

# 9 State-owned enterprises in the marketplace

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This chapter reviews Viet Nam’s practices against the Chapter III of the SOE Guidelines, by assessing to what extent the state has separated its functions as an owner and as a regulator. It further looks at degree of comprehensiveness of mechanism for identifying costs of public policy objectives and funding of public policy objectives.

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## Overarching recommendation from the SOE Guidelines

Consistent with the rationale for state ownership, the legal and regulatory framework for SOEs should ensure a level playing field when SOEs undertake economic activities

### 9.1. Separation of functions

*A. There should be a clear separation between the state’s ownership functions and other state functions that may influence the conditions for state-owned enterprises, particularly with regard to market regulations*

Viet Nam’s legal regulatory framework does not ensure full separation of responsibilities for ownership and market regulation within the general government. Regulations on management and use of state capital invested in production and business in enterprises (Law No. 69/2014/QH13; Decree No. 91/2015/ND-CP; Decree No. 32/2018/ ND-CP; Decree No. 140/2020/ND-CP and guiding circulars) have only mandated a

partial distinction between production and business activities of SOEs and official/administrative activities of the state.

CMSC is the representative agency of the owner and the state capital at enterprises where the State holds 100% charter capital as prescribed by the government. Ministries, ministerial agencies, and governmental agencies (hereinafter collectively referred to as 'Ministries') and People's Committees of Provinces and centrally affiliated cities (hereinafter collectively referred to as 'provincial PPCs') are the owner's representative agencies at enterprises where the State holds 100% of charter capital established under the decisions of or assigned to Ministries or provincial PPCs and not handed over to CMSC or SCIC for management.

Prime Minister, line ministries, CMSC, SCIC and People's Committees of provinces and cities supervise SOEs per their power and many times SOEs are required to obtain opinions from these government entities on their tasks as well as plans according to the regulations on organisation and operation.

While the establishment of CMSC to represent the owner at 19 state-owned groups and corporations is an attempt to keep the state management function and the owner representation function at enterprises separate, the government still can decide on mechanisms and regulations for SOEs to the extent permitted by law to carry out specific plans/projects for industrial development purposes. Currently, the government explicitly uses some SOEs in sectors such as textile, railways, energy and food for the implementation of the State's sectoral and industrial policies.

For instance, the State's ownership function with regard to Viet Nam Expressway Corporation (VEC), a one-member limited company wholly owned by the State, goes hand in hand with the responsibility for implementing policies to expand the network of expressways. The role of VEC is mainly drawing domestic and international commercial loans to fulfil its mandate of implementing highway projects assigned by the government in its project approval decisions.

In the case of large-scale plan/projects with no cash flow to repay the debt, at the proposal of SOE and related agencies, the government may allow postponement of tax payment obligation to the period when the project successfully enters operation and has a stable cash flow. In case of risks rising from external causes (natural disasters, changes in government policies), the government can issue regulations to adjust policies according to the provisions of law and the urgency of the work.

Ministry of Finance, Ministry of Planning and Investment and other key ministries that share responsibilities on state ownership functions informed the OECD Secretariat that structural separation between responsibilities for ownership and market regulation within the general government is one of the key priorities that would be addressed when amending the Law No. 69/2014/QH13. The revised law is scheduled to be submitted to the National Assembly by end-2023. Based on the amended Law the government and the Ministries will amend Decrees and guiding Circulars.

## 9.2. Stakeholder rights

*B. Stakeholders and other interested parties, including creditors and competitors, should have access to efficient redress through unbiased legal or arbitration processes when they consider that their rights have been violated*

### 9.2.1. Legal and arbitral mechanisms for redress available to the stakeholders of SOEs

Vietnamese legislation generally allows no distinction between SOEs and other corporate entities with regard to stakeholder rights and legal and arbitration mechanisms. Stakeholders and other interested parties such as creditors, employees and competitors are free to seek legal redress if they consider that

their rights have been violated. Legislative bodies have promulgated a system of regulations on dispute settlement at courts at all levels or at economic arbitration bodies.

The rights of creditors, consumers and business partners are stated in various laws including Labour Code, Civil Code, Law on Protection of Consumers Rights (No.59/2020/QH12) and Article 317 of the Commercial Law (No. 36/2005/QH11). Depending on the nature of the incident (civil/labour/commercial disputes, etc.), regulations of relevant laws and agreements between the parties will decide the mechanism used for settling their disputes. Measures for handling commercial disputes applicable to both SOEs and non-SOEs include negotiation (as prescribed by the Civil Code and Commercial Law), mediation (as prescribed by Decree 22/2017/ND-CP), arbitration (as prescribed by the 2010 Law on Commercial Arbitration), and Court proceedings (as prescribed by the 2015 Civil Procedure Code or the 2015 Criminal Procedure Code in criminal cases). Also, Clause 1 Article 5 of the 2020 Law on Enterprises states: “The State recognises the long-term existence and development of the types of enterprises prescribed in this Law; ensures equality of enterprises before the law regardless of their types of business and economic sector.”

The Arbitration’s awards and the Court’s sentences and decisions are legally binding and shall be implemented as prescribed by the mentioned laws and the Law on Enforcement of Civil Judgments. In principle, SOEs must fully follow these laws and shall follow and implement the Arbitration’s awards and the Court’s sentences and decisions that are legally effective.

According to these regulations, the handling and settlement of disputes must be conducted on an equal basis, respect and ensure the rights and interests of all parties. As such, SOEs are required to ensure and take responsibility equally as other entities, and there is no preference or difference for SOEs over other entities. In case SOEs have to compensate or face property loss, they must comply with the judgment of the Court and the Economic Arbitration. If SOEs find that the Arbitration’s awards and the Court’s sentences and decisions show signs of violations of the law, threaten or affect their legitimate rights and benefits, they reserve the right to appeal and request competent agencies to appeal and review such awards, sentences, and decisions as prescribed by law (procedures for appeals, cassations, reopening trial rulings or cancellations of arbitral awards).

Finally, Article 3.5 of Decree No. 75/2019/ND-CP on Sanctioning of Administrative Violations in Competition sets out that the National Competition Commission (NCC) can request a halt to anti-competitive behaviours of state agencies, impose remedial and compensatory measures. However, the OECD Mission team is informed that competition enforcement actions against anti-competitive behaviours of SOEs remain very limited. So far, the Viet Nam Competition Authority has confirmed only two relevant enforcement cases (OECD, 2021<sup>[1]</sup>).

### 9.3. Identifying the costs of public policy objectives

*C. Where SOEs combine economic activities and public policy objectives, high standards of transparency and disclosure regarding their cost and revenue structures must be maintained, allowing for an attribution to main activity areas*

According to the current accounting and corporate governance regulations, structural separation between public policy and commercial activities of SOEs are not systematically achieved and there is no regular practice in place for separation of accounts between these two activities. For instance, while many SOEs are mandated to conduct activities of public interest as prescribed by the State, structural separation of activities of public interests from business activities in these SOEs faces difficulties due to the lack of government instructions.

VEC offers a better example in this regard. While VEC is mandated by the government to expand national network of expressways, the business operations of VEC including toll collection for payback and delivery of services along the expressways to which it is the project owner are required to adhere to accounting

and auditing standards that are similar to other industries in private sector. The entire toll collection amount must be monitored in a separate account supervised by a bank and representatives of the authorities. However, concerns with respect to competitive neutrality still remain as VEC is an arm of government policy on road expansion. As for other regular activities of SOEs (such as working as a construction contractor), it is not subject to inspection and supervision by relevant agencies.

#### 9.4. Funding of public policy objectives

*D. Costs related to public policy objectives should be funded by the state and disclosed*

There is no obligation, in the Vietnamese legislation, for costs related to SOEs' public policy objectives to be funded by the state budget. For SOEs involved in the implementation of public policy objectives, relevant costs are identified, disclosed, and financed as prescribed by the law on accounting, taxation, disclosure, etc. The process of determining costs must comply with norms promulgated by state agencies and audited by the State Audit. However, these cost data of SOEs are currently only provided to serve the requirements of state management agencies. At present, as for an SOE that participates in activities of public interest, fees for such activities are yet to be calculated separately and are currently calculated in combination with its business activities.

At the same time SOEs often suffer from procedures that are complex with multiple levels of approval and prolonged duration of implementation, which prevents SOEs from taking charge, remaining flexible, and make quick decisions like private enterprises. For instance, when it comes to expressway development, enterprises (state-owned or private) are under the management of a number of competent authorities in the areas of finance, taxes, labour and wages, toll collection, quality standards, etc. For instance, VEC must comply with the regulations on capital construction investment issued by the government, the Ministry of Planning and Investment, the Ministry of Finance, and the Ministry of Natural Resources and Environment; and be audited by the State Audit for each bidding package as well as work component. Ensuring transparency and simplifying approval process for implementation of projects and separation between public policy activities and commercial activities of SOEs should continue to be the goal and direction of management agencies in the future.

#### 9.5. General application of laws and regulations

*E. As a guiding principle, SOEs undertaking economic activities should not be exempt from the application of general laws, tax codes and regulations. Laws and regulations should not unduly favour SOEs over their market competitors. SOE's legal form should allow creditors to press their claims and to initiate insolvency procedures*

On the issue of competitive neutrality, there is no explicit statutory discrimination. Competition Law explicitly forbids discrimination with no exception made for state owned entities. The Article 5 of the Law No.69 indicates that state investments should be limited to sectors in which private market participants are insufficiently investing or to sectors that are considered important for the country's development. A government directive is also in place according to which SOEs "should operate according to market principles and conform with international standards." However, the OECD mission team finds that these principles are often not adhered to in practice (OECD, 2021<sup>[1]</sup>).

To manage the risk of guaranteeing corporate loans, the government executes Article 41 of the Law on Public Debt Management and Decree No. 91/2018/ND-CP, which specify eligibility criteria and the credit line of government guarantee. To be guaranteed by the government, an enterprise must be profitable in the last three consecutive years, not have any overdue debt, and have its financial plan reviewed by the Ministry of Finance (MOF) and approved by the Prime Minister as prescribed, have at least 20% of the total capex of the project covered by its equity, and meet other specific requirements, with a ceiling of 60%

to 70% of the total capex. The government provides guarantees for SOEs' loans per Decree No. 15/2011/ND-CP on Granting and managing government guarantees. It has issued Decrees and Circulars to provide guidance on the procedures and reporting scheme to supervise and manage SOEs' loan usage.

**Table 9.1. Laws and regulations to ensure competitive neutrality**

<b>Competition Law (No. 23/2018/QH14)</b>	Article 2 states that its scope includes: "business organisations and individuals, including enterprises that produce and provide public-utility products and services, enterprises that operate in state-monopolised sectors/domains [and] public sector entities." Article 8 states that state agencies must not discriminate between enterprises and should not impose or request enterprises or individuals to source (or provide or sell) services and products from (or to) specific enterprises, except for services and products under state monopoly. Article 28 sets out that the state can exercise control over enterprises operating in state-monopolised sectors, but that if the same undertaking has activities outside the monopoly, these activities must remain subject to competition law.
<b>Law on Management and Utilisation of State Capital</b>	Article 5 indicates that state investments should be limited to sectors in which private market participants are insufficiently investing or to sectors that are considered important for the country's development
<b>Law on Public Debt Management</b>	Article 41 specifies eligibility criteria and the credit line of government guarantee
<b>Decree No. 75/2019/ND-CP on Sanctioning of Administrative Violations in Competition</b>	The Decree states that the National Competition Commission (NCC) can request a halt to anti-competitive behaviours of state agencies, impose remedial measures and compensate for damages.

Source: OECD (2021<sup>[1]</sup>), OECD Competitive Neutrality Reviews: Small-Package Delivery Services in Viet Nam, <https://www.oecd.org/competition/fostering-competition-in-asean.htm>.

However, the proximity of SOEs to policy makers, continued conflation of the exercise of ownership rights, the government's explicit use of SOEs as a main vehicle for the implementation of the State's industrial or sectoral policies, policy formulation and regulatory responsibilities within the same government ministries/agencies have led to a perception of discrimination and discrepancy. While Vietnamese law does not confer legal privilege to SOEs, or board members OECD mission team is informed that SOEs are treated "favourably" in all aspects by the government. Sectoral ministries and local governments give their affiliated SOEs privileges such as access to capital, natural resources, land, and human resources. The new OECD Product Market Regulation (PMR) sub-indicator on public ownership control confirms these findings (OECD, 2022<sup>[2]</sup>).

## 9.6. Market consistent financing conditions

*F. SOEs' economic activities should face market consistent conditions regarding access to debt and equity finance. In particular: SOEs' relations with all financial institutions, as well as non-financial SOEs, should be based on purely commercial grounds;*

### 9.6.1. Law on Public Debt Management and Decree No. 91/2018/ND-CP on Granting and managing Government guarantees

The government does provide guarantees for SOEs' loans, but such guarantees are declining. The government grants loan guarantees to enterprises to facilitate their mobilisation of large capital sources, for which the Government's guarantees are sometimes required by credit institutions. The government has issued certain regulations regarding loan guarantees for SOEs, such as the Law on Public Debt Management and Decree No. 91/2018/ND-CP on Granting and managing Government guarantees. According to the provisions of the Law on Public Debt Management, based on the requirements of

socio-economic development, the government can provide state guarantees for enterprises in general (not only SOEs) to borrow foreign loans.

The government has promulgated a list of projects eligible for guarantees, the order and procedures for consideration and grant of guarantees, regulations on consideration and appraisal of enterprises for granting guarantees, regulations on supervision and disbursement of foreign loans, regulations on auditing. However, a comprehensive framework for preventing moral hazard in consequence of managerial over-confidence is not yet in place.

The primary lenders to SOEs are domestic and foreign commercial banks and financial institutions. Also, state-controlled financial institutions can act as lenders to SOEs. Although there are no explicit provisions in the Vietnamese law that indicate SOEs are entitled to preferential lending rates, in practice, a state enterprise that has higher operational costs than its private competitors can benefit from lower borrowing costs resulting from implicit government guarantees. According to Viet Nam Development Bank (VNDB), more than half of its loan portfolio currently consists of loans to SOEs. In principle SOE's creditor – borrower relations should be implemented based on loan contracts/agreements and regulated by specialised laws. While there is no comprehensive mechanism in place to ensure that the creditor/debtor relationship is conducted at arm's length and free from undue influence by government officials, the 2015 Civil Code has explicitly prescribed measures to secure the performance of civil obligations, which are also realised in lending activities of credit institutions.

Annually, the state ownership representative body is mandated to issue decisions on assigning annual production/business plans to SOEs, which include expected return on equity (ROE). Although SOEs should be categorised based on these plans, this is done on an ad-hoc basis in practice. There is no legal regulatory framework in place to ensure market consistent costs of equity financing from the state and capital injections from the state are not subject to a minimum expected rate-of-return on equity. Capital injections from the state depends on the degree of investment required by each sector. The Government's investments are exercised on the basis of capital preservation. According to regulations on management of the State capital and regulations on SOE finance, SOEs' leadership must be responsible for preserving the State capital, and the State capital must be used effectively.

*F.2. [SOE's economic activities should face market consistent conditions regarding access to debt and equity finance. In particular] SOEs' economic activities should not benefit from any indirect financial support that confers an advantage over private competitors, such as preferential financing, tax arrears or preferential trade credits from other SOEs. SOEs' economic activities should not receive inputs (such as energy, water or land) at prices or conditions more favourable than those available to private competitors;*

Criteria for the government's decision on providing an SOE with new equity is elaborated in several legal documents including Law No. 69/2014/QH13 (from Article 10 to Article 21), Decree No. 91/2015/ND-CP (from Article 5 to Article 18), Decree No. 32/2018/ND-CP (from Clauses 2 to 5, Article 1), Decree No. 140/2020/ND-CP (clauses 3 to 10, Article 2; Clause 2, Article 6), Decree No. 121/2020/ND-CP and guiding circulars. The owner representative agencies can decide on providing new or additional equity to public utility companies (i.e. airports, seaports, railways) with an approval from the Prime Minister. The decision should be in line with Prime Minister's direction with regard to national development strategy.

Both SOEs and private enterprises must comply with the Enterprise Law and the Corporate Income Tax Law (CIT Law). Outstanding loans between SOES (if any) are handled as prescribed by law similar to how they are handled between private enterprises or between an SOE and a private enterprise. The Vietnamese Government promulgates tax laws that apply equally to all businesses across the country. SOEs are required to perform the same or equivalent tax obligations as those of joint stock companies as prescribed by the law on taxation. According to the Vietnamese Government, the SOE sector implements tax obligations more strictly than the private enterprise sector. In some cases, to meet the spending needs, state economic groups may prepay part of or most of the payable tax amount of the following period or the following year.

Major SOEs have reported to the OECD that commercial credit is a key financing source for enterprises' operation and trade credit from one SOE to another is not the primary source of finance for SOEs. However, OECD finds that with SOE's current position and prestige, the credit relationship with SOEs seems to be less risky than with private enterprises.

*F.3. [SOE's economic activities should face market consistent conditions regarding access to debt and equity finance. In particular] SOEs' economic activities should be required to earn rates of return that are, taking into account their operational conditions, consistent with those obtained by competing private enterprises.*

In principle, when participating in investment plans, SOEs as well as enterprises must expect, evaluate and manage risks to achieve maximum profit and be approved by the competent authority (usually the ownership entity) on the investment plan. In case of capital investment with a lower interest rate than that in the market, SOEs must clearly present the reason and must be approved by the competent authority.

As of now, no regulations specify the mandatory minimum rate of return. Regardless, SOEs shall be responsible for their own business regulations to ensure efficient investment and use of capital. Annually, the owner's representative agency sets a profit plan including ROE based on previous years' results. However, it is not necessarily equal to or higher than that of private enterprises in the same industry because SOEs are expected to undertake public policy obligations including job creation in the locality.

SOEs that borrow must make sure that: the ratio of the total loan that an SOE takes out for production and business operations (inclusive of loans taken out by subsidiary companies of a state-owned parent company guaranteed by the State in accordance with clause 1 Article 189 of the 2014 Enterprise Law) to equity does not exceed three times the equity as specified in the SOE's latest quarterly or annual financial statement available at the time of borrowing.

The government has emphasised that in recent years, SOEs have actively innovated their management methods, focused on developing effective business fields to ensure higher profits, thereby improving workers' lives and SOE leaders' income. In fact, in Viet Nam, there are many SOEs with large capital scale and the profit rate that is higher than that of the private sector in the same industry. However, there are also many SOEs with low profits, even prolonged losses.

Dividend payout of wholly state-owned enterprises should comply with the Law on State capital management. For dividend payout of other SOEs, the State with a controlling interest can decide the dividend payout ratio. The transfer of capital from one SOE to another shall be decided by competent state agencies and can be exercised in different ways, such as direct investment or withdrawal of profits back to the State budget before investing in other enterprises. The dividend policy of joint stock SOEs will be passed by the general meeting of shareholders. The owner's representative agencies direct their representatives for state capital at SOEs to cast their votes and pass the dividend policy every year at the general meeting of shareholders.

Capital structure of an SOE may change in cases of changes in charter capital, merger, and financial restructuring, all of which must be approved and decided by competent state authorities in writing and disclosed in compliance with the provisions on divestment of Law on Enterprises, Law on Securities, Law on State Capital Management, and other relevant laws.

## 9.7. Public procurement procedures

*G. When SOEs engage in public procurement, whether as bidder or procurer, the procedures involved should be competitive, non-discriminatory and safeguarded by appropriate standards of transparency*

### 9.7.1. Procurement rules and procedures for SOEs

Procurement in SOEs must comply with the provisions of the Law on Bidding, the Law on Management and Use of Public Property, the Law on Construction and related guiding documents. The Law on Bidding prescribes procurement procedures for development investment projects of SOEs and those that the State invests in. SOEs where the State has a controlling interest are required to comply with the provisions of the Law on Bidding in any of their procurements. This is a universal principle that SOEs must practice independent of the size or trajectory of their business. The governing scope of the Law on Bidding does not discriminate between SOEs and private enterprises. Any procurements (or tenders) where 30% of state capital or more is used are required to comply with the Law on Bidding (see Box 9.1). Parties to the procurement share equal rights, interests, obligations, and responsibilities.

According to the government, procurement rules, processes and procedures are stricter for SOEs than for private enterprises. At SOEs, in order to ensure transparency, almost all asset procurement must be conducted through bidding on the basis of the procurement plan approved at the end of the previous year.

The government has issued, guided and required SOEs to conduct procurement in a public and transparent manner to avoid waste and profiteering through the processes of notifying and receiving bidding dossiers, setting up appraisal team, bid evaluation and selection conducted in a public manner. However, audits and inspections find that due to limitations on procurement budgets, many SOEs often fail to procure modern assets with latest technology, leaving procurement in SOEs inefficient.

#### Box 9.1. Procurement regulations for SOEs specified in Law on Bidding

Vietnamese laws and regulations state that when SOEs participate in public procurement and tendering, whether as bidders or bid solicitors, relevant procedures must be competitive without discrimination and secured by appropriate standards on transparency. Procurement regulations and procedures that SOEs must comply with upon participating in bidding are in the governing scope of the Law on Bidding, specifically:

Point b clause Article 1 of the 2013 Law on Bidding prescribes that the selection of providers of advisory services, non-advisory services, goods, construction services, and installation services for SOEs' development/investment projects is under the governing scope of the Law on Bidding.

The determination of whether an enterprise is an SOE or not needs to be based on regulations on enterprises (in the mentioned Law on Enterprises). In cases where enterprises are not SOEs, they are not under the governing scope of the abovementioned Law on Bidding.

Pursuant to point c clause 1 Article 1 of the Law on Bidding, development/investment projects other than cases defined in points a and b of this Clause which are financed by the State or SOEs with 30% or more or less than 30% but more than VND 500 billion of their total capital are under the governing scope of the Law on Bidding.

Furthermore, clause 2 Article 3 of the Law on Bidding also prescribes that in cases where the selection of providers for the provision of raw materials, fuel, materials, supplies, advisory services, and non-advisory services, enterprises must issue regulations on the selection of providers, which will be applied consistently enterprise-wide, and ensure equality, transparency and economic performance.

Source: Law on Bidding, Vietnamese Law Portal, <https://thuvienphapluat.vn/>

Bidding operations are governed by the Law on Tendering and its guiding documents. As far as investments in expressway construction is concerned, Clause 5, Article 29 of the Law on Public-private partnership (PPP) No. 64/2020/QH reads: "To bid, an enterprise wholly owned by the State must enter into



a joint venture with a private investor.” Clause 3, Article 2 of Decree 25/2020/ND-CP prescribes that: “A competent state authority or a bid solicitor must not hold more than 49% of the shares or charter capital at the bidder. In case the bidder is a joint venture, the holding of the competent authority or the bid solicitor in the joint venture shall be equal to the sigma sum of the holding of the competent authority times the holding of each member of the joint venture.

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**From:**  
**OECD Review of the Corporate Governance of  
State-Owned Enterprises in Viet Nam**

**Access the complete publication at:**

<https://doi.org/10.1787/a22345d0-en>

**Please cite this chapter as:**

OECD (2022), “State-owned enterprises in the marketplace”, in *OECD Review of the Corporate Governance of State-Owned Enterprises in Viet Nam*, OECD Publishing, Paris.

DOI: <https://doi.org/10.1787/9ba899a0-en>

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