

THE INVESTMENT AND UTILIZATION OF STATE CAPITAL IN STATE ECONOMIC GROUPS - REALITY AND RECOMMENDATIONS FOR THE LAW IMPROVEMENT

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1- The utilization of state capital in state economic groups

1.1 The objectives of utilization in state economic groups

One of the reasons why state economic groups (SEGs) have been established is the use of economies of scale to enhance effectiveness and competitiveness. This goal has been shown in many Party's resolutions on innovation of state owned enterprises (SOEs), legal documents on pilot establishment of SEGs and the charter of SEGs.

- The establishment of SEGs aims to improve competitiveness in foreign economic relation (according to the 7th Party's Congress); to accumulate and concentrate capital for the enhancement of competitiveness in international market (according to the midterm National Representatives conference VII); to compete and integrate effectively into international economic (according to the third meeting of the Party's Central Executive Committee IX); to become regional level business (the 11th Party's Congress); or to become global corporations (the 12th Party's Congress). These directions imply that the objective is the foundation of SEGs with large- scale, well-known brand-name, competitive capacity, regional or global level ranking.

- The charter for organizations and the operation of parent companies show clearly that the targets are maximizing the efficiency of group; generating profits, preserving and developing owner' equity invested in groups and other companies.

- The Decree No. 101/2009/ND-CP on pilot establishment, organization, operation and management of SEGs stipulates that the establishment of SEGs aims to enhance the effectiveness of management and supervision of state capital and assets invested in enterprises of the groups.

Besides, SEGs have not only economic objectives but also other ones as below:

- SEGs play the role to maintain the balance in national economy, to adjust macroeconomics and to be responsible for public economy and the society. In fact, some SEGs have responsibilities for the balance between supply and demand of essential commodities, such as electricity, petroleum, coal, etc. SEGs are not allowed to increase prices according to market mechanism when macroeconomics fluctuation or inflation occurs. For example, Vietnam Electricity Group cannot increase the price of electricity or Vietnam national Coal- Mineral Industries Group is not allowed to raise the price of coal, or all SEGs are forced to cut down investment to curb inflation and maintain macroeconomics stability¹.

- The charter of all parent companies of SEGs regulates that SEGs have to fulfill obligations assigned by the owner; these duties include public missions and social responsibility.

- According to the Decree No. 101/2009/ND-CP, the pilot SEGs are assigned to maintain the major balances in the national economy, to apply high technologies and to create a motivation for development of other branches and industries and the whole economy.

- The example of the combination between economic activities and public utilities in the objectives of establishment of SEGs is Vietnam Posts and Telecommunications Group. The group plays a principal role in provision postal services, public telecommunications of the government, accounting for 100 % and 63 % relatively. It has brought telephone and internet to rural areas and turned these places into information and cultural center for remote communities,; hence facilitated socio– economic development².

In conclusion, the establishment of SEGs has two main objectives including the achievement of economic targets and the implementation of policies issued or directed by the government.

1.2 The reality of state capital in state economic groups (SEGs)

The scale of state capital in SEGs is shown in the scale of charter capital. All the SEGs that have pilot establishment projects approved have a large scale in term of charter capital.

¹ Resolution no.08/2008/NQ-CP dated 31/03/2008 of the Government on the Governmental regular meeting in March 2008 and Resolution no. 11/NQ-CP of the Government dated 24/02/2011 on main solutions for inflation, stability of macroeconomics, social security.

² Vietnam Post and Telecommunication Group (2010), Closing Report on Economic Corporation model, Hanoi

Table 1: The scale of charter capital of pilot established SEGs

Name	Charter capital (billion)
1. Petro Vietnam (PVN)	177,628
2. Vietnam Electricity Group (EVN)	110,000
3. Vietnam Posts and Telecommunications Group (VNPT)	72,237
4. Vietnam National Coal- Mineral Industries Group	14,794
5. Shipbuilding Industry Corporation	18,574
6. Vietnam National Textile and Garment Group	3,400
7. Vietnam Rubber Group	18,574
8. Baoviet Holdings	6,804
9. Viettel Group	50,000
10. Vietnam National Chemical Group	8,000
11. Vietnam Construction Industry Group	4,607
12. Housing and Urban Development corporation	4,992

Source: Synthesis from The charter on organization and operation of 12 SEGs (2011)

However, there was a significant difference in the scale of charter capital of these groups. The charter capital scale of Petro Vietnam was 52 times larger than the ones of Vietnam National Textile and Garment Group (VND 177,628 billion and 3.400 billion). The charter capitals of 4 groups including PVN, EVN, VNPT and Viettel accounted for 83% of total charter capital. The considerable difference in the size of charter capital shows that the investment rate of the government in these groups relies on the importance of business lines and the interest in business lines of the authority.

The capital accumulation of group itself hardly has any impact on the formation of large -scale enterprises. In fact, the key factors are the huge investment of government and the advantages of corporations before turning into

SEGs. The direct support of governmental budgets for investment in capital construction and frequent expenditure facilitates the formation of SEGs. This is a factor making total assets of significant increase in the period from 2008 to 2009

Table 2: The cost estimate of governmental budgets allocated on SEGs

Unit: VND Billion

	2007	2008	2009	2010	2011
Vietnam National Chemical Group	40,500	5,400		2.9	1,750
The Vietnam National Textile and Garment Group	17,670	15,900	4,300	4.8	5,800
Vietnam Electricity Group (EVN)	13,500	130,000	100,000	141	215,000
Vietnam national Coal-Mineral Industries Group	32,400	28,900	2,600	3	4,431
Vietnam Posts and Telecommunications Group (VNPT)		25,700		60	50,000
Vietnam Rubber Group	39,655	16,000	12,270	12.27	9,000
Petro Vietnam (PVN)	1,700.150	8.900,000	4.900,000	3,500	3.500,000
Shipbuilding Industry Corporation	48,000	7,398	5,836	3.8	2,000
Total	1,891.875	9,129.298	5,025.006	3,727.77	3,787.981

Source: Website of Ministry of Finance <http://www.mof.gov.vn>

Besides, SEGs tend to increase the scale of assets in order to strengthen their position in domestic market by equity as well as debt capital from credit sources. In comparison, the total assets of SEGs (not including Vinashin) increased by 1.67 times while the owner's equity just increased by 1.4 times in the period of 2008 - 2010.

Currently, SEGs hold substantial resources in state owned enterprises sectors as well as in total businesses of the entire economy. In state enterprises sector (including 100% state owned enterprises and enterprises with 50% state own capital), SEGs³ own 30 % of total assets, 51% of owner's equity, and approximately 40% of labor force. In the whole economy, SEGs account for 10.9% of total assets, 14.7% of owner's equity, 9.2% of the debts (including credit and trade debts) and 7.6% of labor with long-term contracts.

Table 3: The proportion of SEGs⁴ in the entire economy and in state enterprises sector in 2009

Index	State economic groups	All enterprises in economy	State owned enterprises	The proportion of SEGs in entire economy (%)	The proportion of SEGs in state enterprises sector (%)
Total assets (VND billion)	960,053	8,803,321	3,273,947	10.9	29.3
Equity (VND billion)	409,386	2,794,262	800,137	14.7	51.2
Revenue (VND billion)	508,638	5,956,245	1,501,636	8.5	33.9
Debt (VND billion)	550,666	6,009,059	2,473,811	9.2	22.3
Taxes and fee (VND billion)	85,982	360,074	134,597	23.9	63.9
Workforce (person)	680,837	8,921,535	1,735,515	7.6	39.2

³ No data of Vinashin

⁴ No data of Vinashin

Source: GSO (2011), Business results of all enterprises of Vietnam in 2009, Statistics Publishing House and Synthesis of CIEM in the Discussion “Summary the pilot establishment of state economic groups” held by CIEM in September 2011.

The following in-depth analysis indicates the reality of the utilization of state capital and the business efficiency of SEG.

Profit is considered a criterion to assess the efficiency of business in SEGs, and it is also used in the reports submitted to state agencies and declarations in mass media. However, a careful examination in term of this criterion shows that the reality of the use of state capital and business effectiveness of SEGs is not accurately reflected in reports.

Firstly, in 2010, 10 out of 11 SEGs satisfied their profitability criterion. However, there was a significant variance in the efficiency of the use of state capital (for example: in ROE, return on equity criterion) among SEGs and even among the groups having high efficiency. According to the report of Steering Committee⁵ on business innovation and development, in 2010, the average ROE of state enterprises was about 13.1%, lower than the average commercial loan interest of credit institutions in the same period. In particular, most of 96 corporations did not reach this profit margin percentage because 80% of profit before tax of 96 enterprises belonged to 4 groups including Petro Vietnam, Viettel, Vietnam Posts and Telecommunications Group and Vietnam Rubber Group.

⁵ Report of the steering committee of Innovation and Development for businesses on the situations of economic groups, company 91 dated 15/2/2011 at the Conference “Deployment of Mission and Plan 2011” between leaders of the Governmental and President of Member Board, Director-General of economic groups, special head companies, Vietnam Development Bank and other state commercial banks

Table 4: The return on equity criterion of SEGs

		ROE index		
		2008	2009	2010
1. Viettel	Merge	78.1	55.7	56.0
	Parent company	77.9	57.1	53.4
2. Vietnam national Coal- Mineral Industries Group	Merge	40.4	26.7	34.4
	Parent company	39.0	21.8	29.1
3. Petro Vietnam	Merge	20.9	18.3	19.2
	Parent company	11.9	12.2	10.7
4. Vietnam Rubber Group	Merge	26.6	18.6	36.3
	Parent company			
5. Vietnam National Chemical Group	Merge		46.4	26.8
	Parent company		27.6	7.2
6. Vietnam Posts and Telecommunications Group (VNPT)	Merge	20.3	14.3	12.9
	Parent company	12.8	9.5	7.3
7. The Vietnam National Textile and Garment Group	Merge	12.1	19.9	23.3
	Parent company			
8. Vietnam Construction Industry Group	Merge	11.1	23.8	12.6
	Parent company	6.0	9.7	1.4
9. Housing and Urban Development corporation	Merge			
	Parent company	20.2	15.9	
10. Baoviet Holdings	Merge		12.7	10.1
	Parent company		10.4	8.4
11. Vietnam Electricity Group (EVN)	Merge	3.0	5.3	-15.7
	Parent company	1.5	1.8	-12.8

In recent years, the financial risk of SEGs is considerable issue of not only representative bodies of the state owner but also financial institutions and parties involved.

According to the data of parent companies up to June 30th 2010, there were 03 enterprises having the debt-to-equity ratio lower than 01: Viettel, VNPT and Petro Vietnam. The debt to equity ratio of remaining groups was about 2-3 times.

Table 5: The debt to equity ratio of parent companies of groups up to June 30th 2010

Group	Debt on equity (times)
1. Baoviet Holdings	3.20
2. Vietnam Construction Industry Group	2.36
3. The Vietnam National Textile and Garment Group	2.77
4. Housing and Urban Development corporation	2.57
5. Vietnam Rubber Group	2.46
6. Vietnam Rubber Group	2.28
7. Vietnam national Coal- Mineral Industries Group	1.59
8. Vietnam National Chemical Group	1.47
9. Viettel Group	0.86
10. Vietnam Posts and Telecommunications Group (VNPT)	0.82
11. Petro Vietnam	0.62
12. Shipbuilding Industry Corporation	none

Source: CIEM (2011), Synthesis of the report on arrangement, innovation and development of enterprises in 10 years.

The situation of financial risk in SEGs shows that there is a weakness in debts and financial risk management of both SEGs and governmental agencies.

On one hand, from the SEGs' view point, according to Article 19 of the Decree 69/2002/ND-CP dated July 12th 2002 on management and handling of outstanding debts for state enterprises, SEGs have responsibility for drawing up the Regulations on management of debts, for opening debt-monitoring books and assigning staff to manage debts. Although SEGs analyzed and assessed debts and financial risks in financial statements, there have differences between reports and real situation due to lack of information transparency. The risks in the utilization of governmental capital are not generally updated for state agencies.

On the other hand, from the governmental view side, the monitoring, analysis and systematic assessment of financial status and debt status of state enterprises and SEGs are not given adequate consideration. There are two main reasons why the management and handling of debts are confused and ineffective. Firstly, according to the Decree 69/2002/ND-CP, Ministry of Finance in collaboration with the State Bank and agencies involved has liability to manage debts. However, these agencies seem to incline to handle debts (debt relief, conversion debt into governmental capital, dealing with the gap in debt trading, offsetting losses and tax debt resolution, etc.) while the monitoring, analysis and systematic assessment of financial status and debt status of state enterprises and SEGs do not receive sufficient consideration. Secondly, the debts of governmental enterprises, especially large-scale groups seem to be complex; the debts come from many sources such as trade credit, governmentally secured credit, parent companies, and national budgets, etc, while the mechanism of handling debts is inefficient plus there is lack of information for evaluation. Therefore, the organization and management of handling debts have been not improved⁶.

⁶ DATC (handling debts and assets in stock) company belongs to Ministry of Finance. It has been operated for a long time, yet still is confused in organization and operation mechanisms.

2- Actual state of legal provisions regarding investing and using state capital in state economic groups

The State has no specific regulations on investing, using state capital and financial managing for SEGs. The investing, using capital state and financial managing of a SEG are conducted via parent companies of the groups. Therefore, depending on legal form of parent company, the group can be defined to be state owned companies or one-member limited liability state / joint stock Company under correlative legal regulations on investing and using state capital.

Since SEG was first experimentally formed (in 2005) until the third quarter of 2012⁷, 13 pilot projects of SEGs were approved, of which 11 had their parent company as legal registered SOEs in accordance with the State Business Law. Until July 1st 2010, these parent companies changed into 11 one-member Limited Liabilities Companies, registered according to the Enterprise Law. Only two SEGs (Bao Viet Insurance Group and Petroleum Corporation) had joint stock companies, registered under the Enterprise Law, as parent companies.

⁷ The time at which end the experiment stage of Vietnam Construction Industry Group and Vietnam Housing and Urban Development Corporation

Table 6: SEGs had their pilot forming plans approved

Group's name	Year of establishment	State ownership in the parent company's charter capital at the establishment time
1. Vietnam Posts and Telecommunications Group	2005	100%
2. Vietnam Coal and Minerals Industry Group	2005	100%
3. Vietnam Textile and Garment Group	2005	100%
4. Vietnam Shipbuilding Industry Corporation	2006	100%
5. Vietnam Electricity Group	2006	100%
6. Vietnam National Oil and Gas Group	2006	100%
7. Vietnam Rubber Industry Group	2006	100%
8. Bao Viet Insurance Group	2007	74.17%
9. Military Telecom Corporation	2009	100%
10. Vietnam National Chemical Group	2009	100%
11. Vietnam Construction Industry group	2010	100%
12. Vietnam Housing and Urban Development Corporation	2010	100%
13. Vietnam National Petroleum Corporation	2011	94.99%

In the period from 2005 until before July 1st 2010, 11 parent companies of 11 SEGs were state owned company, registered under the Law of SOEs, except for the Bao Viet Insurance Group and National Petroleum Corporation that registered under the Enterprise Law. Upon July 1st 2010, all 11 parent companies of these SEGs converted into one-member Limited liability Company registered under the

Enterprise Law. The analysis of legal provisions on investing and using state capital in SEGs was divided into two typical stages of legal characteristics of SEG's parent company which was: SOE (the period before July 1st 2010) and SEG's parent company which was one-member Limited liability company (after July 1st 2010). Only for two SEGs of which parent company was a joint stock company (Bao Viet Insurance Group and Petroleum Corporation), the investment and use of state capital in these SEGs was conducted in the mechanism of investing capital into other enterprises.

2.1- The investment and using state capital in SEGs of which parent company is a state owned company

These are SEGs that were established and operated in the period from 2005 until July 1st 2010, before the Law of SOEs was out of force. This is the case of the following economic groups: Posts and Telecommunications, Coal and Minerals, Textile and Garment, Shipbuilding Industry, Electricity, Gas and Oil, Rubber Industry, Military Telecom, Chemical. The 2 groups of Construction Industry, Housing and Urban Development Industry had their establishing projects approved at the beginning of 2010; however, their main activities in that year were establishing parent company, restructuring subsidiaries and associated companies, so they had not belonged to economic groups.

The investing and using state capital in SEGs in this group mainly follow legal provisions about SOEs regarding investing and using state capital in the Enterprise Law 2003 and in some documents guiding the implementation of regulations on SOEs, including the regulations on the financial management of state companies and management of state capital investments in other enterprises (stated in the Decree 199/2004/NĐ-CP and the Decree 09/2009/NĐ-CP). In late 2009, the investment and using state capital in SEGs were partially regulated in the Decree 101/2009/NĐ-CP dated 25/11/2009 relating to experimental establishment, organizing, running and managing SEGs.

Legal provisions relating to investing, using state capital and financial management of parent company (as SOEs) of SEGs are similar to other SOEs.

The regulations on investing and using state capital in SEG's parent company includes: determining the concept of state capital, the scope of State management, the management of charter capital; approving the initial charter capital level; increasing and decreasing charter capital; regulating the allocation of capital for businesses, the capital mobilization of businesses (including borrowing level or limits, the authority of the business management in borrowing); managing the capital investing out of the company (including authority, obligations, forms of investment outside of the enterprise); managing the use of capital, funds, use of assets, of incomes, expenses, earnings, etc.

Legal provisions relating to investing and using state capital are applied to two types of entities: the first is the legal provisions relating to investing and using state capital that are applied to parent companies of SEGs; the second is the legal provisions relating to investing and using state capital for the owner or legal representatives of parent companies of SEGs.

a) Legal provisions relating to investing and using state capital applied to parent company of SEGs:

- Rights to possess, use capital and assets of the company to do business, obtain legal benefits from capital and assets of the company; rent, buy partially or fully other entities;

- Rights to decide on investment plans, funding, purchasing stocks of other entities, selling assets of the company that account for up to 50% of the remaining assets on the accountant book of the company, or up to a smaller percentage as regulated on the company's charter;

- Rights to decide on borrowing, lending, renting, leasing and other economic contracts of which value are higher than the company's charter capital;

- Rights to utilize company's capital or deposits to invest, establish one-member limited liability entities; form joint stock company or limited liability entities of more than two members with other investors.

- Rights to change asset structure to develop the business; to set the depreciation quoting level on the condition that does not exceed the level regulated by the Government; being facilitated and encouraged to renew technology and assets.

- Cannot use profit-after-tax to reward managers and employees if the company has not yet made full payment of debts and other matured property obligations.

- Obligated to comply the regulations in management of capital, assets, funds, regime of accounting and auditing in accordance with legal provisions; responsible for the truthfulness and lawfulness of company's financial activities.

- Obligated to generate profits for business; make effective use of state budget in the company; ensure the target rate of return state capital assigned by the owner.

- The parent company and the legal owner representative are both responsible for the State budget invested in the enterprise.

- The parent company is responsible to the investor for using funds to invest in the establishment of other enterprise.

- Exercising the annual financial statement and financial disclosure regime; providing necessary information to make credible evaluation of how efficiently the company operates.

- Annual financial statement of the parent company is obliged to be audited.

b) Legal provisions on investing and using state capital applied to owner and owner's representative of the SEGs' parent company:

- The owner only acts as a direct investor into the parent company. The State (Ministries, provincial People Committees) does not invest and intervene directly in the subsidiaries and associated entities. The parent company invests and directly holds the capital of its subsidiaries and associated entities. The owner returns to the state entities the rights to possess, utilize and partially decide on the capital and assets.

- The owner is responsible for investing sufficient charter capital in the parent company (if the condition is not met, no new enterprise is established) in order to solve the problem of lacking responsibility, methods and level of capital investment of the State.

- The State owner is responsible for managing and supervising the efficiency of using capital; preserving and developing capital; respecting the company's Charter; no freely transferring funds and assets of the company.

2.2- The investment and use of state capital in state economic group having state one-member limited liability entities as parent companies

Until July 1st 2010, after the Law of SOEs was out of force, the investment and use of state funds and financial management of SEGs were mainly conducted according to provisions of the Decree 25/2010/NĐ-CP (on converting state entities into state-owned one-member Limited liability companies and organizing the management of state-owned one-member Limited liability companies). The Circular No.117/2010/TT-BTC of the Ministry of Finance (on guiding the financial system of state-owned one-member limited liability entities to implement the Decree 25/2010/NĐ-CP) and the Decree 71/2013/NĐ-CP on investing in enterprises and managing finances of enterprises of which 100% of charter capital is held by the State.

The Decree 25/2010/NĐ-CP, the Circular No. 117/2010/TT-BTC and the Decree 71/2013/NĐ-CP only regulate the investment, use of state funds and

financial management in a parent company with 100% charter capital held by the State, under the forms of one-member limited liability companies.

Current law does not have provisions on investing, using state capital and financial management applied to a company group including parent company, subsidiaries, associated companies, which means there is no provision on investing and using state capital and financial investment applied to SEGs in general.

The investment and use of state capital in subsidiaries (which are joint stock or more than two members limited liability companies), associated companies (which are joint stock or more than two members limited liability companies) are conducted according to the regulations on state capital management in other enterprises..

The investment and use of state capital in a economic group, of which the capital of its parent company is controlled by the State, must comply to the regulations relating to managing state investment into other enterprises.

3 - Assessing the current law on investment and using of state capital in state economic groups

The analysis and evaluation of current laws on investment and using of state capital in state-owned corporation are described in details as following. The analysis and evaluation are reviewed from the perspective of existences and problems with the requirements of clarity and practicality in accordance with the characteristics of SEGs, the law on investment and use of state capital in SEGs. To ensure the requirements, the laws on investment, use of state capital in SEGs can be used as legal basis for monitoring, control activities of investment and use of state capital in SEGs (at parent company and subsidiaries, associated companies).

(1) – SEG is a form of business organization, which is a group of companies, a consortium of businesses. SEG has many different features from individual enterprise, independent business. SEG is assigned to perform many important

goals (holding important and strategic sectors, many important resources such as capital, assets, resources, land, labor force. SEG is the key group which leads other businesses)

In the long term (from 2005 to late 2009), although there had been many SEGs established, but the law on investment and use of state capital in SEG still contained unsuitable features with the form of SEG's operation.

Firstly, the investment and use of state capital in SEGs were only applied in accordance with scattered provisions in many different documents and continuously changing such as the Decree 199/2004/ND-CP, the Decree 09 / 2009/ND-CP, the Circular 242/2009/TT-BTC, the Decree 153/2004/ND-CP⁸, the Circular 72/2005/TT-BTC⁹, the Decree 111/2007/ND-CP¹⁰.

Secondly, the current law on investment, the use of state capital and financial management for parent company of SEGs are similar provisions to single SOE, independent company (before 1/7/2010) or similar to limited company that is a state member of other single organization (after 1/7/2010). The general application of the law on “financial management of state companies” and “management of state investments capital in other businesses” for both SOEs and other independent SEGs is not appropriate

(2) - Along with the establishment of SEGs, there were some legal documents of the parent company-subsidary company (as the Decree 153/2004/ND-CP, the Decree 111/2007/ND- CP and guiding circulars) and legal documents of SEGs such as the Decree 101/2009/ND-CP and the Decree 25/2010/ND-CP.

8 Decree on organization and management of state corporations and transformation of state companies, independent state company in the model of the parent company - subsidiary

9 Circular of the Ministry of Finance guide the form of regulations of the financial management of state companies operating under the "parent company - subsidiary company

10 Organization and management of state corporations and transformation of state companies, independent state company that are the parent company in the form of its parent company - subsidiary operating under the Business Law.

The most significant of them were the Decree 101/2009/ND-CP and the Decree 25/2010/ND-CP. In these legal documents, there are some basic principles of investment in establishment of parent company, subsidiaries, and associated companies; use of state capital in parent company; use of parent company's capital to invest in subsidiaries and associated companies; regulations on investment monitoring framework; use of state capital in SEGs. At the same time, in these legal documents, the responsibilities of ministries and specific guidelines to implement in practical application were also stipulated and issued. Specifically:

- According to the Decree 101/2009/ND-CP, the government should issue regulations on management, monitoring and evaluation of the SEGs; specified criteria, the assessment, the annual ranking of the SEGs; norms and the evaluation of the Board of Directors, General Director, Deputy General Director, and Chief Accountant of parent company. However, the detailed regulation and criteria of management, monitoring, evaluation towards SEGs have not been issued yet until now. The ministries have not issued detailed guidelines, in particular for monitoring and supervising the assigned sector management.

- According to paragraph 2 of Article 6 of the Decree 25/2010/ND-CP, *if there are any differences between the provisions of this Decree and the laws of the SEGs in some aspects such as management, monitoring and evaluation of the State owner of parent company (which is now 100% SEGs), the rights and obligations of the representatives of State owner in parent company of SEGs will be in accordance with the provisions of law on SEGs*, which is applicable under the provisions of the Decree 101/2009/ND-CP on SEGs. However, up to this time, there are no documents that have been issued to guide the application of the provisions of Term 2, Article 6 of the Decree 25/2010/ND-CP.

Due to no guarantee of the legality of issuing guiding documents about the implementation of the provisions of the SEGs, necessary regulatory framework for investment, using capital in the SEGs cannot be created, especially there are no

specific legal frameworks, which are detailed and feasible to apply to manage and supervise towards SEGs.

In fact, there were many cases happened that caused confusion, disorientation, even a gap legally in the management and supervision of the main business lines of SEGs. These situations also happened in monitoring, assessment of the board, Council members, who conduct tasks assigned by the owner, as well as in the regulations of the operation and control of staff in determining the accountability, motivation, sanctions, for those who have legal status and be representative of the owner (directly of the SEGs and in high position of group) or who have authority to protect the rights and interests of state owners in SEGs.

This shows that current law do not respect or realize the importance and the difference of the provisions of law regulating investment activities, the use of state capital in enterprises, which are organized by company groups (including SEGs, corporations in the form of parent-subsidiary company).

Meanwhile, there are a number of provisions, which are no longer consistent with SEGs but continue to be applied to the management of investment and use of State capital in SEGs. Specifically, the Decision no.224/2006/QĐ-TTg issued in 2006, which is mainly applied to monitor and assess for individual State enterprises, is not suitable for monitoring and assessment of SEGs (a group of large-scale companies in which the parent company has a bind in rights and obligations with subsidiaries and associated companies). The promulgation of the Decree no.61/2013/ND-CP (replacing the Decision no.224/2006/QĐ-TTg) did not meet the requirement of monitoring and assessment of a large-scale group of company (which is SEG).

This is also a reason why there have been many legal documents that were issued, but have not established a systematic and consistent legal basis for investment activities and the use of state capital in SEGs; for the management and supervision of investment funded by parent company in subsidiaries and associated

companies; and for the management and supervision of implementation of the rights of ownership of the State arising from the state capital investment in parent company of SEGs. As a consequence, investment in SEGs is inefficient, rampant and out of the main business sectors. Investment activities and use of state capital as well as capital rising are not tightly controlled towards right target, resulting in bad debts, losses, losing capital and state assets.

(3) - After SOE Act expired, parent companies of SEGs were converted into one-member limited companies, the financial mechanism of parent companies (one member limited liability companies) has been implemented under the Circular no.117/2010/TT-BTC. However, the provisions of the rights and obligations of owners, whose capital are invested in other business, defined in the Circular no.117/2010/TT-BTC, are unclear and not consistent with the characteristics of SEGs. Specifically, point 2.1, paragraph 2, Article 13 only regulates the rights and obligations of owners whose capital are invested in other business, such as the rights and obligations of parent companies investing in subsidiaries and associated companies. The rights and obligations are performed under the provisions of the Enterprise Law, but this provision is not specific enough to apply to the investment of capital of parent companies in subsidiaries and associated companies.

The provisions of the rights and obligations of Managing ministries, provincial People's Committees and representatives in the new Decree no.71/2013/ND-CP dated 07/11/2013 are mainly applied for the single, independent SOEs. The financial mechanism of this decree is nearly similar to the one of the Decree no.09/2009/ND-CP and the Decree no.199/2004/ND-CP dated earlier. So, the Decree no.71/2013/ND-CP hardly becomes effectively legal tools to protect the rights and interests of state owners in complicate business combination such as SEGs.

(4) - According to the provisions of law on SOEs, the State has the obligation to invest sufficiently charter capital for SÓEs (parent companies). If not enough, the state must reduce its charter capital. If the charter capital is not

decreased, the SÓEs must switch arrangement or equalize. In fact, these laws are rarely implemented, including the issuance of additional capital in order to fulfill charter capital, register to reduce charter capital if charter capital is insufficient to invest, or convert. Obviously, there is a gap between law and reality.

(5) - There are problems that regulations are incoherent and even confusion between the state capital and parent company's capital, which are invested in subsidiaries, associated companies.

The law prescribes that state capital includes “funds allocated directly from the state budget in establishment process, in business process; the state capital received from other funders under the decision of competent authorities; the value of aids, gifts; derelict asset, surplus asset which is accounted to increase the state capital; additional capital from profit after tax value of land use rights and other items included in the state capital in accordance with the law” (under paragraph 3, Article 2 of the Decree no.09/2009/ND-CP). The state capital also includes "direct investment capital from the state budget, centralized state funds the State Fund when establishing and operating business; budget amounts that are payable deducted; development investment fund, placement assistance fund, the state capital received from other funders, the value of land use rights, the right to use national resources allocated by the State which become state capital increase for business, and other assets are allocated to business by the State, which are prescribed in laws" (under paragraph 2 of Article 3 of the Decree no.71/2013/ND-CP) .

In fact, the capital that parent companies invest in the charter capital of subsidiaries, associated companies is not always state capital as defined in Clause 3, Article 2 of the Decree no.09/2009/ND-CP. In many cases, the capital is not from state budget, but is mobilized from various sources such as bank loans, credit institutions, corporate bonds or combination of state capital and mobilized capital.

Almost legal documents for SOEs still define all funds, which are invested in subsidiaries, associated companies by parent companies, as state capital (such as: the Decree no.199/2004 / ND – CP, the Decree no.09/2009/ND-CP, the Circular no.117/2010/TT-BTC). In essence, capital is from various sources. Parent companies are the owner and have responsibility for this capital. The State is not the owner of this capital (excluding capital budget, if any). This capital is owned and managed parent companies. The State ownership in parent companies is only at a rate corresponding to the state capital in the charter capital of parent corporations. For subsidiaries and associated companies, the State has the right to own these companies at a level corresponding to dominant level arising from owning the entire charter capital of parent corporations.

(6) - The law on financial publicity of SOEs, including SEGs to monitor the investment and use of state capital in SEGs, is not detailed, insufficient in some contents such as publicity contents, forms, tools and so on. For example, provisions of the Decree no.09/2009/ND-CP stipulate state companies to announce the financial situation in public as prescribed. The Ministry of Finance is responsible for guiding, inspecting and monitoring public announcement of figures and financial statements of state companies. The Circular no.242/2009/TT-BTC, which guides the implementation of the Decree no.09/2009/ND-CP, stipulates a general principle that state companies announce financial situations in public under the provisions of Article 30 of the Decree no.09/2009/ND-CP and provisions of current law on auditing and accounting. For a long time, there are only two Decrees of the Government on public finance in SOEs: (1) the Decree no.07/1999/ND-CP issued regulations to implement democracy on public finance in SOEs; (2) the Decree 87/2007/ND-CP issued regulations to implement democracy in joint stock companies and limited liability companies. However, these two documents are limited in financial publicity (audit results and annual financial statements of the enterprises) for internal objects, the parties involved in outside enterprises are inaccessible to monitor. The Decree no.61/2013/ND-CP (Regulations on monitoring and assessment financial performance and financial

publicity for SOEs and enterprises having state capital) has more new contents than the previous two documents (the Decree no.07/1999/ND-CP and the Decree no.87/2007/ND-CP).

However, on one hand, many contents related to publicity are only financial information, which are embodied in general principles. They are not specific enough to implement and still need to wait for the next instruction. On the other hand, the particulars of the nature of SEGs (companies group) are not specific and public enough to monitor and evaluate, such as financial investment activities in parent companies that have state capital in group companies, a list of enterprises invested by parent companies, and insider trading of SEGs.

(7) - After SOE Law expired, the promulgation and adoption of regulations under the Business Law to implement controller's activities in SEGs have many inadequacies. Therefore, the control positions at the SEGs are still not conducted as a rule. There are corporations not having structure of controllers after switching to operate under the Business Law, or if they have controllers, these people are mostly from the internal business. Therefore, the operation of the controller implemented in the SEGs does not comply with regulations.

4 – Several modifications, recommendations and additions in relevant laws

(1) There is a need to innovate the mechanism of state capital supervision and control through controlling the right of state ownership (broader connotation and comprehension of state ownership of capital) in all businesses in SEGs which have investment flows originated from the state capital in / through parent companies to reach its subsidiaries and associated companies. In particular, the right of State ownership in the SEGs is done through parent companies and depends on the dominant level, the impact or the influence of the State on businesses that have investment capital from parent companies in SEGs.

The institutionalization of supervision and control the thought of the State rights ownership in SEGs instead of monitoring and controlling of the state capital into legal regulations is necessary and essential because of following reasons:

Firstly, the state capital investment and state ownership in SEGs are original source, but the state ownership right is the core of the State's interests in SEGs. State ownership right is broader, more comprehensive than state ownership of capital. State ownership rights include the right to possess, use and dispose of many important matters of the corporations such as capital, assets, organization, personnel, rules, development strategy, investment, business. The "management and use of state capital" is narrower in the contents; especially it still cannot express the meaning, the importance of the "control and supervision of state ownership right". There is also a need for changing the phrase "owners of capital" to "owner" in the law.

Secondly, state capital can only be recognized and identified in the parent companies of SEGs; while in subsidiaries and associated companies, an amount or percentage of state capital cannot be recognized and identified. So, laws on management and use or supervision of the state capital cannot be implemented in these companies. In these cases, using the concept of state ownership rights in subsidiaries, associated companies is appropriate. Using the concept of state ownership rights depends on the level (percentage) of ownership in the charter capital of subsidiaries, associated companies which are under ownership rights of parent companies such as the right to possess, use and dispose, corresponding to capital, assets, organization, personnel, investment, business in this company. There is the State ownership of the charter capital of the parent companies, resulting in legal consequences that the State has ownership right including the right to possess, use and disposal capital, assets, production, organization, personnel, investment, business, benefit in subsidiaries and associated companies.

Thirdly, only monitoring and control of the State rights holders in SEGs can ensure the rights and interests of the State to overcome the shortcomings in management and supervision of SEGs in recent times.

(2) Paying attention to promulgate laws and regulations to strengthen supervision and control of the owner in SEGs. There is a need to monitor and control agencies that are responsible for representing owners in carrying out the monitoring and control over the following matters:

- Monitoring and controlling the organization, establishment, joining, reorganization and dissolution of corporations; changing the ownership structure of the subsidiaries that leads to transfer of enterprises under the dominance level of mother company; implementing parent companies' regulations, appointment, reappointment, dismissal, salary, bonus, task performance and results of operations of the Member Board of parent companies.

- Monitoring, controlling objectives, directions, business strategies of the group; investment plan, financial plan of parent companies; portfolio, main business sectors and sectors which are not related to the main business lines, investment field, profession, sectors, project with risk; public activities.

- Financial Monitoring and control in SEGs: the preservation and development of state capital in parent companies, the preservation and development of the parent companies' capital in subsidiaries and associated companies; conditions and financial performance of parent companies, subsidiaries and associated companies; Return on Equity, investment efficiency and business; wage costs; loans, debt and solvency; varying charter capital, structural changes of the charter capital; investment projects which capital are in excess of the owners' allocation of parent company, subsidiaries.

- Focusing on the supplementary of legal provisions for monitoring and control of industries; investing and establishing in subsidiaries and associated companies.

(3) Paying attention to promulgate laws to monitor and control investment and development of SEGs in width. The first is supervision and control of mechanical coupling, merging firms to raise fund in order to have enough capital to establish cooperation. The second is monitoring and control investments outside the businesses to form business layers (according to experience from some countries such as South Korea, China, the number of layers do not exceed three). The third is monitoring and control divisions, investment, capital formation, resulting in many firms in corporate structure not to be out of control.

(4) Implementing the controller institutions under the Business Law for SEGs whose 100 % of the charter capital of parent companies is owned by the State (even modifying the business Law to fix controllers institution) is urgent task. The Controller is a new title, which is different from Supervisory Board in state companies having Board of Directors which is appointed by the owners. Controllers have an important role in helping owners control the implementation status of ownership rights in management and administration of the company. The selection, appointment, task execution, enhancing the capacity of controller members, separating salaries and bonuses of the controllers; dynamics mechanism and responsibilities of the controllers - are the range of current and long-term problems of SEGs which the State holds 100 % charter capital in parent companies. There is a need for promulgating regulations including regulations about control of controllers' activities; defining the supply and information accessing mechanism; coordination mechanism among controllers (when the number of controllers is more than 1); reporting and receiving report mechanism of controller; mechanism of addressing problems, suggestions, recommendations of controllers; and other sanctions.

(5) Strengthening the legal - economic - human resource - information foundation to implement monitor and control mechanisms of the State in SEGs. To complete this task, there is a need to consolidate and further develop the foundation of a monitoring-control mechanism. These activities include

establishing and maintaining following tasks: (a) Clear and explicit regulation system of powers, duties, obligations, responsibilities and relationships in works of related objects (organizations or individuals), (b) Adequate, reliable, up-to-date information systems of SEGs (and other enterprises having state capital), (c) the indicator, criteria system and methods of assessment, monitoring, control and of the owners of the SEGs (and other enterprises having state capital), (d) full-time and professional staff who are representatives for the owners or through authorization of the rights of owners in SEGs.

(6) Modifying the Competition Act and promulgating new regulations to control the merger or new investment in the formation process of cooperation, leading to the formation of monopoly cooperation; controlling the monopoly of SEGs having natural monopoly; controlling the monopoly happened when enterprises in corporations associated or be in agreement to abuse their dominant roles to exclude competition or limited competition.

References

1. GSO (2011), *Business results of all enterprises of Vietnam in 2009*, Statistics Publishing House
2. Decree 25/2010/ND-CP dated 19/3/2010 of transformation of state companies into one-member limited liability companies and management, organization of state-owned one-member limited liability companies.
3. Decree 101/2009/ND-CP on piloting the establishment, organization, operation, management and supervision of SEGs.
4. Charter of parent company - Industry Group Coal - Minerals of Vietnam (Decision 228/2006/QD-TTg dated 11/10/2006), The Vietnam Coal - Minerals of Vietnam (Decision 418 / QD - dated 21/3/2011), Petro Vietnam (Decision 36/2007/QD-TTg date 14/3/2007 and Decision 190/QD-TTg dated 29/01/2011), Post and Telecommunications Group (Decision 180/QD-TTg dated 28/01/2011), Vietnam Rubber Industry Group (Decision 469/QD-TTg date 30/3/2011), Vietnam Electricity Group (Decision 857/QD-TTg date 6/6/2011), Song Da Corporation (Decision 344/QD-TTg dated 8/3/2011), Vietnam Chemical Corporation (Decision 587/QD-Ttg dated 21/4/2011), Vietnam Textile and Garment Group (Decision 340/QD-TTg dated 07/03/2011), Housing and Urban Development Group (Decision 345/QD-TTg dated 8/3/2011), Military Telecom Corporation (Decision 466/QD-TTg dated 30/3/2011).
5. Decree 69/2002/ND-CP dated 12/07/2002 of the management and settlement of outstanding debts in state-owned enterprises.
6. Circular 117/2010/TT-BTC of the Ministry of Finance guides financial mechanism of one member limited liability Company owned by the State to implement the Decree no.25/2010/ND-CP

7. Decree 199/2004/ND-CP of the Government promulgates the Regulations on financial management of state companies and management of state capital investments in other enterprises.
8. Decree 09/2009/ND-CP promulgates the Regulations on financial management of state companies and management of state capital investments in other enterprises
9. Decree 71/2013/ND-CP on capital investment in business and financial management of enterprises of which 100% charter capital is owned by the State
10. Tran Tien Cuong and Nguyen Canh Nam (2011), Report on Pilot State Owned Corporation