

Regulatory Framework for State-Owned Enterprises in the Implementation of African Continental Free Trade Area

Legborsi Nwiabu¹

The governance of state-owned enterprises (SOEs) is essential for efficient and open markets at both the domestic, continental and international levels. In many countries, SOEs are the main providers of key public services, including public utilities. Many African economies have placed SOEs at the centre of their national development strategies with a growing trend to rely on SOEs to remedy market failures and remove direct obstacles to development. Some go beyond this and aspire to a “developmental” state model in which SOEs drive competitiveness, job creation and industrial development. This is partially a response to disappointment with the outcomes of privatisations and structural reform programmes in the 1990s, but there is also a growing consensus that if properly governed, SOEs can support national development.

The operations of SOEs have an impact on citizens’ everyday life and on the competitiveness of the rest of the economy. Many public hospitals and educational institutions, for instance, compete directly with private suppliers of similar services. And ensuring that they operate in a sound competitive and regulatory environment underpins the actualisation of the African Continental Free Trade Area (AfCFTA) objectives. SOEs also play important roles in exploiting natural resources and managing the extractive sector that is predominant in Africa. They can generate significant revenue for the state, enable a government to exercise greater control over the sector, help improve local technologies and skills, or manage exposure to energy transition risks. Although some SOEs have made significant contributions to development and revenue generation, others have struggled with poor governance and corruption².

¹ LLM. International Trade & Investment Lawyer based in Abuja. Nigeria.

² <https://eiti.org/state-owned-enterprises>

With the coming into force of the AfCFTA, it is observed that there is absence or no existing benchmark or regulatory framework for SOE governance in Africa both at the African Union and regional economic communities (RECs) levels. Though efforts by the African Network on Corporate Governance of State-Owned Enterprises under the African Peer Review Mechanism (APRM) to draft the African Union Guidelines on Corporate Governance Of State-Owned Enterprises, it remains to be a pipe dream. The OECD Guidelines on Corporate Governance of State-Owned Enterprises define SOEs as

any corporate entity recognised by national law as an enterprise, and in which the State exercises ownership, which includes joint stock companies, limited liability companies and partnerships limited by shares. Moreover, statutory corporations, with their legal personality established through specific legislation, should be considered as SOEs if their purpose and activities, or parts of their activities, are of a largely economic nature³.

The use of SOEs as instruments in the pursuit of economic development goals need to be guided by rules in trade agreements. Trade agreements can act as commitment devices for beneficial policy reforms by leveraging the interest of trading partners to reduce the adverse cross-border spill over effects of large SOEs⁴. Trade agreements can also provide a mechanism to ensure a policy framework that supports competitive neutrality and improve the availability of data on the prevalence and operation of SOEs. Increasingly, regional trade agreements (RTAs) go beyond the WTO in including provisions that address the potential anticompetitive implications of the operation of SOEs. Recent bilateral and regional agreements signed by China, the EU and the US, include provisions on SOEs⁵ and offer a basis on which to build a robust regulatory framework, solid evidence base on the prevalence of SOEs, their economic performance, and associated cross-border competition spill over effects in Africa.

The African Continental Free Trade Area (AfCFTA) Article 25 deals with transparency and notification requirements for State Trading Enterprises. 25 (1) states that “In order to ensure the transparency of the activities of State Trading Enterprises (STE), State Parties shall notify such enterprises to the Secretariat for transmission to other State Parties”. (2) “For the purpose of this Article, STE refers to governmental, non-governmental enterprises, including Marketing boards, which have been granted

³ OECD (2015), *OECD Guidelines on Corporate Governance of State-Owned Enterprises*, 2015 Edition, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264244160-en>

⁴ Hoekman, B and A Sapir (2021), ‘State-Owned Enterprises and International Competition: Towards Plurilateral Agreement’, in B Hoekman, X Tu, and D Wang (eds), *Rebooting Multilateral Trade Cooperation: Perspectives from China and Europe*, CEPR Press, London. https://respect.eui.eu/wp-content/uploads/sites/6/2021/07/Chapter_12.pdf

⁵ Ibid.

exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports with reference to provisions of Article XVII of GATT 1994.”

SOEs are key players in large cross-border infrastructure projects, which are crucial to realising regional integration goals and to achieving what is considered to be an important development objective. Sometimes, state-owned enterprises are formed out of urgency on the part of the government through what is known as corporatisation, which allows the entity to act as a for-profit body. In many cases, such SOEs work to meet the goals the government had in mind, however, technically speaking, they operate as commercial bodies. Often, governments in developing countries create state-owned enterprises in areas of the economy they wish to grow and encourage economic development⁶. It is envisaged that AfCFTA state parties may be involved in more corporatisation activities in order to benefit from the market access opportunities.

The General Agreement on Tariffs and Trade (GATT) 1947 introduced the first multilateral rules on state enterprises. There, the parties decided to regulate “State Trading Enterprises” (STEs). The basis for including rules was the recognition that a member could avoid complying with their commitments by simply establishing an enterprise, clothing it with the appearance of being a private enterprise, but then use this enterprise to circumvent their commitments. Article XVII of the GATT requires that if a Member establishes or maintains a state enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, then such an enterprise shall, for its exports or imports, act in accordance with two principles: (1) non-discriminatory treatment and (2) commercial considerations⁷. The right of WTO members to maintain or establish STEs, or to offer exclusive privileges, is not limited. The basic obligation imposed on STEs is to make purchases or sales on a non-discriminatory manner (Article XVII:1a), which requires that STEs make purchases or sales solely in accordance with commercial considerations (Article XVII:1b).

Corruption is the antithesis of good governance, and it is a direct threat to the purpose of state ownership⁸. Not only can it damage brand and company reputation and affect SOE performance,

⁶ <https://corporatefinanceinstitute.com/resources/career/state-owned-enterprise-soe/>

⁷ Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994. At https://www.wto.org/english/docs_e/legal_e/08-17_e.htm

⁸ OECD (2018), *State-Owned Enterprises and Corruption: What Are the Risks and What Can Be Done?* OECD Publishing, Paris, <https://doi.org/10.1787/9789264303058-en>

corruption can cause significant financial losses, lead to an erosion of public trust, degrade the national and international investment climate and directly impact the delivery of public services to citizens. Preventing corruption and promoting integrity in SOEs requires mutually-reinforcing approaches from the state and SOEs, relying first on the integrity of the state and its faithful execution of ownership responsibilities and, second, on good practices of the SOE sector that can both signal and support accountability and legitimate state ownership⁹.

Finally, Governments are the cornerstone of implementing an SOE reform agenda in any context and it is recommended that the AfCFTA provide the rules on SOEs operations. We also call on African Union member states to provide legal framework for the implementation of SOEs governance by developing national and regional benchmarks and consensus on good practice. The AfCFTA secretariat should set up technical working group on SOEs to curb corruption and instil corporate ethics. There should be a policy framework to monitor SOEs and private sector activities in Africa in order to promote corporate governance and responsible business using the legal instruments of the African Continental Free Area Agreement.

⁹ <https://www.oecd.org/corporate/ca/Guidelines-Anti-Corruption-Integrity-State-Owned-Enterprises.pdf>

tralac gratefully acknowledges the support of its Development Partners

