



Organisation for Economic Co-operation and Development

**Consultative Meeting
on the Guidelines on Corporate Governance of
State-Owned Assets with Member Countries**

Summary Note

Wednesday 13 October 2004

Location:
International Energy Agency
Room 1
9, Rue de la Fédération,
75739, Paris
France

Consultative Meeting on the Guidelines on Corporate Governance of State-Owned Assets

The meeting started with a welcome message by the Chairman Mr. Mats Isaksson, Head of Corporate Affairs Division, OECD followed by opening remarks by Mr. William Witherell, Director of Financial and Enterprise Affairs Directorate, OECD, and by Mr. Cederlund, Member of the Working Group on Privatisation and Corporate Governance of State-Owned Assets and Senior Advisor, division for State Owned Enterprises in the Swedish Ministry of Industry, Employment and Communication. The discussion then proceeded to deal with the Preamble of the Guidelines.

PREAMBLE

A large part of the discussion focused on the relationship between the Guidelines and the Principles: some participants stressed the complementary role of the Guidelines with respect to the Principles and moreover suggested repeating the concepts comprised in the Principles. In addition, with respect to the Principles, some participants remarked that the equivalent of the new Chapter 1 “Ensuring the basis for an effective corporate governance framework” was missing in the Guidelines, although this aspect is particularly critical for SOEs.

A number of countries asked for clarification and a better definition of the scope of the Guidelines; furthermore they raised the need to specify which SOEs are particularly targeted by each recommendation (for example: SOEs with political objectives or in competitive sectors, large or small SOEs, etc.). Conversely, other countries reiterated that governance should not be related to the size of enterprises. Finally, a number of participants stipulated that the Guidelines do not ask for changes in the national law. They also stressed the need to take into account the different checks and balances existing in the overall institutional framework.

CHAPTER I: Government as an Owner

The session was opened by the Swedish representative, Ms. Eva Halvarsson, Director, Ministry of Industry, Employment and Communications, Division for State Enterprises, who stressed the need for separating the ownership function of the State from its policy involvement.

As a general comment, some countries asked for a clearer distinction between the two concepts of State and Government, in this chapter as well as throughout the document.

Guideline A: With regards to the ownership policy, it was recommended to ask for an appropriate use of public consultation. The functional equivalence of the Annual General Meeting was also questioned by some participants, especially when dealing with fully owned SOEs. However, other member participants considered the AGM to be the appropriate forum to solve intra-governmental issues. Many State representatives underlined the necessity to frame the objective function of the firm and its relationship with the State. At the same time the need to further discuss and elaborate the annotations on both the priorities and the constraints of SOEs’ objectives was stressed.

Guideline B: Many countries suggested strictly limiting directives to strategic and policy related issues, and requiring their public disclosure. Problems related to slow reactions of the government were also mentioned.

Guideline C: This recommendation was considered a very important issue for less developed economies. The need to distinguish between SOEs in competitive sectors and SOEs with political purposes was raised.

Guideline D: Many participants called for more attention to be given to the risks related to the harmonisation of legal forms of SOEs; on the other side others suggested that in this respect the primary importance is to ensure transparency. In the case of a limited number of SOEs present in a particular country, some argued the legal status of its SOEs may be tailored more specifically. There was a general agreement on the need to keep a flexible approach in order to be able to deal with the differences among States, but it was also recommended to avoid as much as possible creating specific SOEs' statute and thus deviating from private sector rules. TUAC underlined the need for clarification and simplification in cases but also mentioned the potential need for and relevance, in certain cases, of specific statutes.

CHAPTER II

Introduction: The discussion of Chapter 2 was opened by the French representative, M. Eric Preiss, Secrétaire Général, Agences des Participations de l'Etat, Ministère de l'Economie, des Finances et de l'Industrie, who warned of the risk that multiplicity of controls may lead to inefficiencies of control, and suggested that there may be cases where SOEs have de facto too much autonomy.

Guideline A: The discussion of this guideline showed divergence in opinions among countries with regards to the need to centralise the ownership functions and consequently generated a call for more flexibility and a greater choice of options. A number of participants asked to consider alternatives in order to avoid adding new layers of bureaucracy; some also mentioned the issue of the accountability of the centralised entity. Some participants stated that a Holding Entity (as in Austria) may act as a filter for political interferences. In any case, the most important issue is considered to be a clear identification within the administration of the ownership function and a clear separation of the ownership function from regulation.

Guideline B: Various representatives asked to balance the content of paragraph 41 since SOEs can be vulnerable to expropriation by the Government. The difficulty in avoiding political interference when in close proximity to Ministries was also underlined.

Guideline C / C1: Certain countries requested going further with fiduciary duty for the State to exercise its right of vote and also for the State to give an explanation when this right has not been exercised. **C3:** Some participants asked to further elaborate on board nomination.

Guideline D: On this subject the need to incorporate assets and liabilities into public accounts was mentioned.

Guideline E: More than one participant asked to move this paragraph to chapter 1 in order to give it more relevance. Others have focused the attention on the multiplicity of the roles of the State and proposed to add the State as a customer and the State as a client. TUAC argued that the main aim is to prevent conflicts of interest and comply with international standards and question the feasibility of clearly separating the industrial policy and ownership functions. Many participants insisted on the issue of fair competition between SOEs and other enterprises.

CHAPTER III

In the introduction, the Italian representative, Dr. Enzo Cardì, President, Poste Italiane, linked the contents of this chapter to those of other chapters, in particular, chapters 5 and 6 and developed a series of cross references. He also warned on the necessity to distinguish between the different conditions in which the State finds itself becoming an owner: whether this happens to prevent crisis or whether it does so after the transfer of shares (and in the latter case if it is through an IPO or through sale to institutional shareholders). The Italian representative also strengthened the need for regulatory requirements with regards disclosure.

The main issues raised concerning this chapter were: the necessity for more attention on effective control and not only on ownership structure; the fact that minority shareholders (and not exclusively majority shareholders) also have obligations; the need for disclosure regarding the shareholders agreements; and the need to eliminate deviations from the one share-one vote principle such as golden shares.

Guideline 3C: It was agreed among the participants that the State may also be a minority shareholder and abuse its position and therefore it is essential to clarify that the State should be subject to the same rules as any other minority shareholder: the State has in fact rights and obligations and it should be exemplary in this regard. There is also a need for redress mechanisms where there have been violations.

CHAPTER IV

The Korean representative, Dr. Il Chong Nam, Fellow, KDI School of Public Policy and Management introduced the chapter. He explained that stakeholders' issues are even more important and complex for SOEs than they are for privately held companies; in this regard unbundling different roles of the State is a key factor. In particular there is the need for attention to fair procurement and creditor protection.

BIAC asked for a certain caution in adding more on this subject with respect to the Principles as they were a balanced compromise. Moreover they added that Corporate Social Responsibility issues are dealt with through other OECD instruments.

Some countries recommended caution on the subject of stakeholders, in order not to open the door to policy considerations. Some participants also underlined the difficulties in transforming the entitlement legacies into effective performance enhancing mechanisms. Other representatives considered that the SOEs specificity is that their ultimate responsibility is towards society and therefore there is the need for a more flexible attitude with respect to the Principles.

Guideline 4B: Some participants suggested not restricting the prescriptions on policy orientation to only large non listed SOEs.

Guideline 4C: Some participants envisaged the need to mention compliance programmes. Others raised an issue concerning the opportunity to involve subsidiaries in the compliance programme. A number of representatives suggested the necessity of a code of conduct specifically for the board. Globally, there was good support given to the idea that SOEs should not be considered as front runners but merely as normal enterprises.

Guideline 4D: In terms of insolvency, it has been remarked that SOEs' employees may be the only ones left unprotected. It is necessary to ensure the same conditions for SOE and private company employees. Regarding state guarantees, participants suggested expanding and going further on the issues of remuneration, disclosure and market prices.

CHAPTER V

The introduction was made by Mr. Jens-Hermann Treuner, Member, Federal Court of Audit Germany, the German representative who underlined the importance of this chapter for all other chapters. He also repeated, as had other colleagues, that SOEs do not need to be front runners with respect to the privately held companies (no additional obligations but good compliance). A clarification of what aggregate reporting exactly means was also called for. Additionally, a suggestion was made to add that SOEs should declare if they follow a corporate governance code, and explain how they apply its recommendations.

Guideline 5A: Some representatives remarked that this specific guideline presupposes a centralised ownership entity, which is not the case in all countries. Others commented that aggregate reporting is useful but not essential, while regular reporting by individual SOEs is the most important target. Some participants also stated that it is nevertheless important to make an effort to streamline SOEs' reporting and accounting standards.

Guideline 5B: Here also, the question of the scope of relevance of this Guideline was raised, and more particularly whether it should also concern small SOEs. The key point, on which many agreed, is to ensure confidence, encourage a good reputation of SOEs and mitigate political risk. There was also general support for the neutral position adopted by the current draft guidelines regarding the best standard.

Guideline 5C: One participant suggested tackling a specific issue, i.e the disclosure of reserves for resources companies according to best practices. **5C2:** transparency regarding the ownership structure should specify which different administrative departments do own shares. **5C3:** participants suggested specifying that disclosure should be made according to new and changing standards, and reminded of the necessity to disclose off-balance sheet liabilities. **5C4:** disclosure of guarantees should be required, but the State should also have a clear general policy regarding granting guarantees, including disclosure and accountability before Parliament.

Guideline 5D: Some participants mentioned that external audit may not be better than state auditors: some state audit bodies are indeed very efficient. What is important is to use sound standards. Many agreed on the need to reinforce independence of auditors (and therefore to make paragraph 127 more prominent).

CHAPTER VI

Mr. Morten M. Kallevig, Deputy Director General, Ministry of Trade and Industry, Department of Ownership, the Norwegian representative introduced this chapter and called for caution when using the term "state representative". The other important issues raised concerned the fact that the owner has to give clear mandate to the board on the way of dealing with conflicts of interest.

Guideline 6A: Some participants asked for further elaboration on how the board should be involved in the nomination process and called for a more balanced approach, involving both the board and the ownership entity in the nomination process. Other participants asked for a clearer distinction between the terms nomination and election. In spite of the need of insisting on active involvement of the ownership function in nomination of the board, the countries agreed that it would be difficult to find a universal model or approach. Some participants suggested that the issue of board nomination might be better treated in chapter 2. There were also alternative options proposed, for example, the Korean model where there is an evaluation committee to nominate the SOEs' board. Some participants underlined that establishing clear criteria for nomination is more important than avoiding political appointees.

Guideline 6B: A number of participants underlined that civil servants on boards should have the same duties and responsibilities as the rest of the board's members.

Guideline 6C: Some participants noted that independence is a difficult concept, particularly for SOEs. It is difficult to figure out how to prevent political interference in practice. However, other participants stated that board independence may be less important than competence. The need to allow flexibility on how the ownership entity should participate in the nomination process in practice was underlined. A suggestion was made to add a requirement to increase diversity within boards.

Guideline 6D: Some participants considered it necessary to add that employees' representatives should act in the interest of the company as a whole and have the same rights and the same responsibilities/liabilities. TUAC underlined the trend to recognise employees' representatives on boards as independent directors. Additionally, they suggested that employees' representatives should be able to positively contribute to the board (and not only listen). In other words, the need for "no super nor silent directors" was made clear.

Guideline 6E: Many participants strongly supported the separation of the function of Chair from CEO in SOEs. Some proposed that the board should not only nominate the CEO, but also nominate the other major executives. On the other hand, the Korean representative illustrated the problems encountered by his country with regards incompetent chairs and commented that CEO and chair may be one and the same, provided that an effective control of the CEO by the board is ensured through a majority of independent directors on the board. The need for the CEO to report to the board was underlined by some participants in order to ensure a proper control of his decisions. Moreover, a number of participants proposed that where the CEO's appointment is the object of shareholder agreement, the latter should be disclosed.

Guideline 6G: Many participants raised the need to add strategic, regulatory or procurement committees. It was also agreed that the desirable level of independent directors within committees depends on the focus of the committee. Some suggested requiring the circulation of minutes of the committees to the board (except for remuneration issues).

Guideline 6H: Some participants stated the need for caution regarding potentially heavy handed "help" from the ownership entity. It was also noted that self evaluation is increasingly considered good practice but such kind of evaluations need not be disclosed. It is also suggested to soften the wording of this paragraph, as "best practices" are still developing in this regard.

Guideline 6I: The need to add the CEO remuneration issue was raised by a number of participants.