

# Public consultation on the draft revisions to the OECD Guidelines on Corporate Governance of State-Owned Enterprises

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## **Introduction**

These comments are submitted to the OECD as a contribution to the ongoing (2023-24) revision of the OECD *Guidelines on Corporate Governance of State-Owned Enterprises (SOE Guidelines)*. The *SOE Guidelines* continue to be used around the world as the leading standard setter for SOE reforms. They have guided national legislative reform efforts, supported the creation of new ownership institutions and underpinned efforts to strengthen the transparency of both SOEs and state shareholding institutions. The proposed revisions developed by the OECD and made available to the public constitute important improvements to this policy instrument. They will help raise the ambitions of ongoing and future national SOE reforms, so that SOEs can deliver sustainable value creation alongside private companies.

The comments that follow are made in the spirit of further heightening the aspirations of the *SOE Guidelines* and making them as useful as possible to countries seeking to improve SOEs' performance through changes to their ownership and governance arrangements, legislative frameworks and disclosure practices. They are structured as follows: (1) a first section offers general proposals to better address several specific state-ownership reform challenges that are often encountered by countries embarking on SOE reforms; and (2) a second section provides more detailed comments and proposals on individual chapters of the *SOE Guidelines*, including by elaborating on the aforementioned general proposals.

## **General proposals to better address several specific state-ownership reform challenges**

- 1. Promoting necessary privatisations and setting an ambition for transparent privatisation processes that take into account the public interest.** SOEs are often kept in state ownership although there is no evident reason for doing so. In their current form, the *SOE Guidelines* call for governments to clearly define the overarching rationales for state ownership and to periodically review the rationales for owning individual SOEs. However, there is no guidance set forth for what to do when the rationales for maintaining an SOE in state ownership are no longer evident. The *SOE Guidelines* could be more ambitious in this respect by recommending that the state privatise SOEs where the rationales for state ownership are not present. The text could further be enriched with new language regarding the need for privatisations to be undertaken transparently and in the public interest. Critics of these proposals might suggest that these topics are outside of the scope of "corporate governance" and therefore do not belong in the *SOE Guidelines*. But the *SOE Guidelines* already include many provisions that are not purely related to corporate governance, for example concerning fair competition in the marketplace, whose inclusion has only served to strengthen the usefulness of the *SOE Guidelines*.
- 2. Further depoliticising SOE boards and senior management.** In many countries, SOE board and/or senior management terms closely follow political cycles, reflecting state shareholder decisions that are influenced more by the political environment than the long-term interests of the enterprise. The *SOE Guidelines* could specifically recommend that SOE board and management appointments and dismissals be based on performance and take into account the long-term interests of the enterprise, as a means of addressing this issue in a targeted manner. This could bolster efforts to decouple SOE corporate and political leadership and support a more professional management of SOEs. Additionally, the *SOE Guidelines* should not limit the prohibition of politicians serving on SOE boards to politicians with material

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influence over SOEs' operating conditions; any politician serving on an SOE could be prone to use their perceived state power to influence corporate decisions in the interest of personal or political gain.

3. **Encouraging corporate restructurings to promote SOE performance improvements.** A fundamental reason for implementing state ownership reforms in line with the *SOE Guidelines* is to ensure that SOEs create value for society, in the form of financial returns and/or the effective and efficient achievement of public-policy objectives. But ownership and corporate governance improvements are not sufficient to ensure that SOEs perform well. In many cases, strengthening SOEs' value creation also requires corporate restructurings to improve enterprise efficiency and/or better calibrated funding for non-commercial objectives. The *SOE Guidelines* could specifically recommend that governments assess the sources of SOEs' underperformance for enterprises with low financial returns and undertake structural changes as appropriate. This would encourage countries with large portfolios of loss-making SOEs to take extra steps to assess and subsequently address the sources of these losses, either through restructuring or better calibrated, and transparent, compensation for public-policy objectives. If the language is carefully crafted, then including such intermediary guidance to help countries better implement the *SOE Guidelines* does not need to contradict the instrument's overall approach, whereby individual provisions contain mostly very ambitious "best practice" final outcomes. For example, the text could state that achieving the *SOE Guidelines'* ambitions related to SOEs' financial performance may require in-depth assessments of the reasons for under-performance, together with structural reforms and/or adjustments to funding mechanisms.
4. **Recommending that national authorities publish online a full list of all enterprises in state ownership, independent of producing a comprehensive aggregate report.** The dearth of data on SOEs is well known and the *SOE Guidelines* already include very ambitious targets for strengthening the quality of individual SOEs' financial disclosures as well as the transparency of state shareholding institutions. In practice, many countries are quite far from achieving the ambitious transparency standards of the *SOE Guidelines*. A large number of countries do not even maintain, let alone publish, a central list of companies in public ownership. The *SOE Guidelines* could include a new recommendation that all countries gather and publish a complete list of the state's SOE portfolio online, independently of – and perhaps as a stepping stone to – producing a full aggregate report on SOEs' activities and performance. This would support greater basic transparency on states' enterprise portfolios even in cases where the authorities do not have the institutional resources to undertake comprehensive aggregate reporting.

### ***Detailed comments on the individual chapters of the SOE Guidelines***

#### *Applicability and definitions*

**SOEs that are slated for privatisation could be more explicitly referenced as under the scope of applicability of the *SOE Guidelines*.** In many countries that are in the nascent stages of SOE reform, establishing centralised monitoring frameworks for SOEs often serves as a stepping stone for implementing stronger and more harmonised governance and transparency practices within the companies. However, companies that are slated for privatisation are often excluded from the scope of such efforts. This would not be a particularly significant issue if such companies were privatised in short order, but the fact is that sometimes privatisation portfolios can remain in state ownership for several years or even decades. It would therefore be fruitful to include some more explicit language in this section reflecting the fact that SOEs that are slated for privatisation should be considered SOEs, and should thus be governed by the standards of the *SOE Guidelines*, until they are actually privatised. While such companies do already fall under the scope of applicability according to the *SOE Guidelines'* clear provisions on ownership and control, it would still be useful to reference them more specifically.

**It could be useful to define "ownership rights" or enumerate some examples in this section.** Other OECD documents have used a version of the following text: "state ownership rights refer to the power, responsibility,

or steering ability to (1) nominate or appoint SOE boards of directors; (2) set and monitor SOE objectives; and (3) vote company shares on behalf of the government.”<sup>2</sup>

**The reference to independent board members’ remuneration as a limit to their independence could be reconsidered.** Normally, independent non-executive board members are remunerated by the enterprise for their board service. The proposed text seems to indicate that such remuneration would constitute a material interest in the company that would jeopardise board members’ independence. Remuneration is a crucial mechanism for attracting qualified independent professionals to SOE board positions.

**The level playing field text could be clarified.** The current text on the level playing field references a situation in which all enterprises are provided “a level playing field with respect to a state’s ownership [...], regulation or activity in the market.” The reference to a “state’s ownership” introduces some confusion, as there is no level playing field concerning state ownership, since private companies are not owned by the state. It could also be useful to include in the “level playing field” text a more general reference to the intended outcome, such as the absence of operational advantages or disadvantages that could distort fair competition in the marketplace.

### *Rationales for state ownership*

**As suggested earlier, this chapter could include a more ambitious reference to – or a new Guideline on – the need to privatise SOEs in which the agreed rationales for state ownership are not present.** One implicit purpose of defining and publishing the rationales for state ownership (i.e. being clear about why the state owns companies) is to ensure that SOEs are only maintained in state ownership if there is a clearly established policy rationale behind it, but the *SOE Guidelines* do not currently make this sufficiently clear. In practice, many countries have – through legislation, policy or otherwise – clearly defined the agreed rationales for state ownership but still maintain non-trivial portfolios of enterprises in which the rationales for state ownership are not evident. This often reflects failed earlier privatisation efforts or simply policy inertia. The *SOE Guidelines* could help bolster necessary privatisation efforts by including more ambitious related language in this section.

**The text could propose new outcomes-based standards for ensuring that privatisations are undertaken transparently and in the public interest.** Without being prescriptive about what methods should be used for privatisations, the *SOE Guidelines* could set some basic ambitions about what factors should be taken into account and what principles should be respected when privatising an SOE. These could include, for example, ensuring that privatising a particular SOE is deemed to serve the public interest more than maintaining the company in state ownership would, that the proceeds are market-consistent and that the process is undertaken with sufficient propriety. This could build on the recent work conducted by the OECD in this domain<sup>3</sup>.

### *The state’s role as an owner*

**The related text could be more prescriptive regarding the need to incorporate SOEs as companies operating primarily under the general companies law.** Rather than just “simplifying and standardising” SOEs’ legal forms, the text could recommend more explicitly that SOEs be incorporated under the same legal forms as private companies. The text could further specify that any additional laws applicable to SOEs by virtue of their state ownership (e.g. a dedicated law on state-owned enterprises) should not introduce any differences in treatment or operational conditions that could distort fair competition with private companies. In their current form, the provisions on SOEs’ legal forms could be interpreted to allow for the continued use of SOE-specific legal forms subject to their own dedicated legislation outside of the general companies law, since such dedicated legislation could be considered “standardised” in line with the *SOE Guidelines*. The OECD regularly recommends to accession-

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<sup>2</sup> See, for example, OECD (2020), *Organising the State Ownership Functions: Implementing the OECD Guidelines on Corporate Governance of State-Owned Enterprises*, <https://www.oecd.org/corporate/Organising-state-ownership-function.pdf>.

<sup>3</sup> OECD (2019), *A Policy Maker’s Guide to Privatisation*, <https://www.oecd.org/corporate/a-policy-maker-s-guide-to-privatisation-ea4eff68-en.htm>.

candidate countries to abolish the use of such legal forms for SOEs engaged in economic activities. The *SOE Guidelines* could also adopt this more stringent and good-practice interpretation of the related provisions.

### *State-owned enterprises in the marketplace*

**This section could include some more specific text on eliminating state subsidies for commercial activities and, as suggested earlier, undertaking structural changes in SOEs with low financial returns.** Although subsidies are implicitly included in this section's "direct financial support", they are common enough in some countries, often to keep loss-making SOEs afloat, that it would be fruitful to reference them explicitly in the text. The text could state that subsidies should only be provided to SOEs to finance public-service obligations and that they should not be used as a systematic measure to keep loss-making SOEs afloat. The text could also propose that in SOEs that regularly achieve low financial returns, or are outright loss-making, the state shareholder should review the sources of these losses and implement structural changes as necessary. Such an explicit text on addressing loss-making SOEs could support national efforts to undertake necessary corporate restructuring – or, as relevant, to more adequately and transparently compensate for public-service obligations – in SOEs, increasing their value-creation potential and reducing their fiscal risks.

As already noted in the first section of these comments, critics of this proposal might note that referencing "loss-making SOEs" risks contradicting the aspirational nature of the *SOE Guidelines*, according to which SOEs should achieve market-consistent rates of return. In their current form, it is true that the *SOE Guidelines* do not generally provide much intermediate guidance for situations where their aspirational standards have not been fully implemented. To maintain consistency with this aspirational approach, softer language could be introduced, such as "achieving market consistent rates-of-return may require structural changes within the enterprises and/or better calibrated and transparent funding for non-commercial objectives".

**The text on the state's rate-of-return expectations could reference private investors' expectations rather than the rates actually obtained by SOEs' private competitors.** The state as shareholder should set shareholder expectations of return that are comparable to those that a private investor would set in like circumstances. The current text sets the ambition that return expectations should mirror the returns actually achieved by competing private companies, but perhaps it would be more ambitious to align the state's expectations with those of private investors in the same industry. It would also avoid the hypothetical situation where the state's return expectations could be aligned with poorly managed, low-performing private competitors.

### *Equitable treatment of shareholders and other investors*

**It should be made clear that public policy objectives should not materially affect SOEs' performance, results or viability.** The proposed IV.C. rightly notes the need to clearly inform non-state minority shareholders about any public-policy objectives that may materially affect the company's performance. However, the inclusion of this text risks contradicting other parts of the *SOE Guidelines*, e.g. III.C.2 recommending that the net costs of public-service obligations be separately funded. It also somewhat conflicts with the aspirational nature of the *SOE Guidelines*, which in their current form present outcomes-based standards associated with the best international good practices. Perhaps this text could be revised to state that information on public-policy objectives, including regarding their costs and funding mechanisms, should be made available to non-state minority shareholders.

### *Disclosure, transparency and accountability*

**As suggested in the first general comments, a standalone Guideline could be added recommending that governments publish a list of all SOEs online.** The dearth of data on SOEs globally is well known and is a result of national government's limited efforts – or limited ability, in particular in cases of highly decentralised ownership arrangements – to be fully transparent about the SOEs in their portfolios. If a person is interested in the SOEs operating in a particular country, in a minority of "good practice" cases, they may find a complete list of SOEs on the website of the state ownership entity, with uncomplicated access to their financial and non-financial disclosures. Otherwise, their options include searching internet-based reference sites, where they may find an

incomplete and/or outdated list, or consulting international sources such as the OECD's recurrent data collection exercise, which, although the most extensive and comparable overview currently available, includes mostly aggregate data rather than a full list of individual companies.

The *SOE Guidelines*, in their current form, do already include text recommending that governments publish a list of SOEs, but it is integrated into the text on undertaking comprehensive aggregate reporting. Including a separate standalone Guideline on publishing a list of SOEs would encourage more countries to take this first step towards greater transparency, even if they do not have the resources to put together a comprehensive aggregate report. The recommended list could reference the legal name of each company and could include additional information as available to the publishing authority. Such information could include, for example: legal form; sector of operation; percentage of government (and private) ownership; identification of other shareholders as relevant; number of employees; links to financial and non-financial disclosures; links to relevant legislation such as the enterprise's founding legislation; a link to the enterprise website as available; and an identification of board members. It could be made clear in the *SOE Guidelines* that the publication of such a list should not be contingent upon gathering all of this enterprise-specific information, but that a basic list of state-owned enterprises should be available online, with such additional information provided as available.

### *The composition and responsibilities of the boards of state-owned enterprises*

**The text could address the frequent issue, mentioned in the first general comments, of SOE board and management changes being linked to political cycles.** It is commonplace, including in many OECD countries, for the boards and/or management of strategically important SOEs to change when a new Government is elected. When boards and/or management are completely replaced following the arrival of new ministers, this reflects a state ownership landscape that is highly politicised, in which boards are not trusted to professionally oversee management according to clear corporate objectives set by the state as shareholder. It makes it difficult to establish and implement long-term corporate strategies and it introduces inefficiencies linked to insufficient institutional knowledge transfer. Given that this practice is so commonplace in many countries, it would be fruitful to include some language in the *SOE Guidelines* to limit it. The text would not need to specifically reference this common practice but could, for example, recommend that the renewal or dismissal of SOE boards and/or CEOs be based on their performance and take into account the long-term interests of the enterprise.

**The recommendation against politicians serving on SOE boards should not be limited to those politicians "in a position to influence materially the operating conditions of SOEs".** Even politicians without a state mandate conferring a direct influence over SOEs' operating conditions could still be prone to use their board position(s) – together with their perceived state power – to influence corporate decisions for personal or political gain. A politician without direct influence over SOEs' operating conditions might also be inclined to work in concert with another member of their political party who *does* have such influence over SOEs' operating conditions. Including the proposed qualifier in the text risks encouraging countries to continue to allow acting politicians to serve on SOE boards, which increases the risk for political interference and conflicts of interest and does not serve to professionalise SOE boards. An additional issue is that acting politicians are unlikely to be in a position to devote adequate time to board duties.