COMMENTS RECEIVED FROM THE PUBLIC CONSULTATION OF THE DRAFT GUIDELINES ON CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES

TABLE OF CONTENTS

ALFONSO C. REVOLLO, INTER-AMERICAN DEVELOPMENT BANK

Dear Sirs,

I am enclosing my comments to the Draft OECD Guidelines on the Corporate Governance of SOE's. As I mentioned in the document, the comments represent my personal opinion and by no means the position of the Inter-American Development Bank.

A.- BACKGROUND

1.- During the eighties, large, medium and small State-owned companies were privatized, including State-owned companies with optimum technical and financial returns, as well as companies showing losses. Little or no distinction was made in regard to the operation and return of State-owned companies, the point of the matter was to commence the privatization process.[1]

2.- Privatizations that took place in OECD countries, shortly thereafter extended to the whole world, to the point that such processes were introduced by International Organizations as economical policies in their loan programs. In like manner the privatization process must comprise both those companies in excellent operating conditions as well as those with losses, the policy had to be that of privatization; International Organizations introduced privatization by means of conditionalities.

3.- Its clear that regardless of how privatization processes are evaluated, the State continues having a large number of State-owned companies that comprise the financial sector, specialized banks and the oil sector, large scale State-owned companies that are renown not only at a nationwide level, but worldwide as well.

4.- In addition to privatization processes, new sectoral regulation systems were introduced, in both the areas of infrastructure and finances. This became necessary due to the new role of the State, which would no longer be regulator and owner of State companies, but rather in charge of supervising due compliance of laws, assigning regulating functions to entities that are independent both administratively as well as financially, in this way allowing for private administration to run state-owned companies.

5.- Upon analyzing several examples, it is clear that the new role of the State has not been fully understood, having noted in several of such examples a certain melancholy for the past role of the State. Perhaps this lack of understanding in the division of the State's new functions has caused not only the delay in the execution but the indefinite postponement of the implementation itself, unfavorably affecting impacted the corporate governance of state-owned companies.

---

[1] The author held the offices of Finance, Defense, Privatization and Pensions Reform Ministries in Bolivia; until May 2004 he worked as Alternate Executive Director in the Board of Directors of the World Bank. Currently he is working with the Inter-American Development Bank in the Sustainable Development Division. The views expressed in this document are personal and do not represent the position of the IADB.

6.- Critiques to privatization processes as well as difficulties encountered in their execution coupled with world crisis in the last few years has in many cases paralyzed privatization processes and in the short term could result in their suspension. Furthermore, in certain cases there will be state-owned companies that will no longer be considered suitable for privatization.

7.- Particularly, the crisis unleashed in Argentina-a country that carried out an aggressive privatization process-has dealt a hard blow to future transactions, mainly due to the high political and social cost Argentina endured as a result of the reforms.

8.- In some cases privatizations have not been successful or have not been executed with transparency. Furthermore, the population has demanded for a greater participation of the state which could be interpreted as a demand to nationalize foreign companies, in particular in those countries where the political tendency is to oppose the free market.

9.- Moreover, it is clear that the role of the state cannot be substituted since in order for certain economical sectors to develop, mainly in the mining, oil, agricultural and financial sectors, the creation of new state-owned companies will be mandatory.

10.- One of the greatest deficiencies of the past have been international norms that can assist the development of state-owned companies. Hence the need to make feasible basic guidelines that can be perfected in a period of time to allow for government administrations and state-owned companies to know what are the basic necessary actions to be taken concerning the behavior and handling of public property.

11.- The private sector has always had guidelines and mechanisms addressed to strengthening the sector through guild Associations and Chambers of Industry and Commerce. The public sector, on the other hand, has lacked from these guidelines in order to responsibly administrate state-owned companies.

12.- The guidelines prepared by OECD concerning this issue are a dire need that initially include the countries comprised in the OECD, but will easily be extended to other countries and allowing, in time, for noticeable improvements in the operations of state-owned companies based on the proposed recommendations.

13.- In this respect, the guidelines drawn up by the OECD team represent progress without precedent, favorably affecting the administration of state-owned companies. Therefore, the comments set forth in this document have the intention of contributing in a necessary dialogue and are not questioning, under any circumstance, the excellent work carried out.

B.- REGULATION

13.- As of the introduction of sectoral regulation and financial systems it is indispensable that state-owned companies follow the same regulations and principles of the private sector, without seeking special regulations or exceptional mechanisms.

14.- It is important that the appointment of regulators is carried out by processes that ensure their transparency and have administrative and financial independence. This will guarantee the acceptance of the corresponding regulating authority not only on the part of the private sector but of the public sector as well.

15.- The importance of assuring an efficient, independent and impartial regulation will permit the regulator to be a just and fair arbitrator for both sectors. Otherwise, the regulator will be pressured into allowing exceptions in regulating state-owned companies. The independence of the regulator is indispensable to avoid political pressures.

16.- Subsidies and special loans given to state-owned companies must be transparent and properly booked, without incurring in disloyal practice against private companies that will eventually restrict their operations or result in economical losses.

17.- State-owned companies must not seek the protection of the State through exceptional norms as has been the case in the recent past. Legislation and regulations must be applied in a clear, precise and indiscriminate manner for all sectors. This will permit forthright and sound competition between the private and public sectors, where applicable.

C.- STATE OWNERSHIP

18.- The ownership of the State can be viewed from two perspectives: the creation of a coordinating/ownership entity or the appointment of clear and specific functions to be carried out by the Board of each state-owned company, based on applicable legislation.

19.- As suggested in the OECD document, the creation of one sole coordinating or ownership entity in representation of the State before all state-owned companies could be an interesting alternative. However, the following must be considered:

- Due to their character, state-owned companies have a political nature and the appointment of their main executives, as well as their board, are contingent on the political circumstances of each country: as political elections and subsequent changes take place, the structures of state-owned companies change accordingly, in adherence to the newly appointed government administration.

- Such course of action would also affect the purpose of the coordinating entity as it would be subject to political pressures and changes, having an adverse effect on the continuity it entails in order to be effectual and competitive in all its operations, all of which are requirements to successfully operate in today's market.

- For efficiency purposes, procedures must be established so that the officials appointed – as in the case of Central Banks – of such entity remain in office irrespective of political changes and circumstances.

- Another alternative would be for the entity to select their executive team based on political consensus or by appointing a council or team composed of "outstanding citizens", individuals that are highly respected in all political arenas. However, the risk of implementing this alternative would be that although the team would have transparency, it would lack the required specialized field expertise to administrate and coordinate the rest of the state-owned companies.

20.- The second alternative is the traditional appointment of executives and directors of state-owned companies in application of legislation currently in force. Perhaps this alternative could be perfected and improved based on experiences of successful public entities. Nevertheless, all such successful examples – proper administration with optimum output – have, in effect, succeeded once they were separated from political influences.

D.- STAKEHOLDERS RELATIONS

21.- State-owned companies must have conditions similar to that of the private sector and insofar as possible, must not benefit from special subsidized loans from Government banking, with the exception of loans for rural areas or specific social issues.

22.- Financial protection to Government companies must be limited, in particular regarding arrears. Government companies have easy access to financing, in particular from suppliers since they have the collateral of the State or the General Treasury of the Nation. This facility at the same time allows their operations to be subsidized, opening the possibility of transferring their liabilities to the Treasury, consequently ceasing to pay the debt. This goes on over the years, therefore transferring liabilities to the General Treasury of the Nation while lacking the consequent lack of a sound financial past.

23.- This way of obtaining relatively easy financing with the backing of the State, to execute non-profitable projects that subsequently result in failure to meet the economical obligations incurred, must be cleared through the corresponding legislation rendering state-owned companies bankrupt.

24.- The State must issue a special legislation to prevent the subrogation of debts from government companies in deficit, because once the debts are transferred to the General Treasury of the Nation, these companies start their activities again, creating a vicious circle.

E.- TRANSPARENCY and DISCLOSURE

25.- In many cases existing legislation for the publication and disclosure of general and financial information of government companies in particular is clear and precise. However, there is a tendency among their executives not to disclose such information.

26.- The Regulators are responsible for due compliance and accessibility to these dispositions to interested parties and general public, as is common practice in any other corporations.

27.- Due to the belief that there are strategic areas in each country's economy, state-owned companies handle their operations discretionally. In most cases the strategic concept does not apply, since it concerns a normal area of economy where the private sector carries out its activities. However state-owned companies are able to access this special classification in order to have comparable advantages in detriment to the private sector. Regulations must be applicable to all the sectors of the economy that are subject to regulation.

F.- THE BOARD

28.- Giving the responsibilities to the coordinating or ownership entity to appoint the Board for all state-owned companies could be the ideal mechanism to maximize transparency in government companies but ostensibly it would not seem to be a realistic process in the medium and long terms, particularly from the political point of view.

29.- Most state-owned companies interact directly or indirectly with Ministries, State Departments or entities with a greater degree of independence. However, in the end, the line of command always exists.

30.- Apparently it would be incompatible to delegate so much responsibility to one sole coordinating entity for all government-owned companies. The implementation of this mega-agency would be very difficult due to the extent of its powers and responsibilities. However, according to the structure presented in the OECD document, it is an interesting alternative and could play an important role in the performance of state-owned companies.

31.- Once this coordinating or ownership entity has the responsibility to appoint Directors, as well as the powers to influence the structure of the companies themselves and composition of the boards, the responsibility of handling and administrating these companies could be reduced since administrative responsibilities would be shared. It is important to emphasize that the ownership entity will only give strategic guidelines.

32.- The implementation of a coordinating entity could also be viewed as a mechanism to thin out the responsibilities appointed to each government-owned company in detriment to the functions each must perform. It is clear that the purpose is quite the opposite, namely, to become a high efficiency articulator to protect State interests.

33.- In like manner, the fact that the coordinating entity has the capacity to impart instructions to state-owned companies and their Boards, even if they are limited to strategic and policy matters only, draws a thin line where the coordinating entity, on one hand and the state-owned company on the other will not assume responsibilities alleging ambiguity and lack of clarity. In order to clearly establish the role of the coordinating entity this must be very well explained as well as the responsibilities of the executives and Boards of state-owned companies.

34.- The risk that the operations of the coordinating entity would be restricted by political power or the exertion of political force to influence the rest of state-owned companies must be carefully measured. All political forces in government would struggle to control this entity in order to maintain its role equivalent to a Mega-Ministry.

35.- Even if the coordinating entity prepares reports for or has relations with Parliament, in order to ensure its operations it is necessary that state-owned companies have normal and expeditious access to the executive power, with a degree of relation and dependency to the same.

ARJEN VAN BALLEGOYEN, GOVERNANCE INTERNATIONAL

1. General:

The overall emphasis of the "Draft OECD Guidelines on the Corporate Governance of State-Owned Enterprises" is to ensure that SOEs are run as much as regular businesses as possible despite government ownership. The draft guidelines try to limit the role of the government to indeed just the ownership function and to avoid government influence on the operational side of the SOE.

Reaction:

This emphasis on the regular business side is appropriate. Regardless of the particular reasoning for the existence of an SOE (state monopoly, historical reasons or public service commitments), business operations should always be run according to rational, market economic principles as this assures the best allocation of resources.

It is however unfortunate that the aspect of Public Service Provision by SOEs is left largely untouched by the Draft Guidelines, thus ignoring an important dimension of SOEs.

2. Public Service Provisions:

The Draft Guidelines make reference to public service provision by SOEs in Chapter I section C, which is further elaborated in the annotation to chapter I, specifically points 27 and 28.

Chapter 1 C: "*Any specific obligations that an SOE is required to undertake in terms of public service provision or special responsibilities above the generally accepted norm should be clearly identified Public Consultation on the Draft OECD Guidelines on the Corporate Governance of State-Owned Enterprises by laws and regulations, disclosed to the general public, and provision made to cover related costs in a transparent manner*".

Reaction:

Public Service Provision is given scant consideration in the Draft Guidelines. Public Service Provision is an important rationale for continued involvement of governments in SOEs in many EU countries. In these countries, EU policy and judicial developments in favour of market economic principles and the reduction of unfair competition are forcing governments to rationalise their stance vis-à-vis SOEs similar to the stance outlined in this OECD draft guidelines.

However, the brief prescription contained in Chapter I section C, with explicit reference to transparency and cost recovery does not do justice to the rather complex issue of public service provision. Difficulty in determining and measuring cost is common with public service provision as is the difficulty in providing clear definitions of the "product" of public service provision where it concerns a fundamental citizen right or prerequisite for the operation of society. How much is continued access to electricity worth in times of shortage or how hard is the right to affordable mobility? Even though such questions can

theoretically be answered in market economic terms, political debate avoids difficult questions such as these.

Public services currently provided by the SOEs and the failure to conceive and/or implement viable alternatives to SOE public service provision hinder the approximation of the prescription contained in chapter I section C of the Draft Guidelines.

Suggestion:

The Draft Guidelines should expand on the principles contained in Chapter 1 section C by introducing alternative good-practice approaches to transparency and cost determination and recovery, thus outlining the path to rational and transparent public service provision by SOEs in addition to describing the end-goal.

3. Role of the state as client

The Draft Guidelines focus to a large extent on the development of the role of the State as the owner of SOE and to keep the state in its role as regulator or industrial policy maker at bay in regards to the operation of the SOE. This is explicit in Chapter I section A.

Reaction:

The emphasis of the Draft Guidelines on the distinction and compartmentalising of the different roles of the state is essential to the rationalisation of the SOE governance.

However, there is a third role that the Draft Guidelines ignores: the role of the State as client. The State is a client of the SOE when it comes to the provision of a public service for the government and the public at large. The relationship between the state as client and the SOE in cases of non-or malperformance of public service provision gives rise to difficult issues of enforcing compliance as well as temptation to misuse any authority the state might have in its role as owner of the SOE.

The Draft Guidelines fail to address these issues.

Suggestion:

Insert another chapter in the draft guidelines concerning the role of the State as client of the SOE.

BISTRA BOEVA, PROFESSOR, UNIVERSITY FOR NATIONAL AND WORLD ECONOMIC STUDIES

1. The Guidelines are important and relevant measure for the countries that transformed their economy from a planned economy towards market economy. The evidence suggests that the State does not behave as a modern owner that sticks to the good practice of corporate governance.
2. The should be implementation of the Guidelines is important for the sustainable economic development and the stable investment climate in the respective countries.
3. It is feasible to extend the area of implementation the Guidelines. The municipal companies in some countries inc. Bulgaria owns assets that are under control of the municipality authorities and various political forces. The lack of transparency and disclosure permits the above authorities to benefit from selling or siphoning the municipal assets. In many cases the privatization of municipal assets does not protect the shareholders rights. From social and economic perspective it is note worthy to recommend the above guidelines to be applied by r big municipal economic entities.
4. I consider very important the Guidelines Chapter one A, C and D.
5. In terms of Chapter second it is very important to recommend to the State special measures for adequate capacity building measures for the respective co-ordinating entity in the framework of a Ministry or agency. Political oriented human resources policy in the ministries leads to frequent changes in the staff and threats the professionalism of the people that are responsible for the governance of state ownership. Special training measures in corporate governance have to be recommend to the people that work at the coordinating entities in the framework in the ministries.
6. The Guideline III. D needs better and more explicit wording. The word ”specific mechanism” has to be replaced with workable recommendation. The annotation does not contribute the understanding and the purpose of the term in question.
7. In terms of Guideline IV C it is noteworthy to reconsider the feasibility of the suggestion for the “code of ethics”. In many countries listed companies stick to the programmes or guidelines for corporate governance that deals with the above issues. The new format of OECD Principles for corporate governance(2004) recommends the disclosure of a programme for corporate governance.
8. The Guidelines for the transparency and disclosure recommend SOE to observe the OECD principles for corporate governance. In this regard is note worthy to reconsider the format of the information that has to be disclosed according guideline V.E. The present format differs from OECD principles for disclosure for the material information. According the practice it would be better if the SOE disclose the same format information inc about board members, their remuneration etc. The double standard for disclosure does not promote good corporate governance practice in the respective country.
9. The Guidelines VI “The responsibilities of SOE” boards are very useful. The specifics of SOEs and their boards requires more recommendations about the boards’ functions. The Guideline E has to be extend with more detail recommendations about the functions. In this regard it is note worthy to think on the possibility to use the same format of recommendations that is envisaged in OECD principles for corporate governance (2004).
10. In the Guidelines has to be given attention to the mechanics of their implementation by the respective national authorities

CESAR FUENTES, PH.D, AND JOSE MOQUILLAZA, M.B.A

Regarding: Chapter I: Ensuring an Effective Legal and Regulatory Framework for SOEs

It is a suggestion that the Guidelines on SOEs must not only include these, but the Regulatory Institutions and Boards. The regulation scope includes the utilities, banking, finance and infrastructure, which are the sectors where the SOEs are key players. Instead of Guidelines for State Owned Enterprises, could be for State Entities.

Regarding: Chapter II: Equitable Treatment of Shareholders

This treatment must include not only when the State is a majority shareholder, but when is a minority shareholder. This could work as an incentive for private and close firms to be more transparent in the spirit of the Principles.

Regarding: Chapter III: Relations with Stakeholders

The point IIIB must include listed and not listed firms, holding more disclosure requisites for the large SOEs than the small ones. Holding this principle for just the listed could work as an incentive for the SOEs to became an unlisted firm.

Regarding: Chapter VI: The Responsibilities of SOE Boards

It must clearly stated as responsibilities of the board, the supervision and resolution of conflicts of interest between members of the board, since the conflict could not only be with the private sector, but concurrently with the state sector. This is more acute in emerging markets where public officials are often members of the Boards of SOEs.

Regards,

Cesar Fuentes, Ph.D.

Associate Professor of Economics and Finance at ESAN Graduate School of Business, member of the Board of Directors of OSIPTEL, the Peruvian Telecom Regulatory Board

Jose Moquillaza, M.B.A.

Member of the Board of Directors of OSITRAN, the Peruvian Transport and Infrastructure Regulatory Board. Former General Manager at CONASEV, the Peruvian Securities Commission

CHRISTIAN STRENGER, DWS INVESTMENT GMBH

The views presented below are personal views that have not been expressly agreed with official bodies.

1. General comment

It is welcomed that the OECD in the draft Guidelines on the Corporate Governance of State-Owned Enterprises (SOE) addresses the specific governance issues of State-Owned Enterprises. SOE are often subject to either passive state ownership or political interference, protection from market forces (like takeovers or bankruptcy), and a complex chain of accountability that inhibits efficient decision making. It is the firm conviction of the undersigned that SOEs should be guided and run as closely as possible as 'normal' privately owned companies and be fully exposed to the market forces.

As outlined in the introduction of the draft text, the Guidelines should therefore be seen as complementary to the OECD Corporate Governance Principles. This approach is advisable to avoid an additional set of governance principles or standards that might contradict or compete with other well-established governance principles for private corporations. The objective of the Guidelines, to amplify or add specificity to the OECD Principles in certain areas relevant for SOE, is therefore the correct avenue.

It is important to note, that in order to carry out its ownership responsibility (i.e. monitoring corporate performance and establishing good governance practices), the State should benefit from the application of governance tools that govern the private sector, including the OECD Principles of Corporate Governance or the ICGN Statement on Shareholder Responsibilities[1]. Since many SOE have been or will be partially privatized, institutional investors are relevant shareholders for listed SOE. Therefore, the ICGN Statement should also be considered in the final Guidelines.

2. Detailed comments on the draft Guidelines

The important issues of the suggested OECD Guidelines are:

I. Ensuring an effective legal and regulatory framework for SOE

- Ensure a level-playing field regarding the legal and regulatory framework for SOEs and the private sector in areas where they compete

- Promote good corporate governance practices in SOE, following the OECD Principles

1. ICGN Statement on Institutional Shareholder Responsibilities, February 2004, available at: http://www.icgn.org/organisation/committees/SRC_committee.php.

II. The State acting as an owner

- The exercise of ownership rights should be centralised in a single entity responsible of the ownership function (B)

- The State should act as an informed, accountable and active owner and establish a clear and consistent ownership policy (A)

- Active ownership means, i.a.: voting state shares, implementing a performance measurement system, keeping close contact with the external auditor and setting up an appropriate remuneration scheme for SOE board members (H)

- Establish well structured and transparent board nomination processes and actively participate in the nomination of SOE's boards (E)

- The government should not be involved in the day-to-day management of the SOE and allow them full operational autonomy to achieve their defined objectives (G)

III. Equitable treatment of shareholders

- Ensure that all shareholders are treated equally and have access to effective redress mechanisms presuming a high degree of SOE transparency and an active dialogue with all shareholders

IV. Relationship with stakeholders

- The State should ensure that SOE fulfill their responsibilities towards stakeholders and report adequately on stakeholder matters

V. Transparency and disclosure

- SOE should observe high standards of transparency in accordance with the OECD Principles, esp. standardized reporting on SOE by the ownership entity; SOE should implement effective internal controls, an independent external audit process, and disclosure of financial and nonfinancial information according to international best practice

VI. The responsibility of SOE boards

- SOE boards should have adequate authority, the necessary competencies and sufficient objectivity to carry out their function of strategic guidance and monitoring of management

- Especially, SOE boards should exercise objective and independent judgement. They should include a sufficient number of independent members. They should have the power to appoint and remove the management board members, should set up specialized committees in particular an audit committee and carry out an annual evaluation to appraise their performance

The above cited Guidelines are deemed vital to ensure that SOE can operate efficiently without undue State influence and should be key elements of the final text. To ensure the effectiveness of the Guidelines they have to be implemented in an existing legal and regulatory framework that is sufficiently autonomous from both political and private interests. If this kind of autonomy cannot be guaranteed, additional

development steps to build the necessary regulatory environment should be taken – an issue that should be included in the Preamble of the Guidelines.

DOMINIQUE DALNE, RESPONSABLE GÉNÉRAL SECTEUR FERROVIAIRE DE LA CSC-TRANSCOM

Commentaire général

1. Les entreprises publiques sont soumises à une concurrence discriminatoire avec les entreprises privées.

La finalité première d'une entreprise privée est la recherche exclusive du profit sur un marché déterminé. Celle d'une entreprise publique est de répondre à des besoins sociaux en intégrant un certain nombre de contraintes et au moindre coût pour la collectivité. Dans les créneaux d'activités commerciales, **une entreprise publique voit son champ d'action limité strictement à son objet social.** C'est le résultat d'une décision politique en Belgique depuis 2005 pour la SNCB-Holding qui doit se séparer d'activités rentables transférées directement dans la sphère privée: par exemple la valorisation immobilière de son patrimoine. Le risque de ce type de décision est le transfert d'un monopole public vers un oligopole privé. La conséquence du point de vue du profit est que l'entreprise publique réinjecte celui-ci directement dans le circuit économique, ce qui n'est pas nécessairement vrai pour l'entreprise privée. Sur le plan de l'emploi, l'entreprise privée opérera une rationalisation pour garantir un profit maximum à ses actionnaires tandis que l'entreprise public pourra garantir un niveau d'emploi acceptable pour réaliser ses missions. La priorité à l'emploi favorise le financement du système de sécurité sociale et les effets de redistribution et d'équité favorables à la population. Par contre, il est vrai que depuis la fin de la Seconde guerre mondiale est passé sous silence la redistribution des fruits réels de la croissance, le partage équitable de la richesse entre l'actionnaire et le travailleur. La rentabilité élevée par action pouvait être comprise en période de haute inflation, mais en période de basse inflation la recherche de profit immédiat ne doit-elle pas céder la place à un profit durable moins élevé basé sur un code éthique plus humaniste qui viserait à réduire les inégalités sociales et régionales. Avoir pour objectif unique l'argent à faire fructifier sans autres préoccupations sociales, n'est-il pas un crime contre l'humanité ? Les soldats qui commencent à refuser de se battre dans des conflits armés ne prennent-ils pas consciences qu'ils risquent de perdre leur vie pour du papier qui gonfle les poches d'un petit nombre. L'OCDE pourrait-elle lancer un débat sur l'argent éthique et le principe de bon gouvernement social à adopter dans les entreprises privées ?

2. Il est nécessaire d'établir un lien de responsabilité civile et pénale de l'administrateur du bien public, y compris pour les administrateurs privés.

La Belgique a vécu ces dernières années 2 traumatismes importants, ceux de Renault à Vilvorde et Sabena à Zaventem. Dans le dernier cas, quand la Commission parlementaire conclut sur base d'expertises a posteriori que l'entreprise a été vidée de sa substance vitale à cause de la commande excessive d'avions par rapport à sa capacité de financement, au cannibalisme des filiales organisées par l'actionnaire privé. Il est nécessaire d'instaurer un contrôle fort avec capacité de blocage de la décision et surtout l'instauration de dispositions légales sur la responsabilité des administrateurs et de réparation des préjudiciés.

3. Les règles comptables européennes pèsent lourdement sur le financement des investissements publics futurs.

L'endettement des entreprises ferroviaires publiques est cumulé avec la dette de l'Etat. Vu la dette publique belge et les critères de convergence de Maastricht, la capacité d'emprunt sur le marché institutionnel à un taux d'environ 5% est limité. Il faut recourir à des partenariats public-privé dont le coût varie entre 12 et 15 %. A la condition que le risque soit assumé par l'investisseur privé, l'emprunt n'est pas additionné à la dette de l'Etat. Même si la garantie d'Etat n'est pas offerte dans ce genre d'opérations, ce placement pour l'investisseur est à risque très limité. Par conséquent, il grève lourdement les comptes de l'entreprise publique. Afin de sortir l'entreprise publique de cette spirale négative, ne pourrait-on pas envisager qu'elles puissent bénéficier d'un taux annuel comparable à celui offert aux banques en même temps que l'emprunt soit découplé de la dette de l'Etat. Les entreprises privées ne sont pas soumises aux mêmes obligations.

Fiches

I : Garantir aux entreprises publiques …p.6

Insérer un nouveau§ A'
« Dans le cadre des activités commerciales à assurer par les entreprises publiques, celles-ci doivent bénéficier des avantages et de la liberté d'action autorisés aux entreprises privées. »

II : L'Etat actionnaire …p.7

Insérer un nouveau § G'
« L'Etat doit pouvoir exercer un contrôle direct sur les décisions d'intérêt stratégique de nature à mettre en péril la viabilité le l'entreprise publique, même si des actionnaires privés sont majoritaires dans le capital »

IV : Relations avec les parties prenantes …p.10

Insérer un nouveau § E
« Les règles comptables européennes doivent être modifiées pour favoriser l'investissement en équipements collectifs. Les entreprises publiques doivent accéder aux marchés financiers institutionnels sans conséquences sur la dette publique consolidée ».

V : Transparence et diffusion de l'information …p.11
Insérer dans C
« L'Etat peut annuler des décisions de nature à mettre en péril la viabilité de l'entreprise publique et l'intérêt collectif ».

VI : Responsabilité du CA d'une entreprise publique

Dernière phrase de l'introduction à adapter.
« Le conseil d'administration doit agir en toute intégrité, être comptable et responsable solidairement sur les plans civil et pénal des mesures qu'il prend. En outre, chaque administrateur doit assumer individuellement ses choix de mauvaise gestion »

GEORGIA SAMBUNARIS, US AGENCY FOR INTERNATIONAL DEVELOPMENT

Thank you for the opportunity to comment on your ***Guidelines***. Since the nature of the global economic considerations are changing for the United States, I have incorporated some general language from our Agency's most recent policy papers and drafts into this paper. There are no strong views as regards the actual placement of the suggested editorial language, whether in the actual Chapters, or in the **Annotation** sections. Please feel free to accept or reject any of these edits.

Comments on Draft OECD Guidelines on the Corporate Governance of State-Owned Enterprises

Par. 2. Line 3. I would just like to point out that the United States believes that the OECD should move towards enforceable guidelines to the extent possible rather than the traditional non-binding guidelines. The recent corporate governance scandals make clear that regulation and enforcement are necessary for companies to effect difficult reforms.

Par. 3. (Today, the Fragile States of the non-OECD countries, defined as failed, failing and recovering states that have experienced instability since the Cold War, but are not recognized as a source of pressing security threats globally. In these countries there is often state ownership of commercial enterprises due to high risk associated with foreign direct investment.)

Par. 4. However, the fragile states still represent a significant source of state-owned enterprises in the non-OECD countries that require extensive economic assistance, as in the early 1990s in the former Soviet Union and Eastern Europe. There is no comparison, however between the two geographical regions regarding the proposed technical assistance for corporate recovery and governance.

Par. 7. Fifth line from the bottom of this paragraph, after bankruptcy: Thus drawbacks to this type of ownership often include lack of transparency, equality, and fairness to citizens and potential shareholders and liquidity in the economy. Corporate governance for SOEs can help to insure financial reporting and proper oversight by regulators in the financial markets.

Par. 10. These guidelines may also be useful in promoting economic recovery in otherwise fragile states that require increased transparency in their operations in order to pave the way for economic transformation.

Chapter 1. The legal and regulatory framework can offer opportunities to complement corporate governance guidelines through enforceable requirements for financial disclosure, and reporting as well as enforceability by regulators.

Chapter II. E. The ownership entity should also insure that appropriately qualified and reputable private sector executives are included in board composition so as to build credibility of SOEs for eventual divestiture or profit-oriented operations.

Chapter II. H. 1. ..and insuring effective proxy systems for notifying appropriate parties of annual meetings.

Chapter III. B. Transparency, equality and fairness…

Chapter III. C. insert **timely** communication, reporting and consultation with all shareholders.

Chapter III. D. Minority shareholders' **right of** access…

IV. Relations with Stakeholders

C. line 2: Programmes related to internal codes of ethics and conduct

V. Transparency and Disclosure (this section is excellent)

V.A. These reports should be subject to external auditing and should be available to the public, stakeholders and shareholders.

VI. The Responsibilities of the SOE Boards

SOE boards should conduct their fiduciary duties with prudent judgment in order to achieve a goal of objective conduct of the corporation. Principals related to duty of care in the best interest of the SOE.

The SOE board members may devote a reasonable amount of resources to corporate social responsibility activities that include humanitarian, educational and philanthropic purposes.

D. last sentence: …remove the CEO and replace principal senior executives.

Annotations for Chapter I. p. 13. no. 29: Enforcement of shareholder rights as well as financial sector reporting compliance and disclosure practices should apply to SOEs. Also appropriate penalties, whether administrative fines or criminal punishment should be advocated for SOEs.

Annotation to Chapter II. p. 15. No. 45: (I would like to recommend that this statement be removed from the text.)

Annotation to Chapter II. p. 17. 53: Board members should come from reputable backgrounds that enhance the company's profile and standing in the community, as well as provide the proper experience and fair duty of care to stakeholders and shareholders alike. To the extent possible, private sector board members should be advocated.

Annotation to Chapter IV. Relations with Stakeholders. P. 25. No. 120. (add standards of conduct and ethical practices.)

Annotation to Chapter V. Transparency and Disclosure. The following may be inserted. The transparency and disclosure policies of a SOE should be subject to the same regulatory oversight of the financial sector as non-SOES. As such the securities and exchange commission or equivalent body, may require timely compliance with normative acts that include reporting of financial statements, annual reports and appropriate penalties if these procedures are not in compliance with regulation.

Annotation to Chapter VI. The Responsibilities of SOE Boards. (I would like to repeat my earlier comments for this section. These comments are key to the fiduciary responsibilities of boards. My concern is rooted in the recent press of the **Wall Street Journal** (Friday, January 28, 2005; Section B, Marketplace, p. B1 titled***: More CEOs Say 'No Thanks' To Board Seats***. This article reveals the new "reluctance" by credible individuals that we need on boards, to participate in board of director

responsibilities due to fear of redress. Unfortunately this will create a dilemma in that the very individuals who are leaders in their field and have the superior financial leadership capabilities may no longer be interested in serving on boards. Part of the problem is rooted in the extremely high salaries of corporate executives, in the range of $3.6 million. Thus board selection and executive compensation of CEOs needs to be addressed.)

GRAY SOUTHON PHD, UNIVERSITY OF AUCKLAND

with support from Robert Howell, Neil Lynch and others

Introduction

Guidelines for the governance of state-owned enterprises are extremely important as many government services have been restructured in the form of State Owned Enterprises, and the governance structures and principles adopted have a major influence on the management and performance of these organisations. The OECD has a major influence in government thinking in both the develop and the developing world, so these guidelines have a potentially major impact on the future of society in many respects.

We consider that these guidelines would gain considerable validity through a greater consideration of a number of issues.

1. While the guidelines are "primarily orientated to state-owned enterprises using a distinct legal form and having a commercial activity", they are also considered to "be useful for non-commercial SOEs fulfilling essentially public policy purposes." While a strong market orientation is important in situations where market mechanisms dominate, greater attention needs to be given to mechanisms to ensure that the SOEs achieve social objectives where markets are weak.

2. While the guidelines are essentially an extension of the corporate governance guidelines, they do recognise some special characteristics of SOE, particularly in the statement:

More fundamentally, corporate governance difficulties derive from the fact that there is a complex chain of agents, without clearly and easily identifiable, or remote, principals. SOEs have multiple principals, involving Ministries, the Parliament, the population or interest groups, and the SOE itself. To structure this complex chain of accountability in order to encourage SOE management to make efficient decision and to ensure their accountability is a challenge. (p3).

These guidelines would have much greater value if the management of this challenge was more directly addressed.

3. The nature of SOEs vary considerably, some having very clear, stable objectives which can be independently assessed (such as with electric power), while others have complex, diffuse, socially dependent and shifting objectives (such as with health). Some SOEs can benefit from a competitive environment, and some perform better in a cooperative environment. In particular, cases where a number of SOEs will be pursuing similar goals in different geographic regions, overall performance can often best be enhanced through cooperative relations between them.

The following changes address some of the prominent aspects of these issues

Recommendations

Chapter I: Ensuring an Effective Legal and Regulatory Framework for SOEs

Currently reads: *The legal and regulatory framework for state-owned enterprises should be developed in order to ensure a level-playing field for SOEs and the private sector in areas where they compete, and with the view to promoting good corporate governance practices, following in this regard the OECD Principles of Corporate Governance*.

Should now read: ***Where the context is essentially of market competition, the legal and regulatory framework for state-owned enterprises should be developed in order to ensure a level-playing field for SOEs and the private sector in areas where they compete, and with the view to promote good corporate governance practices, following in this regard the OECD Principles of Corporate Governance. Where complex social objectives dominate, then governance structures need to reflect the political realities of the interpretation and achievement of those objectives.***

Chapter I A

Currently reads: There should be a clear separation between the ownership function and the state's other roles that may influence the conditions for state-owned enterprises' activity, particularly in regulation and industrial policy.

Should now read: Where the SOE undertakes an essentially commercial function, then there should be a clear separation between the ownership function and the state's other roles that may influence the conditions for state-owned enterprises' activity, particularly in regulation and public policy. Where the SOE is substantially state funded to meet social objectives, then ownership needs to be effectively integrated with the political structures which interpret these objectives. [1]

Chapter I C

Currently reads: Any specific obligations that an SOE is required to undertake in terms of public service provisions or special responsibilities above the generally accepted norm should be clearly identified by laws and regulations, disclosed to the general public, and provision made to cover related costs in a transparent manner.

Should now read: The specific obligations that an SOE is required to undertake should be identified by publicly available laws and regulations with appropriate political and social processes of consultation and discussion to interpret these obligations. Where the SOE is operating in direct competition with the private sector then there must be provision made to cover related costs in a transparent manner.[2]

II. The State Acting as an Owner

Currently reads: ***The state should act as an informed, accountable and active owner and establish a clear and consistent ownership policy, ensuring that the governance of SOEs is carried out in a transparent and accountable manner, with the necessary degree of professionalism and effectiveness.***

Should now read: ***Where the commercial nature of the SOE dominates, the state should act as an informed, accountable and active owner and establish a clear and consistent ownership policy, ensuring that the governance of SOEs is carried out in a transparent and accountable manner, with the necessary degree of professionalism and effectiveness. Where the commercial characteristics are subsidiary, ownership issues need to be integrated into the policy framework.***[3]

V. Transparency and Disclosure

141. D. SOEs should be subject to the same high quality accounting and auditing standards as listed companies. Large or listed SOEs should disclose financial and non financial information according to international best practices, as well as SOEs performing an important public policy role or objective(s).

Should now read: 141. D. SOEs should be subject to the same high quality accounting, auditing *and record keeping* standards as listed companies. Large or listed SOEs should disclose financial and non financial information according to international best practices, as well as SOEs performing an important public policy role or objective(s).

IV. Relations with Stakeholders

IV A Currently reads: Governments, the co-ordinating or ownership entity and SOEs themselves should recognise and respect stakeholders' rights established by law or through mutual agreements, and refer to the OECD Principles on Corporate Governance in this regard.

Should now read: Governments, the co-ordinating or ownership entity and SOEs themselves should recognise and respect stakeholders' rights established by law or through mutual agreements, and refer to the OECD Principles on Corporate Governance in this regard. Further, they need to engage with stakeholders (particularly staff and community groups) to refine the interpretation of their objectives, and to enhance their ability to meet them.[4]

IV C Currently reads: The board of SOEs should be required to develop, communicate and put in place compliance programmes related to internal codes of ethics. These codes of ethics should be based on country norms, in conformity with international commitments and apply to SOEs and their subsidiaries.

Should now read: The board of SOEs should be required to develop, communicate and put in place compliance programmes related to internal codes of ethics. These codes of ethics should be based on country norms, in conformity with international commitments (ILO & UN) and apply to SOEs and their subsidiaries. These codes need to recognise relevant professional codes, community values, environmental and social impact issues, as well as work force.[5]

IV D Currently reads: SOEs should face competitive conditions regarding access to finance. They should establish arm's length relationships with state-owned banks, other state-owned financial institutions as well as any other SOEs. Their legal form should allow creditors to press their claims and to initiate insolvency procedures.

Should now read: Where the SOE operates in a commercially competitive environment it should face competitive conditions regarding access to finance. They should establish arm's length relationships with state-owned banks, other state-owned financial institutions as well as any other SOEs. Their legal form should allow creditors to press their claims and to initiate insolvency procedures. Where it is state funded to provide social objectives, it should take advantage of the most beneficial finance sources, whether commercial or state guaranteed. [6]

VI. The Responsibilities of SOE Boards

VI A. **Currently reads:** SOE boards should be assigned a clear mandate and ultimate responsibility for SOE performance. They should be fully accountable to the owners, act in the best interest of the company and treat all shareholders equitably.

Should now read: Where use of existing knowledge and experience enables the objectives of the SOE to be clearly specified, the boards should be assigned a clear mandate and ultimate responsibility for SOE performance. They should be fully accountable to the owners, act in the best interest of the company and treat all shareholders equitably. Where the objectives are complex social objectives, then a transparent process of consultation needs to be undertaken to ensure that the interpretation of the objectives is optimal. Unless specifically requested by the provider, submissions will be placed in the public domain. Unless there are implications for national security, or explicitly stated reasons for maintaining privacy, then consequent decisions will also be placed in the public domain. Where a number of SOEs serve similar objectives, then such collaboration within and between these SOEs will occur in addition to broader stakeholder consultation undertaken on a collective basis to achieve national consistency. [2]

Notes:

---

[1] In health services the role of market competition to address social goals of equitable access to health services and to achieve public health objectives is highly problematic. In New Zealand, for instance, when public hospitals were structured as competitive "Crown Health Enterprises" (CHEs), the essential cooperation between services was seriously compromised, and major political risks were presented by the threat of hospitals failing. While private commercial enterprises do operate alongside the public hospitals, they fill a particularly niche role which competes with the public services in only a minor way.

[2] Complex social objectives often defy clear specification, and instead must be continually re-negotiated and re-interpreted according to context. In such situations a requirement for clarity leads to a dysfunctional discrepancy between expectations and reality.

[3] Where SOEs need to respond to both a strong political policy framework as well as an independent ownership function they are faced with a confusing and often conflicting set of demands which can only degrade clarity of direction.

[4] Where professionals provide services to meet social objectives the optimal action is often a subtle merging of the skills of the professional and the particular condition of the client, within the broader context of social goals. Such services are usually provided over such a wide range of conditions that policy guidelines and regulations can effectively deal with broad generalities. The achievement of objectives must engage with the skills and experience of both professionals and clients in developing the understanding of the processes required, and optimising the delivery process.

[5] The reliance on the engagement with professionals and clients in achieving social goals demands a sophisticated approach to ethics.

[6] When a state is funding social services through SOEs it should not be faced with the additional cost of commercial financing unless it is beneficial.

IRA M MILLSTEIN

1. Director Liability and Training

- The Guidelines could emphasize that training should be required to inform SOE board members about their responsibilities and potential liability. In particular, this training should address the perception mentioned in the Guidelines that SOE board members have less responsibility and liability than under regular corporate law (paragraph 163).

- It should be made clear that board members have a fiduciary duty to act in the best interests of the company as a whole and cannot act as an individual representative of the constituency that appointed them (paragraphs 172 and 175).

2. Audit Committees

- The Guidelines could encourage audit committee members to have financial experience, including at least one member who would fall within the definition of "audit committee financial expert" in section 407 of Sarbanes-Oxley.[1]

- The Guidelines could also suggest how the outside auditor should be selected (for example, by the audit committee if the SOE has one).

3. Transparency and Disclosure

- The Guidelines could encourage greater attention to the quality of financial reporting and disclosures by suggesting that financial reports be signed by SOE board members.

- Moreover, the Guidelines could suggest that CEOs and CFOs be required to certify that the financial statements and disclosures are appropriate and fairly present, in all material respects, the operations and financial condition of the SOE.

- The financial reports could also be required to include an "internal control report" relating to the effectiveness of the internal control structure and procedures of the authority for financial

[1] Section 407 (Item 401(h) of Regulation S-K) states that an "audit committee financial expert" is a person who has an understanding of financial statements and generally accepted accounting principles ("*GAAP*"); experience in preparing, auditing, analyzing or evaluating financial statements of companies comparable to the company or experience in actively supervising one or more persons engaged in such activities; experience in applying GAAP to accounting for estimates, accruals and reserves; and an understanding of internal accounting controls, procedures for financial reporting and the functioning of audit committees; as a result of: (a) education and experience as a public accountant, auditor, principal financial officer, controller or principal accounting officer of a company, or a position involving similar functions, (b) experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions, (c) experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements, or (d) other relevant experience.

reporting. This report could be signed by the CEO and CFO, reviewed by the audit committee and attested to by the outside auditor.

JAYESH KUMAR, ASSISTANT PROFESSOR OF FINANCE, XAVIER INSTITUTE OF MANAGEMENT

Introduction

I have teaching and research interest in corporate governance my research studies focus on the practices of corporate governance and its impact on the performance of the firms, and stakeholder's interests. In addition in my work on *Role of Corporate Governance on Firm Performance, Dividends Payout, and Firm Financing in India* I have developed understanding for comprehensively relating corporate governance to corporate entities, including State-Owned Enterprises (SOEs). In reviewing the draft guidelines on corporate governance of SOEs, I have drawn upon my understanding of these areas.

This note presents my main comments in the section below. The section provides summary background and comments therein.

Main Points:

Ensuring an Effective Legal and Regulatory Framework for SOEs, Chapter 1: D.

SOEs may be allowed to get exemption from the application of general law under certain conditions, so as to meet their obligations to the public. This may be used as a tool to recover the cost to undertake in terms of public service provisions or special responsibilities. For details ee the discussion on Relations with Stakeholders.

The State Acting as an Owner, Chapter 2: A.

There should be flexibility in defining the ownership policy that defines the overall objectives of the state ownership, in terms of changing business environment. A state may be asked to define the objectives broadly and detailed discussion with respect to some specific SOEs/sectors. Though separation of ownership and regulation is desirable in some industries this should not be generalized to overall economy.

Relations with Stakeholders, Chapter 4: D.

In case SOEs are to face the competitive conditions regarding access to finance and establish arm's length relationship with state-owned banks (read financial institutions). The basic purpose (read reason) for having public ownership may not be fulfilled. If an SOE is required to make investment in a project that may not have profit orientation though socially desirable, then the access to finance in the competitive market may not be available. One needs to understand that most of the public investments are expected to supplement the private investments rather than crowd out. There may be certain occasions in which if SOEs are not provide with access to finance then the society at large may have to incur the cost.

If the state owned banks are to grant credit to SOEs on the same terms and conditions as for the private companies, then the SOEs that are operating in the priority sector, were the private companies are not present then, these SOEs will be forced to opt out of their business from these sectors.

For example, let's say SOEs are required to generate employment by having the projects implemented in rural sector, which may be less profitable than having a project in the urban sector. In such scenario, if the access to cheaper finance is denied, an SOE may run into loss or may not invest in such projects.

It is possible that some SOEs operating in competitive market are expected to serve in those areas that are not profitable, like Indian Airlines (IA), an SOE operating in competitive aviation industry. IA is expected to have regular flights on certain sectors (North-East), which are not profitable but socially desirable. If IA has to raise credit on the same terms and conditions, then IA may not get sufficient credit to operate on these sectors, just because it is more profitable for other competing airlines not to operate or have low operations in those sectors.

In consideration to these and other issues – particularly the potential to deny SOEs to benefit from easier credit, which could seriously undermine the reason for existence of SOEs – I suggest the OECD reconsider its planned guidance for relationship with stakeholders in Chapter 4. In addition, the relevance for such relationship is questionable when the business groups firms are allowed maintain their relationship with some banks and financial institutions to have access to credit and less stringent conditions than the stand-alone firms.

The Responsibilities of SOE Boards, Chapter 6: B.

One suggestion regarding the board structure, recruitment of non-executive directors from the private sectors: Why do we need to restrict the recruitment of non-executive directors only from the private sectors? Is it necessary that the private sector is more business oriented than otherwise? I strongly feel that the recruitment of non-executive directors should be base purely on their expertise and ability to perform, be it from private sector or else. I agree they should be free from conflict of interest. In order to maintain and perform their independence and ability (read expertise) it is necessary that there should be some minimum level of education and knowledge of their responsibilities. It may be suggested that there should be some broad guidelines for selection committees for selection of board members.

JOHN R RIEGER, CPA, ASSOCIATION FOR FINANCIAL PROFESSIONALS

This letter is in response to a request for comments on the *Draft Guidelines on Corporate Governance of State-Owned Enterprises.* I would first like to commend the OECD, the OECD Steering Group on Corporate Governance and the Corporate Affairs Division for taking up such an important project. While the OECD Principles of Corporate Governance have provided guidance for private companies, state owned enterprises (SOE's) which represent a significant portion of many country economies lack this critical guidance. Some countries on their own initiative have instituted some level of SOE accountability but many, particularly non-OECD member countries have not. The result of which is the potential for abuse and the misappropriation of a countries' wealth including the failure to recognize their full economic potential. Improper management of a countries' wealth results in economic and social suffering for the population (but for the few who benefit from the opaque disclosure). Once these Draft Guidelines are completed, this will represent only the beginning. The difficult part will be in creating awareness to both member and non-member countries, assessing country compliance, and most importantly, providing guidance on how to encourage countries to implement the guidelines.

The following identifies specific suggestions for consideration in the language of the text:

1. Within the Preamble a statement reflecting acknowledgement of a countries' need to balance the Public Interest with privatization and free markets. The Guidelines are not meant to suggest or direct any country as to what level of country owned assets should be private and which should be in the public domain. Country Officials through their elected representatives choose the level of government social responsibility. As an example, in one country this may mean that the government maintains control of electric utilities while in another country electric utilities would be privatized. In some countries, part of a utility company may be privatized.

2. Within the Preamble, some comment might be appropriate to recognize the fiduciary duty that government officials have in being responsible and accountable to the citizens of the country for the care and proper management of country owned assets. This "sets the tone" of how officials should consider their role with SOEs.

3. Within the Preamble, it may be necessary to make a statement that due to the hybrid ownership issues of SOEs, Corporate Governance guidelines may not be equal to Corporate Governance Principles for private companies.

4. Chapter 1: I am not comfortable with the term "level-playing field" simply due to the public interest concern. The objective is accountability and transparency of SOEs. It may not always be to keep a "level-playing field". An SOE may exist for example to provide health insurance subsidized by the state or with a need of state control to set prices below private rates for the social benefit of the country. An entity may be set up to encourage home ownership in transition countries and may offer rates that are better than a comparable private company for the social good.

5. Chapter 1 A: Suggested wording- There should be a clear separation between the ownership function and the state's other roles which could impose improper influence, particularly in regulation and industrial policy.

6. Chapter 1 B: Simplifying and streamlining the legal form under which SOEs operate may not always be possible.

7. Chapter III A: I suggest you change the term “equally” to “equitably”. These terms have different meaning. Equal suggest identical treatment and for SOE’s, this may not be possible. “Equitable” means to treat everyone fairly but may or may not be equal. (Golden shares have commonly been used by states to retain preferential control of entities- for the public interest at certain times this may be necessary).

8. Chapter IV D: SOEs should not necessarily be subject to the same competitive conditions regarding access to finance. In some cases special financing may be necessary in the public interest to support a state owned entity. This may mean at times specially arranged financing to support an entity. However, if special financing is necessary to support an SOE in the public interest, it should be disclosed.

9. Chapter V A: This statement is unclear whether SOEs in an aggregate report shows only a combined statement or if this aggregate report discloses material state entities performance separately within the aggregate report.

10. Chapter V D: Should consider changing “SOEs should disclose material information on all matters” to “Significant SOEs should disclose material information on all matters”. It may be an economically inefficient burden to impose such disclosure on insignificant SOEs.

11. Chapter V E: Consider adding a number 5 to include: Reporting any related entities and the material transactions between them.

12. Chapter VI: Consider adding a provision that SOE boards should be selected using a process which is fair, independent and transparent to assure that the selection process is not tainted and is in the best interest of the public.

13. Chapter VI: Consider a provision which requires board members to explicitly state that the SOE complies with all jurisdictional rules and regulations.

Thank you for this opportunity to comment on this important document.

KALLIRROI NICOLIS, VICEPRESIDENT, SOCIAL AID OF HELLAS

Dear friends

We studied your DRAFT TEXT sent to our Civil Society Organization-SOCIAL AID OF HELLAS-very carefully and thoroughly.We thank you for the opportunity you gave to all of us -active citizens as we are-to acquire up-to-date knowledge on such crucial issues of our rapidly evolving global society. Allow us to present our points of views on the current issue of our contemporary SOEs(State-Owned Enterprises).

According to our opinion the contemporary State in order to be flexible for meeting the various and complicated needs of the 21st century Citizens, Has to avoid to be or to remain for good Enterprises-Owner,also it is impossible to try to be a Public-Works Constructor, or a Dictator-Manager, and not at all an absolute Manufacturer.Our evolving State is important to have the ability to exercise full and constructive Control, to organize an efficient Administration independent from the Government ,which has to govern with full transparency and effectiveness And the State has to be a successful Coordinator of any and all the Initiatives and the Enterprises of the gifted and talented Enterpreneurs. The contemporary citizens have to be encouraged to become creative Enterpreneurs. So all the SOE will be transformed into healthy and progressive Citizens-Initiatives, bringing prosperity in all our global society.

Thank you for your consideration

MARIANO A. FABRIZIO AND JUAN F. MENDIZABAL FRERS

Dear Sirs,

We´ve run through the attached *Guidelines on Corporate Governance of State-Owned Enterprises* and we found them in extremely good shape to address, at least from a very strict legal standpoint, the different concerns usually surrounding SOE´s in Argentina. We´ve been working for a long while with SOE´s related matters in our country and the different concerns around which the different players usually settle-down their respective interests are in some way reflected in this paper.

However, and although we will not address comments to any specific section of the attached document, when reviewing the same we played with the idea of confronting *fair playing fields* vs. *level-playing fields* aimed at establishing an efficient system for SOE´s governance, and we thought that this might be useful to your experts when preparing the final draft of guidelines.

In establishing an efficient system for SOE´s corporate governance, we deem important to bear in mind the following statements, which can be reflected along the different guidelines:

1. In most countries (particularly non-developed countries), SOE´s are forced to **(i)** employ big numbers of national employees, whether needed or not; and to **(ii)** attend big numbers of national employees necessities, whether needed or not. When aimed at establishing a clear competitive market, any player must work hard in minimizing these clearly marked inefficiency factors.

2. Assuming the above statements as real (it is hard to think otherwise), we easily conclude that SOE´s are *ex-ante* (e.g. before acting in any clear competitive market) unavoidably inefficient.

3. In most countries (particularly non-developed countries), SOE´s must maintain a "preferred status"; on the one hand, because of the importance that these have in the social and economic local arena; but on the other hand, because such "preferred status" is the only way to achieve a public social and economical consensus (in liberal economy countries) for the transformation of "stated economies" to market clear competitive economies.

4. Looking forward for an efficient competitive market, we need a market (as established in OECD guidelines) with clear rules; non-clear or distorsive rules result in such market´s inefficiency. Hence, the clear competitive market we aim by settling down "efficient" rules (as very well pointed out in the OECD guidelines) is, *ex-ante*, a non-efficient market for SOE´s, for the simple reasons described above. So SOE´s are inefficient even before entering a clear competitive market.

5. All the negative incentives we aim to avoid by settling down clear rules in a competitive market are jeopardized *ex-ante* by the natural inefficiencies of SOE´s.

6. But, even when we intend to develop positively a sub-developed country economy market, it is socially and politically impossible to force SOE´s to get rid of the inefficiencies described in Points 1. thru 5. above, the reason for this being (for example in Argentina) the high percentage

of national workers working and living out of SOE´s; and this fact cannot be adjusted or changed just by the knowledge of the "possitivness" of a clear competitive market.

7. We need to create "incentive" competitive markets before "economic" competitive markets. In this sense, we must create markets in which incentives make possible an equal competition between SOE´s and private companies, the latter being sufficiently competitive in order to attract foreign capital and investors.

8. In the end, we identify this as "fair playing field", which has a slight difference with the OECD guidelines concept of "level-playing field".

9. To introduce SOE´s as an efficient company into clear competitive markets we need to isolate such SOE´s, for so long as if we, otherwise, consider all market-companies (e.g., SOE´s and private companies) as a whole, the clear competitive market will reject the inefficient SOE´s because they are not competitive at all, and as a result distorsive inefficiencies, such as political favoritism, market policies disregard or others, shall arise.

10. SOE´s need to compete within competitive markets in which not only market rules are clear but incentives to all players as well. In other words, SOE´s must maintain their "preferred status" but need to become efficient competitors to private companies.

11. Competitiveness is the consequence of incentives such as tax benefits, but when SOE´s come to center-stage incentives must be carefully managed to avoid, due to their extreme sensitiveness, generating big differences between private companies shareholders and SOE´s private shareholders.

12. In the end, SOE´s need to move to a "fair playing" field... "level-playing" field is not enough. All inefficiencies and in particular government interferences shall not be allowed.

The above describes in general terms the major guidelines along which SOE´s might be developed in Argentina, not intending to address any specific comment to the attached guidelines, but aimed at introducing certain "macro" ideas which might be found useful by your experts when drafting the final document.

We of course place ourselves at your entire disposal to keep on working on this and other matters.

MBAH ROSE, GENERAL COORDINATOR OF RURAL WOMEN ENVIRONMENTAL PROTECTION ASSOCIATION

Thank you very sincerely for forwarding to me the draft which I and my collaborators have found very interesting, and full of relevant information. It is also very specific to African countries where corruption and mismanagement of public resources is very rampant.

-Most state owned corporations in the world have a primordial role to play in the identity and publicity of the image of the country. Consequently most governments always try to invest so much resources into such corporations and are reluctant to privatise them but the appointed managers mostly close relatives of the government executive members in place always end up mismanaging the finances and thereby putting the corporation into financial difficulties with the ultimate result to privatise a corporation that has been brought to its knees.

-The document should lay emphasis on the fact that the should be a group of independent auditors to closely follow_ up the activities of those appointed to head these corporations, and another team of evaluator to evaluate their work after short intervals of times.

-Secondly Governments have a social commitments towards its citizen for the provision at least basic needs such as water, electricity, telephones, roads etc and this is done via subsidies. With privatisation it consequently implies that the poor people shall continuously become poorer because a privatised corporation is out for business and business means profit and gains.

MOHAMED KHAIRY MAHMOUD ZAGHLOUL, KOM HAMADA SPINNING CO

1. In developing countries, transparency and disclosure specially in nomination of board members not on objective basis, as a result OECD working group should indicate in detail the system which insure this transparency.

2. Independency is a wide word, and it is required from OECD working group to indicate the principals of minimum level of independency of board from the government as the owner.

3. Corporate governance in the SOES will not succeed unless the whole country moves towards corporate governance as a culture and this needs much care to simplify and purify the regulations and laws, taxes, customs, material risk,....etc) on the country level.

4. In most cases it is difficult to make separation between chairman & COE in the board structure to avoid problems.

5. In most cases of SOES they not fully convinced 100% by transparency specially if the company need to keep informations about research &development of any product as a secret. OCED group is required to find real solution practically to recover these limitation.

PAUL SWEENEY, ECONOMIC ADVISOR, IRISH CONGRESS OF TRADE UNIONS

Dear Colleagues

We read with interest your draft guidelines which are most helpful. However, the issue of access to equity capital is not addressed and it is the most pressing issue for SOEs (excluding utilities) in Ireland.

I attach a short paper for your consideration on the issue of equity financing. I do think that a centralised holding company could help address the issue.

I have written a couple of books on Irish SOEs – "The Politics of Privatisation and Public Enterprise" in 1990 and now out of print and "Selling Out, Privatisation in Ireland" published last month by New Island in Dublin. I include a draft of the relevant section from that book in the above submission.

I do hope that you will address the issue of access to finance and provide guidelines to government on how to adopt them in the final draft. Here governments adopt the *Perverse Investment* policy – invest, or try to invest, when the company is in trouble but no new equity investment when it is expanding. Governments, in spite of ideology, do have problems in addressing the equity needs of SOEs and guidelines would be most helpful to them, I believe, especially from OECD.

RULES FOR ACCESS TO NEW <u>EQUITY FINANCING</u> – AN ISSUE NOT DEALT WITH IN THE DRAFT PAPER BY OECD ON GOVERNANCE OF STATE OWNED ENTERPRISES (SOES).

The draft paper addresses both the relationship of the state as major shareholder of the companies and the governance of the companies. The publication of the paper is timely and addresses many issues which governments and stakeholders in these company need guidance in addressing. However, there is one area of great importance to the effective performance of SOEs which is not addressed in the draft. This major omission is the issue of access to new equity by SOEs.

Most governments favour retaining a number of SOE s in public ownership because they are:

- Natural Monopolies
- Critical infrastructure
- Operate in Strategic areas.

Governments, as shareholders, have a great reluctance to invest in their own companies. While those who ideologically favour privatisation, generally oppose equity injections by the state into some state companies, but the vast majority support some form of state ownership, especially of monopolies. Yet even where investment of equity passes the "market investor principle" (i.e. it is not a state subsidy), even some of those who support continuing state ownership in a wider context still often have difficulties in agreeing to state equity investment in the companies for expansion etc.

Governments, (or more specifically, politicians) as shareholders often confuse current and capital spending when it comes to SOEs, seeing investment as a choice between "more hospital beds" or the investment in the SOE. There is a serious misconception in the eyes of many between state equity investment in these companies and day-to-day public spending. Some see investment in the company as an opportunity lost to day to day spending on social or health areas.

This is false argument. It neglects the difference between capital and current expenditure. Furthermore, with the ending of state aid to companies, public or private, in the European Union, state equity investment in these companies should generate a financial return in dividends and/or capital growth, unlike investment in roads which generates a return which is not captured financially. The return on investment in other countries where state subsides continue to exist, would be less and would require differing rules of governance. If subsidies are minimized or if they are transformed into payments for social/regional services under strict and transparent rules, (as suggested in the Guidelines) then there is a greater probability of a return.

In the case of Ireland, even though the Exchequer has received €8,175m in capital receipts from the privatisation of 7 state companies, its total investment in all SOEs has been only around €1.5bn.This includes those privatised plus a further 18 or so which are still in state ownership. Those remaining in state ownership are worth at least €7bn. In spite of this substantial increase in value (and some dividend payments), there is an attitude within government and amongst many politicians which is hostile to further equity investment. It is not necessarily ideological but based on an unclear understanding of the value of such time equity investments. The absence of a clear set of guidelines on state equity investment in SOEs would greatly assist in generating greater clarity in this area. This set of guidelines within this document SOE document timely and helpful to those charged with decision-making in this important area.

It is recognised that utility SOEs usually finance by borrowing and the issue of equity is generally not pressing for these types of SOEs. However, other SOEs which do seek to expand must have access to shareholder capital, they are to expand and to develop. The issue of rapid decision making in this area is important too.

The paper should address this issue and set out parameters of good governance for the state as shareholder should follow. If politicians find it difficult to assess whether a venture requires equity or to agree to state equity investment, then some form of institutional arrangement might also be suggested in the Guidelines which might be put in place to enable state equity investment in SOEs where it meets the suggested criteria.

I attach an extract on this issue from an draft of *Selling Out, Privatisation in Ireland*, by the author, published in December 2004 (Tasc and New Island, Dublin).

"Reforms Required to Improve Performance of State Companies.

A number of reforms are required to improve the operations, efficiency, autonomy and profitability of the state bodies which remain in public ownership and to ensure that where necessary, they make their contribution to society. These are :

1. A supportive shareholder – a new holding structure.

2. An end to the state's Investment Strike.

3. Dividend Policy, Financial Returns and Employee Financial Participation.

4. State Support for Pro-Entrepreneurial Initiatives.

5. A Role for Passive Minority Private Shareholdings

6. Reform of Regulation"

On the second issue, the point was made as follows:

"An End to the Shareholder's Investment Strike.

The investment strike in these companies by the state must end. There has been little or now investment in the sector for years and expansion has been frowned upon, as well as halted. To argue for such a policy may seem naïve in the current hostile environment, but if decisions are made on retaining some companies in public ownership and it is likely that even hostile ideologues like the PDs will retain some of the companies and part of others (according to their own, albeit inconsistent, Manifesto), then this area has to be addressed in a coherent way. It is however, recognised that the investment strike is a deliberate policy of the current government to force privatisation. This is no way to govern these companies.

Investment must re-commence in performing state companies. The "perverse investment policy" (Sweeney, 1990, p 62/3) has applied to the commercial state enterprises for two decades. This is where the state invests only when the company will fail (eg Aer Lingus in 1994), but when the company is prospering and wishes to expand, no investment is forthcoming, no matter how well researched. A reversal of this hostile policy is vital if these companies are to expand.

The statutory rules for the Holding company governance (if it is the governing body) should specify that if a sound case for additional investment is made by the board of a state company, then it should receive the capital. The Minister for the sector and of Finance should have a say in such major decisions, above a certain threshold (for each company). Similarly, if the board of company makes a good case for the establishment of a joint venture, then investment should be forthcoming from the state. The broad policy of the government in regard to these companies should be set out in policy guidelines to guide the companies, the Holding company sub board and for transparency.

Conversely, in the unfortunate circumstances that the board of a state company substantially mismanages it and it becomes bankrupt, or external circumstances prevail which lead to this, then the Holding Company sub-board should be empowered to close down the company, or sell off its parts as going concerns, if this is viable.

The investment strike in these companies by the state must end. It has been shown in this book that the total monetary receipts from the state companies, in capital from the sale of the six of the ten of them sold off which generated real cash (ie excluding debts and liabilities) and cash dividends, have greatly exceeded the total investment in the whole twenty four of them by the taxpayer since the 1927, when the first two were set up by Cummain na Gael, the pre-cursor of Fine Gael. The planning of the Shannon electrification scheme, extremely visionary and ambitious for its time and even by today's terms, was decried as "the poisonous virus of nationalisation", by banker, Senator Sir John Keane, a major opponent of the scheme in 1925 (Sweeney, 1990, p 17). Such views are, of course, more prevalent today and have been dominant for some time."

PETRA ALEXANDRU, EXECUTIVE DIRECTOR, BUCHAREST STOCK EXCHANGE

First of all, I consider that recommending guidelines on CG for the state-owned companies is of utmost importance, especially in countries like Romania, where the privatization process is on-going and the state still has important stakes in the most important companies.

From the Romanian market prospective, the state as a shareholder is a very troublesome one, being the less transparent and the less market oriented (at least this is our experience till now !). Most of the decisions, if not all, taken by the state as a shareholder even in listed company are not disclosed to the market, according to market regulations, not to say that many of these decisions are used for political capital. Under these circumstances, I think that in the chapters "The State acting as an Owner" and "Transparency and disclosure" these aspects should be strengthened and impose the State being more accountable for all its decisions.

RICHARD FREDERICK

Dear Ms. Mesnard,

Your Working Group should be congratulated for their excellent work on the draft SOE Guidelines. They are well considered, well constructed, and clearly written. Consequently, I feel less need to comment on the details than on one large overarching concern.

Some years ago, it was common to hear the question posed at governance meetings: "Who governs the governors?" The question usually came in the context of discussions on the role of collective investment funds in governing companies whose shares they held in trust for their beneficial owners.

At some of these same meetings you would hear Jules Muis, former Director General of the Internal Audit Service of the European Commission, and former Vice-President and Controller of the World Bank remind participants that successful governance was like an airplane. It needs two wings (corporate and public sector governance) without which it cannot fly.

It would be unfair to say that the draft Guidelines only have one wing. They correctly recognize and discuss the need for accountability from the governor.[1] The problem is, rather, the weight that is placed upon the accountability of the state, in particular the co-ordinating ownership entity (COE), to the public. If there is a weak link in the accountability chain, it is certainly here, and it is precisely here where we are likely to see great potential for abuse.

More specifically, it would be useful if the guidelines were to provide some detail on how COE accountability and transparency could be strengthened. At present, the accountability of the governor to the ultimate owner is both indirect, and imprecise.

For example, while the SOE is subject to "high quality accounting and financial disclosure standards" (Principle V.D), the COE only needs to "…develop consistent and aggregate reporting on SOEs…." Should it not report on its own performance in managing these SOEs? Should not the public be assured that the objectives of state ownership are being achieved? Further quantifiable and reliable information is required to assure the public that the SOE is, indeed, being managed in the sole interests of its owner (the public). More direct communication and greater public transparency are necessary to ensure better governance.

In summary, while the mandate of the group is to draft principles and best practices for the corporate governance of state-owned assets, this is not fully possible without a more full consideration of aspects of how the public sector is governed. While it is difficult issue, I would like to request that the Working Group reconsider the wording of the guidelines to strengthen the accountability of COEs in particular. It may also be worth bearing in mind that the abuse of political power and privilege, and public sector opacity can be more of a problem than SOE governance in non-member countries.

[1] Principle II states that the "…state should act as an informed, [accountable] and active owner…."Paragraphs 48 and 50 of the annotations recognize the need for accountability to government itself, but not direct accountability to the public.

TEODORO WIGODSKI,
PROFESSOR OF CORPORATE GOVERNANCE, UNIVERSIDAD DE CHILE

Dear OECD Working Group team:

Excellent work, very systematic, integrative and suggestive to recommend critical concepts on good corporate governance practices for SOEs.

My suggestion in Chapter II: *The State acting as an owner* is to add a new point after number 86, related to monetary compensation to SOEs board members as:

a. Fix remuneration, for assistance to board meetings

b. Annual variable remuneration, proportional up to:

- Level of achievement of SOE qualitative and quantitative forecast metrics early agreed with the ownership entity, and

- Total fix remuneration received by each board member.

External auditors' validation to those data and calculations is recommended.

WILLIAM LIVINGSTON

Gentlemen:

The following responds to the request for comment on your "Draft OECD Guidelines on the Corporate Governance of State-Owned Enterprises." As a registered professional engineer and member of the Institute of Internal Auditors, I am a scarred veteran in the design of internal control systems for contemporaneous compliance. Comments were previously supplied in response to your corresponding 2004 project concerning the "OECD Principles of Corporate Governance." As your draft articulates, governance distinctions among institutional types appear only at the second remove. From an architectural and functional standpoint, all institutions are the same – equally at the mercy of their culture.

Comments are restricted to the control strategy of the guidelines and assumed that the compelling purpose of the guidelines is stakeholder protection paramount, as stated. Since the approach taken by the OECD toward this end is conventional regulatory agency practice and thoroughly proven to fail, commentary on pieces and parts of the guidelines, many excellently constructed, would be senseless.

As you have defined, "A crucial condition for protecting minority and other shareholders is to guarantee a high degree of transparency." The transparent attribute for corporate governance and institutional management, through internal control, is peppered throughout your guidelines. "As in large public companies, it is necessary for large SOEs to put in place an internal audit system that will bring a systematic and disciplined approach to improve risk management, financial control and governance processes." The improvement sought is, exactly, transparency. It acts as a solvent of the clots of intellectual confusion, prejudice and misrepresentation.

To an engineering professional seasoned in control science and mechanics, a transparent internal control system for contemporaneous compliance has a completely objective technical specification. Genuine transparency begins only when all illusions end. Such a system incessantly audits itself, which is how the contemporaneous requisite is attained. There is nothing subjective or ambiguous about any system of control (governance). There is no degree to the transparency attribute in a compliance control system. "Translucent" controls don't regulate part way: they don't work at all. There is only one standard of transparency, not low or high, and it is yes or no. Non-transparency amounts to a borrowing of trouble.

To the professional practitioner engaged in data-driven contemporaneous compliance, transparency is not a tally of transpired transactional consequences. It is not a tour of the factory to see how things eventually get to the loading dock. Transparency is the complete institutional control system strategy for dealing with the future. Pragmatic transparency, readily attained, is an idiosyncratic amalgam of 1) institutional objectives 2) the institutional problem-solving strategy 3) the value system used to choose among the alternatives of control action 4) the associated risks of future disturbances. All else is obstruction.

For the practitioner of pragmatic transparency, there is a psychological price. What could be more threatening to false institutional distinctions than a transparent process that makes no cultural distinctions? What is more institutionally alien than an impersonal mode of cognition which has a logic and independent reality apart from the user?

The limits of rules of action

To attain the goal of stakeholder protection, as it is defined through contemporary litigation, two dissimilar sets of "critical success factors" are involved. The first familiar category, expressed in regulations, contracts and statutes, is hindsight-driven rules of action. Your guidelines are filled with them. Rule-based operations (internal control) form the core of institutional process where regulating rules appear as just another item in the rule spectrum for selecting what action is to take place for the next work cycle. Regulatory process and institutional process is one and the same thing – seamlessly interchangeable. Rule-based conduct is always based on the wreckage of history with a large time lag between events and salvaging efforts on event consequences. The residuum of damage response always cycles back in the form of more rules.

In codes of professional conduct, "protection" is defined as damage avoidance or proactive damage attenuation to the extent damage is considered incidental by the stakeholder. Stakeholders are very difficult clients. Comprising a gullible public living in a culture that welcomes engineering virtuosity while resisting social change, they certainly need an advocate.

Hindsight driven rules of action are restricted in utility for stakeholder damage control, of course, to events that replicate previous experience. To account for the novelty intrinsic to every future, the second category of law, tort, covers the requisite competency of "pragmatic foresight." This critical success factor mandates forward looking procedures that examine possible events in the future and evaluate control means to deflect the possibility of negative stakeholder consequences. Attaining the intended goal of protection, as enjoyed by the stakeholders, must comprise both hindsight and foresight practice. The OECD guidelines, bloated with brute force rules of action, indirectly reference the essential future dimension by frequent use of the outlook code word "transparency."

The challenge of the stakeholder protection objective

The basic assumption that an institution is capable of doing anything it desires to do is patently fallacious. As for any viable system, the institution can only do those tasks compatible with its identity as an economic system than runs on noneconomic motives. It is as misleading to assume the institution rules by the law of value as it is ruled by the value of law. There are absolute limits to the problem-solving capabilities of hierarchical formations operating by a chain of command. No law of man can change those limits. To require an institution to do what it cannot, will remain the pursuit of the impossible.

The OECD cannot lock means and ends together. No entity can. As all hierarchies are captive hindsight affairs, the institution cannot attain goals which can only derive from foresight. The illusion that more rule trees and aggressive enforcement will "make" the institution do what it cannot stands on the myth that more hindsight is a viable substitute for foresight.

The legal protection requirement, spanning both time perspectives, presents a monumental regulatory dilemma. Rule based operations and the competency of foreseeability are institutionally incompatible activities. To preserve institutional identity, no expense is spared in portraying and defending rules of action as the necessary and sufficient benchmark for all compliance.

There is an absolute limit, set by the laws of nature - the second law of thermodynamics in particular, to the effectiveness of rule-based methods and crisis response capability to safeguard the future of stakeholders from damage. This limit is defined fresh for specific cases through tort litigation. Tort demonstrates to the defendant that obedience to rules of action has zero relationship to foreseeability – a technological competency delegated exclusively to engineering. The tort process illustrates to a computer-

savvy public that the OECD notion of “transparency,” tort’s “foreseeability,” and the process of engineering are one and the same methodology.

The OECD cannot have transparency paramount and regulate exclusively through rules of action at the same time. The guidelines reveal the choice already made – one made by various regulators many times before. The regulated institution, functionally incapable of foreseeability, has no choice but to translate the guidelines into a checklist of rules of action to be taken by blind obedience and cover up the untranslatable remainder with make believe. However, reality has the capacity to resist false interpretations. Obedience to rules of action represents man’s loss of freedom over his means of freedom.

Benchmark

Fortunately for the OECD, the same path taken by the OECD in these guidelines has a precedent so reliable there is no need to feel curious about the impact your guidelines will have towards your purpose. This precedent was set by the SEC and has, since the OECD principles were issued in 2004, been thoroughly analyzed and quantified. What has developed during the interval between your principles of corporate governance and the SOE initiatives is that SOX 404 took effect. Since the OECD initiative is functionally equivalent to the SEC regulatory framework before 404 kicked in, contrast between the before and after of 404 provided an unprecedented opportunity to obtain an accurate fix on corporate compliance with the intent of regulations via a rules-based system.

As you know, SOX 404 is the first regulatory initiative putting teeth on the mandate for institutional transparency. SOX 404 addresses the transparency (of compliance) attribute obliquely but, for enforcement purposes, rather effectively. Step one requires management to assert the effectiveness of its internal control system design – and that’s right where I work. Step two involves an independent attestation that, sure enough, management’s internal control system achieves its control goals truly as management asserts. Nowhere is there an explicit requirement that the goal of internal control is to help management steer the institution towards its stated objectives. Such control goals of internal control are universally assumed – erroneously. Management always builds the internal control competency it wants.

Numerous and extensive surveys of the efforts of listed institutions to comply with SOX 404 showed the national status of internal control, pre 404, in considerable detail. Many of these surveys are available for inspection on the web. In the majority of institutions, we now know, the problem of determining the effectiveness of internal control was exacerbated by the fact no description of the internal control system in use even existed. Whatever management was using to formulate operating decisions, dependable business performance data from internal control, commensurate with corporate objectives, was not included.

If institutional performance data is not used to navigate, transparency is impossible. When results of institutional activity are omitted in directing the future of the institution, the entire matter of regulatory compliance via internal control implodes. Recent surveys confirm the implosion. Many institutions and the attesting community have preemptively warned stakeholders that compliance with 404 will not be achieved in 2005 and will be reported as such to the regulators as a material deficiency in internal control. An example issued by venerable Kodak in January 2005 shows the form.

“Company officials determined that an internal-control deficiency exists at the company that constitutes a ‘material weakness‘ as defined by the Public Company Accounting Oversight Board’s auditing standards. Consequently, management will be unable to confirm that the company's internal controls over financial reporting were effective as of Dec. 31, 2004.”

Material deficiencies in internal control are not a regulatory violation. It remains to be seen how the markets will react. As professional internal auditors and experts on control design, we cannot isolate

financial reporting, from business operations, from legal compliance. The SEC can't either, but that's not how Congress constructed SOX.

It is important to recognize that the foreseeability competence is not something the institution refuses to engage because management is manifestly unethical. Pragmatic foresight is a competency so alien to the institutional framework, the corporation has no place to begin. The licensed engineer engaged in objective foresight is so maladapted to institutional norms, he must choose between deliberate obscurity and finding another occupation. He cannot escape the fact that the three goal-seeking procedures - for design, for tort, for accountability - are one and the same.

The inescapable OECD dilemma

What the OECD will do in these regards, of course, is to issue the guidelines as a set of rules of action and orphan transparency as an option wrapped in ethics. It means that the pragmatic foresight requisite of law will be left unaddressed, as usual. This choice will be widely applauded by tort lawyers in the OECD realm as their full employment act. What is different about this choice today, as compared to the same choice a decade ago, is that the technology of pragmatic foresight is advancing at tsunami rates. It is how, exactly, you now have a cell phone.

The increase in the pragmatic foresight competency is so large and abrupt, stakeholders are increasingly aware that most of the damage they suffer, legally, should have been prevented. Obedience to the rules is no longer an excuse to a damaged stakeholder. As anticipating stakeholder damage is standard engineering design practice, it is only a matter of time before regulators will be punished, once again, for failing the responsibility entrusted to them by society. The shift in stakeholder perception is not that regulations failed to prevent the damage. The cognitive swing is that the damage suffered could have been foreseen by ordinary engineering care and that regulators are, accordingly, willfully derelict in their primary, paramount duty.

What regulators have reluctantly begun to realize is that the quantitative offense of the regulated, cost wise, has relocated to a realm over which the arsenal given to their agencies has minor influence (table below). There has been no revolt of the regulated to disobey the promulgated rules of action. On the contrary, the record shows the regulated have increased the level of obedience to the regulatory agency rulebooks. The amount fined for a given violation may have gone up, but the rate of violations relative to the proliferation of rules is markedly down. Every institution is diligent in compliance to the rules of action. Every institution has a formal process by which regulatory compliance by rules is subsumed as an operational norm.

The OECD is encouraged to note how the new Federal agency to regulate the accounting profession, established by SOX, addressed this significant risk exposure created by pragmatic foresight - as a top priority. In its first year of operations, in a brilliant move, the PCAOB clearly and dramatically transferred the responsibility for transparency compliance to internal audit of internal control. After designating internal audit as the principal gatekeeper, the explicit onus on internal audit was reinforced by mandating that transparency compliance be maintained on a contemporaneous basis. The PCAOB then validates uninterrupted compliance through an annual audit of the accountancy. In this way, the PCAOB can detect a violation of tort law before stakeholder damage occurs.

By punishing the offense against requisite transparency before stakeholder damage takes place, the PCAOB has shielded itself against culpability in any institutional scandal during its watch. Since transparency can be attained on a fully objective basis, the personal equation is eliminated as a contributing factor and the issues of ethics disappear from consideration. For example, before the PCAOB acted, fraud prevention was everyone's job and no profession's responsibility. The PCAOB correctly made internal

audit solely responsible for preventing fraud – an offense that cannot be prevented by hindsight and investigative techniques. It can only be prevented by the rigor of transparency.

By avoiding the foreseeability conundrum in the short term, the OECD retains full exposure to tort culpability. It will take years for the rebound to take place, but not as many as you might prefer. Take the size of the litigation explosion as a direct measure of the gap engendered by the exclusive regulatory focus on rules of action. The larger the gap gets, the less transparency can be ignored with impunity.

The bind the OECD cannot escape is that, unlike regulation by rules, tort has no remedial feedback loop. For several profound reasons, lessons learned from one tort case never get incorporated by those in a position to avoid the next. Because of the enormous sums of money transferred in tort litigation, the more litigation grows the more litigation is encouraged by the community it so richly rewards. In control engineering terms, it is an open loop system.

No institution of the Establishment can attenuate the expanding scope, depth and range of pragmatic foresight. The use of objective foresight, risk-informed decision making, will increasingly displace the subjective methods employed by the chain of command. No institution can escape the growing, relentless legal consequences of rule-based governance. While the institution is being run by one standard, obedience to rules, business as usual is being evaluated on another, completely different legal basis. Since pragmatic foresight has gone fully objective, incontrovertibly so, subjectivity has been rapidly displaced as a legitimate means for managing the future. This displacement can be measured by the increasing frequency the business judgment rule is being suspended.

Due diligence and willful blindness

As an institution, the OECD can self validate the hostility towards pragmatic foresight by witnessing your own reaction to the commentary provided. You will choose to do what you must. To stand at the crossroads of transparency and obedience to the authority of rules takes more strength than you possess. Fortunately, the conditions of my professional license limit my legal obligation to the inform/consent milestone, as discharged here. It is my duty as an officer of the court to inform without advocacy and it ends there. You get to choose. What this disclosure achieves through the legal principle of deliberate ignorance, by informing you of the consequences of your choice in this vehicle, is substantial escalation of the severity associated with your selection. Henceforth the law views your informed choice to be ineffective, as intentional. This elevated status of culpability has some interesting applications in future litigations.

Attached below for your reference, is a home grown table of salient features of the landscape of contemporary compliance. The table is regularly used in our work. It is an idiosyncratic engineering view from the operational reality of internal control and audit and close enough to the full truth for PCAOB gatekeeper purposes. The constantly changing emphases triggered by cycles of regulation and litigation requires frequent updating of the table.

The OECD is commended for providing the opportunity for comment.

Contemporaneous Compliance Framework (Time/means and ends) January 2005

Civil Law Category	Regulatory	Contract	Statutory	Tort
Compliance Action -Implement Rules -Obtain Outcomes	Implement Rules of Action as applicable to current operations.	Meet contract rules, provisions, outcomes, in a timely fashion.	Implement Rules of and ordinances specific to current situation	Prevent foreseeable damage as outcome; Contemporaneously
Enforcement and Example Agencies	Regulatory Agencies OSHA, ASME, Codes, Standards, Permits	Litigation Arbitration Courts - Construction AIA	Law Enforcement and Courts -State legislatures and local Law	Litigation and Courts SEC, USSG
Derivation Source	Hindsight	Hindsight	Hindsight	Foresight Technology
Violation	Ignore, Misapply Rules when applicable	Failure to meet contract provisions	Specific activity covered by statute	Insufficient foresight
Offense Opportunity Period	Anytime rules are applicable to operations	Contract duration	Anytime during life of statute situation	Time span before damage occurs
Enforcement Action Trigger	Rule Violation	Disgruntled Party	Specific actions covered by the statute	Stakeholder damage
Compliance Focus	Task Execution Reactionary Obedience Economically efficient to let regulator identify rules to follow.	Task Execution Obedience Calculated risk Contract provisions benchmark offense.	Activity Conformance Reactionary Obedience Usually economically efficient to do as you wish and respond to regulator action	Intelligence Synthesis Contemporary systematic investigation of future potentialities. “Foreseeability” is idiosyncratic
Detection and Initialization Intensity -Periodic - Event	Periodic inspections Variable intensity	Random. Depends on the parties to the contract. High probability.	Random. Situationally dependent	Legal action traditionally initiated only after damage is done. Retroactive enforcement.
Enforcement Record	Low enforcement intensity. Small detection rate	High probability of action if not settled by the parties themselves.	Random. Low probability of getting caught	Huge enforcement expense requires large damage and d pockets.
Current Change Rate	Imperceptible. Hindsight plus large lag.	Imperceptible	Imperceptible. Hindsight plus lag	Very High (SoC) tracks technology

Time frame focus of litigation	Whenever rule violated	Terms of the contract	Event covered by the statute	Contemporaneous activity prior to damage
Litigation Financial Impact Total	3-4 $B per year 2004	50-100$B per year 2004	1$B per year	540$B per year 2004
Adjudication - relation to criminal law	Tribunal by Commission Criminal tie rare	Judges Criminal tie very rare	Judges Criminal tie exposure	Jury – Criminal tie frequently precedes action
Due Diligence Reference	Regulation language for each rule of action. Duty standard in granulated form.	Contract language for each provision. Duty standard is specific and limited.	Statute language for each condition. Duty standard is specific and limited.	Standard of Care (by judge) Case by case. Duty standar general and retroactive.
Compliance Tangible Benefit	Easy audits; No fines Institutionally neutral	No dispute legal costs Institutionally neutral	No fines Institutionally neutral	Damage and litigation avoidance. Institutionally incompatible
General Remarks	Regulatory Law is comprised of rules of action. Codes, standards and permitting cover most activities in detail. Regulatory agencies make no warranty that compliance will result in end benefit. Crisis response important.	Contract Law is applied strictly by the wording of the contract and established precedent. Contract parties can make any provisions they wish. Compliance benefit is no litigation. Crisis response may be mitigating factor.	Statutory laws are rules of action for specific, narrowly defined situations. Usually written in response to some unwelcome local event. No warranty that compliance will have any benefit. Crisis response important.	Tort Law is focused on negligence, committed prior to t damage, to foresee the damage potential and prevent it. Crisis response is immaterial in defense Contemporaneo compliance assures no post-damage litigation..

ASOCIACIÓN VENEZOLANA DE EJECUTIVOS (AVE)

Los últimos 20 años del siglo XX estuvieron caracterizados, en lo que se refiere a la implementación de políticas públicas en el mundo occidental, por las privatizaciones de empresas públicas. En algunos casos esas empresas públicas estaban bien manejadas, en la mayoría de ellas no era el caso. Los primeros años de este siglo, aunque ya había movimientos a finales del pasado, se han iniciado campañas, especialmente en Latinoamérica, contra la globalización, las políticas de apertura y por supuesto, de las privatizaciones.

Ante esta situación cobra especial importancia el extraordinario esfuerzo hecho por la OECD para presentar a discusión estos lineamientos de Gobierno Corporativo para Empresas del Estado. Es un excelente paso inicial para la concientización del sector público, en la necesidad de aplicar mejores prácticas en todas las actividades que realizan, pero especialmente, en las empresas que administran.

La credibilidad y transparencia de los gobiernos se ha visto tremendamente afectada por los escándalos de corrupción y malversación de los fondos públicos, con el consecuente desprestigio del sector político, que a su vez ha tenido y tiene, efectos negativos en la confianza de los pueblos en los sistemas democráticos.

El establecimiento y cumplimiento de principios de buen gobierno para ser aplicados, no solo a las empresas públicas que tienen actividad comercial, sino al sector público centralizado nacional o local, indudablemente redundará en mayor estabilidad de los gobiernos democráticos.

En la Asociación Venezolana de Ejecutivos (AVE), específicamente en su Comité de Gobierno Corporativo, estamos convencidos de la necesidad de que el sector público adopte mejores prácticas de gobierno, y por lo tanto, nos convertiremos en promotores de esos lineamientos para su difusión general.

CONFEDERATION OF POLISH EMPLOYERS

Confederation of Polish Employers finds the Guidelines on Corporate Governance of State-Own Enterprises very desired and needed.

We are glad that OECD engaged itself in elaboration of such guidelines.

There is a number of State-Owned Enterprises among Confederation members that is why we examined the document presented for consultation very carefully.

Despite very intensive privatization process the state owned enterprises (SOE) play a very important role in the economy. The implementation of clear and permanent rules on the relations between state authorities and SEO definitely will contribute to the improvement of the SEOs governance and will be beneficial for the entire economy..

We would like to stress, that we are especially pleased to find in the "Guidelines on Corporate Governance of State-Own Enterprises" the following passage (Chapter II, section H, point 4.): "The coordinating or ownership entity (…) has a primary responsibility in (…) setting remuneration schemes for SOE board members that take into consideration the long term interest of the company and are competitive enough to attract and retain qualified professionals".

There is a bill of March 3rd 2000 on the remuneration of management of some legal entities, passed by the Polish authorities (published in Law Gazette Nr. 366). Our organization indicated this bill as a very disadvantageous regulation in Polish law concerning SOEs.

According to the Confederation of Polish Employers this regulation dramatically limits the remuneration, that can be assigned to managers and presidents of undertakings where State keeps the majority of shares or public companies. This dramatic limitation is illustrated by comparison between maximum wages assigned in the Bill and earnings in private companies, where the remuneration is based on market rates. The bill creates unequal possibilities for economic activity to Public Enterprises, what constitutes the abuse of equality of undertakings and fundamental rules of competitiveness.

What seems to be a major negative implication of this law , is causing difficulties in recruiting the management staff for the Public undertakings. It is making those undertakings less competitive than private sector enterprises. There is a trend to observe, that young and talented managers flow from public to private sector. Therefore, Confederation complained about that regulation to the European Commission, as that law abuses article 86, paragraph 1, in reference with article 81 and 82 of the European Treaty.

The very important issue raised in the guidelines is the role of the state as an owner. The state should limit its interference to the development of strategic vision of the company. It should concentrate on its main priorities and focus on the execution of its right to control and monitor the company.

The presented document stresses the importance of hiring the highly professional management in the SEO, which partly criticises the attempts to make the selection on political background basis. The professional not political criteria should be taken into account while appointing the CEOs. Without the professional and experienced human resources the SOE are much less competitive than private companies.

The guidelines put a lot if pressure on transparency, equal access of shareholders, media and public opinion to information on the SEOs economic performance. We very much agree with this opinion and support the notion to carry out an annual external audit. The transparency and control of the SEOs activities can very much contribute to the elimination of corruption and to the increase of the SEOs efficiency.

"Guidelines on Corporate Governance of State-Own Enterprises" is a very general document. It lacks the definition of SEOs. It should also define the public role of the SEOs.

What is missing are the guidelines for SEOs which own a company in another state.

The implementation of the OECD guidelines requires amendments in Polish law, therefore we suggest organising a working group on the guidelines on SEOs management in Poland. Members of this kind of the working group could be the representatives of the employers organization, SEOs, experts and Ministry as a group coordinators.

The notion of centralization of the ownership and recruitment of management staff could be two of the issues discussed within the working group.

FEDERAL MINISTRY OF FINANCE, GERMANY

Page 7 (III. Equitable Treatment of shareholders)

According to section D minority shareholder´ access could be facilitated through specific mechanisms regarding board election. We do not agree with this approach because it suggests that these board members represent a specific group of shareholders. But all board members have to act in the best interest of the company and not in the interest of a specific group of shareholders. These interests may be the same, but must not.

Page 9 (V. Transparency and disclosure)

It is recommended that SOEs, especially large ones, should be subject to an annual independent external audit based on international standards.

From our point of view it should be clarified that – as the key element - an audit takes place on international standards whether internal or external (in case that an internal audit based on international standards takes place (e.g. IAS) an external on the same standards doesn´t make sense) . Furthermore we suggest to mention the relevant standards (like IAS or US GAAP ?!).

Page 18 No. 62

The 3rd sentence should not restricted on regulatory decisions concerning the same SOE. These are other areas of conflicts of interests as well (especial granting subsidies). This sentence could be amended as follows "… in regulatory and other conflict-related decisions …"

Page 21 No. 89

The 3rd sentence is misleading. The State may in cases pursue political ends that are not in the interest of the company. But this may be the case for minority shareholders and their interests as well. Therefore the sentence should be clarified as follows "… political ends that are not in the interest of the company and thereby to the detriment of other shareholders."

Pages 22/23 No. 103

It is not clear why – according to the 3rd sentence – " … there is an ever stronger rationale for reassuring minority in case the share is a dominant shareholders." It is suggested to mention at least the reasons why such a rationale should exist.

No. 104

It is suggested to emphasize the last sentence mentioning the idea of equitable treatment of all shareholders by putting it at the beginning of this paragraph.

FORCE OUVRIERE

Analyse de la dernière version du projet initié par l'OCDE visant les principes directeurs sur le gouvernement d'entreprise relatif aux Entreprises Publiques

Celui-ci se compose de trois parties :

❶ Un préambule retraçant l'intervention des Etats dans le champ de ces entreprises, percutées au début des années 80 par la théorie économique libérale exigeant le retrait de l'Etat. En rapprochant la gestion publique de la gestion privée, il affirme le processus de privatisation: l'argument mis en avant est qu'il s'agit de favoriser la croissance par la concurrence pour une meilleure performance économique et une hausse de la productivité.

Pour accompagner ce processus, des principes directeurs synonymes de contrôle, transparence, responsabilité, s'imposent. Ils ne peuvent remplacer ou contredire ceux élaborés par l'OCDE pour le Gouvernement d'Entreprise.

❷ Six fiches identifiant les principes

1. garantir aux entreprises publiques un cadre juridique et réglementaire efficace ;
2. l'Etat actionnaire ;
3. Egalité de traitement entre les actionnaires ;
4. Relations avec les parties prenantes ;
5. Transparence et diffusion de l'information ;
6. Responsabilité du CA d'une entreprise publique

❸ Le dernier volet est une sorte de guide explicatif qui s'efforce d'identifier les tenants et aboutissants de chaque principe. Il est difficile de résumer les 196 paragraphes rédigés à cet effet. Disons globalement que l'objectif renvoie à la métamorphose de l'Etat qui doit évoluer vers une stratégie actionnariale et non plus une politique de service public historiquement dédiée à l'usager et à l'impulsion industrielle.

<u>Commentaires de la cgt FORCE OUVRIERE</u>

En fait, l'OCDE met ici tous les Etats (membres ou non de l'Organisation) devant une quasi obligation : celle d'ouvrir largement le capital des entreprises publiques aux investisseurs privés, ce qui vaut à terme processus de privatisations.

A l'évidence, Force Ouvrière ne peut souscrire à cette démarche, qui se calque sur les préconisations du rapport Barbier de la Serre (février 2003) invitant l'Etat à se muter en actionnaire et que nous avons condamné.

Certes, les dénationalisations opérées en France dans les années 80, comme les Directives Européennes de libéralisation des Entreprises Publiques pour développer le marché intérieur, ont ouvert la voie à la démonopolisation. Il n'est cependant pas écrit formellement dans les règlements européens que la privatisation en est l'aboutissement.

Or, en administrant aux entreprises publiques un régime de principes directeurs, équivalent à celui des Entreprises privées, l'OCDE dépasse le cadre de la déréglementation européenne en transformant radicalement le rôle de l'Etat.

D'une conception solidaire, il devient actionnaire, autrement dit prépondérant pour les marchés financiers, inexistant pour les citoyens qui passeront d'un statut d'usager à celui de client.

La séparation entre l'Etat actionnaire et l'Etat propriétaire et producteur de normes Services Publics est ici clairement identifiée : il faut réduire son autonomie pour éviter de porter préjudice à la fonction actionnariale, largement privilégiée. Il devra donc hiérarchiser ses objectifs ce qui rendra les arbitrages difficiles entre création de valeur, amélioration de la qualité du service public (…) et garantie de la stabilité de l'emploi … Les choix seront approuvés et soutenus d'une manière ou d'une autre par les Conseils d'Administration, où les syndicats sont actuellement représentés.

Cette perspective de gouvernance publique, qui associe les parties prenantes, et inclut l'application des normes comptables IASB, a été organisée en France dans le cadre de l'agence des participations de l'Etat et du statut de société anonyme décidé par le gouvernement en 2004. Nous avons désapprouvé cette transformation devant la Commission Parlementaire qui auditionnait à cet effet.

Ci-dessous quelques commentaires complémentaires précisant notre analyse :

Principe n° 1

On demande aux pouvoirs publics de distinguer entre la fonction d'actionnaire et les autres missions qui incombent à l'Etat.

D'emblée, on pose le principe d'une séparation des pouvoirs par assimilation aux Entreprises Privées. C'est ignorer la finalité des prérogatives de puissance publique déléguées par les citoyens à l'Etat, et les institutions de contrôle qui rendent compte de la bonne exécution des missions. En tout état de cause la dénomination d'Etat actionnaire qui sous tend une possibilité de faillite est incompatible avec celle d'Etat propriétaire compte tenu des financements publics qui soutiennent le patrimoine.

On recommande de simplifier et de rationaliser la forme juridique sous laquelle les entreprises exercent leurs activités.

Cette précision qui invite (p.14) à s'inspirer du statut des sociétés par action met les entreprises publiques sur la voie de la privatisation.

L'OCDE ferait preuve d'objectivité et de bon sens si, au préalable, elle lançait une évaluation des conséquences économiques et sociales induites par des privatisations qui ont révélé la perversité du profit.

Principe n° 2

↳ *Le regroupement de toutes les fonctions actionnariales au sein d'une entité unique (B) qui doit avoir une certaine marge de manœuvre de décision.*

Cette centralisation qui pourrait prendre la forme d'une agence de participation créera une situation d'indépendance entre la fonction d'actionnaire et celle attachée à la gestion du service public. Au prétexte d'éviter la confusion des responsabilités elle facilitera l'application des politiques restrictives (réduction de l'emploi public, gel salarial, diminution des droits sociaux) qui résulteront des choix stratégiques du Conseil d'Administration.

↳ *Le paragraphe G qui incite les pouvoirs publics à ne pas participer à la gestion quotidienne des entreprises conforte l'évolution vers une autonomie progressive pour atteindre les objectifs actionnariaux. Quelle sera la variable d'ajustement pour parvenir au taux de meilleure rentabilité qui reste le but des actionnaires ?*

Rappelons que, dans le secteur privé, c'est l'emploi ! Et au bout du compte un taux de chômage de 10% considéré désormais lui-même comme variable d'ajustement nécessaire du marché de l'emploi !

Principe n° 3

↳ *Le paragraphe D. Il est question de faciliter la participation des actionnaires minoritaires à la procédure de décision (CA – AG).*

Ainsi, il est demandé aux pouvoirs publics, dont les représentants sont soumis au principe de neutralité, de favoriser les actionnaires minoritaires en demandant à l'état majoritaire de renoncer à user de son pouvoir de décision et de leur donner une sorte de pouvoir spécial que le droit du commerce international leur refuse !

On oublie que le premier devoir de l'état consiste à défendre les intérêts des citoyens usagers du service public. Va-t-il devoir les spolier au profit d'actionnaires qui fussent-ils minoritaires, n'attendent qu'un retour sur investissement ?

Principe n° 4

↳ *La forme juridique doit permettre aux créanciers de faire valoir leurs créances et d'engager des procédures d'insolvabilité.*

Cette exigence équivaut à une autorisation de mise en faillite de l'entreprise publique et au-delà celle de l'Etat en raison de sa qualité d'actionnaire.

Cette procédure qui suppose une analyse juridique approfondie est non seulement irrationnelle mais qui plus est économiquement suicidaire.

Ainsi, s'il s'agit d'une entreprise détenant des infrastructures, ports, aéroports, ceci peut signifier la liquidation des infrastructures, la vente du patrimoine foncier, en même temps que la liquidation de la société d'exploitation. A l'inverse, si l'entreprise n'est que concessionnaire, elle ne pourra pas investir sur le long terme et les sociétés gestionnaires d'infrastructures devraient, au titre de l'aménagement du territoire, être à l'abri de toute faillite, adossée aux états.

Principe n° 5

Les entreprises publiques doivent être chaque année soumises à une vérification externe indépendante conformément aux conditions prescrites par les principes de vérification comptable des OICV.

Il s'agit d'ingérence dans la mesure où chaque état doit demeurer libre de sa propre organisation interne. C'est aussi un contournement des organes internes de l'entreprise, voire un dessaisissement de la représentation nationale.

Dans la note explicative du principe V, on peut lire :

« *Le législateur ou le gouvernement peut décider de confier des responsabilités ou des obligations à certaines entreprises publiques. Ces responsabilités ou obligations, quelles qu'elles soient, doivent être transparentes. Le marché et le grand public doivent être clairement informés de la nature et de l'ampleur de ces obligations*. »

En clair, les états devront se justifier lorsque les missions de service public ne seront pas déléguées aux entreprises privées. C'est un contresens historique qui fait la part belle aux intérêts privés et le début de la fin des services publics.

Principe n° 6

Nous avons noté la suppression de la phrase « choc » figurant dans la version précédente sur les mécanismes de rémunération des administrateurs.

Le paragraphe C intègre la représentation des salariés … mais sans préciser leur statut au sein du Conseil d'Administration : conservent-ils leur liberté syndicale et avec l'exercice de leur mandat, ou siègent-ils en qualité d'actionnaires responsable d'un mandat d'administrateur ? Si l'on suit la logique des principes à savoir la répartition des pouvoirs –ou compétences- les syndicats seraient assimilés à terme à une simple partie prenante (stakeholder), renonçant de fait à la défense des intérêts des salariés et des missions de service public. On ne peut s'inscrire dans cette perspective.

Conclusion

Il ressort de cette architecture une exigence de désengagement total des Etats de leurs propres responsabilités au sein des entreprises publiques, d'adaptation totale du modèle public au modèle privé, y compris sous leur forme juridique. Ces principes n'auront pas d'autre résultat que la remise en cause des missions de service public assurées par des entreprises de transports, de télécommunications, considérées aujourd'hui comme commerciales.

Quant au rôle de l'état actionnaire, il est amené à s'amenuiser, puis à disparaître, car même majoritaire, il doit céder son pouvoir de décision dans les conseils d'administration, se contenter d'être représenté par une agence de contrôle, se désintéresser de la gestion de l'entreprise. L'entité de contrôle doit « se lier elle-même les mains » comme cela est précisé dans la note explicative du principe III.

Pour Force Ouvrière ce projet jette un pont vers la privatisation des entreprises publiques.

HONG KONG EXCHANGES AND CLEARING LIMITED

Overall, we found the Guidelines to be reasonably comprehensive and complete. For the most part, the relevant principles are set out in broad terms with cross-references to the OECD Principles of Corporate Governance and other guidelines where necessary. We endorse the moves to improve transparency and accountability.

We offer the following suggestions on how some of the ideas might be further elaborated on or expanded.

1. So as to maintain a level playing field, you may wish to mention that situations should be avoided where a SOE is, by virtue of its privileged position, in possession of advantageous confidential information not available to the market generally.

2. Senior management is invariably privy to their company's trade secrets. When a former member of the senior management of a company takes up a new post at another company, he may be able to make use of his knowledge to the detriment of his former company. You may therefore wish to mention that, whenever possible, transfers of state-appointed senior personnel from one SOE to another should be subject to a "cooling-off" period so as to minimise any prejudicial effect such a move might have on the previous SOE, particularly where the previous SOE has minority shareholders.

3. As mentioned on page 52 of the 2004 edition of the OECD Principles of Corporate Governance, disclosure of board and executive remuneration on an individual basis (including termination and retirement provisions) is increasingly regarded as good practice and is now mandated in several countries. You may wish to provide for this high level of transparency for all SOEs, whether listed or non-listed.

4. Paragraph 28 deals with SOEs with special responsibilities and obligations for social and public policy purposes. You may also wish to mention the need for the SOE to disclose the overall impact this may have, in particular on its resources, financial or otherwise, and profitability.

5. Paragraphs 136 and 137 deal with internal audit procedures and function. It states that SOEs should ensure that company procedures are adequately implemented and be able to guarantee the quality of the information disclosed by the company. We note that the topic of internal controls is covered on pages 62 to 63 of the 2004 edition of the OECD Principles of Corporate Governance. Having regard to the environment and characteristics of SOEs, you may wish to highlight the importance of having a proper internal control system in place to ensure that company procedures are adequately implemented and SOEs are able to guarantee the quality of the information disclosed by the company.

6. Paragraph 158 provides for disclosure of any financial assistance received from the State and commitments made by the State on SOEs' behalf. While we understand that there may be socio-political considerations involved, you may wish to emphasise the need for all SOEs, whether listed or non-listed, to include in such disclosure details of any government grants or subsidies received.

INDONESIAN CAPITAL MARKET SUPERVISIORY AGENCY

Dear Sir/Madame,

With regard to your e-mail dated 21 December 2004 regarding the above matter, please find below Bapepam's views on the draft based on review by respective colleagues in our office as follows:

1. On Chapter II regarding the *State Acting as an Owner*, we suggest some additional points:

   a. Any relevant government body should not:

      (i) be involved in day to day management of SOEs

      (ii) appoint any affiliated person to sit as SOEs board member.

   b. Any relevant government body should not influence the SOEs with its own political will.

2. On Chapter V regarding *Transparency and Disclosure*, we suggest some additional points:

   a. SOEs should disclose material information on donation

   b SOEs have to provide facilities to the board members that equal to SOEs financial condition and such facilities should be disclosed.

INSTITUTE OF INTERNAL AUDITORS (IIA), MOSCOW OFFICE

Please see below the comments to the proposed draft.

Chapter II, paragraphs 58-60

We recommend to emphasize that state representatives in the BODs of SOE shall act in the interests of ALL shareholders.

Chapter V, paragraphs 135-136

Strong internal audit system is integral not only to large public companies but to a plenty of medium-size public companies as well. We recommend to omit the word "large" in the opening sentence of paragraph 136.

We recommend not to narrow the role of internal audit to improving financial controls and disclosure process. Internal audit can add value by evaluating and improving internal controls understood generally. In this regard we recommend to use the definition of internal auditing promoted by The Institute of Internal Auditors: "Internal auditing is an independent, objective assurance and consulting activity designed to add value and improve an organization's operations. It helps an organization accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance processes."

Reporting to management, as recommended in the draft, will be most likely detrimental to internal audit independence, the more so taking into consideration the specifics of SOEs internal environment. We recommend to omit this recommendation from the draft (paragraph 136).

Chapter VI, paragraph 190

It is essential that audit committees comprise independent (not just non-executive) members. We recommend to include the following statement: "Each member of the audit committee of the SOE must meet specified independence criteria."

INSTITUTIONAL SHAREHOLDER SERVICES (ISS)

Institutional Shareholder Services (ISS), the leading provider of proxy voting and corporate governance services to financial institutions worldwide, has acquired extensive experience in this field serving over 1,000 institutional and corporate clients worldwide, analyzing proxies, and issuing informed research and objective vote recommendations for shareholder meetings of more than 28,000 companies across 102 markets.

ISS supports the OECD's efforts to improve the legal, institutional, and regulatory framework on the corporate governance of State-Owned Enterprises (SOEs). Overall it is ISS' conviction that SOEs, especially when they are also listed companies, should obey the same good corporate governance principles applicable to all public companies. As rightly pointed out by the OECD's Working Group, the general Principles on Corporate Governance set forth by the OECD in 2004 should therefore constitute the reference framework to be generally applied. Nonetheless, given the particular nature of SOE's and in particular the wider number of stakeholders such companies entail, additional principles aimed at implementing better and clearer practices are necessary.

ISS applauds the OECD's attention on a number of important specific issues that constitute fundamental elements for the development of SOEs' good corporate governance practices. Among these, particularly worth noting in our opinion are the references to:

- The need to ensure equitable treatment and equal access to corporate information to all shareholders of SOEs and consequently the need to guarantee minority shareholders' access and participation to decision making processes within SOEs. In particular ISS embraces the Working Group's position where it suggests that "minority shareholders' access to the decision making process could be facilitated through specific mechanisms regarding board election". (Section III, letter D)
- Transparency on financial reporting and auditing procedures as well as disclosure on all material information pertaining to the companies' activities, objectives, and management (Section V); and
- Board of Directors' mandate and accountability. In particular ISS embraces the Working Group's indication that board responsibility should be encouraged and that overall board size should be limited in order to favour the best functioning of this primary corporate governance body (Section VI, letter A)

Within this framework, ISS would like to contribute one additional point to the development of the final version of the Guidelines on Corporate Governance of State-Owned Enterprises in connection to potential candidates to the board of directors of SOEs. ISS believes that the Guidelines should state that individuals holding public offices should not be considered eligible candidates to the board. Furthermore, they should not be in any way involved in the provision of any direct or indirect advisory services to SOEs. Recent news of financial improprieties involving blurred lines between state and business across various markets have demonstrated the detrimental effects that such practices could have on markets and public confidence in SOEs. These events have reinforced the need to address and minimize such potential conflicts of interests that ultimately harm shareholders, as well as stakeholders, of SOEs.

We hope that our contribution may be taken into consideration in drawing up the final draft of the OECD Guidelines.

INTERNATIONAL ORGANIZATION OF SUPREME AUDIT INSTITUTIONS (INTOSAI)

1 Significance of (external) public audit and role of (supreme) audit institutions

While it is approved that the Guidelines stress the necessity of

- Maintaining a continuous dialogue with external auditors and specific state control organs (Section II, Para H3 and Para 81 – 83),
- Efficient internal audit procedures (Section V, Para C and Para. 135 –137) and
- An annual independent, external audit (Section V, Para C and Para. 138 –140),

there is no indication of public audits by supreme auditing bodies. The term "external auditors" seems to denote CPAs; Para 50 mentions that the coordinating or ownership entity should be accountable to representative bodies such as Parliament, but does not directly refer to state audit bodies (i.e. supreme audit institutions).

In view of the importance of public auditing, the Guidelines should clearly specify the relationship between SOEs/the responsible supervising state authorities and (supreme) state audit institutions. Section 23 of the Lima Declaration of Guidelines on Auditing Precepts[1] clearly points out that commercial enterprises with public participation shall be subject to audit by the respective supreme audit institution of the country in question.

Section II, maybe also Section V, of the Guidelines should therefore incorporate that *in view of the significance of public auditing,* the state owner shall support *supreme audit institutions as well as all other audit institutions in their activities concerning the – independent – audits of commercial enterprises with public participation* as well as determine proper actions in response to audit findings to correct or otherwise resolve the matters brought to their attention.

With regard to the fundamental principles of the Lima Declaration as laid down in Sections 6, 10, 11, 16 and 23 of that document – the Guidelines could specify that *public owners shall:*

- *Ensure that auditing powers of the responsible supreme audit institution are not impeded or impaired (in particular the access to all records and documents relating to financial management or the right to request any necessary information);*
- *Furnish to the Supreme Audit Institution all documents and other records relevant to the audit of SOEs;*

1. The authoritative source of international standards for public sector audit of the International Organization of Supreme Audit Institutions (INTOSAI), see: http://www.intosai.org

- *Assure that the audited SOEs comment on the findings of the (supreme) audit institution within the time schedule, or else, comment on their own account on findings brought before themselves;*

- *Assure that shortcomings revealed in the audits of SOEs are corrected, or if necessary, take the necessary measures or accept responsibility themselves;*

- *Assure that SOEs readily accept audit findings of the supreme audit institutions and implement recommendations accordingly, or if necessary, accept findings and implementations themselves and*

- *Maintain cooperation and continuous dialogue with the supreme audit institution responsible for the audit of the SOE (see Section II, Para H3 of the draft).*

2 Other issues

As the draft Guidelines do not adequately deal with "internal control systems" and "quality assurance", the following might also be included:

The public owner shall ensure that SOEs put in place adequate systems

- *Of internal control as well as*

- *Quality assurance or quality management*

which should be evaluated periodically.

INTERNATIONAL SOCIETY OF DOCTORS FOR THE ENVIRONMENT

Dear Sir/Madame,

Following are the comments of the International Society of Doctors for the Environment (ISDE) regarding the OECD Guidelines on Corporate Governance of State Owned Enterprises.

As a recognized source of medical and health expertise, ISDE maintains a position of trust in advocating for sustainable development that addresses the critical linkages between human health and environmental impacts.

Recognizing poverty as an underlying impediment to achieving development objectives, particularly in the context of developing countries, ISDE supports the important efforts of OECD in establishing the Guidelines on Corporate Governance of State Owned Enterprises.

We seek additional explicit commitment to the following items:

1. Call for the utilization of objective criteria to measure the environmental, health and social impacts of SOEs such as the globally recognized commitments outlined in the UN Millennium Development Goals;

2. Necessitate the application and compliance with Public International Law and in particular, the United Nations Universal Declaration on Human Rights;

3. Explicitly prohibit child labor as outlined in ILO Convention 138 on the abolition of child labor and specifically ILO Convention 182 on the Elimination of the Worst Forms of Child Labor;

4. Expressly require the implementation of Environment, Health and Safety (EHS) programs, Environmental Management Systems such as ISO 14,000, and include reference to the recommendations of the Intergovernmental Forum on Chemical Safety (IFCS);

5. Acknowledge the role of SOEs in the delivery of social services, local capacity building and promotion of the Rule of Law;

6. Require SOEs to comply with objective and internationally accepted accounting and financial reporting criteria.

NEW HORIZONS, WOMEN'S EDUCATION CENTRE

Economic Results of Privatization in Uganda

Thank you for sending the OECD on SOES to us in New Horizons. I seem sorry not to have good words on privatasation in Uganda because this not the Anglican Church Hymns that I sing when, am in the congregation . I don't know if it was the Government of Uganda (GoU) that mismanaged privatization proccess or was it the WB, IMF institutioins that have poor policies on the poor and their developing countries SOES? Why didn't the WB and IMF suppervised this process to fight the corruption?

The effects of privatization vary, depending on the type of enterprizes. Furthermore, there are diffirences when assessing impacts from a micro economic or macroeconomic perspective.

Experiences of small business, probably the most experience can be found in the privatization of small business created made the local to loose the business to big companies instead to create local employment opportunities generation and in meeting local needs in stead the foerigner ended up bringing in their country men, e.g. the Asian countries.

Privatization I could comment it as the policy roots of economic crisis, poverty and inequality that has desitivated the old age and their dependents in the country, that was once named the Pearl of Africa by The Prime Minister Winston Churchill. With our soils loose its fertility and agricultures low income of the poor peoples stature. Even as I write now, the Country needs much great attention of the drylands that are becoming into the desert. We need to implement the UNCCCD, International Waters, and CBD to resotare the biodiversity. Uganda currently has 56 district and 29 out of are in the cattle corridors areas, great is essential. The country will soon face dersert if no action is taken to mitigate the situation.

Back to privatization on SOEs from 1997 to todate in 2005, the state privatized to two hundred parastal bodies, without paying the packages of the workers, its unfortunately that those ones in the shoulders of those in state power are ones that bought the companies on credit, just a few went in the private sector.

One factor, more than any other, has crippled national economies, with bad governance of intimidation has increased poverty and inequality and the results has made may millions of people in Uganda go hungry, with this kind of experience, Uganda as the country will not achieve the Goal of IFPRI Vision 2020 of Assuring Nutrition and Food Security. There is this set of policies called structural adjustment programme (SAP) that has been forced on us in the developing countries, while it all so gave the achance to those in the state to rob the nation. That's why the state has no will to fight corruption, the tendering processes in the districts and the some ministers and some local governments through decentaralization governance of system have caused a lot of influence in the processes, although some ministers were censured by Parliament but again the President re-appointed them in the same office duties.

Structural adjustment has been most controversial economic and social policy model foisted onto a reluctant in the Third World. Structural adjustment the devastating impact that of poor policies, undemocratically imposed by the international financial institutions, have had an effect on national productive capacity employment, wages and the growing number of people in poverty. An excellent of how people´s human rights are being sacrificed on the alter of the free market in the name of development.

The current government of President Yoweri Museveni, cxame to in 1986 to date January 2005, its over 18 years in power. Uganda's principal beneficiaries of privatization have been foreigners and State Agent Cofers, who obtained 75% of the total divestiture proceeds, while the local population (state agents) gained only 16% share. Privatization has enriched a few transnationals and other large companies at the expense of the Ugandan people and is seen as ″legal robbery″, porteding major problems down the road.

Newly privatized firms had experienced an increase in non performing loans and defaults and many has closed, were struggling or were grossly exploiting labourers.

Uganda in the past performance of public enterprises had been poor due to the country′s violent political history and depressed economic performance have been multiple and complex. Although the essential commodities are available in the country to down to almost to the rural deep, the cost price is the worst, because people are becoming poor and poorer everyday from worse to worst. My argument is that the government could have brought in the investors without privatizing everything at hand and must make that investor buys the land directly from the owners at the agreed costing price but, not the state to procure the land on behalf of these investors because this makesw them incure in the real sense, because there is no guarantee when that state era ends , this could these investors to flee the country and both their businesses, life and property. I could wonder what President Museveni will be remembered in his era of leadership? nothing has been left for the new generations to come and enjoy the parastals. Another fundamental problem has been political interference that has bee poor management practices.

Privatization of Public Utilities

Public utilities play a special role in a country′s economy. They are ″public″ in that they serve the common interest of society and provide basis services that are essential to the lives and livelihoods of families and communities. Energy, water, electricity, and to some extent mass transport (road, air, and rail) are all grounded and in their limbo, and telecommunications are the services on which modern societies are built, but this is well functioning more especially those ones in the hands of private sector. Because of these are basic services, societies have generally assumed the responbility for providing them, at least at a minimum level, to all of its members regardless of their income or geographical location. And, because public utilities are largely natural monopolies, the questions of availability, access and affordability are of even greater importance. The private sector in transport are the onlys involved and as the source of transport in Uganda, they set any fare fees costs without any compromise. For these reasons public services have been with occasional exceptions under public ownership. With the emergence and prodominance of noeliberalism, however, the supposed inherently greater efficiency of private property has been used as a justification for privatizing public utilities.

Social Impact of Privatization

While the record of privatization is mixed in regard to achieving its economic objectives, its consequences are quite disappointing in social terms.

Employment effects

One of the major stated objectives of privatization was to increase employment and strethening the existing ones, but in most cases the privatization of public enterprises has failed to meet the anticipated goal of creating more jobs instead it has increased poverty and diseases. In nearly al the public enterprises that have been privatized, the laying off of employees has been the a major reform. Privatization has led to an increase in the demand for labour. In particular, privatization has worsened the employment situation of women, elderly and the poor men who have lacked specialized skills.

At the same time, the move towards rationalization, of privatized firms worsened income distribution, since the most vulnerable groups (those with low levels of education and low wages, most of who are women) were in fact retrenched in the process of privatization. Furthermore, privatization has significantly increased discontent among workers in the sense that improved pay has come with increased workloads and other performance criteria that can be detrimental to the workers.

Impact on Women

In most cases, privatization was costly for women, as they tended to be able the ones with few specialized skills or none at all and thus formed the highest % of those laid off by the new owners. Women who lost their jobs in this process were likely to be unskilled. Very few training programmes for alternative employment opportunities have arranged for retreched workers (I can say that they none in Uganda), and women found even fewer alternative job opportunities after loosing their formal sector jobs in mills and factories. Women have also been indirectly affected by the loss of jobs by male household members and the consequent reduction in family earnings.

Tranparency

In general perception of civil society organizations (**CSOs**) that were consulted during SAPRI investigations that privatization was mismanaged and accompanied by corruption and lack of transparency , the majority (93%) those interviewed were of the view that the process was generally poor and the whole process lacked transparency. There was also a widespread belief that the process was not free from political interference, corruption and underhand dealings in which foreigners and the state officials were only beneficiaries and exchange envelopes under the table. Public demonstrations have ensured. The bidding process was revealed, in fact, to have been unfair and biased in favour of certain entities. Although the government documented the way in which the divestiture proceeds were utilized, the remains suspicion that the proceeds have all been mismanaged. Today when you inquire the government ministry officials they say that the money is the consolidated. No body knows where its its kept, perhaps when Presidents Museveni era expires, it will be chance to know more. Otherwise the situation is no well known at all.

Conclusion

Not all privatized enterprises have increased productivity. Yet overall, economies did not benefit as a whole, while significantly sectors of country populations were adversely affected. For those that did, the gains did not translate into improvements at the macroeconomic level. Government is found to have managed the privatization processes poorly, transparency was lacking, and the methods adopted for privatizing firms typically involved atop-down approach to setting the rules. Not surprisingly, the benefits of benefits of privatization have tended to flow almost entirely to those managing the process, thereby worsening the distribution of wealth. Retrechments, which usually accompany the privatization process, exacerbated national employment levels, inequalities increased and the poor were left generally worse off. The process has also led to the displacement of domestic owners by foreigners.

″ If you want trouble to trouble you ask someone who was retrenched″

NIKOIL

Спасибо за драфт документа являющегося значимым дополнением к уже имеющимся инициативам Федерального масштаба в целях повышения бизнес-культуры не только в частном секторе например Кодекс корпоративного управления - ФКЦБ но и в государственном секторе экономики

Особенная ценность этого документа заключается в том что способствует развитию понимания содержания процессов управления компаниями государственного сектора и в свою очередь способствует сближению интересов управления как в государственном секторе так и в частном секторе экономики ледует отметить что документ создает серьезный потециал конкурентных преимуществ если ему следовать для компаний государственного сектора и стимул развития корпоративного управления в частном секторе в связи с намечающейся тенденцией расширения списка конкурентов относительно частного сектора

В настоящее время документ актуален тем что в период когда государственная власть готовит к номинированию своих представителей в советы директоров компаний государственным участием отдельные компоненты документа уже сейчас представляют интерес для формирования договорных отношений между представителями государственной власти выдвигаемыми в советы директоров компаний и государствеенными структурами

С уважением Р С Зинатулина

POLISH FORUM FOR CORPORATE GOVERNANCE (PFCG)

Dear Sirs,

We are pleased to provide this comment to the forthcoming Guidelines on corporate governance in state owned enterprises, what we recognize as an important step in improving governance arrangements in the corporations that are - due to some reasons - still under government control and providing in that way a stability and credibility of those enterprises.

The Polish Forum for Corporate Governance (PFCG) is an independent initiative established in 2001 by the Gdańsk Institute for Market Economics – a non-profit, private research institute – to discuss independently and professionally the institutional settings within the corporate sector and develop recommendations for public policy in this respect. PFCG has successfully contributed so far to the improvements in knowledge on governance issues as well as governance practices themselves. For instance PFCG has issued the White Book on Corporate Governance in Poland, drafted the very first, independent Corporate Governance Code for Polish Listed Companies (April 2002, provided publicity with many press articles, research studies and seminars; it also runs professional website devoted to corporate governance (www.pfcg.org.pl).

We agree and endorse most of the thinking provided in OECD draft "Guidelines". However based on our experience we think that more work is necessary to make Guidelines more clear, precise and challenging in order to address major governance issues that SOE face. We would like to share with OECD staff following comments and points.

1. Functional structure of Guidelines should be changed - Guidelines should be split into two documents: "best practices for governments" and "Guidelines for SOE"

The general analysis of Guidelines creates some hesitation as to the goals and Guidelines' addressees. In facts we can find inside the Guidelines three separate functional "documents" or - let say - governance areas. So we have here some recommendations and detailed provisions (Chapter I A-D, Chapter II A-H) that are addressed fully to governments as regulator and leading governance "actor". Secondly we have some "specific" recommendations addressed to SOE, and thirdly we have some references to recommendations set in Guidelines for listed companies. We think that recommendations provided in Guidelines concerning governments functions are not in fact directly linked to governance problems and arrangements that are faced inside SOE; they resemble rather "best practices for governments in respect to ownership functions" and in that way should be understand. We suggest to take them out and put into separate document and develop.

We suggest that the reference to Guidelines for listed companies may create some uncertainty as to what recommendations should SOE follow. Leaving SOE too much room for interpretation may result in de minimise approach. We propose that the Guidelines for SOE should provide any reader with a complete list of recommendations and provisions without unnecessary reference to other documents.

The above proposed amendments result that Guidelines are more clearer in its goals and moreover easier to implement on any basis ("comply or explain" ?). We also see an alternative way to proposed

Guidelines since may recommendations proposed here are in their functionality similar to what is proposed for listed companies. Thus OECD may propose that SOE should follow Guidelines for Listed Companies on comply or explain basis and when necessary work out own complementary set of governance rules.

2. Provisions on the company board structure, appointment and functioning should be more advanced and challenging

The supervisory board (in two-tier system) is a key element of governance arrangements. This significance is even more important in case of SOE where such mechanisms as takeovers or shareholders activisms are not in place. We fully agree with recommendations provided in point VI. letters A-G. But we feel that the proposed Guidelines should be developed in some respects. The major threat to board effectiveness is that they will be captured by bureaucrats, not enough motivated for objective judgement, with links to management. We think that all these weaknesses and threats should be clearly addressed by Guidelines as they are for listed companies.

- Assignments from administration should be avoided (allowed only in case of larger enterprises where proper transmission of government policy is necessary)
- Appointment of board members should not be subordinated to any political criteria; candidates for board members should be known in advanced to managers, employees and other stakeholders; mentioned groups should have right to propose own candidates,
- Board members should be real and not formal professionals (obligations to pass special exam are frequently very impractical and "artificial").
- Board members should be remunerated according to market standards
- There should be effective rotation mechanism for board membership (not more than two tenures?)
- All board members should disclose their links to governmental administration (including services provided for government) and management
- Board structure should be balanced to represent all stakeholders interested in company effective performance, neither of this stakeholders should dominate including administration.
- Most of board members should be independent from government and managers (the current proposition "sufficient number" we think is impractical and will produce no results). Any changes in "independency" should be disclosed and subject to replacement.
- All sensitive transactions should be subject to board majority voting and disclosure

3. Transparency and disclosure mechanisms should be broadened

Apart from effective and accountable board, transparency and disclosure should be a leading mechanism protecting against managerial opportunism as well as state attempts to interfere company performance. We think that recommendation **V** (transparency and Disclosure) should be re-named (audit, internal control, transparency and disclosure) or split into two chapters (audit and internal control) and transparency and disclosure).

We propose that Guidelines in this are should:

- strongly underline the role of Internet techniques in providing transparency,
- provide for corporate governance reports to be published annually by any SOE
- provide that basic corporate documents (including shareholders meeting resolutions and minutes) are publicly available preferably through internet
- provide that disclosure and transparency properly cover capital group that is under SOE control
- provide for proper auditor independency and rotation

We would be delighted if we could further serve OECD with our opinions and experiences in respect to corporate governance. The issues in question are very important and familiar to us. We even plan to begin drafting our own voluntary governance guidelines for SOE.

PUBLIC SERVICES INTERNATIONAL

Dear Sir/Madam,

I am making a few comments on the draft text of the above Guidelines on behalf of Public Services International (PSI). PSI is the Global Union Federation which represents 20 million public sector trade unionists around the world. It has 633 affiliates in 149 countries. PSI is an autonomous body, which works in association with Federations covering other sectors of the workforce and with the International Confederation of Free Trade Unions (ICFTU) and TUAC. PSI is an officially recognised non-government organisation for the public sector within the International Labour Organisation and has consultative status with ECOSOC and observer status with other UN bodies such as the UNCTAD and UNESCO.

We have worked quite closely with TUAC over the history of the development of these Guidelines and our earlier comments, some of which we note have been taken on board by the Working Group, as well as these, should be seen as being in agreement with TUAC's own observations. Where possible, we have not repeated proposals being made by TUAC.

Certainly, we think that the Working Group has made a good-faith effort to compose a very balanced set of criteria to help governments to effect their ownership responsibilities with respect to SOEs.

Because we place so much stress on them ourselves in our own anti-corruption work with UNICORN, the international trade union network dealing with corruption issues (and as one example of where we will repeat what TUAC has said), we think that Chapter IV C (and the subsequent annotation) should reflect more than just internal codes of ethics, to include social and environmental responsibilities. Companies that cut corners in these areas must be suspect in any OECD state, where generally standards in these areas are quite high. People who are evading these responsibilities cannot be said to be holding to 'ethical standards' because breaches of such standards are inherently unethical.

In para. 122, in the Annotation to Chapter IV, we do not find it acceptable that states that have all signed up to the 'OECD Guidelines for Multinational Enterprises' 'might' only 'voluntarily' comply with them. If NCPs can hold all MNEs to them, when MNEs have not necessarily signed them, then surely states can hold their own enterprises to them.

Two paras later (124), we are a little concerned at the term 'without merit' in the final sentence. Certainly, we support the notion that frivolous or vexatious behaviour should be disciplined. But a whistleblower may in good faith bring to notice an issue that, in the full glare of an enquiry, turns out to be without merit. We would be happier if after 'without merit' the expression '(and evidently not made in good faith)' could be inserted.

Finally, and somewhat pedantically perhaps, the text in one or two places (for example, para 191) seems to confuse the English words/expressions 'comprise' and 'be composed of'. Perhaps an editor could look at the places where this occurs.

RIKSREVISIONEN (THE SWEDISH NATIONAL AUDIT OFFICE)

Please find below the comments of Riksrevisionen (the Swedish National Audit Office) to the draft text of the Guidelines on Corporate Government for State-Owned Enterprises (SOEs). The comments are limited to aspects of the draft guidelines where the Audit Office has recent experience.[1]

Special obligations of the SOEs (Paras 27 to 28)

The Audit Office agrees that any specific obligations should be clearly identified. Laws and/or regulations provide the basis for the SOEs existens. However, when parliament/government has decided that a particual SOE should accept certain obligations in terms of public service provisions or special responsibilities, we have noted the absence of sufficiently clear and formalised instructions to board members and senior management of the enterprise in question.[2] Such instructions should be adopted at the Annual General Meeting in order for them to be binding in accordance with the Companies Act.

Flexibility in administration of capital. (Para 47)

While the Audit Office recognises that flexibility in the administration of capital could in some instances be useful, we would like to point out certain risks associated, as well as one misunderstanding in the text.

If the objectives of the state ownership are not clearly defined – the risk is that any capital movement can be given *ad-hoc* explanation after the event. Further, there is a risk of decreased transparency, especially if decision making procedures are not documented adequately. The risk of cross-subsidisation is eminent and a particularly complex matter to audit. Based on our experience, the importance of well documented decision making and controlling procedures can not be overstated.

Finally we would like to point out that an *ex post* oversight does not avoid events (e.g. cross-subsidisation) from taking place – even if it may have deterring effects. Accountability requires adequate procedures in place and good *ex ante* controls. *Ex ante* controls or pre-"audit", which is the responisbility of the ownership entity, should not be confused with audit. It would be in contradiction to independent external audit – and code of ethics – for external auditors to participate in such *ex ante* controls.

---

1 Riksrevisionen has the right to appoint auditors to take part in the annual audit of SOEs on equal standing as those auditors from privat firms appointed by the annual general meeting. The audit office also carries out performance audits of SOEs as well as matters relating to SOEs. To facilitate access to the conclusions of the Audit Office we attach the English summaries of the following performance audits that were published in 2004.

- Vattenfall AB – uppdrag och statens styrning. *Vattenfall AB – commission and corporate governance* (RiR 2004:18);
- Arlandabanan – insyn i ett samfinansierat järnvägsprojekt; *The Arlanda-railway – insights into a co-financed railway project.* (RiR 2004:22); and
- Regeringens förvaltning och styrning av sex statliga bolag, *The governement's administration and governance of six state-owned enterprises* (RiR 2004:28).

2 *Vattenfall AB – commission and corporate governance* (RiR 2004:18) and *The Arlanda-railway – insight into a co-financed railway project* (RiR 2004:22)

Governance and accountability. (Paras 46 and 48)

The Audit Office recognises that certain flexibility with regard to the entity's processes and procedures, *vis-à-vis* its responsible Ministry as well as *vis-à-vis* the SOEs, may at times be convenient. However, based on the findings in recent audits,[3] we would like to emphasize the importance of recognising the limitations associated with such flexible procedures. In particular, decisions regarding strategic matters or those that may entail significant financial risks must be well documented so that the decision making process, as well as accountability, can be ascertained through financial or performance audits, or through scrutiny by parliament (e.g. Constitutional Committees).

Generally speaking, the lack of transparency in the "chain of command" creates risks for lack of accountability at all levels of governance of SOEs.

Board nomination of government officials. (Paras 58 to 62)

In Sweden, staff members from the central ownership unit are nominated to the boards of the very same SOEs for which they are in charge as government officials. Our conclusion in a recent audit[4] was, based on extensive legal analyses, that this practice is problematic, as objectively based doubts may be raised as to the impartiality of such government officials.

This double role also creates difficulties in achieving a reasonable level of internal control over the ownership unit's governance of State-owned enterprises, especially when combined with the informal way of governance applied.

External Audit. (Paras 138 to 140)

In order for accountability to be assured, all SOEs must annually disclose both financial and non-financial information in accordance with international standards, and be subject to an independent external audit, regardless of size.

If controls by the state are less than efficient, that matter should be discussed separately.

Overall objectives of the SOEs. (Paras 147 to 149)

It is the opinion of the audit offfice, that overall objectives decided by the government should not only be disclosed but also adopted at the AGMs in order for them to be binding in accordance with the Companies Act.

In paragraph 149 it is mentioned that it can be the role of the company to clarify its own ojectives. The Audit Office agrees, but would like to add that – for the sake of accountability and transparency – the owner should be prepared to take responibility for the interpretations of overall and strategic objectives. An appropriate way would be to bring such interpretetations to the AGM for formal and transparent approval by the owner(s).

---

3 *Vattenfall AB – commission and corporate governance* (RiR 2004:18), and *The government's administration and governance of six state-owned enterprises (RiR 2004:28)*

4 *The government's administration and governance of six state-owned enterprises (RiR 2004:28)*

SECURITIES COMMISSION OF ARMENIA

Dear Sirs,

We have studied the Guidelines on corporate governance of state-owned enterprises draft text and, on the whole, the involved items were acceptable. Nevertheless we find articles 41 and 9 disharmonious: in respect of this we advise to make a change to the article 41. The change is expressed in Guidelines on corporate governance of state-owned enterprises draft text below. Replace:

41. Centralisation of the ownership function in a single entity is probably most relevant for SOEs incompetitive sectors. It does not apply to all SOEs mainly fulfilling public policy purposes. These type of SOEs are not the primary target of these Guidelines, and in their case sector ministries may remain the most relevant and competent entities to exercise ownership rights which might be indistinguishable from policy objectives

with:

41. Centralisation of the ownership function in a single entity is probably most relevant for SOEs incompetitive sectors. It does not apply to all SOEs mainly fulfilling public policy purposes. ***It is possible that for these SOEs some of the definitions of these Guidelines will be partially or non implementable****, and in their case sector ministries may remain the most relevant and competent entities to exercise ownership rights which might be indistinguishable from policy objectives*

We would also like to inform you that we have granted the Guidelines to the relevant experts such as those supervising SOEs as well as those cooperating with us on this draft text. Suggestions resulted from continuous dialogue with relevant experts will be sent later.

SECURITIES COMMISSION OF MALAYSIA

Overall, OECD should be commended for laying a strong framework for the governance of State Owned Enterprises (SOEs). The Securities Commission (SC) believes that the draft paper highlighted and addressed key SOEs governance issues very well. However, we believe that there are some improvement opportunities that can be considered in finalizing the exposure draft. The following are areas that we feel can be considered by the Working Group:

Non-OECD Country Perspective

We note in the preamble of the draft Guidelines that "SOEs may still represent up to 20 % of the value added, around 10 % of the employment, and as much as 40% of market capitalisation in some OECD countries". Outside of the OECD, SOEs may represent even larger shares of the economy, such as in China. As such, we believe that non-OECD perspective should be accounted for in the negotiation process.

Diverse ownership structure of state owned enterprises

State owned enterprises cover a diverse range of legal statuses and ownership – from listed companies to government arms length agencies. How the Guidelines define the scope of SOEs in therefore crucial. We note from the preamble that for convenience purposes, the size of the control (e.g. full majority, significant majority or in certain instances linked to the state via a state investment vehicle) is not distinguished. We believe that this simplification might lead to the proposed governance structure being inadequate for certain forms of SOEs. The governance structure should be tailored to account for differing SOEs and those non-market based obligations they may be required to fulfill, where relevant.

Listing a minority of shares

Minority shareholders offer another potential source of pressure on SOEs. Because shareholders have a residual claim on the firm's assets, the value of minority shareholders' investments in the SOEs depends more strongly on the performance of the SOE. The government can retain control of the firm (and thus achieve at least some of the goals of full public ownership) while selling a minority of shares. Listing the minority shares on a stock exchange would also bring to bear the exchange's rules of corporate governance. Depending on the exchange, it may require the SOEs to include independent directors on its board, treat minority shareholders fairly, and provide comprehensive and timely financial reporting—all of which may help temper noncommercial political interference. A public offering of a minority stake in the SOEs also means that an estimate of value of shares in the SOEs will be available in the share price. That in turn may help reveal the commercial cost of political interference and allow performance pay based on market values (employee share ownership, option grants).

Integration of Public and Private Governance

The governance of state owned assets stands in between corporate governance and public governance. It addresses governance and accountability mechanisms for the government as an "owner" of productive assets, including the delivery of public services. At the same time, core issues of corporate governance are also addressed, including the organisation of the board of directors, the responsibilities of the government as a shareholder, and the participation of stakeholders, especially employees within state owned enterprises. Thus striking the appropriate balance is crucial to the success of the guideline and should be considered in finalizing the guidelines.

The SC would like to commend and thank the OECD Working Group on the comprehensive draft and the opportunity to contribute towards improving it.

L'UNION NATIONALE DES SYNDICATES AUTONOMES (UNSA)

Monsieur le Secrétaire général,

L'Union nationale des syndicats autonomes (UNSA) – France – membre de la Commission syndicale consultative auprès de l'OCDE (TUAC) considère comme importants les travaux menés afin de parvenir à l'énoncé de Principes directeurs sur le gouvernement d'entreprises à participations publiques. Comme pour les Principes directeurs révisés pour les entreprises du secteur privé, l'UNSA estime indispensable l'établissement, à défaut de règles plus contraignantes, d'un ensemble de principes et de bonnes pratiques à caractère volontaire.

Dans ce sens, elle s'est engagée de manière constante aux côtés du TUAC dont elle approuve et soutient l'action. Elle reprend donc à son compte les remarques et avis adressés au Secrétariat de l'OCDE .

Nous insistons tout particulièrement sur le fait que, pour être pleinement efficace, le cadre de gouvernance en cours d'élaboration doit impérativement prendre en compte les intérêts des salariés. En cela, elle estime positif que le principe de représentation des salariés au Conseil d'administration soit clairement mentionné dans le texte et souhaite que cette disposition soit maintenue.

A cette fin, l'UNSA, avec le TUAC, restera vigilante sur la suite des négociations avant leur adoption définitive en mai prochain, mais elle insiste d'ores et déjà pour que les amendements proposés par le TUAC soient pris en considération et insérés dans le texte final afin d'en augmenter, selon nous, la portée.

Par ailleurs, sans sous-estimer la charge que cela représente, l'UNSA souhaite qu'à l'avenir la mise à disposition en français des documents de travail, au moins dans leur version achevée, soit diffusés dans de meilleurs délais.

Vous remerciant de bien vouloir prendre en considération ces observations, je vous prie de croire, Monsieur le Secrétaire général, en l'expression de ma haute considération,

ANONYMOUS RESPONDENT

Dear Sir, Dear Madam,

First of all, congratulations for the good job. My opinion of the guidelines is that they are very good, very high-quality standards.

The clear separation between the role of the State as owner and its political role could not always be useful and it will be difficult to put into practice, at least in countries or in SOEs where the State ownership is justified not on the basis of a market failure but on the basis of its role in developing the country. In those cases, SOEs can be a good instrument of public policy, therefore, the political objectives regarding development may sometimes differ from the objectives of a company: maximize the benefit. What is good for the company may not always be good for the State. For instance, I can think about an oil public company wanting to search for new oil fields in high seas. For the company is a good objective, but it will have to enter in project finance, loans, etc. that may low its risk classification and contagiate it to the State's risk classification. There should be a way to reconcile or harmonize both objectives. For instance, the State should be able to say the directors of the SOE not to do it. And, how to reconcile or harmonize both objectives? Which one should prevail?

I agree with determining the objectives of the company but my doubt is whether all of them should be made public.

Also, if the directors are very good, highly-qualified, with market experience, good professionals, well-paid etc. but they will be elected by the coordinating public entity, then, the civil servants working at the coordinating entity should have the same characteristic, otherwise they may not elect good directors.

ANONYMOUS RESPONDENT

Dear Sirs,

I have read the draft text of the Guidelines on Corporate Governance of State-Owned Enterprises with great interest.

Although, I would please like to add some comments on the following issues, following the numbers in the draft.

1) Chapter II The State Acting as an Owner
Annotation to Chapter II, number 47

Comment: This part should be excluded from the draft text. The reason for this is that if the co-coordinating or ownership entity should be able to facilitate a change in the capital structure and therefore be able to give an indirect transfer of capital from one SOE to another, it would reduce the budget making powers of the Parliament and the transparency within the budgetary system. Since the Parliament ultimately represents the owners, the citizens, this proposal should not be a part of these Guidelines because there will truly be less transparency if the ownership entity makes this kind of indirect transfer of capital itself, than if this procedure must pass the Parliament.

2) Chapter II The State Acting as an Owner

H.2. Setting up reporting systems allowing regular monitoring and assessment of SOE performance and in the annotation to chapter II, number 76-80

Comment: In this part the importance of the co-coordinating or ownership entity being able to monitor SOEs' activity and performance on a continual basis, ensureing that adequate external reporting systems are in place for all SOEs, and developing the appropriate devices and selecting proper valuation methods to monitor SOEs' performance in respect of established objectives. To be able to perform effective monitoring of SOE performance, the co-coordinating or ownership entity should have the adequate accounting and audit competencies within the entity.

It is crucial that the person who is in the SOE board does not do the monitoring of the same SOE's performance. Furthermore, the same person should not develop financial objectives for the SOE. There is a clear risk that this person could find it hard to separate the two different roles of being both the owners' representative in the board and act in the best interest of the company. It is also a risk that the owners' agenda does not always correspond with the agenda of the board or the company. In this case, in which interest will the person who is in the board on the owners mandate act? According to the law, it should of course be of the interest of the company, but will this always be the case?

Similar comment would be on the number 59 in the same chapter. It is true that when staff of the ownership entity are appointed to SOE board, they should have the same duties and responsibilities as the other board members and act in the interest of the SOE and all its shareholders. But there are difficulties if this person also develops financial objectives for the SOE and monitors the SOE's performance.

3) Annotations for Chapter VI: the Responsibilities of SOE Boards, number 173

Comment: Who will develop the mechanisms to evaluate and maintain the effectiveness of board independence? The board itself, the owner or someone else? This should be clarified within the text.