



The Regulation of Public Enterprises in Ethiopia: Lessons for South Africa

Henok Ashagrey & Jaap de Visser

Copyright

© Dullah Omar Institute for Constitutional Law, Governance and Human Rights, University of the Western Cape. 2019

Acknowledgment

This project is made possible with the support of the Open Society Foundation for South Africa.



Table of Contents

| | |
|---|-----------|
| Introduction to the project | 4 |
| Project team | 4 |
| Acknowledgment | 5 |
| 1 Introduction to the paper | 6 |
| 2 Evolution and development of state-owned enterprises in Ethiopia | 6 |
| 2.1 The Imperial Era (Haileselesie's regime) | 7 |
| 2.2 The socialist era (Mengistu Hailemariam) | 8 |
| 2.3 The post-1991 era | 8 |
| 3 The concept and forms of state-owned enterprises in Ethiopia | 9 |
| 4 Structure, management and control of public enterprises under the Public Enterprise Proclamation | 13 |
| 4.1 Management Board | 13 |
| 4.1.1 Background | 13 |
| 4.1.2 Formation and composition of the board | 14 |
| 4.1.3 Criteria for appointment to the board | 14 |
| 4.1.4 Removal and resignation | 15 |
| 4.1.5 Transparency and public participation in appointing members of the board | 16 |
| 4.1.6 Liability of board members | 16 |
| 4.2 The General Manager | 16 |
| 4.2.1 Functions and powers | 16 |
| 4.2.2 Appointment and dismissal | 17 |
| 4.2.3 Criteria for appointment and dismissal | 17 |
| 4.2.4 Liability of the General Manager | 18 |
| 4.2.5 Transparency and public participation | 18 |
| 5 State owned enterprises not regulated by the Public Enterprise proclamation | 19 |
| 5.1 Categories | 20 |
| 5.2 Directors | 22 |
| 5.2.1 Appointment | 22 |
| 5.2.2 Removal | 23 |

| | | |
|----------|--|-----------|
| 5.2.3 | Liabilities of the board of directors | 23 |
| 5.2.4 | Conflict of interest rules | 24 |
| 5.2.5 | Directors' liability | 25 |
| 5.3 | General Manager | 26 |
| 5.3.1 | Appointment | 26 |
| 5.3.2 | Removal | 26 |
| 5.3.3 | Liabilities | 27 |
| 6 | How are public enterprises managed/overseen by the central government? | 27 |
| 7 | Ethiopia's decision to reduce its stake in major state-owned enterprises | 29 |
| 8 | Lessons for South Africa: less fragmentation, appointments on merit, and clearer accountability | 30 |

Introduction to the project

The Dullah Omar Institute is conducting research and advocacy on the framework for the appointment and dismissal of Board members to state-owned enterprises (SOEs). This is informed by a need for greater transparency and quality in these appointments. The overall purpose is an improved functioning of SOEs that have a service delivery mandate or a mandate that impacts on a constitutional right. In particular, we want to see an improved accountability structure for the executive leadership of, legislative oversight over and public engagement with those SOEs.

SOEs are enterprises where the state has significant control through full, majority, or significant minority ownership. The research focuses on two key flaws in the appointment and dismissal of SOE board members. The first relates to the procedural issues but is embedded in bigger questions surrounding the role and position of SOEs. In practice, board members are appointed by the relevant shareholder Minister in processes that are not transparent. Partly as a result of the conflicting legislative framework, procedures for the appointment of SOE board members often lack integrity, do not provide for adequate public engagement and take place without any communication to the South African public about the role of SOEs and the importance of the appointment processes. The second flaw relates to substantive criteria for appointment. Too often, there is a disjuncture between the fiduciary duties of SOE board members and the profile, skills and expertise of incumbents, pointing to inadequate criteria for appointment and dismissal or inadequate application of those.

Our aim is to suggest options for law reform, criteria for board membership and criteria for appointment processes that recognise the role of the public in these appointments. Our objective is to complement the existing activities of other civil society organisations in this space.

Project team

The Project Team comprises Ms Motlatsi Komote, Assoc Prof Lukas Muntingh, Ms Samantha Waterhouse, Prof Jaap de Visser and Prof Riekie Wandrag (associate).

1 Introduction to the paper

The role of public enterprises in Ethiopia is manifested in the quantum of capital they command and the magnitude of the economy's dependence on such enterprises.¹ Essential services such as electricity, telecommunication, shipping and logistics, and transport are mainly, if not solely, provided by public enterprises.² In addition to giant state-owned enterprises, such as Ethiopian Airlines, Ethio Telecom, and Ethiopian Electric Power, there are also state-owned enterprise working on railway, industrial parks, hotels, sugar and manufacturing industries.³

This paper has five parts. Part 2 briefly sets out the evolution and development of state-owned enterprise in Ethiopia. Part 3 and 4 explore the concept and forms of state-owned enterprises in Ethiopia and the legal framework that governs them. This includes the structure, management and control of public enterprises under the Public Enterprise Proclamation corporate governance and the Commercial Code. Part 5 concerns the oversight role of the federal government over state-owned enterprise in Ethiopia and part 6 forwards reasons for the government's new economic reform.

2 Evolution and development of state-owned enterprises in Ethiopia

Business activity in organised form began in Ethiopia during Emperor Menilik's reign.⁴ During that time, the number of companies authorised to do business in the country increased significantly and eventually dictated the promulgation of the 1933 Law of Companies.⁵ However, progress was interrupted by the Italian invasion and occupation of Ethiopia which lasted from 1935-1941. Even though the aftermath of

¹ T Meheret 'The concept and characteristics of public enterprises in Ethiopia: an overview' 8(2) (2014) *Mizan Law Review* 313.

² As above.

³ Ethiopia Semonegna 'Ethiopia to partially or fully privatize state-owned/public companies' <<http://semonegna.com/ethiopia-partially-fully-privatize-state-owned-public-companies/>> (accessed 25 August 2018).

⁴ R Pankhurst 'The Franco-Ethiopian rail way and its history' 1963 *Ethiopian Observer* 342 379.

⁵ E Tsegaw 'The legal status of state-owned share companies in Ethiopia' (2015) 7 *Beijing Law Review* 13 212 213.

the invasion saw renewed progress, organised enterprise did not start proliferating until the adoption of the 1960 Commercial Code.⁶

Turning to the history of state owned enterprises in Ethiopia, they came into being through nationalisation, the creation by government of an enterprise *de novo* or through government investment in a joint venture.⁷ Their emergence coincides with the modernisation attempts of the state in the early twentieth century.⁸ At this point in history, the Ethiopian state, together with foreigners, established certain state-owned enterprises, such as the state Bank of Ethiopia and the Ethio-Djibouti Railway Enterprise, to satisfy the state's rising administrative needs.⁹ Since that time, Ethiopian state-owned enterprises have operated under three different regimes. Therefore, the history of state-owned enterprises can be categorised in three periods: the Imperial era, the Socialist era, and the post-1991 era.

2.1 *The Imperial Era (Haileselesie's regime)*

This era was known by its official adoption of the free market economic system. However, this economic system was not well entrenched and developed. In the early stages of this era, there was limited private capital and public sector engagement was needed to uplift the modernisation attempt.¹⁰ Accordingly, many public enterprises were established to run hotels, banks, shipping lines, etc.¹¹ They were created by the state as a sole owner and as joint ventures with private persons, mostly foreigners.¹² Most of these entities were formed in the form of public corporations as share companies.

There was, however, no comprehensive single legal framework regulating public enterprise. Many of the public enterprises established during the Imperial Era were

⁶ S Bekele 'Private Commercial Companies under Ethiopian Law' (1966) cited in Tsegaye (n 2 above) 13.

⁷ T Meheret 'The concept and characteristics of public enterprises in Ethiopia: an overview' 8(2) (2014) *Mizan Law Review* 361.

⁸ D Asrat & A Shiferaw 'Public Enterprises and Cooperatives Module' (2009) 34.

⁹ As above.

¹⁰ As above.

¹¹ As above.

¹² As above.

therefore administratively and operationally similar to the private enterprises and were governed by the Commercial Code.¹³ Nevertheless, there were special state-owned enterprises that were inaugurated and governed by specific proclamation or order of the Emperor.¹⁴

2.2 *The socialist era (Mengistu Hailemariam)*

In 1975, the country declared socialism as its political philosophy. Therefore, privately owned companies were nationalised to form public enterprises.¹⁵ This era was known by state ownership and control of the major means of production. So, there was a dramatic growth in the number of state-owned enterprises.¹⁶ As a result, the government was required to set up an executive organ entrusted with the power to regulate the highly proliferated public enterprises. Among other things, this organ was empowered to create and manage public enterprises despite the fact that each of the enterprises was independent from one another. It was also mandated to adopt a plan, budget and appoint a general manager for each enterprise.¹⁷ Thus, this body was authorised not only to manage the nationalised enterprises but also to create new ones when deemed necessary. However, this organ was ineffective and unable to carry out its responsibilities. To deal with this, the government merged together those public enterprises that worked in the same sector, to form a corporation.¹⁸

The main feature of state-owned enterprises during this period was that the entities were relatively large but overseen by an inefficient and ineffective executive government department. As a result, many state-owned entities failed with some exceptions, such as Ethiopian Airlines.¹⁹

¹³ As above.

¹⁴ As above.

¹⁵ S Jesiah 'Privatization programme in Ethiopia: is the cause justified? 2007 4(1) *Quarter* 3.

¹⁶ D Asrat & A Shiferaw 'Public Enterprises and Cooperatives Module' (2009) 35.

¹⁷ As above.

¹⁸ As above.

¹⁹ As above.

2.3 *The post-1991 era*

The post-1991 era can be categorised in two phases: the first is the Transitional Government of Ethiopia (TGE) established by the 1991 Transition Charter, and the second is the Federal Democratic Republic of Ethiopia (FDRE) decreed by the 1995 Constitution. After the fall of the Derg regime, the then TGE proclaimed a liberalised market-oriented economic policy.²⁰ Accordingly, the new economic policy provided for major and significant liberalisation with respect to privately-owned enterprises.²¹ At the same time, it restricted the role of the state in the economy.²² In the same vein, the FDRE government reinforced the position of the TGE regarding the role of the state in the economy with a view to encourage private economic undertaking.²³ However, the government did not remove itself from economic activity entirely. It still continued to vigorously take part in the economy while inviting the private sector to take over. Hence, it can be said that the post-1991 era is characterised by a mixed system in which state-owned enterprises and private capital owners coexisted.²⁴

Against the backdrop of the above overview, the paper now turns to the conceptualisation and classification of state-owned enterprises and the relevant governing legal framework in present day Ethiopia.

3 The concept and forms of state-owned enterprises in Ethiopia

There are no explicitly recognised categories of state-owned enterprises in Ethiopia. The enterprises in which state or public authorities have ownership rights do not all have the same status and therefore they may be regulated by different laws. Some of the state-owned entities are regarded as public enterprises in accordance with the Public Enterprise Proclamation No. 25/1992 (Public Enterprise Proclamation), and therefore they are governed by the same Proclamation. The remaining state-owned

²⁰ Ethiopian Investment Authority Review 1992 cited in E Tsegaw 'The legal status of state-owned share companies in Ethiopia' (2015) 7 *Beijing Law Review*13.

²¹ E Tsegaw 'The legal status of state-owned share companies in Ethiopia' (2015) 7 *Beijing Law Review*13.

²² D Asrat & A Shiferaw 'Public Enterprises and Cooperatives Module' (2009) 35.

²³ As above.

²⁴ As above.

entities, that do not satisfy the requirements of the Public Enterprise Proclamation, lack the status of public enterprise so they are regulated by the Commercial Code.

The Public Enterprise Proclamation defines a public enterprise as “a wholly state-owned public enterprise established pursuant to the same Proclamation to carry on for gain manufacturing, distribution, service rendering or other economic and related activities”.²⁵ According to this definition three basic elements determine the feature of a public enterprise. The first element requires an enterprise to be wholly owned by the state. The mere existence of a public investment share in an enterprise therefore does not suffice.²⁶ The second element requires the establishment under the Proclamation. The Proclamation determines the legal framework for entities established by the State for the purpose of economic activities for gain. It deals with the requirements for their formation, operation, structure, and disestablishment. If the government establishes a public enterprise, it should specifically indicate that the entity is governed by the Public Enterprise Proclamation.²⁷ The third element in the definition of ‘enterprise’ under the Public Enterprise Proclamation is the fact that public enterprises are commercial entities. They are thus distinct from administrative agencies which carry out regulatory activities and/or render public services. Each of the three requirements must be met in order for an entity to be recognised as a public enterprise and be regulated by the Public Enterprise Proclamation.

However, subsequent proclamations have come up with diversified usages of the term enterprise. For instance, the Privatization of Public Enterprises Proclamation No. 146/1998 (Privatization of Public Enterprises Proclamation) defined the term enterprise as “*a public enterprise governed by the Public Enterprises Proclamation No. 25/1992 or an establishment designated by the Government as a public enterprise for the purpose of the application of this Proclamation*”.²⁸ Consequently,

²⁵ Public Enterprises Proclamation 25/1992 art 2(1).

²⁶ T Meheret ‘The concept and characteristics of public enterprises in Ethiopia: an overview’ 8(2) (2014) *Mizan Law Review* 337.

²⁷ Public Enterprises Proclamation No. 25/1992, Article 6(2).

²⁸ Privatization of Public Enterprise Proclamation No. 146/1998 art 2(3).

the government may classify an entity as a public enterprise for the purpose of privatisation even though it does not satisfy the three cumulative requirements under the Public Enterprise Proclamation. This definition however does not seem to be aimed at extending the scope of the term 'enterprise' as the limb added is meant to designate some entities as public enterprises for the purpose of the proclamation, i.e. privatisation.²⁹ In other words, it does not change the content of the definition for the purpose of the Public Enterprise Proclamation.

The other proclamation that deviates from the definition in the Public Enterprise Proclamation is the Privatization and Public Enterprises Supervising Authority (PPESA) Establishing Proc. No. 412/2004 (PPESA Establishing Proclamation); a proclamation that amalgamates the Ethiopian Privatization Agency and the Public Enterprises Supervising Authority to form the Privatization and Public Enterprises Supervisory Authority (the Privatization and Public Enterprises Supervisory Authority has been elevated to the Ministry of Public Enterprises since 2015).³⁰ This Proclamation defines public enterprise as "*an enterprise as defined under Article 2(1) of the Public Enterprises Proclamation No. 25/1992, or a wholly state-owned share company, but excluding those enterprises for which specific supervising authorities are designated by other laws or decisions of the Government*".³¹ Compared to the abovementioned definitions, this definition is narrower as it excludes some public enterprises.³² It is also broader because it extends the application of the term to share companies wholly owned by the state.³³ However, this definition is

²⁹ T Meheret 'The concept and characteristics of public enterprises in Ethiopia: an overview' 8(2) (2014) *Mizan Law Review* 338.

³⁰ Before the introduction of the PPESA Establishment Proclamation, public Enterprises and their privatization were regulated by two separate regulatory regimes. While the Public Enterprise Proclamation 25/1992 and the Public Enterprises Supervising Authority Establishment Proclamation No. 277/2002 governed the establishment and operation of public enterprises, the Privatization Agency Establishment Proclamation No. 87/1994 (as amended) and the Privatization Proclamation governed privatization of public enterprises.

³¹ Privatization and Public Enterprises Supervising Authority Establishing Proc. No. 412/2004 art 2(2).

³² However, the enterprises which fall outside the scope of Proclamation No. 412/2004 are still public enterprises under Proclamation No. 25/1992. Even though these enterprises are not governed by Proclamation No. 412/2004, a different supervising authority is named thereby enabling them to fall under the definition articulated under Public Enterprise Proclamation. See art 14 of the Public Enterprise Supervising Authority Establishing Proclamation.

³³ What is peculiar about Proclamation No. 412/2004 is that it introduced a new form of public enterprise (i.e. state-owned share company) that was not recognized under Proc. No. 25/1992. Hence, share companies

incorporated in a proclamation issued to establish an authority and the purpose of the definition is to identify the enterprises that come under the supervision of this administrative agency. The PPESA Establishing Proclamation does not repeal the Public Enterprises Proclamation and, what is more, it clearly makes reference to the Public Enterprises Proclamation. Thus, the PPESA Establishing Proclamation does not aim to amend the Public Enterprise Proclamation. The two definitions also have two different goals.³⁴ The Public Enterprise Proclamation is an overarching proclamation applicable to any public enterprise irrespective of the supervising authority designated. On the other hand, the objective of the definition in the PPESA Establishing Proclamation is to identify those entities which are supervised by the authority. In other words, the definition given in the PPESA Establishing Proclamation does not intend to identify public enterprises *per se*, but merely selects those enterprises which will be governed by that particular proclamation or supervised by the PPESA.³⁵

There are other proclamations, such as the Revised Federal Ethics and Anti-Corruption Commission Establishment Proclamation No. 433/2005, which include an array of definitions that each introduced additional elements broadening the scope of the term public enterprise beyond the definition under the Public Enterprise Proclamation. However, none of them have the intention of modifying the definition under the Public Enterprise proclamation. Thus, the term public enterprise

owned by the state are considered as public enterprises under Proclamation No. 412/2004 even if, for legal and practical purposes, they are business organizations by and large regulated by the Commercial Code. Yet, the share companies referred to herein are different from business organizations recognized as such by the Commercial Code. For the purpose of this particular law, reference is made to “a share company partially owned by the state but excluding those share companies in which the state owns shares through public enterprises” (Privatization and Public Enterprises Supervising Authority Establishing Proc art 2(3)). It mainly encompasses companies created by conversion of public enterprises into share companies. In fact, this is a temporary situation by which privatization is facilitated as can be drawn from article 5(1) and 5(4) of Proclamation No. 146/1998. It is a solution to fill the gap created between conversion and privatization of a public enterprise. Despite the categorization of certain share companies into public enterprises under the Supervising Authority Establishment Proclamation, they are subject to different legal regimes thereby confirming that the term “public enterprise” has retained the meaning ascribed to it under article 2(1) of Proclamation No. 25/1992. See T Meheret ‘The concept and characteristics of public enterprises in Ethiopia: an overview’ 8(2) (2014) *Mizan Law Review* 339.

³⁴ T Meheret ‘The concept and characteristics of public enterprises in Ethiopia: an overview’ 8(2) (2014) *Mizan Law Review* 339.

³⁵ T Meheret ‘The concept and characteristics of public enterprises in Ethiopia: an overview’ 8(2) (2014) *Mizan Law Review* 339.

has retained the meaning ascribed to it under article 2(1) of the Public Enterprise Proclamation.³⁶ The paper now turns to an examination of the legal framework for public enterprises under this Proclamation.

4 Structure, management and control of public enterprises under the Public Enterprise Proclamation

As per article 10 of the Public Enterprise Proclamation each enterprise shall, among others, have a Supervising Authority, a Management Board and a General Manager (and Deputy General Manager as may be necessary). This section addresses the enterprises' internal organisational structure. The following section will separately address the state control mechanism, including through the office of supervising agency. This is distinct from its internal organisational structure as it is part of the executive department of the state.

4.1 Management Board

4.1.1 Background

The management board is the highest decision-making body in the enterprise. However, not all decisions that pertain to the enterprise are left to the board.³⁷ The examination of the powers of boards of Ethiopian state owned enterprises can be located in a general narrative on the power of boards of state-owned enterprises. Their powers and responsibilities differ from jurisdiction to jurisdiction. Essentially, there are three categories: advisory boards – that propose decisions and not make them; functional boards – that make routine decisions on the day-to-day affairs of the enterprise; or policy boards – that have policy making powers and make long-term decisions.³⁸

In Ethiopia, the management board of a public enterprise is best categorised as a policy board.³⁹ According to article 14 of the Public Enterprise Proclamation, the

³⁶ T Meheret 'The concept and characteristics of public enterprises in Ethiopia: an overview' 8(2) (2014) Mizan Law Review 339.

³⁷ D Asrat & A Shiferaw 'Public Enterprises and Cooperatives Module' (2009) 83.

³⁸ D Asrat & A Shiferaw 'Public Enterprises and Cooperatives Module' (2009)82.

³⁹ D Asrat & A Shiferaw 'Public Enterprises and Cooperatives Module' (2009) 82.

management board is not expected to make routine decisions on the day-to-day affairs of the enterprise. It is rather expected to formulate broad direction and policy. This can be inferred from the fact that it convenes monthly (the law instructs it to meet at least once a month, even though it may meet more often in cases of urgency).⁴⁰ Detailed managerial decisions are taken by another internal managerial organ, but of course within the ambit of the general policy laid down by the board.⁴¹

4.1.2 Formation and composition of the board

According to article 12 of the Public Enterprise Proclamation, the number of members of the board shall be at least three but not more than twelve. The exact number within this range is to be determined by the supervising authority.⁴² There are two modes of assuming the office of the board: election and appointment.⁴³ As far as election is concerned, the right to elect is carried out by the general assembly of workers of the state-owned enterprise. Not more than one-third of the board members are to assume office by this method.⁴⁴ The remaining board members and the chairperson of the board must be appointed by the supervising authority.⁴⁵ Given that the supervising authority is an executive organ of the state, this is where government officials enter the internal decision-making process of the enterprise.⁴⁶ This may bring crude politics into the internal running of public enterprises.

The term of office of both appointed and elected board members may not be less than three years and no more than five years with the possibility of reappointment or re-election upon expiry.⁴⁷ In order to maintain the continuity of the activities of the board, the term of office of its members shall not expire at the same time.⁴⁸

⁴⁰ Public Enterprise Proclamation art 13(1).

⁴¹ D Asrat & A Shiferaw 'Public Enterprises and Cooperatives Module' (2009) 82.

⁴² Public Enterprise Proclamation art 11(1).

⁴³ Public Enterprise Proclamation art 11 &12.

⁴⁴ Public Enterprise Proclamation art 12(2).

⁴⁵ Public Enterprise Proclamation art 11(1) (2) cum art 12(2) (3).

⁴⁶ D Asrat & A Shiferaw 'Public Enterprises and Cooperatives Module' (2009) 83.

⁴⁷ Public Enterprise Proclamation art 12(6).

⁴⁸ Public Enterprise Proclamation art 12(7).

4.1.3 Criteria for appointment to the board

Article 12(4) of the Public Enterprise Proclamation provides that members of the board shall be appointed or elected on the basis of their profession, experience and competence. These eligibility requirements may serve the purpose of mitigating the risk of politically motivated election or appointment.⁴⁹ Calling upon politicians to assume office in the board of a public enterprise would render it no different from an administrative agency.⁵⁰

In relation to this, the law allows any member of a board to be appointed to act as a board member of any other non-competing enterprise.⁵¹ This indicates the possibility that an outsider to the enterprise may become a member of its MB.⁵²

4.1.4 Removal and resignation

The Public Enterprise Proclamation provides for the resignation and removal from office of board members.⁵³ A vacancy, resulting from resignation, must be filled in the same way as the resigning member came into office. This is done by the board, in consultation with the supervising authority.⁵⁴ The member who resigned is jointly and severally liable with his/her colleagues to the enterprise for damage caused by the board as a result of a failure to properly carry out its duties (if any). This is different only if he or she has dissented from the decision of the board that caused the damage.⁵⁵ As far as the removal from office is concerned, the Proclamation gives exclusive power to the supervising authority to dismiss a member where there are sufficient grounds that make him or her unfit to continue being a member. The authority can remove both elected and appointed members. If the removal concerns a member elected by the general assembly of workers, the supervising authority

⁴⁹ D Asrat & A Shiferaw 'Public Enterprises and Cooperatives Module' (2009)83.

⁵⁰ D Asrat & A Shiferaw 'Public Enterprises and Cooperatives Module' (2009)83.

⁵¹ Public Enterprise Proclamation art 12(5).

⁵² D Asrat & A Shiferaw 'Public Enterprises and Cooperatives Module' (2009) 83.

⁵³ Public Enterprise Proclamation art 12(8) (9).

⁵⁴ Public Enterprise Proclamation art 12(8).

⁵⁵ Public Enterprise Proclamation art 15(2) (3).

notifies the assembly for the purpose of electing someone in replacement. It is suggested that the power to dismiss a board member is vulnerable to abuse because the Proclamation does not define the phrase “sufficient grounds” nor does it provide factors that may amount to sufficient grounds. There is thus no guidance in the law to determine what constitutes sufficient cause for a removal from office. Worse still, the Proclamation does not provide for a mechanism to challenge the decision of the supervising authority to remove a board member. As stated above, the removal from office does not exonerate that board member from his or her liability for damage caused by the board as a result of a failure to properly carry out its duties.

4.1.5 Transparency and public participation in appointing members of the board

The Proclamation is silent regarding the procedure to be followed in the appointment and election of board members.⁵⁶ There is thus no legal yard stick for transparency and participation in the appointment process. It is suggested, however, that the involvement of the enterprise’s workers in the appointment of a third of the board members is a manifestation of public, or at least ‘non-executive’, involvement.

4.1.6 Liability of board members

In article 15, the Public Enterprise Proclamation defines the liability of board members to the enterprise.⁵⁷ It provides that a failure by a board member to perform his or her duties, results in joint and several liabilities to the enterprise for any damage caused. However, a member who dissented from the decision-making that caused the damage is exempted from liability as per article 15(3) of the Public Enterprise Proclamation. The Proclamation is silent on the liability of the board members to third parties.⁵⁸ It may, however, be argued that third parties could

⁵⁶ However, article 12 of the FDRE constitution provides for the conduct of affairs of government to be transparent.

⁵⁷ Public Enterprise Proclamation art 15.

⁵⁸ D Asrat & A Shiferaw ‘Public Enterprises and Cooperatives Module’ (2009)87.

vicariously claim liability from the enterprise, since the board is found in a position inaccessible to third parties to hold it directly liable.⁵⁹

4.2 *The General Manager*

4.2.1 Functions and powers

The General Manager is a key functionary in public enterprises in Ethiopia.⁶⁰ He or she performs executive functions and implements the policies decided by the Board. Essentially, he or she administers the daily affairs of the enterprise.⁶¹ The General Manager organises, directs, administers and controls the enterprise as one economic unit.⁶² He or she is also an agent of the enterprise, whose agency authorisation arises from the law.⁶³ The enterprise carries out its legal activities, acquires rights and incurs liabilities principally through the General Manager. Article 16(1)(b) of the Public Enterprise Proclamation specifically empowers the General Manager to represent the enterprise in all dealings with third parties and in legal proceedings brought by or against it. Furthermore, the General Manager has the power, subject to the approval of the board, to employ, assign and dismiss the officers of the enterprise accountable to him and define their functions. He or she may employ, assign and dismiss other employees of the enterprise in accordance with the internal regulations of the enterprise and the appropriate law, and determine their salaries and allowances.⁶⁴

4.2.2 Appointment and dismissal

According to article 14(2) of the Public Enterprise Proclamation, the board has the power to appoint and dismiss the general manager of the enterprise and determine his or her salary and allowance. As an appointee of the board, the General Manager thus comes second within the hierarchy of authority in the organisational structure of

⁵⁹ D Asrat & A Shiferaw 'Public Enterprises and Cooperatives Module' (2009) 87.

⁶⁰ D Asrat & A Shiferaw 'Public Enterprises and Cooperatives Module' (2009) 88

⁶¹ Public Enterprise Proclamation art 16(1).

⁶² D Asrat & A Shiferaw 'Public Enterprises and Cooperatives Module' (2009) 88.

⁶³ Public Enterprise Proclamation Art 18.

⁶⁴ Public Enterprise Proclamation art 16(1) (c) (d).

the enterprise.⁶⁵ He or she is accountable to the board.⁶⁶ Accordingly, he or she is required to implement or cause the implementation of, the decisions of the board;⁶⁷ to perform other duties assigned to him by the board;⁶⁸ and finally to submit reports to the board in a manner determined by it.⁶⁹

4.2.3 Criteria for appointment and dismissal

The Public Enterprise Proclamation does not determine criteria for the appointment as a General Manager of a public enterprise. As stated above, the Proclamation determines criteria for election or appointment as a board member, namely profession, experience and competence.⁷⁰ However, there is no corresponding provision that determines criteria for the appointment of a General Manager. This does not mean that anyone is qualified for the post. The Preamble to the Public Enterprise Proclamation makes it clear that the aim is to create an organisational structure whereby the enterprise enjoys management autonomy and is thus enabled to be efficient, productive and profitable as well as to strengthen its capability to compete with private enterprises. This aim will not be satisfied in the absence of a highly competent professional and well-experienced General Manager. It is submitted that, even the General Manager's appointment and dismissal by the board itself, may not be made to the detriment of the enterprise.

4.2.4 Liability of the General Manager

As per article 17 of the Public Enterprise Proclamation, the General Manager is responsible for all the tasks he or she is assigned to, and he or she is individually liable for any damage caused to the enterprise either negligently or intentionally. Since the General Manager is an agent of the enterprise, the enterprise may attract liability through his or her improper actions and the General Manager is obliged to

⁶⁵ D Asrat & A Shiferaw 'Public Enterprises and Cooperatives Module' (2009) 88.

⁶⁶ Public Enterprise Proclamation 16(2).

⁶⁷ Public Enterprise Proclamation 16(1) (i).

⁶⁸ Public Enterprise Proclamation 16(1) (m).

⁶⁹ Public Enterprise Proclamation 16(1) (j).

⁷⁰ Public Enterprise Proclamation 12(4).

redress such damage in accordance using legal measures such as contracts, torts and provisions in the Commercial Code.⁷¹

4.2.5 Transparency and public participation

There is nothing in the Proclamation that provides for transparency and/or public participation in the appointment process of the General Manager. Accordingly, the public has no insight into the process, let alone a say in appointment.

It is suggested that, the fact that some of the board members of enterprises are senior members of the ruling party, has undermined the integrity of the process of executive appointment. For instance, Dr. Debretsion Gebremichael, the current Chairman of the Tigrayan People's Liberation Front and the acting President of Tigray Region, was the board chairman of Ethiopian Electric Power.⁷² During his chairmanship, the impartiality of the process to appoint executives was questioned. According to a report by the Ethiopian Radio and Television Agency, the exclusion of Miheret Debebe, who served the enterprise as its CEO since its establishment, from the management of the enterprise came as a surprise.⁷³ However, Dr Debretsion defended the Board's decision to remove Miheret from his position and instead opting to appoint Azeb Asnake as executive of Ethiopian Electric Power:⁷⁴ “Although the board has the power to appoint the top managers, we instead consulted with employees of Ethiopian Electric Power. They are happy with our decision to remove the old management and have welcomed the new appointees” Dr Debretsion said. He also alleged that educational background, experience, leadership capacity and employee acceptance were used as criteria to appoint the new management.⁷⁵ However, after two years Azeb Asnake was removed from her position following the

⁷¹ D Asrat & A Shiferaw 'Public Enterprises and Cooperatives Module' (2009) 88.

⁷² EEPCo splits, new management in place' (2014) <https://www.esi-africa.com/eepco-splits-new-management-in-place/> .

⁷³ EEPCo splits, new management in place' (2014) <https://www.esi-africa.com/eepco-splits-new-management-in-place/> .

⁷⁴ EEPCo splits, new management in place' (2014) <https://www.esi-africa.com/eepco-splits-new-management-in-place/> .

⁷⁵ 'EEPCo splits, new management in place' (2014) <https://www.esi-africa.com/eepco-splits-new-management-in-place/> (accessed 9 September 2018).

replacement of Dr Debrezion by Girma Birru⁷⁶ as Ethio Electric Power Corporation board chair.⁷⁷ The reason for her dismissal remains unclear.⁷⁸

5 State owned enterprises not regulated by the Public Enterprise proclamation

Besides public enterprises that are regulated by the Public Enterprise Proclamation, there are state-owned entities, which are outside the scope of the Public Enterprise Proclamation.

5.1 Categories

There are three categories of public enterprises not regulated by the Public Enterprise Proclamation. The first category includes share companies that were transformed from public enterprises to share companies for the purpose of privatisation. The basis for this is article 5 of the Privatisation of Public Enterprises Proclamation, which reads:

Conversion of an Enterprise to a Share Company

- 1. The agency may, where it deems it necessary in the course of preparation for privatization, cause the conversion of an enterprise to a share company.*
- 2. The capital of a share company established pursuant to sub-Article (1) of this Article shall be divided in to shares and shall totally be held as Government shares.*
- 3. The provisions of Article 312 (1) (b) and 315 of the Commercial Code shall not be applicable with regard to a share company formed under this Article or by taking an enterprise as government contribution.*
- 4. Until such time that the agency starts transferring shares of a company formed pursuant to sub-Article (1) of this Article to private ownership:*

⁷⁶ Girma Birru was an Ethiopian ambassador to the USA. He also previously served as Minister of Trade and Industry of Ethiopia (2001-10) and Minister of Economic Development and Cooperation of Ethiopia (1995-2001). In addition, other postings include minister heading the Ethiopian Revenue Administration Board, Deputy Minister of Finance, Administration and Logistics at the Ministry of National Defense, as well as Chief Advisor to the Minister of Defense on Economic Issues.

⁷⁷ Ethio news 'Azeb Asnake Sacked as CEO of Ethiopian Electric Power' <https://ethio.news/2018/08/24/azeb-asnake-sacked-as-ceo-of-ethiopian-electric-power/> (accessed 9 September 2018).

⁷⁸ Ethio news 'Azeb Asnake Sacked as CEO of Ethiopian Electric Power' <https://ethio.news/2018/08/24/azeb-asnake-sacked-as-ceo-of-ethiopian-electric-power/> (accessed 9 September 2018).

- a) *authorities given to shareholders under the Commercial Code shall be deemed given to the Supervising Authority;*
- b) *all directors of the company shall be appointed by the Supervising Authority;*
- c) *the provisions of Article 307(1), 311, 347(1) and 349 of the Commercial Code shall not be applicable; provided, however, that other provisions of the commercial code shall mutatis mutandis be applicable.*

As stated under sub article (1), the conversion is a simple procedure in preparation of privatisation. Thus, until such time the agency starts transferring shares of a company to private ownership. The authority ordinarily given to a shareholders' meeting under the Commercial Code are given to the Supervising Authority. This includes the approval of fundamental changes, proposals to changes and reports affecting the company and the election of the board of directors. The supervising agency has these powers under the Public Enterprises Proclamation.⁷⁹ The power to appoint and remove board members is particularly relevant in the context of this paper. Unlike the Public Enterprise Proclamation, the Privatization of Public Enterprises Proclamation provides that all directors of the company are appointed by the Supervising Authority. This means that the general assembly of workers has no power to appoint board members. It also seems that the criteria for appointment (i.e. profession, experience and competence) no longer apply. Again, the Privatization of Public Enterprises Proclamation is silent about the appointment of a general manager. In this regard, one can argue that the appointment of a general manager can be made in accordance with the rules of the Commercial Code. Article 5(4)(c) of the Privatization of Public Enterprises Proclamation states that those provisions of the Code, which are not explicitly declared inapplicable, shall *mutatis mutandis* apply to the share company in transition to privatisation. Considering article 349 of the Commercial Code, this would mean that the general manager is appointed by the board and that no specific criteria or procedure is provided.⁸⁰

In practice, however, the agency follows a uniform procedure irrespective of their form as share companies or not. This was confirmed by Ato Wondafrash Asefa, head of Information and Public Relation Service of the Privatization and Public

⁷⁹ Public Enterprise Proclamation art 11.

⁸⁰ The Commercial Code of Ethiopia art 349.

Enterprises Supervising Agency and regulations set out by the Public Enterprise Proclamation to manage all the public enterprises.⁸¹ It thus seems that, in practice, the law employed for the administration of the share companies is the Public Enterprises Proclamation, No.25/1992.⁸²

The second category includes share companies formed as a result of a contribution of the government with the participation of private investors. These can be formed as regular companies under the Commercial Code as the Code does not forbid a government contribution in a share company, provided that all other requirements are met.⁸³

The third category concerns the following: in Article 47(2), the Public Enterprise Proclamation empowers the Council of Ministers to establish any enterprise as a business organisation under the Commercial Code. The Council may establish one of the two basic forms of business organisation under the Code, namely a partnership or a company.⁸⁴

The above state-owned entities, which are outside the scope of the Public Enterprise Proclamation, are regulated by the Commercial Code. The next sub-section discusses the rules for the appointment of board members and executives under the Commercial Code.

Under the Commercial Code, the three main decision making structures in a company are the shareholders' meeting, the board of directors and the general manager.⁸⁵ The discussion here is limited to the board of directors and the general manager.

⁸¹ E Tsegaw 'The legal status of state-owned share companies in Ethiopia' (2015) 7 *Beijing Law Review* 13 212 217.

⁸² E Tsegaw 'The legal status of state-owned share companies in Ethiopia' (2015) 7 *Beijing Law Review* 13 212 214.

⁸³ P Winship *Background documents of the Ethiopian Commercial Code of 1960* (1974) p. 75 as cited in E Tsegaw 'The legal status of state-owned share companies in Ethiopia' (2015) 7 *Beijing Law Review* 13 212 214.

⁸⁴ E Tsegaw 'The legal status of state-owned share companies in Ethiopia' (2015) 7 *Beijing Law Review* 13 212 214.

⁸⁵ A Fentaw & K Gurmu 'Law of Traders and Business Organizations' (2009) 115 <https://chilot.me/wp-content/uploads/2011/06/traders-and-business-organizations.pdf> (accessed 29 August 2018).

5.2 Directors

The board of directors is the managerial body. It is established by general assembly from among the shareholders.⁸⁶ The number of directors is determined in the statutes (memorandum of association) but may not be fewer than three or more than twelve.⁸⁷ Furthermore, all directors must be shareholders of the company. While the Commercial Code allows a legal entity to be appointed as a director, it provides that only a natural person can be appointed as the chairman of the board of directors.⁸⁸ If a legal entity is appointed as a director of a share company, it would appoint a natural person whom it has formally authorized to attend board meetings on its behalf.

5.2.1 Appointment

The first directors may be appointed in the memorandum or articles of association. This appointment shall be submitted to a meeting of subscribers (i.e. those who subscribed to the company's memorandum of association) for confirmation.⁸⁹ If the meeting does not confirm the appointment, other directors may be appointed.⁹⁰ Subsequent directors are appointed by ordinary majority in a general meeting of shareholders.⁹¹ The term of office of a director may not exceed three years but he or she is eligible for re-election. Directors may appoint new directors to fill vacancies left by a director departing or resigning during a financial year.⁹² Such replacement of directors is effective only for the remaining duration of the replaced director's term of office and must be ratified by the next ordinary meeting of shareholders. If the replacement is not confirmed, the general meeting may appoint other directors.

⁸⁶ A Fentaw & K Gurmu 'Law of Traders and Business Organizations' (2009) 221 <https://chilot.me/wp-content/uploads/2011/06/traders-and-business-organizations.pdf> (accessed 29 August 2018).

⁸⁷ The Commercial Code of Ethiopia Art 347.

⁸⁸ AS above.

⁸⁹ Commercial Code art 350.

⁹⁰ As above.

⁹¹ As above.

⁹² Commercial Code article 351.

However, when a director's appointment is considered void, the decisions and acts carried out by that director remain valid. When there is no surviving director, auditors must call a shareholders meeting in order to appoint directors. Where the surviving directors are fewer than half of the number of directors, they must call a shareholders' meeting in order to appoint additional directors.⁹³

5.2.2 Removal

Directors may be removed at any time by a general meeting. The law thus empowers the company to remove directors before the expiry of term of office even if there is no such agenda item.⁹⁴ A director who was removed without good cause may claim compensation.⁹⁵

5.2.3 Liabilities of the board of directors

The board of directors has the powers given to it by law. In addition, it has the powers given to it by a decision of a general meeting of the shareholders. In general, the board of directors possesses the power to act in all circumstances on behalf of the company as long as it falls within the company business purpose. There are also powers which are expressly reserved by law for the meeting of shareholders (such as the approval of the annual accounts and the amendment of statutes) in practice, however, the business of the company is taken care of by the chairperson and the general manager. The board of directors merely defines the general policies to be followed by the company, takes or approves strategic decisions and oversees the chairperson of the board.⁹⁶

A company is bound by agreements entered into by its board of directors provided the agreement falls within the scope of the business purpose of the company. The

⁹³ A Fentaw & K Gurmú 'Law of Traders and Business Organizations' (2009) 122 <https://chilot.me/wp-content/uploads/2011/06/traders-and-business-organizations.pdf> (accessed 29 August 2018).

⁹⁴ Commercial Code art 397(2).

⁹⁵ Commercial code art 354.

⁹⁶ A Fentaw & K Gurmú 'Law of Traders and Business Organizations' (2009) 127 <https://chilot.me/wp-content/uploads/2011/06/traders-and-business-organizations.pdf> (accessed 29 August 2018).

board may not invoke any legal provisions restricting its powers against a person who deals with the company, irrespective of whether that person knows of them or not. Legal provisions limiting the company's purpose or restricting the powers of the board of directors merely enable the company or its shareholders to claim damages from a director if such provisions are not complied with. It does not affect a third party, engaging with the company in good faith.

5.2.4 Conflict of interest rules

The Commercial Code has provisions that regulate a company's business transaction in order to consider potential conflicts of interest between the company and their directors. There are two types of activities that are governed by the conflict of interest rules of the Commercial Code.

The first concerns prohibited activities. As per article 355 of the Commercial Code, directors are strictly prohibited to be partners with joint and several liabilities in rival companies. They may also not compete with the company on their own behalf or on behalf of a third party unless authorised by a general meeting. Directors may not enter into a loan agreement with the company, may not be granted an overdraft by the company or have their obligations toward third parties guaranteed by the company. The prohibition to enter into a loan agreement or guarantee does not apply if the director is legal entity, or if the company operates a banking business.⁹⁷

The second concerns regulated activities. Article 356 of the Commercial Code, for instance, allows valid agreements to be entered between the company and its directors. However, it notes that such agreements require prior approval by the board of directors before being executed. The basic purpose of such regulation is to ensure full disclosure of potentially conflicting relationships between a director and entities with which the company is doing business and to ensure that the other directors have the power to approve or disapprove.⁹⁸

⁹⁷ A Fentaw & K Gurmu 'Law of Traders and Business Organizations' (2009) 123 <https://chilot.me/wp-content/uploads/2011/06/traders-and-business-organizations.pdf> (accessed 29 August 2018).

⁹⁸ The regulation applies to agreements which are entered into (a) directly or indirectly between the company and its directors (b) between the company and another entity in which one of the directors is owner, partner, agent, director or manager of such entity 1. Any such agreement must be obtained a prior approval by broad

5.2.5 Directors' liability

The Commercial Code also contains provisions regarding a director's liability.⁹⁹ Directors may render themselves liable to the company and to third parties.¹⁰⁰ As far as their liability towards the company is concerned, directors are agents and trustees of the company and as such they have certain duties to the company. They must exercise the duties imposed on them by law and by resolutions of the shareholder meetings.¹⁰¹ Breach of these duties or failure to carry out these duties renders directors jointly and severally liable to the company and its shareholders. Directors specifically are jointly and severally responsible when they fail to take appropriate measure within their knowledge to prevent or mitigate damage that may happen to the company. A director, who is not at fault while the decision is taken by the board of directors may not be liable, provided he or she dissented and such a dissent was recorded in the minutes.

Over and above their potential liability to the company, directors are liable to creditors under article 366(1) when they failed to preserve the assets of the company. This is aimed at protecting the creditors' interests, in case the company goes bankrupt.¹⁰²

of directors before being executed 2. Notice shall be given to the auditors 3. The auditors must prepare special report on agreement came within this scope to general meeting of the shareholders, irrespective of their execution date. This report must contain, a listing of all such agreements describe this content and purpose and mention the names of the directors concerned. 4. The meeting must consider the agreements and approve or reject them 5. Agreement approved by the meeting is effective unless set aside on ground of fraud. 6. Agreements not approved will also be in force, but the director concerned will be liable for damage the company suffered from fraud. In the case the concerned director fails to fulfil his liability, the board of directors will be liable.

⁹⁹ Article 364-367.

¹⁰⁰ A Fentaw & K Gurmu 'Law of Traders and Business Organizations' (2009) 124

<https://chilot.me/wp-content/uploads/2011/06/traders-and-business-organizations.pdf> (accessed 29 August 2018).

¹⁰¹ Commercial Code arts 362 & 364.

¹⁰² A Fentaw & K Gurmu 'Law of Traders and Business Organizations' (2009) 125 <https://chilot.me/wp-content/uploads/2011/06/traders-and-business-organizations.pdf> (accessed 29 August 2018).

5.3 General Manager

5.3.1 Appointment

The Commercial Code provides that, as a general rule, the company's day-to-day activities are managed by the general manager. The general manager is appointed by the board.¹⁰³ In principle, he or she is not a member of the board directors.¹⁰⁴ This is to avoid a potential conflict of interest and to ensure that he or she is accountable to the board of directors.¹⁰⁵ However, a close examination of art 362(2) may lead to different result which is exception to the principle stated above.¹⁰⁶ It states that the articles of association of a company may specify that one or more directors may be designated as managers. The Code further states that they are exercising their power in the name of the company. From these provisions we can conclude that manager can be appointed from among the board of directors provided it is stated in articles of association.¹⁰⁷

5.3.2 Removal

The law empowers the board of directors to appoint a general manager for such a period as stated in the law or in the statutes. Inherent to the board's power to appoint the general manager is the power to terminate the appointment.¹⁰⁸ The general manager is an employee of the company and may be dismissed. However, such power must be exercised for good cause and after an enquiry held in accordance

¹⁰³ Commercial code art 348(1).

¹⁰⁴ Commercial Code art 348(4).

¹⁰⁵ A Fentaw & K Gurmu 'Law of Traders and Business Organizations' (2009) 125 <https://chilot.me/wp-content/uploads/2011/06/traders-and-business-organizations.pdf> (accessed 29 August 2018).

¹⁰⁶ A Fentaw & K Gurmu 'Law of Traders and Business Organizations' (2009) 125 <https://chilot.me/wp-content/uploads/2011/06/traders-and-business-organizations.pdf> (accessed 29 August 2018).

¹⁰⁷ A Fentaw & K Gurmu 'Law of Traders and Business Organizations' (2009) 126 <https://chilot.me/wp-content/uploads/2011/06/traders-and-business-organizations.pdf> (accessed 29 August 2018).

¹⁰⁸ A Fentaw & K Gurmu 'Law of Traders and Business Organizations' (2009) 126 <https://chilot.me/wp-content/uploads/2011/06/traders-and-business-organizations.pdf> (accessed 29 August 2018).

with the rules of natural justice. The company will be liable for damages if such removal constitutes a breach of contract.¹⁰⁹

5.3.3 Liabilities

The general manager is liable for damages resulting from an infringement of his power. Furthermore, he or she is liable for damages resulting from an infringement or a violation of the law, the statutes and for damages resulting from deliberate or negligent acts of mismanagement.¹¹⁰ This liability may exist towards the company, a third party and/or individual shareholders.¹¹¹

6 How are public enterprises managed/overseen by the central government?

Before addressing the oversight power of the central government over public enterprises, it is important to note that the Public Enterprise Proclamation is applicable to enterprises established by the central government. It was enacted at a time when Ethiopia was a unitary state. The concept of a regional public enterprise emerged later, subsequent to Ethiopia's federalisation.¹¹² Regional states do establish enterprises to carry out commercial activities. For example, Oromia Regional State established Arsi Forest Enterprise and Bale Forest Enterprise.¹¹³ The Amhara Regional State formed the Amhara Seed Enterprise.¹¹⁴ However, the discussion in this paper is restricted to the Public Enterprise Proclamation.

¹⁰⁹ A Fentaw & K Gurmu 'Law of Traders and Business Organizations' (2009) 126 <https://chilot.me/wp-content/uploads/2011/06/traders-and-business-organizations.pdf> (accessed 29 August 2018).

¹¹⁰ A Fentaw & K Gurmu 'Law of Traders and Business Organizations' (2009) 126 <https://chilot.me/wp-content/uploads/2011/06/traders-and-business-organizations.pdf> (accessed 29 August 2018).

¹¹¹ A Fentaw & K Gurmu 'Law of Traders and Business Organizations' (2009) 126 <https://chilot.me/wp-content/uploads/2011/06/traders-and-business-organizations.pdf> (accessed 29 August 2018).

¹¹² T Meheret 'The concept and characteristics of public enterprises in Ethiopia: an overview' 8(2) (2014) *Mizan Law Review* 341.

¹¹³ Under Regulation No. 86/2007 and Regulation No. 88/2007 respectively.

¹¹⁴ Pursuant to Council of Regional Government Regulation No. 66/2009.

The oversight power of the central government is exercised primarily by the executive department of the state and is exercised in multiple ways. First and foremost, government nominees are included on the management board. Pursuant to article 12(3) of the Proclamation, at least two-thirds of the members are appointed by the government, and, as per article 11(2), the chairpersonship of the board is assumed by one of these government-appointed members. Second, significant decisions in the enterprise's management may be subject to governmental approval.

¹¹⁵ Third, as per articles 11(4) and 32 of the Proclamation, the auditing of accounts of the enterprise is done by government appointed external auditors. However, it is subject to the auditing carried out by the office of the Auditor-General under the mandate of the legislature.¹¹⁶ Fourth, the relevant government organ may issue directives and orders to the company. This provides a formal scheme of control.¹¹⁷ These and other mechanisms of control are provided under the Proclamation and exercised by specified organs in the executive department, namely the supervising authority, the Ministry of Public Enterprises, and the Council of Ministers.¹¹⁸ Thus, all public enterprises are overseen by these organs.

The main regulatory body with the obligation to oversee public enterprises is a supervisory authority designated by the government. As per the language of article 2(2) of the Public Enterprise Proclamation, the supervising authority is an organ designated by the Council of Ministers to protect the ownership rights of the state. This authority is required to be assigned in the regulation establishing the particular public enterprise. The supervising authority could either be the Ministry of Public Enterprises or a sectoral supervising ministry.¹¹⁹ For example, the Ethiopian Airlines Group establishment regulation assigns the Ministry of Transport as the sectoral supervising ministry. In the same vein, the Ministry of Water, Irrigation and Electricity

¹¹⁵ Public Enterprise Proclamation arts 11(8-11) (12), 14(8) & (9).

¹¹⁶ Public Enterprise Proclamation art 32(1).

¹¹⁷ Public Enterprise Proclamation art 47(4).

¹¹⁸ D Asrat & A Shiferaw 'Public Enterprises and Cooperatives Module' (2009) 96.

¹¹⁹ Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation 916/2015 (Proclamation 916/2015) Art 31(2); Sectoral supervising mechanism refers a mechanism in which a public enterprise engaging in a certain economic activity is controlled by the immediate concerned ministry or agency.

is the assigned sectoral supervising ministry for Ethiopian Electric Power and Ethiopian Electric Utility. However, some other enterprises, such as the Sugar Corporation, Railway Corporation, the Chemical Corporation and the Ethiopian Shipping and Logistics Services Enterprise, are supervised by the Ministry of Public Enterprises.¹²⁰

As supervisory authorities, the Ministry of Public Enterprises and a sectoral supervising ministry, such as the Ministry of Transport and the Ministry of Water, Irrigation and Electricity, are mandated to, among other things, exercise the following activities: cause the allocation of an initial capital amount, appoint and remove board members, appoint the board chairman, approve external auditors and financial reports of these auditors, follow up and evaluate the performance of public enterprise and determine the amount of dividends to be paid to the government.¹²¹

The Ministry of Public Enterprises will however assume an additional authority with respect to those public enterprises that are accountable to sectoral supervising ministry, as it is mandated to oversee and assists them by studying their strengths and weaknesses and by sharing international experiences.¹²²

A further organ through which the government exercises control over public enterprises is the Council of Ministers. The Council of Ministers has a wide role with respect to the supervision of public enterprise, including the following; establish, amalgamate, divide and dissolve public enterprises, allocate their capital, assign their supervising authority, determine the sale of an enterprise, or the transfer of an enterprise or its management in any manner and decide on the sale of shares held by the government.¹²³

¹²⁰ M Mezgebu and M Tafesse 'On privatizations of public enterprises in Ethiopia' (2018) <<https://www.mtalawoffice.com/legal-updates/entry/on-privatization-of-public-enterprises-in-ethiopia>> (accessed 2 August 2019).

¹²¹ As above.

¹²² Proclamation 916/2015 Article 31(1) (a).

¹²³ Mezgebu and tafesse (n 122 above); D Asrat & A Shiferaw 'Public Enterprises and Cooperatives Module' (2009) 99.

7 Ethiopia's decision to reduce its stake in major state-owned enterprises

The Ethiopian government has decided to offload shares to end its monopoly over major state enterprises.¹²⁴ The government resolved that shares in the companies be offered to both local and foreign investors, with the government maintaining a majority stake. The corporations targeted in the new strategy include Ethio-Telecom, Ethiopian Airlines, electric power generations and shipping lines and logistics firms.

¹²⁵ This decision forms part of major economic reforms designed to “unleash the potential of the private sector.”¹²⁶ According to the Communication Minister Ahmed Shide, the government previously played a greater role in the economy as the private sector was still maturing.¹²⁷ He noted that the decision to adjust to the current situation was timely, following the development of the Ethiopian private sector.¹²⁸ According to him, the decision will enable the government to mobilise financial resources for other investors, help solve the current foreign currency deficit and strengthen the role of the private sector in the economy.¹²⁹ Again, the Ethiopian Prime Minister Abiy Ahmed stated that ‘this new economic decision will afford us the opportunity to resolve widespread unemployment and reduce weaknesses in market connectivity’.¹³⁰

¹²⁴ Radio Dalsan ‘Ethiopia to reduce stake in major state owned enterprises’ (2018) <https://www.radiodalsan.com/en/2018/06/06/ethiopia-to-reduce-stake-in-major-state-owned-enterprises/> (accessed 26 August 2018).

¹²⁵ As above.

¹²⁶ International ‘Ethiopia plans to sell state enterprises’ <<https://www.iol.co.za/business-report/international/ethiopia-plans-to-sell-state-enterprises-16123372>> (accessed 9 September 2018).

¹²⁷ As above.

¹²⁸ Radio Dalsan ‘Ethiopia to reduce stake in major state owned enterprises’ (2018) <https://www.radiodalsan.com/en/2018/06/06/ethiopia-to-reduce-stake-in-major-state-owned-enterprises/> (accessed on 26 August 2018).

¹²⁹ As above.

¹³⁰ A Maasho ‘Ethiopia loosens throttle on many key sectors, but privatisation still far off’ <https://www.cnbc.com/2018/06/06/reuters-america-ethiopia-loosens-throttle-on-many-key-sectors-but-privatisation-still-far-off.html> (accessed 19 September 2018).

Ethiopia's development partners may also have played a role in this new reform. Many of Ethiopia's them, including the World Bank, have been nudging the government to liberalise the telecom and finance sectors in particular.¹³¹

8 Lessons for South Africa: less fragmentation, appointments on merit, and clearer accountability

Ethiopia and South Africa share an approach of 'state-led' development in which SOEs play a fundamental role. One of the most important differences between the two countries' approaches to SOEs is that, unlike South Africa,¹³² Ethiopia has a dedicated legal regime for SOEs. It exists in the form of a Public Enterprise Proclamation. However, like in South Africa, there is also some fragmentation because not all SOEs in Ethiopia fall under this Proclamation. There is a considerable number of SOEs that are governed by the Commercial Code, i.e. regular company regulations.

An SOE's 'supervising authority' can be located in the relevant sector Ministry or in the Ministry of Public Enterprises. This is similar to South Africa where oversight over SOEs is also spread over sector departments and the Department of Public Enterprises.¹³³

In Ethiopia, the legislation is clearer than in South Africa when it comes to the role of the boards of public enterprises. The law is clear that these boards are generally 'policy boards', i.e. they are not involved in the day-to-day affairs of the company.

The composition of SOE boards is also quite distinct from South Africa. In those SOEs that fall under the Proclamation, the staff of the enterprise elects one thirds of the Board. This does not apply to SOEs that fall under the Commercial Code. In

¹³¹ International 'Ethiopia plans to sell state enterprises'
<<https://www.iol.co.za/business-report/international/ethiopia-plans-to-sell-state-enterprises-16123372>>
(accessed 9 September 2018).

¹³² See R Wandrag 'The Legal Framework for the Appointment and Dismissal of SOE Board Members' Bellville: Dullah Omar Institute
https://dullahomarinate.org.za/women-and-democracy/board-members-of-state-owned-enterprises-toward-transparent-appointments/reports/wandrag_legal_framework_paper_2_revision_4_04_07_2019.pdf
(accessed 8 August 2019).

¹³³ Wandrag (n 132 above).

South Africa, there are no SOE Boards where the staff of the enterprise elects board members. This is also not a common practice in the private sector. The remaining two-thirds of SOE boards in Ethiopia is appointed by the government. This appointment is done through the Supervising Authority, which can be the relevant sector department or the Ministry responsible for public enterprises.

Ethiopia's law is far more explicit than South Africa's law when it comes to requiring appointments based on merit. It insists on "profession, experience and competence" as criteria for appointment to any board. Furthermore, there are very strict rules for personal liability of board members for the damage caused by their faulty decisions.

Similar to South Africa, there is nothing in Ethiopian law that demands transparency of, and/or public participation in, board appointments by government. Indeed, practice suggest that the system is not free from political interference.

In a clear departure from the uncertainty in South African law,¹³⁴ the Ethiopian law is adamant that the board, and not the government, appoints and dismisses the General Manager (the equivalent to the CEO in South African terms). In other words, in Ethiopia the law protects the line of accountability between the CEO and the board of a public enterprise.

Government oversight over SOEs in Ethiopia is manifested in four ways. First, there are the government appointees on the board. Second, certain decisions of the SOE would be made subject to government's approval. Thirdly, the Auditor-General audits the SOE's accounts. Fourthly, the government may issue directives and orders to the company, thereby exercising control.

All in all, the legal framework for government oversight over SOE in Ethiopia is arguably less fragmented than its South African equivalent. Furthermore, it places greater emphasis on merit-based appointments and the need for clear lines of accountability between the CEO and the Board. However, this does not mean that

¹³⁴ See Wandrag (n 132 above) and R Wandrag 'Appointment and dismissal of board members and executives of PRASA, ESKOM and the SABC', Bellville: Dullah Omar Institute, for an overview of the legal wrangling about who appoints the CEO of state-owned enterprises <https://dullahomarinate.org.za/women-and-democracy/board-members-of-state-owned-enterprises-towards-transparent-appointments/reports/wandrag_legal_framework_paper_2_revision_4_04_07_2019.pdf> (accessed 8 August 2019).

SOE operations are immune from undue political interference. Ethiopia has recently embarked on a liberalisation process and is reducing its stake in many SOEs, which is an indicator of a change in approach to 'state-led' development in that country.