privatization process has not substantially diminished the role of SOEs. As of 2019, SOEs constituted 0.31% of the total number of enterprises in Vietnam,[19] however the state-owned sector remains a substantial contributor to the national economy in comparison to domestic private enterprises and foreign direct investment enterprises. SOEs represent 22.8% of the country's capital and contribute approximately 30% to the GDP.[20] It is noteworthy that Vietnam, unlike its Central European counterpart, did not proclaim the end of socialism with the fall of the Soviet Union. The *Doi Moi* officially initiated a shift to a mixed economy, in which some aspects of the centralized command economy were abandoned, other parts however were reformed and retained.[21] Under the privatization policy, the party-state continues to insist the state economic sector as the backbone of the economy,[22] thus a reduced number of SOEs continue to exert considerable influence on the national economy through their advantageous access to credit, markets, and land use.[23]

The dynamic practices of Vietnam and Hungary indicate that SOE privatization has never been a simple issue. The term privatization is a 'fuzzy concept' that encompasses a vast array of ideas and policies,[24] not to mention a diversified process that embraces different scenarios of privatization. Moreover, there is no common definition of what an SOE is, making it more complicated to define SOE privatization. The complexity of the issue is accompanied by the economic and non-economic objectives imposed by SOEs, which especially have their deep

[17] Csaba Moldicz, 'Hungary Economy Briefing: State-Owned Enterprises in Hungary' (2021) 37 China-CEE Institute Weekly Briefing 1 <https://china-cee.eu/wp-content/uploads/2021/02/2021e02_Hungary.pdf> accessed 15 October 2024.

[18] Due to its socialist ideology, the official discussion of SOE reform in Vietnam refers this process as equitization (*co phan hoa*) rather than privatization (*tu nhan hoa*). The concept of equitization will be analyzed in more detail in Section 2.2.2.3 (Chapter 2) of the dissertation.

[19] OECD, *OECD Review of the Corporate Governance of State-Owned Enterprises in Viet Nam* (OECD Publishing 2022).

[20] General Statistics Office, *Statistical Yearbook of 2021* (Statistical Publishing House 2022); OECD, *Multi-Dimensional Review of Viet Nam – Towards an Integrated, Transparent and Sustainable Economy* (OECD Publishing 2020).

[21] Gillespie, 'Is Vietnam Transitioning Out of Socialism or Transforming Socialism?' (n 4) 322.

[22] Minh Cu Luong, 'Key Role of the State Economic Sector in Vietnam's Socialist-Oriented Market Economy Undeniable' (*National Defence Journal*) <http://tapchiqptd.vn/en/events-and-comments/key-role-of-the-state-economic-sector-in-vietnams-socialistoriented-market-economy-undeniable/14196.html> accessed 2 May 2025.

[23] Jonathan Pincus, 'Vietnam: In Search of a New Growth Model' [2016] Southeast Asian Affairs 379, 395.

[24] Paul Starr, 'The Meaning of Privatization' (1988) 6 Yale Law & Policy Review 6.

roots in socialist thoughts. Thus, the underlying significance of SOE privatization, at least in the case of Hungary and Vietnam, conveys the reshaping of the relationship between the state and the economy.[25]

The discourse surrounding the privatization of SOEs has predominantly centered on political and economic dimensions, however the legal issues should not be overlooked. The success or failure of SOE privatization also depends on the regulatory framework within which the privatization process will be carried out. For example, a change in the legal environment of business by withdrawing the state-owned sector's monopoly rights can only be invoked by the legislator.[26] The studies on developing countries also show that the quality of the business regulatory environment for competition, governance, and entry is the preconditions for the success of privatization.[27] All in all, it can be stated that neither the economic and legal issues nor the political aspects of SOE privatization can be disregarded. This study aims to provide a distinctive contribution to the current literature by conducting a comparative analysis of two post-socialist legal frameworks of Vietnam and Hungary. While individual analyses of each country's privatization process exist, these are typically rooted in economic or political science perspectives and do not address the comparative legal aspects in a sustained or structured manner. Moreover, comparative law is a highly productive domain for the exploration of interdisciplinary research incorporating other sciences, as comparative law is interdisciplinary by its very nature.[28] Building on existing work on privatization, post-socialist transformation, and regulatory reform, this study fills the research gap, illustrating the complex political, economic, and legal interplays in transitional economies.

1.2. Research Questions

Against the above background, the research questions are as follows: (i) What are the rationales justifying the privatization of SOEs?; (ii) How do Vietnamese law and Hungarian law regulate SOE privatization?; and (iii) What lessons from the Hungarian experience can be learned so as to improve the current Vietnamese law on SOE privatization?. Underlying these

[25] As Terence Daintith pointed out, the comparative analysis of privatization in different countries should take into account the enormous variance in the role hitherto played by the publicly owned sector in their economies. The privatization process in developed countries such as the United Kingdom, France and the United States dealt with the important and visible sectors of their national economies, however such experiences were significantly incompatible with the privatization task that transitioning countries of Central Europe faced since it implied a complete change in the mode of economic organization and the role of the state in relation to it. *See* Terence Daintith, 'Chapter 2 The Legal Techniques of Privatisation' in Thomas Clarke (ed), *International Privatisation: Strategies and Practices* (De Gruyter 2011).

[26] ibid 45.

[27] *See* Saul Estrin and Adeline Pelletier, 'Privatization in Developing Countries: What Are the Lessons of Recent Experience?' (2018) 33 The World Bank Research Observer 65.

[28] Giorgia Guerra, 'An Interdisciplinary Approach for Comparative Lawyers: Insights from the Fast-Moving Field of Law and Technology' (2018) 19 German Law Journal 579, 585.

questions is an assumption that the formulation and development of the legal framework play a critical role in achieving the objectives of SOE privatization.

The first question concerns the concept of privatization and why governments carry out privatization of SOEs. The term 'privatization' has a 'cluster of overlapping meanings'[29] and has been defined in several ways within the existing literature. The second concept that needs to be defined is 'state-owned enterprise'. SOEs are referred to by different designations, including government business enterprises, public enterprises, government corporations, and government-linked companies. The definition of SOEs differs by country, in addition to its naming. Defining an SOE however is critical to determining which enterprise is an SOE that is subject to privatization. Understanding the concept of SOE privatization from the perspectives of Vietnam and Hungary will be the starting point for a thorough comparison and assessment of the two regulatory systems on the subject at hand.

Answering to the second question is a comparative study of the legal framework for SOE privatization in Vietnam and Hungary. Both Hungary and Vietnam, prior the SOE privatization movement of the late 1980s, adopted the socialist economic model with the leading role of SOEs in the national economy. The two countries shared a similar starting point at the first SOE privatization stage, however pursued different political economy ideologies aftermath the fall of the Soviet Union in 1991. Such change may imply differences in how each country regulates the process of SOE privatization. For example, what is the structure of the SOE privatization legislation in the countries in question? Is SOE privatization given in a single law, or does it depend on a range of laws, regulations, and practices? How are the legal issues arising in the course of SOE privatization addressed according to Vietnamese law and Hungarian law?

The final question is to find feasible solutions to better the Vietnamese law on SOE privatization. Hungary and Vietnam initiated the economic transition around the same period. With some significant advantages over other Central European countries, Hungary was among the region's most successful transition economies and acceded to the EU in 2004.[30] Notably, Hungary chose to privatize large SOEs in some strategic sectors and hastened the privatization process so that the percentage of the private sector in the economy rose to 80% after a decade.[31] On the contrary, Vietnam took a rather more methodical and gradual approach to the

[29] Ernst Ulrich von Weizsacker, Oran R Young and Matthias Finger, 'Limits to Privatization' in Ernst Ulrich von Weizsacker and others (eds), *Limits to Privatization: How to Avoid Too Much of a Good Thing* (Taylor & Francis Group 2005) 4.

[30] Tunde Buzetzky, 'Hungary Country Brief' (*World Bank*, September 2003) <https://web.worldbank.org/archive/website00978/WEB/OTHER/0FFBEA0F.HTM?OpenDocument> accessed 19 April 2025.

[31] WTO, 'Trade Policy Review - Hungary 1998' (*World Trade Organization*, 2 July 1998) <https://www.wto.org/english/tratop_e/tpr_e/tp077_e.htm> accessed 19 April 2025.

privatization of SOEs.[32] The pilot phase of the SOE privatization program lasted from 1992 to mid-1996 and was extended to mid-1998, with only 30 SOEs privatized in seven years.[33] The accelerated phase from mid-1998 to 2011 resulted in the privatization of a substantial number of SOEs, representing nearly 60% of all SOEs undergoing privatization during the 25-year privatization program.[34] But the pace slowed down in the economic restructuring phase from 2011 to 2016.[35] Since 2016, the Vietnamese Government has once again fostered the privatization process so as to improve the efficiency of SOEs by using market mechanisms. However the practice of SOE privatization in Hungary suggests that the fast privatization and changes in the public services that were privatized without proper regulation mechanisms impose several negative impacts, which are evident by the fact that the Hungarian Government has increasingly reinvested in certain key sectors in recent years. The experience of Hungary, with both pros and cons, in regulating the privatization process of SOEs may draw significant implications for Vietnam in improving the legal framework on the accelerating phase of SOE privatization at present.

1.3. Aims of the Research

The aims of the dissertation are as follows:

(i) To present a comprehensive analysis of the concept of SOE privatization.

So far, there has not been a universal concept of either privatization or SOE. For the starting point, the dissertation will examine and analyze the definition, origin, scope, structure, rationales, and goals of privatization in general and SOE privatization in particular. Thereby, the approach within the study scope of the dissertation will be provided.

(ii) To define and analyze how Vietnam and Hungary have dealt with the particular legal issues of SOE privatization.

The success of SOE privatization critically depends on the regulatory framework, which consists of various legal instruments. In general, there are three categories: (i) laws providing fundamental foundations for SOE privatization such as constitutional law and property law; (ii)

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[32] On the periodization of SOE privatization in Vietnam, *see* Seok Hwan Kim and others, 'A Study on Private Enterprises and Entrepreneurs in Transition Economies: Focusing on Russia and Vietnam' (2020) 10(34); Le Hong Hiep, 'Vietnam's New Wave of SOE Equitization: Drivers and Implications' [2017] ISEAS Perspective; Hege Merete Knutsen and Khanh Ta Do, 'Reforming State-Owned Enterprises in a Global Economy: The Case of Vietnam' in Arve Hansen, Jo Inge Bekkevold and Kristen Nordhaug (eds), *The Socialist Market Economy in Asia: Development in China, Vietnam and Laos* (Springer 2020).

[33] Only five eligible SOEs voluntarily took part in the first pilot phase, while 25 SOEs completed the privatization process in the extended phase – an outcome deemed insufficient to meet SOE reform objectives. *See* Hiep (n 32) 3.

[34] ibid 3.

[35] VietnamFinance, 'Bao cao cua Chinh phu ve co phan hoa giai doan 2011-2016 [Report on the equitization of SOEs in the phase of 2011-2016' (*VietnamFinance*, 23 October 2016) <https://vietnamfinance.vn/bao-cao-cua-chinh-phu-ve-co-phan-hoa-giai-doan-2011-2016-20161023201944748.htm> accessed 24 April 2025.

laws governing the privatization process, which can be a single law or a set of laws, regulations, and practices; and (iii) and other laws supporting an SOE privatization program, such as competition law, investment law, and company law. The dissertation will define major legal issues of SOE privatization and analyze how they are addressed under Vietnamese law and Hungarian law.

(iii) To draw implications for the development of Vietnamese law on SOE privatization from the comparative synthesis with the Hungarian experience.

After encountering a slow pace of SOE privatization during the 2011-2015 period, Vietnam faces the challenge of accelerating privatization of the remaining SOEs due to the pressures from further integration into the global economy and the state budget deficit.[36] The in-depth analysis and comparison with Hungarian laws, which illustrates the varying legislative approaches to address the concerned issue, will help to draw implications for the improvement of the law on SOE privatization in Vietnam.

1.4. Delimitation

The dissertation focuses on the legal aspects of the privatization of SOEs. However, due to the multifaceted concept of 'privatization', a comprehensive understanding of its legal dimensions necessitates an in-depth examination of the wider concept of privatization. In light of the ambiguous characteristics of its concept, privatization can be defined in either a broad or narrow sense. For example, Weizsacker, Young and Finger take an expansive perspective, defining privatization as encompassing all strategies formulated to enhance the involvement of private entities in the use of public resources and the generation of goods and services.[37] Accordingly, privatization measures include the conveyance of property rights from public to private ownership and the facilitation of private sector involvement in the management and financing of assets or provision of services by means of leases or contracts despite *de jure* ownership remaining with the state. The dissertation however puts privatization in the context of SOE reform, thus within the research scope, privatization is limited to the divestiture and transfer of SOEs or their assets from governments or their agencies to private entities. Accordingly, public-private partnership arrangements, such as build-own-operate (BOO) and build-operate-transfer (BOT) agreements are not covered within the scope of this dissertation. Since privatization is characterized by the transfer of enterprise ownership from the public sector to the private sector, it is essential to adopt a restrictive definition of privatization that includes instances involving the transfer of shares or assets of an SOE to private shareholders.

The move towards a market economy in Vietnam and Hungary, starting with the SOE privatization programs, involves an unprecedented attempt to transfer the ownership of their

[36] Knutsen and Do (n 32) 150–151.
[37] von Weizsacker, Young and Finger (n 29) 4.

economies from the public to private hands. The development of a legal regime that facilitates such transformation is critical to a successful transition. The framework for SOE privatization consists of various laws, however the dissertation focuses on the discussion of the following categories of privatization laws:

(i) Foundational legal norms for SOE privatization.

Constitutions of some countries stipulate certain requirements regarding the privatization of SOEs; for example, provisions mandate state ownership over specific sectors of the economy. Such constitutional provisions inherently constrain the extent of privatization initiatives within these jurisdictions.[38] In addition, the constitution generally declares the economic regime of a country. Provided Vietnam and pre-transitional Hungary are both shaped by socialist ideology with state dominance in the economy, it is crucial to examine whether their constitutions explicitly permit private investment or impose restrictions on the types of SOEs eligible for privatization.

Property law is also an essential foundation for SOE privatization. Well-delineated property rights are a prerequisite for the formation of a market economy and serve as an incentive for both local and foreign investment in privatized enterprises.[39] Property law is also critical for the privatization itself, because it necessitates the precise definition of the bundle of property rights connected with the SOEs to facilitate their sale. Especially, the establishment of appropriate property rights to real estate is necessary for the implementation of any type of transaction involving land during the process of SOE privatization.[40]

(ii) Laws governing the privatization process.

The decision to implement a specific law regulating the privatization process is contingent upon the legal system as well as the particular conditions of the country concerned. Regardless of the legal structure, laws governing the process of SOE privatization should serve a variety of purposes. A primary function of laws on the privatization process is to clarify the objectives and scope of the privatization program as well as the types of SOEs eligible for privatization. The laws may explicitly provide for a list of SOEs subjected to privatization, but such an approach is inflexible due to difficulties in either removing or adding SOEs to the list as the program evolves. Other main contents of privatization law are to define privatization methods and any

[38] Carlos E Martinez, 'Early Lessons of Latin American Privatizations Lead Articles' (1991) 15 Suffolk Transnational Law Journal 468, 497.
[39] Michele Balfour and Cameron Crise, 'A Privatization Test: The Czech Republic, Slovakia and Poland' (1993) 17 Fordham International Law Journal 84, 84.
[40] Cheryl W Gray, 'Evolving Legal Frameworks for Private Sector Development in Central and Eastern Europe' (World Bank 1993) 209 <https://ideas.repec.org//p/fth/wobadi/209.html> accessed 20 April 2025.

restrictions on prospective bidders and to specify the procedures by which privatization can take place.[41]

(iii) Laws supporting an SOE privatization program.

SOE privatization is underpinned by a wider legal framework in two respects:[42] (i) laws govern the procedural aspects of preparing SOEs for privatization and executing the associated transactions; and (ii) laws facilitate the overall environment conducive to the functioning of the newly privatized entities, such as access to land, market, and credit, and fair competition among privatized enterprises and the remaining state sector. In this sense, various laws are expected to be involved in supporting SOE privatization. For instance, labor restructuring is often a prerequisite for privatization to align with the transition to profit-driven enterprises, thus labor law is a crucial means to balance the rights of redundant employees and the rights of employers to reorganize the labor force in response to the evolving demands of privatization. Competition law is also relevant to facilitate SOE privatization, since it tackles both the precondition of privatization and the business environment for the operation of the privatized enterprises.[43] Nonetheless, in case the enterprise is a public utility, it is essential to establish a regulatory framework that empowers the regulator to safeguard the public interest concerning the pricing of outputs and the quality of services while also facilitating the entry of future competitors.[44]

The dissertation however does not aim to address all of the legal issues arising in the course of SOE privatization. For an in-depth comparative analysis of legal aspects of SOE privatization in the concerned countries, the focus of the dissertation is on the following issues:

- The conversion of SOEs into companies under a modern company law serves as a crucial precursor to privatization[45] because it facilitates the establishment of company structures that are anticipated to emerge from the privatization process. Company law should provide for the business governance in the context of privatization, such as provisions enabling employees to participate in the privatization by granting them voting rights or positions on the board of directors, provisions on special shares granting veto rights to the governance, and provisions defining the governance regime after the SOE is transferred to the private sector.[46] It is also important to stipulate the separation of ownership and management in publicly held

[41] World Bank, 'Privatization Laws' (*World Bank*, 25 November 2020) <https://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/privatization> accessed 20 April 2025.
[42] ibid.
[43] For detailed discussion, *see* Mario Siragusa, 'Privatization and EC Competition Law' (1995) 19 Fordham International Law Journal 999, 1036–1059.
[44] World Bank, 'Privatization Laws' (n 41).
[45] ibid.
[46] Gray (n 40) 7.

corporations,[47] the allocation of power among shareholders and directors, and other corporate governance rules regarding post-privatized SOEs.

- Investment law is another important pillar of a successful SOE privatization since it encourages private investment in SOEs subject to privatization. In this sense, privatization programs should be accessible to both domestic and foreign investors, especially due to the commitments under international investment agreements to promote and protect foreign investment. In the event that foreign investors are anticipated to engage in the privatization initiative, it is imperative that national legislation ensure fair and equitable treatment of these investments, aligning with widely recognized international standards. In certain instances, the government may opt, as a deviation from the norm, to allocate a portion of shares exclusively for domestic investors. Such restrictions should be explicitly prescribed in investment legislation.

1.5. Research Methodology

The ultimate goal of the dissertation is to assess the Vietnamese legislative control of SOE privatization and to find a feasible solution to improve the current framework. Therefore, given that many jurisdictions have dealt with the challenges of SOE privatization for a long while, it is a plausible choice to follow a comparative law perspective to achieve the research objective.

To find solutions to a particular problem of the legal system, it may be necessary to consider alternatives beyond its conventional framework.[48] Due to its benefits of providing insights to engage in legal reform, comparative law is said to have been utilized since the time of Hammurabi.[49] A considerable amount of literature has been produced regarding the significance of the comparative method in legal research.[50] The rationale for conducting legal comparison may be that it leads not only to a wider knowledge and appreciation of the law of other countries but also to a better knowledge and critical evaluation of the domestic system in relation to the foreign systems.[51] Through the examination of how a legal issue has been approached across various legal systems, one may discover aspects that had not been previously contemplated within a particular legal system. The acquired understanding and knowledge of other legal

[47] Larry E Ribstein, *Business Associations* (Second edition, Matthew Bender 1990).

[48] For example, Korad Zweigert and Hei Kötz assert that comparative law is an 'école de vérité' that extends and diversifies the potential solutions available, and provides scholars with the critical capacity to find the 'better solution' for his time and place. *See* Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, Third Edition, Third Edition, Oxford University Press 1998) 15.

[49] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press 1993).

[50] Macmillan Schmitthoff, 'The Science of Comparative Law' (1939) 7 The Cambridge Law Journal 94; WJ Kamba, 'Comparative Law: A Theoretical Framework' (1974) 23 The International and Comparative Law Quarterly 485; Rudolph Schlesinger and others, *Schlesinger's Comparative Law: Cases, Text, Materials* (7th edition, Foundation Press 2009); Zweigert and Kötz (n 62).

[51] Léontin-Jean Constantinesco writes that (in translation) 'comparative law sharpens the eye for defects and weaknesses in one's national legal institutions', quoted in Bernhard Grossfeld, *The Strength and Weakness of Comparative Law* (Oxford: Clarendon Press 1990). Alan Watson claims that the greatest advantage of comparative studies is what they can tell us about law itself, *see* Watson (n 49) 16.

systems may eventually help a country develop better solutions to address the same legal issues.[52] Apparently, the differences or similarities should take into account, for example, the institutional, economic, social, and cultural context of the specific jurisdiction, which may not exist in the others.[53] In some cases, it is however much more cost-saving[54] to learn from other countries and make necessary adaptations than to come up with brand-new solutions.[55] In fact, to modernize and foster legal development, Vietnam has promoted the stance to borrow foreign legal ideas and legal institutions rather than spending decades to gradually build a modern legal framework from internal practices.[56] Even if comparative law cannot fully provide the necessary solutions, it is likely to produce more evidence to evaluate the Vietnamese law than an inquiry, which limits itself to only the system-internal examinations.

The dissertation is primarily conducted through desk research. Desk research involves conducting research by examining the primary sources, including pertinent legislation and judicial cases. Official Hungarian legislation is accessed through the National Legislation Database (http://njt.hu). While certain English translations of laws are provided, the majority of older legislation is available only in Hungarian. In such cases, translation tools are used to understand the legal text, with a double-check by the academic supervisor. Regarding Vietnamese jurisdiction, legislation and regulations in Vietnam are published online and can be

[52] In the paper titled 'Aims of Comparative Law', Patrick Glenn generally provides at least four functions of comparative law. Accordingly, comparative law can be utilized as an instrument (i) of learning and knowledge, ((i) of evolutionary and taxonomic science, (iii) to contribute to understanding and improving one's own legal system, and (iv) for the harmonization of law. *See* H Patrick Glenn, 'The Aims of Comparative Law' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar Publishing 2012); Esin Orucu, 'Developing Comparative Law' in Esin Orucu and D Nelkin (eds), *Comparative Law: A Handbook* (Hart Publishing 2007).

[53] Mary Ann Glendon, Michael W Gordon and Paolo Wright-Carozza, *Comparative Legal Traditions in a Nutshell* (2nd ed, West Group 1999) 11.

[54] Alan Watson famously coined the term 'legal transplant' during the 1970s to indicate the transferring of a certain legal rule from one country to another. In a work that was later regarded as a 'seminal' text in comparative law, he argued that legal transplantation 'is socially easy' and the 'historical and social context of the creation of law are less important', *see* Watson (n 59) 95. Nevertheless, Pierre Legrand positioned the view that a legal transplantation is impossible because legal rules are not autonomous entities that are free from a historical and cultural background, *see* Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4 Maastricht Journal of European and Comparative Law 111.

[55] This is in line with the opinion of the majority of scholars at the international conference 'The Challenges and Practices of Legal Transplant in Vietnam: Sharing European Experiences' organized by the Office of National Assembly of Vietnam in cooperation with the EU Delegation to Vietnam in February 2015. With more than a dozen papers from the most prominent legal scholars in Vietnam, the conference comprehensively synthesized the orthodox views of the Vietnamese legal community on theories and practices of legal transplants. *See* Office of the National Assembly of Vietnam, *The Challenges and Practices of Legal Transplant in Vietnam: Sharing European Experiences* (Hong Duc Publisher 2016).

[56] In Vietnam, the use of comparative law for legislative purposes has become a practice. The documents which the Government must submit to the National Assembly typically include a comparative report to inform legislators how similar legal problems have been dealt with in other jurisdictions. For example, in the drafting of the Law on Consumer Protection in 2010 and 2015, the drafting agency prepared an 84-page and 200-page comparative law report, respectively. For a comprehensive analysis of the role of comparative law in the drafting of the Law on Consumer Protection in 2010, *see* Cuong Nguyen, 'The Drafting of Vietnam's Consumer Protection Law: An Analysis from Legal Transplantation Theories' (Doctor of Philosophy, Faculty of Law, University of Victoria 2011) 109.

accessed in the Vietnamese language at https://vbpl.vn. Several important pieces of legislation and regulations have been translated into English and can be accessed at the mentioned website or at https://vietnamlawmagazine.vn. There is limited access to Vietnamese case law because judgments have only been made available online since July 2017 upon enforcement of Resolution No. 03/2017/NQ-HDTP of the Judicial Council of the Supreme People's Court of Vietnam. The dissertation also incorporates secondary sources, such as textbooks, journal articles, newspapers, reports, and national and international policy documents that address privatization policy, economic reforms, and the involvement of the private sector in economic development. The utilization of secondary sources helps broaden the range and depth of understanding that can be derived from the primary sources. Library research is mainly conducted at the University and National Library (University of Debrecen) and its online database. Meanwhile, the resources related to Vietnam's jurisdiction are accessed at the library of the Vietnam Academy of Social Sciences. The qualitative analysis is employed to offer insights into the issue of the SOE privatization across the examined jurisdictions.

1.6. Structure of the Research

The dissertation contains six main chapters. The introductory section will be followed by Chapter 2, which will provide a comprehensive analysis of the concept of SOE privatization, including the definition, origin, scope, structure, reason, goals of privatization, and the approach of the dissertation regarding the concerned issue. Chapter 2 also presents the legal guidelines for the privatization of SOEs, which serves as the basis for discussion in the subsequent chapters.

Chapter 3 provides an overview of the privatization of SOEs in Vietnam and Hungary. This chapter begins by delineating the initial conditions, followed by the practices of implementing SOE privatization in each country. The chapter also presents recent developments concerning the issue of SOEs and the privatization process in Vietnam and Hungary.

Chapters 4 and 5, respectively, discuss the legal issues arising from SOE privatization in Vietnam and Hungary. Specifically, the two chapters examine laws providing fundamental foundations for SOE privatization, namely constitutional law and property law, the laws governing the privatization process, and the legal issues in relation to company law and investment law, which play the role of laws supporting an SOE privatization program.

On the basis of the findings of the previous chapters, the similarities and differences between the two legal systems will be determined and partly explained in Chapter 6. This chapter also aims to answer the research questions by presenting several implications for the improvement of legislative instruments for SOE privatization in Vietnam.

Each chapter concludes with a summary, providing some remarks on the concerned issues analyzed in the chapter. The whole dissertation has been driven by the connection of different chapters.

CHAPTER 2

Theoretical Framework for the Privatization of State-owned Enterprises

2.1. Introduction

This chapter offers a comprehensive presentation on the theoretical issues surrounding the privatization of SOEs, a topic that has gained prominence in global economic discourse since the late twentieth century. The chapter begins with an exploration of the conceptual foundations of privatization, contextualizing it within broader philosophical, economic, and legal frameworks. The chapter then discusses the origins and definitions of SOE, highlighting the definitional complexities that arise from both international standards and national variations. Given the diverse interpretations of privatization and SOEs, the chapter establishes a working understanding of SOE privatization within this research. The chapter aims to address the central research question on the rationales justifying the privatization of SOEs.

A significant portion of the chapter is devoted to the legal framework for privatizing SOEs. The legal dimension of SOE privatization encompasses several interrelated aspects, including foundational legal norms, laws governing the privatization process, and supportive legislation. The constitutional provisions and property rights serve as the legal bedrock for privatization initiatives. The statutory and regulatory frameworks are analyzed as they have operational effect to the privatization programs, including issues such as institutional actors, privatization methods, and valuation of SOEs. Additionally, company law and investment law are discussed as critical legal components that facilitate the privatization process of SOEs.

The theoretical issues examined in this chapter lay the analytical framework for comparing the experiences of SOE privatization in Hungary and Vietnam in the subsequent chapters, particularly in terms of legal design, implementation challenges, and policy outcomes.

2.2. The Concept of Privatization

2.2.1. The Idea of Privatization

Privatization is a multifaceted concept that necessitates a thorough understanding of the dichotomy between ‘private’ and ‘public’ spheres, both of which are integral to the lexicon of law, politics, and societal interactions.[57] Paul Starr articulates two primary interpretations of the public–private distinction. The first sense posits that public is to private as ‘open’ is to ‘closed’, suggesting a binary opposition based on accessibility. In this framework, the concepts of publicity[58] and privacy[59] are juxtaposed, with publicity denoting openness and accessibility to

[57] Starr (n 24) 7.
[58] For example, a public place, public behavior, making something public such as publishing an article. ibid.
[59] Private places or things are restricted to access, for example homes, letters, diaries. ibid.

the collective, while privacy implies restricted access. The second interpretation frames the public-private distinction in terms of the 'whole' and the 'part'. As such, 'public' refers to the collective interests or opinions of the entire people, contrasting with 'private', which pertains to specific individuals or a class of individuals. In this context, the term 'public' often connotes a sense of 'common' which, although not necessarily, has a close link with the concept of 'government' that in some contexts they are interchangeable.[60] For instance, the state represents the entirety of society in international relations and establishes regulations that are binding on everyone within its borders.

The dichotomy between the public and private spheres, particularly in the domain of ownership, has its roots in the philosophical discourse of ancient Greece. Plato wrote in favor of communal ownership over private ownership and private property:

> '…I think, that if they were going to be true guardians they should not have private houses, or land, or property of any kind, but they should receive their livelihood from the other citizens as payment for their guardianship, and all make use of these resources jointly…It will stop them from introducing private pleasures and pains along private property…since they have no private property apart from their own bodies, everything else being jointly owned…'.[61]

Aristotle however asserted that the community of property was inefficient and let the indolent exploit the diligent:

> '…Property should be in a certain sense common, but, as a general rule, private; for, when everyone has a distinct interest, men will not complain of one another, and they will make more progress, because everyone will be attending to his own business…. It is clearly better that property should be private, but the use of it common; and the special business of legislators is to create in men this benevolent disposition.'[62]

In this respect, privatization signifies a retreat from the public sphere, in particular concerning the withdrawal from state assets, functions and institutions.[63] This process often leads to a smaller government, lower taxes, and a decrease in governmental intervention in public affairs.[64] The emergence of the liberal state has accentuated the differences between private and public domains, aligning closely with the principles of privatization in two primary dimensions: on the one hand, the privatization of religious, moral and economic activities previously governed by the state; and on the other hand, a commitment to public law and

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[60] ibid 8.

[61] Plato, *The Republic* (GRF Ferrari ed, Tom Griffith tr, Cambridge University Press 2000) 163,164.

[62] Aristotle, *Aristotle: The Politics and the Constitution of Athens* (Cambridge University Press 1996) 36.

[63] Starr (n 24) 10.

[64] Carl E Van Horn, 'The Myths and Realities of Privatisation' in William T Gormley (ed), *Privatization And Its Alternatives* (University of Wisconsin Press 1991) 261,262; Ira W Lieberman, 'Privatization: The Theme of the 1990s' (1993) 28 The Columbia Journal of World Business 8; Paul Starr, 'The New Life of the Liberal State: Privatization and the Restructuring of State-Society Relations', in *The Political Economy Of Public Sector Reform And Privatization* (Routledge 1991).

political discourse in the public realm.[65] Within the framework of liberal thought, two principal critiques of state authority emerge. First, the notion of public governance implies a comprehensive set of regulations that constrain state power, thereby ensuring that citizens can hold their government accountable for its actions. Second, the delineation between public and private domains, particularly concerning property rights, implies that any state intervention must satisfy rigorous criteria pertaining to the public interest. Classical liberalism is frequently characterized as a purely privatizing ideology, encapsulating several core principles: (i) the advocacy for limited government to safeguard individual liberties and avert totalitarianism; (ii) the endorsement of free-market economics, preservation of economic liberty, and private ownership; (iii) the promotion of a civil rather than a political society, wherein vibrant mediating institutions impose necessary constraints on both market operations and public morality.[66] Consequently, in a classical liberal constitutional order, governmental actions are functionally confined to parameters governing social interactions. Ideally, governments are constitutionally barred from engaging in direct economic functions such as determining value scales, organizing production, and distributing goods.[67] These functions are expected to emerge organically from the decentralized activities of numerous economic actors, coordinated through market mechanisms and regulated by a system of laws and institutions upheld by the government.[68]

The term 'privatization' gained prominence in political discourse during the late 1970s and early 1980s, coinciding with the rise of neoliberalism.[69] Under the influence of conservative administrations in the United Kingdom, the United States, and France, privatization has come to denote two principal meanings: (i) any transfer of activities or functions from the state to the private sector; and (ii) any transition of goods and services production from public to private

[65] Starr (n 24) 10.

[66] Amy H Sturgis, 'The Rise, Decline, and Reemergence of Classical Liberalism' (*Belmont University*, 1994) <https://www.belmont.edu/lockesmith/liberalism_essay/index.html> accessed 24 April 2025; Shane D Courtland, Gerald Gaus and David Schmidtz, 'Liberalism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2022, 2022); Walter E Block, *Property Rights: The Argument for Privatization* (1st ed. 2019 edition, Palgrave Macmillan 2019).

[67] James M Buchanan, 'Notes On The Liberal Constitution' [1994] Cato Journal.

[68] ibid. The framework-maintenance role of government, as outlined within the classical liberal system, encompasses several critical functions essential for the sustenance of a free market economy. Primarily, this role involves the safeguarding of property rights and the enforcement of voluntary contracts, the guarantee of the unobstructed entry and exit of participants in various industries, trades and professions, and the prevention of fraudulent activities in transactions. This framework also includes the creation of a monetary standard to ensure that the value of the designated monetary unit remains predictable.

[69]The term neoliberalism refers to a range of well-known concepts, including rational-actor economics, market self-regulation, the hypothesis of efficient market, the ability of free markets to generate the optimal social welfare, commitments to individual freedom and consumer choice. *See* Matthew Titolo, 'Privatization and the Market Frame' (2012) 60 Buffalo Law Review 493; Steven Shavell, *Foundations of Economic Analysis of Law* (Harvard University Press 2004); James Hackney Jr., 'The Enlightenment and the Financial Crisis of 2008: An Intellectual History of Corporate Finance Theory' (2010) 54 Saint Louis University Law Journal.

entities.[70] The application of neoclassical economic principles to legal issues, coupled with a commitment to laissez-faire governance, posits that government regulation is often inefficient, thus advocating to 'reduce the size of the public sector...through accelerated privatization projects, reducing the size of bureaucracy primarily by contracting out public functions to private entities'.[71] The overarching goal is to minimize governmental interference, thereby allowing the market to allocate resources efficiently.[72] Therefore, privatization encompasses two layers of meaning. In a broader context, it refers to any reduction in the regulatory and spending activities of the state.[73] Meanwhile, in a more specific sense, privatization excludes deregulation and spending cuts unless they result in a tangible transition of goods and services production from the public to the private entities.[74] This nuanced understanding of privatization is essential for comprehending its implications within contemporary political, economic, and legal frameworks.

Even from the narrow approach, the term 'privatization' seems to be relatively vague, and certain aspects of it need to be clarified. Paul Starr sets the scope of the more specific definition of privatization by several further features. The first is the understanding of the public and private sectors involved in the transition process. The public sector, which is the subject to be privatized, includes state agencies and organizations owned by the state, such as state-owned enterprises and independent public authorities. The private sector covers a range of entities, including commercial firms, informal and household businesses, voluntary associations, cooperatives, and private non-profit corporations. The second critical aspect of privatization is that it refers to shifts from the public to the private sectors rather than an intra-sectoral shift. In this sense, the transformation of a state agency into an independent public authority or SOE should not be regarded as privatization, even though it may improve the enterprise's ability to operate commercially, despite potentially enhancing the enterprise's commercial viability.[75] This is exemplified by the transformation of the United States Post Office into a public corporation,

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[70] Savas defines privatization as 'the act of reducing the role of government, or increasing the role of the private sector, in any activities or in the ownership of assets. *See* ES Savas, *Privatization: The Key to Better Government* (First Edition, Chatham House Pub 1987).

[71] Orly Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought' (2004) 89 Minnesota Law Review 342, 366.

[72] Rubin argues that the task of the government is to support the market rather than to exert control or change its outcomes. This facilitative role includes the establishment and protection of property rights, as well as the enforcement of contractual agreements, yet it should refrain from taking additional regulatory measures. However, an exception arises in situations of market failures, which can occur because of monopoly, externalities, information asymmetry, or the presence of public goods. Under such circumstances, regulation could enhance the market's efficiency. *See* Edward Rubin, 'Can The Obama Administration Renew American Regulatory Policy?' (2011) 65 University of Miami Law Review 357; Steve H Hanke, 'Privatization versus Nationalization' (1987) 36 Proceedings of the Academy of Political Science 1.

[73] Starr (n 24) 14.

[74] ibid.

[75] Glade uses the term 'simulated privatization' to refer to the effort to put a public enterprise on a commercial footing. *See* William P Glade, 'Sources and Forms of Privatization' in William P Glade (ed), *State Shrinking: A Comparative Inquiry into Privatization* (University of Texas 1986) 12,13.

the United States Postal Service, in 1971. Similarly, converting a private nonprofit organization into a profit-oriented company does not equate to privatization, although it may lead towards market engagement. Both of these intra-sectoral changes are better categorized as commercialization, which sometimes serves as a precursor to actual privatization in the case of public agencies. Third, the transition from services produced by the public sector to those generated privately can occur not only due to a deliberate government measure such as asset sales but also as a result of decisions made by individuals or businesses that the government is either reluctant or incapable of accommodating for oversight. This phenomenon is evident in the growth of private schooling, healthcare, and pension systems in response to public sector limitations in service provision. Such change is called 'demand-driven privatization',[76] which does not necessitate a reduction in public services. In certain socialist countries, for instance, the emergence of a shadow economy presents a form of unplanned privatization, stemming from stagnation or slow growth within the public sector. This indicates that privatization, as a process, encompasses a broader spectrum of institutional changes than those instigated by explicit privatization policies. Distinguishing between policy-driven and demand-driven privatization yields valuable insights into the nature and implications of these shifts. Fourth, when examining privatization from the perspective of consumption rather than production, it can be defined as the replacement of public goods with private goods. From the economic perspective, public goods are characterized by two fundamental properties:[77] (i) non-excludability in consumption (one person's consumption does not preclude another's ability to consume the same goods); and (ii) non-rivalry in consumption (it is costly or infeasible to exclude anyone from consumption). However, the production of public goods is not exclusively the domain of governmental entities. For instance, an ownership transfer of medical facilities from the public sector to private entities is a privatization in terms of production, while reallocating funds from public health services to individual medical care exemplifies a consumption-oriented privatization. The shift from public to private goods signifies a broader privatization of consumption, irrespective of whether the provider is publicly owned.[78] Governments can adopt various strategies, either implicit or explicit, to facilitate such a shift. Implicit privatization takes place when public programs are handed over and the government steps back from certain duties, thereby effectively transferring the burden of service provision to the private sector without formal asset transfer.[79] Explicit privatizations, on the other hand, involves the direct transfer of public assets to private ownership, which can take place through the sale or lease of public land, infrastructure, or enterprises. Additionally, the deregulation of sectors previously dominated by public monopolies can lead to privatization. The degree to which these methods shift ownership, financing, and accountability from the public sector varies significantly. Total privatization

[76] Starr (n 24) 15.
[77] ibid.
[78] Starr (n 24).
[79] ibid 16.

occurs when the government completely withdraws from a policy area, while partial privatization may involve the government financing services without direct operational involvement or retaining ownership without management control. Therefore, privatization may reduce government control and accountability, although it does not entirely eradicate these elements. In the case of partial privatization where the government pays for privately produced services, the operational sphere of government may be affected but not necessarily reduce its fiscal and functional responsibilities. Moreover, the sale of public assets can sometimes involve only a partial interest transfer, where governments retain control over enterprises despite selling voting stock. In such cases, privatization may serve primarily as a revenue-generating measure without altering management practices or the relationship between enterprises and state authorities. Interestingly, the outcomes of privatization are not always private enterprises, instead they can also result in hybrid entities that exhibit varying balances of ownership and operational influences. These variations in privatization policies introduce complexities to the simple-minded predictions of what emerges from privatization and its effect on economic efficiency.

It is noteworthy that the connection between three closely related processes of privatization, liberalization, and marketization should be made with caution. In general, liberalization means reducing government restrictions to open up a sector for competition with the aim to dismantle monopolistic structures and introducing multiple providers within a given market. Liberalization can occur without privatization, i.e. introducing competition into the public sector without transferring ownership to private entities. It is feasible to pursue both nationalization and liberalization concurrently, as evidenced by the actions of the French socialists in the early 1980s when they initially nationalized banks and subsequently liberalized the financial markets.[80] Conversely, it is important to recognize that privatization should not be inherently associated with an improvement of competition.[81] The privatization initiatives undertaken by the Thatcher Government in the 1970s and 1980s exemplify this phenomenon, wherein the sale of shares in British Telecom and British Gas resulted in the replacement of public monopolies with private ones and the establishment of new regulatory agencies to assume some of the functions previously fulfilled through public ownership. The decision to reject greater competition by putting liberalization first in this context was likely influenced by concerns regarding potential declines in share prices of the companies.[82] Meanwhile, marketization refers to the restructuring of the processes involved in the production and provision of services, wherein government entities engage with one another or with external enterprises in a manner akin to market transactions, often involving performance-based financial exchanges.

[80] David R Francis, 'French Financiers Marvel at Capitalists in Socialists' Clothing' [1985] *Christian Science Monitor* <https://www.csmonitor.com/1985/0620/fmark20.html> accessed 24 April 2025.
[81] Starr (n 24) 18.
[82] John Kay and others (eds), *Privatisation and Regulation: The UK Experience* (Clarendon Press 1986); Samuel Brittan, 'The Politics and Economics of Privatisation' (1984) 55 The Political Quarterly 109.

Marketization thus is distinct from both privatization and liberalization because it does not inherently require the involvement of private entities or the introduction of multiple competing providers. Despite these analytical distinctions, the three concepts often operate in tandem,[83] particularly within the framework of broader economic reform packages in developing or transitioning countries. Liberalization maximizes the potential advantages of privatized enterprises by relaxing regulatory constraints,[84] while marketization serves to integrate these processes by promoting competitive markets and facilitating private sector-driven economic growth.[85] For example, the introduction of new providers within a market typically signifies a shift towards privatization because private enterprises replace a previously existing state monopoly, while the creation of a market within a specific economic sector facilitates the admission of private enterprises and the reduction of the public sector's role.[86] After all, the three processes are grounded in neoliberal ideology, which promotes minimum state interference and posits that market mechanisms can optimize resource allocation and service quality.

2.2.2. Defining Privatization

The discourse surrounding the concept of privatization reveals a significant deficiency in the precise definition of the term within the existing literature.[87] The term 'privatization' is inherently multifaceted, with its interpretation contingent upon the contextual framework and methodological approach employed in its definition. The understanding of privatization is further complicated by the diverse political, economic, and social contexts that characterize different economies. Moreover, since its emergence as a prominent trend in 1979, the notion of privatization has experienced continuous evolution,[88] demonstrating its dynamic nature.

2.2.2.1. Conceptual Approaches to Privatization

The literature encompasses a diverse array of definitions and conceptual frameworks, ranging from narrow to broad interpretations of the term 'privatization'. Narrow definitions are the most popular and focus on the transfer of ownership rights from government to private

[83] Kean Birch and Matti Siemiatycki, 'Neoliberalism and the Geographies of Marketization: The Entangling of State and Markets' (2016) 40 Progress in Human Geography 177.
[84] Andrei Shleifer, 'State versus Private Ownership' (1998) 12 The Journal of Economic Perspectives 133.
[85] Gérard Roland, *Transition and Economics: Politics, Markets, and Firms* (MIT Press 2000).
[86] Julien Mercille and Enda Murphy, 'What Is Privatization? A Political Economy Framework' (2017) 49 Environment and Planning A: Economy and Space 1040.
[87] Gulshan Sachdeva, 'Privatization: An Interpretative Endeavour' (Kopint-Datorg 1994) Discussion Paper 21; Bulent Seven, 'Legal Aspects of Privatisation: A Comparative Study of European Implementations' (PhD thesis, University of Essex 2003); Demetrius S Iatridis, 'A Global Approach to Privatization' in Demetrius S Iatridis and June Gary Hoops (eds), *Privatization in Central and Eastern Europe - Perspectives and Approaches* (Praeger Publishers 1998).
[88] Seven (n 87) 18; Ernst & Young, *Privatization in the UK: The Facts and Figures* (Ernst & Young 1994) xi; Lan Cao, 'The Cat That Catches Mice: China's Challenge to the Dominant Privatization Model' (1995) 21 Brooklyn Journal of International Law 97, 106.

entities, specifically through the sale of shares in SOEs or public assets.[89] This perspective equates changes in ownership with alterations in management control.[90] From the legal approach, Andrei A. Baev refers to privatization as the 'single act of transferring the legal title of state property, which was in the possession of the state enterprises for the restricted purposes of producing certain goods under state-owned control, to individuals or associated owners'.[91] The most commonly used methods of privatization in the narrow sense include public offering of shares, private sales of shares, new private investment in SOEs, sale of government or SOE assets, reorganization into competent parts, management/employee buyouts, and lease and management contracts.[92]

Broad definitions of privatization extend beyond mere ownership transfer to encompass various processes that facilitate the displacement of the public sector by the private sector. Scholars like Julien Mercille and Enda Murphy delineate privatization as a multi-dimensional phenomenon that includes ownership transfers, shifts in financing sources, shifts in management responsibilities, and shifts in the production and provision of goods and services by private entities.[93] This broader conceptualization also acknowledges ideological and organizational transformations within the public sector. For example, Whitfield identifies five critical elements of public services and assets that may change during privatization, including[94] (i) transferring ownership of public assets to the private or voluntary sector; (ii) reducing governance and accountability of public bodies by new organizational structures; (iii) shifting financial mechanisms and investment strategies to incorporate private capital or impose new/increased user charges; (iv) adjusting operating principles and values to reflect private and commercial interests; and (v) restructuring and commercializing the management of public organizations to facilitate the above changes.

Non-divestiture measures, which fall under these expansive definitions, include various contractual arrangements, such as contracting out, management contracts, franchising, leasing, and concessions. For example, contracting out involves public agencies outsourcing specific

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[89] Christoph Hermann and Koen Verhoest, 'The Process of Liberalisation, Privatisation and Marketisation' in Christoph Hermann and Jörg Flecker (eds), *Privatization of Public Services* (Routledge 2012); Dónal Palcic and Eoin Reeves, *Privatisation in Ireland: Lessons from a European Economy* (Palgrave Macmillan 2011); Iatridis (n 87) 5; Pierre Guislain, *The Privatization Challenge: A Strategic, Legal, and Institutional Analysis of International Experience* (World Bank Publications 1997) 10.

[90] Olivier Bouin, 'The Privatization in Developing Countries: Reflections on a Panacea' (OECD Development Centre 1992) Policy Briefs 3.

[91] Andrei A Baev, 'Civil Law and the Transformation of State Property in Post-Socialist Economies: Alternatives to Privatization' (1993) 12 UCLA Pacific Basin Law Journal 150.

[92] Charles Vuylsteke, 'Techniques of Privatization of State-Owned Enterprises: Methods and Implementation' (The World Bank 1988) Technical Paper 88.

[93] Mercille and Murphy (n 86).

[94] Dexter Whitfield, 'A Typology of Privatisation and Marketisation' (European Services Strategy Unit 2006) ESSU Research Report 1 <https://european-services-strategy.org.uk.archived.website/publications/essu-research-reports/essu-research-paper-1/essu-research-paper-1-2.pdf>.

activities to a private party while retaining overall responsibility for service quality. This arrangement can vary in scope, from comprehensive public service contracts to partial activity outsourcing. The forms of contracting out can include straightforward service contracts, long-term project financing agreements, and lease-back arrangements. Concessions represent another category of non-divestiture measures, which are particularly prevalent in infrastructure sectors with monopolistic characteristics.[95] Within this framework, Build-Operate-Transfer contracts (BOT) involve private contractors financing and constructing infrastructure, with ownership reverting to the government upon contract completion.[96] Meanwhile, Build-Own-Operate (BOO) arrangements allow private entities to retain permanent ownership and operate the facility on the contract, thus not necessitating asset transfer.[97] Under these arrangements, the concessionaire assumes responsibility for capital expenditures and investments, thereby facilitating the transition from public to private management.

In its broadest sense, privatization refers to the inclusion of private entities in the economy through various means, including legislative measures that enable self-employment for artisans.[98] Thereby, privatization extends beyond the mere transfer of enterprises and sectors to include the privatization of the entire economy. It combines various forms of deregulation and entrepreneurship,[99] serving as an umbrella term for a multitude of measures. However, this expansive definition can lead to confusion, particularly in distinguishing privatization from related concepts like deregulation and liberalization.

The definitions above underscore different interpretation of the term 'privatization' based on the standpoint of the authors. The existing literature on privatization predominantly focuses on descriptive accounts rather than engaging in comprehensive analytical scrutiny,[100] resulting in a diverse range of conceptualizations based on the scope, range, or structural parameters of privatization initiatives. Gulshan Sachdeva suggests dividing the concept of privatization into privatization operations and the process of privatization in order to mitigate the conceptual ambiguities and definitional challenges associated with it. Privatization operations are characterized by their targeted objectives, which aim to alter ownership rights and may involve mechanisms such as partial or full divestiture and liquidation. These operations are often critical in specific situations that need immediate changes in ownership. Meanwhile, the process of privatization means changes in the organization and operation of SOEs, the advancement of the private sector, the reorganization of state functions, and the improvement of competition, among

[95] Guislain (n 89) 10.
[96] Pierre Guislain and Michel Kerf, 'Concessions: The Way to Privatize Infrastructure Sector Monopolies (English)' (World Bank Group 1995) Note No. 59.
[97] ibid.
[98] Richard M Phillips and Marian G Dent, 'Privatizing Eastern Europe: A Challenge for the Nineties' in Monte E Wetzler (ed), *Joint Ventures and Privatization in Eastern Europe* (Practising Law Institute 1991) 448.
[99] Sachdeva (n 87).
[100] ibid 7.

other aspects. Thus, the privatization process is a protracted commitment that may have commenced prior to the actual privatization activities and can persist through various fluctuations.

2.2.2.2. National Approaches to Privatization

The term 'privatization' has been defined and interpreted differently across countries, influenced by ideological and political regimes, economic contexts, and legal factors.[101] Specifically, the terminology associated with privatization often reflects the political sensitivities of each country. For example, Bolivia employs the term 'capitalization',[102] while Canada refers to commercialization of its companies in the railway sector.[103] In Slovenia and Macedonia, the preferred term is 'transformation',[104] which avoids the politically charged implication of privatization. Similarly, Vietnam uses the term 'equitization' (*co phan hoa*) instead of 'privatization' (*tu nhan hoa*) in all official instruments and discourse due to the sensitive nature of 'privatization' against socialist ideology.

The scope of privatization also varies in different countries. In the United Kingdom, privatization is narrowly defined as the sale of state assets, while referring to public-private partnerships and outsourcing as 'partnership', even though they involve the transfer of public resources and management of public services to private entities.[105] Meanwhile, the United States adopts a broader interpretation of privatization to include not only the sale of public enterprises but also strategies such as service contracting, imposition of user fees, and the use of vouchers.[106] In Eastern European countries, during the transition phase, the understanding of privatization varied significantly, depending on the level of economic development and the structural reforms undertaken. In Czechoslovakia and Poland, privatization was typically linked to a particular initiative that aimed at the wholesale divestiture of SOEs.[107] However, countries like Romania and Albania, which did not fully adopt Western economic models at the time, approached privatization through SOEs' initiatives to incorporate private ownership elements or to establish joint ventures with private sector entities.[108] Privatization in China refers to the transformation of SOEs into more market-oriented entities, often through corporatization and partial private ownership.[109] This process is characterized by a gradual transition with a mixed ownership

[101] Attila Harmathy, 'The Methods of Privatization' in Hans Smit and Vratislav Pěchota (eds), *Privatization in Eastern Europe: Legal, Economic, and Social Aspects* (Martinus Nijhoff Publishers 1994).
[102] José A Valdez, 'Capitalization: Privatizing Bolivian Style' [1998] Economic Reform Today 20.
[103] Seven (n 87) 19.
[104] ibid.
[105] Whitfield (n 94).
[106] Jeffrey R Henig, 'Privatization in the United States: Theory and Practice' (1989) 104 Political Science Quarterly 649, 650.
[107] Phillips and Dent (n 98) 448.
[108] ibid 448–449.
[109] Lan Cao, 'Chinese Privatization: Between Plan and Market' (2000) 63 Law and Contemporary Problems 13.

structure and the retention of significant state control in key sectors. Qian and Roland describe China's model as partial privatization, with an emphasis on preserving social stability.[110]

If a privatization law exists, in most cases it provides a definition. Privatization occurs in different ways across countries, driven by unique objectives that reflect the political and economic landscape and the institutional framework in each country.[111] For example, the Russian Federal Law on the Privatization of State and Municipal Property of 2001 defines privatization as the alienation of assets owned by the Russian Federation, Russian regions, municipal entities for a consideration of natural and legal entities.[112] In Taiwan, the Act of Privatization of Government-Owned Enterprises (2003) specifies privatization through specific methods, including the sale of shares, auction sale of assets, formation of a privately owned enterprise by joint venture with private individuals by way of contribution in kind, merger of companies with the surviving enterprise being a privately owned enterprise, and cash capital increase.[113] The 1990 Polish Law on Privatization of SOEs emphasizes the transformation of SOEs into state-owned joint-stock companies and limited companies, as well as their liquidation and the sale of their assets. In Hungary, while a single definition of privatization is not codified, the concept is embedded within a set of legislative and regulatory measures established during the post-socialist transition in the early 1990s. Act LIV of 1992 on the Sale, Utilization, and Protection of Assets Temporarily Owned by the State (**Act LIV of 1992**) regulated the course of privatization, with the main goal of selling a significant portion of state assets. Subsequently, Act XXXIX of 1995 on the Sale of State-Owned Entrepreneurial Assets (**Act XXXIX of 1995**) articulated the procedures for privatization, focusing on transparency and competitive sales as mechanisms to achieve economic objectives.

2.2.2.3. Approach of the Research

The privatization of SOEs, central to the thesis, involves the reallocation of assets from public entities to private ones. While various definitions of privatization and various forms of privatization can be deployed, the thesis focuses on the permanent divestiture or transfer of SOEs or their assets from governmental agencies to private parties. The specific characteristics that delineate this rather narrow definition of privatization include: (i) the necessity for the public bodies to execute the transfer of SOEs or their assets; (ii) the requirement that this transfer be permanent; and (iii) the stipulation that the recipient of the transfer must be a private party. One effect of this definition is that if the counterparty in the privatization deal is another SOE

[110] Yingyi Qian and Gérard Roland, 'Federalism and the Soft Budget Constraint' (1998) 88 The American Economic Review 1143.
[111] Paul Cook and Colin H Kirkpatrick (eds), *Privatisation in Developing Countries* (2nd edn, Edward Elgar Publishing 2000); Andrei Shleifer and Robert W Vishny, 'Politicians and Firms' (1994) 109 The Quarterly Journal of Economics 995.
[112] Article 1, Federal Law No. 178-FZ of 21 December 2001 on the Privatization of State and Municipal Property.
[113] Article 6, Act of Privatization of Government-Owned Enterprises of 2003

or a government agency, the arrangement cannot be called privatization. This definition also excludes other private management arrangements, like BOT and BOO models, which do not involve the transfer of ownership. The thesis construes privatization of SOEs primarily as the transfer of enterprise ownership from the public sector to the private sector, including scenarios where full or partial shares of an SOE or its assets are sold to private entities.

Privatization can be categorized into full or partial forms. Full privatization entails the total relinquishment of ownership and control of a state enterprise or its assets to private investors. Whereas partial privatization involves a smaller degree of ownership transfer, which represents various ownership alternatives and may lead to a discontinuity in control depending on whether a controlling interest is sold.[114] The decision to relinquish control is distinct from the decision regarding the extent of ownership to be sold. It is a common misconception that selling a majority of shares automatically results in the loss of control. If other shareholders widely distribute the remaining shares, a minority stake can still maintain control. Conversely, a government may retain a majority of assets while a private entity holds minority shares, thereby gaining control. This scenario can arise if the government retains non-voting shares or issues golden shares to the private investors. For example, China Unicom, a state-owned telecommunications operator, announced the divestment of 35.2% of its shares to 14 private investors.[115]Although this transaction would reduce Unicom's ownership of its A-shares from 62% to 36%, the distribution of the remaining shares among numerous private investors results in Tencent and Baidu, the two largest private stakeholders, possessing only 5.18% and 3.3% of shares, respectively.[116] Also, the new board's composition, with private investors occupying only 4 of 15 seats, indicates their minority status.[117] Therefore, the relationship between ownership and control is complex and nonlinear. It is feasible for a government to transfer effective control without divesting a majority of its shares, and conversely, it may maintain effective control even after selling a majority stake. This implies that the dynamics of ownership and control in the context of privatization are multifaceted and warrant careful consideration.

Another note is about the terminology used in the thesis. As mentioned above, Vietnam does not officially endorse the term 'privatization', instead it employs the term 'equitization' to describe the process of converting SOEs, which are wholly owned by the state, into mixed ownership enterprises that involve multiple stakeholders. Circular No. 50-TC/TCDN specified that:

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[114] Ahmed Galal and others, *Welfare Consequences of Selling Public Enterprise: An Empirical Analysis* (Oxford University Press Inc 1994) 583.

[115] Dominic Chiu, 'CSR 2019: Challenges to SOE Mixed Ownership Reform in China – A Case Study' (*The SAIS China Studies Review*, 30 October 2019) <https://saiscsr.org/2019/10/30/csr-2019-challenges-to-soe-mixed-ownership-reform-in-china-a-case-study/> accessed 29 May 2025.

[116] Xinhua, 'China Unicom Brings in Private Investors' (*Xinhua*, 16 August 2017) <http://www.xinhuanet.com//english/2017-08/16/c_136531027.htm> accessed 29 May 2025.

[117] Chiu (n 115).

> 'Converting a state-owned enterprise into a joint-stock company (also known as equitization of state-owned enterprises) is a measure to convert an enterprise from state ownership to a form of multi-owner enterprise, in which there exists partial state ownership.'[118]

The Party's instruments and Vietnamese literature have attempted to differentiate these two terms, emphasizing their significant distinction because the ideological stance of the ruling Party seeks to maintain a degree of state control over these enterprises post-equitization. As such, the retention of state ownership imbues the term 'equitization' with a less negative connotation than 'privatization', which may imply a more complete divestiture of state interests and a potential deviation from the Party-State's overarching objectives. Nonetheless, the existing body of literature frequently conflates the concepts of equitization and privatization,[119] particularly in the context of partial privatization.[120] The practice of equitization of SOEs in Vietnam over the years has also indicated that the State intends to release smaller SOEs so that they operate as private companies in domestic markets,[121] contributing to the conflation of the two concepts. To maintain clarity, the thesis will use the term 'privatization' for a comparative study between Hungary and Vietnam, while noting political considerations specific to Vietnam's perspective on SOE reform where relevant.

2.3. Origins and Definitions of State-owned Enterprises

2.3.1. State-owned Enterprises in Historical Perspective

The origin of SOEs can be traced back over centuries, and their development has been shaped by distinct economic, social, and political situations across countries and regions.[122] Understanding the historical trajectory of SOEs is important for analyzing their current functions and significance in the economy.

Historically, state involvement in economic activities has been an essential element of governance since the inception of statehood.[123] From ancient civilizations, such as Egypt and

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[118] Section I(1), Ministry of Finance of Vietnam, 'Circular No. 50-TC/TCDN Providing Guidance of Financial Issues, Sale and Issuance of Share Certificate in the Converting of State Enterprises into Joint-Stock Companies under the Government Decree No. 28-CP Dated 7 May 1996.' s I(1).

[119] Scott Cheshier, Jago Penrose and Thi Thanh Nga Nguyen, 'The State as Investor: Equitisation, Privatisation and the Transformation of SOEs in Viet Nam' (UNDP Viet Nam 2006) 2006/3; Hiep (n 32); Jay Rosengard and The Du Huynh, 'Vietcombank Equitization' (*Fullbright University Vietnam*, 28 February 2009) <https://fsppm.fulbright.edu.vn/> accessed 19 September 2024.

[120] Hong Hanh Le, *Co Phan Hoa Doanh Nghiep Nha Nuoc – Nhung Van De Ly Luan va Thuc Tien [Equitization of State-Owned Enterprises – Theoretical and Practical Issues]* (Chinh tri Quoc gia Publisher 2004) 135; George B Radics, 'Bank Privatization in Vietnam: Examining Changes to Management in Vietnam's New Banking Law, Decree No. 59/2009/ND-CP' (2010) 19 Pacific Rim Law & Policy Journal Association 331, 331.

[121] Cheshier, Penrose and Nguyen (n 119).

[122] Martins Pedro Miguel Gaspar and others, 'Forging Ahead: Restoring Stability and Boosting Prosperity' (World Bank Group 2023) 85.

[123] Raymond Vernon, 'The International Aspects of State-Owned Enterprises' (1979) 10 Journal of International Business Studies 7, 7.

the Qing dynasty in China, state enterprises were granted privileges and monopolies, indicating the longstanding relationship between the state and economic management.[124] However, the modern conception of SOEs has developed, with their formation occurring approximately 150 years ago in developed Western and certain Eastern countries, around 100 years ago in nations that emerged post-World War I, and roughly 75 years ago in post-colonial and post-communist states.[125] The historical development of SOEs prior to the global wave of privatization can be divided into five key periods: (i) from the mid-19th century to World War I, a notable yet quantitatively restricted role of SOEs; (ii) the interwar period, marking a notable increase in the relevance and scope of SOEs; and (iii) post-World War II to the late 1970s, a period with SOE presence expanding into new sectors and contributing substantially to national gross product.

From the mid-19th century, the profound changes in the economic and social structures caused by the Industrial Revolution required the establishment of robust infrastructure systems to support a growing economy and military security amidst rising tensions among European powers.[126] Even in an economy dominated by private enterprises and a prevailing ideology favoring minimal state intervention, the need for state oversight in critical sectors became apparent. The state assumed responsibility for traditional public works, like road and canal networks, and intervened in key industries like railways, communications, and energy, particularly when new technologies emerged. At the same time, local governments expanded their roles beyond mere maintenance of public order and welfare to supply essential public services like transportation, electricity, and water to mitigate the challenges from rapid urban growth- a byproduct of industrialization. Therefore, SOEs emerged as vital components of urban infrastructure, capable of delivering services efficiently while generating revenue for municipalities.[127] The networked nature of infrastructure and public utilities pointed to the need for coordinated planning to ensure comprehensive service provision, particularly in areas often overlooked by profit-driven private entities.[128]

In the latter half of the 19th century, as modern European states took shape, the role of government intervention in economic activities increased.[129] The early economic government entities (**EGEs**) functioned primarily as extensions of state administration or specific ministries,

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[124] Maciej Bałtowski and Grzegorz Kwiatkowski, 'Origin and History of the State-Owned Enterprise Sector', *State-Owned Enterprises in the Global Economy* (1st edn, Routledge 2022) 7.
[125] Herbert Obinger, Carina Schmitt and Stefan Traub, *The Political Economy of Privatization in Rich Democracies* (1st edn, Oxford University Press 2016) 6.
[126] Giuseppe Bognetti, 'History of Western State-Owned Enterprises: From the Industrial Revolution to the Age of Globalization' in Luc Bernier, Massimo Florio and Philippe Bance (eds), *The Routledge Handbook of State-Owned Enterprises* (1st edn, Routledge 2020) 27.
[127] JA Hassan, 'The Growth and Impact of the British Water Industry in the Nineteenth Century' (1985) 38 The Economic History Review 531; Robert Millward, 'Public Enterprise in the Modern Western World: An Historical Analysis' (2011) 82 Annals of Public and Cooperative Economics 375.
[128] Bognetti (n 126) 27.
[129] Bałtowski and Kwiatkowski (n 124) 7.

with their assets directly tied to the state budget.[130] It was only post-World War I that Western nations began to adopt legal and organizational frameworks for independent enterprises with financial autonomy. While the motivations for government involvement during this period varied across nations, three main reasons can be identified. First, EGEs served as instruments for national unification,[131] exemplified by the cases of Italy and Germany, where their development was closely linked to the processes of national and economic consolidation.[132] Second, governments sought to exert control over strategic economic sectors,[133] as illustrated by Great Britain's establishment of a state monopoly in telegraphic communication through the Telegraph Act of 1869 and subsequent nationalization efforts in the telecommunications and oil industries. Lastly, EGEs played a crucial role in facilitating industrialization in the contexts where private capital was insufficient,[134] as seen in China and Japan. In China, a collaborative model between state and private capital emerged to modernize the economy, while Japan's accelerated industrialization involved the nationalization of key industries, including telecommunications and steel production.

The interwar period includes several pivotal events for the evolution of SOEs, especially in the West. The experiences of World War I proved the inadequacies of free market mechanisms, prompting substantial state intervention in rationing and production regulations, which reshaped the dynamics between public and private sectors.[135] The prevailing notion emerged that government action could rectify failures, fostering a collaborative relationship between these sectors. After World War I, government involvement in the economy increased, leading to the nationalization of various sectors and a greater role for SOEs in manufacturing and public utilities. From the legal perspective, the evolution of modern republics in Western nations required a clear boundary between state economic activities and public budgeting.[136] These developments resulted in the commercialization (or corporatization) of existing EGEs to align their operational principles more closely with private sector efficiency and effectiveness. In Western Europe, the 1920s witnessed the widespread emergence of commercialized EGEs. France, for instance, granted financial and operational autonomy to public entities, including railways, in 1923. Similarly, Britain began to operate state companies as distinct legal entities with considerable autonomy starting in 1926.

The Great Depression and the associated economic turmoil of the 1930s further highlighted the failures of self-regulating markets, prompting a re-evaluation of government intervention in

[130] ibid 7–8.
[131] Millward (n 127).
[132] Bałtowski and Kwiatkowski (n 124) 8.
[133] ibid.
[134] ibid.
[135] Bognetti (n 126) 30.
[136] Bałtowski and Kwiatkowski (n 124) 11.

economic activities.[137] This is reflected in the adoption of nationalization policies and the establishment of new SOEs as mechanisms to stabilize economies and replace failing private enterprises. In Italy, the government responded to the economic crisis by creating a state-owned holding company in 1933 to temporarily acquire shares in private industrial enterprises facing bankruptcy. In the United States, the New Deal under the administration of President Franklin D. Roosevelt took an important step away from classical liberal economic principles, advocating for increased government involvement.[138] A notable outcome of this shift was the establishment of the Tennessee Valley Authority in 1933, which aimed to develop energy infrastructure, generate electricity, prevent flooding, and stimulate economic growth in the distressed region.

The period also witnessed the rise of socialist ideology, which emphasized public ownership as a dominant economic principle and then gained traction in countries across Eastern Europe and Asia. Following World War I, Russia underwent a significant transformation in property ownership with the establishment of a communist system, which was deemed essential for the comprehensive reconstruction of the national economy. The nationalization process in Russia was notable for its rapid and extensive implementation, often executed by non-legislative and coercive means. This approach facilitated a remarkable transition in the ownership landscape, with the state controlling over 95% of over 38,000 enterprises with more than 10 employees by the end of 1920.[139]

The period following World War II until the late 1970s is known as 'the great age of public enterprises'[140] due to the need for economic reconstruction and the establishment of modern welfare states influenced by Keynesian economic principles. The adoption of an interventionist development model led to an increased emphasis on state ownership as a mechanism to address market failures, meet public service demands, and allocate resources in alignment with state-defined socio-economic objectives.[141] In Western developed economies, nationalization efforts became prominent. For example, the United Kingdom nationalized about 20% of its economy within the initial four years post-war.[142] Additionally, the nationalization and subsequent merger of four major railway companies into British Rail in 1948 exemplified the trend of state interventionism that persisted until the late 1970s. Similarly, Italy favored statist economic policies. The Ente Nazionale Idrocarburi group in the oil and gas sector was established in 1953, and more state-owned business groups were created in various sectors, including manufacturing, mining, and energy in subsequent years. Consequently, the latter half of the 1960s saw the

[137] Malcolm G Bird, 'State-Owned Enterprises: Rising, Falling and Returning? A Brief Overview' in Luc Bernier, Massimo Florio and Philippe Bance (eds), *The Routledge Handbook of State-Owned Enterprises* (1st edn, Routledge 2020); Bałtowski and Kwiatkowski (n 124); Bognetti (n 126).
[138] Bałtowski and Kwiatkowski (n 124) 13.
[139] ibid.
[140] Toninelli (n 1) 18.
[141] Bałtowski and Kwiatkowski (n 124); Bognetti (n 126).
[142] Bałtowski and Kwiatkowski (n 124) 15.

formation of an economic system predominantly based on state-owned mega-corporations was formed in Italy.[143]

The newly formed communist bloc underwent an even more significant transition from private to public ownership. Following the establishment of the People's Republic of China in 1949, the Communist Party initiated a comprehensive and systemic nationalization of the economy, which unfolded over a span of seven years. This process was characterized by a dual approach involving both legal frameworks and extensive asset confiscations, which notably impacted enterprises with foreign investments.[144] Concurrently, China actively pursued the transition from market-driven mechanisms to a centrally planned economy. A parallel trajectory was observed in the nations of Central and Eastern Europe, where the adoption of communist ideology led to an augmentation of state ownership, often at the expense of private property rights.[145]

In the 1960s, developed Western European countries like the United Kingdom, France, and Italy had SOEs contributing about 20% of GDP. In communist countries, this figure typically ranged from 80% to 90%, exhibiting the predominance of the state-owned enterprise sector.[146] The United States was a distinctive case, since it persistently upheld an economy mostly reliant on the private sector, with a very low proportion of SOEs.[147]

2.3.2. Defining State-owned Enterprises

2.3.2.1. Definitions of State-owned Enterprises in the Practice of International Organizations

The OECD's Guidelines on Corporate Governance of State-Owned Enterprises defines an SOE as 'any undertaking recognized by national laws as an enterprise in which the state exercises ownership or control'.[148] The definition is based on two primary criteria: ownership and control. Ownership is understood as direct majority ownership, while control may be exerted through various means, including minority ownership coupled with governance

[143] ibid.

[144] ibid 17.

[145] The main characteristics of nationalization in the Central and Eastern European context can be defined as follows: (i) Legal means: the formal expression of the state's will through legal instruments, executed without the consent of private owners; (ii) Objects: the means of production; (iii) Effects: the compulsory transfer of property rights from private owners to the state; (iv) Beneficiary: the state as the effective beneficiary; (v) Purpose: to establish a socialist economic order by abolishing exploitation and the exploiting classes; (vi) No rules on compensation for nationalization, unlike expropriation for public utility. For more detail, *see* Emőd Veress, 'Nationalization, Collectivization, Reprivatization and Privatization in East Central Europe: Arguments for a General Theory', *Lectures on East Central European Legal History* (Central European Academic Publishing 2022) <https://doi.org/10.54171/2022.ps.loecelh_10> accessed 24 November 2025.

[146] Bałtowski and Kwiatkowski (n 124) 14.

[147] ibid.

[148] OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises 2024* (OECD Publishing 2024) 9.

structures that ensure sustained state influence over the enterprise's operations or board of directors. The guidelines advocate for a case-by-case assessment of such arrangements, emphasizing that minority shareholding can confer control if the corporate structure allows for an 'effective controlling influence' by the state. The definition excludes entities under government ownership or control for a limited duration due to specific circumstances such as bankruptcy or liquidation. Furthermore, the OECD guidelines stipulate that statutory corporations, which are established by specific legislation, should be classified as SOEs if their activities are predominantly economic in nature. Economic activities are defined as those involving the provision of goods for services in a market context, which could theoretically be undertaken by private entities for profit. The requirement for recognition as an enterprise under national law serves as an indirect application of an activity and purpose test, dependent on legal provisions. However, the guidelines address the complexities of *de facto* SOEs by incorporating broad criteria for control, thereby facilitating a nuanced evaluation of government influence beyond formal ownership structures.

By comparison, the World Bank defines SOEs as 'government owned or government controlled economic entities that generate the bulk of their revenues from selling goods and services'.[149] Control is achieved through majority ownership or significant minority shareholding where the distribution of remaining shares allows for effective government control, including the power to appoint board members. However, this definition is more restrictive than the OECD's one because it emphasizes ownership stakes over effective influence. This limitation may not adequately reflect the contemporary international landscape, where influence can be exerted through various channels beyond mere ownership.[150] Additionally, the World Bank's definition confines investment activities to 'commercial activities', which means selling goods and services, without explicitly considering the underlying objectives of enterprises. The ambiguity of the term 'economic entity' or 'commercial activity' results in the situation that enterprises engaging in commercial activities to further non-commercial policy objectives remain unexamined with this framework.[151]

The European System of Accounts offers a broader definition of SOEs. It includes non-financial corporations and financial companies that are recognized as independent legal entities and are under government control.[152] This definition covers all non-financial companies (public non-financial corporations, quasi-corporations, and non-profit institutions) under state control, irrespective of ownership size. Some companies that are part of the general government, due to

[149] World Bank, 'Bureaucrats in Business: The Economics and Politics of Government Ownership' (The World Bank 1995) Policy Research Report 26.
[150] Mark McLaughlin, 'Defining a State-Owned Enterprise in International Investment Agreements' (2019) 34 ICSID Review - Foreign Investment Law Journal 595, 604.
[151] ibid.
[152] European System of Accounts, 'Chapter 2 - Units and Groupings of Units' (2010) <https://ec.europa.eu/eurostat/esa2010/chapter/view/2/> accessed 8 December 2024.

their non-market nature, will also be included in this definition because they operate as service providers and sometimes compete with private companies. SOEs can be divided into the following groups: (i) Companies fully owned by public authorities; (ii) Companies where public authorities have a majority share; (iii) Companies where public authorities retain a minority share but have special statutory powers; (iv) Companies where public authorities have a minority share and no special powers.

2.3.2.2. Definitions of State-owned Enterprises under National Laws

Different countries employ distinct terminologies to refer to SOEs, such as government corporations, government business enterprises, government-linked companies, public enterprises, and public sector units or enterprises, among others. The terminology and legal definitions of SOEs vary among jurisdictions, reflecting diverse legal frameworks and governance structures.

In South Africa, the legal definition of SOEs is described in detail under the Public Finance Management Act of 1999 and the Companies Act 71 of 2008. The former defines the equivalent of an SOE as a 'national government business enterprise' that is owned by the national executive, and has the authority to provide goods and services according to ordinary business principles. This definition also includes a business model that is financed fully or substantially from sources other than the National Revenue Fund or by way of a tax, levy, or other statutory money. The Companies Act 71 of 2008 (Chapter 1 Section 1) refers to an SOE as an enterprise registered as a company that either meets the criteria set forth in the Public Finance Management Act or is owned by a municipality as per the Municipal Systems Act 2000. In New Zealand, the State-owned Enterprises Act 1986 defines SOEs as enterprises that are owned by the Crown but operate as commercial entities. These enterprises are registered as public companies and are subject to the Companies Act because they provide services directly to the public through market transactions. This means that the market determines the quality, quantity, and prices of the services provided. In the Middle East and Central Asia, countries such as Jordan, Tajikistan and Pakistan define SOEs as non-financial companies with at least 50% direct or indirect ownership by the central government), specifically excluding health and education institutions.[153]

In post-socialist countries like Vietnam and Hungary, the concept of state enterprises under the socialist regime differed fundamentally from that of SOEs after the transition to market economies. In Vietnam, the Decree No.93-CP of the Council of Government of 1977 defined state enterprises as 'material production and business units of the unified socialist economy" tasked with fulfilling political and economic objectives assigned by the Party and the State.[154]

[153] Ernesto Ramirez Rigo and others, *State-Owned Enterprises in Middle East, North Africa, and Central Asia: Size, Costs, and Challenges* (International Monetary Fund 2021) Annex 1.

[154] Articles 1 and 2, Charter of State Enterprises promulgated by the Decree No. 93-CP of the Council of Government of 1977

Their operations followed state plans determined through central planning mechanisms,[155] and management of assets strictly adhered to state reporting systems, although they were granted legal person status and operated on the principle of financial autonomy.[156] Meanwhile, Hungary's Act VI of 1977 on State Enterprises described these entities as economic units established by authorized state bodies that had a legal entity and independently managed the assets entrusted to them from the state ownership.[157] As the state operated state enterprises in order to perform its economic tasks, the state ensured the implementation of the social interest and the goals specified in the national economic plans in the operation of enterprises primarily through the economic regulatory system and official regulations.[158] State enterprises functioned more as administrative units with production targets set by the state. The state was a direct owner and manager with bureaucratic governance, and state enterprises had limited autonomy. The 1984 amendment to Act VI of 1977 introduced the concept of the self-managed enterprise, thus resulting in two types of state enterprises: self-managed enterprises[159] and state-administered enterprises, which remained under the control of the sectoral ministries.[160] In Vietnam, similar reforms in 1988 altered state enterprises by granting the Congress of Workers and Employees, the highest authority within each enterprise, the power to decide on business directions and development plans.[161] These legal and institutional adjustments marked early attempts in both countries to introduce elements of enterprise autonomy within the framework of socialist state ownership. After the transition to market economies, Vietnam and Hungary redefined state enterprises as SOEs operating under general company law. In Hungary, the legal foundation for business entities, including SOEs, is primarily established by Act V of 2013 on the Civil Code, which delineates business entities as incorporated enterprises formed through the financial contributions of their members to engage in collective economic activities, with profits or losses shared among them. Section 29(1) of the Act CVI of 2007 on State Property (**Act CVI of 2007**) stipulates that the state may only participate in business entities through a legal representative and that its liability is limited to its financial contributions. Accordingly, the state may hold ownership in limited liability companies, companies limited by shares, and limited partnership (as a limited partner). Furthermore, Act CXXII of 2009 on More Economical Operation of Publicly Owned Companies (**Act CXXII of 2009**) elaborates on public ownership, defining business entities in which the Hungarian State or local governments exert majority influence –

[155] Articles 6 and 7, Charter of State Enterprises of 1977.
[156] Article 2, Charter of State Enterprises of 1977.
[157] Section 2, Act VI of 1977 on State Enterprises.
[158] Section 3, Act VI of 1977 on State Enterprises.
[159] The management of self-managed enterprises could take one of two forms: (1) the enterprise council, which is a representative body of employees. Section 4, Legislative Decree XXII of 1984 amending Act VI of 1977 on Enterprises.
[160] Section 1(2), Legislative Decree XXII of 1984.
[161] Article 9, Charter of State Enterprises promulgated by Decree No. 50 HDBT of the Council of Ministers of 1988.

defined as owning more than 50% of voting rights – as SOEs.[162] This definition covers both direct and indirect influence, which means that subsidiaries of such entities are also subject to the regulatory framework, thereby promoting transparency and economic efficiency.[163] The Law on Enterprises of 2020 lays forth the definition of SOEs in Vietnam.[164] Accordingly, an SOE is an enterprise where the State holds more than 50% of the charter capital or voting shares.[165] Article 88 of the Law categorizes SOEs into two distinct types: (i) wholly state-owned enterprises, which are single-member limited liability companies with 100% state ownership, and (ii) partially state-owned enterprises, which include multiple-member limited liability companies and joint-stock companies where the State retains over 50% of charter capital or voting shares. In terms of corporate governance regime, SOEs wholly owned by the State are subject to the provisions under Chapter IV of the Law, which are generally stricter than those applicable to companies with no state capital. Meanwhile, SOEs having a state capital proportion of more than 50% but less than 100% fall within the scope of the regulations applicable to multi-member limited liability or joint-stock companies stipulated in the Law.

The above definitions suggest several dimensions of SOEs that should be considered, including the level of government ownership (central/federal, state/regional or local), the founding mechanism of the enterprise, its hierarchical position within public administration, and its intended purpose.[166] Additional variations include the extent of government ownership (full, majority or minority), the listing status on stock exchanges, and the nature of government shareholding through various financial vehicles.[167] On another note, the diversity in the legal forms and operational characteristics of SOEs is crucial for understanding government ownership policies and their implications for state objectives and rights as owners.[168] While a broader array of SOE forms may afford governments increased flexibility, it can also complicate ownership policies and create barriers to the application of general corporate laws. An unstructured evolution of SOE classification, lacking comprehensive consideration of broader implications, risks engendering confusion and opacity in governance, ownership dynamics, and the relationship between SOEs and other parts of the government and the law.[169]

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[162] Article 1(b), Act CXXII of 2009 on More Economical Operation of Publicly Owned Companies .

[163] Anita Boros, 'OECD Guidelines on Corporate Governance of State-Owned Enterprises from Hungarian State-Owned Enterprises' Point of View' [2017] PRO PUBLICO BONO - Public Administration 6, 8.

[164] Vietnam has altered the legal manifestation of SOEs on six occasions within three decades, in 1988, 1995, 2003, 2005, 2014 and 2020. For more discussion, *see* Thi Thanh An Chu, 'Revisiting the Concept of State-Owned Enterprises from Vietnam's Perspective' (2023) 22 Balkan Social Science Review 69.

[165] Article 4(11), Law on Enterprises 2020.

[166] PWC, 'State-Owned Enterprises: Catalysts for Public Value Creation?' (2015) <https://www.pwc.com/gr/en/publications/government/state-owned-enterprises-catalysts-for-public-value-creation.html> accessed 8 December 2024.

[167] ibid.

[168] David Robinett, 'Held by the Visible Hand: The Challenge of State-Owned Enterprise Corporate Governance for Emerging Markets' (World Bank Group 2010) Working Paper 37711.

[169] ibid.

2.3.2.3. Characteristics of State-owned Enterprises

The concept of SOEs lacks a universally accepted definition. The term 'state-owned enterprise' can encompass a broad spectrum of entities, with some definitions extending to all government-affiliated entities that provide goods and services, both financial and non-financial corporations, as in the case of the proposal by the European System of Accounts. On the other hand, a narrower interpretation limits the term to government-owned entities established primarily for profit generation, which operate similarly to private firms. For example, definitions provided by the World Bank and New Zealand prioritize clarity and practical governance by focusing on ownership thresholds and commercial activities.

Neither the broad nor narrow definitions adequately address the complexity of SOEs in the context of privatization in Vietnam and Hungary over the historical period to the present. A more nuanced definition is necessary to capture the distinct political, economic, and legal framework of each country while also facilitating the analysis of relevant issues vital to stakeholders and managers in the state-owned enterprise sector. For the purpose of the research, SOEs are characterized by the following key attributes:

First, SOEs possess a separate legal status. This legal autonomy is crucial for the establishment of a regulatory framework governing their operations. SOEs are structured to hold assets independently from the state and are funded by public grants or revenue-generating activities. This separation allows SOEs to pursue commercial interests, thereby granting them budgetary autonomy. Unlike traditional government departments, which may lack financial independence, SOEs operate as independent entities capable of generating income and borrowing without relying heavily on government transfers. Furthermore, managerial discretion is a defining feature of SOEs, enabling them to make operational decisions autonomously, a characteristic not typically afforded to government offices.[170]

Second, the ownership of control of SOEs by the state is a fundamental aspect of their definition. Ownership can manifest in various forms, including outright ownership, majority shareholding, or significant minority stakes that confer effective control over management decisions. It is noteworthy that ownership does not always equate to control.[171] Governments may hold passive stakes without exerting influence; conversely, they may exert significant influence over SOEs (for example, the appointment of the majority of the board) with smaller but sufficiently concentrated stakes against diluted ownership of the remaining stock. Therefore, the complexity of ownership structures necessitates a clear delineation between direct and indirect ownership and control, particularly in mixed economic systems.[172]

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[170] Luc Bernier, Massimo Florio and Philippe Bance (eds), *The Routledge Handbook of State-Owned Enterprises* (Routledge 2020) 5.
[171] ibid 3.
[172] ibid.

Third, SOEs primarily engage in commercial activities, defined as the production and sale of goods and services to consumers. There should be a clear distinction between commercial and non-commercial activities, with the latter typically falling under the exclusive purview of government authority. Commercial activities include not only the sale of goods or services but also the pricing and amount of those goods or services, highlighting the operational scope of SOEs in the marketplace.

The final criterion addresses SOEs' policy objectives. The purpose behind SOE activities introduces a layer of complexity, particularly regarding their policy objectives. This aspect is contentious, as SOEs' accountability mechanisms diverge significantly from private enterprises. While the latter are primarily accountable to their shareholders, the former are accountable (at least partly) to the government, which often entails a broader obligation to the national interests. This dual accountability introduces the potential for SOEs to engage in conduct driven by strategic considerations. The legitimacy of utilizing commercial activities for strategic state purposes is a contentious issue that underscores the ideological divides among countries.[173] States that traditionally leverage SOEs to achieve public policy objectives domestically may extend this practice to the economic engagement of SOEs, whereas countries with a more delineated separation between public and private sectors and a limited role of the state in the economy may reject the notion of employing commercial means for public missions. The complexity of accountability is further compounded when considering enterprises with mixed ownership structures, where both government and private interests intersect.[174] The research takes the view that states may articulate their policy preference regarding the definition of control to include minority ownership or broader measures of influence, the range of activities deemed commercial, and whether SOEs are limited to profit-making purposes or permitted to operate based on alternative considerations.

2.4. Privatization of State-owned Enterprises: A Debate

2.4.1. Rationales for Privatization of State-owned Enterprises

2.4.1.1. Economic Aspects of Privatization of State-owned Enterprises

There are several interconnected strands within the argument for privatization from an economic perspective. First, privatization can further liberalization, in particular enhancing competition by dismantling state monopolies, which are not inherently natural monopolies. Technological advancements have diminished the conditions that once justified these monopolies, suggesting that breaking them up could foster a more competitive market environment. In this context, providing targeted subsidies for specific consumer groups or private service providers may be a more efficient option than maintaining loss-making state

[173] McLaughlin (n 150) 608.
[174] ibid.

enterprises. The inefficiencies associated with monopolistic markets are well-documented. Monopolies typically produce lower outputs and charge higher prices compared to firms operating in competitive markets.[175] The disparity between the marginal cost of production and the marginal benefit to consumers causes a poor allocation of resources. Consequently, economists have long stressed the importance of competition policy and antitrust regulations to mitigate the risks of monopolistic dominance.[176] However, discourse on privatization must also consider the concept of natural monopolies, where the economies of scale are so substantial that only one enterprise can efficiently operate in the market.[177] Industries such as water and electricity distribution exemplify this phenomenon, as the high fixed costs of developing infrastructure render competition impractical. In such cases, mainstream economic theory has historically supported public ownership because it enables the imposition of regulatory frameworks that can prioritize social welfare over monopolistic profit maximization. This perspective was particularly influential in the economic literature following World War II, setting itself apart from the broader 'Pigovian' argument for government intervention to rectify market failure stemming from externalities. [178]

The theoretical foundation of SOE privatization is rooted in property rights theory, which asserts that private ownership enhances economic efficiency by aligning managerial incentives with profit maximization.[179] Critics of state ownership argue that the inefficiencies observed in state-run enterprises stem from the inherent limitations of central planning, which is often unsustainable.[180] North's historical analysis suggests that the clarity and enforcement of property rights fundamentally influence productive and allocative efficiency within an economy.[181] He contends that ambiguous property rights invariably lead to significant declines in economic efficiency, while well-defined private property rights facilitate effective management of complex economic activities. Scholars such as Kornai, Grofeld, Lipton and Sachs have similarly emphasized economic efficiency as a central argument for the privatization of SOEs.[182] They

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[175] Gérard Roland, 'Chapter 1. Private and Public Ownership in Economic Theory' in Gérard Roland (ed), *Privatization: Successes and Failures* (Columbia University Press 2008).
[176] ibid 11.
[177] William J Baumol, 'On the Proper Cost Tests for Natural Monopoly in a Multiproduct Industry' (1977) 67 The American Economic Review 809; OECD, *Glossary of Industrial Organisation Economics and Competition Law* (OECD Publishing 1993) 30.
[178] W Arthur Lewis, *The Principles of Economic Planning* (Psychology Press 2003); James Edward Meade, *Planning and the Price Mechanism: The Liberal-Socialist Solution* (G Allen & Unwin 1948).
[179] Shleifer and Vishny (n 111).
[180] Ludwig von Mises, 'Economic Calculation in the Socialist Commonwealth' in Friedrich A Hayek (ed), *Collectivist economic planning: Critical studies on the possibilities of socialism,* (Reprint edition, A M Kelly 1975); Friedrich August Hayek, *The Road to Serfdom* (Reprint edition, Routledge 2001).
[181] Douglass Cecil North and Robert Paul Thomas, *The Rise of the Western World: A New Economic History* (Reprint edition, Cambridge University Press 1999); Douglass Cecil North, *Structure and Change in Economic History* (Norton 1981).
[182] Janos Kornai, *Road to a Free Economy* (W Norton & Co Inc 1990); David Lipton, Jeffrey Sachs and Stanley Fischer, 'Creating a Market Economy in Eastern Europe: The Case of Poland' (1990) 1990 Brookings Papers on

argue that accountable private owners are more likely to utilize resources effectively, whereas public ownership often results in mismanagement, inefficient resource allocation, and a lack of organizational agility. Kornai further highlights that a stringent budget constraint is a characteristic feature of privately owned firms, contrasting with state-supported enterprises that lack such financial discipline.[183] In other words, the inefficiencies of public sector production and services are attributed to their insulation from market forces, as they are shielded by governmental obligations to cover losses.[184] This lack of exposure to bankruptcy risks leads to wasteful management practices, as public managers may pursue non-pecuniary objectives without the incentive of personal financial gain. Furthermore, the efficiency and profitability of public enterprises can be further compromised by governmental macroeconomic policies and income redistribution goals. Neoliberal discourse expresses skepticism regarding the compromises made by political and bureaucratic entities that undermine market mechanisms in resource allocation.[185] In this context, profit-driven entrepreneurs are favored over bureaucrats focused on budget maximization and politicians concerned with electoral gains. Existing scholarly research provides substantial support for the notion that private ownership of business enterprises is superior to public ownership, particularly in terms of efficiency and profitability.[186]

The managerial rationale is linked to the ownership rationale for privatization. A prevalent critique of public ownership is its failure to provide adequate incentives for monitoring managerial conduct, which may allow managers the latitude to pursue personal agendas. While it is commonly argued that managers of SOEs are accountable to political decision-makers, the effectiveness of this accountability is questionable because political stakeholders may not be particularly sensitive to the performance of SOEs.[187] However, certain circumstances, such as fiscal constraints, financial losses, or potential closures of SOEs, can elevate enterprise performance to a significant political priority, thereby constraining managerial discretion in those contexts. Some scholars introduce an alternative perspective on how privatization alters the mechanisms for monitoring managerial behavior, particularly through the role of capital market pressures.[188] A fundamental function of stock markets is to provide managers with

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Economic Activity 75; Irena Grosfeld, 'Privatization of State Enterprises in Eastern Europe: The Search for a Market Environment' (1990) 5 East European Politics and Societies 142.

[183] János Kornai, 'The Soft Budget Constraint' (1986) 39 Kyklos 3.

[184] SOE losses as a percentage of GDP were 9% in Argentina and Poland in 1989; approximately half of Tanzania's SOEs consistently incurred losses throughout the 1980s; and around 30% of SOEs in China were loss-making in 1991. These financial losses had to be covered through allocations from public funds. *See* Sunita Kikeri, John Nellis and Mary Shirley, *Privatization: The Lessons of Experience* (The World Bank 1992).

[185] Anindya Sen, 'Chapter 58: State-Owned Enterprises and Privatization' in Amitava Krishna Dutt and Jaime Ros (eds), *International Handbook of Development Economics*, vol 2 (Edward Elgar Publishing 2008).

[186] William L Megginson and Jeffry M Netter, 'From State to Market: A Survey of Empirical Studies on Privatization' (2001) 39 Journal of Economic Literature 321.

[187] Roland (n 175) 14.

[188] John Vickers and George Yarrow, 'Economic Perspectives on Privatization' (1991) 5 Journal of Economic Perspectives 111; Jean-Jacques Laffont and Jean Tirole, *A Theory of Incentives in Procurement and Regulation* (MIT Press 1993).

incentives beyond traditional accounting-based reward systems.[189] Two salient arguments supporting private ownership emerge from this analysis. First, stock prices serve as indicators of managerial performance, which can inform contractual arrangements between shareholders and managers, potentially linking remuneration packages to stock market outcomes. This relationship can further influence the managerial labor market, as managers with a reputation for maximizing firm value enhance their marketability.[190] Conversely, the absence of market valuation, as seen in purely public firms, diminishes the mechanisms for disciplining managers, as the informational advantage provided by stock prices is lost. Second, private ownership facilitates market participants' ability to be involved in management through mechanisms such as proxy fights or takeovers, which are largely absent in public ownership contexts.[191] Although political takeovers can occur, they are infrequent and differ in nature from corporate takeovers. Nevertheless, this argument may be less applicable in jurisdictions where corporate takeovers are infrequent. Moreover, public utilities rarely experience takeovers, even amidst heightened takeover activity in other sectors.

Privatization programs are often justified through a range of financial rationales that underscore their potential benefits for governments and economies. A key argument is that privatization enables enterprises to gain quicker access to international capital markets, thereby enhancing their financial capacities and investment opportunities.[192] Another justification for privatization is the reduction of commercial risk for governments. By divesting public assets, states can mitigate their exposure to economic fluctuations, including recessions and volatile currency exchange rates, which can adversely affect public enterprises. This is because the shift can also eliminate the need for costly rescue operations from failing public enterprises.[193] However, it is essential to recognize that such rescue operations are not exclusive to the public sector; nationalization often occurs in response to the financial distress of private enterprises, indicating a more complex relationship between state intervention and market stability.[194] Furthermore, privatization is often pursued as a fiscal strategy to alleviate government debt and lessen the financial burdens associated with subsidizing loss-making SOEs.[195] The sale of state assets can yield significant one-time revenues, as evidenced by the privatization of Japan's Nippon Telegraph and Telephone Corporation in the 1980s. Similarly, countries like Brazil and

[189] Roland (n 175) 14.
[190] Eugene F Fama, 'Agency Problems and the Theory of the Firm' (1980) 88 The Journal of Political Economy 288; Bengt Holmström, 'Managerial Incentive Problems: A Dynamic Perspective' (1999) 66 The Review of Economic Studies 169.
[191] Roland (n 175) 15.
[192] VA Jafarey, 'Privatization, Deregulation, and Macroeconomic Policies: The Case of Pakistan', *Structural Adjustment and Macroeconomic Policy Issues* (International Monetary Fund).
[193] Richard Hemming and Kenneth Miranda, 'XX. Privatization' in Ke-young Chu and Richard Hemming (eds), *Public Expenditure Handbook* (International Monetary Fund 1991) 143.
[194] Vickers and Yarrow (n 188); Laffont and Tirole (n 188).
[195] Sen (n 185).

India have utilized privatization proceeds to address budget deficits, thereby alleviating the financial strain of supporting inefficient SOEs. The immediate influx of funds from privatization can enhance government liquidity, enabling investment in critical areas such as education and infrastructure.

2.4.1.2. Ideological and Political Considerations for Privatization of State-owned Enterprises

Privatization is not solely an economic process but also a political one, often driven by ideological commitments to reduce state intervention in the economy. In Western Europe, the ideological justifications for privatization can be generally divided into two groups: the neoliberal conservative governments in countries such as Britain, France, and Portugal; and the more pragmatic and limited ambitions in other countries.[196] The radical right in countries like Britain and France views privatization as a strategic endeavor to redefine the public-private boundary in favor of the latter. This ideological position is supported by a profound anti-state sentiment, with privatization efforts seen as a means to combat entrenched technocratic elites and historical traditions of dirigisme, particularly in France.[197] In the United Kingdom, privatization was essential for dismantling the post-war social-democratic consensus and promoting self-reliance and individualism.[198] Also, proponents argue that public ownership restricts consumer choice due to monopolistic practices and undermines individual economic freedom by enforcing involuntary shareholding in the public enterprises.[199] A further ideological motivation is to establish a property-owning democracy, wherein the sale of shares in denationalized industries is to broaden public ownership and foster a culture of popular capitalism.[200]

In post-communist countries, motivations for privatization are shaped by the historical legacy of communist regimes, which maintained monopolistic control over both political and economic spheres.[201] The party's ability to provide economic rewards to supporters and punish dissenters was a major source of its coercive powers.[202] Decentralizing economic power through rapid privatization is viewed as a vital strategy to curtail political dominance. Scholarly contributions from economists emphasize that a robust market economy and political democracy are interdependent, with substantial private ownership necessary to prevent regression in the

[196] Vincent Wright, 'Industrial Privatization in Western Europe: Pressures, Problems, and Paradoxes' in Vincent Wright (ed), *Privatization in Western Europe: Pressures, Problems, and Paradoxes* (Pinter Publishers 1994) 14.
[197] ibid.
[198] ibid.
[199] ibid.
[200] ibid 15.
[201] Joseph E Stiglitz, 'Some Theoretical Aspects of the Privatization: Applications to Eastern Europe' in Mario Baldassarri, Luigi Paganetto and Edmund S Phelps (eds), *Privatization Processes in Eastern Europe: Theoretical Foundations and Empirical Results* (Palgrave Macmillan UK 1993).
[202] ibid 187.

democratization process.[203] Consequently, privatization emerges as a foundational strategy to establish a viable democratic framework. Moreover, the motivations for privatization in Eastern Europe include the goal of fostering a middle class through the promotion of small private enterprises, reflecting a vision of capitalism that is both politically and economically bipolar.[204]

In China, the political motivations behind its privatization efforts are closely linked to the need to attract foreign investment and integrate into the global economy after the dissolution of the Soviet Union.[205] However, political and ideological considerations prompted China to embark on its privatization strategy, known as 'privatization with Chinese characteristics',[206] which significantly differed from the speedy and mass privatization of SOEs in Russia and many Eastern European countries. The Chinese model emphasizes the rendition of a robust state sector alongside the development of a parallel non-state sector. This strategic approach insulates the state sector from private economic encroachments while simultaneously creating a buffer to absorb shocks for potential future privatization of the state sector. Central to this model is the concept of 'market socialism',[207] which allows for market-oriented reforms that remain compatible with socialist principles. Chinese reformers, notably Deng Xiaoping, advocate for a pragmatic approach to economic reform, referring to a Sichuan proverb '[i]t does not matter if it is a yellow cat or a black cat, as long as it catches mice',[208] translating to the necessity of prioritizing economic pragmatism over strict adherence to ideological purity.[209] Despite the expansion of market activities, Chinese policymakers have maintained a careful balance, ensuring that the state sector remains dominant and that market developments occur within ideologically acceptable boundaries. Existing literature has further elucidated the political economy underpinning China's privatization strategy, highlighting the dual objectives of enhancing the performance of state enterprises while retaining state control over essential economic sectors.[210] This pragmatic adaptation reflects the pressure of globalization, where competitiveness and efficiency are paramount.

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[203] Lipton, Sachs and Fischer (n 182); Grosfeld (n 182).
[204] Iván Major, *Privatization in Eastern Europe: A Critical Approach* (Edward Elgar Publishing 1993) 56.
[205] Guy S Liu, Pei Sun and Wing Thye Woo, 'The Political Economy of Chinese-Style Privatization: Motives and Constraints' (2006) 34 World Development 2016.
[206] Cao (n 109) 13.
[207] Cao (n 109).
[208] Xiaoping Deng, *Selected Works of Deng Xiaoping, 1938-1965* (Foreign Languages Press 1992) 292, 293.
[209] Cai Yongshun, 'Relaxing the Constraints from above: Politics of Privatising Public Enterprises in China' (2002) 10 Asian Journal of Political Science 94; Cao (n 109).
[210] Yutao Huang, 'Solve the Problem or Escape Responsibility? The Politics of Chinese Privatization Reform' (2019) 4 Chinese Political Science Review 1; Liu, Sun and Woo (n 205); Yuanzheng Cao, Yingyi Qian and Barry R Weingast, 'From Federalism, Chinese Style, to Privatization, Chinese Style' (Social Science Research Network, 1 December 1997) <https://papers.ssrn.com/abstract=57564> accessed 11 December 2024.

The period between 1977 and 1999 witnessed a major global trend towards the privatization of SOEs.[211]

In developed countries of the West, privatization emerged as a response to the inefficacies associated with state ownership. The United Kingdom government, led by Margaret Thatcher, initiated a comprehensive privatization program after unsuccessful attempts to reform SOEs under the New Public Management. By 1990, a total of 115 unprofitable coal mines had closed, and four years later, British hard coal mining was nearly fully privatized.[212] Throughout the 1980s, the government privatized about 40 major SOEs in sectors such as gas supply, airports, and water supply, along with prominent automotive brands like Rolls-Royce and Jaguar.[213] Italy experienced a parallel trend, where privatization and restructuring of SOEs were implemented in key industries, including textiles and automotive manufacturing. State-owned holding enterprises were dissolved or restructured into commercial entities, facilitating the introduction of shares into public trading markets.[214] In Germany, the reunification process involved the privatization of over 8,000 socialist SOEs from the former East Germany.[215] The establishment of Treuhandanstalt, a specialized trust agency, was pivotal in expediting the privatization of East German enterprises. In 1994, SOEs in Germany fell to just 140.[216] Australia also witnessed a pronounced privatization movement. In 1990, SOEs constituted 7% of GDP, but by 2011, it had fallen to 1.3%.[217] This illustrates the influence of neoliberal ideologies within a relatively affluent society.

In post-communist countries, the transition away from state ownership became evident from the early 1990s, although the extensive legacy of SOEs made the privatization process take over many years. The privatization wave of the 1990s was an indicator of big transformations in the economy of East European and Asian countries. By 2003, data showed that the private sector's contribution to GDP in 22 former communist countries in Europe and Central Asia had surpassed 50%, a remarkable increase from a mere 9% in 1994.[218] This change indicated the profound impact of SOE privatization on the economic landscape of these countries. In Russia, despite its formal transition to a non-socialist framework, the socialist legacy continued to significantly influence the economy throughout the 1990s. Evidently, the initial phase of privatization in the early 1990s primarily targeted smaller, regional, and local SOEs. In China, the government initiated a socialist market economy program in the early 1990s. This initiative

[211] Bird (n 137) 65.
[212] Bałtowski and Kwiatkowski (n 124) 22.
[213] ibid.
[214] ibid 21.
[215] ibid.
[216] ibid.
[217] ibid 23; Malcolm Abbott and Bruce Cohen, 'A Survey of the Privatisation of Government-Owned Enterprises in Australia since the 1980s' (2014) 47 Australian Economic Review 432, 432.
[218] Operations Evaluation Department, *Economies in Transition: An OED Evaluation of World Bank Assistance* (World Bank 2004) 7.

facilitated the gradual transformation of SOEs into independent economic entities capable of operating within a market framework. The privatization sped up in the middle of the 1990s, leading to the partial or complete divestiture of numerous smaller SOEs, while private domestic enterprises and enterprises with significant foreign capital continued to thrive.

2.4.2. Reconsidering the Conventional Wisdom on Privatization of State-owned Enterprises

Opposition to privatization of SOEs includes concerns about (but is not restricted to) the mixed results on the effects of privatization, neglect of social welfare and employment considerations by newly established private entities, potential loss of control over enterprises deemed strategically vital to the country, transfer of national assets to foreign investors resulting in profit diversion beyond national borders, and the exploration of alternative strategies to enhance the efficiency of SOEs.

(i) Mixed Results on the Effects of Privatization of State-owned Enterprises

The effect of privatization on firm efficiency and performance is a complex and contested issue in economic literature. Proponents assert that private enterprises inherently exhibit greater efficacy, however empirical evidence is inconsistent. An OECD study suggests that privatization generally results in increased profitability and efficiency despite limited data and methodological difficulties.[219] A widely referenced literature review of 2001 concludes that the majority of studies support the claim that enterprises undergoing divestiture, whether fully or partially, tend to exhibit increased efficiency.[220] However, a study evaluating the impact of privatization on large Spanish SOEs privatized since 1990 revealed mixed results, with most firms showing no significant improvement in economic performance following privatization. The findings imply a need to re-evaluate the underlying assumptions of property rights theory, particularly regarding the managerial effectiveness and quality of management post-privatization.[221] Research on public sector banks in India indicates that they may achieve efficiency levels comparable to or exceeding those of private banks.[222] This challenges the assumption that privatization invariably enhances operational performance. Other subsequent literature also highlights methodological flaws and selection biases that may distort results in

[219] OECD, 'Privatising State-Owned Enterprises: An Overview of Policies and Practices in OECD Countries' (Organisation for Economic Co-operation and Development 2003).
[220] Megginson and Netter (n 186).
[221] Maria Teresa Bosch, 'The Effects of Privatisation on Companies' Economic Performance: The Spanish Case' [2009] SSRN Electronic Journal <https://papers.ssrn.com/abstract=1425424> accessed 12 December 2024.
[222] Milind Sathye, 'Efficiency of Banks in a Developing Economy: The Case of India' (2003) 148 European Journal of Operational Research 662.

favor of privatization. Thus, the relationship between privatization and efficiency may be more heterogeneous than previously acknowledged.[223]

In terms of fiscal objectives, privatization has been a strategic policy in OECD countries to reduce public deficits and generate tax revenues. The Italian privatization program from 1994 to 2003, for instance, generated over $110 billion, significantly contributing to debt reduction.[224] However, empirical analysis of 29 transition economies from 1991 to 2010 indicates a deterioration in government budget balances linked to privatization, particularly a negative correlation with tax revenue collection.[225] This finding remains consistent across different estimators and model specifications, suggesting that privatization may not yield the anticipated fiscal benefits.

Overall, there have been mixed results on the economic impact of SOE privatization. High-income countries have the strongest evidence of privatization improving efficiency, whereas middle- and low-income countries have limited and more mixed results.[226] The fact that developing countries often lack the requisite conditions for effective privatization may be one explanation for this difference.[227] The ideological impetus behind privatization to reduce government involvement in the national economy, coupled with the absence of a conducive environment, often leads to inconclusive outcomes, necessitating a more nuanced understanding of the privatization process and its implications on economic efficiency.

(ii) Concerns for Social Welfare and Employment

The impacts of SOE privatization on social welfare can be analyzed through the distribution within an economy from two primary aspects: the sources of distributional changes and the demographic groups affected by the privatization initiatives.[228] While privatization can enhance market competition and lead to lower prices and better services, it is not without cost. Transaction costs linked to privatization can offset potential benefits, particularly in utility sectors like water and electricity, where privatization often results in higher consumer charges that disproportionately burden lower-income populations. Moreover, the sale of state assets at a discounted rate can shift wealth from the public sector to private owners, favoring those with

[223] Holger Mühlenkamp, 'From State to Market Revisited: More Empirical Evidence on the Efficiency of Public (and Privately-Owned) Enterprises' (University Library of Munich 2013) 47570 <https://ideas.repec.org//p/pra/mprapa/47570.html> accessed 12 December 2024; Sumru Altug and Alpay Filiztekin (eds), *The Turkish Economy: The Real Economy, Corporate Governance and Reform* (1st edition, Routledge 2006).
[224] OECD, 'Privatising State-Owned Enterprises' (n 219).
[225] Ernesto Crivelli, 'Fiscal Impact of Privatization Revisited: The Role of Tax Revenues in Transition Economies' (2013) 37 Economic Systems 217.
[226] Sumedh Rao, 'Is the Private Sector More Efficient? A Cautionary Tale' (UNDP Global Centre for Public Service Excellence 2015) Discussion Paper 10.
[227] Sen (n 185).
[228] ibid.

greater financial capacity and exacerbating public losses.[229] Foreign ownership of domestic assets further complicates the situation, as profits may be repatriated rather than reinvested locally, potentially increasing income inequality and diminishing the government's capacity to fund public services.[230] This dynamic can lead to a concentration of wealth and resources, particularly in essential sectors like healthcare and education, where access to quality service depends on individual financial capacity.[231] Empirical evidence suggests that public health expenditures yield broader benefits than private expenditures, which can intensify health disparities.[232]

Privatization affects different stakeholder groups, especially employees and shareholders. A study in transition economies, including Hungary, Romania, Russia, and Ukraine, indicates that privatization does not necessarily result in significant job losses or wage cuts.[233] However, in Brazil, evidence shows that workers in privatized SOEs experienced a wage decline of about 25% relative to a matched control group, with similar wage reductions observed in private sector firms connected to privatized entities.[234] These findings underscore the possible adverse effects of privatization on workers. Moreover, privatization often leads to job losses as private enterprises streamline operations, negatively affecting local economies reliant on SOEs for employment. It is therefore necessary to carefully consider the broader socio-economic impacts of SOE privatization.

(iii) Channeling of Profits outside the Country

Privatizing SOEs poses a risk of directing profits outside the country, a situation that may jeopardize the economic stability and development of a country. The historical context of privatization across different countries highlights the challenges and drawbacks linked to the transfer of state-owned assets into private ownership. For example, during the transition period following the Soviet Union's dissolution, the process of privatization frequently resulted in the rise of oligarchs who extracted wealth from the economy without making any significant contributions to its development, thus directing profits outside the nation.[235] The observed

[229] ibid.
[230] Sarah Y Tong and Yanjie Huang, 'China's State-Owned Enterprises: The Dilemma of Reform' (2012) 04 East Asian Policy 62.
[231] Jacob Novignon, Solomon A Olakojo and Justice Nonvignon, 'The Effects of Public and Private Health Care Expenditure on Health Status in Sub-Saharan Africa: New Evidence from Panel Data Analysis' (2012) 2 Health Economics Review 22.
[232] ibid.
[233] David J Brown, John S Earle and Álmos Telegdy, 'Employment and Wage Effects of Privatisation: Evidence from Hungary, Romania, Russia and Ukraine' (2010) 120 The Economic Journal 683.
[234] David Arnold, 'The Impact of Privatization of State-Owned Enterprises on Workers' (2022) 14 American Economic Journal: Applied Economics 343.
[235] Alexander Abramov, Alexander Radygin and Maria Chernova, 'State-Owned Enterprises in the Russian Market: Ownership Structure and Their Role in the Economy' (2017) 3 Russian Journal of Economics 1; Alexander Radygin, Yury Simachev and Revold Entov, 'The State-Owned Company: "State Failure" or "Market Failure"?1' (2015) 1 Russian Journal of Economics 55.

pattern prompts serious concerns about the long-term sustainability of economic growth subsequent to privatization. It suggests that local economies might increasingly depend on foreign capital and expertise, which may reduce economic sovereignty.[236]

A further argument against privatization is the possibility of profit repatriation, which can deplete local economies of essential capital resources. The privatization of strategic sectors, particularly when involving foreign investors, can lead to the profit outflow to other nations, thereby diminishing the resources accessible for domestic investment and hindering economic growth.[237] This issue holds importance in developing countries, where the repatriation of profits may intensify prevailing economic difficulties and impede recovery initiatives after a crisis.[238] Empirical data show that privatization may result in a scenario where foreign direct investment fails to yield local economic advantages, given that profits are frequently repatriated instead of being reinvested within the host economy.[239]

(iv) Alternatives to Enhance SOEs' Performance

The debate surrounding the privatization of SOEs is increasingly supported by evidence indicating that effective management and restructuring can yield competitive performance levels without necessitating a transfer of ownership to the private sector. Research indicates that SOEs can perform comparably to privatized entities when their objectives align with profit maximization.[240] This challenges the prevailing assumption that privatization inherently leads to better outcomes. The possibility that SOEs are restructured and managed more effectively without relinquishing state ownership provides alternatives to privatization. For example, mixed-ownership reforms that incorporate non-state shareholders into SOE governance have demonstrated performance improvements by enhancing governance structures, reducing agency costs, and increasing decision-making efficiency.[241] The corporatization (without privatization) of SOEs in China has positively impacted performance through internal governance reforms. This suggests that corporate governance reforms may serve as a feasible

[236] Fuzhong Chen and others, 'The Ownership, Innovation, and Sustainable Development of Micro and Small Enterprises: Evidence of China' (2022) 12(4) SAGE Open.
[237] Kyle A Johnston and Miguel D Ramirez, 'Foreign Direct Investment and Economic Growth in Cote D'Ivoire: A Time Series Analysis' (2015) 5 Business and Economic Research 35.
[238] ibid.
[239] Dirk HM Akkermans, 'Net Profit Flow per Country from 1980 to 2009: The Long-Term Effects of Foreign Direct Investment' (2017) 12(6) PloS One 1.
[240] Richard Bozec, Gaétan Breton and Louise Côté, 'The Performance of State–Owned Enterprises Revisited' (2002) 18 Financial Accountability & Management 383; Narjess Boubakri, Jean-Claude Cosset and Omrane Guedhami, 'From State to Private Ownership: Issues from Strategic Industries' (2009) 33 Journal of Banking & Finance 367.
[241] Rongwu Zhang, Yanzhen Lin and Yingxu Kuang, 'Will the Governance of Non-State Shareholders Inhibit Corporate Social Responsibility Performance? Evidence from the Mixed-Ownership Reform of China's State-Owned Enterprises' (2022) 14 Sustainability 527; Shan Zhu, 'Study on the Impact of Mixed Ownership Reform on the Performance of State-Owned Enterprises' (2021) 4 Academic Journal of Engineering and Technology Science.

policy option for countries intending to reorganize SOEs while avoiding extensive privatization measures.[242] Moreover, effective restructuring of SOEs can lead to significant economic benefits, such as better capital allocation efficiency and higher total factor productivity.[243] Targeted reforms, like performance management systems and accountability measures, can drive SOEs towards greater efficiency and effectiveness while maintaining public ownership.[244] Another strategy is to excel SOE in achieving social and environmental goals, prioritizing corporate social responsibility and sustainability over short-term profits, particularly in high-polluting industries.[245] Additionally, enhancing SOE governance with better management practices and performance evaluation systems aligned with public interests can bolster their effectiveness without requiring privatization.[246] This approach ensures accountability to the public while simultaneously improving operational efficiency and financial performance. Recent SOE reform practices in several countries, especially China, suggest that a mixed economy, where state and private enterprises coexist, may better serve national interests by providing essential services while maintaining a degree of profitability.[247]

(v) Revisiting the Role of SOEs in Strategic Sectors

SOEs have reemerged as pivotal players within strategic sectors in the 21st century, signifying a renewed commitment to pursuing economic and societal goals. According to a study that critically examines the revival of SOEs over the past two decades and outlines their distinct characteristics in comparison to the traditional SOEs of the 20th century, the contemporary political-economic landscape has fundamentally altered the mission, mandate, governance structures, and ownership framework for SOEs. First, the emergence of several developing economies as formidable industrial competitors, coupled with the intensification of global market competition, has necessitated this evolution.[248] Furthermore, the transition from a unipolar to multipolar international order has heightened political competition among states,

[242] Varouj A Aivazian, Ying Ge and Jiaping Qiu, 'Can Corporatization Improve the Performance of State-Owned Enterprises Even without Privatization?' (2005) 11 Journal of Corporate Finance 791.
[243] Li Zhao, 'Capital Allocation Efficiency, SOEs Reform and China's Economic Growth' (2019) 9 Journal of Asian Business Strategy 184.
[244] Xinru Huang, 'The Influence of "Reverse Mixed Ownership Reform" on the Internal Control of Private Enterprises' (2022) 31 BCP Business & Management 362.
[245] Min Maung, Craig Wilson and Xiaobo Tang, 'Political Connections and Industrial Pollution: Evidence Based on State Ownership and Environmental Levies in China' (2016) 138 Journal of Business Ethics 649; Grzegorz Zimon, Arash Arianpoor and Mahdi Salehi, 'Sustainability Reporting and Corporate Reputation: The Moderating Effect of CEO Opportunistic Behavior' (2022) 14 Sustainability 1257; Zhang, Lin and Kuang (n 241).
[246] Xueru Deng, Xinze Liu and Ruiyue Wang, 'A Review of Performance Management in State-Owned Enterprises and Private Enterprises in China' (2023) 17 Lecture Notes in Education Psychology and Public Media 243.
[247] Michaela Tichá, 'State or Private Ownership? A Survey of Empirical Studies' (2012) 12 Review of Economic Perspectives 120.
[248] Roberto Cardinale, Matteo Landoni and Zhifu Mi, 'Global State-Owned Enterprises in the 21st Century: Rethinking Their Contribution to Structural Change, Innovation, and Public Policy' (2024) 68 Structural Change and Economic Dynamics 468.

particularly in strategic sectors and the management of infrastructure and trade routes.[249] Others look at the evolving role of SOEs and analyze why they continue to be significant despite efforts to reform or privatize them over the past few decades.[250] These point out that SOEs have adapted by becoming both policy-driven and competitive, strategically investing in strategic sectors while simultaneously adopting corporate governance models that promote efficiency. Thus, it is necessary to reassess how SOEs can balance public service and market-oriented goals effectively.

Moreover, market failures arise more often, and state ownership can be a response. Recent global events, especially the 2008-2009 financial crisis and the COVID-19 pandemic, have significantly underscored the importance of SOEs in strategic sectors, prompting renewed discussions regarding their privatization. Several key arguments support the continued relevance of SOEs, particularly in emergencies. First, SOEs, which contribute approximately 10% to global GDP,[251] have been recognized for their stabilizing functions during the economic downturns. Research shows that SOEs effectively acted as macroeconomic stabilizers post-2008, facilitating recovery by aligning with government policy objectives, such as employment growth.[252] The COVID-19 pandemic further highlights the critical role of SOEs in ensuring resource security amidst global supply chain disruption. The impact of the 2008 financial crisis and the COVID-19 pandemic on the productivity and efficacy of SOEs has been a topic of interest. While some studies found that the crisis of 2008 had a positive influence on the after-crisis labor productivity of SOEs,[253] others emphasize the risk of resource misallocation and the rise of 'zombie firms' due to government-led investment through SOEs during crisis periods.[254]

2.5. Legal Framework for Privatization of State-owned Enterprises

2.5.1. Foundational Legal Norms

2.5.1.1. Constitutional Issues

The success of privatization programs relies significantly on strong legal foundations. The objectives of these programs shall align with constitutional provisions that govern business activities and privatization specifically. Furthermore, they must adhere to overarching principles, which shape the relationships between private businesses and their interactions with

[249] ibid.

[250] Maria Vagliasindi, Tito Cordella and Judith Clifton, 'Introduction: Revisiting the Role of State-Owned Enterprises in Strategic Sectors' (2023) 26 Journal of Economic Policy Reform 1.

[251] Sonia Royo, Ana Yetano and Javier García-Lacalle, 'Accountability Styles in State-Owned Enterprises: The Good, the Bad, the Ugly ... and the Pretty' (2019) 22 Revista de Contabilidad - Spanish Accounting Review 156.

[252] Mingyue Fang and Rui Ruan, 'State-Owned Enterprises in China as Macroeconomic Stabilizers: Their Special Function in Times of Economic Policy Uncertainty' (2023) 31 China & World Economy 87.

[253] Haiyue Liu, Doudou Li and Shuyan Xu, 'The Impact of Internal Financing on Productivity—An Empirical Study on Chinese Listed Manufacturing Firms' (2018) 6 Economics World 350.

[254] Jiani Li, Jie Li and Tianhang Zhou, 'State Ownership and Zombie Firms: Evidence from China's 2008 Stimulus Plan' (2023) 31 Economics of Transition and Institutional Change 853.

the state or public sector. These principles foster a legal setting conducive to private investment, thereby facilitating successful privatization efforts. In jurisdictions with a formal constitution, specific provisions may directly or indirectly influence privatization activities. In the absence of a written constitution, provisions of a constitutional nature may still exert similar effects. Provisions of this kind can be categorized into three groups: those that safeguard specific types of public property or activities from privatization, those that impose procedural requirements on the privatization process, and those that impose certain controls on privatization authorities.[255]

(i) Constitutional safeguarding of specific categories of property or sectors

In many socialist countries, constitutions historically designated all productive assets, including enterprises, as state property or property belonging to the people, thereby granting the state special protection and privileges. This framework, largely derived from the 1936 Soviet Constitution, required the repeal for SOE privatization to occur. For instance, the 1976 Constitution of Portugal declared the nationalizations from the 1974 revolution as irreversible,[256] but certain amendments were made in 1982[257] and 1989[258] to facilitate SOE privatization.

Another form of constitutional restriction is the prohibition on private-sector involvement in specific strategic sectors of the national economy. For example, Article 177 of the Brazilian Constitution historically granted the state a monopoly over petroleum and natural gas, but this was modified in 1995 to allow concession regime through further legislative action. Mexico's constitution also contained restrictive clauses on hydrocarbons and previously prohibited the privatization of public commercial banks until amendments in 1990. In some jurisdictions, while certain activities remain state-controlled, private participation is allowed through joint-ventures or concession agreements. Bolivia's constitution (Article 139), for instance, recognizes state ownership of petroleum deposits but permits private sectors to engage in exploration and production under concession contracts. Germany's constitution uniquely mandates federal administration for certain public services like railways and telecommunications, implying a constitutional barrier to privatization.[259] Particularly, Article 87e(3) of the Basic Law sets limits

[255] For more discussion, *see* Akritas Kaidatzis, 'A Typology of the Constitutional Limitations on Privatization', *Hellenic Review of European Law (Special Edition)* (2007); Daintith (n 25); Guislain (n 89); Terence Daintith and Monica Sah, 'Privatisation and the Economic Neutrality of the Constitution' [1993] Public Law 465; Tony Prosser, 'Constitutional Limitations on Privatisation', *U.K. Law for the Millennium* (The UK National Committee of Comparative Law 1998); Whitfield (n 94).

[256] Article 83, Portuguese Constitution of 1976.

[257] The 1982 amended Constitution revokes Article 50, which emphasized the collective ownership of primary means of production, economic development planning, and the democratization of the institutions. Article 61(1) includes the possibility of free private initiative as an instrument of the collective progress.

[258] The 1989 amended Constitution removes the reference to nationalization as a state objective in Article 81, deletes the mention of collective appropriation of the means of production in Article 288, and allows the reprivatization of nationalized enterprises in Article 83.

[259] Articles 87d – 87f, Basic Law of Germany.

to a far-reaching substantive privatization of federal railway infrastructure companies: 'The Federal Government accepts private investors but must always hold the majority of shares'.[260]

In addition, some constitutions restrict foreign investment in specific sectors, thus further complicating privatization efforts. This is notably observed in Central and South America, as historical exploitation by foreign entities, particularly United States capital, has prompted these countries to constitutionally ban the alienation of their natural resources.[261] For example, Article 176 of Brazil's constitution historically restricted mining operations to Brazilian-controlled entities. However, significant amendments to the Constitution in 1995 modified this provision, allowing foreign subsidiaries to engage in mining, provided they were established under Brazilian law and maintained headquarters in the country.[262] Furthermore, the amendments abolished preferential treatment for Brazilian enterprises in public procurement,[263] thereby enhancing the competitive landscape for foreign and domestic private enterprises alike.

(ii) Constitutional requirements as to procedure of privatization process

Constitutions may set requirements for the authorization over privatization. In many civil law countries, especially those influenced by the French legal tradition, constitutional provisions explicitly mandate parliamentary approval for privatizing SOEs. For instance, Article 34 of the French Constitution of 1958 required laws on nationalization and the transfer of public-sector enterprises to be legislated by parliament. Similar requirements are found in the constitutions of Morocco, Senegal, and Togo that necessitate legislative authorization for transferring majority stakes in SOEs to the private sector.[264] In certain jurisdictions, constitutions provide detailed requirements for the content of the enabling legislation. Article 11 of the 1992 Paraguayan Constitution, for example, mandates that laws concerning privatization set out procedures for granting preferential rights to employees of the privatized entity. On the other hand, common law countries, such as Australia, Malaysia, New Zealand, and the United Kingdom, typically allow the government to privatize public assets without legislative intervention, provided there is no explicit constitutional prohibition.[265]

Constitutions may also impose limitations on government discretion in privatization, as evidenced by a comparative analysis of the French and British systems.[266] In France, any

[260] For more discussion on constitution foundations of railway regulation in Germany, *see* Thomas Fetzer, 'Railway Regulation in Germany', in Matthias Finger and Juan Montero (eds), *Handbook on Railway Regulation* (Edward Elgar Publishing 2020).
[261] Daintith (n 25).
[262] Article 176(1), Brazilian Constitution (amended) (1995).
[263] Amendment No. 6/1995 of the Brazilian Constitution revokes Article 171 that makes a distinction between Brazilian companies and Brazilian companies of domestic capital in the public procurement context.
[264] Article 71 of Morocco's Constitution; Article 67 of Senegal's Constitution; Article 84 of Togo's Constitution.
[265] Guislain (n 89) 37.
[266] For an in-depth examination, *see* Tony Prosser, 'Constitutions and Political Economy: The Privatisation of Public Enterprises in France and Great Britain' (1990) 53 The Modern Law Review 304; Cosmo Graham and

privatization initiative must be legislatively authorized, thereby requiring prior parliamentary oversight of the government. Conversely, the United Kingdom lacks such a requirement, thus allowing the government to bypass parliamentary control unless legislative action is warranted for other reasons. The asset valuation for privatization further illustrates the divergent constraints faced by the French and British governments. The French Constitutional Council establishes that the principles of equality and the right to just compensation, as stated in the Declaration of Human Rights (Article 7), prevent the transfer of public assets to private entities at undervalued prices. Consequently, independent expert valuations are mandated, ensuring that sales occur only at prices reflective of true asset value. In contrast, the United Kingdom's approach involves post-transaction scrutiny by the National Audit Office and the Public Accounts Committee, lacking the preemptive checks present in the French system. Additionally, the French Constitutional Council has sought to regulate the use of 'golden shares', which allow the Minister of the Economy to veto major share acquisition in privatized enterprises. While the Council upholds the constitutionality of these provisions, it requires that the minister justify each veto, with judicial oversight available to challenge such decisions. In the United Kingdom, however, the governance of golden shares is embedded within the articles of association of the respective enterprises, which potentially limit judicial recourse and often do not require justification for government actions. The French constitutional framework thus provides a level of parliamentary and judicial oversight over privatization that is absent in the UK. However, this advantage should be weighed against potential drawbacks of cumbersome and lengthy procedures.[267]

(iii) Control of constitutionality of privatization legislation

Control of constitutionality of privatization legislation has emerged as a significant legal issue in many jurisdictions. For example, France's Constitutional Council has the authority to review legislation prior to its promulgation. In Poland, there was a notable case where the president referred a privatization law to the constitutional court, arguing it violated the separation of powers by requiring specific parliamentary approval for privatization in strategic sectors.[268] The Polish Constitutional Court upheld this argument, declaring the law unconstitutional. Turkey has witnessed frequent constitutional challenges to privatization laws.[269] In 1994, the Constitutional Court invalidated Law No. 3987, which allowed the government to privatize through statutory decrees, asserting that such powers belonged

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others, *Privatizing Public Enterprises: Constitutions, the State, and Regulation in Comparative Perspective* (Oxford University Press 1991).

[267] Guislain (n 89) 39.

[268] Michael S Borish and Michel Noël, 'Private Sector Development during Transition : The Visegrad Countries' (The World Bank 1996) Discussion Paper <https://digitallibrary.un.org/record/194716> accessed 14 December 2024.

[269] Guislain (n 89) 40.

exclusively to parliament.[270] Furthermore, the Turkish Constitutional Court exercises judicial review over the justification for a privatization program. The Court annulled critical articles of Law No. 4107 of 1995, which enabled the privatization of up to 49% of Turk Telekom's shares, on the basis that these provisions granted excessive discretion to the administration (the Privatization High Council) in determining the valuation of sale conditions of Turk Telekom.[271] Previously, the Court also annulled portions of Law No. 4000 on the sale of shares in Turk Telekom, specifically criticizing the provisions allowing the Ministry of Transport to determine the rules and procedures to sell 49% of Turk Telekom, deeming it an inappropriate transfer of legislative power.[272] These judicial interventions compelled the Turkish government to adopt a more systemic approach to privatization. The legislative landscape shifted with the introduction of Law No. 4161 in 1996, which established a Value Assessment Committee responsible for formulating sector policies and successfully withstood constitutional review. [273] The progression continued with Law No. 4502 in 2000, which aimed to dismantle Turk Telekom's monopoly by 2003.

2.5.1.2. Property rights

In essence, privatization is the process of transferring ownership of specific assets from a public entity to a private entity, thereby illustrating the importance of ownership rights. From a legal approach, ownership specifies the rights and obligations associated with a particular object and to other subjects. It includes a set of rights recognized by the law, specifically the rights to use and control assets, to derive economic benefits from ownership, to dispose of assets, and to transfer any of the aforementioned rights to others.[274] The concept of full ownership can only be articulated when the owner possesses the capacity to exercise these diverse rights. The law may limit the exercise of these rights, however such limitations must not render them devoid of significance.[275] Therefore, the role of property rights in privatization is to (i) clarify ownership of SOEs and their assets, (ii) establish a legal mechanism for transferring these rights from the state to private entities, and (iii) ensure protection and enforceability of these newly acquired rights.

Property rights are a fundamental component of a market economy and are typically safeguarded by the constitution or constitutional tradition of a country. Moreover, ownership specifies an individual's rights and obligations pertaining to a specific object and in relation to

[270] İzak Atiyas, 'Recent Privatization Experience of Turkey: A Reappraisal' in Ziya Onis and Fikret Senses (eds), *Turkey and the Global Economy: Neo-Liberal Restructuring and Integration in the Post-Crisis Era* (Routledge 2009).
[271] ibid.
[272] ibid.
[273] ibid.
[274] Guislain (n 106) 47; Svetozar Pejovich, 'Basic Institutions of Capitalism', in *The Economics of Property Rights: Towards a Theory of Comparative Systems* (Springer Netherlands 1990) 28.
[275] Guislain (n 89) 47.

others, therefore property rights are regulated by civil law. However, in some constitutions or legal systems, particularly those influenced by communist ideologies, private ownership rights may be unrecognized. Moreover, in socialist economies, the rights to use and benefit from assets were often shared between enterprises and central authorities, leading to ambiguity in property rights. This ambiguity reflects the confusion typical of command economies, where all property is state-owned. Countries moving away from communism frequently need constitutional amendments to enable privatization, as seen in Central and Eastern Europe and the former Soviet republics in the late 20th century. The transition process often involves granting elements of property rights to various stakeholders, including managers and employees of SOEs, which complicates privatization efforts. For instance, the Polish government faced resistance when attempting to sell SOE assets without the consent of workers' councils, highlighting the complexities of ownership and worker expectations during privatization.[276] The corporatization policy under Poland's privatization law of 1990 led to the state treasury taking legal ownership of enterprises, thus dissolving workers' councils. This demonstrates that as privatization reintroduces property rights, it raises critical questions regarding key issues such as restitution, legitimacy, equity, and social justice, particularly in countries that historically opposed private property. Addressing these issues is crucial for privatization to achieve its intended outcomes.[277]

Successful privatization depends on a clear transfer of ownership titles and the establishment of robust private property rights, which are essential for the functioning of a market economy and the attraction of foreign investment.[278] A comprehensive privatization must clarify definitions and protections of ownership rights, the processes for titling and registration, the enforcement mechanisms, and the effectiveness of the judicial system. Ultimately, the legal framework for privatization should eliminate obstacles arising from unclear property regimes or inadequate protection of ownership rights.

2.5.2. Privatization Law

2.5.2.1. Legislative approaches

The need for a country to enact a privatization law depends on its unique legal and political context and the specific attributes of the SOEs intended for privatization. In certain jurisdictions, the government can facilitate the privatization process without special laws, either because the constitution does not demand them or existing SOE legislation is sufficient.

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[276] Barthold Albrecht and Marcel Thum, 'Privatization, Labor Participation, and the Threat of Bankruptcy: The Case of Poland' (1994) 150(4) Journal of Institutional and Theoretical Economics 710.

[277] Richard E Ericson, 'The Concept and Objectives of Privatization' in Hans Smit and Vratislav Pěchota (eds), *Privatization in Eastern Europe: Legal, Economic, and Social Aspects* (Martinus Nijhoff Publishers 1994) 22.

[278] Mario Baldassarri and Luigi Paganetto, 'Introduction' in Mario Baldassarri, Luigi Paganetto and Edmund S Phelps (eds), *Privatization Processes in Eastern Europe: Theoretical Foundations and Empirical Results* (Palgrave Macmillan UK 1993) 9.

When legislative action is deemed necessary, the decision between a comprehensive law or subordinate instruments becomes critical. It may be advantageous to confine the law to overarching principles and leave the details of its application to subordinate instruments. However, no universal guideline exists to determine which elements of privatization should be governed by law and which should be left to the discretion of involved parties or the relevant authorities, such as the ministers or privatization agencies. This determination is influenced by various factors, including constitutional, legal, and political traditions, the prevailing political climate, and the level of trust that parliament has in the government.[279] Additionally, the choice of legal instruments is shaped by the objectives of privatization initiatives, the need for customized or standardized approaches, the degree of centralization or decentralization in the process, and the accountability mechanisms for executing agencies, whether through *ex ante* or *ex post* controls.[280] These foundational decisions must be made at the outset of the privatization process, as they will significantly shape the legal architecture for privatization efforts. Legislation also should not serve as a substitute for a comprehensive privatization strategy. Overloading a law with considerations meant for subordinate instruments may hinder the flexibility needed for effective privatization[281]. Certain strategic aspects, such as the pace of privatization, timing, and selection of privatization techniques, should generally remain outside the law.

Countries may adopt different legislative approaches to SOE privatization, choosing between general legislation for all SOEs and specific laws targeting individual SOEs or groups of SOEs. The choice depends on the need for uniformity in privatization processes versus the need for tailored solutions for specific SOEs.[282] When a cohesive set of rules for privatization transactions is deemed essential, general legislation is advantageous. Such laws typically grant governmental bodies or agencies with broad authority to privatize SOEs. For instance, in the Philippines, Presidential Proclamation No. 50 (in 1986) empowered the president to determine state assets for privatization. General laws may define their scope by clarifying key terms like 'privatization' and setting criteria for the inclusion or exclusion of certain sectors or SOEs. Alternatively, general laws list specific SOEs set for privatization, as seen in Argentina, France, Morocco, and Nigeria from 1989 to the mid-1990s. However, this approach can restrict government flexibility in adapting to changing market conditions, which potentially undermines the effectiveness of privatization strategies. Moreover, the designation of specific enterprises can engender uncertainty for management and staff, adversely affecting productivity and increasing the risk of asset misappropriation, particularly during the lengthy period between designation and actual privatization.[283] To mitigate these risks, some countries have opted for a

[279] Guislain (n 89) 114.
[280] ibid.
[281] ibid 115.
[282] ibid.
[283] ibid 116.

more flexible approach by issuing decrees that list enterprises for privatization. In Mozambique, a series of decrees facilitated the gradual inclusion of SOEs for privatization. This method enables quicker response to market dynamics and reduces the likelihood of asset deterioration prior to privatization. General laws may include privatization operations conducted by SOEs or state holding companies, permitting deviations from standard corporate governance practices. For example, in France, the privatization laws of 1986 and 1993 outlined different procedures based on the level of state ownership in enterprises, thereby establishing a regulatory framework for various privatization scenarios. Conversely, specific legislation is often employed when the privatization scope is limited or when particular SOEs present unique legal challenges that a general law cannot adequately address. In the early 1990s, Argentina, Belgium, Brazil, Canada, and the United Kingdom enacted specific privatization laws targeting highly regulated sectors like finance and infrastructure. In 2005, Japan passed the Postal Services Privatization Act to reform postal services. In Guinea, where the legal framework was weak, privatization agreements were ratified through presidential ordinances, enabling the country to initiate privatization efforts in 1986, prior to the establishment of a comprehensive privatization law in 1993. In summary, the decision on general versus specific privatization legislation reflects the need to balance regulatory consistency and adaptability in addressing the complexities of privatizing SOEs. Each approach carries distinct advantages and challenges that need careful consideration within a country's political, economic, and legal landscape.

2.5.2.2. Major Issues Governed by Privatization Law

The design of a privatization law is critical, as it defines the regulatory framework for a country's privatization initiative, establishes the core principles guiding these efforts, and outlines the institutional mechanisms for policy formulation and execution. As discussed above, the decision to enact a specific privatization law depends on the constitutional and legal contexts of a country. Even in the absence of such a requirement, privatization law serves multiple purposes, such as setting government objectives, creating institutions for implementation, and specifying privatization methodologies and bidder restrictions.[284] The key issues governed by privatization law are as follows:

(i) Identifying privatization candidates

Identifying candidates for privatization is a fundamental aspect of privatization legislation, which sets parameters of the privatization program. The selection criteria for privatizing SOEs depend on the privatization objectives and foundational norms (as prescribed by the constitution). At a minimum, these criteria should incorporate a policy assessment to determine which enterprises are eligible for privatization. In many cases, the law lists the enterprises to be privatized. However, a common challenge with a rigid listing of enterprises for privatization is

[284] World Bank, 'Privatization Laws' (n 41).

its inflexibility, which complicates the addition or removal of entities as the program evolves. To address this, two alternative approaches can be employed:[285] (i) implementing a 'negative list' strategy that allows SOEs to be eligible for privatization except for those explicitly excluded; or (ii) requiring high-level political decisions on a case-by-case or sectoral basis to determine which SOEs are transferred to the privatization agency for disposal.

(ii) Institutional arrangements

Institutional arrangements that prioritize transparency and consistency in implementation are essential for effectively managing privatization programs. The process of privatization transactions has distinct operational requirements that differ from traditional bureaucratic practices. These include the need for transparency, the intersection of privatization and existing political and bureaucratic domains, and the requirement for controlling agencies to maintain professionalism when engaging with private domestic and foreign buyers.[286] Because of these considerations, some suggest establishing a central unit or agency, which is tasked with the overarching guidance of the privatization program and operates under a singular mandate focused on asset and enterprise sales in line with established policy principles.[287] The privatization law should also provide for clear authority over program execution, the capacity to recruit competent personnel and external advisors, and the monitoring and oversight of the process. While a centralized agency is deemed optimal for ensuring coherent policy formulation and process control, the execution of individual transactions should be decentralized as much as possible. This may involve the provision of regional, sectoral, municipal, or enterprise-specific groups that operate under the central agency's guidelines.

(iii) Methods of Privatization

Selecting an appropriate privatization method is critical and should be guided by the specific characteristics of the enterprise and the overarching objectives of the privatization program. Legal frameworks for privatization often specify authorized methods and techniques, requiring a careful review of these provisions to identify permissible approaches in the absence of explicit legislative guidance. Should the existing legislation be inadequate, it may need to be amended to allow for additional techniques or restrict certain methods. Implementing regulations typically offers further clarity on how these techniques are applied.[288] Many privatization methods originate from established private commercial practices, particularly in the context of mergers and acquisitions. However, certain techniques are uniquely applicable to the privatization of SOEs and should be explicitly incorporated into privatization legislation. Post-socialist countries' privatization experiences have underlined the need for specialized

[285] ibid.
[286] ibid.
[287] ibid.
[288] Guislain (n 89) 40,49.

techniques to address the unique challenges faced by countries in Central and Eastern Europe, as well as the former Soviet Union.

(iv) Valuation of SOEs to be privatized

The valuation of SOEs for privatization is a complex process that requires careful consideration to ensure fair market pricing and public accountability. An independent valuation is necessary to provide political protection for public officers against accusations of undervaluing assets and to mitigate risks of collusion between buyers and privatization officials, particularly in situations with insufficient competition.[289] While establishing a reference price through independent valuation can be beneficial, utilizing competitive and transparent sale procedures is often more advantageous. Competitive bidding allows multiple potential buyers to perform their valuations, which can more accurately reflect the enterprise's true value. This approach is generally more efficient and cost-effective than relying solely on pre-sale expert valuations, despite some jurisdictions mandating prior valuations in privatization processes.[290] Valuation methodologies should be tailored to the specific context of the country and sector, as generic approaches may not be applicable. Ultimately, valuation should serve as a guideline for the selling agency, allowing flexibility to accept bids below the estimate if competitive procedures yield no acceptable offers.[291] Moreover, privatization law should mandate the publication of valuation reports for public accountability.

2.5.3. Supporting Laws

The legal environment of a country is crucial to the success of privatization programs, affecting both the preparatory processes and the operational framework for newly privatized enterprises. A supportive legal framework is essential in two main areas: it must establish laws for the preparation and execution of privatization transactions, and it should create an environment that enables privatized businesses to access essential resources, engage in enforceable contracts, and compete equitably with both each other and the remaining state sector.[292] Labor restructuring is often necessary prior to privatization, which necessitates the establishment of labor laws that balance the rights of redundant employees with the employer's need to adapt the workforce to new market demands. Privatized enterprises operate more efficiently under competitive conditions, thus underscoring the importance of competition laws. These laws should facilitate the assessment of potential anti-competitive effects arising from the acquisition of state enterprises by powerful entities and prohibit unfair trade practices. In the case of privatizing public utility enterprises, a regulatory framework must be legally established to safeguard public interests in pricing and service quality and to encourage future market

[289] ibid 118, 120.
[290] ibid 119.
[291] ibid 120.
[292] World Bank, 'Privatization Laws' (n 41).

entrants. While some legal factors may only indirectly influence the privatization process, others will directly and significantly impact it. Not all identified legal shortcomings can or should be addressed simultaneously, therefore the scope of necessary reforms will vary based on the specific context of each country.[293] Government legal advisors must identify existing laws, regulations, practices, and institutions that hinder privatization efforts. Once these obstacles are recognized, prioritizing their resolution is critical. This may involve repealing or amending existing legislation or adding specific provisions into privatization laws. For instance, nations transitioning from centrally planned economies need to develop an entirely new legal framework to support economic activity. For instance, the governance of privatization transactions often falls under corporate law, especially for SOEs structured under private law. Additionally, foreign investment legislation significantly influences the extent of foreign participation in privatization processes. For the purpose of the comparative study between the two transition economies - Vietnam and Hungary - the research focuses specifically on company law and foreign investment law as critical components supporting privatization initiatives.

2.5.3.1. Company law

Company law serves as the foundational framework for the establishment, management, operation, and dissolution of companies, outlining the legal boundaries within which these entities function. It includes authorization for different types of companies, such as limited liability and joint-stock companies, and grants them juridical personality. Key aspects of company law cover minimum capital requirements, regulations for the sale or transfer of shares, and the distribution of powers among corporate governance structures. Corporatization, or the transformation of enterprises into corporations under contemporary corporate law, is a critical precursor to effective privatization. This process allows for clear identification of assets and liabilities, establishes a transitional board of directors, issues shares to the government, and facilitates the sale of partial interests as needed. Company law also allows companies to deviate from default legal provisions, enabling customized operational methods, as long as the rights of shareholders and creditors are safeguarded. The significance of a robust legislative framework is underscored by the challenges faced by many transition economies that historically lacked such structures.[294] In the context of privatizing SOEs, the unbundling of rights associated with shares can facilitate the transition to private ownership. This may involve separating income rights from control rights or restricting the rights linked to specific classes of shares. Countries like Mexico and Jamaica established different share categories with varying rights, enabling the government to retain control while gradually transferring ownership.[295] This approach is particularly advantageous when the government seeks to maintain a majority stake temporarily,

[293] Guislain (n 89) 87.
[294] Cheryl W Gray and Rebecca J Hanson, 'Corporate Governance in Central and Eastern Europe : Lessons from Advanced Market Economies' (World Bank Group 1993) Policy Research Working Paper WPS1182.
[295] Guislain (n 89) 57.

either due to underdeveloped capital markets or a strategic desire to enhance the enterprise's performance before further divestment.

Post-privatization control devices are another issue that may be governed by company law. The phenomenon of state control over privatized companies can be tracked back to the privatization of SOEs, [296] which often engenders a dual sense of insecurity for both the state and the new private owners concerning their respective interests in these entities. Governments are concerned not only with economic implications but also with political and security aspects, whereas new owners frequently worry that state involvement in privatized firms may threaten their economic and commercial interests.[297] In fact, states typically seek to maintain a degree of oversight over privatized entities, particularly those in strategic sectors, to safeguard national interests.[298] In this context, post-privatization control measures emerge as legal devices designed to reconcile the interests of the state and private owners. These measures include various provisions and arrangements established at the time of privatization to ensure government influence over the privatized SOEs at a certain level while shielding these companies from competitive pressures in the corporate control landscape. Prominent post-privatization control mechanisms include:[299]

(i) Golden shares: This instrument grants the government authority over critical industries without prohibiting private ownership. Golden shares permit the government to veto certain corporate decisions, thus extending the state influence beyond the initial privatization phase, despite the government often holding only a minority stake or a single share. Golden shares serve as a bridge between the principles of free market privatization and the need for state oversight in privatized enterprises, making them a favored tool for governments engaged in privatization efforts.

(ii) Retaining a controlling interest: In this scenario, the government opts to privatize a minority stake in an enterprise, thereby preserving public ownership and control over the long term. This strategy aims to enhance the enterprise's performance by incorporating private capital and management expertise while ensuring that the government retains ultimate control.

(iii) State core of shareholders: This approach involves structuring the ownership of the privatized enterprise to include a stable group of national investors, such as banks or industrial groups, who are required to maintain their shareholding for a designated

[296] Bernardo Bortolotti and Domenico Siniscalco, *The Challenges of Privatization: An International Analysis* (Oxford University Press 2004) 88–89.
[297] Atip Latipulhayat, 'Golden Shares and Privatisation of Strategic Sectors: A Comparative Study between Indonesia and the UK' (2012) 2 International Journal of Public Law and Policy 397.
[298] Stefan Grundmann and Florian Möslein, 'Golden Shares - State Control in Privatised Companies: Comparative Law, European Law and Policy Aspects' (2004) 1 European Banking and Financial Law Journal 2.
[299] OECD, 'Privatising State-Owned Enterprises' (n 219) 106–116.

period. This arrangement aims to provide stable governance in the initial post-privatization phase, thus protecting the enterprise against hostile takeovers. This strategy is particularly relevant in contexts with underdeveloped equity markets and concentrated ownership among a few shareholders.

Despite the utility of these control mechanisms, they raise critical legal and governance questions in company law. A significant issue in corporate governance stems from the state's retained ownership stake – that is, the state, as a shareholder, possesses rights that differ from those of traditional private shareholders.[300] The overarching goal of privatization is to enhance corporate efficiency and performance, thus privatization efforts should involve not just ownership transfer but also reforms in corporate governance structures. Initiatives that aim solely to generate revenue without fostering effective governance frameworks are unlikely to improve corporate performance as intended.

2.5.3.2. Foreign Investment law

Privatization is an essential channel to accommodate foreign participation in countries with inadequate domestic savings to support economic growth and development.[301] Foreign investors are expected to assist in transferring advanced technologies and providing entrepreneurial and managerial expertise that may be lacking in economies transitioning from central planning to market-oriented systems. The foreign investment regime includes various aspects, some applicable to all foreign investments while others are specifically relevant to the privatization process. An assessment of a country's legal and constitutional framework is necessary to ascertain whether it adequately safeguards the interests of foreign investors. The law should ensure equal treatment for foreign investors involved in the privatization initiative adhering generally accepted international standards. Key considerations related to foreign investment during SOE privatization include:

- The presence of legal provisions that prevent discrimination against foreign investors, such as limitations on ownership stakes in privatized SOEs, restrictions on foreign ownership of certain assets, especially land and real estate, and prohibitions or limitations on foreign participation in certain sectors earmarked for privatization.
- The regulatory environment that guarantees the repatriation of profits and capital;
- Investment incentives for foreign investors, especially strategic investors, to participate in privatization programs;

[300] Ádám Auer and Tekla Papp, 'Corporate Governance in State-Owned Companies in Hungary' [2017] Public Administration 26, 28.
[301] Baldassarri and Paganetto (n 278) 12.

- Clarity in the legal framework to avoid ambiguous terms allowing for administrative discretion that can deter foreign investment;
- Legal protections for foreign investors participating in the SOE privatization process;
- Consistency between the foreign investment laws and the privatization laws;
- Information disclosure and transparency.

2.6. Conclusion

The chapter outlines the complexities of privatization, focusing on its ideological, political, and economic foundations. It explores the dichotomy between public and private spheres, tracing the historical evolution of privatization from philosophical debates in ancient Greece to modern neoliberal policies. The chapter also examines the concept of SOEs, which lacks a universal definition, and proposes the understanding of SOEs within this research. By detailing the processes, definitions, and diverse national approaches to privatization and SOEs, the chapter underscores the complexities and variations in the privatization of SOEs. The analysis in this chapter answers the research question, 'What are the rationales justifying the privatization of SOEs?'. The debate on the SOE privatization over the past decades shows that privatization has been shaped by broader global trends, such as market liberalization and shifts in governance models, while also being deeply influenced by local political ideologies and economic conditions. Finally, the chapter presents major issues in the legal framework for SOE privatization by categorizing them into three sets: (i) foundational legal norms, (ii) privatization law, and (iii) supporting laws. These serve as the guidance for the comparative analysis between the Vietnamese and Hungarian laws on SOE privatization. The next chapter will provide an analysis of the contexts of SOE privatization in Vietnam and Hungary, which helps better understand their trajectories toward market-oriented reforms despite a shared legacy of centrally planned economic systems.

CHAPTER 3

Initial Conditions and Practices of Privatization of State-owned Enterprises in Vietnam and Hungary

This chapter offers a comparative analysis of the initial conditions and practice of SOE privatization in Vietnam and Hungary, two transitional economies that began reforming their state economic sector in the post-communist era. The objective is to explore how these countries, despite sharing a common legacy of centrally planned economies, took different paths in embracing market-oriented reforms. The chapter discusses the initial economic, political, and legal conditions that shaped the reform agendas in Vietnam and Hungary, respectively. The chapter contributes to understanding the rationales justifying SOE privatization in Vietnam and Hungary. In addition, the analysis will provide insights into the design, development, and implementation of legal frameworks for privatizing SOEs in the two countries in subsequent chapters. The chapter follows a chronological structure to track the evolution of SOE privatization practices from the early reform periods to the most recent developments.

3.1. Vietnam

3.1.1. Initial Conditions

3.1.1.1. Economic Factors

Vietnam's shift from an economy under centralized control to a market economy follows a unique path. The CPV governed the economy through conventional Soviet institutions that were set up in the North in the late 1950s and later extended to the South after reunification in 1975. Accordingly, the Vietnamese economy was characterized by central planning, agricultural corporatization, the nationalization of major enterprises as SOEs, state control over domestic and foreign trade, and reliance on Soviet and Chinese assistance.[302]

The primary driver behind the economic reform was the failure of the command economy, as it showed inherent flaws from its inception.[303] The main issue was the Northern region's lack of material resources and the state's struggle to meet the stringent demand of the economic model.[304] Political leaders however utilized the war conditions to excuse the shortcomings,

[302] Adam Fforde, 'A Public Affair? Vietnam's State Enterprise Sector: The "State Business Interest" and Policy History' (2021) 73 Europe-Asia Studies 559, 564; Robert Cassen (ed), *Soviet Interests in the Third World* (Sage Publications 1985).
[303] John Walsh, Burkhard Schrage and Trung Quang Nguyen, 'Opening of the Vietnamese Economy: Achievements and Challenges' in John Walsh, Burkhard Schrage and Trung Quang Nguyen (eds), *The Political Economy of Vietnam's Industrial Transformation* (Springer 2021) 15.
[304] James Riedel and William S Turley, 'The Politics and Economics of Transition to an Open Market Economy in Viet Nam' (OECD 1999).

thereby deflecting accountability for systemic failure.[305] Le Duan, the General Secretary of CPV at that time, found himself at a crossroads post-reunification, perceiving the 'collective mode' as one of humanity's most significant inventions.[306] By the late 1970s, both central and local authorities began to acknowledge the struggles faced by SOEs under the socialist transformation policies. The CPV admitted that, despite a steady increase in state investment capital and the number of SOEs dominating the material production sector,[307] the industrial production value did not rise as expected.[308] In the late 1970s, the average annual growth rate of industrial production at industrial SOEs was 1.5% in comparison with 0.6% for the overall economy.[309] Consequently, the ambitious industrial production targets set by the 4th National Congress of CPV remain unmet. It was clear that the economic model was not working.

The cessation of foreign aid and the imposition of an economic blockade by the United States significantly exacerbated Vietnam's economic challenges during the late 1970s and early 1980s. The deterioration of Sino-Vietnamese relations, largely due to the Sino-Soviet split, led to the termination of Chinese subsidies in 1977.[310] As the Soviet Union, the leading nation within the socialist bloc, began to face a gradual economic decline, the ramifications for Vietnam were profound. The reduction in Soviet aid, which was critical for Vietnam's post-war reconstruction and development, became increasingly evident by the late 1970s. When the Soviet Union's economic situation worsened in the early 1980s, Vietnam was compelled to reassess its reliance on Soviet support.[311] The need for this reassessment arose from the sharp decline in aid that affected key sectors of the Vietnamese economy, especially petroleum, food and flour, cotton for the textile industry, and fertilizers. There were additional factors to consider, such as the reluctance of certain Mekong Delta provincial secretaries of CPV to procure rice by coercive measures, and incentives drastically redirected SOEs from fulfilling production quotas towards commercial activities.[312]

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[305] Walsh, Schrage and Nguyen (n 303) 15.
[306] Phong Dang, *Tu Duy Kinh Te Vietnam 1975-1989 [Vietnam's Economic Thinking 1975-1989]* (Tri Thuc 2009).
[307]Between 1976 and 1980, SOEs constituted over 60% of the industrial sector. *See* Manh Duc Dao, '1976-1985: San Xuat Cong Nghiep Chia Thanh 2 Giai Doan Ro Ret [1976-1985: Industrial Production Was Divided into 2 Distinct Periods]' [2023] Tap chi Cong thuong <https://tapchicongthuong.vn/1976-1985--san-xuat-cong-nghiep-chia-thanh-2-giai-doan-ro-ret-110961.htm> accessed 17 December 2024.
[308] Communist Party of Vietnam, 'Bao Cao ve Phuong Huong, Nhiem vu va Nhung Muc Tieu Chu Yeu ve Kinh Te va Xa Hoi Giai Doan 1981-1985 Tai Dai Hoi Dang Lan Thu V [Report on the Main Orientations, Tasks and Targets in the Economic and Social Fields for the 1981-1985 Period at the 5th National Congress]' (1982).
[309] Quoc Ngu Vu, 'SOE Equitization in Vietnam: Experiences, Achievements, and Challenges', *Southeast Asian Affairs 2003*, vol 2003 (2003) 327.
[310] Walsh, Schrage and Nguyen (n 303) 16.
[311] Nguyen Minh Trang and Ton Nu Bao Ninh, 'Vietnam's Economic Transformation after 1986: From Central Planning to Market-Oriented Economy' 3 International Research Journal of Economics and Management Studies IRJEMS <https://irjems.org/irjems-v3i8p115.html> accessed 17 December 2024.
[312] Fforde (n 302) 567.

In the late 1970s, Vietnam's push for reform was driven by a mix of resource shortages and socio-economic issues, worsened by military conflicts and natural disasters. The brief but intense military engagement with China in the northern border areas in early 1979 resulted in substantial losses for both countries involved.[313] The military mobilization and the need to support the war effort placed immense pressure on Vietnam's economic resources. In addition, significant natural disasters, particularly two serious floods between late 1978 and 1979 that ravaged provinces in the Mekong Delta - the principal rice-producing area of the country - resulted in numerous families being rendered homeless and the postponement of crop planting.[314] Food shortages and hyperinflation further exacerbated the situation.[315]

The combination of an unsuitable economic model, leadership changes, and systemic failures in policy implementation led to economic difficulties faced by Vietnam in the 1980s. The transition to a Soviet-style economic framework in Southern Vietnam proved to be particularly detrimental, resulting in a severe crisis marked by declining growth rates and high inflation.[316] The country experienced a deepening socio-economic crisis, with stagnation in production and shortfalls in economic targets set by the Five-Year Plan of the 1981 and 1985 period. Many sectors reported negative growth, and hyperinflation escalated to an astonishing 700%, severely impacting the lives of government officials, civil servants, and the general population.[317] Over 7 million individuals faced severe hunger, and national foreign currency reserves fell to critically low levels.[318] In 1989, the GDP of Vietnam dropped to USD97, while the external debt-to-GDP ratio escalated to 330%.[319]

Vietnam began a transition from plan to market in the 1980s, marked by Decision No. 25-CP in 1981 that allowed all SOEs to operate according to market principles.[320] Resolution No. 156-HDBT issued three years later marked a final push to maintain central planning and target the problem of scattered SOEs - a result of uncoordinated asset acquisitions by various state groups since the 1950s without central control. The policy aimed to rearrange (*sap xep lai*), literally means transferring SOEs to new owners.[321] Following the formal start of economic reform in late 1986, important changes in incentives and regulations were implemented to

[313] Walsh, Schrage and Nguyen (n 303) 16.
[314] Dang (n 306); Andrea Pressello, 'The Cambodian Conflict and the Polarization of Southeast Asia: Japan's Response, 1978–1980', *Japan and the shaping of post-Vietnam War Southeast Asia* (Routledge 2017).
[315] Melanie Beresford, 'Doi Moi in Review: The Challenges of Building Market Socialism in Vietnam' (2008) 38 Journal of Contemporary Asia 221.
[316] Dinh Lam Tran, 'The State-Owned Enterprises Reform in Vietnam' (2014) 6 Suvannabhumi 37.
[317] Trang and Ninh (n 311).
[318] ibid.
[319] Quan-Hoang Vuong, 'The Financial Economy of Viet Nam in an Age of Reform, 1986–2016', in Ulrich Volz, Peter Morgan and Naoyuki Yoshino (eds), *Routledge Handbook of Banking and Finance in Asia* (Routledge 2018) 201.
[320] Fforde (n 302) 561.
[321] ibid 570.

reorganize SOEs and allow enterprises in the private sector to play a more dynamic role in the national economy. Decree No. 217/1987/HDBT was enacted to facilitate greater enterprise autonomy by reducing certain state subsidies and control mechanisms, a key step in Vietnam's broader economic reform agenda.[322] The Vietnamese government had to push for a more substantial reform of SOEs due to tight budgets and serious economic depletion. As such, the Second Plenum of the 7th Party Congress in 1991 approved a proposal for the pilot program of 'equitization', a process of converting SOEs into joint-stock companies.

3.1.1.2. Political Considerations

Vietnam supports state ownership as a means to achieve social equality by adopting orthodox Marxist-Leninism.[323] This ideology is stated in the Communist Manifesto, which posits that a communist revolution requires substantial limitations on private property rights, including the abolition of land ownership and the allocation of land rents for public purposes.[324] In Vietnam, this doctrine was implemented through policies that established the people's ownership of land, nationalized major corporations, created cooperative farms and SOEs, and criminalized private commerce.[325] The concept of the party-state, central to Leninism, also shaped the state governance model. The CPV exerted complete control over the government, legislature, judiciary, armed forces, and all political institutions.[326] This structure goes beyond a mere single-party state, as it represents a comprehensive system aimed at maintaining ultimate control over political activities.[327]

In the 1970s, economic stagnation triggered 'fence breaking' activities (*pha rao*) within the rigid command planning system. Production units and local authorities began employing flexible strategies that not only experimentally combined state and private markets but also violated central regulations.[328] This involved practices such as the unauthorized sale of industrial products in the market and the implementation of contract systems in agriculture.[329] The

[322] Martin Painter, 'The Politics of Economic Restructuring in Vietnam: The Case of State-owned Enterprise "Reform"' (2003) 25 Contemporary Southeast Asia 20, 29.
[323] Gillespie, 'Is Vietnam Transitioning Out of Socialism or Transforming Socialism?' (n 4) 325.
[324] Karl Marx, *Marx: Selected Writings* (Lawrence H Simon ed, UK ed edition, Hackett Publishing Company, Inc 1994) 175.
[325] Ho Chi Minh, 'Report on the Draft Amended Constitution', 18 December 1959, reproduced in Ho Chi Minh Ho Chi Minh's Collected Works (Hanoi: National Politics Publishing House, 1959), pp. 214–221 *cited in* Gillespie, 'Is Vietnam Transitioning Out of Socialism or Transforming Socialism?' (n 4) 235.
[326] Börje Ljunggren, 'Vietnam – the Scope and Limits of Transition' (The Swedish Institute of International Affairs 2024) 2 4 <https://www.ui.se/butiken/uis-publikationer/ui-brief/2024/vietnam--the-scope-and-limits-of-transition/>.
[327] ibid 5.
[328] Adam Fforde and Stefan De Vylder, *From Plan To Market: The Economic Transition In Vietnam* (Westview Press 1996) 130; Brian Van Arkadie and Raymond Mallon, *Vietnam: A Transition Tiger?* (Asia Pacific Press 2003) 49; Martin Painter, 'The Politics of State Sector Reforms in Vietnam: Contested Agendas and Uncertain Trajectories' (2005) 41 The Journal of Development Studies 261, 266–267.
[329] Fforde and Vylder (n 328) 130–131.

prevalence of spontaneous changes and serious economic crises resulted in intense policy debates within the party-state about partial decentralization reforms in agriculture and industrial enterprises between 1979 and 1981.[330] This period of experimentation with reform initiated a transformation in the beliefs of various societal sectors, including the Party and government, thereby altering the informal constraints that significantly impacted economic performance.[331] In a notable shift, Truong Chinh, the acting General Secretary of the CPV, renounced previous dogmas in favor of market-oriented reforms and led a group of reformers to revise the Political Report of the Central Communist Party between July and December 1986.[332] The *Doi Moi* reforms embraced the coexistence of diverse economic sectors within a 'commodity economy' and initiated the opening of international trade and economic relations.[333] These reforms involved de-collectivizing agriculture, liberalizing prices and trade, restructuring state enterprises, and promoting a private economy.[334] Incremental reforms in external economic policy were also implemented, extending foreign economic relations beyond the socialist bloc and encouraging foreign investment.[335] As a result, Vietnam transitioned from a closed, planned economy to a more open, market-oriented economy, characterized by a gradual rather than abrupt reform process.

However, there are two worthy notes regarding Vietnam's political reform as the precondition for SOE privatization. First, unlike the Soviet Bloc, the CPV did not declare an end to socialism following the Soviet Union's dissolution. The *Doi Moi* reforms officially recognized a mixed market economy, retaining certain aspects of the centrally planned economy while reforming others.[336] Accordingly, the National Assembly continues to formulate detailed five-year socio-economic plans to guide national development, and a smaller number of state-owned enterprises have maintained their role within the national economy. These present challenges that are distinct from those faced by transition economies in the former Soviet Union and Eastern Europe. Second, the *Doi Moi* reforms were driven by grassroots initiatives in response to economic crises, with the initial goal of preserving the planned economy rather than

[330] ibid 131–132; Charles Harvie and Tran Van Hoa, 'Vietnam's Economic Reforms and Transition to a Market Economy' in Charles Harvie and Tran Van Hoa (eds), *Vietnam's Reforms and Economic Growth* (Palgrave Macmillan UK 1997) 41–46; Dang Phong and Melanie Beresford, *Authority Relations and Economic Decision-Making in Vietnam: An Historical Perspective* (NIAS 1998).
[331] Arkadie and Mallon (n 328) 49.
[332] Thanh Tu Anh Vu, 'The Political Economy of Private Sector Development in Vietnam since Doi Moi' (Australian National University 2019) 7.
[333] ibid 8.
[334] Harvie and Hoa (n 330); Arkadie and Mallon (n 328) 68–75.
[335] Pietro P Masina, *Vietnam's Development Strategies* (Routledge 2006) 100–112; Vu Tuan Anh, 'Economic Policy Reforms: An Introductory Overview' in Carolyn Gates, Irene Noerlund and Vu Cao Dam (eds), *Vietnam in a Changing World* (Routledge 1995) 25–26.
[336] Gillespie, 'Is Vietnam Transitioning Out of Socialism or Transforming Socialism?' (n 4) 322.

establishing a new market-oriented model.[337] This gradual approach led to the dismantling of the planned economy, which was first called a 'multi-sectoral commodity economy' and then, at the 2001 Party Congress, a 'socialist-oriented market economy'. The unique characteristics pose challenges for the reform of Vietnamese SOEs that are not apparent in the transition economies of the former Soviet Union and Eastern Europe.[338]

The governance structure has undergone major transformations since the *Doi moi*, characterized by bold economic reforms while maintaining political stability. [339] This period saw a notable decentralization of political power and a liberalization of state-society relations, reflecting a shift toward a more polycentric governance model.[340] One of the most important is the relative withdrawal of Party organizations from direct state governance, which affords state bodies greater autonomy to operate.[341] This shift is largely due to the growing market economy, which requires a governance approach relying more on state laws than on party directives.[342] The CPV acknowledges that its frequent interventions may hinder state efficiency and lead to delays in governance processes.[343] Consequently, the National Assembly has emerged as a more active and influential institution, taking on a significant role in reviewing government plans, budgets, and legislative functions.[344] This evolution aligns with the newly adopted doctrine of a 'socialist law-based state', which emphasizes the importance of legal frameworks in governance and necessitates improved lawmaking and supervisory functions for the National Assembly.[345] Additionally, the administrative apparatus has experienced a considerable increase in workload, size, and power, further facilitated by the Party's diminishing involvement in state affairs.[346] Economic development, particularly in sectors with significant state intervention, has also contributed to the expansion of administrative functions.[347] Local authorities have become more

[337] Communist Party of Vietnam, Bao cao chinh tri cua Ban chap hanh Trung uong Dang tai Dai hoi dai bieu toan quoc lan thu VI [Political Report of the Central Executive Committee at the 6th National Party Congress], 15 December 1986.
[338] Nguyen Van Thang and Nick J Freeman, 'State-Owned Enterprises in Vietnam: Are They "Crowding out" the Private Sector?' (2009) 21 Post-Communist Economies 227, 230.
[339] Duy Nghia Pham, 'From Marx to Market: The Debates on the Economic System in Vietnam's Revised Constitution' (2016) 11 Asian Journal of Comparative Law 263, 268.
[340] Duy Nghia Pham and Hai Ha Do, 'The Soviet Legacy and Its Impact on Contemporary Vietnam' in Hualing Fu and others (eds), *Socialist Law in Socialist East Asia* (Cambridge University Press 2018).
[341] Dang Phong and Beresford (n 330); Jonathan D London, 'Politics in Contemporary Vietnam' in Jonathan D London (ed), *Politics in Contemporary Vietnam: Party, State, and Authority Relations* (Palgrave Macmillan UK 2014) 1,7.
[342] John Gillespie, *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam* (1st edn, Routledge 2006).
[343] Gareth Porter, *Vietnam: The Politics of Bureaucratic Socialism* (Cornell University Press 1993) 153–156.
[344] Arkadie and Mallon (n 328) 60; Pham and Do (n 340) 115.
[345] Communist Party of Vietnam, Cuong linh Xay dung dat nuoc trong thoi ky qua do len chu nghia xa hoi (bo sung, phat trien nam 2011) [Political Program for National Construction in the Transitional Period to Socialism (Revised in 2011)].
[346] Dang Phong and Beresford (n 330).
[347] Pham and Do (n 340) 115.

important in the national politics, evidenced by their growing representation in the Central Executive Committee of the CPV and their greater autonomy to manage local resources and investment projects.[348] Fiscal reforms have empowered local authorities to generate and retain surplus funds, thereby increasing their influence in policy-making and allowing for experimentation with local governance strategies.[349] However, differing from the Soviet Bloc model, Vietnamese market reforms have not led to political collapse, rather the CPV continues to exert influence over the state apparatus as well as extend its reach into various societal institutions.[350]

3.1.1.3. Legal Legacies

The evolution of the Vietnamese legal system, particularly during the high socialist era, reflects a complex interplay of Soviet jurisprudence and local ideological influences. In the early 1950s, Northern Vietnam adopted Soviet-style legal principles, which led to the creation of a socialist legal system defined by the 1959 Constitution and the introduction of people's courts in 1960.[351] This system was subsequently extended to the South after reunification in 1975. The Vietnamese legal system was built on the Soviet doctrine of 'socialist legality' (*phap che xa hoi chu nghia*), which defines law as a set of rules imposed by the state to serve the interests of the ruling class and enforced through state coercion.[352] This Marxist-Leninist view fundamentally denies the existence of natural law[353] and prioritizes collective interest over individual rights,[354] thus positioning law as a political instrument of the CPV instead of a protector of citizens' rights.[355] The Soviet-inspired economic, political, and legal concepts have also influenced legal change and transplantation in Vietnam.[356] For instance, the socialist idea of public ownership

[348] Thanh Tu Anh Vu, 'The Political Economy of Industrial Development in Viet Nam: Impact of State–Business Relationships on Industrial Performance, 1986–2013' in John Page and Finn Tarp (eds), *The Practice of Industrial Policy: Government—Business Coordination in Africa and East Asia* (Oxford University Press 2017).
[349] Chris Dixon, 'State, Party and Political Change in Vietnam N' in Duncan McCargo (ed), *Rethinking Vietnam* (Routledge 2004) 18.
[350] Gillespie, 'Is Vietnam Transitioning Out of Socialism or Transforming Socialism?' (n 4) 322.
[351] Penelope Nicholson, *Borrowing Court Systems: The Experience of Socialist Vietnam* (Martinus Nijhoff Publishers 2007); John Gillespie, 'Concept of Law in Vietnam: Transforming Statist Socialism', in Randall Peerenboom (ed), *Asian Discourses of Rule of Law: Theories and implementation of Rule of Law in Twelve Asian Countries, France and the U.S.* (Routledge 2004).
[352] Gillespie, 'Concept of Law in Vietnam' (n 351); Minh Tam Le, 'Ban Chat, Dac Trung, Vai Tro, Cac Kieu va Hinh Thuc Phap Luat [Nature, Characteristics, Role, Types and Forms of Law]' in Minh Tam Le (ed), *Giao trinh Ly luan Nha nuoc va Phap luat [Textbook on Theory of State and Law]* (Cong an nhan dan [People's Police Publishing House] 2003); Gordon B Smith, 'Socialist Legality and the Soviet Legal System' in Gordon B Smith (ed), *Soviet Politics: Continuity and Contradiction* (Macmillan Education UK 1988).
[353] Gillespie, 'Concept of Law in Vietnam' (n 351) 146; Le, 'Ban Chat, Dac Trung, Vai Tro, Cac Kieu va Hinh Thuc Phap Luat [Nature, Characteristics, Role, Types and Forms of Law]' (n 352) 61.
[354] Vladimir Gsovski, 'The Soviet Concept of Law' (1938) 7 Fordham Law Review 1.
[355] Gillespie, 'Concept of Law in Vietnam' (n 351) 146; Le, 'Ban Chat, Dac Trung, Vai Tro, Cac Kieu va Hinh Thuc Phap Luat [Nature, Characteristics, Role, Types and Forms of Law]' (n 352) 68–69; Pham and Do (n 340) 104–105.
[356] Pham and Do (n 340) 128.

made it difficult to recognize private ownership of land,[357] while state sector dominance resulted in distinct legal frameworks governing private and state enterprises. Despite its Soviet roots, the Vietnamese legal system exhibited unique characteristics that diverged from Eastern European models. The CPV emphasized 'revolutionary morality' (*dao duc cach mang*) and the Maoist 'mass line' (*duong loi quan chung*), which encouraged popular participation and support, thereby motivating the masses to engage in bureaucratic and legal work.[358] This approach fostered a legal environment in which party-state officials prioritized a flexible and outcome-oriented approach over strict adherence to legal principles.[359] For this reason, not only was the role of law and legal institutions weakened, but the flexible interpretation and application of or even departure from legal rules in view of moral precepts or political expediency were also allowed.[360] Thus, Vietnam had a less developed legal system in comparison to its Eastern Bloc counterparts.[361]

The legal framework for SOE privatization has been shaped by the distinct features of Vietnam's overall legal system. To swiftly respond to changing economic conditions, the country frequently deployed subordinate law that followed conventional communist practice to 'concretize' the CPV decision.[362] This adaptive approach was exemplified by a series of decrees aimed at reforming SOEs and facilitating their formal privatization. During the period of the high command mechanism between 1975 and 1981, a key policy shift was Decree No. 25-CP of the Government Council (dated 21 January 1981) to legalize and promote commercial activities within SOEs. The subsequent instrument, Decree No. 146-HDBT of 1982, sought to enhance state control over SOEs by regulating commercial transactions and ensuring that production plans remained under government oversight, signaling the grasp of central planning. The promulgation of Decree No. 127 in late 1987 marked the critical step in the post-*Do Moi* reform era, initiating a comprehensive SOE reform program that aimed at establishing a commercial foundation for SOEs, granting them increased autonomy and financial accountability. This decree put into action a resolution of the 6th Congress of CPV that emphasized greater independence for SOEs while maintaining collective ownership of enterprise assets.

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[357] Toan Le, 'Interpreting the Constitutional Debate Over Land Ownership in the Socialist Republic of Vietnam (2012–2013)' (2016) 11 Asian Journal of Comparative Law 287.
[358] John Gillespie, 'Changing Concepts of Socialist Law in Vietnam', in John Gillespie (ed), *Asian Socialism and Legal Change: The Dynamics of Vietnamese and Chinese Reform* (ANU Press 2005) 45,49; Pham and Do (n 350) 106.
[359] Hai Ha Do, *The Dynamics of Legal Transplantation Regulating Industrial Conflicts in Post-Đổi Mới Vietnam* (University of Melbourne, Law School 2016); Pham and Do (n 340) 106.
[360] Pip Nicholson, 'Renovating Courts: The Role of Courts in Contemporary Vietnam' in Jiunn-rong Yeh and Wen-Chen Chang (eds), *Asian Courts in Context* (Cambridge University Press 2014).
[361] John Gillespie, 'Understanding Legality in Vietnam' in Stéphanie Balme and Mark Sidel (eds), *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam* (Palgrave Macmillan US 2007).
[362] Fforde (n 302) 570.

The late 1980s signified a substantial evolution in Vietnamese jurisprudence, moving from the rigid framework of 'socialist legality' to a more sophisticated 'socialist law-based state' (*nha nuoc phap quyen*).[363] The latter emphasizes that the state is constituted by, for, and of the people.[364] This change has facilitated significant legal reforms, which allow for the incorporation of market-oriented legislation and legal principles from capitalist systems,[365] and the emphasis on the rule of law to limit the powers of party-state entities.[366] However, the economic, political, and legal legacies of the socialist era still influence Vietnamese law in the post-*Doi Moi*. Some elements of socialist legality remain in policy documents, statutory laws, legal scholarship, and regulatory practices.[367] The class-based perspective on law continues to have relevance within the 'socialist law-based state', and the CPV's policies remain the primary determinants of legal interpretation and application.[368] Where divergence between law and policy exists, state officials - who are usually simultaneously Party members - tend to follow the latter.[369] Despite an increasing reliance on legal mechanisms by the bureaucracy to govern the economy and society, discretionary power remains substantial, as the enforcement of laws typically necessitates administrative guidance.[370]

3.1.2. Practices of Privatization of State-owned Enterprises

3.1.2.1. Pilot Phase (1992 to mid-1996)

Although the initial legal basis for formal privatization was laid in the late 1980s and early 1990s, the actual moves toward privatization were rather cautious. The 7th Congress of the CPV in 1991 initiated a significant policy shift regarding the ownership structure of SOEs. The Congress pushed for a trial scheme to change or dissolve the ownership of certain SOEs deemed unnecessary for state retention. This regulation stressed that the conversion of eligible SOEs into joint-stock companies should be executed on a pilot basis, with close oversight and careful evaluation of the outcomes prior to any large-scale divestiture.[371] In line with the CPV's resolution, the National Assembly approved a pilot privatization program in late December 1991. Subsequently, the Government issued a legal instrument, namely Decision 202-CT in June 1992, to implement experiments for converting state enterprises into joint-stock companies.

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[363] Xuan Tung Nguyen, 'Tong Bi Thu Do Muoi: "Vi Sao Phap Nuoc Khong Nghiem" [General Secretary Do Muoi: 'Why State Law Is Not Strictly Abided]' (*Ministry of Justice*, 10 May 2018) <https://www.moj.gov.vn/qt/tintuc/Pages/thong-tin-khac.aspx?ItemID=2846>.
[364] Article 2, National Assembly of Vietnam, Constitution 1992 (amended) (2001).
[365] Pham and Do (n 340) 125.
[366] Gillespie, 'Concept of Law in Vietnam' (n 351) 244.
[367] Pham and Do (n 340) 127.
[368] Le, 'Ban Chat, Dac Trung, Vai Tro, Cac Kieu va Hinh Thuc Phap Luat [Nature, Characteristics, Role, Types and Forms of Law]' (n 352) 334; Nicholson (n 360) 557.
[369] Nicholson (n 360) 545.
[370] Arkadie and Mallon (n 328) 60.
[371] Communist Party of Vietnam, 'Resolution No. 2-NQ/HNTW on tasks and solutions for socio-economic stabilization and development during the 1992-1995 period' (1991).

This phase marked a strategic approach to the partial privatization of SOEs by restructuring them into joint-stock companies and enabling the sale of a portion of state-held shares. The implementation guidelines specified that the initial pilot enterprises selected for this process should be small or medium-sized and have the potential to be profitable. SOEs classified as 'strategic enterprises' were explicitly excluded from participating in the privatization process. The shares resulting from privatization were designed to be registered, transferable, and inheritable, thereby enhancing their liquidity and accessibility. Importantly, these shares were made available to both enterprise employees and external investors. Employees of the enterprises were granted preferential access to the shares along with suitable redundancy and retirement packages, ensuring that the transition to a joint-stock model was equitable and took the welfare of the workforce into account. The Ministry of Finance was key in coordinating the efforts of various governmental bodies, including the Central Institute for Economic Management, the Ministry of Labor, War Invalids and Social Affairs, the State Bank, and other governmental bodies to implement the pilot program. The Central Steering Committee for Enterprise Reform (**CSCER**) was formed in September 1992 to supervise governmental efforts in the reform of SOEs. The line ministries and the chairpersons of the provincial and municipal people's committees formed divestiture steering committees to develop divestiture plans, which were then submitted for approval by CSCER and the Ministry of Finance.

Initially, seven SOEs signed up for the pilot program under Directive No. 203/CT dated 8 June 1992, but they later decided to withdraw. Disappointed with the progress made, the Prime Minister issued Directive No. 84-TTg in March 1993 to speed up the pilot program. However, the pilot phase was unsuccessful, with only five SOEs being privatized.[372] Several factors for the failure included:[373] (i) concerns by managers that they would lose the preferential treatment given to state enterprises such as access to land, quotas, subsidized credit, and less strict financial reporting requirements; (ii) the lack of clear and transparent guidelines on privatization procedures, especially those for valuation, formal classification of what enterprises could be privatized, and what to do with the social welfare services, funds and facilities provided by state enterprises prior to privatization; (iii) the fact that many state enterprises are too small for a joint-stock company structure to be economic; (iv) the lack of liquidity in share trading because of restrictions under privatization and the lack of formal share-trading institutions; (v) the limited institutional capacity to implement privatization complex institutional arrangements that provided opportunities to slow progress; (vi) political concerns about the impact of privatization on the leading role of the state in the economy and, consequently, on state control over the economy.

[372] Nguyen Manh Hai and Michael O'Donnell, 'Reforming State-Owned Enterprises in Vietnam: The Contrasting Cases of Vinashin and Viettel' (2017) 41 Asian Perspective 215, 223.
[373] Arkadie and Mallon (n 328) 128.

3.1.2.2. Extended Pilot Phase (mid-1996 to mid-1998)

The Political Report to the 8th Congress of the CPV in mid-1996 raised significant concerns about the slow progress of SOE reform. The report specifically pointed out problems with enhancing enterprise efficiency and accountability, along with the stagnation of the pilot privatization program. The report maintained that mass privatization was not an appropriate approach because 'the state economy plays the leading role and, together with the cooperative sector, will become the foundation of the economy'.[374] Another resolution adopted by the Fourth Plenum of the 8th Congress in 1996 identified the acceleration of SOE reform as one of six priority areas. Key reform priorities included speeding up the privatization program, developing a legal framework for restructuring small SOEs (those with capital below VND1 billion), and converting SOEs into limited liability or joint-stock companies in accordance with the Company Law. Additionally, the resolution called for the implementation of regulations to oversee enterprises with monopoly powers and mandated compulsory auditing and the publication of annual reports.

For the implementation, Decree No. 28 was enacted in May 1996, removing the enterprise management's power to block privatization decisions and setting clear guidelines regarding responsibilities in the reform process. This decree led to the formation of a Central Steering Committee on Privatization, chaired by the Minister of Finance, to manage the privatization process. In March 1997, amendments were made to Decree No. 28, leading to the issuance of Decree No. 44 in June 1998 that marked the next privatization phase. Both decrees aimed to mobilize additional capital and technology for the development of SOEs, while encouraging employees to buy shares. Despite the broadening of the privatization process to include all non-strategic small and medium-sized SOEs, the extended pilot phase saw limited results, as only 25 additional SOEs were privatized between 1996 and 1998.[375]

3.1.2.3. Accelerated Phase (mid-1998 to 2011)

SOE privatization in Vietnam gained significant momentum after the enactment of Decree No. 44/1998/ND-CP in June 1998. This decree created a more structured legal framework for transforming SOEs into privatized entities. However, SOEs in strategic industries and those with capital over VND10 billion were mandated to keep a majority state share during the privatization process, reflecting the government's intent to safeguard strategic sectors and large SOEs from full privatization. The early years of this phase saw a notable increase in the number of SOEs converting to the new structure, with 102 SOEs equitized in 1998 and 249 in 1999.[376] Despite this progress, the government acknowledged the need for further reforms to achieve its

[374] Political Report of the Central Committee at the 8th Congress of the Communist Party of Vietnam in 1996.
[375] Konstantin M Wacker, 'Restructuring of the SOE Sector in Vietnam: Where Do We Stand and What Are the Challenges Ahead?' (ISEAS-Yusof Ishak Institute 2016) 3.
[376] ibid 4.

ambitious target of reducing the number of SOEs by 2005. The viability of certain SOEs and their suitability for joint-stock management remained persistent challenges.

In 2002, Decree No. 64 replaced Decree No.44 to enhance the legal framework for privatization. This decree further decentralized operational control by requiring owning entities to develop specific arrangements for SOEs under their management.[377] It mandated the liquidation of non-strategic SOEs that resisted privatization,[378] showing the government's desire to maintain overarching control over the process. Decree No. 64 also addressed issues related to SOE debt and promoted market-based valuation methods for privatization.[379] The subsequent Decree No. 187 in 2004 continued to refine the privatization framework, focusing on transparency and the development of capital markets.[380] The government's commitment to SOE restructuring was further articulated in the Five-year Socio-economic Development Plan of the 2006-2010 period, which identified SOE reform as a critical task. In 2005, the State Capital Investment Corporation (**SCIC**) was created to consolidate state ownership in small and medium-sized SOEs, facilitating restructuring and divestment efforts.

The 2000s witnessed a substantial increase in the number of privatized SOEs, with a total of nearly 4,000 enterprises undergoing privatization.[381] Notably, between 2003 and 2006, more than 2,600 SOEs were privatized, making up almost 60% of all privatizations over the preceding 25 years.[382] This surge coincided with Vietnam's preparation for the World Trade Organization (**WTO**) accession and the expansion of its stock exchange.

3.1.2.4. Economic Restructuring Phase (2011-2015)

In this period, restructuring SOEs, especially state-owned groups and general corporations, was considered one of the three principal tasks in Vietnam's economic restructuring efforts. The ongoing transition shifted from a focus on economic growth to a more balanced approach to both stability and growth, with a continued emphasis on the leading role of the state economic sector.[383] SOEs were recognized for their importance in providing essential public goods and services for both societal needs and national defense and security.[384] They also serve as the cornerstone of the state economy, fulfilling a leading function and acting as a significant material

[377] Article 3, Decree No. 64/2002/ND-CP on Conversion of State-owned Enterprises into shareholding companies 2002.
[378] Article 2, Decree No. 64/2002/ND-CP.
[379] Articles 9-22, Decree No. 64/2002/ND-CP.
[380] Article 1, Decree 187/2004/ND-CP on Conversion of state-owned enterprises into shareholding companies 2004.
[381] Hiep (n 32) 3.
[382] ibid.
[383] Communist Party of Vietnam, Conclusion No. 10-KL/TW of the Third Plenum of the 11th Party Central Committee dated 18 October 2011
[384] ibid.

force that enables the state to guide, regulate, and stabilize the macroeconomy.[385] Vietnam expanded its perspective on privatization, no longer confining it solely to small and medium-sized SOEs to enhance their performance efficiency. In pursuit of this objective, the Government formulated a comprehensive roadmap, initially stated by the Prime Minister's issuance of Decision No. 929/QD-TTg in July 2012 on the approval of the restructuring scheme of SOEs focusing on economic groups and state-owned corporations for the period 2011-2015. The Prime Minister then enacted Decision No. 37/2014/QD-TTg on issuing criteria and a list of classification of SOEs to promote the arrangement and innovation of existing SOEs.

Nevertheless, the privatization program encountered a slow pace from 2011 to 2015, with just 422 SOEs undergoing privatization, or 78% of the target.[386] Several factors could explain this sluggishness, including: the consequences of the 2007-2008 global financial crisis, the lengthy planning involved in privatizing large-sized SOEs, the reluctance of certain ministries and SOEs to meet privatization targets, and the lack of investor confidence due to the major government ownership of the privatized SOEs.[387] In addition, a review of 426 SOEs that went public between 2011 and 2015 revealed that 70 enterprises had more than 90% state ownership, 82 enterprises had over 65%, 96 enterprises had over 50%, and 156 enterprises had less than 50% of their charter capital owned by the state.[388] The data indicated that many SOEs, which were not subject to controlling shares maintained by the State, struggled to sell their shares, resulting in a high ratio of state capital. Consequently, this situation hindered efforts to innovate governance and attract external capital for business development and failed to draw in foreign investors to engage in the initial purchase of shares in privatized enterprises.

3.1.3. Recent Developments

Vietnam has undergone the new phase of SOE reform, driven by a strong push from within following the 12th National Congress of the CVP and the formation of a new government in early 2016. First, the political leaders' perception of the intended role of SOEs, based on the socialist development principles, is now changing.[389] The statement at the Third Plenum of the 9th Party Central Committee in 2001 was that: 'the state sector plays the decisive role in holding

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[385] ibid.

[386] Mai Khanh, 'Restructuring of SOEs still slow' (*VietNamNet*, 6 March 2016) <https://vietnamnet.vn/en/restructuring-of-soes-still-slow-E151632.html> accessed 28 October 2025.

[387] Bao dau tu, 'Bao cao tinh hinh co phan hoa doanh nghiep nha nuoc giai doan 2011-2015 va 9 thang 2016 [Report on the equitization of SOEs in the 2011-2015 period and the first 9 months of 2016]' (*baodautu*, 27 October 2016) <https://baodautu.vn/co-phan-hoa-doanh-nghiep-nha-nuoc-mot-so-bo-dia-phuong-van-chay-i-d53612.html> accessed 16 February 2024; Hiep (n 32) 3–4.

[388] Quyet Tien Dang, 'Co Phan Hoa Doanh Nghiep Nha Nuoc - Chang Duong 2011-2015 va Dinh Huong 2016-2020 [Equitization of State-Owned Enterprises: The Journey of 2011-2015 and the Orientation of 2016-2020]' [2016] Tap chi Tai chinh 6. State held more than 90% of charter capital in 15 state-owned groups and general corporations such as Vietnam National Petroleum Group, Vietnam Steel Corporation, Vietnam Machinery Installation Corporation Lilama, and Vietnam Airlines.

[389] Knutsen and Do (n 32).

firm to the socialist orientation…and SOEs must be…the core force and the main contributor for the state economic sector to perform the leading role in the socialist-oriented market economy'.[390] However, the 12th National Congress acknowledged the private sector for the first time as 'an important driving force of the economy'.[391] Most recently, the 13th National Congress in 2021 further pointed out the need for a fair business environment that fosters the growth of the private sector to become 'an important impetus for the economic development of the country'.[392] Such an ideology shift implies a more substantial approach to reforming SOEs and encourages the private sector to acquire shares in SOEs that are being privatized or divested.

The economic context of Vietnam during the 2011-2015 period is another driving force for a more substantive phase of the SOE privatization. The Government has faced the expanding fiscal deficit and public debt,[393] prompting the mobilization of financial resources from SOE stakes to support public investment projects. The Government set the target to raise at least VND250 trillion through the privatization and divestment of SOEs between 2016 and 2020.[394] In addition, domestic industry stakeholders, both private sector businesses and more efficient SOEs, have been active principal actors in shaping the privatization policy[395] to remedy inefficient SOEs that have been draining them of resources. A report in 2016 found that SOEs contributed to only 30% of GDP growth, despite accounting for 40% of the country's total investment.[396] SOEs have also continuously received privileges over private businesses in terms of access to land, cheaper loans from state-owned commercial banks, government contracts, and reduced tax rates.[397] SOEs made up 17% of outstanding debt in the economy and 60% of non-performing loans;[398] whereas non-state enterprises, comprising around 96% of the total number

[390] Communist Party of Vietnam, 'Resolution of the Third Plenum of the Party Central Committee under the 9th National Party Congress on Continuing Restructuring, Renovation, and Development of SOEs' 2001.
[391] Communist Party of Vietnam, 'Resolution of the 12th National Party Congress' 2016.
[392] Communist Party of Vietnam, 'Resolution of the 13th National Party Congress' 2021.
[393] Vietnam continuously encountered a budgetary deficit from 2003, with an increase of 8.6 times between 2003 and 2015. The expanding fiscal deficit and public debt have been predicted to pose major risks for the country's macro economic stability in a long term. *See* Hong Hiep Le, 'Growing Fiscal Deficit Presents a Major Risk for Vietnam' (2016) 40 ISEAS Perspective 1.
[394] Decision No. 707/QD-TTg on approving program of restructuring state-owned enterprises with particular attention paid to State-owned economic groups and corporations for the 2016-2020 period 2017.
[395] Knutsen and Do (n 32); Manh Hai Nguyen and Michael O'Donnell, 'Reforming State-Owned Enterprises in Vietnam: The Contrasting Cases of Vinashin and Viettel' (2017) 41 Asian Perspective 215.
[396] World Bank and Ministry of Planning and Investment of Vietnam, *Vietnam 2035: Toward Prosperity, Creativity, Equity, and Democracy* (Washington, DC: World Bank 2016) <http://hdl.handle.net/10986/23724> accessed 28 November 2024.
[397] Hoang Cuong Le, Helen Cabalu and Ruhul Salim, 'Winners and Losers in Vietnam Equitisation Programs' (2014) 36 Journal of Policy Modeling 172.
[398] In 2006, the state economic groups emerged as conglomerates of large SOEs, featured complex cross-ownership arrangements and internal banks. They were operating with financial losses and played a role in the accumulation of bad debts. *See* Government of Vietnam, 'Report No. 460/BC-CP on the Economic Restructuring Plan for the Period 2016-2020' (2016).

of enterprises, only accounted for 21% of total bank credit.[399] At the same time, the more efficient SOEs, which receive minimal state subsidies but possess strong managerial capacities, advanced technology, and human resources, expect greater benefits from increased autonomy through the privatization process.[400]

International stakeholders have exerted a strong external push on Vietnam to expedite SOE privatization. Major international organizations, such as the World Bank, UNDP, and OECD, have consistently criticized the underperformance of SOEs, the continuous postponement of privatization, and the corruption concerns in their studies on Vietnamese SOEs.[401] Key trade partners, especially the United States and the EU, have yet to acknowledge Vietnam as a market economy due to the concern that SOEs continue to enjoy favored access to resources without sufficient political independence and transparency.[402] Moreover, Vietnam's obligations under several high-quality free trade agreements, such as the Comprehensive and Progressive Agreement of Trans-Pacific Partnerships (**CPTPP**) and the EU-Vietnam Free Trade Agreement (**EVFTA**), require the country to ensure a fair playing field among all economic actors, including SOEs, domestic private businesses, and foreign businesses. For example, the CPTPP includes a dedicated chapter on SOEs, marking it as 'the first comprehensive and detailed discipline of SOEs'.[403] This means SOEs must adhere to market principles and transparency requirements regarding ownership, special voting rights, operational data, and business outcomes. Similarly, the EVFTA has a chapter on SOEs that addresses non-discrimination and transparency. Multinational private businesses also advocate for SOE privatization because they perceive investment opportunities in Vietnam.[404] In sum, international stakeholders expect substantial changes in SOE reform policies, going beyond reducing the

[399] S Phang, 'Vietnam Gets Tough on State Firms in Economic Growth Push' (*Bloomberg.com*, 25 July 2013) <https://www.bloomberg.com/news/articles/2013-07-24/vietnam-gets-tough-on-state-firms-in-economic-growth-push> accessed 29 November 2024.

[400] Nguyen and O'Donnell (n 395) 222.

[401] OECD, *OECD Review of the Corporate Governance of State-Owned Enterprises in Viet Nam* (n 20); OECD, 'OECD Peer Review of Competition Law and Policy in Viet Nam' (2018) <https://www.oecd.org/countries/vietnam/competition-law-and-policy-in-vietnam.htm> accessed 30 November 2024; UNDP, *Growth That Works for All: Viet Nam Human Development Report 2015 on Inclusive Growth* (Social Sciences Publishing House 2016); World Bank, 'Taking Stock: An Update on Vietnam's Recent Economic Developments' (World Bank, Hanoi 2018); World Bank, 'Corporate Governance of State-Owned Enterprises: A Toolkit' (World Bank Publications 2014) Document 91357.

[402] US Department of State, '2020 Investment Climate Statements: Vietnam' (*US Department of State*, 2020) <https://www.state.gov/reports/2020-investment-climate-statements/vietnam/> accessed 30 November 2024; US Department of State, '2017 Investment Climate Statements: Vietnam' (*US Department of State*, 2017) <https://www.state.gov/reports/2017-investment-climate-statements/__trashed/> accessed 30 November 2024. https://www.state.gov/reports/2020-investment-climate-statements/vietnam/ (access: 15.9.2024).

[403] Tsuyoshi Kawase and Masahito Ambashi, 'Disciplines on State-Owned Enterprises under the Trans-Pacific Partnership Agreement: Overview and Assessment' (Economic Research Institute for ASEAN and East Asia 2018) . ERIA-DP-2017-13.

[404] Nguyen and O'Donnell (n 395) 222.

number of SOEs to touch the core issue of separating state ownership from the operation of these enterprises.

The SOE reform policy from 2016 onward consists of two key strategies: privatization and divestment. The privatization initiatives now include medium and large SOEs and those of non-strategic interests. This move makes a departure from the earlier principle of 'keeping the big and releasing the small', which held that only small and less important public enterprises would be privatized, while larger SOEs would remain under state ownership because of their strategic position in the national economy.[405] The shift is expected to produce greater outcomes and considerable productivity improvements, contributing to the real GDP growth of the country. Divesting from privatized SOEs is another crucial part of SOE reform, just as important as privatization. The empirical evidence from the last twenty years suggests that the privatization of SOEs in Vietnam has been more symbolic than substantial in nature. Although more than 95% of SOEs had been privatized by 2017, just 8% of their equities had been actually bought by private investors.[406] By increasing the amount of state capital transferred to investors through divestment, the Government can effectively achieve the primary privatization purpose, which is to relocate public resources to more productive sectors. It planned to privatize 137 SOEs [407] and divest in 406 SOEs during the 2017-2020 period.[408] In addition to the above two key strategies, the Government attempted to enhance transparency in SOE corporate governance by listing privatized SOEs and those set for privatization on the stock exchange. To accomplish the goal, the Government would employ market mechanisms to boost the operational effectiveness of SOEs, both in terms of leveling the playing field among economic sectors and bolstering management capacities of the state and SOE owners.[409]

Contrary to expectations, the Government failed to meet its targets for speeding up SOE reform. During the 2017-2020 period, only 35 of 127 SOEs were privatized, and the divestment process moved slowly, reaching only 21.8% of the initial target number of SOEs.[410] The halt in privatization and divestment towards the end of the period was said to be caused by the emergence of Covid-19, which diminished the Government's emphasis on SOE privatization and affected the valuation of businesses and state capital at SOEs.[411] In 2022, the Government

[405] Le, Cabalu and Salim (n 397) 174; Nguyen and O'Donnell (n 395) 220.
[406] Thi Tuong Van Pham and Thi Ha Mai, 'Privatization of State-Owned Enterprises in the Period 2016-2020: Current Situation and Some Recommendations' (*The Communist Review*, 18 October 2020) <https://tapchicongsan.org.vn/> accessed 22 November 2024.
[407] Decision No. 707/QD-TTg on approving program of restructuring state-owned enterprises with particular attention paid to State-owned economic groups and corporations for the 2016-2020 period.
[408] Government of Vietnam, 'Decision No. 1232/QD-TTg on Approval of the List of Enterprises with State Capital to Be Divested in the 2017-2020 Period'.
[409] Resolution No. 142/2016/QH13 on the Five-year Socio-Economic Development Plan 2016-2020 2016.
[410] Pham and Mai (n 406).
[411] Viet Nam News, 'SOE Equitisation Slow This Year Due to COVID-19' (*Viet Nam News*, 13 October 2021) <https://vietnamnews.vn/economy/1058257/soe-equitisation-slow-this-year-due-to-covid-19.html> accessed 4 December 2024.

signed two significant documents to revive the SOE reform, namely Decision No. 360/QD-TTg approving the Scheme on the restructuring of state-owned enterprises with the focus on state economic groups and corporations for the 2021-2025 period, and Decision No. 1479/QD-TTg approving the Plan to reorganize state-owned enterprises and state-invested enterprises for the 2022-2025 period. These instruments set specific milestones to fundamentally complete the reorganization and restructuring of SOE ownership by 2025. The Ministry of Planning and Investment (**MPI**) expects 22 SOEs to be privatized between 2021 and 2025, mostly big ones, such as the Bank for Agricultural and Rural Development of Vietnam and the Mobifone Telecommunications Corporation.[412]

3.2. Hungary

3.2.1. Initial Conditions

3.2.1.1. Economic Factors

A centrally planned economic system established in Hungary post-World War II shared foundational similarities with other centrally planned systems in the region, albeit with notable distinctions. The Soviet-style model, despite its oppressive and exploitative nature, initially facilitated substantial capital accumulation in Eastern Europe, characterized by rapid industrialization, urbanization, and upward social mobility.[413] However, by the early 1950s, the limitations of this model became apparent, as the labor reserves that had previously fueled economic growth during the phase of socialist 'primitive accumulation' began to dwindle.[414] In Hungary, forced industrialization and land collectivization rapidly resulted in significant economic challenges, escalating to crisis level by mid-1953.[415] Hungary then took a relatively lenient approach to tackle its economic difficulties. The introduction of the New Economic Mechanism in 1968 marked a shift towards decentralization, transferring significant decision-making from central authorities to individual SOEs. Important decisions about investment and the armament sector remained under governmental purview, indicating a hybrid model of economic governance. Enterprises were relatively independent because the central government maintained control over pricing, wages, and interest rates, but more responsibilities were handed over to them over time. The 1968 reform also enabled the creation of cooperative subsidiary branches of the industrial sectors, which greatly impacted the competitive position of SOEs in industrial and service sectors. In 1972, Hungary passed the first legislation on foreign

[412] VietnamPlus, 'De an co cau lai doanh nghiep nha nuoc - "don bay" moi co phan hoa [The plan to restructure state-owned enterprises - "new leverage" to equitization]' (*VietnamPlus*, 1 April 2022) <https://www.vietnamplus.vn/post-781371.vnp> accessed 21 July 2024.
[413] Gáspár Miklós Tamás, 'A Capitalism Pure and Simple' [2008] Left Curve 66.
[414] Adam Fabry, 'The Origins of Neoliberalism in Late "Socialist" Hungary: The Case of the Financial Research Institute and "Turnabout and Reform"' (2018) 42 Capital & Class 77, 84.
[415] Endre Domonkos, 'The Consequences of Stalinist Economic Policy in Hungary (1949-1953)' [2022] Journal of Management and Business Administration 3.

investment to ease administrative control over the founding of joint ventures with foreign partners. In 1977, the State Enterprise Act was enacted with the aim of finding a better balance between centralized control and enterprise autonomy. Between 1984 and 1985, 70% of enterprises were transformed into self-governing entities, with an elected managerial body or a single leader at the top.[416] Throughout the 1980s, Hungary exhibited a progressive move towards economic liberalization. The 1982 legislation package for small entrepreneurs the fostered the growth of the private sector.[417] The unification of the exchange rate in 1981 and the subsequent allowance for enterprises to engage in international trade using convertible currencies after 1988 further exemplified Hungary's effort to integrate with global markets. The country's membership in the International Monetary Fund (**IMF**) in 1982 and the establishment of a two-tier banking system in 1987 underscored its economic reforms, contrasting sharply with Czechoslovakia's lack of IMF affiliation during the communist era. In the 1980s, Hungary extended financial incentives to foreign investors in several stages. The Government initiated the conversion of SOEs into joint-stock companies in 1989. Also, Hungary was the first Central European country to integrate value-added tax into the system, and a substantial portion of prices had been liberalized by 1989.[418]

Hungary also faced substantial problems at the macroeconomic level. The country experienced significant deficits in both public finance and trade. The connection between them and the concept of 'goulash socialism' was evident, as the government had to provide incentives to its citizens. The combination of these deficits contributed significantly to the accumulation of a substantial foreign debt. As of 1987, Hungary's total external debt had escalated to USD20.5 billion, which represented a major 75% of its GDP and accounted for 312% of its convertible-currency exports. This financial situation positioned Hungary among the countries with extremely high levels of indebtedness.[419] Between 1987 and 1990, Hungary found itself in a precarious position, on the edge of a liquidity crisis.[420] The ratio of debt service to convertible-currency exports during this period was among the highest globally. These factors resulted in a scarcity within numerous reputable markets.[421] Moreover, during the communist period in Hungary, the government's involvement in redistribution was particularly significant, ranking among the highest in comparison to other centrally planned economies. In 1989, the Hungarian

[416] Peter Mihályi, 'Privatization in Hungary - An Overview', in United Nations Conference on Trade and Development, *Privatization in the Transition Process: Recent Experiences in Eastern Europe* (UNCTAD 1994) 363.
[417] Béla Galgóczi, 'Privatisation in Hungary' (1998) 1 SEER: Journal for Labour and Social Affairs in Eastern Europe 27, 27.
[418] Libor Žídek, 'Evaluation of Economic Transformation in Hungary' (2014) 14 Review of Economic Perspectives 55, 58.
[419] Timothy Condon and Kemal Dervig, 'Hungary-Partial Successes and Remaining Challenges: The Emergence of a "Gradualist" Success Story?' in Olivier Jean Blanchard, Kenneth A Froot and Jeffrey D Sachs (eds), *The Transition in Eastern Europe, Volume 1* (University of Chicago Press 2008) 126.
[420] ibid.
[421] Paul G Hare, 'Hungary: In Transition to a Market Economy' (1991) 5 Journal of Economic Perspectives 195.

Government's incomes - expenditures (in % of GDP) were 61.3% - 63.7%, compared to 46% - 48%, and 43.8% - 50.7% in Poland and the Soviet Union, respectively.[422] During the 1980s, inflation rates were remarkably high, averaging around 9%, which stood in stark contrast to the economic conditions observed in Czechoslovakia in the same period.[423] On the other note, Hungarian SOEs generally exhibited a notable degree of inefficiency, characterized by excessive production waste, an overstaffed workforce, and deficiencies in quality management and marketing practices.[424] It is noteworthy that 65.2% of Hungary's output was produced by the state sector by 1984[425] – substantially lower than countries like Czechoslovakia (97% in 1986), East Germany (95.6% in 1982), and Poland (81% in 1985).[426]

Overall, the economic factors indicate that Hungary had deviated significantly from the traditional concept of a centrally planned economy by the final year of the communist administration.[427] Before the official privatization under the new political regime in the early 1990s, Hungary had already initiated a process of spontaneous privatization, which served two goals: [428] (i) improving competitiveness at the global level and drawing foreign investment; and (ii) using the income from the privatization to pay the government's debts.

3.2.1.2. Political considerations

In 1949, the communist regime held an election with a single-list format and then adopted a constitution modeled after the Soviet system, thereby establishing the Hungarian People's Republic. In Hungary, the state's involvement in the economy, which had already been significant during the interwar period, became even more pronounced starting in 1948. This shift occurred as the Rákosi regime adopted Stalinist approaches, which were characterized by enforced centralization and industrialization to stimulate economic development and reinforce its tenuous hold on power.[429] Between 1948 and 1953, the economic structure of Hungary

[422] Žídek (n 418) 59.
[423] ibid 60.
[424] Lívia Markóczy, *State Directed Profit Motive and Resource Dependency* (Budapest University of Economics 1990); Jone L Pearce, Imre Branyiczki and Gyula Bakacsi, 'Alawful Reward Systems: A Theory of Organizational Reward Practices in Reform-Communist Organizations' [1991] Graduate School of Management, University of California, Irvine Working Paper OB91003.
[425] The figures on the size of the state sector might show around 65% of the economy under state control, however the total, which included both state enterprises and cooperatives, were over 90% of the country's GDP. In practice, Hungarian authorities treated cooperatives very much like state enterprises. See Hare (1991).
[426] Dieter Bös, 'Privatization in Europe: A Comparison of Approaches' (1993) 9 Oxford Review of Economic Policy 95, 98.
[427] Jean Tesche and Sahar Tohamy, 'A Note on Economic Liberalization and Privatization in Hungary and Egypt' (1994) 36 Comparative Economic Studies 51, 55; Kent Klaudt, 'Hungary after the Revolution: Privatization, Economic Ideology and the False Promise of the Free Market' (1995) 13 Minnesota Journal of Law & Inequality 303, 306; Galgóczi (n 417) 28.
[428] Imre Branyiczki, Gyula Bakacsi and Jone L Pearce, 'The Back Door: Spontaneous Privatization in Hungary' (1992) 63 Annals of Public and Cooperative Economics 303, 305.
[429] Tibor Iván Berend and György Ránki, *The Hungarian Economy in the Twentieth Century* (St Martin's Press 1985).

underwent a significant reorganization to align itself with the principles of socialist ideology and the practice of the Soviet model. In 1949, the country became a member of the Council for Mutual Economic Assistance, an economic group connected to the Soviet Bloc. To establish a socialist economic system based on state ownership, the Hungarian Communist Party implemented two distinct strategies to transform the economy. The first strategy was a gradual restriction and imposition of burdens on private activities through mechanisms such as price control, price rationing, and taxation, which ultimately forced private owners to cease their activities. Second, the State took steps to nationalize the means of production through administrative regulations and legislative measures. Nationalization was successfully completed by the conclusion of 1949, while the most radical manifestation of the planned economy had been attained by the end of 1953. Seven sectoral ministries were established to oversee the operations of 1,500 SOEs in the industry.[430]

In addition to the economic challenges arising in the early 1950s, the death of Joseph Stalin in 1953 brought significant change, ushering in the period of ideological *détente* and a series of mild reforms across the Soviet Bloc.[431] This transition was exemplified in Hungary by the replacement of the authoritarian Mátyás Rákosi with Imre Nagy, a reform-oriented communist and agricultural economist. From 1953 to 1955, economists associated with Nagy published several critiques of centralized planning and proposed reforms to improve the 'economic mechanism'.[432] These events led to a gradual relaxation of the direct planned economy, starting in 1956. The Government announced a reorganization of mid-level directing organs due to the perception that the development of the national economy and the enhancement of management efficiency in the industrial sector required the further centralization and better use of production means.[433] Accordingly, there were three categories of SOEs that could operate in the industry: those governed by a minister or council, those under the control of ministers, and trusts.

After consolidating his power within the party-state, János Kádár adopted a pragmatic strategy to restore the regime's legitimacy. This approach involved a gradual relaxation of political repression and priority over economic policies that sought to enhance living standards for the population, thereby fostering a more favorable public perception of the government.[434] Furthermore, Kádár's administration sought to strengthen diplomatic and economic ties with Western nations, indicating a strategic pivot in Hungary's foreign relations during this period.[435]

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[430] László Szakadát, 'Property Rights in a Socialist Economy: The Case of Hungary' in John S Earle, Roman Frydman and Andrzej Rapaczynski (eds), *Privatization in the Transition to a Market Economy: Studies of Preconditions and Policies in Eastern Europe* (Palgrave Macmillan 1993) 21.
[431] Fabry (n 414) 84.
[432] János Kornai, *Overcentralization in Economic Administration: A Critical Analysis Based on Experience in Hungarian Light Industry* (John Knapp tr, 2023 reprint, Oxford University Press 1959).
[433] Szakadát (n 430) 34.
[434] Fabry (n 414) 85.
[435] ibid.

Debates on economic reform resumed in 1957 and intensified after the 8th Party Congress in 1962, where nomenklatura members expressed concerns about Hungary's poor export performance and the low productivity of SOEs.[436] In the year 1967, there was a notable increase in the influence of those advocating for economic reforms within the dominant political group, known as the Hungarian Socialist Worker's Party (**MSZMP**). In January 1968, a novel economic mechanism was instituted – the New Economic Mechanism. The main concept underlying the new system was to integrate certain elements of the market economy into the Hungarian economic framework with the objective of realizing socialism. Consequently, the existing economic system underwent a process of relaxation, permitting SOEs to function in accordance with prevailing market conditions. The New Economic Mechanism also exemplified a significant evolution in economic policy influenced by East-West knowledge exchange, because Hungarian economic research had achieved substantial integration within the global epistemic community, thanks to the country's relative openness compared to other nations within the Soviet Bloc.[437] The New Economic Mechanism not only reformed economic practices but also brought a notable transformation in the internal party-state. It led to a diminishing influence of traditional economic policymaking entities such as the National Planning Office and various sector-specific ministries in favor of the Ministry of Finance.[438]

By the onset of the 1980s, signs of a crisis became apparent across the Soviet bloc, as demonstrated by a rising increase in stagnation and indebtedness. In response to these challenges, Hungary worked on reforming its socialist economy by decentralizing leadership structures and cautiously introducing competitive market forces into the economic system. The country also experienced a decline in its trust towards the Soviet model, prompting them to seek alternative strategies to facilitate capital accumulation. Having said that, the emergence of neoliberal ideologies and practices was not merely a consequence of the regime change, instead they developed organically within Hungarian society during the 1980s as a response by local political and economic elites to the intensifying crisis faced by the Kádár regime.[439] The dissolution of communist regimes in Central and Eastern Europe during 1989-1990 marked a significant transformation from centrally planned economies to market economies in the region. The political changes positioned Hungary to pursue economic reform, in which privatization of SOEs was essential to diminish the state's predominant role in the economy.[440] The political

[436] Hans-Jurgen Wagener (ed), *Economic Thought in Communist and Post-Communist Europe* (Routledge 1998) 170–171; György Földes *Az eladósodás politikatörténete, 1957-1986* (Maecenas Kiadó 1995) 27-31 *cited in* Fabry (n 432) 85.
[437] Fabry (n 414) 85.
[438] Agnes Gagyi, 'A Moment of Political Critique by Reform Economists in Late Socialist Hungary: "Change and Reform" and the Financial Research Institute in Context' (2015) 1 Intersections 59.
[439] Fabry (n 414) 79.
[440] M Tardos, 'Economic Organizations and Ownership' (1989) 40 Acta Oeconomica 17; János Kornai, 'The Affinity Between Ownership Forms and Coordination Mechanisms: The Common Experience of Reform in Socialist Countries' (1990) 4 The Journal of Economic Perspectives 131; David Stark, 'Privatization in Hungary: From Plan to Market or from Plan to Clan?' (1990) 4 East European Politics and Societies 351.

transition in Hungary however was not identical with other countries like Romania, Czechoslovakia, and the German Democratic Republic, where the communist party-state collapsed entirely. Instead, the MSZMP agreed to engage in negotiations with opposition factions, leading to competitive elections and parliamentary governance. In May 1990, the Hungarian Democratic Forum won these elections and formed a coalition government, which marked the beginning of regime transition in the country. The discourse around SOE privatization thus occurred amid the disintegration of the old governance structure and the formation of the new political and societal institutions. The first post-communist government accelerated the gradual economic reforms that had been initiated under the previous regime, shifting the goal toward a capital market economy rather than continuing with a socialist market system.[441] The privatization of SOEs in Hungary was integral to the reform agenda, facilitating the transition to capitalism as the former communist regime diminished in power and private ownership gained broader acceptance.[442] The new Hungarian government, which took office in early 1990, made it a priority to lower state ownership to 50% by the end of 1993.[443]

3.2.1.3. Legal Legacies

The emergence of the 'socialist legality' concept in Hungary during the 1950s, particularly under the leadership of Prime Minister Imre Nagy, represented a significant ideological shift in the governance of the state following the death of Joseph Stalin.[444] Appointed in 1953, Nagy, while a committed communist, sought to distance his administration from the oppressive Stalinist practices of his predecessor, Mátyás Rákosi.[445] His vision of socialist legality was predicated on the notion that state power should be exercised in accordance with socialist laws, thereby rejecting the arbitrary governance seen during the Rákosi era.[446] Article 41(2) of the 1949 Constitution asserted the independence of judges and stated that they should be 'subject only to the law".[447] The formalization of socialist legality was first defined through Act II of 1954 on the Court System, which aimed to restore legal order and judicial independence.[448] During this time, the judiciary still operated within the framework of a unified power structure, but it maintained the independence of legal proceedings and decisions.[449] Imre Szabó's analysis of socialist legality suggests that the state actions must reflect the will of the ruling classes, as

[441] Roman Frydman, Andrzej Rapaczynski and John S Earle, 'Introduction', *The Privatization Process in Central Europe* (Central European University Press 1993) 96.
[442] Cheryl W Gray, Rebecca J Hanson and Michael A Heller, 'Hungarian Legal Reform for the Private Sector' (1992) 26 George Washington Journal of International Law and Economics 293, 294.
[443] Tesche and Tohamy (n 427) 58.
[444] Fruzsina Gardos-Orosz, 'Two Influential Concepts: Socialist Legality and Constitutional Identity and Their Impact on the Independence of the Judiciary' (2021) 22 German Law Journal 1327, 1329.
[445] ibid.
[446] ibid.
[447] Article 41(2), Constitution of Hungary 1949.
[448] Prime Minister Imre Nagy, Speech in the Parliament (July 4, 1953).
[449] Gardos-Orosz (n 444) 1330.

expressed by the Communist Party, their true representative.[450] The Party's intentions are manifested through state actions, showing a dynamic interplay between the constructed will of the people, the Party, and the legal framework of the state. This interaction is complex, as the general will that informs state actions is often abstract and resistant to concrete inquiry, thereby shielding the Party's authority from contestation. In contrast to bourgeois states, where the codification of laws is primarily driven by societal and economic imperatives, socialist states necessitate such codification to fulfill the ruling class's demand for legal certainty and effective governance.[451] Szabó emphasizes the importance of an integrated legal policy, which is dictated by the Party to ensure legal security. This policy mandated laws to be interpreted and applied in accordance with the Party's general and judicial policies. Ultimately, the concept of socialist legality is characterized as a normative yet quasi-legal framework that prioritizes the objectives of the Party over the establishment of the rule of law.[452]

The consolidation of the Kádár regime in Hungary, particularly following the constitutional amendment of 1972, marked a significant evolution in the structure and function of the judiciary within the framework of socialist authoritarianism. This period saw a notable enhancement of judicial independence, albeit constrained by the overarching political context. The passage of Act IV of 1972 on The Courts instituted critical reforms aimed at bolstering the autonomy of the judiciary, drawing parallels to the 'Western bourgeois concept' of judicial authority.[453] Under the leadership of Secretary General János Kádár, Hungary's political environment was characterized by a relative leniency compared to other communist regimes, resulting in the judiciary being infrequently utilized as a tool for overt political repression.[454] Instead, it functioned primarily to uphold the privileges of the ruling elite, with its influence predominantly confined to specific domains, particularly in matters concerning SOEs. Unlike other socialist nations, where disputes among state entities were typically resolved through state arbitration, the Hungarian judiciary maintained a homogeneous structure that adjudicated such conflicts directly.[455] However, the judiciary's role in broader social relations was markedly limited. The procedural framework imposed significant restrictions on access to judicial recourse, and judicial review of administrative actions are both rare and substantively constrained. [456]The courts were primarily tasked with ensuring socialist legality, which did not extend to evaluating

[450] Péter Szilágyi, Szab´o Imre szocialista normativizmusa, 4JOGELMÉLETI SZEMLE 23. (2003), cited in ibid.
[451] ibid.
[452] Zdenek Kühn, 'The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?', *The Judiciary in Central and Eastern Europe* (Brill Nijhoff 2011).
[453] MIKLÓS KENGYEL,ABÍRÓI HATALOM ÉS A FELEK RENDELKEZÉSI JOGA A POLGÁRI PERBEN 210–11 (Gábor Luca & Mezey Barna eds., 2003) cited in Fruzsina Gardos-Orosz, n 444 above.
[454] András Sajó, 'The Judiciary in Contemporary Society: Hungary' (1993) 25 Case Western Reserve Journal of International Law 293, 293–294.
[455] ibid 294.
[456] ibid.

the constitutionality of legal statutes or adhering to principles of rule of law.[457] As a result, the judiciary exhibited minimal engagement with the interests of power holders or society at large. However, the late 1980s heralded a shift towards greater independence, particularly as the Communist Party's control over the courts began to waned.[458] The constitutional court, the highest organ of constitutional protection, was established in 1989 by Act No. XXXII in order to develop the rule of law, to protect the constitutional order and fundamental rights, and to promote the separation of powers.[459]

The Hungarian legal system traditionally evolved in a manner consistent with other continental legal frameworks, which mainly rely on written statutes.[460] The constitutional amendments of 1989 facilitated the enactment of fundamental statutes by the Parliament. This legislative change laid the groundwork for the establishment of a multi-party parliamentary democracy, a modern system of state organization, and the development of a market economy within a constitutional state. However, Article 19(1) asserted that: 'The Parliament is the supreme body of State power and popular representation in the Republic of Hungary'. This phrasing reflects a remnant of the socialist state ideology, which positioned the parliament at the highest of state institutions, thereby enabling it to exercise state power without limitations.[461]

Hungary's legal tradition is characterized by a robust adherence to legalism, which, despite historical fluctuations in the respect for rights, has remained a significant aspect of its governance.[462] This legal framework has been notably resilient, persisting even during periods when regimes were not fundamentally aligned with human rights principles.[463] The country is frequently described as a 'country of lawyers', reflecting its strong legal culture and the prominence of its legal profession.[464] Historically, Hungary has maintained an independent and esteemed bar association, a legal entity that predates its incorporation into the Soviet sphere of influence.[465] This tradition of legal professionalism has endured through different political regimes, including the fascist era, indicating a deep-rooted commitment to legal norms. Furthermore, the Compromise of 1867, which established the Austro-Hungarian dual monarchy

[457] ibid.
[458] Zoltán Szente, 'Stepping Into the Same River Twice? Judicial Independence in Old and New Authoritarianism' (2021) 22 German Law Journal 1316.
[459] Kecskés Laszlo, 'Introduction' in Kecskés Laszlo (ed), *Business Law in Hungary: Handbook for investors managers and lawyers* (Economic and Legal Publishing House 1998) 35.
[460] ibid 33. A critical feature of Hungarian civil law is that it belongs to the German group of law. *See* Tamás Sárközy, 'The Present State and the Future Work of Hungarian Economic Legislation' (1993) 35 Acta Juridica Hungarica 3.
[461] Andras Jakab and Miklós Hollán, 'Socialism's Legacy in Contemporary Law and Legal Scholarship: The Case of Hungary' (2004) 2004 Journal of East European Law (Columbia University) 95, 101.
[462] Antal Örkény and Kim Lane Scheppele, 'Rules of Law: The Complexity of Legality in Hungary' (1996) 26 International Journal of Sociology 76, 77.
[463] ibid 78.
[464] ibid 77.
[465] Hermann and Verhoest (n 89).

with a constitution-like nature, laid the groundwork for legalistically oriented administrative management practices in Hungary.[466] These features help explain why Hungary likely possessed a better track record on this issue compared to other democracies with older histories, [467] and it was the first country among the post-Soviet republics to adopt a significantly revised constitution.

3.2.2. Practices of Privatization of State-owned Enterprises

3.2.2.1. Spontaneous privatization (late 1980s to early 1990)

In the late 1980s, large SOEs experienced a notable change in their status as the political landscape began to change and economic liberalization emerged. Prior to the political turn and free parliamentary elections, SOEs faced a decline in resources and subsidies, exacerbated by the instability of the Comecon market and the liberalization of prices and imports.[468] The weakening of the political system led to a precarious position for these previously privileged SOEs.[469] In response to the growing crisis, enterprises adopted various strategies. Some undertook significant organizational restructuring, with over a hundred enterprises undergoing transformation into one or more companies between 1988 and 1989. This process is known as 'spontaneous privatization', a largely unregulated phenomenon where SOEs undergo partial transformations, typically without a direct link to the acquisition of new ownership.[470] During these partial transformations, SOEs usually set up wholly owned subsidiaries, which enabled them to sell shares or contribute assets to form joint ventures with domestic or foreign investors. By mid-1990, approximately 40% of SOEs in the trade and construction sectors had started forming several hundred new companies, averaging 10% of their assets.[471] It is however important to note that the outcomes of these transformations did not always equate to true privatization. In many instances, new ownership was retained by state-owned banks or other enterprises, particularly those involved in supplier relationships.[472] While these developments contributed to the broader process of decomposing the denationalizing traditional SOEs,[473] they

[466] Örkény and Scheppele (n 462) 77.
[467] ibid 80.
[468] Éva Voszka, 'An Attempt At Crisis Management And The Failure Of The Spontaneous Privatization' (1994) 8 Industrial & Environmental Crisis Quarterly 23, 23.
[469] Paul Shrivastava, 'Crisis Theory/Practice: Towards a Sustainable Future' (1993) 7 Organization & Environment 23. Privatization Research Institute (1991): Lábadozásunk évei (The years of our recovery), Ed.
György Matolcsy, Budapest *cited in* Voszka (n 468).
[470] Voszka (n 468) 23; Roman Frydman, Andrzej Rapaczynski and John S Earle, *The Privatization Process in Central Europe* (Central European University Press 1993) 132.
[471] Eva Voszka, 'Spontaneous Privatization in Hungary' in John S Earle, Roman Frydman and Andrzej Rapaczynski (eds), *Privatization in the Transition to a Market Economy: Studies of Preconditions and Policies in Eastern Europe* (Pinter 1993).
[472] Frydman, Rapaczynski and Earle (n 470) 133.
[473] Laszlo Urban, 'Hungary' in John Earle, Roman Frydman and Andrzej Rapaczynski (eds), *Privatization in the Transition to a Market Economy: Studies of Preconditions and Policies in Eastern Europe* (Palgrave Macmillan 1993).

did not necessarily reflect a complete transfer of property rights to private owners. The extent of actual privatization could be more accurately assessed through the volume of foreign investment during this period. The spontaneous privatization process faced substantial criticism from both the government and the emerging opposition group. Critics argued that the spontaneous privatization process allowed state assets to slip from governmental oversight, leading to the liquidation of goods at diminished prices and the empowerment of managers to assume ownership roles, which aided the conversion of their political power into economic influence.[474]

3.2.2.2. State-governed privatization (1990-1994)

The privatization policy adopted by Hungary's first post-socialist government in May 1990 had several key characteristics designed to establish a market economy in Hungary:[475]

- The government prioritized economic efficiency over political objectives, focusing on immediate fiscal goals like reducing subsidies and increasing revenue to alleviate the budget deficit. Long-term goals included improving microeconomic efficiency through the establishment of genuine private ownership, which was expected to foster profit motivation, competition, innovation, and the expansion of the private sector.

- The approach to privatization focused mainly on selling state assets rather than their free distribution to the public, with the intention of maximizing treasury revenues. Initial considerations did not prioritize the reorganization of assets or restructuring of enterprises, which were expected to be managed by new private owners in the post-privatization period.

- The government sought to attract larger strategic corporate and foreign investors to infuse capital and expertise necessary for achieving the outlined economic objectives.

- A gradual privatization strategy was adopted, with a target to privatize 50% of SOE assets by 1994.

- Transparency and accountability were emphasized within a decentralized framework, allowing privatization initiatives to be initiated by the State Property Agency (**SPA**), the SOEs themselves, or potential investors.

The four-year privatization phase was divided into two parts: (i) the transition from a centrally planned economy to a market economy and stabilization in the first two years (1991 and 1992); and (ii) dynamic economic growth, currency convertibility, and adherence to EC

[474] Voszka (n 468).
[475] Anna Canning and Paul Hare, 'Political Economy of Privatization in Hungary: A Progress Report', *Reconstituting the Market* (Routledge 1999) 5.

regulations in the next two years (1993 and 1994).[476] The establishment of SPA through Act VII of 1990 on State Property Agency (**Act VII of 1990**) marked a significant institutional step in the privatization process. By July 1990, the SPA became directly accountable to the Government instead of Parliament, thus limiting judicial recourse against its decisions. The SPA's initial program efforts however faced challenges, as shown by a faulted showcase program involving 20 major SOEs.[477]

From 1991 onwards, the focus of privatization shifted to safeguarding state-owned assets and modernizing enterprises.[478] The Parliament enacted a comprehensive legislative framework on privatization in June 1992, which comprised Act LIII on the Management and Utilization of Entrepreneurial Assets (**Act LIII of 1992**) and Act LIV on the Sale, Utilization, and Protection of Assets Temporarily Owned by the State (**Act LIV of 1992**). The State Holding Company (**SHC**) was established to exercise the right of ownership and determine the conversion of SOEs into economic associations. During this period, the political objective of fostering a property-owning middle class emerged, leading to a decrease in the emphasis on maximizing budget revenue.[479] The government began to address issues of compensation for individuals whose properties had been confiscated under the previous regime and initiated favorable loan schemes to encourage domestic participation in the privatization process. By late 1992, the government proposed a Small Investor Share Purchase Program to encourage Hungarians to own shares. However, this initiative was ultimately abandoned before full implementation.[480] This shift in policy coincided with a decline in focus on attracting foreign investors starting in January 1994.

In summary, the period from 1990 to 1994 witnessed a notable transition in Hungary's privatization strategy, moving from a decentralized approach to a more centralized model. The government's original target in the early 1990s was to transfer ownership of 50,000 units to the private sector.[481] However, as the project progressed, the number of units set for privatization was significantly reduced. Key sectors, such as pharmacies, tourist agencies, hard-currency shops, commercial chains, and food stores, were excluded from the initial privatization package.[482] Additionally, a stipulation was introduced to limit the number of employees in the unit eligible for privatization to a maximum of 10, and in some cases, 15.[483] This modification resulted in the registration of approximately 10,000 establishments for privatization. Further scrutiny revealed that out of these registered units, around 2,000 were already privately owned,

[476] Marko Simoneti, 'A Comparative Review of Privatisation Strategies in Four Former Socialist Countries' (1993) 45 Europe-Asia Studies 79, 79.
[477] Canning and Hare (n 475) 6.
[478] OECD, 'Review of Industry and Industrial Policy in Hungary' (OECD 1994).
[479] Canning and Hare (n 475) 6.
[480] ibid 7.
[481] Yudit Kiss, 'Privatisation in Hungary. Two Years Later' (1992) 44 Soviet Studies 1015, 1021.
[482] ibid.
[483] ibid.

and an additional 3,000 were under leasing agreements that would not expire until the anticipated completion of the pre-privatization project.[484] Consequently, around 5,000 units remained for sale.[485] As of April 1992, around 700 units were sold and nearly 2,000 leased, among which corporate owners purchased 130 and leased 430 units.[486] The pace was set to accelerate after 1992, when the new and more favorable credit terms for potential buyers were implemented. Despite a recession in the Hungarian economy during this period, the post-communist government achieved notable successes in privatizing state-owned assets and promoting the growth of the private sector. Between 1990 and 1993, the private sector's GDP contribution increased from approximately 25% to 50%,[487] with its employment share estimated at around 53% by the end of 1993.[488] The sale of a 30% stake in the state-owned telecommunications enterprise - Matáv to an American-German consortium in December 1993 significantly boost in revenue and enhance the prestige of the privatization process.[489] From 1991 to 1994, the total number of enterprises with majority state ownership decreased from 1,848 to 553, mainly due to privatization or liquidation.[490]

3.2.2.3. Strategic Privatization (1994-2002)

In the summer of 1994, Hungary experienced a significant political transition with the establishment of a coalition government led by the Hungarian Socialist Party, in partnership with the Alliance of Free Democrats. The new government adopted a privatization program with the following principles:[491]

- Speeding up the privatization process without prior restructuring of the SOEs involved;

- Favoring asset sales over distributive privatization methods, such as free transfers or preferential schemes;

- Enhancing the role of enterprise management and independent consultancy firms in the privatization process, thereby moving away from a centrally managed approach;

- Transferring the management of state-owned assets to commercial firms rather than state-run organizations.

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[484] ibid.
[485] Heti Vilaggazdasag, 8 June 1991 *cited in* ibid.
[486] Heti Vilaggazdasag, 6 June 1992 *cited in* ibid.
[487] Attila Kovács, 'Chapter 4. Economic Integration and Interdependence in Hungary: Challenges and Experiences Since the Fall of the Iron Curtain' in Zoltán Felméry (ed), *Economic Integration and Interdependence in Central and Eastern Europe* (Dialóg Campus 2020) 115.
[488] Canning and Hare (n 475) 8.
[489] ibid 8–9.
[490] Klaudt (n 427) 319.
[491] Canning and Hare (n 475) 10.

The coalition's plan proposed merging the SPA and the SHC, with the goal of placing the privatization process under the jurisdiction of the Ministry of Finance. These proposals faced immediate backlash, especially from opposition parties and trade unions, who had previously criticized the SHC's transparency issue and the risk of political interference.[492] Legislative preparations for privatization were already underway, but progress was hindered by extensive debates among various political groups, local and national governments, and within the coalition itself. Trade unions and management bodies expressed strong opposition to the government's preference for cash sales to outside investors, fearing it would undermine their interests. By the end of 1994, discussions on privatization legislation were postponed due to the prioritization of the 1995 budget debate, which caused a significant slowdown in the privatization process. The delay raised concerns about the government's ability to mediate between competing interests and maintain its commitment to privatization.[493] In January 1995, talks about new privatization legislation resumed but faced further delays as the new Minister of Finance implemented a radical macroeconomic stabilization plan.

Following these challenges, the Parliament passed Act XXXIX of 1995, which established a legal framework for the privatization of large public utility SOEs and commercial banks. The legislation sped up privatization significantly, with cash sales reaching approximately Ft400 billion in the fourth quarter of 1995, mostly in foreign exchange.[494] The revenue was largely derived from the sale of major stakes in strategic enterprises in the energy, financial, and infrastructure sectors, including electricity-generating enterprises, gas-distribution enterprises, and telecommunications enterprises.[495] In 1997, the privatization of the energy sector was further supported by new pricing regulations to align energy prices with global standards, necessitating substantial increases in gas and electricity prices in this period.[496]

While the original privatization legislation aimed for completion by the end of 1997, an amendment in July 1997 expanded the scope of privatization. The minimum long-term holdings of the state in key SOEs was reduced from 50% and 25% to a singular golden share.[497] This adjustment brought the nominal book value of state-owned assets from approximately Ft350 billion to Ft200 billion, representing about 3% of the GDP.[498] Reducing long-term state ownership in the critical industries, such as banking, telecommunications, and energy, could lead to substantial efficiency gains, however the retention of a golden share allowed the state to maintain a degree of oversight over the operation of these enterprises. The Hungarian practice

[492] ibid.
[493] ibid 11.
[494] Elkan (n 16) 65.
[495] This is so-called the privatization of the 'inner core' of the state sector. *See* Tamás Sárközy, 'Post-Socialist "Primitive Accumulation of Capital" and the Law' (2008) 49 Acta Juridica Hungarica 143, 169.
[496] Elkan (n 16) 65.
[497] ibid 67.
[498] ibid.

of divesting SOEs in public utility services, including gas, electricity, and water, to foreign investors was distinctive.[499] By mid-1997, the public sector had sold off around 70% of the book value of its original holdings.[500] In addition, pharmaceutical industries, banks, and certain agricultural SOEs were scheduled to be privatized in 1998 and 1999.[501] By the end of the 1990s, Hungary successfully finalized the privatization efforts, mainly employing the sales method with a preference for foreign direct investment throughout the process.[502]

3.2.2.4. Completion Phase (2002-2008)

From the summer of 2002, the socialist-liberal government coalition again held power in Hungary, making the completion of the privatization agenda increasingly intertwined with contemporary political dynamics. A referendum on 5 December 2004, initiated by the Worker's Party and supported by opposition factions, brought more attention to this political context. One of the referendum's key propositions sought to halt the privatization of hospitals. However, the referendum was not successful, because neither of the posed questions garnered affirmative responses from at least 25% of the electorate. In addition, Hungary's preparation for EU accession required further liberalization of its markets and adherence to EU competition laws. The focus of privatization initiatives was on the remaining state-owned infrastructure to foster competition and efficiency.

Hungary's accession to the EU in 2004 initiated a major shift in the nation's economic policy focus from SOE privatization and state ownership to addressing budgetary imbalances.[503] Consequently, this transition diminished the significance of the commercial rationale for SOE privatization over time. Act CVI on State Property of 2007 (**Act CVI of 2007**) governs the accomplishment of the broad-scale privatization in Hungary by providing clear guidelines on the rationale for state ownership in enterprises.[504] Accordingly, the state exercises ownership rights to ensure the efficient, cost-effective, value-preserving, value-enhancing utilization of state property in accordance with its functions that are essential for fulfilling state duties, addressing social needs, and facilitating the implementation of the Government's economic policy.[505] Although the left-wing Bajnai government announced the completion of privatization

[499] László György and József Veress, 'The Hungarian Economic Policy Model After 2010' (2016) 61 Public Finance Quarterly 360, 372.
[500] Elkan (n 16) 63.
[501] Ranko Jelic and Richard Briston, 'Hungarian Privatisation Strategy and Financial Performance of Privatised Companies' (1999) 26 Journal of Business Finance & Accounting 1319, 1330.
[502] Miklós Szanyi, 'Chapter 5: Some Aspects of State Ownership in East-Central European Transition' in Miklós Szanyi (ed), *Seeking the Best Master: State Ownership in the Varieties of Capitalism* (Central European University Press 2019) 144, 145; János Kornai, 'Socialist Transformation and Privatization: Shifting from a Socialist System' (1990) 4 East European Politics and Societies 255, 295–296.
[503] Szanyi (n 502) 156.
[504] OECD, 'Ownership and Governance of State-Owned Enterprises: A Compendium of National Practices - OECD' (OECD 2021) 81.
[505] Article 2, Act CVI on State Property 2007.

in 2008,[506] the potential for reinitiating privatization remains, with the primary goal of enhancing market structures and optimizing the management and utilization of state property and national assets.[507]

3.2.3. Recent Developments

Amidst the infrequent prospects for privatization currently, the Hungarian Government has reconsidered its strategy by initiating fresh investment in critical economic sectors like machinery production, energy, and telecommunications since 2010. The reversal is largely attributed to the reassessment of a state-led capitalist paradigm after the 2008-2009 global financial crisis. As mentioned above, the privatization in the 1990s involved important industries and enterprises, which may have rendered the national economy vulnerable to external shocks.[508] In the late 2000s, as privatization goals were met, a new dimension of economic patriotism emerged, focusing on bolstering the presence of national businesses and curbing the future internationalization of economies in Central and Eastern Europe.[509] The Hungarian Government's objectives, as outlined in the Fundamental Law of 2011, counteract the adverse effects of privatization on the national economy, a sentiment echoed in the Act CXCVI on National Assets of 2011 (**Act CXCVI of 2011**).[510] The analysis of the legislative frameworks concerning national assets of the years 2007 and 2011 highlights a significant distinction: the latter aims to establish overarching principles for the protection of national assets, which are deemed essential for fulfilling public duties and addressing public needs.[511] The new legislative approach thus seeks to expand the scope of enterprises in national ownership and enhance their efficiency.[512] As an illustration, politically motivated transactions and regulatory changes have been implemented with the explicit goal of reducing utility costs, a key commitment made during the electoral campaigns of 2010 and 2014. The Hungarian government has consistently expressed its intention to raise national ownership within key sectors, such as banking, retail, media, and utility services.[513] Hungary has been endeavoring to recalibrate this scenario and establish a portfolio of enterprises that better fits the nation's economic development requirements.[514] Between 2010 and 2020, the book value of state-owned assets rose by 52%.[515]

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[506] Hungarian Government (2009).
[507] OECD, 'Ownership and Governance of State-Owned Enterprises' (n 504) 81.
[508] Csaba Lentner, 'Dimensions in Hungarian State Companies – in an Historical and International Perspective' (2019) 15 Polgári szemle 146, 159.
[509] ibid 160.
[510] Lóránt Csink, Balázs Schanda and Zs András Varge (eds), *The Basic Law of Hungary : A First Commentary* (Clarus Press 2012) 84.
[511] Preamble, Act CXCVI on National Assets of 2011
[512] Lentner (n 508) 162.
[513] Miklós Szanyi, 'The Reversal of the Privatisation Logic in Central European Transition Economies: An Essay' (2016) 66 Acta Oeconomica 33, 35.
[514] For more discussion, see Moldicz (n 17).
[515] ibid 1.

As of 2019, the state possesses significant ownership in more than half of the nation's 400 SOEs,[516] supplemented by a substantial number of municipally held enterprises.

3.3. Conclusion

The privatization of SOEs in Vietnam and Hungary serves as a compelling case study in the interplay of historical, economic, and political factors that shape the trajectory of post-socialist economies. The analysis in this chapter delineated both the convergences and divergences in the privatization process of the two countries. Both Vietnam and Hungary transitioned from centrally planned economies to market-oriented systems, primarily driven by the recognition of inefficiencies inherent in state-controlled enterprises. This shift was motivated by the necessity for external investments and the integration of private sector dynamics to foster economic growth and enhance the performance of SOEs. The privatization processes in both countries were characterized by a phased approach, commencing with the privatization of smaller SOEs before progressing to larger, strategically significant SOEs. Initial reforms were marked by caution and stringent regulations, reflecting the governments' concerns regarding the potential socio-economic repercussions of rapid privatization. The role of international organizations and foreign investors was pivotal in both contexts, as they provided the impetus for privatization. Hungary's strategy was largely influenced by its aspirations to integrate with Western markets, while Vietnam's reforms were responsive to global trade commitments, such as WTO accession, and CPTPP and EVFTA agreements.

However, the privatization experience in Hungary was catalyzed by a regime change following the collapse of communism in Eastern Europe, which facilitated a dramatic ideological shift toward capitalism. In contrast, Vietnam's approach, particularly under the *Doi Moi* policy, was characterized by incremental reforms that preserved a socialist framework, with the leading role of SOEs in the national economy. Regarding the speed and extent of privatization, Hungary adopted a more rapid and comprehensive strategy, significantly reducing state ownership across various sectors. Conversely, Vietnam's privatization efforts have been more gradual, emphasizing partial privatization while still favoring state dominance in strategic industries. Hungary's legal reforms, which were integral to its transition to democracy, set up robust mechanisms for privatization, such as clear guidelines for foreign investment and enterprise restructuring. In contrast, Vietnam's legal evolution has been slower, characterized by a continued reliance on informal practices and party directives alongside formal legal structures, which has complicated the privatization process. Consequently, the outcomes of SOE privatization so far are markedly distinct between the two countries. By the early 2000s, Hungary had completed most of its privatization and shifted to discussions on optimizing state-

[516] U.S. Department of State, '2019 Investment Climate Statements: Hungary' (*U.S. Department of State*, 2019) <https://www.state.gov/reports/2019-investment-climate-statements/hungary/> accessed 15 October 2024.

owned assets. Vietnam continues its privatization efforts, with recent pushes to include larger SOEs and attract greater foreign participation, but progress remains uneven.

The comparative analysis presented in this chapter helps clarify the rationales that drove SOE privatization in each country. It also lays the contextual groundwork for exploring in detail the legal frameworks regulating the process of SOE privatization in Vietnam and Hungary in Chapters 4 and 5, respectively.

CHAPTER 4

Legal Framework for the Privatization of State-owned Enterprises in Vietnam

This chapter provides an in-depth analysis of the legal framework for privatization of SOEs in Vietnam, exploring the interplay between socialist-oriented governance and market-oriented legal reforms.[517] The chapter begins with an examination of the foundational legal norms for privatization, with particular focus on constitutional dimensions. The developments of constitutional provisions on the status of the state economic sector underscore a dual commitment to uphold socialist principles while gradually incorporating market mechanisms in Vietnam. The chapter also addresses the legal institutions of property rights as a foundational component of Vietnam's privatization regime. The subsequent section discusses the legislative framework governing the privatization process, which has largely been shaped by executive instruments instead of comprehensive legislation passed by the National Assembly. Finally, the chapter analyzes how company law and foreign investment facilitate or hinder the process of privatizing SOEs in Vietnam. In doing so, the chapter directly engages with the research question: How does Vietnamese law regulate SOE privatization?

4.1. Foundational Legal Norms

4.1.1. Constitutional Dimensions

4.1.1.1. Constitutional safeguarding of specific categories of property or sectors

Vietnam's constitutional framework takes a distinctive approach compared to Western constitutions, particularly in its integration of national economic identities, ideology, and aspirations with political and individual rights.[518] The making process of a constitution can serve as a public and national forum where various stakeholders engage in discussions about the relationship between the state and the market, the functions of institutional actors, and other

[517] As discussed in Chapter 3, Vietnam has developed a socialist legal system with significant similarities to civil law jurisdictions, particularly in its reliance on legislation as the primary source of law. The hierarchy of legal instruments is established by the Law on Promulgation of Legal Instruments, initially enacted in 1996 and subsequently revised in 2008, 2015, and 2025. As a matter of form, the structure of legal instruments in Vietnam has not changed much through different versions of this Law. The Constitution serves as the supreme law and lays the foundation of the legal system. Codes (*Bo luat*) and Laws (*Luat*), passed by the National Assembly, govern specific subject areas and set out general principles and rules. The Government and its ministries are then responsible for issuing decrees, decisions, and circulars to elaborate on details and guide the implementation of Codes and Laws. In some cases, decrees or circulars may be issued to address issues that have not been covered by a Law.

[518] Ngoc Son Bui, 'Economic Constitutions in the Developing World' (2019) 12 Law and Development Review 669; Duy Nghia Pham, 'Che Do Kinh Te Trong Hien Phap 1992 - Phat Hien Mot so Bat Cap va Kien Nghi Huong Sua Doi' (2011) 11 Tap chi Nghien cuu lap phap 57.

critical economic issues.[519] Given the country's adherence to socialism, the extent to which the privatization of SOEs can be implemented in Vietnam depends on how SOEs are positioned within the constitutional framework.

The 1992 Constitution was a milestone in the evolution of the national economy, as it gradually departed from the Soviet model in its provisions on the economic system. Articles 24 and 25 encouraged foreign investment and trade, while Article 19 mandated SOEs to run autonomously and be accountable for their performance. These provisions signaled the government's serious intention to move toward a market-based allocation of resources and a rule-based system of state management. Article 21 furthered the recognition of private sectors, allowing individuals and private capitalists to organize production and trade freely.[520] However, the 1992 Constitution simultaneously emphasized the leading role of state ownership[521] and the state economic sector[522] in a multi-sectoral commodity economy. These provisions, when read alongside the economic functions of the State under Article 26,[523] implied the direct business activities rather than regulating the economy, as they did not provide for the limits of state intervention in economic matters.[524] The constitutional amendments of 2001 strengthened the private sector's role in the national economy, officially acknowledging it as a key component.[525] This revision introduced the concept of a 'socialist-oriented market economy', replacing the previously ambiguous terminology of a 'multi-sectoral commodity economy'. The inclusion of market-related terminologies like 'market economy', 'competition', and 'liberty to legally conduct business' into the Constitution[526] marked a significant ideological shift, reflecting the Vietnamese party-state's increasing acceptance of market principles. However, the wording of Article 19 was preserved in the constitutional revision, asserting the need to consolidate and develop the state sector, particularly in key industries, to maintain its leading role in the economy. The duality of the recognition of the private sector and the prominent position of the

[519] Bui (n 518).
[520] Article 21, Constitution of 1992: 'Private individual and private capitalist sectors are entitled to adopt their own ways of organizing production and trading, to set up enterprises of unrestricted scope in fields of activity which are beneficial to the country and the people. Encouragement shall be given to the development of the family economy'.
[521] Article 15, Constitution 1992: 'The multi-sectoral economic structure with various forms of organization of production and trading is based on a system of ownership by the entire people, by collectives, and by private individuals, of which ownership by the entire people and by collectives' constitutes the foundations.
[522] The First clause of Article 19, Constitution 1992: 'The state sector shall be consolidated and developed, especially in key branches and areas, and play the leading role in the national economy'.
[523] Article 26, Constitution 1992: 'The State manages the national economy by means of laws, plans and policies; it makes a division of responsibilities and devolves authority to various departments and levels of the administration; the interests of individuals and collectives are brought into harmony with those of the State'.
[524] For more discussion, *see* Pham, 'Che Do Kinh Te Trong Hien Phap 1992 - Phat Hien Mot so Bat Cap va Kien Nghi Huong Sua Doi' (n 518).
[525] Article16, National Assembly of Vietnam, Constitution 1992 (amended) (2001).
[526] *Ibid.*, Arts. 16, 21, 57.

state sector in the national economy reflects the Party-State's intention to maintain oversight and control over economic activities, ensuring their alignment with socialist orientations.

During the constitutional-making process in 2012, the reform of SOE governance became a central theme, reflecting broader discussions about Vietnam's economic and political trajectory. A significant focus of the debates was on Article 51 of the proposed constitution, which stated that 'the Vietnamese economy is a socialist-oriented market economy with multi-forms of ownership and multi-sectors of economic structures; the state economic sector plays the leading role'.[527] Scholars and stakeholders engaged in an intense discourse on the constitutional language's implications on two main issues: the justification for the preferential treatment of SOEs and the extent of state intervention in the market. Some members of the National Assembly endorsed a broad expression of 'multi-forms of ownership and multi-sectors of economic structure', instead of explicitly assigning the leading role to the state economic sector.[528] While critics, particularly from the economic community, expressed concerns that the wording of the official proposal could hamper market growth by positioning the least effective economic sector as the leading force of the national economy,[529] others argued that a more precise definition of the state's role in fostering investment could boost investor confidence and reinforce Vietnam's commitment to market reforms.[530] The term 'state economic sector' also incited vigorous debate. Some participants called for a clearer differentiation between 'state economic sector' and 'state-owned enterprises', voicing concerns about the potential conflation of these concepts.[531] Others contended that the assertion of the state economic sector's leading role was incompatible with the subsequent claim of equality among all economic sectors.[532] The Chair of the Constitutional Editing Board rejected this argument, clarifying that the term 'state economic sector' covers a broader concept than SOEs and reflects the Party-State's influence in guiding market dynamics, thus it is in line with the idea of equality among different economic sectors.[533] Eventually, the final version of the 2013 Constitution emphasizes commitments to

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[527] The November 2013 draft constitution can be accessed at the website of Ministry of National Defence, https://mod.gov.vn/vn/chi-tiet/sa-ttsk/sa-tt-cmsk/sa-tt-cmsk-3/sa-tt-cmsk-3-dtsd/3e3f5064-0cac-4966-8e21-28138892019f.

[528] Nguyen Thao, 'Sua Hien phap: Kinh te nha nuoc khong the chu dao? [Amending Constitution: State economy cannot play the leading role?]' (*VnEconomy*, 6 November 2012) <https://vneconomy.vn/sua-hien-phap-kinh-te-nha-nuoc-khong-the-chu-dao.htm> accessed 16 February 2025.

[529] Bloomberg News, 'Vietnam State Companies Still Dominate in Constitution' (*Bloomberg*, 27 November 2013) <https://www.bloomberg.com/news/articles/2013-11-26/vietnam-state-companies-still-dominate-in-constitution> accessed 16 February 2025.

[530] ibid.

[531] Minh Phong Nguyen, 'Nhan Thuc Dung Dan ve Kinh Te Nha Nuoc va Doanh Nghiep Nha Nuoc' (*Nhan Dan*, 28 November 2013) <https://nhandan.vn/nhan-thuc-dung-dan-ve-kinh-te-nha-nuoc-va-doanh-nghiep-nha-nuoc-post189752.html> accessed 16 February 2025.

[532] Hanh Vu, 'Hien Phap: Kinh Te Nha Nuoc Giu Vai Tro Chu Dao' (*VOV.VN*, 5 November 2013) <https://vov.vn/kinh-te/hien-phap-kinh-te-nha-nuoc-giu-vai-tro-chu-dao-289652.vov> accessed 16 February 2025. The second clause of the proposed Article 51 stated: 'Actors of different economic sectors are equal, cooperate, and compete in accordance with the law'.

[533] ibid.

various forms of ownership and diverse sectors within the economic system, fundamental market principles, and safeguarding of private property, while maintaining that the state economic sector holds the leading role.[534]

Notwithstanding the constitution provisions facilitating private sector growth and diversifying the ownership structure of SOEs, the state sector continues to occupy a prominent position within the national economy, reflecting one of the few steadfast ideological tenets from the Vietnamese leadership. This commitment has been enshrined in different versions of the Constitution during the transition era and has shaped the legislative framework governing the SOE privatization in Vietnam. Specifically, the privatization of SOEs has been taken place in a socialist-oriented market economy, striving to improve their efficiency by encouraging competition with the private sector while still preserving state control over critical industries. SOE privatization in Vietnam therefore should not be perceived as a withdrawal of state involvement but rather as a novel manifestation of state interventionism.[535] The principal goal of a government in a socialist-oriented market economy is to keep SOEs dominant in key industrial sectors and employ this influence to further political objectives.[536]

4.1.1.2. Constitutional requirements as to procedure of privatization process

In Vietnam, there are no explicit constitutional provisions outlining the procedural requirements for privatization. However, an understanding of this process can be gleaned from various relevant constitutional articles and laws.

Article 57 of the 1992 Constitution expressed the freedom of enterprises, stating that 'citizens enjoy the freedom of enterprises as determined by laws'. In this context, 'laws' (*phap luat*) include not only legislation passed by the National Assembly but also legal documents issued by various state agencies. The Constitution also outlined the powers of the Government as 'to ensure the overall management of the building and development of the national economy; to carry into effect national financial and monetary policies; to manage and ensure the effective use of property in the ownership of the entire people; to promote the development of culture, education, health care, science and technology; to carry out the plan for socio-economic development and to give effect to the State budget'.[537] The Law on Organization of Government of 2001 further specified the Government's competence in the economic domain, including: the consolidation of management and effective utilization of assets owned by the entire people and national resources; the enforcement of policies promoting thriftiness; and the execution of responsibilities as the proprietor of the state's capital in enterprises where the state has invested

[534] Article 51, Constitution 2013.
[535] Martin Gainsborough, "Privatisation as State Advance: Private Indirect Government in Vietnam", Working Paper, University of Bristol (June 2009), 269.
[536] Thanh Tu Anh Vu, "Competition and Privatization in Vietnam: Substitutes or Complements?", paper presented at the 2nd Vietnam Development Forum, Japanese National Graduate Institute for Policy Studies (3 July 2006), 5.
[537] Article 112(4), Constitution of 1992.

as outlined by laws.[538] These constitutional provisions and laws placed the regulation of SOE privatization within the purview of the executive branch.

The 2013 Constitution reiterates the principle of limiting fundamental rights, including economic rights, as follows: '…human rights and citizens' rights in the political, civil, economic, cultural, and social fields shall be recognized, respected, protected, and guaranteed in accordance with the Constitution and law'.[539] Law (*luat dinh*) should be understood as legislation enacted by the National Assembly. However, the freedom of enterprises under Article 33 remains subject to laws. The current legislation on the organization of the Government continues to affirm its role as the actor exercising the management and use of public properties and national resources. This includes representing the entire people's ownership of properties and holding the portion of state-owned capital invested in SOEs in line with legal stipulations.[540] Although the Law on Management and Use of State Capital invested in production and business in enterprises of 2014 (*hereinafter referred to as* the Law on Management and Use of State Capital of 2014) mentions privatization as a method to transform state ownership of SOEs, it addresses the issue only briefly in a single article and lacks detailed provisions or further elaboration.[541] As such, the relevant frameworks have emerged primarily through sub-legislation documents, such as directives and decrees by the Government and the Prime Minister. The involvement of the National Assembly in the privatization process has been described as passive and ambiguous,[542] despite the significant impact of the SOE sector on the national economy. The existing legal provisions thus reinforce the executive's authority in privatizing SOEs.

Furthermore, the absence of a judicial review mechanism to assess the constitutionality of legal documents adds to the uncertainty of the privatization process. Although the Standing Committee of the National Assembly is granted the authority to interpret the Constitution and laws, it has not exercised this power since the 2013 Constitution was enacted.[543] The persistence of the state economic sector's leading role in strategic industries has contributed to ambiguity

[538] Article 9(6), Law on Organization of the Government of 2001.
[539] Article 14, Constitution of 2013.
[540] Article 8(6), Law on Organization of the Government of 2015.
[541] Article 37 (1) provides that SOEs are entitled to transform their ownership in the form of converting to joint-stock companies, or the sale of the whole of the enterprise or the sale of a part of state investment in joint-stock companies and multiple-member limited liability companies. However, Article 1(2) states that the Law only applies to SOEs with 100% charter capital held by the State.
[542] Duy Nghia Pham, 'Tai Cau Truc Tap Doan va Doanh Nghiep Nha Nuoc: Mot Goc Nhin Tu the Che va Phap Luat [Restructuring State Economic Groups and Enterprises: An Institutional and Legal Perspective]' <https://fsppm.fulbright.edu.vn/>.
[543] The 1959 Constitution first stipulated that the National Assembly Standing Committee has the duty and power to officially interpret the Constitution, laws, and ordinances. To date, the Committee has only conducted this task 5 times. The most recent time was on November 10, 2006, when the Committee officially interpreted Clause 6, Article 19 of the State Audit Law (Resolution No. 1053/2006/NQ-UBTVQH). *See* Minh Tuan Dang and Quynh Mai Le, 'Gioi Han Quyen Con Nguoi, Quyen Cong Dan Tai Vietnam: Nguyen Tac Hien Phap va van de Thuc Thi' (2020) 5 Khoa hoc kiem sat.

regarding the extent and nature of reforms applicable to SOEs over time. The understanding of the SOEs' role and the degree of ownership transfer from the state to the private sector is largely shaped by the policies set by the CPV and a plethora of legal documents from different state agencies.[544]

4.1.2. Property Rights

4.1.2.1. Legal recognition of property rights

The 1992 Constitution brought a major change to the country's economic regime by endorsing the development of a multi-sectoral commodity economy grounded in market principles. The constitutional form also introduced a tripartite system of ownership that includes state ownership, collective ownership, and private ownership - a departure from the 1990 Constitution, which recognized only state and collective ownership. The subsequent legal reforms, particularly the Civil Code of 1995, reinforced property rights and ownership regime, thereby facilitating a favorable environment for the growth of private enterprises. A contentious aspect of this transition pertained to land ownership. In a socialist system, individuals do not have the right to own, sell, or inherit land. Article 17 of the 1992 Constitution stipulated that land remain under the ownership of the entire people. However, Article 18 introduced a compromise by allowing the state to allocate land for long-term use, granting individuals or organizations the right to transfer land-use rights through sale or inheritance. The 1993 Law on Land defined the land system, addressing management, allocation, duration, and the rights and duties of land users. While the state retains control over land management, the law enhances the right of individuals and organizations by permitting the transfer and mortgage of land-users. The 2013 Constitution and subsequent legislation, including the Civil Code, further strengthen the recognition of private ownership in Vietnam.

However, the enduring of Marxist-Leninist ideology on public ownership of productive means continues to shape property and ownership dynamics in Vietnam. Evidently, the changes in the ownership regime under the Constitution of 1992 were subject to two qualifications. First, the 1992 Constitution stated that all businesses are equal before the law;[545] however, it simultaneously established a multi-component economic structure based on a system of ownership by the entire people, collectives, and private individuals, with the first two forming the foundational basis.[546] Second, the Constitution emphasized that economic diversity should be aligned with state management and socialist orientations. These provisions suggest that the private sector economy is intended to complement the socialist economic sector and that the state ultimately exercises oversight and authority over the private economic sector. The framework for a market economy relies on the establishment and guarantee of three freedoms:

[544] Pham, 'From Marx to Market' (n 339) 284.
[545] Article 22, National Assembly of Vietnam, Constitution 1992 (amended) (2001).
[546] ibid., Article 15.

freedom of property, freedom of enterprises, and fair competition.[547] However, Vietnam's commitment to these freedoms under the 1992 Constitution was questioned, particularly regarding the preferential position of the state economic sector and public ownership.[548] Some observers note that this framework does not result in a uniform administrative and regulatory treatment for enterprises, as managers across different ownership forms often face arbitrary interpretations of the evolving legal and regulatory landscape by government officials, a situation made worse by ambiguities inherent in legislation.[549] The foundational role of ownership by the entire people and of collectives is abolished under the 2013 Constitution, however Vietnam stops short of declaring general equality among various economic sectors without explicitly addressing equality of ownership regimes. Article 51(2) asserts that all economic sectors are important components of the national economy, and that entities across different sectors are equal before the law and should cooperate and compete in accordance with laws. Nevertheless, some commentators caution against conflating equality among ownership regimes with equality among economic sectors, suggesting that the failure to adequately recognize the distinctions may lead to misunderstandings.[550]

Moreover, the right to privately own productive means has been recognized,[551] but in a relatively restricted sense that excludes several important productive means. For example, the 1992 Constitution did not grant the right to land ownership, instead individuals and business entities might obtain land-use rights through long-term use or leases. The Land Law of 1993 and another decree of 1995 made a disparity between private enterprises and SOEs. The latter benefited from long-term use rights granted by the Government for large areas of prime land, whereas private enterprises encountered significant restrictions regarding the transfer, exchange, lease, and mortgage of land-use rights. Under the current constitutional framework, land, natural resources, and properties managed or invested in by the State are collectively owned by the entire people and uniformly managed by the State.[552] Such an arrangement suggests potential privileges in accessing resources for SOEs, which raises concerns about equality and fair competition in resource allocation. Moreover, the entire people's ownership of productive means has brought up major issues in the privatization of SOEs, especially their undervaluation due to land-use rights (this issue will be explored in Section 4.2.3 below).

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[547] Pham, 'Che Do Kinh Te Trong Hien Phap 1992 - Phat Hien Mot so Bat Cap va Kien Nghi Huong Sua Doi' (n 518).
[548] ibid.
[549] Brian Van Arkadie and Raymond Mallon, *Vietnam: A Transition Tiger?* (Asia Pacific Press, Canberra, 2003), 156.
[550] Du Anh Nguyen, Van Thang Mai, and Thi Kim Que Hoang, "The Socialist-Oriented Market Economy in Vietnam: From the Constitution to Free Trade Agreements", 15(1) *Revista de Direito* (2023), 1-20, at 7.
[551] Article 58, National Assembly of Vietnam, Constitution (1992).
[552] Article 53, Constitution of 2013.

In sum, it is argued that due to the selective adoption of neoliberal ideology concerning property rights, Vietnam's legislative framework exhibits formal alignment with international legal models, but the practical application and interpretation of these laws reveals a disparity, indicating a lack of functional convergence.[553] Consequently, property rights, as the foundation for privatization, remain somewhat tenuous.[554]

4.1.2.2. Protection of property rights

With the recognition of private ownership, the 1992 Constitution provided for protection against nationalization. Article 23 stated that the lawful property of individuals and organizations should be safeguarded from state appropriation, except under specific circumstances deemed necessary for national defense, security, or broader national interests. In such cases, the state was mandated to conduct mandatory purchases or requisitions, ensuring that compensation is provided to affected individuals or organizations at market value.[555] The 1992 Constitution stipulated that the procedures for property requisitioning or confiscation should be governed by a law (an act issued by the legislature),[556] contrasting with the previous 1980 Constitution, which allowed for an executive instrument to serve as the legal basis.[557] Furthermore, the Constitution of 1992 expanded the scope of assets that individuals and organizations own to serve the development of a market-oriented economy with many participating components.[558] Therefore, the 1992 Constitution set up a stronger framework for protecting property rights, aligning with the objectives of building a market economy and a socialist rule-of-law state in Vietnam.[559] The Constitution, and subsequently the Civil Code of 1993, extended the recognition and protection to foreign individuals and overseas Vietnamese who invest in Vietnam.

The Constitution of 2013 built upon the foundations laid by its predecessor, reaffirming the state's authority to nationalize property under exceptional circumstances. Specifically, the third clause of Article 32 provides that: 'In case of extreme necessity for national defense or security

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[553] John Gillespie, *Transplanting Commercial Law Reform: Developing a "Rule of Law" in Vietnam* (Routledge, New York, 2006, 1st ed); John Gillespie, "Is Vietnam Transitioning Out of Socialism or Transforming Socialism?: Searching for Answers in Commercial Regulation", in Hualing Fu et al. (eds.) *Socialist Law in Socialist East Asia* (Cambridge University Press, Cambridge, 2018), 319–50.

[554] Sadrel Reza, "Institutional Aspects of Privatization: The Case of Viet Nam," Working Paper Series, Asian Development Bank Institute, Tokyo (December 1999), 15.

[555] The second clause of Article 23, Constitution of 1992.

[556] The third clause of Article 23, Constitution of 1992.

[557] Article 28, Constitution of 1980.

[558] Article 58, Constitution of 1992.

[559] For more discussion, *see* Thai Duong Tran, 'Nguyen Tac Gioi Han Quyen Trong ca Ban Hien Phap Viet Nam [Principles of Limitation of Rights in Vietnamese Constitutions]' (*To chuc Nha nuoc*, 2 August 2018) <https://tcnn.vn/news/detail/40674/Nguyen_tac_gioi_han_quyen_trong_cac_ban_Hien_phap_Viet_Namall.html> accessed 18 February 2025; Diem Pham, 'Ownership Forms in Vietnam's Current Legislation' (*Vietnam Law & Legal Forum*, 4 January 2011) <https://vietnamlawmagazine.vn/ownership-forms-in-vietnams-current-legislation-4344.html> accessed 18 February 2025.

reasons or in the national interest, in a state of emergency or in response to a natural disaster, the State may compulsorily purchase or requisition the property of organizations or individuals and pay compensation at market price'. While the 2013 Constitution retains the protective measures for private ownership, it broadens the definition of ownership rights to include 'everyone', thereby expanding the subjects entitled to these rights. However, it introduces a more extensive basis to justify the nationalization, including national defense, security reasons, national interests, a state of emergency, and response to a natural disaster.[560] Some warn that this provision potentially makes the protection of property rights weaker than that provided by the Constitution of 1992.[561] Although this limitation principle must also be perceived in connection with the principle of limitation of rights stipulated in Clause 2 of Article 14,[562] in terms of constitutional techniques, some scholars suggest that the Constitution needs to express that the acquisition and requisition are prescribed by law.[563]

The enactment of the 2013 Constitution has prompted significant amendments to various legislation related to the protection of property rights. The Civil Code of 2015 establishes a principle to safeguard ownership rights and other property-related rights within the civil law realm. Specifically, Article 163(2) states that ownership rights and associated property rights shall not be subject to arbitrary restrictions or unlawful deprivation. In instances deemed necessary for national defense, security, or the national interest – such as emergency situations or natural disaster prevention – the State is authorized to purchase or requisition property from individuals and organizations, ensuring compensation at market value.[564] Furthermore, the Law on Enterprises of 2014 reinforced the protection of property rights for enterprises and their owners. The Law stipulated that the State acknowledges and safeguards the rights of enterprises to own assets, capital, income, and other lawful interests. It explicitly prohibited the nationalization or administrative confiscation of lawful assets and capital, except under strictly necessary circumstances.[565] In such cases, the State is required to follow legal protocols for the purchase or requisition of assets, ensuring that enterprises receive fair compensation and that there is no discrimination among different types of businesses.[566] In terms of land rights, the Constitution does not confer the right to own land, however it does provide legal protection for land use rights and assets associated with land users. Such protection is detailed by land

[560] Article 32(2), Constitution of 2013.
[561] Tran, 'Nguyen Tac Gioi Han Quyen Trong ca Ban Hien Phap Viet Nam [Principles of Limitation of Rights in Vietnamese Constitutions]' (n 559).
[562] The second clause of Article 14 of the Constitution of 2013 states that: 'Human rights and citizens' rights may not be limited unless prescribed by a law solely in case of necessity for reasons of national defense, national security, social order and safety, social morality and community well-being'.
[563] Tran, 'Nguyen Tac Gioi Han Quyen Trong ca Ban Hien Phap Viet Nam [Principles of Limitation of Rights in Vietnamese Constitutions]' (n 559).
[564] Article 163(2), Civil Code of 2015.
[565] Article 5(3), Law on Enterprises of 2014.
[566] ibid.

legislation,[567] provided that the protection of land use rights must be placed in a context of harmony with the legitimate rights and interests of the State and other individuals and organizations.

4.1.2.3. Clarification on property ownership of state-owned enterprises

Historically, the state ownership function in Vietnamese SOEs was decentralized, with various government ministries and high-level public institutions responsible for exercising the function of state ownership over SOEs. This dispersed ownership model led to delays in the decision-making process regarding the privatization of SOEs. Recognizing the inefficiencies inherent in this decentralized model, Vietnam initiated reforms in 2005 aimed at consolidating and coordinating state ownership functions to expedite the privatization process. The establishment of the State Capital and Investment Corporation (**SCIC**) in June 2005 marked a pivotal shift in this direction. SCIC was mandated to manage state shareholdings and exercise the state's ownership rights in enterprises with state-invested capital. SCIC primarily engages as a stakeholder in privatized and partly privatized SOEs, thus making further divestment of government capital in these enterprises. By the end of 2010, the SCIC had managed a total of 927 SOEs, of which 538 remained in its portfolio at the conclusion of the period as a result of divesting state capital.[568] However, 19 major state-owned economic groups and corporations were not under SCIC's jurisdiction. In 2018, the establishment of the Commission for the Management of State Capital at Enterprises (**CMSC**) further centralized state ownership functions, particularly for the largest SOEs. This transition was formalized through the Decree No. 131/2018/ND-CP, which aimed to delineate the ownership and regulatory functions of the state, thereby enhancing the efficiency of SOE sales and privatization. The CMSC had overseen approximately 200 SOEs by 2022, representing a substantial portion of state-owned equity capital in Vietnam.[569] The goal of creating CMSC is to streamline the privatization process, but it also introduces an additional layer of government oversight for enterprises undergoing privatization.

Despite these advancements, challenges remain regarding the clarity of enterprise ownership and the nature of state investment in SOEs. The Law on Management and Use of State Capital of 2014 defines the representative state owner as the agency or organization designated by the government to exercise rights associated with state capital in enterprises. This law allows for extensive engagement from public sector entities in the ownership and management functions of SOEs, resulting in continued involvement from various ministries and

[567] Article 26 of the Law on Land 2013, and now Article 17 of the Law on Land 2024.
[568] Duc-Tho (Tom) Nguyen, Tran-Phuc Nguyen and Jeremy DK Nguyen, 'Vietnam's SCIC: A Gradualist Approach to Sovereign Wealth Funds' (2012) 17 Journal of the Asia Pacific Economy 268.
[569] OECD, *OECD Review of the Corporate Governance of State-Owned Enterprises in Viet Nam* (n 19) 47.

government agencies outside the CMSC's purview.[570] The entities involved include various line ministries, such as the Ministry of Finance, the Ministry of Industry and Trade, the Ministry of Transport, the Ministry of National Defense, and the Ministry of Agriculture and Rural Development. Different provincial people's committees typically hold ownership at the subnational level. As a result, the decision-making of SOE privatization is still adherent to shortcomings due to unclear ownership. In response to the ongoing ambiguities, current legislative proposals aim to amend the Law on Management and Use of State Capital of 2014. A key objective of these amendments is to separate the state's ownership role from its management responsibilities, positioning the state as a professional investor rather than a direct manager of enterprises.[571] This shift would clarify the status of state capital as an asset of SOEs, thereby aligning it more closely with business law principles.

4.2. Law Governing The Privatization Process

4.2.1. Legislative Approach

The legal framework governing the process of SOE privatization in Vietnam mainly consists of executive legislation, which includes two main sets of regulations: (i) the classification of SOEs eligible for privatization, and (ii) the procedural guidelines for the privatization process.

(i) The classification of SOEs subject to privatization

To prevent the excessive use of discretionary power or ambiguity in reform directions, SOEs must be positioned in the economy with clear criteria or standards for determining which industries should prioritize state-owned capital while selling off others to promote private sector growth.[572]

The Vietnamese Government has worked progressively to shape the layout of the state-owned sectors through different reform phases, beginning with the first legal instrument introduced in 2002. The Prime Minister's Decision No. 58/2002/QD-TTg set up a classification system for SOEs, identifying 41 sectors for full state ownership[573] and 30 sectors for majority state ownership. The classification went through several revisions, with the subsequent decisions of the Prime Minister in 2004, 2007, 2011, and 2014, reflecting a consistent trend of

[570] OECD classified the state ownership model of Vietnam as featuring both the dual model and coordination agency model. *See* ibid 50.

[571] The draft can be accessed at the website of the Government of Vietnam, https://chinhphu.vn/du-thao-vbqppl/ho-so-du-thao-luat-quan-ly-va-dau-tu-von-nha-nuoc-tai-doanh-nghiep-6627

[572] Ruilong Yang, 'Constructing the Foundations of Microeconomic Analysis of Chinese Economics: Based on the Theory of Classified Reform of State-Owned Enterprise' (2023) 6 China Political Economy 2, 12.

[573] These included SOEs in sectors of natural monopolies, public utilities, and large and profitable enterprises with high technologies or important for macroeconomic stability. See Sections I and II of the Classification criteria and list of state enterprises and state corporations of various types issued under the Decision No. 58/2002/QD-TTg.

reducing the sectors requiring full or majority state ownership.[574] The domain of SOE playing was codified for the first time under the Law on Management and Use of State Capital, which took effect in November 2014. Accordingly, the Law outlines four forms of state capital investment in enterprises,[575] each linked to specific provisions on the scope of investment. The subsequent period of 2016 to 2020 saw a refinement of these classifications because SOEs needed to focus on sectors with natural monopolies, the application of advanced technologies, substantial investment requirements, and the potential to drive socio-economic development that businesses of other economic sectors were unwilling to invest in.[576] Decision No. 58/2016/QD-TTg was enacted in 2016 to replace Decision No. 37/2014/QD-TTg. This change cut the number of sectors requiring full state ownership to 11 and adjusted ownership thresholds in certain sectors like oil and gas, where the state must maintain at least 65% of shares. The decision listed the details of SOEs subject to restructuring and the specific proportion of shares that must be held by the State in each enterprise.[577] Such an approach faced criticism for being overly influenced by state authorities instead of market forces. Evidently, the issuance of Decision No. 26/2019/QD-TTg in 2019, which revised the list of SOEs set for privatization, moved many SOEs into a category where the state would keep a majority stake, rather than the previous arrangement where the state would own less than 50% of charter capital as prescribed by Decision No. 58/2016/QD-TTg.[578]

From 2021 onward, the Government has reaffirmed its commitments to reduce both full and partial state ownership in SOEs so that these enterprises should focus on core and essential fields.[579] As such, Decision No. 22/2021/QD-TTg of 2021 introduces a new classification system of SOEs into three groups according to their political and economic significance and outlines different ownership and control structures for each group. Unlike the preceding instrument, Decision No. 22 does not include a list of specific SOEs undergoing privatization

[574] The Decision No. 37/2014/QD-TTg in 2014 delineated 16 sectors where the state should maintain full ownership and 24 sectors where majority ownership ranging from more than 50% to 65%, more than 65% to under 75%, and more than 75% of share capital was mandated.

[575] According to Article 6, forms of state capital investment in enterprises encompass: (i) the establishment of enterprises with 100% state-owned charter capital; (ii) the augmentation of charter capital for existing wholly state-owned enterprises; (iii) the injection of additional state capital to maintain the expected ratio of state shares and paid-in capital in joint-stock companies or limited liability companies with two or more members; and (iv) the repurchase of a part or the whole of an enterprise.

[576] Article 1, Decision No. 707/QD-TTg on approving program of restructuring state-owned enterprises with particular attention paid to State-owned economic groups and corporations for the 2016-2020 period 2017.

[577] Decision No. 58/2016/QD-TTg on the criteria for the classification of state-owned enterprises, state-invested enterprises and list of state-owned enterprises undergoing restructuring in 2016-2020. 2016, Annexes IIa, IIb.

[578] Decision No. 26/2019/QD-TTg on the list of State-owned enterprises to be equitized by the end of 2020, Annex.

[579] These include those related to national defense and security, as well as areas that are not being invested by other economic sectors. SOEs should also play a role in leading the development of other economic sectors to mobilize, allocate, and effectively use social resources. *See* Decision No. 360/QD-TTg approving the Scheme on the restructuring of state-owned enterprises with the focus on state economic groups and corporations for the 2021-2025 period 2022.

and divestment, instead a decentralized decision-making mechanism shall be applied in restructuring SOEs. The three groups are as follows:

- The first group of enterprises consists of those deemed strategically important, which should be wholly owned by the States. These include SOEs operating in 13 sectors related to security and national defense, natural monopolies, social order and security maintenance, and public utility services.
- The second group of SOEs is characterized by the government's desire to maintain a majority of shares (ranging from 50% to 65%, and more than 65%), including those involved in important infrastructure facilities, national resources, and sectors to ensure economic stability.
- The last group comprises the rest of SOEs, which can undergo privatization or divestment through various methods, resulting in the state no longer holding their shares and contributed capital.

The current classification framework has several shortcomings that could impede the privatization process in practice. First, the extent of the state's full ownership has decreased in the commercial sector of the national economy, nonetheless its plans have consistently emphasized the role of SOEs as an important economic material force of the state economy. The strategies for SOE privatization have seen little change, largely due to the State's ongoing influence over many strategic sectors. Indeed, Decision No. 58/2016/QD-TTg reduced the number of industries to be wholly controlled by the State from 16 to 11, however the recent instrument – Decision No. 22/2021/QD-TTg increases such industries to 13, and the Government remains the majority state ownership in many industries between 2021 and 2025. Consequently, there is no indication that the State intends to decrease its level of control over SOEs following the process of privatization. Another problem is that the regulatory approach has simply categorized SOEs based on the proportion of capital share retained by the state, without considering the firm size. Small and medium-sized SOEs should be fully privatized or divested because retaining ownership in such enterprises is unnecessary to regulate the economy. It is also recommended to give priority to large-scale SOEs that are not currently owned or controlled by the government during the privatization process. The findings on the effect of privatization on firm performance in Vietnam show that only large-scale enterprises are able to improve their profitability after privatization.[580] However, the existing provisions on classification produce limited impact on targeting which SOEs should be prioritized for privatization and divestment.

[580] Van Tan Nguyen, 'The Impact of Equitization on Firm Performance: Evidence from Vietnamese State-Owned Enterprises' (Doctor of Philosophy, University of Economics and Law (Vietnam National University Ho Chi Minh City) 2022).

(ii) The procedural guidelines for the privatization process

The procedural guidelines for the privatization process of SOEs in Vietnam cover a wide range of regulatory issues critical for the effective execution of privatization initiatives. The evolution of the legal framework for privatization has been marked by the issuance of numerous legal documents designed to create a robust legal foundation for tackling the challenges encountered throughout the privatization process. During the first ten years of privatization efforts, a series of decrees and decisions were issued to refine and clarify the legal parameters governing this transition. The early legal frameworks for privatization, established between 1990 and 1993, had a notably limited scope. These documents primarily focused on the selection criteria for enterprises designated for pilot privatization and provided a basic outline of the privatization process, without mentioning other important regulatory issues, such as the form of issuing shares, debt settlements, or enterprise valuation. Decree No. 28/CP was introduced in 1996, followed by Decree No. 25/CP in 1997, which amended several provisions of the earlier decree to articulate the objectives, conditions, and procedural aspects of privatization more clearly. In 1998, the Government issued Decree No. 44/CP with additional regulations on the form of privatization, the right to purchase shares in privatized enterprises, and enterprise valuation. Currently, the privatization procedure is governed by two government decrees: Decree No. 126/2017/ND-CP of 2017 on conversion from SOEs and single-member limited liability companies with 100% of charter capital invested by SOEs into joint-stock companies, and Decree No. 140/2020/ND-CP of 2020 on amending Decree No. 126/2017/ND-CP. These regulations outline essential components such as the prerequisites for privatization, the decision-making authorities, the privatization methods, the criteria for purchasing shares, the valuation of SOEs, and policies for employees affected by privatization.

For a general assessment, the reliance on administrative regulations and decrees carries a level of risk due to discretionary interpretation and implementation. This situation allows for ongoing adjustments, reaffirmations, and modifications of the SOE privatization schemes, which can pose legal uncertainties for private entities interested in engaging with these privatization initiatives.[581] Evidently, the Vietnamese Government has demonstrated a preference for implementing periodic directives rather than establishing long-term decisions regarding the privatization programs. The proportion of state ownership maintained in post-privatized enterprises has been subject to regular reviews and modifications to conform with the Government's overarching economic growth goals and investment strategies, thereby influencing the business sectors available for privatization. For example, Decision No. 986/QD-TTg in 2018 established a framework whereby the state is mandated to retain a minimum ownership stake of 51% in state commercial banks in the period of 2021 and 2025. However, Decision No. 22/2021/QD-TTg, issued three years later, contradicts the previous instrument by

[581] Painter (n 322); Pham, 'From Marx to Market' (n 339).

asserting that the government is required to retain a minimum of 65% of the overall voting shares in these banks during the same timeframe. In another case, the Government approved a decision in 2019 to privatize Vietnam Posts and Telecommunications Group (**VNPT**), a state-owned telecommunications giant, whereby state capital post-privatization would range from over 50% to under 65% of the charter capital.[582] However, the privatization plan has recently been postponed by the Government to ensure VNPT's role as an SOE in executing a national strategy for the development of digital infrastructure.[583]

4.2.2. Institutional Arrangements

(i) Regarding wholly state-owned enterprises

In Vietnam, the institutional framework managing SOE privatization is structured in a decentralized way, which lays out the roles and competencies of various state actors. The authority to approve the privatization plan for wholly state-owned enterprises involves a range of agencies that represent state ownership in enterprises, including ministries, ministerial or governmental authorities, provincial people's committees, or organizations created by laws to exercise the right of state ownership in enterprises.[584] Despite the decentralized nature of authority, the Prime Minister retains ultimate decision-making power regarding the privatization of SOEs. Specifically, the Prime Minister is responsible for approving the list of SOEs set for privatization, which is formalized through a government decision.[585] This foundational legal instrument enables relevant authorities to approve and implement privatization plans for SOEs in their respective jurisdictions.[586] According to the current legal provisions, the authority to approve privatization plans of wholly state-owned enterprises is as follows:[587]

- The Prime Minister has the power to approve privatization plans of (i) significant economic groups, state-owned corporations, and SOEs with accounting capital of at least VND1,800 billion, and of (ii) single-member limited liability companies where 100% of the charter capital is invested by SOEs (known as level II enterprises).
- The representative authority of state ownership in SOEs is empowered to decide the privatization plan of SOEs under its management, based on the list of SOEs approved for privatization by the government.

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[582] Decision No. 26/2019/QD-TTg on the list of State-owned enterprises to be equitized by the end of 2020 2019.
[583] Thai Khang, "Chua co phan hoa VNPT de thuc hien su mang phat trien ha tang so quoc gia [VNPT has not yet been equitized to carry out the mission of developing national digital infrastructure]", *VietNamNet* (22 December 2022), available at https://vietnamnet.vn/chua-co-phan-hoa-vnpt-de-thuc-hien-su-mang-phat-trien-ha-tang-so-quoc-gia-i5011035.html.
[584] Article 3(1), Decree No. 126/2017/ND-CP.
[585] Article 45(1)(b), Decree No. 126/2017/ND-CP
[586] The current instrument is Decision No. 1479/QĐ-TTg approving the plan for rearrangement of SOEs and state-invested enterprises for the period of 2022-2025.
[587] Article 45, Decree No. 126/2017/ND-CP

- The board of members or chairperson of SOEs is in charge of approving privatization plans for level II enterprises, except for those falling under the Prime Minister's competence.

(ii) Regarding privatized state-owned enterprises

Before 2006, line ministries, provincial governments, and various state or quasi-state entities mainly held the responsibility for exercising the state's ownership functions and further divestment from privatized SOEs. The establishment of the SCIC represented a significant change in this paradigm, as it assumes such responsibility in privatized SOEs, except for those established by the Prime Minister's decisions or when the Prime Minister delegates this function to other agencies.[588] In principle, once privatized, all SOEs should be transferred to the SCIC, regardless of the degree of ownership held by the state or the previous corporate structures. This transition sought to simplify the privatization process by separating ownership from regulatory roles, thereby mitigating political interference in business operations. The SCIC was created as a largely autonomous entity under the Ministry of Finance, with its initial leadership comprising senior officials from the Ministry. However, from its inception, SCIC aimed to enhance its autonomy, particularly in managing the Central Fund for Support Enterprises Restructuring, which historically was generated from the sale of state capital and was overseen by the Ministry of Finance. In early 2007, a pivotal request was made to transfer the management of the Central Equitization Fund from the Ministry of Finance to the SCIC. In late 2007, a compromise was reached that let SCIC manage the operation of the funds, while the Ministry of Finance kept the decision-making power. During its first decade, the SCIC successfully divested from more than 900 enterprises, with a total capital cost of VND5,724 billion and returns of VND14,109 billion, which is 2.5 times the initial capital investment.[589] This performance notably exceeds the average state capital divestment ratio of 1.5 times,[590] indicating a robust approach to managing state assets.

A noteworthy turning point in the institutional framework is the establishment of the CMSC in 2018 through Decree No. 131/2018/ND-CP. The CMSC was responsible for exercising ownership rights over 19 of the largest state-owned groups and corporations. The SCIC was also transferred from the Ministry of Finance to the CMSC in November 2018, thereby centralizing state capital management. An impact of the CMSC's establishment on the governance landscape of SOEs is that it facilitates the government's objective of reducing state capital through privatization. While CMSC is empowered to make independent decisions regarding most SOEs,

[588] Article 7, Decree No. 151/2013/ND-CP on the functions, tasks and operation mechanism of the State Capital Investment Corporation.
[589] Bui Duc Long, 'Thoai von nha nuoc tai doanh nghiep: Thuc tien tai Tong cong ty Dau tu va Kinh doanh von nha nuoc' (*Tap chi Tai chinh*, 11 December 2016) <https://tapchitaichinh.vn/thoai-von-nha-nuoc-tai-doanh-nghiep-thuc-tien-tai-tong-cong-ty-dau-tu-va-kinh-doanh-von-nha-nuoc.html> accessed 19 February 2025.
[590] ibid.

it must consult the Prime Minister for those established directly by the Prime Minister. Despite the CMSC's role, line ministries retain significant operational control over many companies within the CMSC's portfolio. Decree No. 131/2018/ND-CP mandates the CMSC to consult key line ministries before making important financial and human resources proposals to the Prime Minister. The reliance on line ministries, which have extensive institutional knowledge of the SOEs, suggests that they continue to play a crucial role in the management and privatization processes.[591]

In December 2024, the Vietnamese Government announced its plan to dissolve the CMSC and revert the management of the 19 state-owned groups and corporations back to the relevant ministries.[592] This decision, as outlined in a government document signed by the Deputy Prime Minister Nguyen Hoa Binh, is part of a broader strategy to restructure and streamline the administrative apparatus. Consequently, the SCIC is expected to cease its functions and be managed by the Minister of Finance and other relevant ministries and agencies.[593] This shift signifies a regression to a more decentralized structure after seven years of efforts aimed at consolidating and coordinating state ownership functions. The dissolution of the CMSC raises critical questions regarding the future evolution of Vietnam's institutional framework for SOE management and the acceleration of privatization efforts, which have faced persistent challenges despite over three decades of implementation.

4.2.3. Methods of Privatization

During the pilot privatization phase, the law stipulated three main forms of privatization,[594] with the aim to mobilize capital from various stakeholders, including employees, officials, and domestic and foreign investors, to facilitate technological renewal and enterprise development.[595] The first form of privatization allows the state to maintain the current value of the enterprise while issuing shares to attract additional capital. The value of the state's shares in this case is based on the actual value of the state capital in the enterprise, taking into account the costs of privatization and any preferential values granted to employees. The second form involves the state selling a portion of the existing value of the enterprise. Here, the state utilizes a part of its actual capital to sell shares to external shareholders, thereby generating funds for the enterprise. The third form entails the separation of a component of the enterprise that qualifies for privatization based on certain criteria for privatization. This component is capable

[591] OECD, *OECD Review of the Corporate Governance of State-Owned Enterprises in Viet Nam* (n 19) 51.
[592] Viet Nam News, 'State Capital Management Commission to Be Dissolved' (*Viet Nam News*, 7 December 2024) <https://vietnamnews.vn/economy/1688556/state-capital-management-commission-to-be-dissolved.html> accessed 19 February 2025.
[593] ibid.
[594] Decision No. 143-HDBT on continuing the pilot program of innovating the management of state enterprises 1990; Decree No. 28/CP of the Government on the transformation of a number of SOEs into join-stock companies 1996.
[595] Article 1, Decree No. 28/CP.

of operating independently and maintaining separate accounts, making it possible to privatize distinct assets, such as warehouses, factories, and service departments. Following this separation, the detached entity is transformed into a joint-stock company. In 1998, Decree No. 44/CP of the Government expanded the privatization framework by introducing another form by allowing the sale of the entire existing value of the state capital in an enterprise to convert it into a joint-stock company.[596] This approach enables SOEs to divest completely from state ownership, thereby recovering capital for the state budget without retaining any state shareholding in the privatized entity. Data from a study on the privatization process until October 2000 reveals that the application of these privatization forms varied significantly. Specifically, the first form was applied to 51 SOEs (accounting for 11% of all privatized SOEs), the second form to 195 SOEs (accounting for 42.48%), the third form to 69 SOEs (accounting for 15%), and the fourth form to 145 SOEs (accounting for 31.52%).[597] However, the practice of privatization revealed legal complexities concerning the relationship between the principal enterprise and the separated entity in the third form, which lacked clear regulatory guidance.[598] Moreover, there were no clear guidelines set for restructuring enterprises prior to privatization, leaving investors uncertain about the debt burdens and the appropriate approach to dismantling them.[599] Consequently, since 2002, the legal framework has evolved to remove the separation of an enterprise component as a distinct form of privatization. Instead, the law permits a combination of selling a part or all of the state capital and issuing additional shares to attract additional investment.[600] The current legal framework allows for the privatization of SOEs through three methods:[601] (i) issuing additional shares to boost charter capital while maintaining the existing state capital; (ii) divesting a portion of the existing state capital, or a combination of divesting state capital and issuing additional shares to increase charter capital; and (iii) selling all of the state capital in the enterprise, or both selling the entire state capital and issuing new shares to increase charter capital.

The law mainly provides for standard methods for privatizing SOEs. Decree No. 44/CP of 1998 set the foundational procedures for the public announcement and sale of shares in SOEs undergoing privatization. This decree allowed for different methods for sale, including public auctions, negotiations, and competitive bidding. However, the complexity of the privatization process, characterized by the involvement of multiple stakeholders across different levels and

[596] Article 7(4), Decree No. 44/1998/ND-CP replacing the Decree No. 28-CP on the transformation of a number of SOEs into join-stock companies 1998.
[597] Thi Bach Duong Tran, 'Nhung van de Phap Ly ve Co Phan Hoa Doanh Nghiep Nha Nuoc o Viet Nam' (Master's thesis, Vien Nha nuoc va Phap luat 2001) 33.
[598] ibid 32.
[599] Reza (n 554).
[600] Article 3(4), Decree No. 64/2002/ND-CP on conversion of State-owned Enterprises into shareholding companies 2002.
[601] Article 5, Decree No. 126/2017/ND-CP on conversion of SOEs and single-member limited liability companies with 100% of charter capital invested by SOEs into shareholding companies 2017.

localities with overlapping functions in concluding the implementation process, often resulted in lengthy negotiations between potential buyers and government entities.[602] To streamline the process, Decree No. 187/2004/ND-CP was introduced, bringing about a major transition from private sales to initial public offerings (**IPOs**) as the predominant method of privatization. During the years 2005 to 2010, the government mainly sold its stake in SOEs through IPOs.[603] However, the requirement of Decree No. 187 to exclusively conduct IOPs through the auction method[604] posed challenges, particularly for larger enterprises. This prompted legal amendments in 2007 to incorporate underwriting and direct negotiation as additional methods of sale.[605] Further advancements were made with the introduction of Decree No. 126/2017/ND-CP in 2017, which added the book-building method to the existing options of public auction, underwriting, and direct negotiation. This new method seeks to improve the objectivity and accuracy of IPO pricing, thereby promoting a fair and transparent privatization process. The competitive nature of IPOs aims to optimize pricing and protect state assets during the privatization process. However, the reliance on IPOs has revealed several shortcomings in practice. The typical process for transforming a wholly state-owned enterprise into a joint-stock company in Vietnam involves selecting a securities company as a consultant, conducting a public auction, and subsequently selling shares to employees and institutional investors, including strategic ones. A drawback of this approach is the insufficient engagement of strategic investors, who are crucial for the successful privatization of SOEs. In addition, the law provides that the selling price to strategic investors depends on the methods of sale (either negotiation or auction) and is determined based on the average selling price of the initial public offering, as indicated by the results of the public auction.[606] When investors apply to register as strategic investors, the specific floor price for purchasing shares in the SOEs has not yet been established. Therefore, it is difficult for them to make informed decisions about share purchases. The regulation that the selling price for strategic investors cannot be lower than the average successful bid price at the IPO has left them feeling unfairly treated.[607] Consequently, these regulatory inadequacies present significant barriers to attracting strategic investors, which in turn undermines the effectiveness of the privatization process of SOEs in Vietnam.

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[602] Reza (n 554).

[603] Thi Quy Vo, 'Privatization and Corporate Performance in Transition Economies: The Case of Vietnam' (Development & Policies Research Center 2012) 2012/22 5.

[604] Article 28, Decree No. 187/2004/ND-CP on conversion of state-owned enterprises into shareholding companies 2004.

[605] Articles 41 and 42, Decree No. 109/2007/ND-CP on conversion of enterprises with 100% state-owned capital into shareholding companies 2007.

[606] Article 6(3), Decree No. 126/2017/ND-CP on conversion of SOEs and single-member limited liability companies with 100% of charter capital invested by SOEs into shareholding companies.

[607] KIS Vietnam Securities Corporation, 'Co Phan Hoa Khong Can IPO?' (*KIS Vietnam Securities Corporation*, 3 September 2014) <https://kisvn.vn/co-phan-hoa-khong-can-ipo/> accessed 20 February 2025.

The law also includes employee incentive schemes to motivate participation in the privatization of SOEs. During the initial stage of privatization, employees received incentives such as benefits from dividend allocations based on a portion of state shares' value to employees during their lifetime, and the option to purchase enterprise shares on credit.[608] Currently, employees can choose to buy shares at a discount or buy additional shares. Employees who want to purchase extra shares beyond those mentioned above shall subscribe to shares from auctions, following the same regulations applied to other investors.[609]

4.2.4. Valuation of SOEs

Although Vietnam has been privatizing SOEs since 1990, it was not until the promulgation of Decree No. 28/CP in 1996 that there were regulations for the valuation of SOEs set for privatization. This decree outlined the principles for determining the value of an enterprise, including: (i) the value of the SOE at the time of privatization should be the actual value acceptable to both the seller and the buyer of shares, and (ii) the valuation process should be grounded in several key criteria prescribed by laws. The first criterion is that the valuation should rely on the verified financial records in the enterprise's accounting books at the time of privatization, which must be audited by a legally recognized agency. Second, the valuation should consider various advantage coefficients associated with the SOE, such as its geographical location, product reputation, and operational efficiency, as evidenced by the profit-to-capital ratio from the last three years. Lastly, the valuation should incorporate the value of land-use rights, as stipulated by the Law on Land and its related regulations. While the Decree No. 28/CP did not specify the method to determine the value of SOEs, the asset-based approach emerged as the predominant method during this period. In 2002, the Ministry of Finance further refined the valuation process by issuing a circular that introduced two primary methods: the asset-based method and discounted cash flow. To enhance the flexibility in the valuation process, the legal framework has been developed to allow consultancy organizations to select appropriate methods for determining enterprise value. According to the existing legal provisions, six recognized methods for enterprise valuation include: the mean ratio method, transaction value method, asset-based method, discounted free cash flow method, discounted dividend stream method, and discounted free cash flow to equity method.[610] The consulting firm providing enterprise valuation service shall apply the asset-based approach and at least one other approach to determine the SOE's value in accordance with the legal guidelines on pricing and valuation.[611] The law does not specifically provide for criteria or conditions when each additional method can be applied. In other words, the asset-based method is mandatory for all SOEs undergoing

[608] Article 11, Decree No. 28/CP of the Government on the transformation of a number of SOEs into join-stock companies.
[609] Article 42, Decree No. 126/2017/ND-CP on conversion of SOEs and single-member limited liability companies with 100% of charter capital invested by SOEs into shareholding companies.
[610] Circular 28/2021/TT-BTC of the Ministry of Finance on issuing Vietnamese valuation standard No. 12.
[611] Section 11, Decree No. 140/2020/ND-CP.

privatization, while at least one additional method must be used for cross-verification at the consulting firm's discretion. In addition, the enterprise value and the value of state capital in the enterprise must not be lower than the valuations derived from the asset-based method.[612]

Despite the advancements in legal provisions for valuation processes and methods, the valuation of SOEs set for privatization remains a complex issue in Vietnam. This condition is particularly true for land valuation due to ambiguities surrounding the entire people's ownership of land. The existing law on land categorizes land use rights into several distinct cases: land allocation with usage fees, land allocation without usage fees, land leasing with a one-time payment, and land leasing with annual payments. These classifications are critical in assessing the value of land use rights in the context of privatization. Notably, the law stipulates that land with annual rent fees is excluded from the SOEs' valuation, whereas land with a one-time payment for rent is included.[613] This regulatory approach risks undervaluing SOEs set for privatization, especially when the land leasing with a one-time payment does not reflect market value, as the valuation relies on the price lists announced by the local governments. A study indicates that the price system of land use rights set by provincial and municipal people's committees is often only 20% of the prevailing market rates.[614] Moreover, the 2013 Law on Land allows for the potential alteration of land use purpose after privatization, which can lead to substantial profits for the newly privatized entities. This expectation can incentivize enterprises to seek changes in land use, further complicating the valuation process. The requirement for SOEs undergoing privatization to develop and secure approval for land use plans adds another layer of complexity,[615] because the value of land use rights must be factored into the enterprise's actual value. Consequently, many SOEs experience stagnation in the privatization due to challenges in obtaining the required approvals for land use plans. To address these valuation challenges, the Ministry of Finance proposes two solutions: (i) separating the arrangement and management of real estate from the privatization plan to remove the need for approval from competent authorities as a condition for privatization; and (ii) limiting the inclusion of land use rights in enterprise valuations in specific cases.[616] Regarding the second proposal, the value of land use rights should be included in the SOE's valuation in two cases: when land is allocated or auctioned for real estate businesses of SOEs whose main business line is real estate or as determined by the Prime Minister's decisions.[617] However, this proposal raises

[612] Article 22(2), Decree No. 126/2017/ND-CP.
[613] Article 30, Decree No. 126/2017/ND-CP; Section 15, Decree 140/2020/ND-CP.
[614] Phan Linh, '"Diem den" tham dinh gia khi co phan hoa va thoai von nha nuoc' (*VnEconomy*, 25 August 2022) <https://vneconomy.vn/diem-den-tham-dinh-gia-khi-co-phan-hoa-va-thoai-von-nha-nuoc.htm> accessed 20 February 2025.
[615] Article 47(1), Decree No. 126/2017/ND-CP.
[616] Bao dien tu Chinh Phu, 'Se tach qua trinh sap xep, xu ly nha dat ra khoi qua trinh co phan hoa' (*Bao dien tu Chinh Phu*, 30 September 2022) <https://xaydungchinhsach.chinhphu.vn/se-tach-qua-trinh-sap-xep-xu-ly-nha-dat-ra-khoi-qua-trinh-co-phan-hoa-119220930144230409.htm> accessed 20 February 2025.
[617] ibid.

some concerns, particularly regarding SOEs that lease land and pay annual rents. Although enterprises do not possess land use rights in this case, they enjoy significant business advantages due to their preferential access to annual leases. As a result, purchasers of such SOEs may benefit from these advantages while acquiring the enterprises at a reduced price due to the exclusion of land from valuation. This exclusion could undermine the perceived value of SOEs, as land-use rights are typically the most valuable assets. Ultimately, failing to account for these rights may impede the government's objective of mobilizing financial resources from privatizing SOEs to support public investment initiatives.

4.3. Supporting Laws

4.3.1. Company Law

4.3.1.1. Corporatization (pre-privatization)

Before 1 July 2010, the regulatory framework for the establishment and operation of enterprises in Vietnam was primarily defined by two key legislative instruments: the Law on SOEs of 2003 and the Law on Enterprises of 2005. The Law on SOEs defined that 'state-owned enterprise means an economic organization in which the State owns the entire charter capital or holds the controlling shareholding or controlling capital contribution, and which is organized in the form of a state company, joint-stock company, or limited liability company'.[618] Meanwhile, the Law on Enterprises of 2005 mandated all SOEs to transform to a corporate model within four years, starting from 1 July 2006, thereby necessitating a comprehensive restructuring of these entities.[619] During the transitional period leading up to the full conversion of SOEs, various forms of SOEs coexisted. These included state companies (*cong ty nha nuoc*),[620] which were fully owned by the state; state shareholding companies, where all shareholders were state companies; state shareholding companies that had controlling shareholding or controlling capital contribution for the state; single-member limited liability companies and limited liability companies with multiple members. In addition, enterprises in which the state held more than 50% of charter capital were classified as SOEs, while those with state capital contributions of 50% or less were not recognized as such.

Upon the completion of the conversion process, the legal framework governing SOEs, particularly the 2003 Law on SOEs, is no longer relevant, marking the end of the old model of SOEs. The transformation to joint-stock companies or limited liability companies under the 2005 Law on Enterprises brings several critical legal implications, as follows:

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[618] Article 1, Law on State-owned Enterprises of 2003.

[619] Article 166(2), Law on Enterprises of 2005.

[620] State company means an enterprise in which the State owns the entire charter capital and which is established, and organized pursuant to this Law. State companies shall be organized in the form of independent state companies or state corporations. Article 3(1), Law on State-owned Enterprises of 2003.

- Change in legal organization model: SOEs underwent a formal rebranding, moving from their previous designations to joint-stock companies or limited liability companies with a new organization structure.
- Reform in corporate governance: The governance structure underwent significant modifications. The old-model SOEs typically operated under a management framework with a board of directors appointed by the founding authority. In contrast, joint-stock companies are governed by a General Meeting of Shareholders and an elected Board of Directors, while limited liability companies may have a Board of Members or a Chairman. Furthermore, the establishment of a supervisory board becomes mandatory for joint-stock companies with more than 11 shareholders or those with institutional shareholders holding a majority stake. Similar requirements apply to limited liability companies with multiple members.
- Reconstruction of the company charter: The conversion process required the development of a new company charter for SOEs transitioning to joint-stock companies and limited liability companies, aligning with the stipulation of the 2005 Law on Enterprises.

The transition to a new legal organizational framework, featuring innovative corporate governance principles outlined in a unified Law on Enterprises applicable to both SOEs and private entities, is expected to greatly change how the state manages and oversees its SOEs. This reform aims to strengthen the independence of these enterprises, enhance their accountability, and promote transparency and operational efficiency. Ultimately, the bureaucratic interference in the privatization decision is likely to be reduced.

4.3.1.2. Post-privatization control devices

The concept of golden shares has been incorporated into different versions of the Law on Enterprises in Vietnam.[621] Golden shares, which are so-called 'preferred voting shares' under Vietnamese law, have more voting power than common shares, thereby granting the state a mechanism to maintain control over enterprises where the state holds a minority stake. Article 116 of the Law on Enterprises of 2020 specifies the parameters governing these preferred voting shares as follows:

(i) Only government-authorized organizations or founding shareholders are permitted to hold preferred voting shares.[622]

[621] Article 52 Law on Enterprises 1999; Article 78 Law on Enterprises 2005; Article 116 Law on Enterprises 2014; Article 116 Law on Enterprises 2020.
[622] Article 116(1), Law on Enterprises 2020.

(ii) The voting rights associated with these shares are limited to a three-year period following the issuance of the Enterprise Registration Certificate, after which preferred voting shares shall be converted to common shares.[623]

(iii) The transferability of preferred voting shares is restricted, allowing transfers only under specific circumstances, such as by an effective court judgment of decisions or in accordance with inheritance laws.[624]

The issue of golden shares gained attention during the 2016 privatization of some big SOEs,[625] driven by concerns about the potential loss of Vietnamese brands to foreign investors in case of selling most profitable SOEs. Government officials began to recognized this risk and said to consider applying protective measures, including the use of golden shares.[626] However, a comprehensive study by the OECD on corporate governance of SOEs in Vietnam reveals a gap in the practice of applying golden shares. Despite the government's acknowledgement of the potential benefit of golden shares in preventing the sale of critical SOEs to external investors beyond state control, it appears that regulations for these shares have not yet been enforced in reality.[627] Interactions between the OECD team and various ministries and government entities indicate a complete absence of instances where the state exercises its preferred voting rights in any company.[628] Moreover, there have been no official reports on golden shares or veto power over corporate decisions, which can serve as the basis to assess SOE disclosure and transparency in Vietnam. While all SOEs, including single- and multi-member liability limited companies and joint-stock companies, are mandated to submit periodic reports on their management and organization structures, such reports do not cover details about preferred voting rights or associated veto powers over corporate decisions.[629] Regarding publicly listed SOEs, the existing regulations require these enterprises to disclose changes in the number of voting shares, resolutions from Annual Shareholders' Meetings, and corporate governance reports.[630] Yet, there are no requirements for the disclosure of preferred voting shares in the corporate governance

[623] ibid.

[624] Article 116(2), Law on Enterprises 2020.

[625] For example, the State was expected to get $2 billion from selling major stakes in two giant SOEs in beverage sectors, Sabeco and Habeco. *See* Jake Maxwell Watts and PR Venkat, 'As Vietnam Deals Surge, Brewers Go Up for Sale' *Wall Street Journal* (13 September 2016) <http://www.wsj.com/articles/as-vietnam-deals-surge-brewers-go-up-for-sale-1473755089> accessed 21 February 2025.

[626] Bang Luong, 'Will Vietnam decide to use "golden share" to protect company brands?' (*VietNamNet*, 5 October 2016) <https://vietnamnet.vn/en/will-vietnam-decide-to-use-golden-share-to-protect-company-brands-E164440.html> accessed 21 February 2025.

[627] OECD, *OECD Review of the Corporate Governance of State-Owned Enterprises in Viet Nam* (n 19) 112–113.

[628] ibid 113.

[629] Article 109(2) Law on Enterprises 2020.

[630] Article 120, Law on Securities of 2019. Before 1 January 2021, public-listed SOEs were required to disclose changes in the number of voting shares and the resolution of Annual Shareholders' Meetings, while there were no stipulations regarding the disclosure of compliance with corporate governance standards (Article 101 of the Law on Securities of 2006, and Section 19 of the Law No. 62/2010/QH12 on amending the Law on Securities of 2006).

reports.[631] It appears that there is a lack of regulatory clarity regarding golden shares or vetoes in any SOE-relevant legislation. Due to the absence of documented cases of golden shares, it is unclear whether they have actually been applied as a post-privatization control device in Vietnam.

On the other hand, retaining a controlling interest has been a persistent trend throughout the process of SOE privatization in Vietnam. Although the government decisions have provided for a gradual reduction in the number of industries where the state holds full or majority ownership, a very small portion of shares has been purchased by private businesses.[632] Vietnam has set targets to diminish its direct ownership in SOEs and promote private ownership, nevertheless SOE privatization has not yet taken place as scheduled and has encountered continuous delays.[633] These facts reflect a reluctance among government authorities to relinquish control over SOEs. The evolution of enterprise law in Vietnam further illustrates this tendency, as evidenced by the revisions of the Law on Enterprises in 2014 and 2020. The Law on Enterprises of 2014 defined a state-owned enterprise as one in which the state holds 100% of the charter capital,[634] thereby establishing a narrow scope for what constitutes an SOE.[635] The 2014 Law also had a separate chapter for the corporate governance of SOEs, while enterprises with less than 100% state ownership were subjected to regulation applicable to enterprises of other ownership types. This revision however led to confusion among policymakers and contributed to the stagnation of the privatization process, as other laws implied a broader scope of SOEs than the 2014 Law on Enterprises.[636] The subsequent revision of the Law on Enterprises occurred 5 years later, and the drafting process kicked off a fierce debate regarding the threshold of state ownership necessary to maintain control over SOEs. The drafting agency, the Ministry of Planning and Investment, proposed the threshold of more than 50% of charter capital held by the State. This proposal stirred up concerns among members of the National Assembly over whether such a threshold was enough to ensure the control of the state over SOEs. For example, representatives from Lang Son province and An Giang province advocated for a higher threshold of at least 75% so as to ensure unequivocal state control over SOE important

[631] Reports on corporate governance are made according to the form in Appendix V of Circular No. 96/2020/TT-BTC of Ministry of Finance on providing guidelines on disclosure of information on securities market.
[632] Pham and Mai (n 406).
[633] James Guild, 'A Dream Deferred? The "Equitization" of Vietnam's State-Owned Enterprises' (11 February 2021) <https://thediplomat.com/2021/02/a-dream-deferred-the-equitization-of-vietnams-state-owned-enterprises/> accessed 29 April 2025.
[634] Article 4(8) Law on Enterprises 2014.
[635] The underlying motivation for this legislative adjustment was to enhance Vietnam's negotiating position in two significant free trade agreements at the time, namely the Trans-Pacific Partnership and the European Union-Vietnam Free Trade Agreement. By the restructuring and sale of the State's share, and applying the newly enacted SOE definition, the number of SOEs would decrease from 700 to less than 300 at the end of 2015, thus the macroeconomic indicators of Vietnam would be healthier. For detailed discussion, see Chu (n 164).
[636] OECD, *OECD Review of the Corporate Governance of State-Owned Enterprises in Viet Nam* (n 19) 38.

management decisions.[637] Although the final version of the law was approved with the threshold of more than 50% of the charter capital or voting shares, the discourse surrounding the law-making process illustrates a prevailing apprehension among Vietnamese politicians regarding the implications of privatization. Many still hold onto a dogmatic perception that selling businesses and state assets carries the risk of weakening the foundation and material strength of socialism, instead of considering transferring capital and other resources to those who can utilize them effectively.[638]

Under the existing legislation, the corporate governance regime for SOEs wholly owned by the State is subject to the separated provisions,[639] which are generally stricter than those for companies with no state capital. Meanwhile, SOEs with state capital between 51% and less than 100% are subject to the same rules applicable to multi-member limited liability or joint-stock companies.[640] The Law on Enterprises 2020 seeks to clarify the SOE landscape in Vietnam, but concerns arise that its broader definition compared to that of the 2014 legislation may enable joint-stock companies with state ownership to receive preferential treatment from the state owners and state banks.[641] Furthermore, state shareholders account for a large proportion of over 50% on average, while there are no specific protections for minority investors in privatized companies in practice.[642] This suggests that state shareholders effectively exert significant influence on the decisions made during general meetings of shareholders of privatized enterprises, where decisions are typically determined by simple majority vote.

4.3.2. Foreign Investment Law

The Party-State of Vietnam has adopted a cautious stance towards foreign investment in the privatization of SOEs, reflecting a complicated connection between ideological commitments and economic imperatives. The initial phase of SOE privatization started in 1990, but it was not until 1993 that the Prime Minister authorized the sale of shares to foreign entities, with such transactions requiring case-by-case approval.[643] Despite the commencement of the pilot program, the results of privatization during its early years were modest, primarily due to the limited capacity of the domestic private sector. Consequently, from 1996 onward, Vietnam began to liberalize its investment policies, allowing for increased foreign participation in SOE

[637] Thao Nguyen, 'Danh Gia Tac Dong Cua Viec Thay Doi Quy Dinh ve Doanh Nghiep Nha Nuoc [Regulation Impact Assessment of the Revision of State-Owned Enterprises]' (*Quan doi Nhan dan*, 20 November 2019) <https://www.qdnd.vn/chinh-tri/tin-tuc/danh-gia-tac-dong-cua-viec-thay-doi-quy-dinh-ve-doanh-nghiep-nha-nuoc-603030> accessed 31 October 2024.
[638] Dinh Thien Tran, 'Co Phan Hoa Doanh Nghiep Nha Nuoc: Can Thay Doi Tiep Can [Equitization of State-Owned Enterprises: Need to Change the Approach]' [2017] Nghien cuu kinh te 3, 8.
[639] Chapter IV, Law on Enterprises 2020.
[640] Article 89, Law on Enterprises 2020.
[641] OECD, *OECD Review of the Corporate Governance of State-Owned Enterprises in Viet Nam* (n 19) 38.
[642] ibid 112.
[643] Directive No. 84-TTg on promoting pilot privatization of state-owned enterprises and solutions to diversify ownership forms of state-owned enterprises 1993.

privatization. However, by 2004, foreign investment in privatized firms remained minimal, amounting to only VND24 billion (approximately USD1.5 million), highlighting the limited impact of foreign capital during this period.[644] The impetus for reevaluating restrictions on foreign investment was largely driven by Vietnam's commitments under various bilateral and multilateral agreements, which necessitated a more open approach to foreign participation in the economy. Between 2014 and 2015, the Vietnamese government planned to privatize over 400 SOEs,[645] aligning with WTO commitments and specific requirements set forth by SOE management.

The recent phase of SOE privatization has witnessed a notable increase in foreign involvement, influenced by significant internal factors. A shift in ideological perspective has emerged, recognizing the private sector as a vital engine for economic growth[646] and the necessity of fostering a competitive business environment.[647] Additionally, Vietnam's economic landscape has prompted the government to seek financial resources through the privatization of SOEs to address fiscal imbalances and public debt.[648] However, the predominance of small-scale domestic enterprises with limited financial capacity has resulted in a competitive disadvantage in public auctions for shares of larger SOEs.[649] In response, the Party's resolutions have increasingly emphasized the attraction of strategic and foreign investors to participate in the privatization process. Resolution No. 05-NQ/TW, issued in November 2016, outlines policies aimed at attracting capable strategic investors and reducing state ownership to enhance corporate governance. Similarly, Resolution No. 12-NQ/TW, dated June 2017, focuses on promoting the restructuring and efficiency of SOEs by encouraging strategic investments. Since 2017, the government has not set specific percentages of shares for sale to domestic versus foreign investors, except in special sectors. Resolution No. 50-NQ/TW, which came out in August 2019, further stresses the importance of the foreign-invested sector within the Vietnamese economy and aims to improve institutional frameworks for foreign investment cooperation until 2030. This resolution reflects a more favorable disposition toward foreign involvement in the transformation of SOEs into joint-stock companies, despite the political sensitivity surrounding such changes. The Party-State's leaders have reiterated that the transition towards a market-oriented economy must adhere to established market regulations[650] while also

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[644] Thanh Tu Anh Vu, 'Co Phan Hoa o Viet Nam – Khuc Dao Dau Cua Cuoc Truong Chinh [Equitization in Vietnam – The Prelude of a Long Struggle]' (*Fulbright School of Public Policy and Management*, 2005) <https://fsppm.fulbright.edu.vn/en/policy-papers/policy-research/equitization-in-vietnam-the-prelude-of-a-long-struggle/> accessed 30 December 2024.

[645] U.S Department of State, 'Department of State: 2014 Investment Climate Statement' (*U.S Department of State*, 2014) <https://2009-2017.state.gov/documents/organization/229305.pdf> accessed 30 December 2024.

[646] Communist Party of Vietnam, 'Resolution of the 12th National Party Congress' (n 391).

[647] Communist Party of Vietnam, 'Resolution of the 13th National Party Congress' (n 392).

[648] *See* Section 3.1.3, Chapter 3 of the dissertation.

[649] Vinh Du Tran, 'Tu Nhan Hoa va Nhung Noi So' (*Tuoi tre*, 2015) <https://cuoituan.tuoitre.vn/tu-nhan-hoa-va-nhung-noi-so-724223.htm> accessed 30 December 2024.

[650] ibid.

addressing concerns regarding the potential deviation from socialist principles. The privatization of profitable SOEs is mandated by Resolution No. 12/NQ-TW, and opposing this trajectory is viewed as a cognitive barrier to progress.[651]

4.3.2.1. Restrictions on foreign participation

Limits on foreign ownership have long been considered major legal barriers for foreign investors seeking to engage in the privatization of SOEs in Vietnam. The initial legal framework was established by Decision No. 145/1999/QD-TTg in 1999, which aimed to facilitate foreign investment in SOEs by allowing foreign entities to purchase shares, albeit with strict limitations: (i) foreign investors were entitled to purchase shares of SOEs in a select few export-oriented sectors,[652] and (ii) their ownership was limited to a minority shareholding of no more than 30% of enterprise charter capital.[653] Subsequent legislation in 2002 aimed to further liberalize the privatization process by removing restrictions on the types of entities eligible to acquire shares in privatized SOEs.[654] However, another instrument issued a year later still specified a range of industries and trades where foreign investors could contribute capital or buy shares up to 30% of the total capital.[655] Following Vietnam's accession to WTO and the ratification of major free trade agreements, foreign ownership ratios became subject to both domestic law and international agreements, leading to further complexities in market access. A study in 2017 revealed that there were 54 business lines in which foreign investors were prohibited from engaging and an additional 113 business lines that were subject to market access requirements.[656] The Law on Investment 2020 and its implementation guidelines[657] have lowered these restrictions to 25 and 59, respectively. If an SOE operates in a business sector subject to market access requirements set by a sector-specific law, such a cap will be applied. If there are no regulations in place that restrict foreign investors' access to the market under Vietnam's domestic laws, foreign investors are granted the same level of market access as domestic investors.

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[651] Hiep Le, 'Co Vuong Mac Nhan Thuc Hay Khong Ma Co Phan Hoa Khong Tien Trien Gi? [Is There a Perception That the Privatization of SOEs Is Not Progressing?]' (*Thanh Nien*, 2023) <https://thanhnien.vn/co-vuong-mac-nhan-thuc-hay-khong-ma-co-phan-hoa-dnnn-khong-tien-trien-gi-185231016174418883.htm> accessed 30 December 2024.

[652] A list of 12 state-owned sectors permitted to sell shares to foreign investors was provided in the Annex to Decision No. 145/1999/QD-TTg.

[653] Article 6, Decision No. 145/1999/QD-TTg.

[654] Decree No. 64/2002/ND-CP regarding the conversion of SOEs into joint-stock companies.

[655] Decision No. 36/2003/QD-TTg promulgating the regulation on contribution of capital to, and purchase of equities from Vietnamese enterprises by foreign investors.

[656] Central Institute for Economic Management, 'Thu Hut Nha Dau Tu Chien Luoc Vao Co Phan Hoa Doanh Nghiep Nha Nuoc [To Attract Strategic Investors to Participate in SOE Equitization]' (Report Launching Workshop on Strategic Investors in Equitization of State-owned Enterprises, Hanoi, 30 October 2017).

[657] Decree 31/2021/ND-CP on elaboration of some articles of the Law on Investment.

The problem however stems from ambiguities that remain in the current legislation regarding explicit foreign ownership limits. This existing framework often defers to relevant laws, which can lead to inconsistent enforcement by authorities during the SOE privatization.[658] For example, Decree 155/2020/ND-CP states that if the public company is an SOE undergoing privatization, the ratio of foreign ownership may be restricted according to the privatization plan approved by the relevant authorities during the privatization process.[659] Accordingly, the Prime Minister is vested with the authority to approve privatization plans for significant economic entities,[660] while the remaining SOEs fall under the jurisdiction of various representative authorities,[661] including ministries, ministerial-level bodies, and provincial people's committees.[662] This suggests that the competent authorities may determine the proportion of foreign ownership at their discretion. A broader examination of privatization strategies reveals that a majority of approved plans permit only a minimal allocation of shares to strategic investors, specifically only 6 out of 46 approved privatization plans (accounting for 13%) permit a sales ratio exceeding 50% for strategic investors.[663] This restriction has been identified as a contributing factor to the dismissed interest exhibited by strategic investors, especially those from foreign markets.[664]

Foreign investors have encountered other legal obstacles. Between 2004 and 2007, the legal recognition of strategic investors excluded foreign investors and referred to domestic investors who were directly involved in production, regularly supplied raw materials, and had a strong connection to the long-term strategic interests of the privatized enterprises.[665] It was not until 2007 that the scope of strategic investors was broadened to include foreign investors.[666] However, current legal provisions pose another challenge in the process of selecting strategic investors and setting the initial share price for their purchase.[667] Specifically, the SOEs

[658] For a detailed discussion, *see* Thi Thanh An Chu, 'The Equitization of State-Owned Enterprises in Vietnam: A Legal Analysis of Foreign Investment' (2024) 14 KLRI Journal of Law and Legislation 174.
[659] Article139(2), Decree No. 155/2020/ND-CP.
[660] These include: (i) economic groups, state corporations, or enterprises with state capital reflected in their financial statements totaling at least VND1,800 billion. See Article 45(1)(b), Decree No. 126/2017/ND-CP.
[661] Article 45(2)(d), Decree No. 126/2017/ND-CP.
[662] Article 3(10), Decree No. 126/2017/ND-CP.
[663] T. Hang, 'Co Phan Hoa Doanh Nghiep Nha Nuoc: Nha Dau Tu Ngoai Khong Man Ma [Privatization of State-Owned Enterprises: Foreign Investors Are Not Interested]' (*Dai doan ket*, 31 October 2017) <https://daidoanket.vn/co-phan-hoa-doanh-nghiep-nha-nuoc-nha-dau-tu-ngoai-khong-man-ma-10087117.html> accessed 30 December 2024.
[664] ibid.
[665] Article 26(2), Decree No. 187/2004/ND-CP on conversion of state-owned enterprises into shareholding companies.
[666] Article 6(3)(a), Decree No. 109/2007/ND-CP on conversion of enterprises with 100% state-owned capital into shareholding companies.
[667] Article 6(3), Decree No. 126/2017/ND-CP on conversion of SOEs and single-member limited liability companies with 100% of charter capital invested by SOEs into shareholding companies 2017; Article 1(3) Decree No. 140/2020/ND-CP on amending Decree No. 126/2017/ND-CP on conversion of SOEs and single-member limited liability companies with 100% of charter capital invested by SOEs into shareholding companies 2020.

undergoing privatization must assess the application for registering as strategic investors and create a list of qualified strategic investors within 20 days from the date of posting the notice. SOEs must also submit the shortlist to the Steering Committee and report to the agencies representing state ownership for approval of the shortlist. The process of selecting and organizing the registration for purchasing shares by eligible strategic investors occurs prior to the disclosure of information regarding the first public offering of shares. However, the duration required to finalize the sale of share - a four-month timeframe - is insufficient for strategic investors to make a decision regarding a significant investment with binding conditions and responsibilities attached to the SOEs after privatization. Given the magnitude of the deal, foreign investors require ample time to do thorough research and evaluation, however their ability to assess the enterprise's value and business potential is hindered by low levels of transparency and information disclosure.[668]

4.3.2.2. Investment Incentives and Protection

The legislative framework governing foreign investment in Vietnam has evolved significantly since the introduction of the first foreign investment legislation in 1987, with a particular focus on attracting greenfield FDI. Currently, the Law on Investment 2020 provides for the following investment incentives:[669]

- Enterprise income tax incentives, including the application of enterprise income tax rates lower than ordinary tax rates for a definite period of time or for the whole implementation duration of investment projects; exemption from or reduction of enterprise income tax and other incentives in accordance with the law on enterprise income tax;

- Exemption from import duty on goods imported to create fixed assets and materials, supplies, and components imported for production in accordance with the law on import duty and export duty;

- Exemption from or reduction of the land use levy, land rental, or land use tax;

- Accelerated depreciation, or increase of deductible expenses when calculating taxable incomes.

Only newly initiated and enlarged investment projects are eligible for such incentives.[670] In other words, there are no regulations on incentives for investing in the acquisition of shares in SOEs that are being privatized and divested. The engagement of investors, particularly strategic investors, can be especially beneficial in terms of corporate governance for struggling SOEs that are experiencing financial difficulties and inefficient performance. However, the absence of

[668] *See* Chu (n 658).
[669] Article 15(1), Law on Investment 2020.
[670] Article 15(3), Law on Investment 2020.

legislation regarding investment incentives for purchasing shares of SOEs results in a limited interest of foreign investors in taking part in the privatization initiatives of those SOEs.

Another obstacle to attracting foreign investment in the purchase of shares in privatized SOEs is the presence of significant legal risks, which are not adequately mitigated by investor protection measures. An issue has been highlighted about situations where internal problems result in the cancellation of transactions. Waterway Transport Joint Stock Corporation (VIVASO), the strategic investor of Vietnam Feature Film Studio (VFS), was forced to divest after acquiring 65% of VFS's charter capital. This consequence was due to the conclusion of the Government Inspectorate in 2018 about the violations during the privatization process. Nevertheless, VIVASO has not yet finished the process of divestment, while VFS has been unable to find a new strategic investor, resulting in the conversion of VFS into equity being continuously postponed.[671] In submitting its comments on the draft of the revised Law on Management and Use of State Capital, the Vietnam Chamber of Commerce and Industry has also expressed worry about the possibility of transactions being cancelled due to the seller's faults in the sale of shares of SOEs. This concern arises from the lack of provisions that protect buyers of stakes in SOEs in the event of a dispute.[672] The Chamber reports that there have been cases where investors legitimately repurchase the capital in privatized SOEs through a public auction, however if an internal error is found on the seller's side, it is recommended to terminate the transaction.[673] This practice deters investors from participating in the privatization of SOEs. Therefore, VCCI proposes measures to safeguard the property rights of buyers who participate in purchasing state capital in enterprises, specifically: (i) if the buyer is unaware of the seller's faults during the transaction process, the property rights of the bona fide buyer to the purchased capital are protected by law; (ii) in case the auction is carried out in a public and transparent manner, following proper process and including several independent participants, the auction outcomes must be protected by law.[674] Other analysts also concur with the proposals, asserting that these rules will facilitate the expeditious privatization of SOEs and foster a conducive business climate for both domestic and foreign investors to engage in acquiring state capital in privatized enterprises.[675]

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[671] Mi Lan, 'Lum Xum o Hang Phim Truyen Viet Nam van Chua Cham Dut [The Controversy at Vietnam Feature Film Studio Is Not over Yet]' (*Lao dong*, 9 January 2024) <https://laodong.vn/van-hoa-giai-tri/lum-xum-o-hang-phim-truyen-viet-nam-van-chua-cham-dut-1290055.ldo> accessed 24 April 2024.

[672] Duc Minh, 'Legal Risks Scare Investors from Privatization of State-Owned Firms - VnExpress International' (*VnExpress*, 15 November 2023) <https://e.vnexpress.net/news/business/companies/legal-risks-scare-investors-from-privatization-of-state-owned-firms-4677181.html> accessed 24 April 2025.

[673] Ngoc Linh, 'Co phan hoa doanh nghiep nha nuoc: Giam chan tai cho vi nha dau tu so rui ro [Equitization of SOEs: Standing still because investors are afraid of risks[' (*Tien Phong*, 27 November 2023) <https://tienphong.vn/post-1590125.tpo> accessed 2 May 2025.

[674] Ngoc Linh, 'De Xuat Bao ve Nha Dau Tu Mua von Co Phan Hoa [Proposal to Protect Investors Buying Equitized Capital]' (*Tien Phong*, 18 November 2023) <https://tienphong.vn/de-xuat-bao-ve-nha-dau-tu-mua-von-co-phan-hoa-post1586962.tpo> accessed 30 December 2024.

[675] ibid.

4.4. Conclusion

The chapter provides a comprehensive analysis of the legal framework for SOE privatization in Vietnam, emphasizing the inherent tension between maintaining socialist ideology and fostering private sector growth.

At the constitutional level, the changes since the 1992 Constitution have given stronger legal backing for private sector participation and market principles. Key advancements in property law have strengthened the recognition and protection of property rights, which serves as a critical foundation for the privatization process. The law governing the process to privatize SOEs has been revised several times to rectify procedural and structural inefficiencies. Significant reforms in institutional arrangements have been made to enhance the efficiency of state ownership functions, thereby accelerating the pace of divestment from SOEs. The chapter underscores the need to address critical issues, such as privatization methods and the valuation of SOEs, which are now governed by more detailed regulations, providing consistent guidance to stakeholders involved in the privatization process. The requirement that traditional SOEs transform into corporate entities under a unified legislation applicable to both state and private enterprises further supports the privatization process. Moreover, Vietnam has actively sought to improve its investment climate to attract foreign investors equipped with advanced technologies, management expertise, and substantial capital to participate in buying shares of SOEs undergoing privatization. These legal improvements are expected to bring more substance to the SOE privatization at present.

However, the persistence of socialist-oriented economic policies continues to shape the legal landscape, which potentially slows down the progress of SOE privatization. The continued recognition of the 'leading role' of the state sector in the constitution reflects Vietnam's cautious approach to privatization and market liberalization. This commitment has resulted in an ambiguous legal environment where privatization does not necessarily equate to diminished state influence but rather a reconfiguration of state intervention. The legislative framework for privatization, primarily shaped by executive decrees and decisions, The classification of SOEs eligible for privatization, while evolving, remains subject to political discretion rather than market-driven criteria. This, combined with inconsistent application of regulatory instruments, has contributed to delays and uncertainties in the privatization process. The effectiveness of institutional actors is further compromised by persistent bureaucratic oversight and recent policy reversals, such as the dissolution of the CMSC, raising concerns about the sustainability of Vietnam's privatization efforts. Furthermore, ambiguities surrounding the concept of the entire people's ownership within the property rights framework lead to valuation challenges, particularly concerning land use rights, and continue to impede effective SOE privatization. Post-privatization control mechanisms, particularly the retention of majority state ownership, reflect the government's reluctance to fully relinquish control. Frequent changes to provisions

governing SOEs within the company law framework exacerbate legal uncertainties. Another significant challenge is the regulatory environment for foreign investment in privatized SOEs. Despite Vietnam's gradual opening to foreign capital, restrictions on ownership, opaque approval processes, and legal uncertainties surrounding investor protection continue to limit foreign participation in privatization efforts. Such conditions create a less favorable environment for foreign entities considering engagement in the privatization of SOEs. All in all, the findings in this chapter directly answer the question of how Vietnamese laws govern SOE privatization. The chapter shows that the privatization of SOEs in Vietnam remains an incremental and politically sensitive process. Although there have been significant legal and institutional reforms aimed at facilitating this transition, the state retains substantial influence over privatized enterprises, often prioritizing political and economic stability over full market liberalization.

CHAPTER 5

Legal Framework for the Privatization of State-owned Enterprises in Hungary

The previous chapter examines the development of the legal framework for SOE privatization in Vietnam, focusing on the constitutional, legislative, and institutional factors that have shaped the country's cautious approach to the issue in question. This chapter continues to look at how the legal framework[676] for privatizing SOEs in Hungary has changed over time, using the same analytical structure to answer the research question: How does Hungarian law regulate SOE privatization?. Hungary presents a markedly different case from Vietnam due to significant variations in its political transition, economic policy trajectory, and legal tradition. By detailing the development of the Hungarian legal framework for SOE privatization, the analysis not only contributes to a more profound understanding of the Hungarian case but also establishes a critical reference point for a comparative study with Vietnam. Chapters 4 and 5 attempt to address the research question of how Vietnam and Hungary regulate SOE privatization, thereby adding to the broader discourse on post-socialist legal and economic reform.

5.1. Foundational Legal Norms

5.1.1. Constitutional Dimensions

5.1.1.1. Constitutional safeguarding of specific categories of property or sectors

Hungary's shift from a socialist regime required the formulation of a new constitutional framework, particularly concerning the economic system that the country would adopt. This process generally reveals two distinct approaches: one that explicitly endorses a specific economic model and another that merely establishes regulatory parameters for economic activities.[677] Hungary in the early 1990s exemplified the former approach by stating in its 1989 constitutional revision that 'the Hungarian economy is a market economy',[678] which ensured

[676] In Hungary, the Constitution, and now the Fundamental Law, is the highest law of the land but does not explicitly outline the hierarchy of legal sources. Instead, it establishes relationships among different laws by specifying which particular laws must not conflict with each other. For example, Government decrees and the decrees of the Governor of the National Bank shall not conflict with statutes (Article 15 (4) and Article 41(4) of the Fundamental Law). In other words, there is no linear hierarchy among the laws, instead it is necessary to examine which law can grant authorization to which. For instance, there is no hierarchy between decrees of the Government and those of local governments, as both authorizations derive from the Fundamental Law or from a statute, and neither can authorize the other to issue a decree. For detailed discussion, *see* Csink, Schanda and Varge (n 510).

[677] Otto Luchterhandt, 'The Role of the Federal Constitutional Court in Economic Matter', *Constitutional Aspects of The Transition to a Market Economy* (European Commission for Democracy through Law 1994) 85.

[678] The Constitution of 1949 (revised in 1989) included the social market economy in the Preamble, while Article 9 solely referenced the market economy. The Constitutional Court interpreted that the Preamble was not mandatory

equal status and protection for both public and private ownership.[679] This move away from socialist constitutional principles raised critical questions regarding the scope of private property rights, the extent to which certain properties and sectors should remain under state control to serve the public interest, and how the government could regulate private activities while retaining state ownership in certain domains. The provisional solutions were to some extent sought by Article 10(2) of the Constitution, which mandated that the domains of ownership and economic activities exclusively reserved for the state be defined by law. In other words, the regulatory landscape surrounding privatization should be further elaborated in various legislative acts, provided that the constitutional basis for these regulations remains somewhat ambiguous.[680] The limitations to privatization can be found in the Concession Act of 1991, which stipulates that state monopoly in certain sectors can only be transferred to the private sector through concession rather than selling state property.[681] Act XXXIX of 1995 further clarified the conditions under which enterprises may remain under state ownership, grouping them into the following categories: national public utility providers, enterprises of strategic significance to the national economy, enterprises involved in national defense or other special duties, and enterprises whose share is required to safeguard the ownership of the state and its voting rights as provided for by the Concession Act.

In other words, the 1989 Constitution made a legally assessable declaration concerning state ownership, asserting that the extent of exclusive state property should be delineated by law. This legislative discretion, particularly evident in Article 10(2) of the Constitution, reflects Hungary's acknowledgment of the evolving nature of strategic sectors during its transition period from a centrally planned economy to a market-oriented one. For example, the telecommunications industry underwent a major change when a new telecommunications act came into force in July 1993. This act broke up the existing monopoly and made it easier for new companies to enter the market through partial privatization. The privatization process was exemplified by a contract ratified in December 1993, which resulted in the transfer of 30.4% of MATÁV's assets to a German-American consortium comprising Deutsche Bundespost Telekom and Ameritech, collectively referred to as Magyarcom in Hungary.[682] This privatization was said to lead to numerous benefits, including expedited network construction, enhanced service technology,

for state organs, thus defining the Hungarian economy as a market economy without specific attributes, while the social market economy remained a state objective. *See* Decision No. 33/1993 (V.28) AB [1993] 247, 249.

[679] Article 9(1), Constitution of Hungary 1949 (revised in 1989).

[680] Attila Harmathy, 'Legal Questions of Privatisation in Central and Eastern European Countries', in Council of Europe, *Constitutional Aspects of The Transition to a Market Economy* (European Commission for Democracy through Law 1994) 167–168.

[681] Article 1(1), Concession Act 1991.

[682] Judit Ványai, 'A New Era: The Development of Telecommunications in Hungary' (1998) 20 Technology in Society 25.

improved cable television services, and better regulation of local telephone companies.[683] In the energy sector, privatization initially occurred through the sale of public utility assets to foreign ownership - a percentage the state intended to retain over the long term as stipulated in the appendix of the Privatization Law 1995. The first round of privatization in 1995 involved the sale of six supplying enterprises and two power plants, while the subsequent rounds from 1996 onward allowed for foreign majority ownership of Hungarian electricity enterprises.[684] However, the legal risk associated with the privatization process stemmed from the absence of constitutional limitations on such initiatives, because the legislation facilitating privatization could be amended at any time by the ruling government through a simple majority legislative procedure.[685] The extensive privatization of strategically important assets raised critical concerns about the state's capacity to safeguard national economic interests. An observer claimed that the strategic assets deemed essential for national economic interests saw a dramatic reduction, decreasing to one-third of their original scope within twenty years due to the absence of constitutional limitations on privatization of state wealth.[686] The selling of strategic industries during the period of 1995 and 1996, particularly in sectors traditionally characterized as natural monopolies, including oil and gas, telecommunications, and electricity, yielded significant adverse effects. Rather than transitioning from state monopolies to a competitive market structure, the privatization process led to the emergence of private monopolies and foreign state monopolies.[687] The privatization of the banking sector that took place between 1994 and 1997 led to foreign ownership of two-thirds of the sector's assets by the year 2000[688] and then increased to 85% by 2007.[689] The discourse surrounding the economic efficiency of privatizing SOEs, particularly during the 1990s, reveals a subtle relationship between economic rationality and political considerations. Critics contend that the swift implementation of privatization during this period was motivated more by the urgency to create market economy institutions than by a well-defined strategy for privatization itself.[690]

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[683] ibid.

[684] Gábor Bakos, 'Privatizing and Liberalizing Electricity, the Case of Hungary' (2001) 29 Energy Policy 1119.

[685] Article 24 of the 1989 Constitution provided that Parliament achieved quorum with the attendance of at least half of its members, and that its decisions should be passed with a majority of one-half of the votes of the Members of Parliament present.

[686] Mária Bordás, 'The Efficiency of State Property Management and Public Money Utilization' (2010) 51 Acta Juridica Hungarica 231, 243.

[687] Gidai E., Giday A. and László T., Néhány fontosabb ágazat (vállalat) privatizációja, in Báger G. and Kovács Á. (szerk.), Privatizáció Magyar országon II. Háttértanulmányok, (Állami Számvevőszék, Budapest, 2004) 201–268 *cited in* István Simon, 'The Transformation of the Hungarian Fiscal and Monetary Constitution' (2018) 57 Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae Sectio iuridica 113, 130.

[688]Várhegyi É., Külföldi tulajdon a magyar bankrendszerben, (2001) 48 (július–augusztus) Közgazdasági Szemle, (581–598) 583–584 *cited in* ibid.

[689] ibid.

[690] Bordás (n 686).

The dissolution of social property in Hungary following the historical context of 1989 has significantly influenced the objectives outlined in the Fundamental Law of 2011, which serves as the new constitution of the country. The Fundamental Law mainly aims to mitigate the adverse effects of privatization on the national economy by establishing a definition of national assets and introducing rules on their protection.[691] Article 38 of the Fundamental Law refers to national assets as the property of the State and of the local governments with the purpose of serving public interests, fulfilling public needs, and preserving natural resources, taking into account the future generations' needs. The detailed governance of these assets is further elaborated in the cardinal act, specifically the Act CXCVI on National Assets of 2011. The Act categorizes national assets into four distinct groups based on the degree of public interest in the protection and preservation of the national property.[692] These categories are: (i) exclusive property of the state and local governments; (ii) national assets of outstanding importance for the national economy; (ii) national assets with limited marketability; and (iv) business assets. Assets of the first category are characterized by their illiquid nature, prohibiting alienation, encumbrance, or shared ownership, with limited exceptions for public interest entities.[693] National assets deemed of outstanding importance are similarly protected, though they may allow for certain rights of use or ways established by law.[694] Assets with limited marketability are subject to specific management conditions as dictated by law or local decrees.[695] Meanwhile, business assets are managed without stringent legal restrictions, allowing for their alienation and encumbrance. The primary objective of business assets is to generate revenue and fulfill strategic economic interests while performing public tasks in a market-oriented manner in return for payment.[696] The state and the municipality hold ownership of national property, whereas the rights holder is entitled to operate and thus has the rights to possess, utilize, gather benefits, maintain, renovate, develop, and transfer these aforementioned rights to others. Notably, the Act restricts the rights holder of national assets of outstanding importance to specific entities, including the minister, central budgetary institutions, and wholly state-owned enterprises. Therefore, from 2011 onward, constitutional provisions have been instituted that impose restrictions on the scope of property that can be transferred to the private sector.[697] Furthermore,

[691] Csink, Schanda and Varge (n 510) 164.
[692] Zoltán Nagy, 'Regulation of Public Finances in Hungary in Light of Financial Constitutionality' in Zoltán Nagy (ed), *Regulation of Public Finances in Light of Financial Constitutionality : Analysis on Certain Central and Eastern European Countries* (Central European Academic Publishing 2022) 96.
[693] Section 3(1) 3, Act CXCVI of 2011 on National Assets.
[694] ibid., section 3(1) 12.
[695] ibid., section 3(1) 6.
[696] ibid., section 3(1) 18.
[697] Some however raise questions over the purpose of serving the public interest of business assets, because these assets are to be transferred without restrictions and do not possess the same protective status as non-tradable assets. *See* Lehoczki Zóra Zsófia, 'The special requirements applicable to the management of national assets, with a special

the Fundamental Law establishes barriers to the ownership transfer of national assets, even with the business assets, through the requirements of proportionate values[698] and transparency.[699]

5.1.1.2. Constitutional requirements as to procedure of privatization process

When the transition began, the 1949 Constitution (revised in 1989) set mandates for legislative action regarding the privatization of SOEs. It specified that areas of economic activities and ownership deemed the exclusive domain of the state should be determined by law.[700] The passing of such legislation generally required a simple majority – more than half of the votes from Members of Parliament present at the session.[701] This majority rule provided a streamlined mechanism to advance privatization initiatives but was subject to specific exceptions wherein stricter procedural thresholds applied. Article 61(4) of the Constitution is a notable example. It says that to pass the law on licensing of commercial radio and television and on the prevention of monopolies in the media sector, a two-thirds majority of the vote from Members of Parliament is required. In practice, such a requirement introduced significant legislative challenges, as the prolonged political debates made it difficult to reach the majority threshold for passing broadcasting regulations.[702] In turn, it significantly delayed the launch of the privatization of the broadcast media until early 1996, when Act I on Radio and Television entered into force.

The systemic transformation of the 1990s in Hungary was characterized by a pronounced focus on the creation of market economic institutions and defining private property rights, mainly through privatization efforts. The reduction of state ownership in SOEs and thus decreasing state influence in the national economy was deemed crucial from economic, institutional, and political perspectives. During the 2000s, state property saw a significant decline, with the privatization process anticipated to reach completion by 2008.[703] Consequently, the post-transition era witnessed a paradigm shift in state property management from a focus on privatization and revenue generation to asset management.[704] The 2011 Fundamental Law is a clear sign of this change, as it establishes stricter legislative procedures governing state property and economic activities. Specifically, Article 38(2) of the Fundamental Law stipulates that cardinal laws must be used to define the scope of exclusive state property and exclusive economic activities of the state, as well as to impose limitations on alienating

respect to the requirement of transparency', *Debreceni Jogi Műhely* (University of Debrecen 2020) <https://szakcikkadatbazis.hu/doc/9720822> accessed 14 January 2025.

[698] Article 38(3), Fundamental Law of 2011.

[699] ibid., Article 38(4).

[700] Article 10(2), Constitution 1949 (revised in 1989)

[701] ibid., Article 24

[702] Open Society Institute/ EU Monitoring and Advocacy Program, 'Television Across Europe: Regulation, Policy, and Independence' (Open Society Institute 2005) Monitoring Reports 247.

[703] Szanyi (n 502) 151.

[704] Abramov, Radygin and Chernova (n 235) 225.

national assets of outstanding economic significance. A cardinal law, as prescribed in Article T(4) of the Fundamental Law, requires a two-thirds majority vote from the Members of Parliament present for its adoption or amendment. This constitutional provision thus expands the scope of qualified majority requirements beyond fundamental rights and state office regulations to encompass economic policy concerning national wealth management, exclusive state property, and the exclusive economic activities of the state.[705] In other words, the privatization of SOEs, which are the right holders of state property or conduct economic activities falling within the scope of Article 38(2) of Fundamental Law, can only be determined by a cardinal law. These constitutional provisions show a clear intention for a deliberate institutionalization of state involvement in the economy, while also protecting national assets through legal safeguards. While cardinal laws may enhance governance stability by embedding long-term commitments within the legal framework,[706] they also pose challenges to timely decision-making and adaptability to evolving economic conditions. Moreover, this shift indicates a potential erosion of economic neutrality within Hungary's constitutional framework. Critics argue that the Fundamental Law directs Parliament to enact cardinal laws concerning national wealth management, exclusive state property and economic activities, and several aspects of public finances and the central bank, thus deviating from the neutrality of economic policy as established by the previous Constitution.[707] The 1949 Constitution (revised in 1989) recognized the Hungarian economy as a market economy[708] and affirmed the equal rights and protection of private and public property,[709] while remaining largely silent on economic policy. The Constitutional Court historically upheld the notion of economic neutrality,[710]and the formula on economic neutrality was a statement that the Constitutional Court often reiterated in its rulings.[711] The degree or level of government involvement, particularly its restriction, cannot be directly inferred from the Constitution.[712] The contemporary emphasis on asset management

[705] Fanni Mandák, 'Challenges and Pitfalls in the Recent Hungarian Constitutional Development: Discussing the New Fundamental Law of Hungary' in Zoltán Szente, Zsuzsanna Fejes and Fanni Mandák (eds), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development* (L'Harmattan Kiadó 2015) 155.

[706] The law-making practices in Hungary show that the legislature however can breach the qualified majority rules. An observer described that the government initially aimed to adopt provisions necessitating a two-thirds majority, but due to the government's lack of such a majority between 2015 and 2018, the bill was reformulated into a different law that only required a simple majority to pass the relevant provisions (e.g., Case Reg No II/01483/2017 of the Hungarian Constitutional Court on Law No. CIV of 2017). Overt violations of constitutional legislative procedures, particularly following failed attempts to adopt provisions with a two-thirds majority, risk enabling the current majority to amend the Constitution with a simple majority. *See*, András Jakab, 'What Is Wrong with the Hungarian Legal System and How to Fix It' (Max Planck Institute for Comparative Public Law & International Law 2018) Research Paper 2018–13 13.

[707] Simon (n 687) 114.

[708] Preamble, Constitution 1949 (revised in 1989).

[709] Article 9(1), Constitution 1949 (revised 1989).

[710] Decision No. 33/1993 (V.28) AB [1993] 247.

[711] László Sólyom and Georg Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (University of Michigan Press 2000) 294.

[712] Decision No. 33/1993 (V.28) AB [1993] 247.

has curtailed privatization opportunities in Hungary, relegating it to instances where the government seeks to enhance the efficiency and cost-effectiveness in managing and utilizing state property and national assets.[713] However, recent government rhetoric suggests a reversal of the privatization paradigm, advocating for increased state intervention in response to market failures.[714] This, coupled with the departure from economic neutrality as enshrined in the new constitution, raises concern regarding the potential for obscurity and arbitrariness in economic policy, as well as the weakening of established market institutions.[715]

5.1.1.3. Control of constitutionality of privatization legislation

The establishment of the Hungarian Constitutional Court in 1990 marked a major milestone in constitutional governance following the amendments to the Constitution in 1989. The Constitutional Court was designed to serve as the supreme institution for safeguarding constitutional integrity within the Hungarian legal system. Its inception in 1990 heralded a new era of judicial review concerning the constitutionality of legislative actions made by the Parliament, the government, and local authorities. The Court had the power to assess the constitutionality of laws passed by the Parliament, including those not receiving presidential ratification.[716] Furthermore, the Court was empowered to interpret constitutional provisions and address instances where the legislature might have failed to fulfill its legislative responsibilities, potentially resulting in unconstitutional conditions. While the Court cannot make laws, it has significant influence by nullifying unconstitutional ones.[717] Between 1990 and 1995, the Court reviewed all the most important legal regulations,[718] including those related to privatization. Therefore, the Constitutional Court had a significant impact on the formulation of the new democracy of Hungary as well as the development of the new legal and socio-economic framework of the country.[719] For example, in 1993, the Court addressed the constitutionality of provisions within Act No. LIII of 1992, which established the State Asset Management Joint-stock Company (ÁVRt.). In Decision No. 33/1993, the Court annulled specific exemptions that had previously excluded certain sections of the Companies Act from applying to ÁVRt., thereby ensuring that standard corporate governance regulations were applicable to this state-owned entity.[720] In its reasoning, the Court held that the management and utilization of entrepreneurial assets remaining in state ownership require making significant strategic decisions for the entire

[713] OECD, 'Privatisation and the Broadening of Ownership of State-Owned Enterprises' (Organisation for Economic Co-operation and Development 2018) 17 <https://www.oecd.org/corporate/Privatisation-and-the-Broadening-of-Ownership-of-SOEs-Stocktaking-of-National-Practices.pdf>.
[714] Szanyi (n 502) 156.
[715] ibid 156–157.
[716] Article 26(4), Constitution 1949 (revised in 1989).
[717] ibid., Article 31/A(2).
[718] Imre Voros, 'Contextuality and Universality: Constitutional Borrowings on the Global Stage - The Hungarian View' (1999) 1 University of Pennsylvania Journal of Constitutional Law 651, 652.
[719] ibid.
[720] Decision No. 33/1993 (V.28) AB [1993]

national economy, ensuring the unconditional and uninterrupted provision of public services, and - to a lesser extent - the professional preparation of future privatization. Another significant ruling was Decision No. 28/1994, which addressed the constitutionality of statutory provisions that threatened to diminish nature conservation areas by permitting their privatization without adequate limitations or obligations to safeguard environmental assets.[721] Although this judgment is more related to environmental issues, its implication is to set limitations on privatization and conditions within which privatization can take place. The Court acknowledged that private ownership of nature conservation areas is not inherently unconstitutional, however the absence of necessary legal frameworks to replace the protective measures afforded by state ownership could contravene environmental conservation objectives. The ruling highlighted that unclear privatization regulations and property relations that compromise the established level of environmental protection are unconstitutional.[722]

However, the recent jurisprudence of the Constitutional Court, particularly in relation to the economic regulatory framework set by the Fundamental Law of 2011, seems to be a rather reduced constitutional era. This change is first evident in the context of fiscal legislation, where the Constitutional Court's authority has been notably curtailed. This limitation is not merely a consequence of the Fundamental Law itself but reflects a broader constitutional paradigm that seeks to restrict judicial intervention in matters of budget formulation and public debt management by the Parliament.[723] Under the current constitutional framework, while the public debt exceeds 50% of the GDP, the jurisdiction of the Constitutional Court is confined to reviewing laws related to the central budget, its implementation, and fiscal levies, but only insofar as these laws pertain to fundamental rights such as the rights to life, human dignity, and other personal liberties. It means that the Court has limited power to assess the constitutionality of legislation concerning SOE privatization, which is intrinsically linked to budgetary considerations and public debt reduction when the general government public debt surpasses 50% of GDP. The Court reserves its authority to invalidate fiscal laws referenced if they are enacted or published in violation of the procedural rules prescribed by the Fundamental Law.[724] Thus, the economic constitution as established by the Fundamental Law grants significant leeway to the legislature in terms of economic intervention, and no institution has the legal authority to scrutinize numerous essential powers held by the one-party government.[725] Second, the Fourth Amendment to the Fundamental Law, which was passed in March 2013, nullified

[721] Decision No. 28/1994. (V. 20.) AB [1994].
[722] For more discussion, *see* Gyula Bándi, 'The Case of the Hungarian Constitutional Court with Environmental Principles: From Non-Derogation to the Precautionary Approach' (2019) 7 Hungarian Yearbook of International Law and European Law 49.
[723] Simon (n 687) 125.
[724] Article 36 (4)(5), Fundamental Law 2011.
[725] Kim Lane Scheppele, 'Understanding Hungary's Constitutional Revolution' in Armin von Bogdandy and Pál Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (UK ed edition, Hart/Beck 2015) 112.

over two decades of rights-protecting case law established by the Constitutional Court prior to the new constitutional regime. Specifically, Point 5 of the Final and Miscellaneous Provisions of the Fundamental Law states that: 'The decisions of the Constitutional Court made prior to the entry into force of the Fundamental Law are repealed'. This provision shall be without prejudice to the legal effects produced by those decisions. The Constitutional Court had already attempted to navigate this transition by maintaining the applicability of prior rulings where the language of the old and new constitutions was substantially similar; otherwise, if the new constitution significantly differed, the previous decisions would no longer be used.[726] The Fourth Amendment however primarily targeted rulings that defined and safeguarded constitutional rights and the foundations of market regulations, including those related to privatization processes initiated during Hungary's transition to a market economy.

5.1.2. Property Rights

5.1.2.1. Legal recognition of property rights

The departure from the socialism foundation occurred just before the political turn, when the Hungarian Parliament passed the most significant revision of the country's constitution, commonly known as the 'new' Hungarian Constitution,[727] on October 18, 1989. The property rules in the Constitution, as a result of the political and economic shifts of 1989, reflected the temporary nature of the transition phase to a market economy that was to dissolve social property.[728] Article 9(1) of the Constitution explicitly defined the Hungarian economic system as a market economy, setting the foundational conditions for property ownership. The Constitution addressed property in ten distinct contexts, all aimed at dismantling the state property structure inherited from the communist era and instituting a property system conducive to market economy principles.[729] Article 13(1) of the Constitution guaranteed the right to property. To go further, the Constitution ensured equal protection for both private property - belonging to individuals or private entrepreneurs - and public property. This aspect was a clear departure from the previous regime's exclusive emphasis on state ownership.[730] The Constitution also enshrined the freedom of enterprise and the promotion of fair competition as two critical tenets of a market economy.[731] The only provision that reflected a transitional nature was the inclusion of the rule on cooperatives[732] as a compromise to preserve existing cooperative

[726] ibid 118.
[727] Gray et al. (1992) 297.
[728] Csink et al. (2012) 134.
[729] Csink et al. (2012) 134.
[730] Article 9(1) of the 1989 Hungarian Constitution provided that: "The economy of Hungary is a market economy in which public and private property shall receive equal consideration and protection under the law".
[731] Article 9(2) of the 1989 Hungarian Constitution stated that: "The Republic of Hungary recognizes and supports the right to enterprise and the freedom of competition in the economy".
[732] Article 12 (1) of the 1989 Hungarian Constitution provided that: "The State shall support cooperatives based on voluntary association and shall recognize the autonomy of such cooperatives".

structures. The legislative reforms that followed, particularly the amended Civil Code in 1991, were pivotal in transitioning from a socialist to a market economy based on private ownership. The comprehensive revision of the property rights chapter of Act XIV of 1991 on the amendment of the Civil Code abolished all forms of socialist ownership and eliminated the privileges associated with state and cooperative ownership. This legislative shift not only clarified the scope of exclusive state property but also authorized the transfer of certain assets to private entities. Particularly, the amended Civil Code reviewed the scope of exclusive state property and non-transferable assets and granted the state the authority to transfer certain properties, including forests and land, to private owners. The remnants of the previous system concerning the sections of the Civil Code were no longer subjected to enforcement and should be interpreted in accordance with the intent of the amendments.[733] In addition, Act I of 1987 on Land, revised in 1991, played a crucial role in liberalizing the private real estate market. This legislation addressed land, structures, and various constructions, as well as the entitlements of proprietors and users, and the acquisition and disposition of real property. Despite being somewhat unstable in its details due to ongoing modification, this Act contributed to the elimination of administrative obstacles to private real estate acquisition. For instance, it removed the previous cap of fifty hectares on private land ownership and permitted Hungarian individuals or legal entities to obtain real estate without any legal restrictions. Consequently, these reforms established a legal framework conducive to a genuine market economy predicated on private property rights.[734] As compared with Western European or American privatizations, the implementation of property law reform was not only to facilitate the process of selling or disposing state-owned assets to private ownership but also, in a broader consideration, to establish and foster an economy based on the private sector.

However, the Fundamental Law of 2011 introduces ambiguous treatment of ownership structures, as it fails to specify the balance between public and private assets. Based on Clause 4 of Article 37 of the Fundamental Law, a private owner may only claim protection against state authority if the national economic indicators are relatively favorable, i.e. the government debt is below half of the total GDP. These provisions, when read together, imply that the government is granted discretion to manage and dictate the desired processes, and that the interest of the state enjoys priority over the protection of property rights supporting individual freedoms, and that there is no impartial forum to serve justice in a constitutional dispute between the state and the owner. In addition, Article XIII(1) introduces a notion of social responsibility of property[735] while recognizing that everyone shall have the right to property and inheritance.[736] Its

[733] Gray, Hanson and Heller (n 442) 305.
[734] Paczolay (1992) 811.
[735] Clause 1 of Article XIII of the Fundamental Law states that 'Everyone shall have the right to property and inheritance…. Property shall entail social responsibility'.
[736] Following the introduction of the Fundamental Law, the new Civil Code was adopted on 11 February 2013, however it did not introduce dramatic changes in property law. *See* Attila Menyhárd, 'Property Law in the New

interpretation can be seen as a problem of private law and constitutional law, because it does not make clear that the owner's fundamental right to protection from the state extends to the rights and privileges acquired in observance of the provisions of law (this point will be discussed in the below section). On the other note, the Fundamental Law in 2011 refrains from categorizing the economy explicitly as a market economy, instead defining it as one based on work that generates value and on freedom of enterprise.[737] A prominent figure in the governing party, involved in drafting the Fundamental Law, articulated a vision for an economic framework centered on labor, aiming to uphold the values of European civilization.[738] Consequently, it can be stated that the change in Fundamental Law does not aim to lay down the most important guarantees of the market economy but rather to strengthen the government's involvement in the economy. The Constitutional Court however continues to classify Hungary's economy as a market economy, citing the Fundamental Law's provisions for freedom of enterprise and fair competition as essential criteria.[739] Moreover, the economic system of Hungary should be characterized as a market economy according to the fundamental economic and political principles established in the Treaty of Rome underpinning the European Union, of which Hungary is a member state. As such, this document establishes the framework for the privatization of SOEs by delineating the economic context in which these enterprises function. Some suggest that Hungary's economy is envisioned as one that balances private property as a fundamental component with public ownership by the state, local governments, or public entities.[740]

5.1.2.2. Protection of Property Rights

The protection of property rights is primarily defined through provisions governing expropriation, a mechanism by which the state can acquire privately owned property under specific conditions. The amended Constitution of 1989 established a foundational guarantee against expropriation in Article 13(2), asserting that property may only be taken in exceptional cases 'when such action is in the public interest, and only in such cases and in the manner stipulated by law, with provision of full, unconditional, and immediate compensation'. This constitutional safeguard applied to both administrative actions and legislative enactments and reinforced the principle that any expropriation lacking these compensatory measures is unconstitutional. The 1991 amendment to the Civil Code also guaranteed adequate

Hungarian Civil Code: Key Issues' in Attila Menyhárd and Emőd Veress (eds), *New Civil Codes in Hungary and Romania* (Springer International Publishing 2017) 43.

[737] Article M (1) of Hungarian Fundamental Law 2011

[738] Ablonczy (2012) 83.

[739] Constitutional Court Decision 3192/2012. (VII. 26) AB.

[740] Lentner (n 508) 160.

compensation for property expropriated for the public interest.[741] In the context of Hungary's transition to a market economy, the elevation of protection against expropriations from the Civil Code to the Constitution reflects the state's greater willingness to uphold property rights.[742]

The Fundamental Law of 2011 outlines the conditions under which expropriation may occur. Expropriation must be justified by exceptional circumstances and public interests, and full, unconditional, and immediate compensation is required.[743] The Constitutional Court plays a critical role in evaluating state interference with property rights, as it assesses whether the state compensates for losses incurred due to public law interventions.[744] However, property owners may endure state interference without compensation, justified by the social functions of property in case of the social responsibility of property established in the Fundamental Law. Furthermore, the Fundamental Law restricts the jurisdiction of the Constitutional Court over laws related to the central budget and public finance when the public debt exceeds 50% of GDP, as stated in Article 36(4) of the Fundamental Law. As such, it limits constitutional review of certain governmental decisions, and the Constitutional Court can only annul expropriation laws if they violate specific fundamental rights, including the right to life, human dignity, the right to the protection of personal data, freedom of thought, conscience and religion, or the rights related to Hungarian citizenship.

In addition to constitutional provisions, various legislative acts govern expropriation in Hungary. The new Civil Code of 2013 affirms that: 'Ownership of real estate property may be acquired under exceptional circumstances for public use against immediate, full, and unconditional compensation'.[745] The provision of the Civil Code however lacks elaboration of detail on expropriation. Act CXXIII of 2007 on Expropriation lists the current and detailed statutes on expropriation and delineates the aims, conditions, procedural rules, methods of compensation and covering subsidiary costs, as well as the regulations on preparation and taxability. The Act on Expropriation specifies a finite list of purposes for which expropriation may be initiated, such as national defense, country and city planning, energy production and supply, water supply network and management, and environmental protection.[746] To be considered as legitimate, expropriation for any of the purposes listed above must satisfy four preconditions:[747]

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[741] Section 177(1) of the Civil Code (amended in 1991) provided that: 'Real property may be expropriated in special cases and in the public interest, for the reasons and in the manner prescribed by law. Full, unconditional, and prompt compensation shall be made for expropriated real properties'.
[742] Gray, Hanson and Heller (n 442) 305.
[743] Article XIII (2), Fundamental Law 2011.
[744] For more discussion, *see* András Téglási, 'The Constitutional Aspects of Ownership' in István Sándor (ed), *Business Law in Hungary* (Patrocinium 2016).
[745] Paragraph 1 of Section 5: 43, Civil Code 2013.
[746] Section 2, Act on Expropriation 2007.
[747] ibid., section 3(1).

(i) The purpose of public interest cannot be fulfilled by limiting the existing rights concerning the estate;
(ii) The acquisition of the property rights of the estate is not possible through sale and purchase agreement or, in cases specified by the law, exchanges;
(iii) The fulfillment of the purpose of public interest is possible only on the estate in question, or it would violate the right of property to a greater extent if fulfilled on another estate; and
(iv) The public benefits of the activity made possible through expropriation greatly outweigh the damage it causes.

Moreover, there are terms and conditions applying to expropriation for specific purposes. For example, in the case of energy production, the expropriation is allowed as long as: (i) the estate is required to establish or expand a 50 MW or higher capacity power plant; (ii) the estate is required to establish a 50 MW or higher capacity district heating power plant; (iii) the estate is required to establish or expand a nuclear plant or radioactive waste container; (iv) the acquisition of an estate in the safety zone of a nuclear plant or radioactive waste container is required.[748] However, an amendment to the Act of Expropriation, which became effective on 1 January 2013,[749] provides that the fulfillment of the listed conditions under the Act need not be considered in certain cases. Notably, for certain projects deemed critical to national economic interests – such as those related to transportation infrastructure or water resource management – the requirement to demonstrate that public interest work can only be conducted on the expropriated property is waived.[750] This raises significant concerns regarding the balance between public interest and property rights, particularly when the potential for alternative sites exists that may impose lesser infringements on property rights.[751] The amendment's implications are particularly troubling in light of the criteria for determining what constitutes a top priority project for the national economy. The potential for government decrees, which are less rigorous than statutory acts, to classify projects as top priority raises questions about the objectivity and accountability of such designations.[752] This lack of stringent criteria for prioritization may lead to arbitrary or capricious decisions that undermine the protection of property rights in Hungary. While the Fundamental Law stipulates expropriation in exceptional circumstances and for the public interest, with full, unconditional, and immediate compensation, there has been an

[748] ibid., section 4(1).
[749] Act CLXXXIV of 2012 on the Modification of Act CXXIII of 2007 on Expropriation and Other Related Acts.
[750] Section 4(2), Act on Expropriation 2007.
[751] Imre Andorkó, 'Chapter IX. Expropriation Law in Hungary' in Jacques Sluysmans, Stijn Verbist and Emma Waring (eds), *Expropriation Law in Europe* (1st edition, Uitgeverij Kluwer BV 2015) 270.
[752] ibid.

observable increase in enterprise takeovers recently.[753] Some claim that this is the consequence of blurring boundaries between the state and private sphere.[754]

5.1.2.3. Clarification of property ownership of state-owned enterprises

Defining basic rights to private property requires a subsequent identification of specific owners. The need to define owners applies to both public and private sectors. In the context of privatization, the theoretical focus often centers on the inquiry 'Who is the buyer?', however, political dynamics frequently shift this focus to 'Who is the seller?'.[755] This was particularly evident in Hungary, where the assignments of ownership rights to state-owned properties, including those of SOEs, encountered significant challenges.[756] The legislation governing this transformation began with Act XIII of 1989 on the Transformation of Economic Organizations and Economic Associations (**Act XIII of 1989 on Transformation**), which facilitated the conversion of small enterprises into economic associations and permitted larger enterprises to transition into economic associations, principally joint stock companies or limited liability companies.[757] While the Act XIII of 1989 did not mandate the privatization of state property, it created a framework that allowed for such possibilities. However, the problem was that this legislation inadvertently favored the chief executives of certain state enterprises, who exploited the legal provisions of the Act VI of 1988 on Association and the Act XIII of 1989 to transfer state assets – such as real estate and production means - into private ownership.[758] This process was marred by numerous abuses and inequities, prompting calls for a cessation of unregulated privatization in favor of a more structured, state-controlled approach. In response to these challenges, Act VII of 1990 established the SPA, which was tasked with the management of

[753] Zsófia Czifra, '2024 Saw Hungary's Largest Business Deal to Date' (*Budapest Business Journal*, 18 December 2024) <https://bbj.hu/business/industry/deals/2024-saw-hungarys-largest-business-deal-to-date/> accessed 23 January 2025; Zsófia Czifra, 'State Dominates Transactions Market Once Again' (*Budapest Business Journal*, 30 December 2023) <https://bbj.hu/business/industry/deals/state-dominates-transactions-market-once-again/> accessed 23 January 2025.

[754] Edit Zgut, 'Informal Exercise of Power: Undermining Democracy Under the EU's Radar in Hungary and Poland' (2022) 14 Hague Journal on the Rule of Law 287.

[755] Péter Mihályi, 'Property Rights and Privatization: The Three-Agent Model (A Case Study on Hungary)' (1992) 31 Eastern European Economics 05, 25.

[756] Gray, Hanson and Heller (n 442) 307.

[757]Tamás Sárközy discussed two approaches to indirectly privatizing socialist state enterprises: (i) converting all state enterprises into single-member state-owned companies or single-member state-owned limited liability companies and subsequently selling shares to investor; or (ii) transforming state enterprises individually into commercial corporations under normative rules, as envisioned by Act XIII of 1989. Given the predominance of the state sector, underdeveloped commodity and money exchanges, and the newly established stock exchange, the Miklós Németh Government opted for the second alternative. *See* Tamás Sárközy, *The Right of Privatization in Hungary (1989-1993)* (Akadémiai Kiadó 1993) 22–23.

[758] Kornai argued that converting a state enterprise into a joint-stock company is meaningful only if it results in a real privatization; otherwise, the process may produce misleading or even adverse outcomes. He stressed that former managers must not be allowed to select the new owners or position themselves as primary beneficiaries of the privatization. Kornai, 'Socialist Transformation and Privatization: Shifting from a Socialist System' (n 502) 297–298.

state property. This legislation also aimed to delineate the dual roles of the state as owner and regulatory authority. The SPA was granted the responsibility of exercising proprietary rights over properties undergoing transformation under the auspices of the Transformation Act.[759] The SPA controlled 10% of the business shares and stock of state-administered enterprises[760] and held a 20% stake in the original capital of self-managed enterprises, as reflected in their balance sheets.[761] Furthermore, the SPA managed the assets of SOEs that were not undergoing transformation, as well as any remaining state-owned properties after the dissolution of state economic entities, along with properties assigned to it by legislative or parliamentary decisions.[762] The clarity of ownership rights provided the definitive legal authority to sell the property

5.2. Law Governing The Privatization Process

5.2.1. Legislative Approach

The legislative framework governing the privatization process in Hungary has undergone considerable evolution since the late 1980s. At the outset, the privatization landscape lacked a comprehensive legal structure. Act XIII of 1989 on Transformation facilitated the transition of SOEs into corporate entities, thereby enabling external entrepreneurs to acquire shares in these newly established associations based on surplus assets. This situation describes the process of privatization through capital augmentation, which means that the enterprise undergoing transformation must attract greater capital influx as a direct result of the privatization initiative. Nevertheless, the initial attempts at privatization faced several challenges, including the undervaluation of assets,[763] insufficient oversight and regulatory guidance, and conflicts of interest among enterprise managers, who frequently prioritized their personal benefits over the state's interests. The Hungarian government responded to the issues associated with spontaneous privatization by enacting Act VII of 1990, which pertained to the State Property Agency and the Management and Utilization of the Property. This legislation established the SPA and defined its responsibilities in the management of state assets, as well as its role in overseeing the privatization process through a systematic tendering system. In addition, the Transformation Act underwent amendments in 1990 that significantly diminished the influence

[759] Section 7(1)(a), Act VII of 1990 on State Property Agency.

[760] ibid., section 7(1)(aa). Under Article 21(2) of the Transformation Act, all shares belong to the SPA if no entrepreneurs contributed. In the event there were not external entrepreneurs investing in a state-administered company transforming to a company, this act would appear to transfer ownership rights from the founding body to the SPA.

[761] Section 7(1)(ab), Act VII of 1990 on State Property Agency.

[762] ibid., section 7(1)(b)-(c).

[763] The absence of regulations governing asset evaluation, competitive bidding, and operational transparency led to 'sweetheart deals', where enterprises were sold at undervalued prices, particularly to foreign buyers. For more discussion, *see* Lajos Bokros, 'Hungary: Issues for Privatisation' in Christopher T Saunders (ed), *Economics and Politics of Transition* (Palgrave Macmillan UK 1992); Rebecca J Hanson, 'The Legal Framework for Privatization in Hungary' (1992) 23 Law and Policy in International Business 441.

of managers in spontaneous privatization. Other legislative measures, such as Act LXXIV of 1990 on Minor Privatization, provided additional refinement of the privatization process for state enterprises in retail trade, public catering, and consumer services. The overarching structure of SOE privatization throughout this period exhibited a fragmented and reactive nature, lacking a sufficient emphasis on the management of state assets.

The year 1992 marked a crucial turning point in developing a more structured framework for SOE privatization. Two key legislative acts were enacted to clarify the responsibilities associated with SOEs set for privatization, and the management of assets remained under state ownership. Act LIII of 1992 identified the enterprises that would continue to be retained under state ownership, whereas Act LIV of 1992 replaced earlier legislation and set regulations for privatizing properties that were temporarily under state ownership. The Government Decree No. 126/1972, dated July 28, outlined the framework for economic organizations that would continue to be wholly or partially owned by the state. This decree was issued under the authority of Act LIII and specified the scope of economic organizations subjected to this particular category. Act LIV established the regulations governing the process of privatization, covering the sale of assets and transfer of assets from state enterprises prior to their corporatization.[764] The SHC was created to permanently transform enterprises that remained under state ownership into economic associations while also exercising proprietary rights. Meanwhile, properties temporarily kept in state ownership continued to be managed by the SPA. Notwithstanding these advancements, the relationship between the SPA and SHC remained ambiguously defined, leading to potential overlaps in their responsibilities. The latter extended its scope from the former, whereas the previously mentioned act did not include any stipulations, for example, regarding the transfer of property between the two entities.

The introduction of Act XXXIX of 1995 was a key step forward in creating a unified legal framework for the process of SOE privatization. This legislation set detailed rules for privatization and regulated various techniques of privatization. At the same time, the Act recognized the concept of permanent state ownership.[765] The enactment of this Act led to the consolidation of the SPA and SHC into a singular entity known as the Hungarian Privatization and State Holding Company (**HPSHC**), thereby streamlining the privatization process. The legislative landscape continues to evolve following the accomplishment of the broad-scale privatization with the enactment of Act CVI of 2007 on State Property, which still serves as the main framework for privatizing SOEs to the present day. The Act seeks to improve the efficiency and effectiveness of the management of state-owned properties includes stipulations regarding

[764] Act LIV of 1992 was considered as a significant unification of laws in comparison with the three preceding acts. *See* Sárközy, 'The Present State and the Future Work of Hungarian Economic Legislation' (n 460) 18.
[765] The Annex to Act XXXIX of 1995 identifies the associations operating with a share in the property of companies in permanent state ownership. It also indicates the proportion of state property and the minister or organ exercising the rights of state membership (shareholder's rights).

the transfer of shares in SOEs. The Government decree No. 254/2007 (X. 4.) was promulgated to provide detailed regulations on the management of state property. After that, the formation of Hungarian National Asset Management Inc. (**HNAM**) in 2008 greatly strengthens ownership rights and portfolio management functions, making it a key player in the privatization process.

In summary, the process of privatization of SOEs in Hungary has been shaped by high-level legislation enacted by the Parliament. Hungary initially implemented a strategic approach to creating a structured framework for the privatization process, featuring medium-term and multi-year programs. This approach is more likely to be adopted during the high era of economic transition, when there are many privatization candidates available within a relatively short period of time. Furthermore, the path of privatization legislation in Hungary reflects a move toward centralized governance and a more unified regulatory framework, instead of the varied assortments of laws, regulations, and practices seen in the early phase of privatization in the late 1980s and early 1990s. The implementation of these strategic changes demonstrates the government's commitment to fostering a more orderly and transparent process of SOE privatization. However, as the privatization has become less frequent, the Hungarian Government is increasingly relying on an ad hoc approach. Specifically, recent regulatory developments and prevailing practices suggest a waning emphasis on privatization as an isolated goal, as this process becomes progressively connected with broader legislation for state property management.

5.2.2. Institutional Arrangements

Hungary's institutional framework for privatizing SOEs has undergone significant evolution, adapting to new strategies and objectives throughout the years. In general, the progression of institutional arrangements in chronological order is as follows:

5.2.2.1. From spontaneous to a more centralized model

The SPA was established in 1990 to help manage and oversee the privatization of SOEs. The role of SPA included monitoring both spontaneous transformations initiated by an enterprise itself and active transformations initiated by the SPA. A self-managed enterprise could start its transformation through a two-thirds majority vote from its governing body, subsequently requiring SPA's approval for the proposal.[766] This proposal should detail the economic objectives of the transformation, identify any interested external entrepreneurs along with the nature of preliminary negotiations, and include the enterprise's balance sheet.[767] Notably, enterprises were prohibited from entering binding agreements with external parties without prior SPA consent.[768] Should the SPA fail to respond within a designated timeframe, the enterprise may proceed with

[766] Section 17(1), Transformation Act.
[767] ibid, Section 17(2).
[768] ibid, Section 17(3).

its transformation independently,[769] albeit with the obligation to inform the SPA of its plans and financial standings.[770] The transformation was completed when the SPA signed the contract of association.[771] Act LIV of 1992, which replaced Act XIII on Transformation and Act VII on State Property Agency, established special rules for transformation effective after 30 June 1993. These provisions required SOEs that had not transitioned to economic associations by that date to prepare necessary documentation and convene organization meetings by 31 December 1993. This stipulation significantly curtailed the autonomy of enterprises seeking self-initiated transformations beyond the deadline, placing them under the SPA's regulatory purview and exposing them to potential administrative pressure.[772]

To safeguard against potential abuses during the privatization process, Act VIII of 1990 on the Protection of State Property was enacted concurrently with the SPA's formation. This legislation mandated SPA notification for major asset transfers so as to ensure state revenue protection and promote transparency and competition. Specifically, the Act set thresholds for various transactions, such as relinquishing contributions exceeding 10% of an enterprise's total value or transferring property rights values over Ft30 million.[773] These provisions established a framework for state oversight and reinforced the principle that no property divestment could occur without SPA approval. Such approval was not merely procedural but substantive.[774] The SPA was not empowered to engage in direct economic activities,[775] rather it focused on facilitating the privatization of SOEs,[776] providing assessments on transformation projects, and safeguarding state interests.[777] In case SPA disapproved a transformation plan within sixty days, the affected enterprise had the right to seek judicial review,[778] although the SPA's discretionary authority in this context was rendered unreviewable.[779]

In 1992, pursuant to the enactment of Act LIII, a super holding entity called the SHC was formed to oversee large SOEs. The decision to create SHC stemmed from a clear need for sustained state involvement in strategic economic sectors, which seemed contrary to the SPA's mandate to privatize its portfolio. In a practical sense, SHC had its role in the process of SOE privatization. The SHC was responsible for the efficient asset management and potential

[769] ibid, Section 17/B(1)
[770] ibid, Section 17/B(2)
[771] ibid, Section 17(3).
[772] Atilla Tárkány-Szücs, 'Privatization in Hungary, Processes and Achievements' in Hans Smith and Vratislav Pěchota (eds), *Privatization in Eastern Europe: Legal, Economic, and Social Aspects* (Martinus Nijhoff Publishers 1994) 227.
[773] Section 1(1) and Section 3, Act VIII of 1990 on the Protection of State Assets Entrusted to Enterprises.
[774] Mihályi, 'Privatization in the Transition Process' (n 416) 373.
[775] Section 11, Act on State Property Agency 1990
[776] ibid, Section 10
[777] ibid, Section 13(1)
[778] ibid, Section 13(4).
[779] ibid, Section 13(1), repealed by Section 9(1), Act LIII of 1990.

divestiture of SOEs. The government might reassess the scope of assets remaining in permanent state ownership biennially. In case of a specific demand for privatization, the government could move the assets or SOEs to the SPA for privatization. This legislation, as part of the legislative package on privatization enacted in June 1992, provided legal uniformity to coordinate institutions with jurisdiction over SOE privatization. As observed by Tamás Sárközy, the enactment of Acts LIII and LIV of 1992 reflected a 'state-centered' approach, because underdeveloped market conditions and lingering socialist structures meant that the government had to guide the socio-political and economic transition from the top.[780]

5.2.2.2. Centralized model with emphasis on privatization goals

While SPA was created to manage short-term state assets with the primary objective of expediting SOE privatization, the SHC was intended to play a bigger role reorganizing most strategic enterprises where the state planned to keep ownership in the long run. However, the objectives quickly became muddled by 1993 when the government pressures began to push the partial divestiture of enterprises in the SHC's portfolio.[781] The SHC's dilemma was whether it should maximize portfolio value or adhere to short-term government directives. The conflicting purposes resulted in operational indecision, as the SHC oscillated between functioning as a genuine holding entity and acting as a government agency. The influence of political forces further complicated the SHC's operations, as they dictated strategic objectives and sought involvement in daily management decisions, which often led to the replacement of holding managers.[782] Moreover, the lack of a clear framework for long-term state ownership posed critical challenges, as ownership criteria were often shaped through negotiations among various ministries, enterprises, and political factions.[783] This fluidity allowed the government to modify the composition of the SHC's portfolio at will. In response to these complexities, the HPSHC was established in 1995, combining functions of the SHC and SPA. It is the declared objective of Act XXXIX of 1995 to provide for the 'most rapid possible sale of state assets to private owners'.[784] The new entity thus reaffirmed the prioritization of privatization, placing asset management and corporate governance as secondary importance, even for enterprises designated for long-term state ownership.[785] Article 9 of Act XXXIX of 1995 mandated the renaming of SHC to HPSHC upon the Act's enactment, while Article 10 dissolved the SPA and transferred its rights and obligations to HPSHC through universal legal succession. HPSHC was set up as a one-man joint stock company with registered, non-negotiable shares. Although Act

[780] Sárközy, *The Right of Privatization in Hungary (1989-1993)* (n 757) 164.
[781] István Csillag, Arnold Ludány and Éva Voszka, 'Management of Residual State Property: Implications for Corporate Governance of Privatized Companies the Case of Hungary' (*Pénzügykutató Zrt.*, June 1998) <https://www.penzugykutato.hu/en/node/765> accessed 22 January 2025.
[782] ibid.
[783] ibid.
[784] Section 1(1), Act XXXIX of 1995.
[785] Csillag, Ludány and Voszka (n 781).

XXXIX of 1995 introduced the HPSHC as the legal successor of the SHC, it adopted a more centralized organizational structure similar to the SPA. The HPSHC was governed by a Board of Directors comprising 9 to 11 members, while operational management was assigned to a general manager. The Act increased the powers of the Director and the Board. Moreover, Section 2(2) of Act XXXIX of 1995 allowed for tailored evaluations of each privatization transaction. These changes suggest a shift towards greater bureaucratic control over privatization activities.

The legislation also introduced a 'simplified privatization', which meant a streamlined evaluation and approval process for privatizing certain enterprises, especially small and medium-sized enterprises. This scheme was designed to speed up transactions while ensuring adequate oversight. The HPSHC published a biannual list of business organizations available for sale, and invited offers to be submitted within 90 days at or above the listed floor price. In the absence of offers, a simplified privatization procedure could be initiated. The board of management proposed privatization arrangements to HPSHC, which then sought advice from external experts before deciding to either prohibit the sale, impose conditions, or authorize the sale. Act XXXIX of 1995 also removed previous mechanisms that permitted privatization initiatives led by independent consultations, known as 'self-privatization'. This decentralized approach was replaced by a more centralized model under the HPSHC, which no longer accommodated privatization efforts led by approved independent consultation, thereby reinforcing tighter control over the privatization.

While HPSHC took the main responsibility in managing and privatizing state-owned properties, it also conducted its tasks in coordination with other governmental agencies. Such a collaborative approach was particularly evident in the privatization of the banking sector. Although HPSHC held the nominal responsibility for overseeing the privatization process, the Ministry of Finance played a critical supervisory role with respect to banking privatization. Two primary factors account for this dual oversight.[786] First, the Ministry of Finance was in charge of consolidating bank balance sheets, which was the fundamental prerequisite for effective privatization. Given its access to extensive data regarding the banking system and its various components, the ministry was uniquely positioned to facilitate this secondary privatization process. Second, the ministry, as the pertinent supervisory agency, held responsibility for overseeing the health of the entire sector, thus it was deemed suitable to consolidate all these activities, considering the strategic implications associated with the development of the whole system.[787]

[786]For more detail, *see* CW Neale and S Bozsik, 'How the Hungarian State-Owned Banks Were Privatised' (2001) 13 Post-Communist Economies 147.
[787] ibid.

5.2.2.3. Centralized model with emphasis on state property management

In 1999, a significant transformation occurred in the management of state-owned assets and privatization of SOEs, marked by a notable decline in the number of assets under state ownership.[788] This decline necessitated a strategic separation of asset management from privatization activities. Consequently, the HPSHC underwent a comprehensive reorganization, leading to the establishment of a new decision-making framework. By July 2001, this restructuring culminated in the creation of two successor entities: the National Holding Company and the Debt Management Company. The former was designated as the primary assets manager, tasked with overseeing the sale of assets intended for privatization. These alterations indicate a shift in government focus as the administration began to pursue the goal of optimizing the worth of assets in enterprises subjected to remain entirely or partially under state control. Additionally, the strategy involves divesting assets timely, which guarantees the highest market value.[789]

With a smaller remaining SOE sector upon the completion of institutional privatization, the HNAM was established in 2008 under Act CVI of 2007 on State Property. This agency is tasked with exercising rights of state property ownership over SOEs while also being responsible for privatization. HNAM aims to achieve effective management of assets, which entails the possibility of selling shares of SOEs in some cases. HNAM is fully owned by the central government and is tasked with overseeing the management of assets owned by the state. HNAM functions under the oversight of the Minister of National Development. HNAM's portfolio encompasses companies, real properties, and intangible properties. Currently, HNAM Inc. exercises ownership supervision over more than 350 state-owned business associations, of which it directly exercises ownership rights over about 95% of the companies. HNAM combines the roles of ownership function, portfolio manager, and, when necessary, a privatization agency. This approach may, however, slow down the process of SOE privatization, because staff may lack the requisite expertise in privatization, as their responsibilities are often dispersed across various non-privatization-related functions, and other priorities inherent in their mandate may take precedence over privatization.[790]

5.2.3. Methods of Privatization

Hungary's approach to privatizing SOEs has been strategic, focusing on diverse methods to facilitate a wide range of investors getting involve. The general rules on privatization methods have been significantly shaped by Act XXXIX of 1995 (Chapters III and IV) and subsequently Act CVI of 2007 (Chapter V), creating a unified framework for privatization practices.

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[788] 175 state-owned enterprises, or about 1/10 of that of 1990. See OECD, 'Privatising State-Owned Enterprises' (n 219) 52.

[789] ibid.

[790] Sunita Kikeri, 'Privatization of State-Owned Enterprises' (Asian Development Bank 2022) Issue 47 13.

(i) Standard methods

The Hungarian government posited that privatization of SOEs through sales would yield superior management expertise, technological advancements, and enhanced corporate governance compared to alternative methods such as voucher programs.[791] This perspective was further motivated by the necessity to alleviate mounting government debt and to bolster state revenues.[792] Consequently, the predominant methods of SOE privatization in Hungary include trade sales and public offerings.[793]

Trade sales involve the sale of these entities to specific investors or investor groups. This approach can take various forms, including public or closed tenders, direct sales, and auctions. The preference for trade sales in Hungary can be attributed to this method's advantages in the environment lacking sophisticated market structures, which was particularly relevant in the country's early transition phase. Another significant benefit of trade sales is their capacity to attract FDI, which can yield long-term economic advantages that extend beyond the immediate sectors involved. Between 1991 and 1992, direct sales were the predominant method of privatization, with the selling price being the primary criterion for transactions.[794] By mid-1993, nearly 300 SOEs had been privatized through trade sales, accounting for approximately 80% of privatized book value.[795]

Public offerings are another frequently utilized privatization method in Hungary. This approach involves an open competitive process where SOE shares are listed on the stock market. However, unlike trade sales, public offerings necessitate a well-developed financial and legal framework. As such, during 1990 and 1991, only three out of thirteen issues were privatization IPOs.[796] The landscape shifted in 1995 with the enactment of Act XXXIX of 1995, which facilitated a broader adoption of IPOs. The introduction of restitution in the form of compensation coupons, exchangeable for ownership in privatized enterprises, further promoted public offerings. These coupons were traded on the Budapest Stock Exchange, often at prices significantly below their face value. The reopening of the country's stock market in 1990 also contributed to the progression of the public offerings in the process of SOE privatization. In its turn, the privatization process played a crucial role in the development of the stock market. The Hungarian Government prioritized capital market development, recognizing that a liquid stock market could provide funding for corporate investments and attract foreign capital.[797] The

[791] Jelic and Briston (n 501) 1328.
[792] ibid.
[793] The predominant privatization methods in Hungary during the period of 1980 and 2001 were trade sales (81%), public offerings (16%), and other methods (3%). *See* OECD, 'Privatising State-Owned Enterprises' (n 219) 94.
[794] Galgóczi (n 417) 32.
[795] OECD, 'Trends and Policies in Privatisation' (1994) 1 OECD 16,40.
[796] Schindele Ibolya and Perotti Enrico C, 'Pricing initial public offerings in premature capital markets: The case of Hungary' (2001) 79 Hungarian Statistical Review 45.
[797] ibid.

substantial number of privatization IPOs and their significant proceeds relative to private issues underscore the contribution of privatization to the evolution of Hungary's stock market.

(ii) Non-standard methods

The Hungarian approach to privatization of SOEs includes non-standard methods, particularly management and employee buyouts. Management and employee buyouts (**MEBOs**) typically involve the transfer of ownership of an SOE to a newly established legal entity, wherein a significant or majority stake is held by the employees and managers of the enterprise.[798] There were two regulatory developments in the early 1990s to support MEBOs as a way to speed up the privatization of smaller SOEs in Hungary. The Act on Employee Share Ownership Program (**ESOP**) of 1992 allowed employees to purchase shares of their company, provided that at least 40% of the workforce expresses interest in forming an ESOP during the founding assembly. This Act facilitates collective purchasing by employees, enabling them to acquire shares using company assets as collateral for loans rather than personal assets. The ESOP structure is characterized by favorable financing conditions, including low down payments and preferential interest rates, with debt servicing primarily sourced from future profits. In addition to the ESOP framework, incentives for management to engage in buyouts were further developed in 1993. The SPA proposed a management buyout procedure (**MBOs**) that would provide special incentives for managers, including the possibility for the company to act as a guarantor for loans necessary for the buyout. Managers would also be granted the right to purchase a predetermined quantity of shares at favorable terms, thereby enhancing their ownership stake as they increase company profitability. However, the privatization landscape shifted between 1994 and 1995 under the new governing coalition, which sought to accelerate ownership transformation and maximize revenue from privatization. Act XXXIX of 1995 maintained the ESOP framework but introduced some restrictions, such as a 50% reduction in the portion of the purchase price that could be financed through loans. Additionally, the Act mandated that management buyout entities pay 20% of the market value of the company upfront, with a five-year timeline to acquire a majority stake. Notably, the SHC would waive its voting rights during this initial period, facilitating a smoother transition of control. Despite the formal classification of these buyouts as ESOPs, empirical studies indicated that they predominantly function as management-led buyouts.[799] Research conducted by the Institute for Privatization Studies revealed that a small number of key managers typically held the majority of shares; while in instances where managers did not hold a majority, they could still exert significant influence over decision-making through disproportionate voting rights established in the company's governing

[798] OECD, 'Privatising State-Owned Enterprises' (n 219) 101.

[799] Morris Bornstein, 'Non-Standard Methods in the Privatization Strategies of the Czech Republic, Hungary and Poland' (1997) 5 Economics of Transition 323; Bela Galgoczi and János Hovorka, 'Employee Ownership in Hungary : The Role of Employers' and Workers' Organizations' (International Labour Organization 1998) IPPRED-11.

documents.[800] As a result, managers might hold only about one-fourth of the shares, but their control of the company was usually not challenged by the workers, who as a group held a majority of the shares.[801]

Another method to consider in the early phase of privatization was mass privatization. Mass privatization typically involves distributing shares of SOEs to the general population, either through free vouchers or at nominal prices, allowing eligible citizens to acquire stakes in privatized enterprises.[802] This method was a very important way for transition economies to quickly transfer SOEs into private hands. In Hungary, the government faced mounting pressure to expedite the privatization process, leading to the consideration of mass privatization around late 1992 and early 1993. However, one of the primary criticisms of mass privatization is its potential failure to establish an effective corporate governance structure. The risk associated with a dispersed ownership model is that it may perpetuate outdated business practices, entrench existing management, and hinder necessary restructuring efforts.[803] The discourse surrounding mass privatization in Hungary was contentious, with politicians and economists engaging in extensive debates. While there was modest support for mass privatization on several grounds, opponents raised significant concerns regarding the efficacy and implications of such a strategy.[804] Moreover, there had been some methods enacted and applied in Hungary that are theoretically capable of achieving the goals of mass privatization, such as accelerating state divestment and supporting the expansion of the domestic proprietary middle class.[805] The methods include privatization leasing, buying on the installment plan, and various preferential loans. After several years of debate, the Hungarian government adopted a weak version of mass privatization known as the Small Investors' Share Ownership (**SISOP**), which differed in material respects from other programs adopted in the region. This program allowed the state to sell 5-15% of the share blocks in the designated SOEs to small investors under favorable terms, diverging from the more common voucher distribution model in other Eastern European countries. The SISOP included provisions for local investors to obtain non-recourse and interest-free loans to finance their share purchases. However, the non-recourse nature of these loans posed risks, as it effectively functioned as a put option for investors, allowing them to sell shares back to the state at the value of the outstanding debt.[806] This aspect raised concerns that the SISOP could resemble a mass giveaway. This method was not encouraged in practice because the SISOP did not anticipate the involvement of investment funds,[807] with the expectation that

[800] Galgoczi and Hovorka (n 799) 4.
[801] Bornstein (n 799) 329.
[802] OECD, 'Privatising State-Owned Enterprises' (n 219) 86.
[803] Mats Sacklén, 'The Privatization of Central and Eastern Europe' [1994] Svensk Juristtidning 785, 801.
[804] Bornstein (n 799) 331.
[805] Voszka (n 468).
[806] OECD, 'OECD Economic Surveys: Hungary' (1993) 75–79 <https://www.oecd.org/en/publications/oecd-economic-surveys-hungary_19990529.html> accessed 7 February 2025.
[807] Bornstein (n 799) 333.

strategic investors would dominate the IPOs and gain control over the privatized enterprises. The initial implementation of the SISOP included a trial phase in April 1994, which yielded a satisfactory response from investors during two IPOs.[808] However, following the June 1994 parliamentary elections, the subsequent coalition government opted to abandon the mass privatization initiative.

Restitution, as a legal and moral principle, mandates state compensation for property expropriations deemed unjust, particularly those executed under improper or non-compliant legislation.[809] In Hungary, the government initially proposed that restitution should only pertain to expropriations that occurred after the Communist Party's rise to power in June 1949, as prescribed under Act XXV on Compensation of 1991. However, the Constitutional Court challenged this position, deeming the cut-off date arbitrary.[810] Therefore, Act XXIV of 1992 on Compensation extended the restitution framework to encompass expropriations dating back to 1939, thereby including actions taken by the Horthy regime and the pre-Communist government in the aftermath of World War II. Moreover, the Constitutional Court required a uniform approach to redress, stipulating that all expropriated properties should be addressed either through the return of physical assets or through financial compensation.[811] Given the impracticality of returning all physical properties, the Compensation Act opted to provide financial compensation in the form of freely tradable certificates or compensation vouchers. By 1994, approximately 1.2 million Hungarians, representing about 10% of the population, received these vouchers, which collectively held a face value of 120 billion forints.[812] The compensation vouchers were designed to serve multiple functions: they could be exchanged for shares in SOEs, traded on the Budapest Stock Exchange, utilized in privatization auctions, or used to purchase state-owned land and residential properties.[813] Several evidence suggests that the trading of these privatization securities contributed positively to the development of equity markets in Hungary, as it increased participation and provided valuable experience to traders involved in the voucher transactions.[814] However, a significant challenge emerged within the restitution program because the government, who favored cash sales to strategic investors over smaller ones, did not allocate sufficient property for purchase using the compensation vouchers.[815] By August 1995, the issuance of compensation vouchers in Hungary had reached a face value of 129 billion forints, while their nominal value, inclusive of capitalized interest,

[808] ibid 334.
[809] ibid 324.
[810] Constitutional Court, Decision No. 28/ 1991 (IV. 3) AB.
[811] ibid.
[812] Rodney M Chun, 'Compensation Vouchers and Equity Markets: Evidence from Hungary' (2000) 24 Journal of Banking & Finance 1155, 1159.
[813] C Edward Fletcher, *Privatization and the Rebirth of Capital Markets in Hungary* (McFarland 1995).
[814] Chun (n 812) 1157.
[815] Bornstein (n 799) 326.

amounted to 220 billion forints.[816] Nevertheless, a mere one-third of the total had been utilized for share acquisitions and other privatization efforts, with an insignificant portion allocated for life annuities.[817] Furthermore, since the market for these vouchers was characterized by substantial trading discounts, their holders faced risks as the discount increased from nearly 50% in 1993 to 80% in late 1995.[818]

5.2.3. Valuation of SOEs

Valuation has been a thorny issue in the privatization of SOEs in Hungary. Act VII of 1990 on State Property Agency mandated that state assets should be sold at a 'fair price' and required management to seek the opinion of the SPA regarding the valuation of enterprises slated for privatization. However, several major factors challenged the valuation process of SOEs in Hungary. As the country relied heavily on asset sales for privatization, the government typically invited bids from potential buyers for ownership stakes in enterprises, often engaging external auditors and consultants to assist in determining a fair market value.[819] The final purchase price was then negotiated, influenced by various factors including the identity of the investor, their commitment to employment preservation, the nature of the payment, and the competitive position of the company in the market.[820] In the absence of a comprehensive privatization program and a well-developed regulatory framework, individual SOEs were sold piecemeal, often resulting in protracted negotiations over specific transactions. Moreover, the legacy of communist accounting practices hindered the application of standardized valuation techniques, as evidenced by the case of Danubius privatization, where accounting principles diverged significantly from International Accounting Standards.[821] Key discrepancies included the treatment of fixed assets, provisions for doubtful debts, and the accounting of intangible assets. Notably, prior to 1990, land was often not valued in enterprises accounts, thus the valuation of land and buildings used for commercial and industrial uses was sporadic and arbitrary.

Several developments in the legal framework helped improve the valuation of SOEs undergoing privatization. The introduction of a new Accounting Act in 1992, aligned with European Community directives, aimed to address some of the above valuation issues, although it allowed for considerable discretion in valuation methodologies. Another pivotal change occurred with the enactment of legislation in September 1991, which facilitated the transfer of

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[816] Hungarian Privatization and State Holding Company, 'Compensation Scene' (1995) 4 Privinfo 36.
[817] ibid.
[818] Bornstein (n 799) 326.
[819] Raj Aggarwal and Joel T Harper, 'Privatization and Business Valuation in Transition Economies' in Laurent L Jacque and Paul M Vaaler (eds), *Financial Innovations and the Welfare of Nations: How Cross-Border Transfers of Financial Innovations Nurture Emerging Capital Markets* (Springer US 2001) 182.
[820] ibid.
[821] Maria R Borda and Shahrokh M Saudagaran, 'The Commercial Valuation of Danubius A Study of the Privatization Process in Hungary' (1994) 5 Journal of International Financial Management & Accounting 262.

certain state-owned assets to municipal ownership. This legislation fundamentally altered the landscape of land valuation, as local authorities became stakeholders in transformed enterprises based on the value of urban land associated with them. The financial pressure faced by local authorities, particularly deficits, motivated them to valuate land. Act XXXIX of 1995 also set guidelines for evaluating bids based on the real market value of expected revenues at the time of evaluation. However, privatization agencies were granted a notable degree of flexibility in determining prices for divestiture. Generally, the competent authorities employed two primary valuation approaches: (i) asset valuation, which aimed for reliability beyond balance sheet figures; and (ii) business valuation, which estimated prices based on projected earnings.[822] The Hungarian approach to privatization of SOEs prioritized revenue generation over the speed of asset sales.[823] The SPA and HSHC and their successor, the HPSHC, frequently sought to sell entire enterprises rather than portions, believing that this strategy would minimize transaction costs and maximize revenue.[824] Additionally, privatization agencies aimed to protect employment levels by selling enterprises as complete units, aligning with management preferences for such transactions.[825] The wide administrative discretion and non-transparency in the valuation process thus contributed to widespread corruption within the Hungarian privatization framework, undermining the integrity and efficacy of the privatization efforts.

After the completion of institutional privatization, the valuation of SOEs undergoing privatization is governed by the specific legal framework designed to ensure transparency, fairness, and the safeguarding of public interests. Central to this framework is the Act on State Assets of 2007, which mandates that the disposal of state assets must adhere to principles of transparency and equal treatment while prioritizing the protection of public interests. Specifically, it is important to accurately assess the fair market value of any state assets before their disposal. This valuation process may involve professional appraisals or alternative valuation methodologies as designated by governmental authorities. Furthermore, Act CXCVI of 2011 on National Assets reinforces the necessity of maintaining the value of national assets throughout their management and transfer processes. Collectively, these legal provisions establish a comprehensive framework to guide the valuation of state-owned assets during privatization, ensuring that the process is conducted with integrity and in accordance with national economic objectives.

[822] Janos Kerekes, 'Recent Developments in Privatization in Hungary' (OECD 1993).
[823] Morris Bornstein, 'Framework Issues in the Privatisation Strategies of the Czech Republic, Hungary and Poland' (1999) 11 Post-Communist Economies 47.
[824] ibid.
[825] ibid.

5.3. Supporting Laws

5.3.1. Company Law

5.3.1.1. Corporatization (pre-privatization)

Hungarian company law governs the formation of new companies and the transformation of previously state-owned enterprises into separate entities with corporate personality. The process of corporatization entails a change of legal form aimed at elucidating the legal ownership relationships pertaining to the enterprises undergoing conversion,[826] thereby rendering them more amenable to prospective privatization efforts. While Act VI of 1988 on Economic Associations (**Act VI of 1988**) recognized various forms of business organization, Act XIII of 1989 provided for the conversion of SOEs into Western-style companies as delineated by the former. Thus, specific legislation was implemented to govern the corporatization process in Hungary because Act VI of 1988 was found to be deficient in two critical aspects that led to conflicts of interest between the state and the managers of SOEs.[827] Firstly, it is important to note that although Act VI of 1988 defined property claims for new capital, it failed to provide a clear definition of ownership concerning existing assets. This oversight resulted in a significant degree of ambiguity surrounding the authority to sell state assets, as well as the entitlement to the proceeds generated from such sales. Furthermore, the legislation exhibited a deficiency in explicit stipulations regarding the conversion of SOEs into corporate entities. Although the state held formal ownership of SOEs, there was no formal provision that transferred all shares of the company to the state. The Act instead facilitated the creation of new economic entities, thereby allowing enterprises to sell or contribute almost all of their assets to a newly formed company. The transfer left shell entities burdened with substantial debt, while the newly established companies assumed none of these financial obligations. An exemplary case that illustrates he potential for abuses during the corporatization process is the asset transfer associated with the APISZ stationery chain.[828] In 1989, APISZ Ltd. was founded with a relatively modest share capital, which was later augmented through an in-kind contribution from an SOE. This strategic maneuver successfully transitioned the SOE into private hands, enabling the new proprietors to retain both cash and shares while simultaneously relegating a shell entity burdened with significant debt. The transaction faced scrutiny due to the absence of state participation - as the enterprise owner - in the buyer selection process, as well as its failure to generate an equitable return for the state. Although Hungarian officials intervened to halt this transaction, the absence of valuation regulations at that time made many similar transactions technically lawful. These actions were widely viewed as unpopular,

[826] Frydman, Rapaczynski and Earle (n 470) 140; Daintith (n 25) 70.
[827] Hanson (n 763) 444–445.
[828] For more detail, *see* ibid 446.

stemming from perceptions of unjust property deprivation and the undervaluation of SOEs, which appeared to favor foreign buyers.[829]

In addressing these problems, the Hungarian Parliament enacted Act XIII of 1989, which sought to confer legal succession to the transformed economic entity.[830] In general, the new legislation allowed for the transformation of SOEs into limited liability companies or companies limited by shares.[831] The chosen form should depend in part upon the nature of the business activities of the SOEs. For example, banking institutions and savings banks were only permitted to convert into limited companies.[832] Moreover, SOEs were prohibited from directly adopting the partnership structure; they were required to first establish a corporate form before transitioning into a partnership arrangement. One of the most critical objectives of Act XIII of 1989 was to ensure that the newly established entities would inherit the legal rights and obligations previously held by their predecessors. Notably, Article 9 of Act XIII of 1989 set out a requirement for transformed companies to assume all liabilities from the original SOEs. This provision thereby rectified the previous loophole that permitted the evasion of debt through asset transfers. Furthermore, the Act facilitated the complete transformation of SOEs into corporate forms while ensuring that the state maintained ownership of any shares that were not sold to insiders or other investors. Consequently, in contrast to the scenario involving partial transformations as stipulated by Act VI of 1988, an SOE ceases to exist entirely, thereby giving rise to a new entity structure in a corporate format. This provision, in conjunction with the stipulations regarding legal succession and liability, helped mitigate the abuses observed under Act VI of 1988, thereby fostering a more equitable and transparent process of corporatization and eventual privatization of SOEs.

5.3.1.2. Post-privatization control devices

Act XXXIX of 1995 established a regulatory framework for enterprises that remained under full or partial state ownership, ensuring that the government maintained controlling interest in these entities. As a general rule, the Act mandated that the state's ownership stake should not fall below 50% plus one voting right, thereby safeguarding its influence over the governance of these enterprises. The categories of enterprises subject to this regulation were enumerated in an appendix to Act XXXIX of 1995. This framework then underwent significant modification with the enactment of the Act of State Property in 2007, which effectively repealed Act XXXIX of 1995 upon completion of institutional privatization processes. Currently, the governance of SOEs is primarily governed by the Act of National Assets of 2011, which delineates specific enterprises that are to remain under state control. By definition, enterprises with more than 50%

[829] ibid.
[830] Section 1 and Article 8, Transformation Act 1989.
[831] ibid, Section12(1).
[832] ibid, Section 12 (2).

of state ownership are recognized as SOEs, thus the relevance of corporate governance principles in these enterprises is twofold: it pertains to the operational efficacy of economic organizations owned by the state; and it addresses the nature of the contractual relationship between these entities and the state.[833] Neither the Civil Code nor the Budapest Stock Exchange's Recommendations for Corporate Governance of Public Companies Limited by Shares provides explicit provisions for state-owned economic enterprises. Principles for the lawful operation of these entities however can be found in the Recommendations for Corporate Governance of Enterprises Owned by State or Local Government issued by the HNAM.[834] The special rules for SOEs are also encapsulated in two legislative acts, namely Act CXXII of 2009 on the cost-effective operation of SOEs and Act CXCVI of 2011 on National Assets. Regarding rules for decisions in entities where the state or local government holds a majority stake, the supreme governing body possesses significant competencies, including the establishment and dissolution of economic associations, as well as the acquisition and transfer of shares within these associations.[835] SOEs that provide essential services are endowed with special shareholder rights. As such, the state is granted an option to purchase shares that it does not currently own, a provision aimed at safeguarding supply security, fulfilling service obligations, enhancing operational efficiency, and aligning with national economic strategies.[836] Furthermore, shareholders within these state-owned companies have the right to compel the state to purchase their shares if the state opts to exercise its purchasing rights.[837] These rights are mandatory and financial in nature, rather than being aligned with the classical rights of shareholders.

The concept of golden shares emerged as a common legal device for post-privatization control in Hungary to maintain state control over certain privatized companies deemed strategically important. Established under Act XXXIX of 1995, these shares conferred special voting rights to the Hungarian state, allowing it to exercise significant influence over critical corporate decisions, particularly in instances where the state retained a minority stake of 25% plus one vote.[838] The specific powers associated with golden shares included the authority to approve changes in equity capital, modifications of shareholder rights, corporate restructuring activities such as mergers or separations, and participation in the election or recall of board members representing the state's interests. This regulatory framework was reinforced by an amendment in 1998, which prohibited the removal of golden shares from the articles of association of strategically significant companies. In addition, the legislation limited the

[833] Auer and Papp (n 300) 43.
[834] Ádám Auer, *Corporate Governance: Állami Részvétellel Működő Gazdálkodó Szervezetek* (Nemzeti Közszolgálati Egyetem 2015) cited in Auer and Papp (n 313) 43.
[835] Section 8(14), Act CXCVI of 2011 on National Assets.
[836] Section 7/A(1), Act CXXII of 2009 on the cost-effective operation of SOEs.
[837] ibid, Section 7/F(1).
[838] Section 7(1), Act XXXIX of 1995.

ownership of golden shares solely to the Hungarian state and its affiliated entities.[839] However, Hungary's accession to the EU in 2004 prompted the European Commission to look into the compatibility of the golden share framework with EU law. The Commission argued that the provisions of the Act XXXIX of 1995 imposed unjustified restrictions on the free movement of capital and the right of establishment, as they conferred disproportionate rights to the state in 31 privatized companies.[840] After the Commission issued a reasoned opinion, Hungary faced the potential of infringement proceedings that could lead to a referral to the European Court of Justice if it failed to address the concerns raised.[841] In response to the infringement procedure initiated by the European Commission, the Hungarian Parliament voted to pass Act XXVI of 2007 on the Abolition of Golden Shares, which came into force on 21 April 2007. This legislation mandated the abolition of golden shares in certain privatized companies, converting them into ordinary shares unless the affected companies convened a general meeting to transform them into regular voting preference shares issued under the effective company act within a specified 90-day period.[842] The primary objective of the Golden Share Act was to comply with the provisions of EU law and eliminate the proposed state measure.[843] As a result, each instance of national legislation regarding golden shares must be assessed on a case-by-case basis and justified according to the stipulations outlined in EU law.[844]

Although Act XXVI of 2007 formally abolished the special preference rights associated with golden shares, the Hungarian state may continue to exert influence as a minority shareholder through instruments recognized within the general corporate governance framework. These mechanisms are grounded in Act IV of 2006, now incorporated in Act V of 2013 on Civil Code. One such instrument available for the state is preference shares with the multiple voting rights.[845] Under the statutory framework, the volume of the voting rights attached to such shares is determined by the company's articles of association but cannot exceed ten times the voting rights of an ordinary share.[846] In the case of public limited companies, multiple-voting shares can exercise their enhanced voting right only in matters requiring a

[839] Section 7(5), Act XXXIX of 1995 (amended in 1998).

[840] European Commission, 'Free Movement of Capital: Commission Calls on Hungary to Modify Privatisation Framework Law' (*European Commission - European Commission*, 28 June 2006) <https://ec.europa.eu/commission/presscorner/detail/en/ip_06_865> accessed 12 February 2025.

[841] ibid.

[842] Section 1(2), Act XXVI of 2007 on the Abolition of Golden Shares.

[843] The Golden Share Act was repealed by the Act CIV of 2023 on the amendment of certain laws related to the strengthening of the competitiveness of domestic economic actors and increasing the efficiency of public administration.

[844] For more discussion on control mechanisms in company practice, *see* Institutional Shareholder Services and others, 'Report on the Proportionality Principle in the European Union: Proportionality Between Ownership and Control in EU Listed Companies' (European Commission 2016) Ares(2016)140624 <https://ec.europa.eu/docsroom/documents/14881/attachments/2/translations/en/renditions/pdf>.

[845] Section 183(1) and Section 186(2), Act IV of 2006; Section 3:230(2), Act V of 2013.

[846] Section 188, Act IV of 2006; Section 3:232(1), Act V of 2013.

simple majority as prescribed by the law or the articles of association.[847] In addition, Act V of 2013 formally recognizes the voting preference share with veto rights, which grants its holder a specific right of veto concerning certain decisions of the general meetings.[848] Functionally, this mechanism replicates the negative veto powers, but such veto powers now arise from the company's articles of association, rather than from a special statutory privilege. Another mechanism through which the state may exert influence is the issuance of preference shares.[849] Under this arrangement, holders of such shares in a private limited company are entitled, in accordance with the company's article of association, to appoint one or more members of the management board, up to one-third of all members. This entitlement enables preference shareholders to appoint or remove directors without requiring any action by the general meeting.[850] Taken together, these instances demonstrate that Hungarian law has evolved to provide a more nuanced mechanism that effectively allows the state to preserve a certain form of control over privatized enterprises within the general framework of corporate governance.

5.3.2. Foreign Investment Law

The privatization of SOEs in Hungary was significantly influenced by several factors that underscored the preference for foreign involvement from the outset. One primary justification for this approach was the notable lack of entrepreneurship within the domestic populace and economic organizations, which resulted in insufficient capital to acquire the state-owned assets being privatized.[851] This financial shortfall necessitated the inclusion of foreign investors, who possessed the requisite capital and brought additional advantages such as advanced technologies, access to Western markets, and the potential for transferring know-how and best practices in international business. While it is theoretically possible for Hungarian firms to attract Western managerial personnel through aggressive hiring practices and to acquire new technologies via licensing and leasing agreements, these measures do not equate to the comprehensive engagement in strategic decision-making and daily management that direct foreign investment entails.[852] Moreover, foreign involvement yields additional benefits beyond the demonstration effects of managerial know-how to domestically owned firms, as the market-oriented approaches of Western management provide a necessary disciplining effect during Hungary's transition to a market economy.[853] In other words, there was a quest for 'good owners'

[847] Section 286(4), Act IV of 2006.
[848] Section 3:232(2), Act IV of 2013.
[849] Section 189, Act IV of 2006; Section 2:233, Act V of 2013.
[850] However, preference shares entitling holders to appoint executive officers may not be issued where the company's management powers are excerised by a general director. *See* Section 189(3),Act IV of 2006; Section 3:233(4), Act V of 2013.
[851] Bordás (n 686); Péter Mihályi, 'The Evolution of Hungary's Approach to FDI in Post-Communist Privatization' (2001) 10 Transnational Corporations 61.
[852] Stark (n 440) 359.
[853] ibid.

and 'good corporate governance',[854] which was particularly salient in the privatization of critical sectors such as banking.[855] Although such an approach might cause the slow and often frustrating pace of the privatization process, improvements in corporate governance in Hungary were observed, with its quality reportedly reaching levels comparable to those in highly industrialized countries.[856] The Hungarian government's strategy for privatization was notably shaped by the unique economic context of the country, particularly the high level of foreign debt, which amounted to approximately USD20 billion at the beginning stage of the privatization.[857] This substantial debt burden precluded the distribution of state-owned assets free of charge,[858] a practice that was more common in other transitioning economies in the region. Instead, new owners were required to pay a fair price for the assets, a critical factor in establishing genuine ownership interests among the recipients of these assets.[859] Given the inadequate financial capacity of Hungarian citizens and emerging economic entities, the Hungarian government adopted a policy framework that permitted and actively encouraged foreign investment in the privatization process. This strategic openness to foreign capital was further bolstered by the existence of joint ventures and the initiation of collaborative efforts with Western banks and multilateral institutions at that time.[860] As a result, a notable characteristic of company ownership in Hungary is the relatively high proportion of foreign investors following the completion of the institutional privatization.[861]

The decline in privatization-related FDI in Hungary can be viewed as a potential permanent trend. During the transition period, Hungary's privatization efforts were intricately linked to FDI, with a significant influx of foreign capital resulting from the sale of SOEs to strategic foreign investors.[862] This approach set Hungary apart from many Central and Eastern European

[854] Mihályi Peter, 'Foreign direct investment in Hungary – the post-communist privatisation story re-considered' (2001) 51 Acta Oeconomica 107, 112.
[855] István Ábel and Pierre L Siklos, 'Secrets to the Successful Hungarian Bank Privatization: The Benefits of Foreign Ownership through Strategic Partnerships' (2004) 28 Economic Systems 111; György Szapáry, 'Banking Sector Reform in Hungary: Lessons Learned, Current Trends and Prospects.' (National Bank of Hungary 2001) Working Paper 2001/5.
[856] Adam Torok, 'Corporate Governance in the Transition - The Case of Hungary: Do New Structures Help Create Efficient Ownership Control?' in László Halpern and Charles Wyplosz (eds), *Hungary: Towards a Market Economy* (Cambridge University Press 1998).
[857] Mihályi, 'The Evolution of Hungary's Approach to FDI in Post-Communist Privatization /' (n 851) 63.
[858] Hungarian privatization programs were considered as also far more market-oriented compared to other privatization schemes in Eastern European countries. *See* Frank Sader, 'Privatization and Foreign Investment in the Developing World, 1988-92' (The World Bank 1993) Working Paper Series WPS1202 38.
[859] Evidence from Hungary indicates that foreign investors participating in SOE privatization are actively asserting their rights to shape corporate strategies. *See* Josef C Brada, 'Privatization Is Transition--Or Is It?' (1996) 10 Journal of Economic Perspectives 67.
[860] Mihályi, 'The Evolution of Hungary's Approach to FDI in Post-Communist Privatization' (n 830) 63.
[861] András Kisfaludi, 'Company Law in Hungary' in Christa Jessel-Holst, Rainer Kulms and Alexander Trunk (eds), *Private Law in Eastern Europe: Autonomous Developments or Legal Transplants?* (Mohr Siebeck 2010) 421.
[862] Kálmán Kalotay and Gábor Hunya, 'Privatization and FDI in Central and Eastern Europe' (2000) 9 Transnational Corporations 63.

countries, which either adopted alternative privatization strategies or engaged in cash sales to foreign investors at a later stage. As the privatization process neared completion, the volume of privatization-related FDI experienced a marked decline, with 1997 marking the last year of substantial inflows in this category.[863] Although the privatization process resumed in 2003, focusing on state-owned banks and other enterprises,[864] it was accompanied by a re-evaluation of the state's role in the economy, particularly in response to the financial crisis of 2008-2009. Fidesz politicians have criticized the extent and execution of previous privatization efforts and advocated for a rebalancing of the ownership structure within the Hungarian economy, emphasizing the importance of domestic capital – both state and private.[865] After that, under Viktor Orbán's administration, a systemic renationalization of certain private enterprises has been initiated, particularly in sectors deemed strategic. This move aligns with Orbán's broader objective of enhancing the state's influence in the economy.[866] The policy direction underpinning this shift has been further reinforced by the Covid-19 pandemic, which prompted the government to implement measures aimed at safeguarding Hungarian companies in critical sectors from potential hostile takeovers that could jeopardize national interests and public order.[867] As a result, it is expected that the 'open door' policy towards privatization-related investment in Hungary seems to no longer exist.

The evolution of the legal framework governing foreign investment in privatization divides systemically into two stages, corresponding to varying levels of foreign capital inflow.[868] The initial stage was marked by a liberalization of investment conditions, during which the enclave law model predominated.[869] This model is designed to provide preferential treatment to foreign-invested enterprises, thereby incentivizing foreign direct investment. The passing of Act XXIV of 1988 on Foreign Investment (**Act XXIV of 1988**) was a key event in this phase. It happened just prior to the country's major political change, which led to the collapse of the communist regime in the early 1990s. The introductory sentence of this Act makes it clear that its goal is to facilitate the direct participation of foreign operating capital in the Hungarian economy.[870] This illustrates the strategic intent to attract foreign investment as a means of economic development.

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[863] Magdolna Sass, 'FDI in Hungary: The First Mover's Advantage and Disadvantage' (2004) 9 EIB Papers 62, 68.
[864] ibid.
[865] Marcin A Piasecki, 'Was Viktor Orbán's Unorthodox Economic Policy the Right Answer to Hungary's Economic Misfortunes?' (2015) 46 International Journal of Management and Economics 41, 52.
[866] ibid.
[867] Deloitte Hungary, 'Temporary Changes in the FDI Ruleset' (*Deloitte*, December 2022) <https://www2.deloitte.com/hu/en/pages/legal/articles/temporary-changes-in-the-FDI-ruleset.html> accessed 14 February 2025.
[868] Władysław W Jermakowic and Carl J Bellas, 'Foreign Direct Investment and Privatization in Central and Eastern Europe: Facts and Issues' in CASE - Center for Social & Economic Research (ed), *Foreign Privatization In Poland* (CASE Research Foundation 1994).
[869] The enclave model implies a different treatment of foreign and domestic investors. *See* Valdas Samonis, 'Earning or Learning? Western Direct Investment Strategies in Post-Soviet Economies' (1992) 2 MOST: Economic Policy in Transitional Economies 101.
[870] Preamble, Act XXIV of 1988 on Foreign Investment.

In contrast, the subsequent stage emerged as investment conditions became more stabilized, resulting in the prevalence of the national treatment law,[871] which forms the legislative base not only for domestic but also for foreign entities. In fact, Act XXIV of 1988 remains in force to date, but nearly two-thirds of its original provisions have long been repealed.[872]

5.3.2.1. Restrictions on Foreign Participation

From the outset, Act XXIV of 1988 allowed foreign investors to acquire majority ownership and up to 100% ownership of SOEs, with the exception of certain enterprises designated for permanent state ownership. The Act further provided that investments below 50% ownership did not require governmental approval, while acquisitions exceeding this threshold necessitated joint consent from the Ministries of Trade and Finance.[873] However, amendments to Act XXIV of 1988 on Foreign Investment effective from January 1991, eliminated the need for government approval for foreign investment in Hungarian companies.

Although the current legislation does not provide for general restrictions on foreign ownership, the national government recently announced a minimum of 50% domestic ownership in key sectors such as banking, media, energy, and retail. Moreover, foreign investments are now subject to screening requirements, which potentially impose certain restrictions on foreign investors intending to engage in strategic sectors. Before January 2019, Hungary did not have any screening system in place, apart from specific sectoral assessments found in certain regulated fields such as energy, utilities, and banking. In these areas, obtaining controlling stakes had historically required the prior consent of the relevant authorities. Currently, there are two distinct sets of restrictive regulations: Act LVII of 2018 on the Control of Foreign Investment Offending the National Security and Act LVIII of 2020 on Intermediary measures and pandemic preparedness in connection with the termination of the state of emergency. Both acts establish a pre-screening procedure that mandates foreign investors to notify relevant governmental authorities regarding the establishment or alteration of ownership in enterprises engaged in activities deemed tragic for national security. The application scope of the two regimes can be analyzed from two aspects: screening thresholds and sectors covered.

(i) Screening threshold

Under the 2018 FDI Regime, foreign investors are obligated to notify the Minister of Interior if they intend to establish an enterprise or acquire ownership rights in enterprises critical to national security. The notification threshold is triggered under several conditions: (i) If the foreign investor's ownership exceeds 20% or if the acquisition collectively results in ownership

[871] Contrary to the enclave model, the treatment of foreign direct investment on an equal basis as local investment is referred to as national treatment. *See* Samonis (n 869).
[872] András Nemescsó, David Kohegyi and Zsófia Deli, 'Hungary' in Tafadzwa Pasipanodya (ed), *Investor-State Arbitration: Laws and Regulations* (7th edn, Global Legal Group 2024) 28.
[873] Section 9(2), Act XXIV of 1988.

surpassing this threshold; (ii) if the investor acquires more than 10% in a public limited liability company; (iii) if the acquisition grants the investor dominant influence over the enterprise.

Under the 2020 FDI Regime, the notification obligations are expanded, thus requiring foreign investors to notify the Minister of Innovation and Technology under the following circumstances: (i) Acquisitions that confer majority influence in a strategic company, provided the transaction's aggregate value is at least HUF 350 million, and the investor is from the EU, EEA, or Switzerland; (ii) Acquisitions exceeding 10% in a strategic company by investors who have a background outside the EU/EEA/Switzerland, contingent upon the transaction's value meeting the aforementioned threshold; (iii) Acquisitions resulting in ownership stakes of 15%, 20%, or 50% in strategic companies, or where foreign ownership collectively exceeds 20% applicable to investors without an EU background; (iv) Acquisitions of rights to operate or utilize strategic infrastructure in designated industries.

(ii) Sectors covered

The screening procedure under the 2018 FDI Regime is limited to sectors critical to national security, such as the manufacturing of dual-use products, the provision of financial services and the operation of payment systems, and the services related to electricity, natural gas supply, and water utilities.[874] The scope of these activities is further refined by government decrees.

Under the 2020 FDI Regime, the definition of a strategic company encompasses various types of limited liability and public companies engaged in activities within strategic sectors, including energy, transport, and communication. Government Decree No. 289/2020 specifies the sectors and activities of strategic importance, which encompass communication, retail and wholesale trade, energy, food production, information technology, construction, medical equipment, tourism, and labor hire.

The FDI Regimes of 2018 and 2020 afford foreign investors the right to pursue judicial review concerning investment screening decisions. This provision enables investors to challenge prohibitive decisions on the grounds of violations of fundamental procedural rules for issues pertaining to the qualifications of the investment.[875] In such instances, the Budapest Capital Regional Court is designated as the exclusive jurisdictional authority to adjudicate these matters. Should the Court determine that a legal infraction has occurred, it is mandated to annul the decision, and the Minister in charge shall launch a new procedure. In other words, it is impossible to amend the decision.

5.3.2.2. Investment Incentives and protection

Act XXIV of 1988 on Foreign Investment brought significant alterations in the regulations on foreign investors in Hungary. Foreign investors were afforded national treatment across

[874] Section 2(4), Act LVII of 2018.
[875] Section 6(8) of Act LVII of 2018, Section 285 of Act LVIII of 2020.

almost all economic sectors, with the exception of the financial sector. This change meant that a wide array of business sectors opened to foreign participation with the possibility of converting SOEs into essentially private enterprises, thereby enhancing Hungary's attractiveness as a destination for privatization-related investments.[876] One of the key features of the 1988 Act was the provision of various tax exemptions for foreign capital. These incentives were contingent upon factors such as the proportion of foreign ownership, the volume of investment, and the specific sector involved. The Act also permitted the repatriation of all profits and granted duty-free status for contributions in kind. Thus, the fiscal incentives were central to Hungary's investment legislation. Moreover, the Hungarian government actively sought to attract large, reputable multinational corporations by offering customized and substantial incentives.[877] As such, the negotiation of tax regimes was often tailored to individual foreign investors, reflecting an enclave approach characterized by discretion in investment agreements.[878] In addition to fiscal incentives, Act XXIV of 1988 and Act VI of 1988 provided robust investment protections for foreign investment and guaranteed full protection and safety. These mechanisms include assurances of repatriable compensation in the event of expropriation and protection against unfavorable alterations in governing laws. In the event of nationalization, expropriation, or any measures that could adversely affect an investor's property, the investor would be promptly indemnified for any damages, with compensation paid at actual value.[879] The liability of foreign investors was limited to the amount of their capital contribution or commitment in limited partnerships, limited liability companies, and joint stock companies.[880] The Foreign Investment Act also provides for the rights of foreign investors to participate effectively in management.[881]

After 1996, significant alterations in the investment incentives regulations emerged, primarily influenced by commitments to international organizations such as the WTO as well as adverse experiences associated with tailor-made incentives to sell SOEs to foreign investors during the previous period. The regulatory landscape became characterized by increased transparency and normative standards, reflecting a shift towards a more structured approach to foreign investment. The investment policy adopted a more proactive stance, aiming to strategically channel investment into designated sectors, regions, and activities, while applying performance requirements as prerequisites for accessing various fiscal, financial, and other

[876] Vera Ranki, 'Revolution by Legislation in Hungary' (1992) 10 Bulletin of Australian Society of Legal Philosophy 121, 157.

[877] These well-known companies, such as Suzuki, GE, General Motors and Ford, provided a kind of 'green light' for other investors. *See* Katalin Antalóczy, Magdolna Sass and Miklós Szanyi, 'Policies for Attracting Foreign Direct Investment and Enhancing Its Spillovers to Indigenous Firms: The Case of Hungary' in Eric Rugraff and others (eds), *Multinational Corporations and Local Firms in Emerging Economies* (Amsterdam University Press 2011) 186.

[878] Cheryl W Gray and William Jarosz, 'Foreign Investment Law in Central and Eastern Europe' (The World Bank 1993) Working Paper WPS 1111 17.

[879] Section 1(1), Act XXIV of 1988; Section 9(1), Act VI of 1988.

[880] Sections 94, 155, and 232

[881] Section 27 of the Foreign Investment Act authorizes foreign investors to participate in management.

incentives. A notable emphasis was placed on attracting large, export-oriented investments, particularly within the manufacturing sector. In 2003, a new phase of the regulatory framework on investment incentives emerged, aligning more closely with EU regulations. This period highlighted the inherent tension between competition and investment incentives policies within the EU framework. The emphasis shifted to financial incentive, with fiscal incentives becoming less prominent. In Hungary, there has been a clear preference for large, job-creating projects and investments in prioritized sectors. The government introduced the VIP investment cash subsidy, which is contingent upon individual government decisions, aimed at attracting investments in manufacturing, including greenfield, brownfield, or capacity extension projects.

5.4. Conclusion

The chapter provides a detailed answer to the research question on how Hungarian law regulates SOE privatization by examining its evolution as the country transitioned from a socialist economy to a market-oriented system. The privatization process was initially grounded in constitutional norms and property law, which collectively dismantled the dominance of state ownership in the economy. The legal architecture facilitating this transition was primarily shaped by the Transformation Act of 1989 and the subsequent Act XXXIX of 1995 that enabled diverse privatization methodologies. Key institutional mechanisms, such as the SPA and the HPSHC, were established to oversee the privatization process. Initially, the Hungarian government adopted a liberal approach, promoting spontaneous privatization and encouraging foreign investment. However, the 2000s witnessed a paradigm shift toward a more regulated privatization strategy, emphasizing state asset management. The interplay of company law and investment law further supported the acceleration of SOE privatization, particularly during the early transition period, which actively fostered the corporatization of SOEs and foreign participation. All in all, a review of the development of Hungarian business law indicates that it was an active contributor to the country's privatization, especially in the first 10 years.[882]

Despite these advancements, the rapid dissolution of social property without a comprehensive legal framework has had detrimental effects on the Hungarian economy. The lack of constitutional constraints on privatization under the Constitution of 1989 raised concerns regarding the potential loss of strategic national assets and the emergence of private monopolies in key industries. Furthermore, the legislation governing the privatization process lacked essential provisions for the valuation of SOEs, whereas the investment law left discretion to negotiate investment incentives between relevant authorities and foreign investors. Therefore, the legal framework has shifted to state property management, particularly following the constitutional changes introduced by the Fundamental Law of 2011. The new legal landscape

[882] Sárközy (n 494) 175. In addition, a review of Hungarian privatization history demonstrates that legal reforms in Hungary were designed to facilitate both privatization and broader economic transformation through high-level legislation. *See* Ádám Boóc, 'A Short Review of the History of the Hungarian Privatization' (2005) 46 Acta Juridica Hungarica 115.

establishes cardinal laws that require a two-thirds parliamentary majority to alter certain economic policies, thereby reinforcing state control over key assets. The integration of privatization into the broader property management framework is evidenced by the reconfiguration of institutional arrangements, including the establishment of HNAM. The investment framework has changed to stricter regulation of foreign acquisitions of Hungarian firms, as illustrated by the introduction of stricter screening mechanisms and greater government oversight of foreign acquisitions, particularly in strategic sectors such as energy, banking, and telecommunications. In sum, the legal framework regarding SOE privatization in Hungary continues to evolve in response to emerging challenges, reflecting a broader tension between market efficiency, national interests, and political considerations.

CHAPTER 6

Comparative Synthesis, Suggestions, and Final Remarks

6.1. Introduction

This chapter offers a comparative examination of Vietnam and Hungary, building upon the analysis of their legal frameworks governing the privatization of SOEs presented in Chapters 4 and 5, respectively. The primary objective is to identify both the convergences and divergences in their approaches, taking into account the distinct historical, economic, political, and legal contexts that have shaped each country's path toward privatization.

The chapter begins by comparing the initial conditions and motivations that triggered SOE privatization initiatives in Vietnam and Hungary. This contextual foundation is essential for understanding how each country's unique circumstances influenced the development and implementation of their respective legal frameworks. Following this, the chapter presents a comparative synthesis of the two legal systems as they pertain to SOE privatization, focusing on foundational legal norms, the regulatory frameworks governing the privatization process, and laws supporting or complementing the process. A central focus of this chapter is to address the research question: What lessons can be drawn from the Hungarian experience to improve the current Vietnamese legal framework on SOE privatization? While recognizing that legal and institutional reforms must be tailored to each country's specific jurisdictional realities, the Hungarian case offers valuable insights that can inform potential improvements in Vietnam's ongoing reform efforts. Accordingly, this chapter evaluates relevant aspects of the Hungarian experience that may serve as reference points for enhancing the Vietnamese laws on the issue in question. These comparative insights aim to move beyond an inward-looking, system-specific analysis by incorporating a broader, practice-informed perspective.

The chapter concludes by summarizing key findings and presenting final remarks that encapsulate the overarching arguments of the dissertation.

6.2. Comparative Synthesis

The comparative analysis of the initial conditions for the privatization of SOEs in Vietnam and Hungary reveals that the two countries share certain similarities but also exhibit significant differences due to their unique historical, economic, political, and legal contexts.

The most notable similarity between the two countries is their historical background of centrally planned economies influenced by Soviet models. Under the centrally planned economic systems, both Vietnam and Hungary established SOEs as the dominant form of economic organization, characterized by state control, nationalization of enterprises, and forced industrialization, which significantly shaped their economic landscapes. The inefficiencies and stagnation inherent in these command economies led to economic crises that served as a catalyst

for reforms in the two countries. Vietnam grappled with hyperinflation, food shortages, and external debt crises, while Hungary faced high foreign debt and inflation. These economic hardships ultimately compelled both governments to pursue market-oriented reforms. In contrast to the shock therapy approach adopted by some post-Soviet states, both Vietnam and Hungary embraced a gradualist approach to economic transition. Vietnam's Doi Moi reforms initiated in 1986 introduced market-oriented policies while retaining socialist principles. Meanwhile, Hungary's New Economic Mechanism of 1968 had already begun decentralizing and implementing limited market reforms. The political context reveals a similar initial condition. Both countries functioned under single-party systems that resisted privatization. However, as economic pressures mounted, both parties recognized the necessity for reforms. Regarding the legal and institutional frameworks, both countries inherited legal systems deeply intertwined with socialist ideology, where laws served as instruments of party control rather than independent regulatory mechanisms. The legal legacies of socialism presented major difficulties for the privatization of SOEs, requiring extensive legal reforms.

On the other hand, several key differences in the initial conditions significantly influenced approaches to the privatization of SOEs in the two countries. Hungary initiated its reform process earlier than Vietnam, with significant steps taken in the 1960s and 1970s, such as the New Economic Mechanism, which granted greater autonomy to SOEs. Meanwhile, Vietnam's transition was characterized by a prolonged reliance on Soviet support and a delayed acknowledgment of the failures of its command economy. Vietnam's reforms began in earnest only in the mid-1980s with the Doi Moi policy. Therefore, regarding the timing and nature of economic reforms, Hungary had a more developed mixed economic model by the time privatization was formally implemented. The most critical difference lies in the political reforms accompanying the economic transitions. The Communist Party of Vietnam initiated the privatization process, retaining control over the transition and upholding a socialist-oriented market economy. As a result, political reforms remained limited, with the communist party continuing to dominate governance. In contrast, Hungary underwent a political transformation alongside economic reform, culminating with the collapse of the communist party-state and the establishment of a multi-party democracy in 1990. This political shift allowed new political actors to influence economic policies and strategies regarding privatization. In addition, the legal traditions and adaptability of the two countries differ markedly. Hungary's legal system, despite its socialist period, retained elements of its pre-communist legal traditions, including a strong legalistic culture and an independent judiciary. The establishment of a constitutional court in the late 1980s, reflecting a move towards the rule of law. These provided a better foundation for adapting to a capitalist legal framework in Hungary. Vietnam, however, had a weaker legal tradition due to its prolonged period of socialist legality, where law was subordinate to party directives, thus complicating the legal adaptation necessary for the privatization of SOEs in the long run. These differences in initial conditions placed Hungary in

an advanced position in terms of economic liberalization, financial and legal infrastructure, openness to foreign investment, and political transition, giving it a significant edge over Vietnam in the initial conditions for privatizing SOEs.

Table 1. Comparison of Initial Conditions and Practices of SOE Privatization

Feature	Vietnam	Hungary
Initial conditions		
Economic factors	Heavily centralized economy post-1975 modeled on the Soviet system; hyperinflation and extreme poverty; foreign aid loss; severe inefficiencies and stagnation in SOEs	Early industrialization under the Soviet model; early trigger of a new economic mechanism (1968) and more autonomy to SOEs (from the 1970s); high external debt
Political context	One-party system; gradual governance reforms through Doi moi; socialism retained in the constitution.	Transition to multi-party democracy post-1989; political support for full privatization.
Legal legacies	Soviet-style 'socialist legality'; favoring flexibility over legality, influenced by 'revolutionary morality'; gradual shift toward the rule of law and legal modernization.	Civil law tradition; strong legalistic culture; early shift to Western-style rule of law.
Practices		
Objectives	Reduce fiscal burden; balance the promotion of the private sector with the maintenance of the state enterprise sector's leading role.	Fiscal revenue; efficiency gains; foreign investment; creation of a private ownership class.
Models	Gradual and selective, mixed ownership, strategic retention of control.	Fast, extensive, sales-focused, with an emphasis on foreign capital.
Process and Results	1. Pilot (1992- mid-1996): cautious, very few SOEs privatized. 2. Extended Pilot (mid-1996 – mid-1998): broadening scope of SOEs subject to privatization, moderate result (25 SOEs). 3. Accelerated (mid-1998 – 2011): a substantial number of privatized SOEs (nearly 4,000 SOEs). 4. Restructuring (2011-2015): focusing on large SOEs but at a slow pace (508 SOEs). 5. Towards a more substantive reform (2016 – present): emphasis on divesting non-strategic medium and large SOEs; ongoing process.	1. Spontaneous (late 1980s – 1990): informal asset transformations. 2. Centralized (1990 – 1994): institutional privatization; state majority in enterprises dropped sharply (from 1,848 to 553). 3. Strategic (1994 – 2002): accelerated sales, focus on strategic sectors and foreign investment; private sector reached 80% of the economy by 1998. 4. Completion (2002 – 2008): EU accession and completion of institutional privatization; focus shift to state asset management.

A comparative analysis of the initial conditions and practice of SOE privatization in Vietnam and Hungary must move beyond a simple comparison of similarities and differences. The divergence is not only policy preferences but also legally mediated results. The nature of the political transformation in each country defined the purpose of privatization, which in turn determined the legal and institutional frameworks that emerged. This process led to two distinct varieties of post-communist capitalism: Hungary's 'capitalism from without,'[883] and Vietnam's state-centric 'capital from below' with a neoliberal orientation.[884] Hungary's political shift from socialism used privatization as a political instrument to 'shrink the state', redistribute economic power, and attract foreign capital.[885] Meanwhile, the Communist Party led Vietnam's reforms, using privatization as a practical way to stabilize the economy, improve efficiency, and sustain the socialist order. As a result, the two countries established different legal-institutional architectures that shaped their respective economic outcomes. Their different approaches to foreign investment in the early stage of the SOE privatization process are evident. Hungary built on its more developed and market-oriented system of economic law,[886] strong legal culture, and establishment of the Constitutional Court. This legal predictability served as a reliable commitment designed to attract massive foreign investment. By contrast, Vietnam, lacking an independent legal tradition, developed a legal framework that functions primarily as an instrument of state control. The framework, which is characterized by deliberate legal ambiguity, ensures the state remains the ultimate arbiter. The country's cautious approach is thus the direct result of a legal system designed to manage and direct foreign capital rather than relinquish control over it.

The in-depth analysis of the legal frameworks for privatization of SOEs in Vietnam and Hungary is presented in Chapter 4 and Chapter 5, respectively. The major findings from the comparison of the two countries are as follows:

(i) Foundational legal norms

The foundational legal norms for the privatization of SOEs in Vietnam and Hungary share several similarities, primarily in their gradual recognition of market principles and property rights as essential components of economic transformation. Both Vietnam and Hungary have undergone significant constitutional reforms aimed at facilitating their transition from centrally planned economies to market-oriented systems. The 1992 Constitution of Vietnam marked a shift away from the Soviet-style economic model by acknowledging the role of private property,

[883] Lawrence P King and Iván Szelényi, 'The New Capitalism in Eastern Europe: Towards a Comparative Political Economy of Post-Communism' in In Neil Smelser and Richard Swedberg (eds), *Handbook of Economic Sociology* (Princeton University Press 2005) 6.
[884] ibid 18; Iván Szelényi and Péter Mihályi, 'Varieties of Post-Communist Capitalism: A Comparative Analysis of Russia, Eastern Europe and China', *Varieties of Post-communist Capitalism* (Brill 2019) 126.
[885] Harvey Feigenbaum, Jeffrey Henig and Chris Hamnett, *Shrinking the State: The Political Underpinnings of Privatization* (Cambridge University Press 1998).
[886] Sárközy, 'The Present State and the Future Work of Hungarian Economic Legislation' (n 460) 8.

allowing individuals and businesses to engage in production and trade, and granting SOEs autonomy in their operation. Similarly, Hungary's 1989 Constitution explicitly established the country as a market economy, removing the socialist principle of state dominance and ensuring legal protections of private property. However, a crucial distinction lies in the degree of commitment to privatization embedded in the constitutional frameworks. Vietnam's constitution retains provisions asserting the dominant role of the state economic sector, ensuring continued state intervention in critical industries. In contrast, Hungary's constitutional reforms aim to reduce state involvement by facilitating a comprehensive and structured privatization process. One of the most striking differences is the procedural requirements for privatization. Hungary established a clearer and more concrete legal foundation for privatization through legislative acts. For example, Act XXXIX of 1995 outlined specific conditions under which SOEs could be privatized and which sectors were to be retained under state control. The legislative acts created a more transparent and rule-based approach to privatization, specifying the methods, conditions, and oversight mechanisms for transferring state assets into private hands. The constitutional basis serving rationales for state ownership is institutionalized by the Fundamental Law of 2011, which introduces stricter controls over privatization by defining national assets and restricting their transfer through cardinal law. This legislative safeguard is designed to prevent the rapid sale of strategic industries and protect essential public services from foreign or private monopolization. In contrast, Vietnam's privatization process has been guided largely by executive decrees and sub-legislative documents rather than formal acts passed by the National Assembly. As a result, privatization strategies have been primarily dictated by the CPV and government agencies, leading to inconsistencies in implementation and a lack of transparency. The absence of legislative oversight has contributed to a slow and uneven privatization process, as different sectors and enterprises faced varying degrees of state involvement and intervention. The constitutional requirements for judicial oversight represent another critical area of divergence. Hungary's Constitutional Court played an active role in reviewing privatization laws and ensuring their alignment with constitutional principles. For example, in the 1990s, the Court ruled against privatization measures that compromised environmental conservation areas and challenged the legality of certain corporate governance structures in privatized enterprises. In contrast, Vietnam lacks an independent judicial review mechanism for privatization legislation. The absence of a constitutional court means that the legal challenges to privatization decisions are rarely heard, and the interpretation of privatization laws remains under the control of the executive branch. This lack of judicial oversight has contributed to legal uncertainty, as privatization policies can be modified or reversed without due process, making it difficult for private investors to operate with confidence.

Property rights protection also differs significantly between the two countries. Hungary's constitutional amendments and legal reforms, particularly the 1991 revision of the Civil Code, provided strong guarantees for private ownership, ensuring equal treatment between state and

private ownerships, as well as ensuring that expropriation could only occur under exceptional circumstances with full, unconditional, and immediate compensation. This legal clarity fostered investor confidence and facilitated the privatization of SOEs, as private enterprises could operate with the assurance that their property rights were legally protected. In contrast, Vietnam's legal framework, while formally recognizing private property, retains substantial limitations on land ownership and emphasis on the leading role of the state economic sector. The Vietnamese Constitution does not allow private ownership of land, instead granting land-use rights that are subject to state allocation and revocation. This distinction has created legal ambiguities in the privatization process, particularly regarding the valuation of land assets when transferring SOEs to private ownership. The preferential treatment of SOEs in terms of land use, coupled with the lack of clear legal protections for private enterprises, has resulted in an uneven playing field where privatized firms, with full or majority ownership transferred to private entities, often struggle to compete with state-backed enterprises that continue to enjoy government support and resource advantages.

These fundamental differences can be explained largely by the political context in which privatization occurred in the two countries. Hungary's transition from a communist regime to a multi-party democracy in 1989-1990 created an environment where privatization was driven by new political actors committed to reducing state control over the economy. This shift allowed for a more comprehensive and market-driven approach to privatization, where SOEs were transferred to private ownership with minimal government interference. In Vietnam, however, privatization has occurred within the framework of a one-party socialist state, where economic reforms have to align with political stability and party control. As a result, privatization has been implemented cautiously, with the CPV maintaining direct oversight over the whole process. This fundamental political difference has shaped the pace and scope of privatization of SOEs in Vietnam, making it a more controlled and incremental process compared to Hungary's rapid transition. Unlike Hungary, where privatization aimed at full transfer to private ownership, Vietnam's privatization process has been characterized by 'equitization' or 'partial privatization', where the state retains a controlling stake in privatized enterprises in most cases, thus limiting the extent of market competition and private sector expansion.

In summary, while both Vietnam and Hungary have established foundational legal norms for privatization of SOEs through constitutional and property rights reforms, Hungary's approach has been more structured and market-oriented. The presence of a strong legal framework, judicial oversight, and a clear commitment to private property rights facilitated Hungary's transition to a market economy, whereas Vietnam's privatization process has been constrained by political considerations, state intervention, and legal ambiguities.

(ii) Law governing the privatization process

Vietnam and Hungary have made great efforts to establish legal frameworks governing the process of SOE privatization, ensuring that the process adheres to state policies and economic objectives. Both countries have progressively developed privatization laws, reflecting changes in economic priorities and external influences. The Vietnamese Government has issued various executive decrees and regulations to classify SOEs eligible for privatization, define procedures for privatization, and outline the roles of government agencies. Similarly, Hungary has enacted a series of legislative acts beginning with Act XIII of 1989 and later Act XXXIX of 1995, which formalized the structured privatization approach. Another similarity is the evolving role of state agencies in overseeing the privatization process. Hungary set up the SPA in 1990, which was later replaced by the HPSHC in 1995 and eventually the HNAM in 2008, consolidating state ownership functions. Vietnam also made an effort to centralize the institutional arrangements regarding the privatized SOEs by establishing the SCIC in 2005 and the CMSC in 2018. Regarding privatization methods, both Vietnam and Hungary have implemented public offerings, direct sales, and auctions as the prevailing methods to privatize SOEs. Additionally, SOE valuation was a big regulatory issue in both countries, with concerns over undervaluation, lack of transparency, and inconsistencies in pricing mechanisms. Hungary faced valuation challenges in its early privatization phase due to inconsistencies in valuation methodologies and the lack of standardized accounting practices. Over time, Hungary introduced more structured valuation principles under Act XXXIX of 1995 and subsequent laws, emphasizing fair market value and professional appraisal standards. Similarly, Vietnam has improved regulations on SOE valuation to provide clear guidelines and enhance the flexibility in the valuation process, allowing consultancy organizations to select appropriate methods for determining enterprise value.

However, the two countries have much divergence in terms of their legislative approaches to the privatization of SOEs. Vietnam's privatization law is primarily executive-driven, relying on government decrees, prime ministerial decisions, and ministerial circulars, which are subject to frequent modifications, without overarching privatization objectives. For example, since the enactment of Decision No. 58/2002/QD-TTg of 2002, Vietnam has continuously redefined the scope of SOEs eligible for privatization. The reliance on executive instruments introduces risks of legal uncertainty and discretionary interpretation, as privatization can be revised periodically based on shifting economic and political priorities. In contrast, Hungary's privatization laws have been structured through comprehensive parliamentary acts, providing a higher level of consistency and stability. The pivotal moment occurred in 1995 with the enactment of Act XXXIX, which provided a structural framework consolidating various privatization regulations into a single, stable law. This Act also reinforced the government's commitment to privatization as a long-term economic strategy.

Another difference can be seen in the model of institutional arrangements in charge of executing privatization programs. Hungary's privatization institutions evolved from decentralization to centralization, marked by the creation of the SPA in 1990. The SPA was

initially responsible for overseeing privatization, but it then operated in parallel with the SHC, which managed long-term SOEs. To reduce bureaucratic inefficiencies, these two entities were merged in 1995 into the HPSHC, centralizing privatization and management of state assets. Since 2008, Hungary has further consolidated its state asset management under the HNAM, which oversees the privatization process and long-term state asset management, with more emphasis on the latter function. In contrast, Vietnam's institutional framework for privatization remains a decentralized model, with the involvement of multiple entities (e.g., provincial people's committees, ministries, and relevant government agencies) in decision-making, which slows the process and introduces bureaucratic hurdles. The effort to centralize state ownership functions in privatization enterprises began in 2005 with the establishment of the SCIC, aiming to speed up the divestment of state ownership from SOEs. A further attempt to consolidate state ownership functions was the creation of CMSC, which took over 19 of the largest SOEs. However, the dissolution of CMSC at the end of 2024 again highlights Vietnam's inconsistent approach to institutional oversight of the SOE privatization process.

While both countries provide for legal provisions on the use of standard methods for privatization, Hungary adopted a more market-driven approach, which prioritized competitive bidding and strategic investor engagement. Act XXXIX of 1995 facilitated large-scale offerings on the Budapest Stock Exchange, which significantly contributed to the stock market's development in Hungary. Moreover, Hungary employed additional mechanisms such as management and employee buyouts and a weak form of mass privatization (Small Investors' Share Ownership Program) to accelerate ownership transfer. In contrast, Vietnam has not implemented such non-standard methods to privatize SOEs. The adaptable and pragmatic approach to privatization methods in Hungary, despite a certain lack of transparency, provided greater chances for different social groups to contend for ownership positions, thus contributing to the relatively swift and considerable expansion of SOE privatization in the country.[887]

In comparison with Hungary, the valuation process of SOEs undergoing privatization remains a contentious legal issue due to the ambiguities surrounding property rights of state assets, especially land. Land use rights, which are not privately owned in Vietnam, create difficulties in accurately valuing privatized enterprises. The valuation process is further complicated by state-determined land prices, which are often lower than market rates, leading to concerns about undervaluation and loss of state assets.

In summary, the comparative study on the law governing the privatization process of SOEs in Vietnam and Hungary suggests that while the two countries share a commitment to structured SOE privatization and have developed institutional mechanisms to oversee the process, their legal approaches differ: Vietnam's privatization remains state-driven with frequent regulatory adjustments, whereas Hungary's approach has been more legally codified and investor-friendly.

[887] Csillag, Ludány and Voszka (n 781) 3.

Table 2. Comparison of Legislative Approaches and Institutional Arrangements

Feature	Vietnam	Hungary
Legislative Basis	Predominantly governed by executive legislation (decisions and decrees issued by the government and Prime Minister). E.g.: Decision 202-CT of 1992 on Implementing Experiments to Convert State Enterprises to Joint-stock Companies; Decree No. 28/CP of 1996 on the transformation of a number of SOEs into joint-stock companies	High-level parliamentary legislation since early privatization phases. E.g.: Transformation Act 1989; Act LIII of 1992 on the Management and Utilization of Entrepreneurial Assets owned by the State; Act LIV of 1992 on the Sale, Utilization and Protection of Assets Temporarily Owned by the State.
Legal Consistency	Pragmatic and frequently revised by executive decisions, resulting in legal uncertainty and discretionary implementation. E.g.: Decision No. 986 (in 2018) set 51% state ownership ratio in state commercial banks for the 2021-2025 period, but Decision No. 22 (in 2021) raises the ratio to at least 65%.	Progressed from fragmented legislation to a unified and structured legal framework and oriented toward comprehensive reform in a short timeframe. Act XXXIX of 1995 (Privatization Act), later replaced by State Property Act of 2007 and National Assets Act of 2011.
Institutional Structure (Early)	Decentralized; key roles played by ministries, local authorities, and SOEs; Prime Minister retains ultimate decision-making.	SPA created in 1990; self-managed enterprises initially had transformation rights, later curbed by SPA oversight.
Institutional Evolution	Mixed model at the later privatization phases: - Decentralized decision-making among the Prime Minister, ministries, ministerial or governmental authorities, and provincial people's committees for wholly state-owned enterprises. - SCIC (2006) exercises state's ownership functions and further divestment from privatized SOEs, except 19 largest SOEs. - CMSC (2018) authorizes to make ownership transformation of SOEs under SCIC's portfolio and 19 largest SOEs (CMSC however is dissolved in December 2024, reverting its authority to SCIC and relevant ministries).	Central agencies play a significant role: - SPA (1990) for management of short-term state assets with the primary objective of expediting the SOE; SHC (1992) for permanent state ownership. - SPA and SHC merged into HPSHC (1995). - HNAM created in 2008 for state property management and privatization.

(iii) Supporting laws

In respect of company law, both Vietnam and Hungary implemented corporatization as a prerequisite for privatization. Vietnam's Law on Enterprises of 2005 mandated that SOEs transition into joint-stock or limited liability companies, formally aligning them with private-sector corporate governance structures. Similarly, Hungary's Transformation Act of 1989 facilitated SOEs' conversion to corporate entities, clarifying their governance structures. However, a key difference between Vietnam and Hungary is that Vietnam focused more on organizational restructuring, whereas Hungary's transformation ensured a cleaner break between SOEs and the state. As a result, Vietnam's SOEs often retained close financial and administrative ties to government agencies post-corporatization. Regarding post-privatization control devices, Vietnam and Hungary introduced golden shares and retained control interest in the company law so as to ensure state control in privatized enterprises, however the application of these control devices differs significantly in the two countries. Hungary actively applied golden shares under its Act XXXIX of 1995, ensuring state control in strategic sectors. The country then abolished its golden share system in 2007 following pressure from the European Commission, as it was deemed incompatible with EU laws on capital movement and competition. Vietnam, on the other hand, does not have a clear enforcement mechanism for golden shares, and there is a lack of transparency, as no public records detail the application of golden shares. Vietnam favors exercising control through direct majority ownership in privatized enterprises, frequently adjusting its privatization strategy to maintain state influence over key industries.

The legislative approach to foreign investment in SOE privatization further highlights the contrast between the two countries. Vietnam has historically taken a cautious approach, gradually opening SOE privatization to foreign investors but maintaining significant restrictions. Early regulations, such as Decision No. 145/1999/QD-TTg, capped foreign ownership at 30% in select sectors. Although later reforms have reduced these restrictions, foreign investors still face uncertainty due to discretionary approval processes and unclear sector-specific limits. Hungary, in contrast, adopted a liberal foreign investment policy from the outset, allowing full foreign ownership of privatized SOEs under the Foreign Investment Act of 1988. This approach was driven by the need to attract capital, modern management, and technology, as domestic investors lacked the financial capacity to acquire large SOEs. However, Hungary's stance shifted in recent years, with Act LVII of 2018 and Act LVIII of 2020 introducing foreign investment screening procedures, restricting ownership in critical sectors such as energy, finance, and telecommunications. This change represents a reversal of Hungary's previously open-door investment policy, whereas Vietnam has gradually liberalized foreign participation, albeit at a cautious pace. Investment incentives and legal protections for investors also differ. Vietnam provides tax breaks, land-use exemptions, and customs duty reductions to encourage greenfield investments but does not offer comparable incentives for

acquiring shares in privatized SOEs, reducing their attractiveness to foreign investors. Additionally, significant risks for investors arise from legal uncertainties surrounding transaction cancellations—such as cases where SOE privatizations were overturned due to government mismanagement. Hungary, by contrast, historically provided strong legal protections, including compensation guarantees against expropriation, full profit repatriation rights, and customized incentives for strategic foreign investors. However, following the renationalization policies under the Orbán government, the legal environment has become more restrictive, particularly in strategic industries.

Overall, Vietnam and Hungary share certain commonalities in corporatization requirements and post-privatization control mechanisms but differ significantly in foreign investment openness and investor protections. The disparities in company law and investment law, which serve as the legal framework supporting the privatization process, have partly contributed to the varying outcomes of SOE privatization in the two countries.

6.3. Suggestions for Vietnam

As discussed in Section 3.2.3 of Chapter 3, Vietnam has entered a new phase in the acceleration of SOE privatization, driven by both the strong push from within and external pressures. This phase is expected to usher in more substantive changes to the privatization process, with a strategic focus on large SOEs and a further reduction of state capital. The overarching objective is to reallocate public resources to more productive and dynamic sectors of the economy. In this context, the improvement of the regulatory framework is a crucial step toward achieving the goals of restructuring SOEs, as unequivocally declared by the Government.[888] While Vietnam's legal framework for SOE privatization has evolved over time, the analysis in Chapter 4 reveals that significant weaknesses persist. These deficiencies have consistently hindered the progress of privatization, resulting in the government's repeated failure to meet the targets outlined in its privatization plans for successive periods. The ongoing legislative review presents a critical window of opportunity. As the National Assembly is currently considering the revision of significant legislation related to SOE privatization, including the Law on Enterprises, Law on Management and Use of State Capital, and Law on Investment, there is an urgent need to address existing regulatory shortcomings. The comparative analysis with Hungary produces several recommendations to improve the legal framework governing the privatization of SOEs in Vietnam.

A primary recommendation is to codify the legal regulations governing the process of SOE privatization by high-level parliamentary legislation, as opposed to the current reliance on a fragmented array of decrees and decisions issued by the executive branch. This more structured legislative approach is essential for several reasons. Firstly, the privatization of SOEs holds

[888] Decision No. 360/QD-TTg, *supra* note 9.

significant implications across economic, political, and social dimensions. In the economic sense, privatization is posited to enhance not only the efficiency of the state economic sector but also the efficient allocation of resources between the state and private economic sectors. Politically, the privatization process facilitates the transformation of SOEs into forms that align with the principles of a socialist-oriented market economy. The second rationale for a unified act on privatization is to address the inherent deficiencies of the Vietnamese legal system. The privatization process is connected to numerous critical legal issues, each of which is governed by different legal documents. This existing framework, characterized by a multitude of regulations, often leads to conflicts and inconsistencies. This situation is worse due to the prevailing principle in Vietnamese legislative practice that prioritizes specialized laws over general laws. Accordingly, when discrepancies arise between different legal documents, the specific provisions of specialized laws take precedence, which can undermine the effectiveness of privatization efforts. Therefore, the introduction of legislation on SOE privatization would address the challenges posed by the current disjointed and contradictory legal landscape, thereby facilitating a more effective implementation of SOE privatization.

There are two legislative options to achieve the objective. The first option involves the promulgation of a dedicated act on SOE privatization. This proposal has garnered support from several legal scholars and policy analysts.[889] The main rationale for this proposal is that privatization is a complex, multi-stage process that includes not only the initial conversion of ownership and state capital divestment but also restructuring of corporate governance, oversight mechanisms, and post-privatization accountability. Vietnam however currently lacks such necessary systemic regulations, posing significant risks to the oversight of public capital, especially as the number of wholly state-owned enterprises is expected to decline.[890] The alternative entails incorporating detailed provisions on SOE privatization within the existing Law on Management and Use of State Capital. While the Law currently recognizes privatization as a method of ownership transformation, it is limited in scope – applying primarily to wholly state-owned enterprises – and lacks substantive regulatory regulations. As the National Assembly is in the process of amending the Law, this presents a timely opportunity to strengthen its provisions. A thorough amendment would not only expand the application scope to include SOEs with the state holding controlling interests, in accordance with the Law on Enterprises 2020, but also introduce a specific chapter addressing the privatization process. This chapter should set out clear provisions such as institutional authority, procedures, asset valuation

[889] The proposal to develop a law regulating the equitization process was raised twenty years ago, coinciding with Vietnam's commencement of accelerating SOE reform prior to the WTO accession. *See* Le, *Co Phan Hoa Doanh Nghiep Nha Nuoc – Nhung Van De Ly Luan va Thuc Tien [Equitization of State-Owned Enterprises – Theoretical and Practical Issues]* (n 136). This issue was once again brought up in the legal discourse upon Vietnam's entry in the second accelerating phase. *See* Tuyet Anh, 'Co Phan Hoa Doanh Nghiep Nha Nuoc: Can Co Luat [Equitization of SOEs: Need to Enact a Law]' (*Bao dau tu*, 22 April 2015) <https://baodautu.vn/co-phan-hoa-doanh-nghiep-nha-nuoc-can-co-luat-d25807.html> accessed 23 February 2025.

[890] Tuyet Anh (n 889).

principles, and criteria for investor participation. The choice between these two options depends on several contextual factors, most notably a clear articulation of the objective of privatization in Vietnam's current political-economic environment. While the primary goal of privatization is often framed as reallocating public resources to more productive sectors, it must also be aligned with Vietnam's policy of maintaining state ownership in key sections deemed strategically essential to national development. Moreover, international experience – such as that of Hungary – demonstrates the importance of aligning SOE privatization with the broader legal framework governing state asset management. Although countries may vary in how they prioritize efficiency, fiscal returns, or strategic retention, a common lesson is the need to avoid the excessive disposal of public assets. Given these considerations, a preferable option may be to pursue a comprehensive amendment of the Law on Management and Use of State Capital, integrating detailed privatization provisions within a consolidated legal framework.[891] This approach offers greater legal coherence and enforcement while simultaneously reinforcing the institutional and procedural clarity needed to advance the SOE reform agenda in Vietnam.

The second recommendation emphasizes the necessity of strengthening regulatory institutions and enhancing the accountability of competent authorities involved in the privatization process of SOEs. This recommendation is closely connected to the first one, which advocates for the codification of legal regulations on SOE privatization by the legislature's instrument. Such legislative measures create avenues for the establishment of monitoring institutions that can oversee the executive branch's actions during the implementation of privatization initiatives. A critical problem in the existing regulatory landscape governing the privatization of SOEs in Vietnam is the disparity between law in books and law in action. The practice over years has demonstrated that when the legal burden has lightened, implementation challenges remain so that privatization schemes have consistently experienced slow progress and delays. Such delays can be attributed to inadequacies in the enforcement mechanism, characterized by a decentralized decision-making process spread across multiple institutions, which lack clearly defined regulations regarding accountability. Therefore, to improve SOE privatization, a fundamental requirement, which has been widely acknowledged by both

[891] At the time of revising the dissertation after the preliminary defense, Vietnam passed the Law on Management and Investment of State Capital in Enterprises on 14 June 2025 to replace the Law on Management and Use of State Capital of 2014. The new law broadens its application scope to cover SOEs as defined by the Law on Enterprises, those in which the State holds more than 50% of charter capital or voting shares. The 2025 legislation focuses on capital management and enterprise autonomy, such as permitting SOEs to invest in real estate, set salary and bonus policies, and manage asset transactions. The law also provides for general principles for restructuring state capital in enterprises through enterprise rearrangement and transfer of state capital. Although effective from 1 August 2025, the law defers numerous key matters to forthcoming government decrees. The issuance of these implementing decrees is still pending, leaving the legal infrastructure to govern privatization incomplete. Therefore, the recommendation proposed in the dissertation remains relevant for a robust and coherent legislative path forward.

government officials and observers, is a political consensus and political will (*quyet tam chinh tri*) around the need for bolder legal enforcement.[892]

The third recommendation underscores the necessity of researching and establishing an institution and mechanism for the interpretation of the constitution in Vietnam. The state economic sector is constitutionally acknowledged as the leading component of the national economy. While some argue that the state economic sector does not equate to SOEs, in my view, the former can only fulfill its designated role through the latter, which function as market actors. Therefore, a core constitutional issue requiring clarification is the relationship between the state economic sector's leading role and the principles of a socialist-oriented market economy, which advocate for freedom of enterprise and freedom of fair competition. Specifically, there is a need to set forth the boundaries of state intervention and to clarify how this leading role, operationalized largely through SOEs as market actors, is constitutionally reconciled with a competitive economic landscape. A competent authority should be empowered to provide authoritative interpretations on these matters. Such interpretations would help ascertain the nature and scope of SOE privatization, which serves as a foundational element for the development and implementation of privatization initiatives. Currently, Vietnam lacks a robust mechanism for the constitutional review of legislation. This gap leads to arbitrary policy shifts, legal ambiguities and regulatory inconsistencies, which pose significant barriers to potential investors and hinder the privatization process. While the establishment of a judicial review mechanism is an ambitious and complex reform, it is a necessary step toward ensuring long-term coherence and legitimacy in economic policymaking. Such a reform would not only support the effective implementation of SOE privatization but also contribute to the broader development of a stable, rules-based economic governance framework in Vietnam.

The fourth recommendation highlights the relevance of a comprehensive review and revision of regulations governing foreign investment in the privatization of SOEs. The successful privatization experience of Hungary serves as a pertinent case study, illustrating the importance of market-oriented legislation that fosters a stable legal environment conducive to attracting investors. Since 2016, Vietnam has made strides in reforming its regulatory framework to expedite the privatization process, particularly by addressing foreign ownership

[892] DTH, 'Bo Truong Vuong Dinh Hue: Tai Co Cau DNNN Vua La Quyet Tam Chinh Tri, Vua La van de Quan Trong va Cap Thiet [Minister Vuong Dinh Hue: Restructuring SOEs Is Both a Political Determination and an Important and Urgent Issue]' (*Ministry of Finance*, 28 November 2012) <https://mof.gov.vn/webcenter/portal/cd/pages_r/l/chi-tiet-tin-cong-doan?dDocName=BTC356372> accessed 6 May 2024; Duy Binh Le and others, 'Transparency of State Owned Enterprises in Vietnam : Current Status and Ideas for Reform' (World Bank Group 2014) Policy Note 89810 <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/618601468132616527/Transparency-of-state-owned-enterprises-in-Vietnam-current-status-and-ideas-for-reform> accessed 6 May 2024; Pham, 'Tai Cau Truc Tap Doan va Doanh Nghiep Nha Nuoc: Mot Goc Nhin Tu the Che và Phap Luat [Restructuring State Economic Groups and Enterprises: An Institutional and Legal Perspective]' (n 542).

limits, enhancing information disclosure, and streamlining participation procedures for foreign investors.[893] However, regulatory and procedural challenges continue to deter potential foreign investors. A critical observation is the complexity and inconsistency of the regulations surrounding SOE privatization, especially concerning foreign ownership limits. The absence of tailored investment incentives and the lack of robust legal protection for foreign investors diminish the attractiveness of participating in the privatization of SOEs. For Vietnam to achieve its privatization goals, it must further refine its legal and regulatory frameworks to provide a more attractive and secure environment for foreign investment. This includes ensuring transparent and stable investment policies, protecting investor rights, and addressing procedural bottlenecks. By doing so, Vietnam can better leverage foreign investment to enhance the performance and competitiveness of its SOEs, ultimately contributing to the broader economic development goals of the country.

Finally, the delineation of property rights within SOEs is critical for enhancing operational efficiency and facilitating the privatization process of SOEs. In transition economies like Vietnam, SOEs have historically functioned under a nebulous ownership framework, wherein government entities simultaneously fulfill regulatory and managerial roles. This conflation of responsibilities often leads to inefficiencies, as state officials may prioritize political agendas over enterprises' economic performance. Persistent bureaucratic oversight, where state representatives retain significant influence over strategic decisions even in partially privatized enterprises, has hindered Vietnam's gradual privatization process. The consequence is that potential investors exhibit reluctance to acquire shares in SOEs due to concerns regarding their lack of managerial voice, as the state may continue to exert control over these entities. To address these challenges, it is imperative to implement corporate governance reforms that distinctly separate the state's ownership role from the operational management of SOEs. These changes would reduce bureaucratic interference, allowing these enterprises to operate according to market principles. Moreover, it is important to reinforce regulations aimed at protecting minority shareholders in privatized SOEs, because the practice of Vietnamese privatization over the years shows that the government often maintains a majority stake in many enterprises post-privatization. One critical aspect of this regulatory framework is the requirement for comprehensive information disclosure about the state shareholder's interests, including the presence of preferred voting shares. This is particularly pertinent given the provisions of Vietnamese company law that allow the state to hold up to 99% of shares in SOEs without being subjected to stringent corporate governance regulations. Such a scenario heightens the risk of mismanagement in the absence of adequate information disclosure mechanisms. In sum, a well-defined legal framework that clarifies state ownership rights without encroaching on management autonomy and robust corporate governance provisions applicable to SOEs will

[893] For detail, *see* Chu (n 658).

foster transparency, investor confidence, and market-oriented decision-making, ultimately accelerating the privatization process and improving SOE performance.

6.4. Final Remarks

The concept of privatization, particularly in the context of SOEs, is characterized by its inherent ambiguity and complexity. It encompasses a diverse range of policies and scenarios that extend beyond mere ownership transformation, touching upon the broader implications for the state's role in economic governance. As such, SOE privatization is a significant issue for post-socialist economies, such as Vietnam and Hungary. It also implies that privatization strategies must be contextually tailored to the unique socio-political, economic landscapes, and legal traditions of individual countries. The analysis of the initial conditions and practices of privatizing SOEs in Vietnam and Hungary, as presented in this research, affirms the necessity of this contextualized approach.

Although the existing literature has extensively explored the political and economic dimensions of SOE privatization, its legal aspects remain comparatively underdeveloped. Previous studies on Vietnam and Hungary have largely approached this issue through political science or economic frameworks, often lacking a structured legal comparison. This dissertation addresses that gap by offering a comprehensive comparative legal analysis, building upon established research in privatization, post-socialist transformation, and regulatory reform. Through an in-depth examination of legal norms, legislative processes, and supporting frameworks such as company law and investment law, this research elucidates both similarities and differences in the legal treatment of SOE privatization in Hungary and Vietnam. These legal divergences reflect broader ideological, economic, and institutional distinctions between the two countries. The findings demonstrate the critical importance of a coherent and robust legal framework to support the legitimacy and effectiveness of SOE privatization. In particular, the process of privatization must be recognized as a legal transformation that requires clearly defined rules governing ownership, control, and regulatory oversight.

The comparative findings indicate that while Hungary has successfully completed its broad-scale privatization of SOEs and now emphasizes the management of state assets, Vietnam's privatization efforts are ongoing and continue to face significant challenges in achieving the targets. Drawing on Hungary's experience, the dissertation proposes several critical recommendations for enhancing Vietnam's legal framework for SOE privatization. First, Vietnam should prioritize the codification of its legal framework for SOE privatization through high-level parliamentary legislation, helping resolve inter-law conflicts and address procedural ambiguities and weak enforcement that currently obstruct the privatization process. A preferred option is to incorporate a dedicated chapter on privatization in the revised version of the Law on Management and Use of State Capital by a comprehensive amendment, given that the National Assembly is considering amending this law. Second, institutional reform must

accompany legal change. Vietnam should strengthen the autonomy, accountability, and coordination mechanisms of the authorities charged with implementing privatization policies. Vietnam must overcome the disconnect between law in books and law in action. The solution entails establishing more transparent, centralized decision-making processes and robust oversight bodies that can ensure the integrity and efficiency of the privatization agenda. Third, constitutional interpretation mechanisms should be developed to clarify the legal boundaries of state ownership in a socialist-oriented market economy. An independent institution capable of interpreting constitutional provisions would provide a more stable foundation for long-term policy consistency. Fourth, the legal framework governing foreign investment in SOE privatization must be made more transparent, predictable, and investor-friendly. Vietnam should further align its regulations with international standards, providing strong investor protections, simplified participation procedures, and tailored incentives for strategic investments. Finally, clarifying property rights and implementing robust corporate governance reforms are critical. Vietnam need to ensure a clear separation between the state's role as an owner and the operational autonomy of SOEs. This includes limiting undue political influence, safeguarding minority shareholder rights, and mandating disclosure obligations when the state retains significant ownership stakes. Such reforms will build investor confidence and enable SOEs to operate more efficiently under market principles.

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