



Practice Note for Botswana State-Owned Enterprises and Statutory Corporations: Final

State-Owned Enterprises (SOE's) and statutory corporations, that is a corporation created by a specific statute and not a company formed under the Companies Act of Botswana, sometimes have dual mandates, namely a commercial and a developmental one.

Whilst a state-owned enterprise may not be a company registered in terms of the Companies Act, an SOE or a statutory corporation must practise good governance. It is for this reason that the OECD developed guidelines for the governance of state-owned entities.

In Botswana as in many countries, the public enterprise landscape is sometimes a reflection of the source allocation in the pursuit of socio-economic development. But historically these have a focus on administration rather than enterprise. This has led to a history of service operational inefficiencies and poor financial results.

This does not however mean that an SOE should not be bound by the principles of good governance set out in the Botswana Code.

Consequently the Botswana Code should be applicable to SOE's but where there is any inconsistency with the OECD guidelines for SOE's or statutory corporations the OECD guidelines should be

applicable. This would place Botswana's SOE's in line with the governance framework of state-owned enterprises in many jurisdictions in the world as the Code and the OECD guidelines are based on international best governance principles and practices.

The State must ensure, however, that it separates its role as a regulator from its role as the shareholder in an SOE. It must be remembered that the State in many cases is represented by a minister but the minister is in fact a conduit for every citizen of Botswana. There are, therefore, many more stakeholders of an SOE than there are of a private company.

The minister should take great care when making appointments to the boards of directors of SOE's. The principles set out in the Code should be adopted namely using members with the necessary skills and representivity who can add value to the decision making process in the company.

The board of the state-owned enterprise should recognise the interests and expectations of all stakeholders linked to the SOE and ensure that those are taken into account in the decision making process and that all have equal access to information reports issued by the SOE.

While an SOE may not be a company, those who direct and manage it must carry out their duties with good faith, care, skill and diligence, even though Sections 129, 130, and 158 of the Botswana Companies Act will not be applicable.

In regard to dispute resolution, the rules of the Arbitration Foundation of Southern Africa and the ADR clause in the King III Report can be applicable to SOE's by agreement. The administration of an arbitration or mediation can take place in Botswana with a Botswana mediator or arbitrator.

An SOE should ensure that there is communication with stakeholders and that sustainability issues material to the SOE are embedded in the long term strategic plan of the SOE. A contract can be concluded between the minister acting for the citizens of Botswana and the board of an SOE that the board will adopt the Botswana Code in carrying out its mandate.

Compliance with the code is being positively impacted by two market forces. Firstly responsible investment by financial institutions and asset managers. This includes inter alia a consideration of the quality of the governance of a company and its long term strategic plan so that the trustee of a pension fund can make an informed assessment that the business of the company will be sustained in our new world order of global financial crisis, climate change and ecological overshoot. Trustees should also consider the supply chain code of conduct of each company so that the traceability of its input products is known to the investor. It is only in this way that a trustee can discharge his duty of care to the ultimate beneficiaries, the pensioners of the future. The Solbanes Oxley Act of America which was passed after the Enron and Worldcom scandals resulted in increased costs and administrative burdens for American companies, with the result that entrepreneurs are listing their companies on European exchanges rather than on American exchanges to escape the cost of administration. The passing of legislation such as the Public Finance Management Act in South Africa has also not resulted in better governance in SOE's than in private sector companies adhering to the King Code in South Africa on an apply or explain basis. It is extremely difficult if not impossible to lay down processes and procedures which would be appropriate for all kinds of enterprises. More particularly is this so in the case of SOE's where sometimes there is a dual mandate, one developmental and one of enterprise.

State-owned enterprises must observe the basic principles of corporate governance, of fairness accountability responsibility, transparency, with directors acting on the basis of independence and intellectual honesty, making decisions on an unfettered basis in the best interest of that state-owned enterprise. Transparency and disclosure as laid down in the Code are critical for SOE's because of the interest in SOE's of every citizen of Botswana.

In a lot of state-owned enterprises the government or the minister representing the government appoints the chairman and the chief executive and in some instances the entire board. When a board does not appoint its own chief executive and chairman fairness is called into question. This is so because the board having made a collective decision, the chief executive has to lead the management team in implementing that decision. When something goes wrong and the company suffers loss each director incurs individual and personal liability but none has been a party to selecting the chief executive who implements the decisions of the board. This is a breach of the basic tenet of good governance, namely the alignment of authority with responsibility and vice versa. Notwithstanding the power of the ministers to appoint, ministers should endeavour to ensure that board members are appointed with the necessary skills and representivity needed for the business of the state-owned enterprise and the board should appoint its own chief executive and chairman. The fact that the minister has the right to do so in terms of the Act does not mean that he cannot delegate to the board the power to do so which would be a better governance practice than a state appointed chairman and chief executive.