

Legal Status and Objectives of State-owned Enterprises in Ethiopia: A Global Perspective

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ABSTRACT

State-owned enterprises take on various legal statuses across jurisdictions and, sometimes, even within the same jurisdiction. Also, state-owned enterprises pursue multiple commercial and public service objectives. In Ethiopia, relevant laws define the status and objectives of state-owned enterprises. These laws have been, however, criticized for inadequately regulating the legal status and objectives of state-owned enterprises. This article appraises these laws in light of the OECD Guidelines on Corporate Governance of State-owned Enterprises, the World Bank toolkit on Corporate Governance of State-owned Enterprises, and national best practices. Thus, it finds that the existing laws on the status and objectives of state-owned enterprises do not cope with global practices. They establish multiple forms of statuses and mandate state-owned enterprises with expansive and potentially competing objectives. This situation causes state-owned enterprises to face multifaceted problems. The laws need improvement to incorporate the best rules of status and objectives of state-owned enterprises.

Introduction

State-owned enterprises (SOEs) have undergone several modifications over the years and now have a legal status that is closely linked to their legal form (W. Friedmann 1969, 83-89; Obinger, Schmitt, & Traub 2016, 6-19). Changing their legal form will fundamentally alter their legal status. SOEs are also responsible for

carrying out tasks that are recognized and mandated by the law. Legal status and objectives are crucial for the existence and continued operation of SOEs. They ensure standardized corporate governance in SOEs. As a result, international institutions such as the OECD and the World Bank recognize legal status and objectives as an integral part of the corporate governance of SOEs.

Scholars also contribute to the discussion on the legal status and objectives of SOEs.

Similarly, Ethiopia has enacted laws and regulations that define the legal status of SOEs. These laws establish three categories of SOE legal status, which are departmental undertaking, statutory corporation, and share company. The laws and regulations also require SOEs to participate in the production and distribution of goods and services while fulfilling public interest obligations and investing in less viable investment sectors. However, the laws and regulations have several problems and challenges. They involve gaps and inconsistencies, which cause disparities in SOEs. Moreover, they do not provide adequate guidance on critical issues related to SOEs. They are criticized for not keeping up with global developments on the legal status and objectives of SOEs. In light of the situation, this article delves into the impact of the current Ethiopian legal system on the corporate governance of SOEs. The article compares the Ethiopian practices with the OECD Guidelines and World Bank toolkit on Corporate Governance of State-owned Enterprises and national practices. Additionally, it draws from various scholarly works on the subject to provide an in-depth analysis.

The article structures the remaining parts as follows: The second section will review the concept of legal status and objectives of SOEs. The third section will examine the global practices on the legal status and objectives of SOEs. This section will analyze the OECD Guidelines, World Bank toolkit, and national practices on the legal status and objectives of SOEs. The fourth section will investigate the legal framework and issues of legal status and objectives of SOEs in Ethiopia. Section five will appraise the similarities and differences between Ethiopian practice and global practices on the legal status and objectives of SOEs.

Section six will deal with the problems and challenges Ethiopian SOEs face due to the current legal structure on status and objectives. Finally, the article ends with a conclusion.

1: The Concept of Legal Status and Objectives in State-Owned Enterprises

The evolution of the legal status of SOEs is exceedingly associated with their legal form. A renovation of their legal form fundamentally alters their legal status. Legal form significantly determines the legal status of SOEs. Legal status is the legal condition that a SOE possesses by the law. It encompasses a set of privileges, obligations, powers, or restrictions of a SOE (Garner 2009, 1542). Legal status subjects SOE to ordinary laws of the land and receive equal treatment and protection as natural persons. More specifically, legal status clinches the creation, regulation, purposes (objectives), financial and operative, governance structure, and relationship with the owners and other stakeholders of SOE (Friedmann 1947, 377). It guarantees SOE a distinguished way of establishing, regulating, and implementing objectives, governance structure, and interaction scheme.

Correspondingly, an objective is a key value in SOE, as in other entities. An objective is a specific result that an SOE aims to achieve within its available resources and restricted time framework (Nestian 2014, 868). It is a guideline for outlining the actions and efforts to achieve the SOE's goals. It provides a clear statement about the quality or the quantity of work to be achieved within a given period. It assures the continued existence of SOEs. Peter Drucker (2013) argues that objectives “are not fate; they are direction. They are not commands; they are commitments. They do not determine the future; they are means to mobilize the resources and energies of the business to make the future” (Drucker 2011,

121). An objective must be SMART: specific, measurable, assignable, realistic, and time-related. It shall necessarily be formulated based on current facts and information about the internal and external context and on the quality or the quantity of work to be accomplished within a given period. SOE often pursues objectives that are distinguished from other entities. They carry out both commercial and public service objectives including industrial and policy goals. The process involves the state as owner and playmaker.

2. Global Practice on Legal Status and Objectives of State-Owned Enterprises

The legal status and objectives of SOEs are of great importance globally. The OECD guidelines and the World Bank toolkit provide recommendations in this regard. Additionally, countries establish legal frameworks to govern the legal status and objectives of SOEs. Scholars also offer their perspectives on the legal status and objectives of SOEs. This section analyzes the global practices related to the legal status and objectives of SOEs.

2.1. Global Practice on Legal Status of State-owned Enterprises

The OECD guideline recommends that countries should strive to simplify and streamline the operational practice and the legal status under which SOEs operate (OCED 2015, principle II(A)). This guideline provides that SOEs may have a specific, and sometimes multiple legal status given the specific objectives, societal considerations, and special protection accorded to certain stakeholders. It simultaneously commends the legal status shall be as simple as SOEs undertake normal corporate practice. The World Bank toolkit also suggests countries introduce legal status that will realize effective ownership control and ensure efficient performance in SOEs as

private companies (The World Bank 2014a, 34).

Although the OECD guideline and World Bank toolkit provide recommendations, they do not endorse any specific legal status for SOE. As a result, the legal status of SOEs varies between countries depending on their economic value, political ideology, historical context, and level of economic development. Countries as diverse as Kosovo, Chile, and Singapore recognize a relatively uniform legal status of SOEs. In these countries, all SOEs have a standard legal status; however, the state is the only shareholder. In Kosovo, Law No. 03/L-087 stipulates that every publicly owned enterprise has a joint stock company status.¹ In Chile, the Chilean Public Enterprise System (SEP) Code defines SOE as an enterprise established by law without employing any specific typology, and hence, all SOEs have public administration status (The World Bank 2014b, 16). Similarly, the Company Act 1967 of Singapore recognizes that all government-linked companies take on a limited liability company status.²

On the other hand, many countries introduce multiple legal statuses of SOEs in their territories. In these countries, there are wide ranges of legal statuses of SOEs. The Commerce Act of Bulgaria stipulates that SOEs may choose a single-owner limited liability company, a single-shareholder joint-stock company, or a state enterprise (to be established via separate law) status.³ Similarly, in Brazil, Decree Law 200 of 1967 recognizes two types of legal statuses for SOEs: public enterprise and public/private joint venture statuses.⁴ In Paraguay, Law 5058/2013 recognizes two legal statuses of SOEs: public enterprise and

¹ Law No. 03/L-087 2008, Article 4.1.

² Companies Act 1967, Article 17.

³ Commerce Act 1991, Article 62.

⁴ Decree Law 200 196.

corporation statuses.⁵In India, the Company Act of 1956 recognizes departmental undertaking status, statutory corporation status, and governmental limited liability status.⁶ In Niger, ordinances adopted in 1986 put in place four types of legal statuses of SOEs: industrial and commercial public entity status, administrative public entity status, state-owned company status, and partially state-owned company status(World Bank 2019, 37-38).

By and large, SOEs have no universally harmonized legal status. Countries pragmatically establish various types of legal statuses. This corresponds broadly, though not entirely, to either of the following groups of legal statuses: i) departmental enterprise status, ii) statutory corporation status, and iii) share company status.

2.1.1. Departmental Enterprise Status

An SOE with departmental undertaking has no distinct legal personality. Rather, it is an integral part of a competent government office and is managed just like other government departments. Its assets and financial management are kept strictly under the control of the Government (Femandes 1981,103). The Government hires its employees with a civil servant status (Id.103). It possesses sovereign immunity and cannot sue or be sued under its name unless the Government approves it. Countries such as Germany, Sweden, New Zealand, and Belgium recognize this type of legal status (W. Friedmann 1969, 84). However, some countries privilege SOE with departmental enterprise status a de facto managerial and financial independence. For example, in Sweden, the Swedish Railways, and in Germany, the German railways and Postal service have financial

autonomy and operate a separate revenue and expenditure account(Id.,84).

2.1.2. Statutory Corporation Status

A statutory corporation status was originally adopted in Britain, Belgium, Brazil, Italy, Spain, and Uruguay, and now, is a common type of legal status over all the world (Id.,86). An SOE with statutory corporation status is established by a specific statute and is wholly owned by the state to achieve a special purpose. An SOE with statutory corporation status has a separate legal personality; acquires and owns the property, and sues and be sued in its name (Mwapachu 1980, 154). It has the privilege to control its finances, including plowing back profits into the development of the enterprise(Id., 154). It employs commercial accounting methods to audit its profit and loss. Moreover, it is managed by a governing board and manager and has managerial autonomy (Robson 1955, 21). Nevertheless, it is still responsible to the Government via supervising ministries or other government agencies. It recruits employees independently, in the pattern of business executives, under terms and conditions determined by the corporation itself(Id, 21). It does not enjoy any legal privilege and immunity, and hence, it is fully liable under the law.

Overall, an SOE with statutory corporation status reflects both private and public status. Its outward legal form, commercial operation, managerial structure, finance administration, employee condition, and accountability for legal actions resemble commercial private companies (W. Friedmann 1969, 86). Simultaneously, an SOE with statutory corporation status pursues public tasks on behalf of the government, controlled by the government within the limits defined by the statute, and hence, has evident public sector status (Id., 86).

⁵ Law 5058/2013.

⁶ Companies Act 1956, Section 617.

2.1.3. A Share Company Status

A share company status is the most convenient legal status and allows the Government to participate in the market, usually in joint investment with private individuals. Some countries such as Austria, Finland, Greece, and Sweden predominantly adopt share company status whereas most other countries adopt it as an alternative convenient vehicle to participate in the market (Id., 87). An SOE with a share company status is often established and regulated by the company acts other than executive orders (Public Sector and Development 2020, 20) and engages in pure commercial and industrial activities. It has a separate legal personality from shareholders, can sue and be sued, enter into a contract, and acquire property in its name (Id., 20). Its management is entrusted to a separate governing board of directors and has autonomy in the allocation and administration of finance (Id., 20). Its employees entirely have a private sector status.

2. 2. Global Practice on Objectives of State-owned Enterprises

It is a pie in the sky for SOEs to operate only according to commercial principles. Even private enterprises may not exercise only commercial objectives. While the level may vary considerably, both SOEs and private enterprises undertake both commercial and non-commercial objectives. Regarding the objectives of SOEs, the OECD guideline recommends that “any public policy objectives that individual SOEs, or groups of SOEs, are required to achieve should be clearly mandated by the relevant authorities and disclosed.” (OCED 2015, principle I (D)).it further adds that “costs related to public policy objectives

should be funded by the state and disclosed.” (OCED 2015, principle III (D)).

As well, the World Bank toolkit suggests that:

SOEs, especially those providing public services and supporting other public policy goals, have to balance commercial and noncommercial objectives. Such SOEs are often explicitly established to carry out public service obligations, even though they operate in competitive markets. For such SOEs, additional measures are required as part of a state ownership framework to ensure that noncommercial obligations are properly identified, compensated, and carried out transparently (The World Bank 2014a, 33).

From these documents, it is possible to deduce that firstly, SOEs may undertake commercial and non-commercial objectives; however, the documents give more emphasis and priority to the non-commercial objectives of SOEs. Secondly, countries shall adopt policies or laws that define the objectives of SOEs. This helps SOEs to exactly know the priorities of the state and coherently strive to achieve them. Thirdly, the policies or laws shall clearly mandate non-commercial objectives. The non-commercial objectives shall be separated from commercial ones and disclosed to the general public. Fourthly, the countries shall balance non-commercial and commercial objectives, and lastly, countries shall properly identify, and transparently compensate SOEs for costs incurred in the exercise of non-commercial objectives.

Pragmatically, countries follow different approaches in recognizing the non-commercial objectives of SOEs. Some countries adopt policies or laws and explicitly set forth non-commercial objectives of SOEs. For example, in Australia, the Resource Management Guide

No. 126 explicitly determines the non-commercial objectives of SOEs.⁷ In Israel, the General Company Law clearly spells out the non-commercial objectives of SOEs.⁸ Similarly, the State-owned Enterprises Act 1986 of New Zealand sets forth the non-commercial objectives of SOEs.⁹

On the other hand, some countries do not enact policies or laws on the non-commercial objectives of SOEs. In these countries, the objectives of SOEs are implicit under the general SOE laws, company acts, sectoral policies, specific establishment acts, and contractual agreements between the SOEs and the relevant supervising authority. For example, in India, the supervising ministry and individual SOEs determine non-commercial objectives through mutual consultation and agreement within the purview of the government policy direction (OECD 2021b, 20). In Hungary, following the Government's decisions, non-commercial objectives are assigned to SOEs (Christiansen 2013,21). In the Netherlands, non-commercial objectives are inferred from performance contracts, sectoral legislation, attendant regulation, and shareholder (Ministry of Finance) action (Id,31). Also, in Austria, Greece, Kazakhstan, Mexico, and Turkey, non-commercial objectives of SOEs are implicit under company acts or SOE laws (OECD 2021b, 20). In a few countries, except statutory corporations whose non-commercial objectives are specified in their respective founding acts, it is unclear how the objectives of individual SOEs are discerned. For instance, in Croatia, SOEs including those that participate in the competitive market do not have clearly defined financial goals, and thus, are not required to achieve a minimum rate of return.

They are, however, expected to generate a profit, cover their expenses, and/or reduce their losses (OECD 2021a, 108).

Also, countries take on different approaches in balancing the commercial and non-commercial objectives of SOEs. Some countries attempt to balance the commercial and non-commercial priorities or strengthen the commercial orientations of SOEs by employing different approaches. Accordingly, some countries categorize SOEs into different lines of orientation. In Finland, the state ownership policy groups SOEs into different areas of priority: SOEs focus on strategic interest, financial interest, and special assignment.¹⁰ In Norway, following the government decision, the state ownership policy pronounces SOEs to pursue fully commercial objectives; commercial and other specifically defined objectives; and sectoral policy objectives.¹¹ Some others attempt to strengthen the commercial orientations of SOEs by corporatizing them under company law and undertaking commercial objectives. For example, the Corporation Law of Brazil prescribes all joint stock companies pursue profit-seeking activities (Wong 2018, 10). In the Netherlands, the 2007 Ownership Function Policy corporatizes all SOEs and mandates them to maximize profit (Christiansen 2013, 30). Over the past decades, China increasingly corporatized its large SOEs and established a modern enterprise system with a board of directors, a board of supervisors, and a management team (Lin 2021,107). Countries also list SOEs in domestic and international stock exchange markets to make them more competitive in the market. For example, in China, most SOEs in oil and chemicals, telecommunications, transportation, and

⁷ Resource Management Guide No. 126/2015, Section 1-8-1.12.

⁸ Company Law 1999, Paragraph 4(a).

⁹ State-Owned Enterprises Act 1986, Section 4.

¹⁰ Government Resolution on State-Ownership Policy 2016, 1 &3.

¹¹ The Government's Ownership Policy 2008, 59 &74.

metallurgy industries have been fully listed in stock exchange markets.¹² In India, more than 200 SOEs have been listed, mostly on the Bombay Stock Exchange (today known as BSE) from 2009 to 2013 (World Bank 2021, p.13). Some other countries employ comparable private enterprise standards to evaluate the performance of SOEs. In New Zealand, the State-owned Enterprise Act 1986 prescribes that SOEs shall “operate as a successful business and, to this end, to be as profitable and efficient as comparable businesses that are not owned by the Crown.”¹³

Moreover, some countries follow performance-based payment and compensation systems, for example, in the form of restricted stock to align the interests of the executives with the state and other shareholders. The annotation of OECD guidelines also provides that “there is a strong case for aligning the remuneration of board members of SOEs with private sector practices” (OECD 2015, 45). In Norway, Statoil pays the top executives shares equal to 20-30 percent of their salary in the form of restricted stock.¹⁴ In Brazil, the Banco do Brasil pays executive officers shares in return for their good achievements.¹⁵ In doing so, countries install appropriate caution to ensure the payment is justified. For example, the Swedish Remuneration Guidelines for SOEs provide that the remuneration of senior executives shall be reasonable, well-considered, competitive, and appropriate for the purpose.¹⁶ It also prescribes that payment shall be comparable

to private companies; comprise a variable component; and severance payment shall not exceed 18 months’ salary.¹⁷

On the other hand, many countries entrust SOEs to perform expansive and multiple corporate objectives such as commercial, production, developmental, and social objectives. In Saudi Arabia, for example, Oil Giant Saudi Aramco operates schools, runs hospitals, constructs new universities, supports the surrounding communities, develops the country’s non-oil economic sector, and facilitates the development of the broader economy in the country (Wong 2018, 10). In China, beyond commercial activities, SOEs are responsible for undertaking multiple non-economic goals that include public product supply, strategic resource control, and economic development (Xiaoyang 2011, 125). For example, Petroleum companies such as Petro China, Sinopec, and CNODC are expected to create long-term economic value; ensure energy safety; strengthen international competitiveness and resource acquisition capability; support economic development; contribute to the governmental revenue; support social development; and create employment opportunities (Zhu 2012, 845-846). In the Gambia, SOEs are in charge of both expansive commercial and public service obligations (World Bank 2017, 37).

Countries do not only mandate SOEs to pursue multiple but also complex and conflicting objectives. They do not formulate and operatively coordinate SOE objectives. In Sweden, the Swedish Tobacco Company was originally conceived to make a profit, but over time also pursued social responsibilities such as creating employment (Schneyer 1970, 179). Similarly, in New Zealand, the State-owned Enterprise Companies Act 1986 provides that SOEs

¹² See < <http://www.enread.com/news/business/51049.htm> > (Last visited on August 19, 2023).

¹³ State-Owned Enterprises Act 1986, Section 4.

¹⁴ Statement on Remuneration for Statoil’s Corporate Executive Committee 2014, 2&3.

¹⁵ Banco do Brasil Reference Form 2015, 293.

¹⁶ Guidelines for Terms of Employment for Senior Executives in State-owned Companies 2009.

¹⁷ Id.

shall engage in profit maximization activities, and simultaneously, shall be good employers and socially responsible.¹⁸ In the United Kingdom, the Royal Mail shall maximize profit as well as keep post offices open in rural areas, which is not viable from an economic standpoint (Wong 2004, 8). In Zambia, SOEs undertake public service obligations below the standard of cost and this hinders them from pursuing profitable commercial activities (Balbuena 2014, 48). As well, in Peru, SOEs' objectives are rarely coherent and hardly consistent (Saulniers 2019, 60). Alongside this, countries mandate SOEs multiple objectives without setting an explicit order of priority. SOEs do not have clear criteria for decision-making.

In addition, countries go through different paths regarding compensation for costs of non-commercial objectives. Most countries establish separate and transparent funding mechanisms for non-commercial objectives. In New Zealand, the State-Owned Enterprises Act 1986 “requires Ministers to agree with the [SOE] to pay for any goods or services that they wish [an SOE] to provide to any person.”¹⁹ In Namibia, the Public Enterprises Act of 1990 prescribes that costs associated with non-commercial activities or services that may not be in line with the financial objectives of the public enterprise (i.e., public service obligations) are subject to reimbursement by the State according to terms defined in an agreement between the SOE and the Government.²⁰ In Brazil, the national treasury compensates Banco do Brasil for the extension of subsidized loans to the agricultural sector allowing it to realize a net return of three percent (Wong 2018, 11). Some countries employ indirect mechanisms to compensate SOEs for non-commercial objectives. In the

Netherlands, for example, contractual agreements mandate SOEs to pursue objectives, and hence, any compensation for non-commercial priorities is determined based on that contractual arrangement (Christiansen 2013, 32). In contrast, some countries do not clearly address financing of non-commercial objectives. Israel has no legislation that recognizes the financing of SOEs for costs of non-commercial obligations justifying that one of the *raison d'être* of the state's ownership over SOEs is to provide public service obligations in the country (Id., 27). It however structures some tariffs to ensure SOEs fulfil their assigned non-commercial obligations (Id.). In Malawi, the state does not compensate SOEs for special non-commercial obligations and responsibilities (Balbuena 2014, 31).

3: The Legal Framework and Issues of Legal Status and Objectives of Ethiopian State-Owned Enterprises

Ethiopia has implemented laws and regulations regarding the legal status and objectives of SOEs over the past few decades. These legislations provide the groundwork for good corporate governance practices and improved performance of SOEs. This section evaluates the legal framework and concerns related to the legal status and objectives of SOEs.

3.1. The Legal Framework and Issues of Legal Status of State-owned Enterprises

Ethiopia has a number of laws and regulations that define the rights, obligations, power, privileges, and liabilities of SOEs. These laws and regulations outline the establishment, regulation, structure, and interaction of SOEs with the state, shareholders, and other stakeholders. They also recognize different types of legal status for SOEs, including departmental

¹⁸ State-Owned Enterprises Act 1986, Section 4.

¹⁹ Id.

²⁰ Public Enterprises Act 1990, Part II, Section 6.

undertaking status, statutory corporation status, and share company status.

3.1.1. Departmental Undertaking Status

In Ethiopia, a departmental undertaking status is the oldest form through which the state initially launches its business activity in the country. This legal status has been recognized with different names such as agency and administration. Although they do have different nomenclature, all of them relatively manifest the same legal status. A departmental undertaking status is recognized by the proclamation, unlike other forms of legal status. For example, Proclamation No. 553/2007 establishes the Drug Fund and Pharmaceutical Supply Agency, among other things, to supply quality-assured essential pharmaceuticals at affordable prices in a sustainable manner to the public.²¹ Similarly, Proclamation No. 535/2007 establishes the National Lottery Administration to generate, through undertaking lottery activities, revenue that could contribute to financing the country's economic and social development programs.²²

An SOE with departmental undertaking status has an independent legal personality. For example, Proclamation No. 553/2007 specifies that the Drug Fund and Pharmaceutical Supply Agency is an autonomous government organ; has its legal personality; owns the property; enters into a contract; and sues or be sued by its name.²³ Similarly, Proclamation No. 535/2007 recognizes that the National Lottery Administration is an autonomous federal

organ having its separate legal personality, and hence, can sue or be sued by its name.²⁴

An SOE with department undertaking status has an independent administrative structure; however, varies depending on the nature of the department undertaking. Proclamation No. 553/2007 provides that the Drug Fund and Pharmaceutical Supply Agency has a board, a director general, and two deputy director generals appointed by the Government.²⁵ On the other hand, Proclamation No. 535/2007 prescribes that the National Lottery Administration has a Director General appointed by the Government.²⁶ Despite the variation in the administrative structure, the director generals in both institutions recruit and administer employees based on the federal civil servants' proclamation.²⁷

An SOE with departmental undertaking status operates based on a budget financed by the Government which passes through the national budget process. For example, Proclamation No. 553/2007 stipulates that the Drug Fund and Pharmaceutical Supply Agency gets the budget from the Government in kind or cash, net income generated from the supply of pharmaceuticals, and grants in kind or cash from donor agencies.²⁸ As well, Proclamation No. 535/2007 prescribes that the National Lottery Administration has a budget allocated from the Government as the residual surplus of the administration is

²¹Drug Fund and Pharmaceutical Supply Agency Establishment Proclamation No. 553/2007, Article 8(1).

²² National Lottery Administration Re-establishment Proclamation No. 535/2007, Article 5.

²³ Drug Fund and Pharmaceutical Supply Agency Establishment Proclamation No. 553/2007, Article 6, 9(11).

²⁴ National Lottery Administration Re-establishment Proclamation No. 535/2007, Article 3.

²⁵ Drug Fund and Pharmaceutical Supply Agency Establishment Proclamation No. 553/2007, Article 10.

²⁶ National Lottery Administration Re-establishment Proclamation No. 535/2007, Article 7.

²⁷ Drug Fund and Pharmaceutical Supply Agency Establishment Proclamation No. 553/200, Article 14(2)(b); National Lottery Administration Re-establishment Proclamation No. 535/2007, Article 8(2)(d).

²⁸ Drug Fund and Pharmaceutical Supply Agency Establishment Proclamation No. 553/2007, Article 4.

transferred to the Central Treasury.²⁹ Moreover, an SOE with departmental undertaking status books of accounts and other financial documents are annually inspected by an auditor general or external auditors similar to the audit process of other government offices.³⁰ The accounting and auditing system is similar to one applicable to other government departments. Overall, in Ethiopia, the laws guarantee a SOE with departmental undertaking status de facto managerial and financial independence. They entrust SOEs an independent administration autonomy.

3.1.2. Statutory Corporation Status

The laws and regulations employ different designations while establishing a statutory corporation status, namely Corporation, Enterprise, Group, Institute, and Service. The legislations do not forward any clear line of distinction among these nomenclatures or do not justify the reason why they employ such different nomenclatures. A close examination of the nomenclature however implies no basic distinction among themselves. All of them manifest a statutory corporation status.

An SOE with statutory corporation status is recognized by the Council of Ministers Regulation.³¹ For example, the legal statuses of the Ethiopian Telecommunication Corporation, the Ethiopian Electric Power Corporation, the Ethiopian Airlines Group, and the Ethiopian Toll Roads Enterprise are recognized by the Council of Ministers regulations.³² An SOE with statutory

corporation status does not involve any share of private individuals and is wholly owned by the state. It has a distinct legal personality from the state.³³ It owns and possesses property, concludes contracts, and may sue or be sued by its name.³⁴ It will not be held liable beyond its total assets.³⁵ It can issue bonds as well as negotiate and sign loan agreements with local and international financing sources. For example, Ethiopian Telecommunication Corporation, Ethiopian Airlines Group, and Ethiopian Electric Utility enjoy this right.³⁶

An SOE with statutory corporation status is overseen by a board appointed by the state, and a general manager, and deputy general managers as may be necessary, are appointed by the board. For example, the Ethiopian Telecommunication Corporation, Ethiopian Airlines Group, Ethiopian Toll Roads Enterprise, and Ethiopian Electric Utility are governed by a management board appointed by their respective supervising authorities.³⁷ A manager appointed by the board runs the day-to-day operation of these SOEs with statutory corporation status.³⁸ The manager is responsible for employing, assigning, dismissing, and determining the salaries and allowances of employees as per

²⁹ National Lottery Administration Re-establishment Proclamation No. 535/2007, Articles 9, 10(4), 11.

³⁰ Drug Fund and Pharmaceutical Supply Agency Establishment Proclamation No. 553/2007, Article 20.

³¹ Public Enterprises Proclamation No. 25/1992, Article 6.

³² Ethio-Telecom Establishment Council of Ministers Regulation No. 197/2010, Article 2(1); Ethiopian Electric Power Corporation Establishment Regulation

No. 18/1997, Article 2(1); Ethiopian Airlines Group Establishment Council of Ministers Regulation No. 406/2017, Article 3(1); and Ethiopian Toll Roads Enterprise Establishment Council of Ministers Regulation No. 310/2014, Article 2(1).

³³ Public Enterprises Proclamation No. 25/1992, Article 7.

³⁴ *Id.*

³⁵ *Id.*, Article 7(2).

³⁶ Ethio-Telecom Establishment Council of Ministers Regulation No. 197/2010, Article 5(6); Ethiopian Airlines Group Establishment Council of Ministers Regulation No. 406/2017, Article 6(10); Ethiopian Electric Utility Establishment Council of Ministers Regulation No.303/2013, Article 5(5).

³⁷ Public Enterprises Proclamation No. 25/1992, Article 11.

³⁸ *Id.*, Article 16.

the civil servants and labor laws of the country.

An SOE with statutory corporation status operates based on its capital. It receives no budget from public revenue and other sources. For example, Ethiopian Telecommunication Corporation, Ethiopian Airlines Group, Ethiopian Toll Roads Enterprise, and Ethiopian Electric Utility are operating by their capital.³⁹ However, Proclamation No. 25/1992 provides that “without prejudice to the powers and duties of the auditor general under other laws, the accounts of each enterprise shall be audited by external auditors appointed by the supervising authority.”⁴⁰ Thus, an SOE with statutory corporation status books of accounts and financial documents are audited annually by the auditor general and independent external auditors as private businesses. The auditing process is completely different from a SOE with government department status expected to pass through. Generally, an SOE with statutory corporation status has more administrative autonomy than with departmental undertaking status. It has the financial flexibility to administer its approved budget rather than the department undertaking status.

3.1.3. Share Company Status

Ethiopia employs different names in defining a share company status. Some laws explicitly employ the name share company

status for SOE, i.e. Ethiopian Pulp and Paper Share Company. Whereas others do not explicitly pronounce the share company status of an SOE. For example, the founding laws of the Commercial Bank of Ethiopia, Development Bank of Ethiopia, and Ethiopian Insurance do not explicitly use the share company status though they do.

An SOE with share company status involves different levels of state ownership: wholly or partially owned by the state. As a result, a share company status manifests different characteristics. A share company status of SOE wholly owned by the state is created by Proclamation No. 25 /1992 and the Commercial Code. Article 47(2)(a) of Proclamation No. 25/1992 prescribes that the Government has the power to establish a SOE in a business organization status under the Commercial Code applicable to private enterprises.⁴¹ This provision certainly is not specific and does not mention the exact legal status that SOE can take on under the Commercial Code. But Article 6 of Proclamation No 1206/2012 provides that a SOE may have a share company status with only the Government as a shareholder until any of its shares are transferred to private ownership. This article also stipulates that the Commercial Code shall be applicable except for some provisions on the minimum number of shareholders, valuation of contribution in kind, share, general meeting of shareholders, appointment of directors, and qualification shares.⁴² This share company status has a transitory nature and facilitates the transfer of state ownership to the private sector. However, practically many SOEs with this type of share company status such as the Commercial Bank of Ethiopia and Development Bank of Ethiopia continue operating to the present. In addition,

³⁹ Ethio-Telecom Establishment Council of Ministers Regulation No. 197/2010, Article 6; Ethiopian Airlines Group Establishment Council of Ministers Regulation No. 406/2017, Article 7; Ethiopian Toll Roads Enterprise Establishment Council of Ministers Regulation No. 310/ 2014, Article 6; Ethiopian Electric Utility Establishment Council of Ministers Regulation No.303/2013, Article 6.

⁴⁰ Public Enterprises Proclamation No. 25/1992, Article 32(1).

⁴¹ Id, Article 47(2) (a).

⁴² Public Enterprises Privatization Proclamation No 1206/2012, Article 6.

a share company status of SOE wholly owned by the state is regulated by both Proclamation No 25/1992 and the Commercial Code. For example, the enabling laws of the Commercial Bank of Ethiopia and Development Bank of Ethiopia specify that “without prejudice to the applicability of Monetary and Banking laws, the Bank shall be governed by the Public Enterprise Proclamation No. 25/1992.”⁴³ On the other hand, a share company status of SOE partially owned by the state is established and regulated by the Commercial Code applicable to private share companies. This type of legal status is created through a public-private partnership scheme and joint investment arrangements of the state and private sector. For example, Ethiopian Pulp and Paper is jointly owned by the state (70%) and the International Finance Corporation (IFC) (30%).⁴⁴ The legal status of this company is regulated by the Commercial Code.

An SOE with a share company status has an independent legal personality from the state or shareholders. It has its name; acquires, and owns assets; sue, or be sued by its name; issues bond; and enters into a contract with a third party including a loan contract. The Commercial Bank of Ethiopia and Development Bank of Ethiopia, for instance, have separate legal personality from the state, own property, concludes deal with third parties, and may or may be sued by their names.⁴⁵ Similarly, Ethiopian Pulp and

Paper S.C. has a distinct legal personality from its shareholders.⁴⁶

An SOE with share company status recognizes the board to oversight SOE; however, the appointment process varies based on the degree of state ownership over SOEs. For example, a share company status of SOE wholly owned by the state integrates a board appointed by the state to manage SOE.⁴⁷ The board appoints the manager who is responsible for running the company as well as recruiting and administering employees according to the employment laws of the country.⁴⁸ This form of legal status installs a governance structure that is more similar to an SOE with statutory corporation status. Conversely, a share company status of SOE partially owned by the state incorporates a board appointed by the general shareholders meeting or by a supervisory board if the memorandum of association provides.⁴⁹ The board appoints the manager who runs the day-to-day business of SOE and administers employees as per the employment law.⁵⁰ Overall, a share company status of SOE partially owned by the state assumes more administrative independence than an SOE with statutory corporation status.

An SOE with share company status operates based on its capital. It is not budgeted by the Government as well as by the private shareholders. For example, the Commercial Bank of Ethiopia, Development Bank of

⁴³ Commercial Bank of Ethiopia Establishment Council of Ministers Regulation No. 202/1994, Article 2(2); Development Bank of Ethiopia Re-establishment Council of Ministers Regulation No. 83/2003, Article 2(2).

⁴⁴See <

<https://businessguide.ezega.com/Default.aspx?action=BussinessDetail&bid=2398325> >(Last visited on August 19, 2023).

⁴⁵ Public Enterprises Proclamation No. 25/1992, Article 7 ; The Commercial Code of the Federal

Democratic Republic of Ethiopia Proclamation No. 1243/2021, Article 265.

⁴⁶ The Commercial Code of the Federal Democratic Republic of Ethiopia Proclamation No. 1243/2021, Article 265.

⁴⁷ Public Enterprises Proclamation No. 25/1992(1992), Article 14.

⁴⁸ Id, Article 16.

⁴⁹ The Commercial Code of the Federal Democratic Republic of Ethiopia Proclamation No. 1243/2021, Article 298(2), 331.

⁵⁰ Id, Article 337, 338.

Ethiopia, and Ethiopian Pulp and Paper all pursue their objectives based on their capital specified in their enabling acts and memorandum of associations. An SOE with share company status is generally exempted from budget accounting, and audit laws and procedures applicable to government offices, and hence, has financial autonomy and flexibility. Its book of accounts and financial documents are audited by an independent external auditor.⁵¹ However, a share company status of SOE partially owned by the state observes a high-quality accounting and auditing standard than SOE wholly owned by the state.⁵²

3. 2. The Legal Framework and Issues of Objectives of State-owned Enterprises

Ethiopia has put in place laws and regulations that require SOEs to serve various purposes. These laws and regulations guide SOEs to have a better understanding of their role in the market. This section analyzes how the laws and regulations address the objectives of SOEs and identifies any legal issues encountered in the process.

3.2.1. Policy on Objectives of State-Owned Enterprises

Over the past several decades, the state-owned and created many SOEs that have monopoly or dominance in many strategic sectors. These SOEs contribute to the national GDP, create enormous employment, and commit money to less viable investments. They participate in the provision of utilities, health, education, transportation, and other essential services. This situation necessitates coherent state policy on objectives. A state policy on the objectives guarantees SOEs with clear and reliable objectives to provide service with better quality to citizens. It ensures SOEs

have a continuous significant economic and social role in the country.

Yet, Ethiopia has not developed a policy that explicitly defines the objectives of SOEs. Also, it has no complementary public policy that establishes the sub-objectives of individual SOEs. The general SOEs laws such as the Public Enterprises Proclamation and the Commercial Code do not explicitly specify the objectives of SOEs. The objectives bearing on individual SOEs are instead inferred from other laws. They are generally understood by referring to the constituting laws or articles of association of SOEs. The following enabling laws of SOEs exemplify the situation.

The Drug Fund and Pharmaceuticals Supply Agency Establishment Proclamation No.553/2007 prescribes that the agency has the objective:

*to enable public health institutions to supply quality-assured essential pharmaceuticals at affordable prices in a sustainable manner to the public; play a complementary role in developmental efforts for health service expansion and strengthening by ensuring an enhanced and sustainable supply of pharmaceuticals; and create enabling conditions for enhancing the accumulation of the Fund in its revolving and cost recovery process.*⁵³

The Ethiopian Electric Power Corporation Establishment Regulation No. 18/1997 provides that the purpose of the Corporation is:

to engage in the business of producing, transmitting, distributing, and selling electric energy (in accordance with economic and social development policies and priorities of the Government)

⁵¹ Id, Article 348.

⁵² Id, Articles 349-353, 355-57.

⁵³ Drug Fund and Pharmaceutical Supply Agency Establishment Proclamation No. 553/2007, Article 8.

*and to carry on any other related activities that would enable it to achieve its purpose.*⁵⁴

The Ethiopian Airlines Group Establishment Regulation No. 406/2017 enjoins the airline group:

*to provide domestic and international air transport services as well as general aviation services; manufacture and repair aircraft and aircraft parts; construct, expand, maintain and administer airports; provide airport services, other aeronautical services, and non-aeronautical services; provide services to air operators without discrimination; cause the provision of some of its services by other parties on the basis of outsourcing contracts; ensure quality standards of such services through mechanisms set in the outsourcing contracts; organize airport service security to ascertain reliable, safe, and secured service in the airport premises; provide aviation training services; invest in other carriers, aircraft manufactures, and aviation services through equity participation; provide hotel, recreational and other tourism services related to the aviation industry or invest in such services through equity participation; sell and pledge bonds; negotiate and sign loan agreements with local and international financing sources; and engage in other related activities necessary for the attainment of its purposes.*⁵⁵

The Development Bank of Ethiopia Establishment Regulation No 83/2003 mandates the bank:

*provide investment credits including short-term loans to viable projects that will contribute to the country's economic development; mobilize funds from sources within or outside the country; manage funds entrusted to it; participate in equity investment; provide domestic and foreign banking services to its borrowers; accept time deposits; guarantee loans and other financial obligations; draw, accept, discount, buy and sell bills of exchange, drafts, and promissory notes payable within or outside of Ethiopia; issue and sell bonds; act as a trustee; provide technical and managerial services; open and operate bank accounts with banks and banking correspondents in Ethiopia or abroad; and engage in such other activities as is customarily carried out by development banks.*⁵⁶

These enabling laws specify the objectives of individual SOEs: departmental undertaking, statutory corporation, and share company. In the absence of state policy and general SOE laws, they recognize the objectives the state intends to achieve through individual SOEs. The next section articulates the nature of the objectives of SOEs.

3.2.2. Commercial and Non-commercial Objectives of State-owned Enterprises

Although there is no state policy or general laws for SOEs that define their objectives, the enabling laws specifically mandate individual SOEs to pursue certain commercial and non-commercial objectives. A close reading of the enabling laws indicates that commercial activities include those SOEs intend to charge for, have no restrictions on profitability, and face actual

⁵⁴ Ethiopian Electric Power Corporation Establishment Regulation No. 18/1997, Article 5.

⁵⁵ Ethiopian Airlines Group Establishment Council of Ministers Regulation No. 406/2017, Article 6.

⁵⁶ Development Bank of Ethiopia Re-establishment Council of Ministers Regulation No. 83/2003, Article 6.

or potential competition in the market. On the other hand, non-commercial activities comprise public service obligations or industrial policy objectives where the cost of service provision exceeds the revenues.

The enabling laws request individual SOEs to jointly exercise commercial and non-commercial objectives. For example, Proclamation No.553/2007 prescribes that the Drug Fund and Pharmaceuticals Supply Agency shall provide public service obligations, and simultaneously, enhance the accumulation of the fund through maximizing the sale of pharmaceuticals.⁵⁷ Similarly, Regulation No. 18/1997 and Regulation No. 406/2017 mandate the Ethiopian Electric Power Corporation and the Ethiopian Airlines Group to jointly pursue commercial and non-commercial objectives.⁵⁸ These laws enumerate the objectives of mixing both commercial and non-commercial activities. They do not separate non-commercial objectives from commercial ones in a clear manner. Moreover, the enabling laws do not balance the commercial and non-commercial objectives or strengthen the commercial orientation of SOEs. They do not group some SOEs to exercise commercial and others to exercise non-commercial objectives.

In addition, the enabling laws prescribe individual SOEs to pursue multiple objectives. For example, Regulation No. 406/2017 charges the Ethiopian Airlines Group to achieve at least eleven objectives.⁵⁹ Regulation No. 83/2003 stipulates the Development Bank of Ethiopia

to operate about thirteen objectives.⁶⁰ Similarly, Regulation No. 202/1994 expects the Commercial Bank of Ethiopia to achieve a minimum of eleven objectives.⁶¹ The enabling laws mandate not only individual SOEs pursue multiple objectives, but also equally competing commercial and non-commercial objectives. Besides, the enabling laws stipulate nothing about the state funding of costs of non-commercial activities. They imply SOEs cover the costs for non-commercial objectives from their gains of commercial activities. The enabling laws mandate SOEs to perform both commercial and non-commercial activities. They expect SOEs to maximize their profit and set off any cost they may incur in exercising non-commercial activities. SOEs take independent responsibility for public programs and non-commercial practices.

4: The Similarities and Differences of Legal Status and Objectives of Ethiopian State-Owned Enterprises with Global Practice

4.1. The Similarities and Differences of Legal Status of State-owned Enterprises

The OECD guideline and the World Bank toolkit recommend countries streamline and simplify the legal status to ensure effective corporate governance in SOEs. Globally, countries introduce two forms of legal statuses. Some countries adopt a uniform or single form of legal status while many others recognize multiple forms of legal status. Ethiopia adopts multiple forms of legal statuses. This is almost consistent with the practice in the wider world. Nevertheless, in Ethiopia, the multiple legal status of SOEs lacks clarity and is complex.

⁵⁷ Drug Fund and Pharmaceutical Supply Agency Establishment Proclamation No. 553/2007, Article 8.

⁵⁸ Ethiopian Electric Power Corporation Establishment Regulation No. 18/1997, Article 5; Ethiopian Airlines Group Establishment Council of Ministers Regulation No. 406/2017, Article 6.

⁵⁹ Ethiopian Airlines Group Establishment Council of Ministers Regulation No. 406/2017, Article 6.

⁶⁰ Development Bank of Ethiopia Re-establishment Council of Ministers Regulation No. 83/2003, Article 6.

⁶¹ Commercial Bank of Ethiopia Establishment Council of Ministers Regulation No. 202/1994, Article 5.

It involves concepts and practices different from what has been commonly implemented in different jurisdictions. First, the laws recognize a departmental undertaking status with an independent legal personality and guarantee SOE to own assets and sue or be sued in its name. It involves de facto administrative autonomy. Second, the laws recognize the legal status of SOEs with various nomenclatures which makes it hard to easily understand them. Third, the laws create entities with a specific legal status but do not manifest the nature of that legal status. For example, Proclamation No. 858/2014 established the Ethiopian Broadcasting Corporation with statutory corporation status, but it is an autonomous government organ. Similarly, an SOE wholly owned by the state does not fully reflect the nature of a share company status.

4.2. The Similarities and Differences of Objectives of State-owned Enterprises

The OECD guideline and the World Bank toolkit suggest SOEs may pursue commercial and non-commercial objectives. They also recommend countries adopt policies or laws on objectives; distinguish non-commercial objectives; balance commercial and non-commercial objectives; and establish a transparent compensation system for the costs of non-commercial objectives. Concerning this, countries employ different approaches. Regardless, most countries adopt policies or laws that explicitly state non-commercial and commercial objectives. As well, most countries exert efforts to balance commercial or non-commercial objectives or to strengthen the commercial orientation of SOEs. These countries differentiate SOEs into commercial and non-commercial objectives; corporatize SOEs under company law; list SOEs in domestic and international stock exchanges; employ comparable private enterprises' performance

evaluation systems; and adopt performance-based payment and compensation systems. Correspondingly, most countries develop laws that establish separate and transparent funding mechanisms for costs SOEs incur in pursuing non-commercial activities.

Ethiopia regulates the objectives of SOEs differently from international recommendations and best practices of countries. Ethiopia has not adopted a policy or a law that explicitly states the objectives of SOEs. The objectives are impliedly inferred from the enabling laws of individual SOEs. The enabling laws mandate SOEs to pursue multiple and conflicting commercial and non-commercial objectives. They do not clearly state non-commercial objectives. They do not balance commercial and non-commercial objectives or strengthen the commercial orientation of SOEs. They do not group SOEs to pursue specific commercial or non-commercial objectives; corporatize SOEs under company law; list SOEs in domestic and international stock exchanges; employ comparable private enterprises' performance evaluation systems; etc. Moreover, the enabling laws stipulate SOEs to cover the costs of non-commercial activities from their gains in commercial activities. They do not set any transparent state funding system for non-commercial activities.

5. Problems and Challenges of Legal Status and Objectives of Ethiopian State-Owned Enterprises

Ethiopia has implemented laws that define the legal status and objectives of SOEs. These laws aim to keep SOEs within a certain legal framework while defining their objectives in the market. However, the current laws have several inadequacies, gaps, and practical disparities that undermine the legal status and objectives of SOEs. Additionally, these laws fall short of international guidelines, toolkits, and best

practices adopted by other countries. Consequently, this situation poses significant problems and challenges in the corporate governance of SOEs.

The current laws that govern the legal status of SOEs create discrimination and unequal treatment between them. Some SOEs are exempt from certain regulations while others are strictly regulated. For instance, the Federal Government's Public Procurement Proclamation applies only to SOEs with departmental undertaking status, giving them a competitive advantage in the procurement process. Similarly, SOEs with statutory corporation status have more privileges than others, such as the right to issue bonds and negotiate loan contracts with financial institutions. Additionally, SOEs with statutory corporation and share company status have the right to recruit and administer their employees under the Labor Law, while others must do so under the Federal Civil Servant Proclamation. Furthermore, the current laws regarding legal status create confusion and opaqueness regarding the governance of SOEs and their relationship with other parts of the Government and the law. These issues could ultimately complicate the state's effort to develop a comprehensive state ownership policy, leading to broader state objectives over SOEs.

The current laws that govern the objectives of State-Owned Enterprises (SOEs) have a significant impact on their performance. These laws lead to SOEs operating with ill-defined, competing, and unrealistic objectives, which often require guidance and direction from their supervising authority. This opens up opportunities for the state to interfere for political gain, and capture SOEs and their resources. Additionally, SOEs operate with a broad range of commercial and non-commercial objectives, without any order of priority. This causes managers to

attempt to achieve all objectives, ultimately leading to achieving none or developing a substantial latitude to run SOEs in their interest. Furthermore, this dilutes the performance evaluation process of managers.

Conclusion

The OECD guideline and the World Bank toolkit don't recommend any specific legal status for SOEs. Different countries adopt various legal statuses for their SOEs, including Ethiopia which recognizes multiple types. However, Ethiopia's laws and practices regarding legal status deviate from global norms, creating confusion around the legal status of SOEs. Additionally, Ethiopia has not adopted a clear policy or law outlining the objectives of SOEs, resulting in multiple and potentially conflicting commercial and non-commercial objectives. SOEs also cover costs for non-commercial activities from their profits in commercial activities, which is not sustainable. This situation poses challenges to the corporate governance of SOEs. Therefore, Ethiopia needs to reform its laws on the legal status of SOEs and align them with their nature of operation. It should also adopt a policy outlining the objectives of SOEs, separate commercial and non-commercial objectives, and corporatize SOEs under company law. Listing SOEs in domestic and international stock exchanges or implementing performance evaluation systems comparable to those used by private enterprises can strengthen their commercial orientation. Finally, Ethiopia should establish a clear and transparent compensation system for non-commercial activities.

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