

RESTRUCTURING OF PUBLIC ENTERPRISES FOR PRIVATIZATION, COMMERCIALIZATION AND PUBLIC-PRIVATE PARTNERSHIPS IN NIGERIA: AN OVERVIEW

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Introduction

The restructuring of public enterprises or state owned enterprises (SOEs) or economic sectors raises constitutional, legal, strategic, emotional, institutional and economic issues and challenges. Such restructuring can take the form of privatization, commercialization or any other form of public-private partnership (PPP).¹ The word ‘privatization’ is a concept as well as a process. As a concept, it is not only emotive but controversial. As a process, the methods adopted vary from sector to sector, country to country and in Nigeria, from one phase to another. It also has both a narrow and broad meaning. Yet at another level, it can mean the privatization of a sector or the

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¹ Adapted from an unpublished paper titled ‘Privatization and Commercialization in Nigeria’ delivered at the Faculty of Law, Obafemi Awolowo University, Ife on 13 July, 2012.

entire economy. Sometimes the level of irreversibility of the privatization transaction is critical in determining its classification.

As a concept it is the process of transferring ownership and sometimes control of a business, an enterprise, an agency, a sector or public enterprise from the public sector to the private sector. Some transfers will involve the introduction of private entry, often by the abolition of monopolies or barriers to entry and the introduction of competition. In a narrow sense, privatization implies permanent transfer of control from the public sector to the private sector.² Broadly, privatization involves all forms of public-private partnership (PPP) where measures are adopted for the transfer from the public sector to the private sector of activities exercised until then by a public authority. It is in this broad category that we have sub-contracting, management contracts, lease and concessions.³

As a process, privatization describes the sequencing of transactions and the methods of sale. For example, how do you determine the public enterprise or sector to be privatized? Second, how do you determine the strategy to be adopted in privatizing a public enterprise? Third, how do you attract investors-local or international? Fourth, how do you determine whether it is full or partial privatization? Fifth, how do you carry out due diligence on the enterprise? Sixth, who and how

² Section 14 of the Privatization and Commercialization Act, Cap 369, Laws of the Federation of Nigeria, 1990, now repealed, defines privatization as the relinquishment of part or all of the equity and other interests held by the Federal Government or its agency in enterprises whether wholly or partly owned by the Federal Government. Unfortunately, there is no definition of the word 'privatization' in the Public Enterprises (Privatization and Commercialization) Act, Cap P38, Laws of the Federation of Nigeria, 2004 (hereinafter referred to as "the Act"). See also Amina Tukur Othman, *Privatization in Nigeria* (Ta'alim Limited, 2003) 1 and Sam Amadi, *Privatization & Public Good: The Rule of Law Challenge* (Centre for Public Analysis & Research, 2008) p xv.

³For example, Design-Build (DB), Build-Transfer (BT), Design-Build-Maintain (DBM), Design-Build-Operate (DBO), Build-Operate-Transfer (BOT), Design-Build-Operate-Maintain (DBOM), Build-Own-Operate (BOO), Build-Own-Operate-Transfer (BOOT), Rehabilitate-Operate-Transfer (ROT) and Design-Build-Finance-Maintain (DBFM).

will the transaction documents (Advertisement for Expression of Interest, Information Memorandum, Non-Disclosure Agreement, Request for Proposals, Share Sale/Purchase Agreement, Asset Sale Agreement, Shareholders Agreement, Concession Agreement and Management Contract) be prepared. Seventh, who is the approving authority and what administrative structures will you create?

According to the provisions of section 14 of the Privatization and Commercialization Act,⁴ ‘commercialization’ means the reorganization of enterprises wholly or partly owned by the Federal Government in which such commercialized enterprises shall operate as profit-making commercial ventures and without subventions from the Federal Government. Although the Act did not define ‘commercialization’, section 8 of the Act provides thus:

Notwithstanding the provisions of any other enactment and without prejudice to the generality of section 6 of this Act, a commercialized enterprise shall operate as a purely commercial enterprise and may, subject to the general regulatory power of the Government of the Federation

- (a) fix the rates, prices and charges for goods and services it provides;
- (b) capitalize its assets;
- (c) borrow money and issue debenture stocks; and
- (d) sue and be sued in its corporate name.

It is clear, therefore, that when a public enterprise is fully commercialized, the expectation is that it should operate as a purely commercial enterprise without subventions from the Federal Government.

⁴Cap 369, LFN 1990, now repealed.

Section 33 of the Act defines a ‘public enterprise’ as any corporation, board, company or parastatal established by or under any enactment in which the Government of the Federation, a Ministry or extra Ministerial department or agency has ownership, or equity interest and includes a partnership, joint venture or any other form of business arrangement or organization. This definition captures most of the candidates for either privatization or PPP transactions.⁵ According to the Infrastructure Concession Regulatory Commission,⁶

A Public-Private Partnership is a “contractual agreement between a public agency (federal, state or local) and a private sector entity. Through this agreement, the skills and assets of each sector (public and private) are shared in delivering a service or facility for the use of the general public. In addition to the sharing of resources, each party shares in the risks and rewards potential in the delivery of the service and/or facility”. In effect, the key defining elements of a PPP is the focus on service delivery and a real partnership that involves the sharing of risks and rewards.

PPPs have been used for delivery of services worldwide in sectors like, power, education, roads, aviation and even in some specific segments of defence services like facility maintenance and simulators procurement/training.⁷

⁵ No surprise that the definition of “infrastructure” in section 36 of the Infrastructure Concession Regulatory Commission Act, 2005 is almost the same as “public enterprises” in section 33 of the Act. Common candidates in this category include telecommunications, railways, seaports, airports, power and highways.

⁶ Available at <http://www.icrc.gov.ng/ppp/> accessed 19 October, 2018.

⁷ A typical example of a PPP in Nigeria is the contractual agreement between FAAN and Bi-Courtney Aviation Services for the Build Operate and Transfer (BOT) of MMA2 domestic airport terminal in Lagos. There was also the Lagos-Ibadan Expressway Concession between the Federal Government of Nigeria and Bi-Courtney Consortium which was later terminated.

However, one of the challenges that the PPP transactions have had in Nigeria is the absence of economic and technical regulators in the key economic sectors.⁸ This is understandable because at the time that the public enterprises were set up most of them were seen as public utilities and therefore only the public sector that could provide them. Consequently, various Roadmaps or instruments have been used to prepare economic sectors for PPP transactions.⁹

For ease of exposition, therefore, this Chapter is divided into seven parts, namely, Part I dealing with Historical Perspectives; Part II with Privatization Challenge; Part III with the First Phase; Part IV with the Second Phase; Part V with the Third Phase; Part VI with Reform Activities, Part VII with the Journey So Far and the Concluding Part.

Part I

Historical Perspectives

The history of privatization is traceable to Ancient Greece when governments contracted out almost everything to the private sector and in the Roman Republic, when private individuals and

⁸ On 11 February, 2015, the Federal Executive Council (FEC) approved the Reform Bills (Ports & Harbour Authority Bill, 2014; The Nigerian Railway Authority Bill, 2014; The National Transport Commission Bill, 2014; the National Inland Waterways Bill, 2014; National Postal Commission Bill, 2004; the National Roads Fund Bill, 2014; The Federal Roads Authority Bill, 2014; and the Federal Competition and Consumer Protection Bill, 2014. The Petroleum Industry Bill is already in the National Assembly). When these Reform Bills are passed into law, there will be proper technical/economic regulators in the key sectors of the economy. Unfortunately, these bills were not passed into law until the expiration of the life of the Jonathan Administration in May 2015. On assumption of office in May 2015, the Senate President, Dr Abubakar Bukola Saraki took on the responsibility of get these bills passed into law.

⁹ See the National Electric Power Policy 2001; National Policy on Public-Private-Partnership (PPP), 2013; National Integrated Infrastructure Master Plan (NIIMP), 27 August, 2014 prepared by the National Planning Commission; National Strategy Vision 20:2020; National Policy on Housing 2012; National Policy on Urban Development 2012; Nigeria Lands, Housing and Urban Development Road (Final Draft); and Roadmap for Power Sector Reform, August 2010.

companies performed the majority of services including tax collection (tax farming), army supplies (military contractors), religious sacrifices and construction. As an ideology, privatization is perhaps traceable to the golden age of the Han Dynasty in China. Taosim came into prominence for the first time at a state level and it advocated the *laissez-faire* principle of Wu wei. Even during the Renaissance, when most of Europe practiced feudalism, the Ming Dynasty of China began once more to practice privatization especially with regards to their manufacturing industries. The Nazis sold off public ownership in steel, mining, banking, shipyard, ship-lines, and railways. These had originally been nationalized in the early 1930s because of the economic disaster of the Great Depression. However, Bel argues that Nazi privatization was set, 'within a framework of increasing state control of the whole economy through regulation and political interference.'¹⁰ Uncooperative industrialists, like the head of the Junkers aircraft company, were removed from their positions; the market was very much controlled by the party. The strategy goes back a decade to Fascist Italy. Then, state monopolies on match production, life insurance, telephone networks, and tolled highways were ended after Mussolini came to power. The Ansaldo company, which produced boats, trains, airplanes, and naval equipment, had initially been nationalized by the Fascists in 1921 when it went into bankruptcy. This was reversed in 1925.¹¹

In more recent times, Winston Churchill's government privatized the British steel industry in the 1950s, Western Germany embarked on large-scale privatization, including the selling of its majority stake in Volkswagen to small investors in a public share offering in 1961 and in the 1970s,

¹⁰ Germa Bel 'Retrospectives: The Coining of "Privatization" and Germany's National Socialist Party' [2006] (20) (3) *The Journal of Economic Perspectives*, 187-194.

¹¹ See Matthew Wills, 'The Roots of Privatization', 23 April, 2018 <<https://daily.jstor.org/the-roots-of-privatization/>> accessed 23 October, 2018.

General Pinochet implemented a significant privatization programme in Chile. However, it was in the 1980s under the leaderships of Margaret Thatcher in the United Kingdom and Ronald Reagan in the United States that privatization gained worldwide momentum. Similar exercises were carried out in Eastern Europe and the former Soviet Union with assistance from the World Bank and the US Agency for International Development; while Japan privatized the Japan Post. There were also privatizations in France, Belgium, Denmark, Italy, Netherlands, Spain, Argentina, Brazil, Cuba, Indonesia, Malaysia, Peru, Singapore, Venezuela, Poland, Philippines, Hungary and Thailand. In other words, privatization transactions took place in developing and transition countries as well as in industrialized countries.

In Nigeria, the Report of the Presidential Commission on Parastatals¹² set up in 1981 under the Shehu Shagari Administration revealed that public enterprises were characterized by misuse of monopoly power, defective capital structure, mismanagement, corruption and nepotism. Consequently, the Commission¹³ recommended that there should be an increased role for the private sector especially in parastatals where security and other sensitive aspect of public policy are not as paramount as the satisfactory delivery of service to the people.

Similarly, the International Monetary Fund (IMF), in considering the request by the Federal Government for a loan under Shagari's Administration imposed certain conditionalities. One of them was the divestiture of ownership, management and control of some public enterprises. The debate on whether Nigeria should embark on privatization resonated throughout the regime of Buhari/Idiagbon until General Babangida in his 1986 Budget Speech announced government's

¹²See Federal Republic of Nigeria, Report of the Presidential Commission on Parastatals, Lagos, Federal Government Press, 1981, p 63.

¹³ Also known as Onosode Commission.

intention to divest its holdings in certain key sectors of the economy and subsequently promulgated the Privatization and Commercialization Act No. 25 of 1988¹⁴ and introduced the Structural Adjustment Programme (SAP). This was the first legislative instrument on privatization and commercialization in Nigeria. In 1993, this enactment was repealed and the Bureau of Public Enterprises Act¹⁵ was promulgated under the Abacha Administration. Not much was achieved by this enactment until the Public Enterprises (Privatization and Commercialization) Act was promulgated in 1999 (the Act). In the area of PPP transactions, the main instrument at the federal level is the Infrastructure Concession Regulatory Commission Act of 2005. The details of these enactments will be discussed hereunder.

From 2003 to 2007, Nigeria attempted to implement an economic reform program called the National Economic Empowerment Development Strategy (NEEDS). The purpose of the NEEDS was to raise the country's standard of living through a variety of reforms, including macroeconomic stability, deregulation, liberalization, privatization, transparency, and accountability. The NEEDS addressed basic deficiencies, such as the lack of freshwater for household use and irrigation, unreliable power supplies, decaying infrastructure, impediments to private enterprise, and corruption. The government hoped that the NEEDS would create 7 million new jobs, diversify the economy, boost non-energy exports, increase industrial capacity utilization, and improve agricultural productivity. A related initiative on the state level is the State Economic Empowerment Development Strategy (SEEDS).

¹⁴See also Amupitan J, 'Private Placement Method of Privatization in Nigeria' in *New Vista in Law*, [2002] (2) 343-356.

¹⁵ See Decree No. 78 of 1993 (hereinafter referred to as "the BPE Act").

Since the passage of the Electric Power Sector Reform Act of 2005 that regulates the power sector, all the other attempts to pass the bills regulating the oil and gas, ports and harbours, railways, postal services and inland water ways have not been successful as they have been in the National Assembly. Indeed the Ports and Harbours Bill has been in the National Assembly since 2002/2003.

In March 2015, the National Integrated Infrastructure Master Plan was launched.¹⁶ It was a policy document for accelerated infrastructure development. It set out the framework for raising Nigeria's infrastructure stock from 20-25 per cent of GDP to at least 70 per cent by 2043. It provides the strategies, targets and priority projects as well as total investment outlay for the first five years and scheduled timelines for deliverables. However, with the change of government in Nigeria in May 2015, it is not clear to what extent this Master Plan is still being implemented.

In April 2017, the Federal Government of Nigeria launched the Economic Recovery and Growth Plan (ERGP) – 2017-2020.¹⁷ The ERGP is a medium term plan built on the Strategic Implementation Plan (SIP) for the 2016 Budget of Change. The ERGP has been developed for the purpose of restoring economic growth while leveraging on the ingenuity and resilience of the Nigerian people. One of the objectives of the ERGP is the privatization of selected public enterprises and assets and building on the National Industrial Revolution Plan and the Nigeria Integrated Infrastructure Master Plan. It is also expected that the ERGP will leverage the power of the private sector. Accordingly, the Bureau of Public Enterprises will privatize the Afam Power Plant, re-privatize the Yola Distribution Company Plc, concession Terminal B at Warri Old Port, restructure and recapitalize the Bank of Industry, partially commercialise the Nigerian Postal

¹⁶ See National Integrated Infrastructure Master Plan, National Planning Commission, The Presidency, March 2015.

¹⁷ Available at <https://yourbudget.com> accessed 8 November, 2018.

Services, partially commercialize selected National Parks, partially privatize the Calabar and Kano Free Trade Zones and re-concession the Lagos International Trade Fair Complex. In terms of PPP, BPE is working on the health sector, railways and highways.¹⁸

Part II

Privatization Challenge

The concept of privatization poses its own challenges. In this context, it is apposite to examine the objectives of privatization. In the words of Guislain,¹⁹

Defining privatization objectives is an important exercise that should be undertaken as early as possible. Many privatization programs have foundered when clear objectives were lacking or where conflicting objectives were simultaneously pursued. The definition of objectives is not an easy task, however, and it is made no easier by the multiplicity of possible objectives and actors with different, often conflicting interests

The objectives²⁰ can be discussed under various heads including:

¹⁸ See the Presentation by the Director General of BPE, Alex A Okoh at the Stakeholders Media Interactive Forum of 29 October, 2018.

¹⁹P Guislain, *The Privatization Challenge: A Strategic, Legal, and Institutional Analysis of International Experience* (The World Bank: Washington, DC, 2001) 16. See generally Loannis N Kessides, *Reforming Infrastructure: Privatization, Regulation, and Competition* (The World Bank: Washington, DC, 2004; Antonio Estasche & Gines de Rus (eds) *Privatization and Regulation of Transport Infrastructure: Guidelines for Policymakers and Regulators* (The World Bank, Washington, DC, 2000); and Luis A Andres and Others, *The Impact of Private Sector Participation in Infrastructure: Lights, Shadows and the Road Ahead* (The World Bank, Washington, DC, 2008).

²⁰ See also H R Zayyad 'Privatization and Commercialization in Nigeria'. <<http://unpan1.un.org/intradoc/groups/public/documents/aapam/unpan028228.pdf> >accessed on 12 May, 2013.

Efficiency and Development of the Economy

In emerging economies, the key objectives are the creation of a market economy, encouragement of private enterprises and expansion of the private sector in general. Others are the promotion of macroeconomic or sectoral efficiency and competitiveness, elimination of rigidities, promotion of competition particularly by abolishing monopolies, development of efficient capital markets, improvement of access to foreign markets for domestic products, promotion of foreign investment, promotion of domestic investment and maintenance or creation of employment.

The whole concept of core investor sale introduced in the third phase of the privatization programme was aimed at the promotion of macroeconomic or sectoral efficiency and competitiveness.²¹

Efficiency and Development of the Enterprise

It is assumed that because public enterprises are funded wholly or partly by government and also run by government they are run inefficiently. Consequently, in terms of public enterprises, privatization will introduce new technologies and promote innovation while the private investors will upgrade plant and equipment, increase productivity, including utilization of industrial plant, improve the quality of the goods and services produced, introduce new management methods and

²¹An example of this is the privatization of Aluminium Smelter Company Plc where the core investor is RUSAL of Russia and the Eleme Petrochemical Company Limited where the core investor is Indorama of Indonesia. RUSAL is the leading aluminium smelter in the world while Indorama has successfully operated similar plants in Indonesia and Thailand.

teams and allow the enterprise to enter into domestic and international alliances essential to its survival.²²

Budgetary and Financial Improvements

In Nigeria, a conservative estimate shows that between 1975 and 1995, \$100 billion²³ was spent on public enterprises and that the funding of these enterprises has been a drain on the treasury. In the words of President Obasanjo, 'It is conservatively estimated that the nation may have lost about USD800 million dollars due to unreliable power supply by NEPA and another USD4000 million through inadequate and inefficient fuel distribution.'²⁴ Thus, the objectives of privatization in this regard include the reduction of the financial drain on the state in the form of subsidies, unpaid taxes, loan arrears and guarantees given, mobilization of private resources to finance investments that can no longer be funded from public finances, generation of new sources of tax revenue, limitation of the future risk of demands on the budget inherent in state ownership of businesses,

²² Almost all the enterprises in the third phase of privatization were non-performing. Delta Steel Company Plc was shut down in 1995 until privatized in 2005; Ajaokuta Steel Company Ltd and National Iron Ore Mining Company Ltd were not completed; Aluminium Smelter Company Plc was shut down. Similarly, apart from the Anambra Motor Manufacturing Company Ltd and Peugeot Automobile of Nigeria Ltd, all the motor vehicle and truck assembly companies had shut down. Other than non-performance, there was a high level of debt overhang, staff and pension liabilities and corruption. Due to debt level of Nigeria Airways, National Fertilizer Company Nigeria, Nigeria, Jos Steel Rolling Company Ltd, Oshogbo Steel Rolling Company Ltd, Katisina Steel Rolling Company Ltd, Calabar Cement Company Ltd, Nigeria Sugar Company, Bacita, and Nigeria Newsprint Manufacturing Company Limited were liquidated.

²³ I I Omoleke and Others, 'An Examination of Privatization Policy and Foreign Investments in Nigeria' [2011] (5) (2) *African Journal of Political Science and International Relations*, 72-82.

²⁴Obasanjo, O 'Imperative of Privatization' in Privatization Handbook (2000) 4.

including the need to provide capital for their expansion or to rescue them if they are in financial crisis.

A cursory examination of the appropriations made between 1970 and 1999 and 1999 till date will show that no appropriations were made to the public enterprises listed for privatization. Instead the proceeds of sale were paid to the government treasury for the purpose of appropriation. Similarly, the \$500 million paid by Transcorp for 51% of Nigerian Telecommunications Limited (NITEL) shares was insufficient to cover the staff benefits.

One major challenge for the reform of the power sector is the funds necessary to pay off the staff benefits and the creditors of the former National Electric Power Authority (NEPA).

Income Distribution or Re-Distribution

Before the privatization programme, share ownership was limited and in very few hands. Besides, government owned and operated the ‘commanding heights’ of economy. Privatization is seen as fostering broader capital ownership and promotion of popular or mass capitalism. It also provides avenues for the development of a national middle class, foster the economic development of a particular group, encourage employee ownership, and restore full rights to former owners of property expropriated by previous regimes. In Nigeria, this objective was actualised in the first phase of the privatisation Programme.²⁵

²⁵ In the *Final Report of the Technical Committee on Privatization & Commercialization*, Vol. 1, page iv, 800,000 new shareholders were created and out of initial investment of N652 million, the proceeds realized exceeded N3.7 billion thus creating a capital gain of nearly 600%.

Political Considerations

Although, maximizing economic efficiency and return on investment is usually the main objective of a privatization programme, in practice other considerations of a socio-political, nature also influence the choices of the authorities. In the midst of tension between the conflicting objectives, other political considerations include the reduction of the size and scope of the public sector or its share in economic activity and re-definition of the field of activity of the public sector, abandoning production tasks and focusing on the core of government functions, including the creation of an environment favourable to private economic activity. Other political considerations include the reduction of the opportunities for corruption and misuse of public property by government officials and SOE managers, reduction of the grip of a particular group on the economic and raising the government's popularity and its likelihood of being returned to power in the next elections.

In practice, the multiplicity and sometimes mutually incompatible nature of the objectives make it essential to rank them. The more objectives there are, the more complex the entire privatization process.

As will be shown shortly, the reform activities carried out by the National Council on Privatization/Bureau of Public Enterprises are aimed at restricting the role of government to regulation and creation of institutions while the private sector runs the enterprises as can be seen in the ports in Nigeria.²⁶

²⁶The concession of Nnamdi Azikiwe International Airport was almost concluded before it was aborted. It was meant to be a pilot study. One major issue that led to its abortion was the conflict between the Federal Airports Authority and the Federal Capital Development Authority as to the ownership of the airport. There were other issues relating to the composition of the Special Purpose Vehicle (SPV) used for the acquisition.

Other Challenges²⁷

Other than the objectives, there are other challenges including:

a) **Constitutional**

The question often asked is whether privatization is constitutional given the provisions of section 16 of the Constitution of the Federal Republic of Nigeria, 1999, as amended²⁸ dealing with economic objectives and whether the provisions of the Act are not inconsistent with the Constitution? Section 16 of the Constitution provides, *inter lia*, as follows:

(1) The State shall, within the context of the ideals and objectives for which provisions are made in this Constitution –

(a) harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self-reliant economy;

(b) control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity;

(c) without prejudice to its right to operate or participate in areas of the economy, other than the major sectors of the economy, manage and operate the major sectors of the economy;

.....

(2) The State shall direct its policy towards ensuring -

(a) the promotion of a planned and balanced economic development;

²⁷ See Michel Kerf and Warrick Smith, *Privatizing Africa's Infrastructure: Promise and Challenge* (The World Bank, Washington, DC, 1996).

²⁸ Hereinafter referred to as "the Constitution".

- (b) that the material resources of the nation are harnessed and distributed as best as possible to serve the common good;
 - (c) that the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or a of a group; and
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- (3) A body shall be set up by an Act of the National Assembly which shall have power –
 - (a) to review, from time to time, the ownership and control of business enterprises operating in Nigeria and make recommendations to the President on same; and
 - (b) to administer any law for the regulation of the ownership and control of such enterprises.

Commenting on this provision, Sam Aluko²⁹ stated thus:

The economic philosophy of the present Federal Government is hinged on the market: “that government has no business in business”. Therefore, all the

²⁹ Sam Aluko ‘Federal Government Reform Agenda and the Nigerian Economy: 1999-2007: A Critical Assessment: <http://www.nigeriavillagesquare.com/articles/guest-articles/the-nigerian-economy-1999-2007-a-critical-assessment.html>. Accessed on 12 May, 2013. See Also Omolete and Others (n) at 73-74, ‘Privatization in Nigeria: Critical Issues of Concern to Civil Society by Otive Igbuzor delivered at the Power Mapping Roundtable organised by the Socio-Economic Rights Initiative (SERI) held at Niger Links Hotel, Abuja: 3 September, 2003.

existing government projects, plants, enterprises, refineries and shareholdings in industries, trade, banking, finance and agriculture must be privatised and sold, so that government, particularly the Federal Government, can concentrate on governance, forgetting that a government that cannot run an industry successfully cannot govern efficiently. So, the Bureau of Public Enterprises (BPE) has been very active, since the present regime came on board on May 29, 1999, in selling off enterprises, including houses and other landed properties owned by the Government. Such a philosophy violates the Nigerian Constitution not only by abandoning the control of the major sectors of the Nigerian economy but also by offering Nigeria for sale to domestic and foreign private interests and concerns.

When the provisions of section 16 of the Constitution are read with the provisions of all enactments on privatization and commercialization³⁰ and other relevant enactments³¹ dealing with the review of the ownership structure and control of business enterprises operating in the country, it becomes clear that the ultimate goal of privatization includes the actualization of the economic objectives in the Constitution. As will be shown below, the reform activities including the drafting of the Competition Policy and the Federal

³⁰ Especially the Act which provides for privatization and commercialization mode, partial and full privatization and commercialization, management of privatized and commercialized enterprises, allotment of shares, etc.

³¹ For example, the Nigerian Investment Promotion Commission Act, Cap N117, LFN, 2004, the Nigerian Communications Commission Act, 2003, the Electric Power Sector Reform Act 2005 and the Investments and Securities Act, 2007 and the enabling laws of all other regulatory authorities.

Competition and the Consumer Protection Commission Bill are also aimed at meeting the economic objectives in the Constitution.

Amadi has argued that the jurisprudential basis of the contention that privatization of public enterprises in Nigeria is unconstitutional is weak but that the privatization process flouts fundamental constitutional objectives. With due respect, a thorough reading of Amadi's work will show that there was no proper demonstration of understanding of the concept and process of privatization. The assertions in the work are too general and lacked empirical evidence. For instance, at page xxv, Amadi asserted that the privatization process lacks credibility and transparency due partly to the method of divestment which emphasized core investor sale and not public offers. A cursory examination of the provisions of the Investments and Securities Act, 2007 and the Nigerian Stock Exchange requirements for listing will show that almost all the public enterprises listed in the third phase had no track record to qualify for listing and therefore, public offers could not have been an option or a privatization method. In the first phase of the privatization exercise, as will be shown below, public offers were used because of the nature of the enterprises privatized and the enabling law so expressly provided but not industrial sectors like steel and aluminium, oil and gas, transport, insurance, paper and sugar companies that the Act provided for core investor sale if public offers are impossible. How could the National Fertilizer Company of Nigeria, Aluminium Smelter Company Plc or Ajaokuta Steel Company Limited or NITEL or NEPA or Delta Steel Company PLC, etc be privatized by way of public offers when at the point of privatization, they were virtually dead public enterprises?³²

³² Amadi (n 2) 163.

It is noteworthy that all commentators on this section 16 always reproduce section 16(1) to (2) and sometimes subsection (4) without reproducing subsection (3) that validates the enactments on privatization and control of the economy. In Nigeria, parliamentary approval is not required for privatization transactions.

In Article 34 of the French Constitution of 1958, privatization requires parliamentary approval. The Constitutions of Benin³³, Morocco³⁴, Senegal³⁵, Togo³⁶ and other countries with French legal tradition requirement parliamentary approval.

b) **Do we need a law on privatization?** This varies from country to country but in Nigeria, we have the Act. In countries like the UK, Australia, Malaysia and New Zealand, there is no enabling legislation. In such systems, it is generally considered that in the absence of explicit prohibition, the government possesses inherent power to privatize public assets and enterprises without the need for special legislative authorization.

c) **Legal**

³³Article 98 of the Constitution provides that the rules pertaining to nationalizations and transfers of enterprises from the public to the private sector are a matter of law.

³⁴Article 35 of the 1972 Constitution (preserved in the 1992 Constitution) declares that the nationalization of enterprises and the transfer of enterprises from the public to the private sector are matters of law.

³⁵Article 56 of the Constitution of March 7, 1962 states that ‘the National Assembly shall hold the legislative power. It alone shall vote the laws. The rules concerning...nationalization of enterprises and transfer of enterprise from the public to the private sector shall be established by law’. As mandated by the Constitution, Law No. 87-23 of August 18, 1987, permits privatization of the SOEs listed in a schedule annexed to the law.

³⁶In Togo, privatization has been carried out without any special enabling legislation. The 1979 Constitution did not list privatization among the matters that are within the exclusive jurisdiction of parliament. This situation changed, however, with the constitutional revision of October 14, 1992. The Constitution’s new Article 84 provide that ‘the rules concerning . . . nationalization of enterprises and transfer of ownership of public sector enterprises to the private sector shall be set by law’.

The legal status of SOEs to be privatized varies greatly and affects the choice of privatization techniques. For example, it is easier to privatize SOEs established under the provisions of the Companies and Allied Matters Act (CAMA)³⁷ than those established by statute. That was why it was easier to privatize (or attempt to privatize) NITEL than NEPA or the Ports and Railways. Indeed, in the first phase of the privatization programme, almost all the enterprises were limited liability companies. This can be contrasted with the third phase dealing with the industrial sectors.

d) **Purpose of Governance**

The other challenge is ‘what is the purpose of governance’? It is argued that under the social contract theory of Locke and Rousseau, it is the duty of government to provide public goods and, therefore, such public goods should not be privatized. Originally some of the public goods exhibited natural monopolies and the initial capital outlay was high. It was thought that they were best provided by government. However, with information technology and the knowledge and resources available to the private sector, this argument is being faulted.

e) **Valuation Methods**

When a public enterprise is to be privatized whether by share sale or asset sale, the critical question is what valuation method should be adopted. Should it be the historical cost, book value, replacement cost, discounted cash flow and a combination of some of all? Empirically, even when a method is adopted, different valuers may give different values. What happens if the book value is highly inflated? For example, at the time that the Aluminium Smelter Company Plc at Ikot Abasi, Akwa Ibom State was to be privatized,

³⁷ Cap C20, Laws of the Federation of Nigeria, 2004.

the book value was about \$3bn; the plant was not producing, the cost to government of maintaining the plant and other personnel and overhead cost was N134m monthly, construction was incomplete and the cost of a new plant was about \$1bn. More fundamentally, while gas supply was critical to the operations of the plant, there was no gas plant around and the plant was dependent on the Nigerian Gas Company Limited for the supply of gas. Secondly, if gas is supplied at commercial rate, the plant was not viable unless subsidized by government.

This scenario was replicated at the Delta Steel Company Plc at Aladja, near Warri; the Ajaokuta Steel Company Limited; the Nigerian Iron Ore Mining Company Ltd, the Steel companies at Jos, Katsina, and Oshogbo; the vehicle assembly plants at Bauchi, Kaduna, Ibadan and Lagos; the Paper Mill companies at Iwopin, Oku Ibokun, Jebba; the Sugar companies at Sunti, Lafiaji and Bacita. Most of these companies were shut down before they were listed for privatization and yet, the workers were still being paid.

Whatever method is adopted, the value of a public enterprise is what a prudent buyer is willing to pay for it despite the seller's valuation methods.

f) **Transaction Cost**

Before a public enterprise is taken to the point of sale and there is completion and proceeds received, costs are incurred. Transaction Advisers – legal, technical, financial and management are usually engaged. The privatization agency, the Bureau of Public Enterprises (BPE), incur other costs including enterprise visit, due diligence, and data room exercise. Unfortunately, in the Nigerian experience, there was no budgetary allocation for the purpose of privatizing any public enterprise and yet, section 19 of the Act provides thus:

- (1) There is hereby established in the Central Bank of Nigeria an account to be known as the Privatization Proceeds Account into which shall be paid **all proceeds** received from the privatization of public enterprises before and after the commencement of this Act.
- (2) The funds in the account established under subsection (1) of this section shall be utilized for such purposes as may be determined by the Government of the Federation from time to time. (Emphasis added)

The critical question is what is the meaning of ‘all proceeds’. Does it refer to the gross proceeds or net proceeds? As the General Counsel of BPE between 2004 and 2009, the author is aware that the position of the BPE is that since there is no budgetary allocation for privatization, the proper construction is that it is the net proceeds.

g) **Stakeholders**

Worldwide, privatization is unpopular. The concept itself is emotive and controversial essentially because it means several things to several stakeholders. The issue is how to reconcile the competing interests at play. The stakeholders include the Federal Government, President of the Federal Republic of Nigeria, the Vice-President who is also the Chairman of the National Council on Privatization (NCP), other members of the NCP especially the Minister of Finance and the supervising Minister of the public enterprise to be privatized, the Managing Director of the public enterprise, the unions, the workers, the pensioners, the Nigerian public and the Development Partners.

h) **Strategic/Core Investor**

Section 33 of the Act defines a ‘strategic investor’ as a reputable core investor or group of investors having the requisite technical expertise, managerial experience and the financial capacity to effectively contribute to the management of the enterprises to be privatized. All the stakeholders are interested in who emerges as the core investor. In such circumstances, should the focus be on technical or managerial or financial giving the conflicting objectives of privatization?

i) **Privatization Methods**³⁸

Privatization methods include share sale or core investor sale, asset sale, management contract, public offer, private placement, leases, auctions, concession, sale by share issue, debt-equity swap, management/employee buy out and guided liquidation. How do you determine the best method for a particular public enterprise?

j) **The Post Acquisition Plan (PAP)**

In the third phase of the privatization programme, all core investor sales were accompanied by a Post Acquisition Plan (PAP). The challenge posed by this arrangement is if the investor pays too high for the public enterprise so as to increase the revenue to the treasury, there may be no funds for rehabilitating the public enterprise. What should be the proper policy of government – pay very high purchase price and forget about revamping the sector or pay low and have funds to turn around the public enterprise?

Lastly, there is the fear of creating private monopolies from public monopolies. The rest of this paper will be devoted to addressing the privatization challenge including PPP transactions.

³⁸ See Bureau of Public Enterprises’ Privatization Procedures Manual, March 2006 p 20.

Part III

First Phase (1988-1993)

Any casual observer of the Nigerian economy since the colonial period through independence especially during the oil boom era of the 1970s, will observe a large parastatal sector. In the words of Zayyad:³⁹

The parastatal sector is composed of such economic activities as banking and insurance; oil prospecting, exploration, refining and marketing; cement, paper and steel mills; hotels and tourism; sugar estates; etc. A survey undertaken by the Technical Committee on Privatisation and Commercialization (TCPC) shows that there are nearly 600 public enterprises at the federal (national) level alone, and an estimated 900 at the state (regional) and local government levels. The estimated 1,500 public enterprises in Nigeria account for between 30 and 40 per cent of fixed capital investments and the same proportion of formal sector employment...These investments were valued at over N36 billion at their historical book values. The returns from these investments had never exceeded two per cent per annum, which is less than 25 per cent of the annual subventions from the government to the public enterprise sector.

Of course, with the oil boom of the 1970s, nobody was concerned with the large size until the fall in the world market for oil in the 1980s. More fundamentally, these public enterprises were accused of misuse of monopoly powers, defective capital structure, bureaucratic red tape in their

³⁹ H R Zayyad, 'Privatization and Commercialization in Nigeria' <<http://unpan1.un.org/intradoc/groups/public/documents/aapam/unpan028228.pdf>> accessed on 12 May, 2013.

relations with supervising ministers, mismanagement, nepotism and corruption. It became clear, therefore that the government could not support such activities and the programme of privatization and commercialization was embarked as part of the Structural Adjustment Programme of 1986. The first legal framework for the privatization programme was the Privatization and Commercialization Decree.⁴⁰ This marked the first phase in the privatization programme in Nigeria. The Privatization and Commercialization Act had three parts, namely, Part I dealing with privatization (sections 1 – 11), Part II dealing with commercialization (sections 12- 13) and Part III dealing with miscellaneous matters. (sections 14 – 15). Section 1 listed public enterprises for partial⁴¹ and full privatization⁴² while section 3 provided for the establishment and composition of the Technical Committee on Privatization and Commercialization. The functions of this Committee were stated in section 4 of the Privatization and Commercialization Act. The privatization method was expressly stated in section 6 of the Privatization and Commercialization Act as offer for sale in the capital market. The choice of this method was the need to ensure wider share ownership in Nigeria and the desire to extend the frontiers and depth of the Nigerian capital market.

⁴⁰ No. 25 of 1988 which later became an Act of Parliament and Cap 369, Laws of the Federation of Nigeria, 1990.

⁴¹In the First Schedule, Part I, 11 Commercial and Merchant Banks, 4 Agricultural, Cooperative and Development Banks, 3 Oil Marketing Companies, 3 Steel Rolling Mills, 3 Air and Sea Travel Companies, 4 Fertilizer Companies, 3 Paper Mills, 3 Sugar Companies, 5 Cement Companies, and 6 Motor Vehicles and Truck Assembly Companies were listed for partial privatization. In these public enterprises the shares held by the Federal Government varied from 31.53% to 100%.

⁴² In the First Schedule, Part II, 65 enterprises were listed for full privatization. On the whole a total of 111 enterprises were to be privatized. Out of this number, 88 enterprises were privatized in the first four years. See Final Report of the Technical Committee on Privatization and Commercialization, p 14

Under section 7, not less than 10 per cent and not more than 20 per cent of the total shares on offer shall be allotted to associations and interest groups such as, but not limited to, State Investment Agencies, workers, trade unions, market women organizations, universities, friendly societies, local and community associations. Similarly, not more than 10 per cent of the shares on offer shall be reserved for the staff of the company.

Section 12 of the Privatization and Commercialization Act provides for partial⁴³ and full⁴⁴ commercialization of enterprises and when commercialized, such fully commercialized enterprises were expected to operate as purely commercial enterprises, without any subvention from government while those to be partially commercialized still received subvention from government but with a high level of autonomy.

From the categorization, it is clear that enterprises for privatization (either partial or full) were those incorporated under the provisions of the relevant company enactment while those to be commercialized were essentially statutory corporations. Similarly, whereas enterprises to be privatized required divestiture, no divestiture is involved in the case of commercialization. In all 110 enterprises were to be privatized while 35 were slated for commercialization.

⁴³ In the Second Schedule, Part I, 14 enterprises were listed for partial commercialization.

⁴⁴ In the Second Schedule, Part II, 11 enterprises were listed for full commercialization. On the whole a total of 35 enterprises were to be commercialized.

In the Final Report of the Technical Committee on Privatization and Commercialization,⁴⁵ the Committee stated that seven enterprises were unprivatizable in the conditions there were at that time for reasons ranging from technical insolvency to inauspicious operational environment.⁴⁶

In the case of enterprises for commercialization, Reform Packages and Performance Agreements were prepared. The Performance Agreements were entered into with some of the enterprises.⁴⁷

Part IV

Second Phase (1993-1999)

The promulgation of the Bureau of Public Enterprises Decree ⁴⁸ (BPE Act) marked the second phase of the privatization and commercialization programme in Nigeria. The BPE Act is in four parts, namely, Part I dealing with the establishment of the Bureau of Public Enterprises (sections 1 – 9), Part II dealing with Financial Provisions (sections 10 -12), Part III dealing with Privatization and Commercialization (sections 13 -18), Part IV dealing with Public Enterprises Arbitration Panel (sections 19 – 22) and Part VI dealing with miscellaneous matters (sections 23 – 27).

In place of the Technical Committee on Privatization and Commercialization, section 1 of the BPE Act established the Bureau of Public Enterprises while section 3 deals with its functions. Section 13 of the BPE Act is *in pari materia* with sections 1 and 6 of the Privatization and

⁴⁵ 4 June, 1993 at page vii.

⁴⁶ The enterprises are the three Inland Steel Rolling Mills that were eventually liquidated; the paper mills at Jebba and Oku Ibokun (eventually liquidated), Savannah Sugar Company Limited (was privatized in 2002 with a high debt overhand) and the Nigerian National Shipping Line Limited.

⁴⁷ Such enterprises include Nigerian Airports Authority, National Power Plc (created out of NEPA), Nigerian Security, Printing & Minting Company, Eleven River Basin Development Authorities.

⁴⁸ Decree No. 78 of 1993 (hereinafter referred to as “the BPE Act”).

Commercialization Act. In other words, enterprises are listed for partial⁴⁹ and full⁵⁰ privatization and the method is offer for sale or private placement. Similarly section 14 of the BPE Act is *in pari materia* with section 7 of the Privatization and Commercialization Act in terms of allotment of shares except that subsection (5) of section 14 of the BPE Act introduced allotment to the indigenes of each State of the Federation and the residents of the Federal Capital Territory, Abuja. Sections 17 and 18 of the BPE Act which are *in pari materia* with sections 12 and 13 of the Privatization and Commercialization Act, dealing with partial⁵¹ and full⁵² commercialization and the status of commercialized enterprises.

Section 19 of the BPE Act provides for the establishment of Public Enterprises Arbitration Panel. The powers of the Panel are spelt out in section 20 of the BPE Act. Unfortunately, the powers of the Panel are limited to disputes arising under a Performance Agreement prepared pursuant to the commercialization of an enterprises. Similarly the provisions of the Arbitration and Conciliation Act are not applicable to any matter which is the subject of arbitration under the BPE Act. Due to these limitations, the Panel was never constituted. Section 25 of the BPE Act repealed the provisions of the Privatization and Commercialization Act.

⁴⁹ In the Second Schedule, Part I, 3 Oil Marketing Companies, 3 Steel Rolling Mills, 2 Fertilizer Companies, 3 Newsprint Companies, 3 Sugar Companies, 4 Cement Companies and 1 Transport Company are listed for partial privatization. The shareholding ranged from 31.53% to 100%.

⁵⁰ In the Second Schedule, Part II, 13 Commercial and Merchant Banks, 13 Insurance Companies, 4 Hotels, 2 Salt Companies, 2 Textile Mills, 3 Transport Companies, 3 Breweries, 2 Wood Processing Companies and 6 Motor vehicle and Truck Assembly Companies were listed for full privatization.

⁵¹ In the Third Schedule, Part I, 23 enterprises were listed for partial commercialization.

⁵² In the Third Schedule, Part II, 14 enterprises were listed for full commercialization.

Undoubtedly, the privatization programme was truncated during the second phase essentially due to stiff opposition and considerable controversy generated in the first phase especially the structural imbalance in the distribution of shares between the Northern and Southern parts of Nigeria. It is not on record that the Bureau of Public Enterprises that replaced the Technical Committee carried out any privatization exercise in terms of conclusion of any transaction during the period.

Part V

Third Phase (1999- Present)

The third phase of the privatization programme was heralded with the promulgation of the Public Enterprises (Privatization and Commercialization) Decree.⁵³ The President, General Abdulsalam Abubakar in his broadcast to the nation in October 1998, reaffirmed his commitment to the privatization programme and launched the third phase and set up the legal machinery for its actualization. The importance that the Federal Government attached to the privatization programme could be garnered from the Address by President Olusegun Obasanjo on the occasion of the inauguration of the National Council on Privatization on 6 July, 1999 titled ‘The Imperative of Privatization’⁵⁴ President Obasanjo, stated, *inter alia*,

Today’s inauguration of the National Council on Privatization is, therefore, very significant in several important respects. Firstly, it is a critical step in our Administration’s socio-economic agenda. Secondly, it is a demonstration of our commitment to institutional reforms. Thirdly, the response of stakeholders in the months ahead will enable us determine, with a great measure of accuracy, the

⁵³ No. 28 of 1999, now Cap P38, Laws of the Federation of Nigeria, 2004 – the Act.

⁵⁴ See National Council on Privatization Handbook, 2nd Edition, (2000) 3 – 6.

extent to which we have regained international faith and confidence in our country in general and in our economy in particular.

The Act, made more far-reaching provisions than the two earlier enactments.⁵⁵ Like the other two Acts, the Act has six parts, namely, Part I dealing with privatization and commercialization⁵⁶ (sections 1 – 8), Part II deals with the establishment, tenure and functions of the National Council on Privatization (sections 9 – 11), Part III deals with the establishment, functions and powers of the Bureau of Public Enterprises, among others (sections 12 – 22), Part IV with Legal Proceedings (sections 23 – 26), Part V with the Public Enterprises Arbitration Panel (sections 27-30) and Part VI with miscellaneous provisions (sections 31 – 35).

One major difference between the provisions of the Act and the Privatization and Commercialization Act is section 2 of the Act dealing with mode of privatization.⁵⁷ Unlike the previous enactments that only provided for offer for sale through the capital market or private placement, section 2(3) of the Act provides that if shares cannot be offered for sale or private placement, the National Council on Privatization ‘may approve that the shares be offered for sale through a willing seller and willing buyer basis or through any other means’. It is in exercise of this power that, other privatization methods were adopted by the National Council on Privatization, acting through its Secretariat, the Bureau of Public Enterprises.

⁵⁵ See Wale Babalakin ‘Legal Dynamics of Privatisation in Nigeria’ being a Paper presented at a Roundtable organized by First Bank of Nigeria in 2003 page 4 <<http://www.babalakinandco.com/documents/LEGALDYNAMICSOFPRIVATISATION.pdf> > accessed on 12 May, 2013.

⁵⁶ The First Schedule to the Act deals with Privatization (Partial and Full) while the Second Schedule deals with Commercialization (Partial and Full). The enterprises are essentially the same as those in previous enactments.

⁵⁷ See also section 13(5) of the BPE Act though the provisions in the Act are broader than those in the BPE Act.

Another major difference is section 3 of the Act which empowers the Government of the Federation to further divest of its shareholding in the privatized enterprises in accordance with the policy guidelines and decisions issued, from time to time, by the National Council on Privatization and section 4 of the Act that provides for strategic (core) investor sale on such terms and conditions as may be agreed upon.

One anomaly in all the enactments is the provision that shares should be reserved for staff of the public enterprises to be privatized and the shares shall be held in trust by the public enterprises for its employees without indicating how payment for the shares should be made.⁵⁸ Who pays for the shares, the staff or the public enterprises?

Between 1999 and 2003, over 30 public enterprises were privatized⁵⁹ and from 2000 to 2007, 148 public enterprises were privatized (including the lease agreements [concession] of the terminal ports in Lagos, Calabar, Warri and Port Harcourt).⁶⁰ These lease agreements were the first form of PPP transactions successfully carried out by BPE. The concessioning of the Lagos International Trade Fair Complex and the Tafawa Balewa Square were not as successful.

It must be stated that whereas most of the enterprises listed in the First Phase were doing well and some already listed on the Stock Exchange, almost all the enterprises in the third phase could not meet the listing requirements. Consequently, the provisions in the enactments for sale by way of public offer or private placement could not be carried out in the third phase. The most viable

⁵⁸ See section 5(3) of the Act.

⁵⁹ Othman (n 2) v.

⁶⁰ See the Bureau of Public Enterprises' Public Enterprises (Privatization and Commercialization) Act, 1999 published in May 2007, pp 44 – 53. It should be stressed that some transactions in the extractive industries sector (lead, zinc, barytes, salt in Cross River State, tin and allied mineral products in Plateau State, bitumen, kaolin, feldspar/quartz, etc) were subsequently aborted and are being re-privatized.

option was that of strategic (core) investor sale who will turn around the enterprise and then ensure that it is listed. All the attempts made to list the shares of Sheraton Hotels and Towers, Abuja and that of Nigerdock Plc on the Nigerian Stock Exchange failed because they could not meet the listing requirements. The two enterprises that were likely to meet these requirements were the Eleme Petrochemical Company Limited and Transcorp Hilton Hotel. The Nigerian Aviation Handling Company PLC was privatized by way of share flotation.

Part VI

Reform Activities

The critical importance of well-performing public institutions and good governance for development and poverty reduction has come to the forefront in the 21st century.⁶¹ Just as it was increasingly recognized in the 1980s that individual investment projects were less likely to succeed in a distorted policy environment, so it has become obvious in the 21st century that neither good policies nor good investments are likely to emerge and be sustainable in an environment with dysfunctional institutions and poor governance.⁶² Put differently, privatization, commercialization

⁶¹ See generally P O Idornigie 'De-regulation of Infrastructure' in Epiphany Azinge and Bolaji Owasanoye (eds), *Deregulation: Law, Economics and Politics* (NIALS Press 2012) 32.

⁶² See Reforming Public Institutions and Strengthening Governance, A World Bank Strategy, November 2000 (The World Bank, Washington DC, 2000) p vii. See also The World Bank, Public-Private Infrastructure Advisory Facility: Private Participation in Infrastructure: Trends in Developing Countries in 1990-2001 (The World Bank, Washington, DC, 2003), Ashoka Mody (ed), *Infrastructure Delivery: Private Initiative and the Public Good* (The World Bank, Washington, DC, 1996), Michael U Klein and Bitu Hadijimichael, *The Private Sector in Development: Entrepreneurship, Regulation and Competitive Disciplines* (The World Bank, Washington, DC, 2003), J Edgardo Campos and Jose Luis Syquia, *Managing the Politics of Reform* (The World Bank, Washington, DC, 2006), Frank Sader, *Attracting Foreign Direct Investment Into Infrastructure: Why Is It So Difficult* (The World Bank, Washington, DC, 2000), Timothy C Irwin *Government Guarantees: Allocating and Valuing Risk in Privately Financed*

and PPP transactions in Nigeria and the attraction of private investors to infrastructure delivery will be a mirage unless institutional reforms take place.

Globally, the last two decades have witnessed a fundamental shift in the paradigm of infrastructure delivery around the world. Governments in industrial and developing countries alike are retreating from owning and operating infrastructure and are focusing more on regulating and facilitating infrastructure delivery services provided by private firms. In the words of Cleaver,⁶³

This shift offers the promise of more efficient investment in and operation of infrastructure services, as well as the potential to shift the burden of new investment from public budgets to the private sector. Particularly for developing countries, infrastructure privatization may also unleash large inflows of foreign direct investment and help develop local capital markets. In addition, bold privatization programs can send a clear message to international capital markets, the wider investor community and the local populace that governments are committed to improvement economic management.

The need to manage the Nigerian economy efficiently can also be felt when considered along 183 countries. *Doing Business*⁶⁴ is in its fiftieth edition. *Doing Business* in a series of annual reports investigating the regulations that enhance business activity and those that constrain it in developed

Infrastructure Projects (The World Bank, Washington, DC, 2007 and Tomoko Matsukawa and Odo Habeck, *Review of Risk Mitigation Instruments for Infrastructure Financing and Recent Trends and Developments* (The World Bank, Washington, DC, 2007.

⁶³ See Kevin M Cleaver, Foreword to Michel Kerf and Warrick Smith (n 20) vii.

⁶⁴ A Publication of The World Bank and International Finance Corporation (The World Bank, Washington, DC,) available at www.worldbank.org accessed 22 October, 2018

and developing countries has consistently shown that Nigeria lags behind other countries in Africa.⁶⁵ Out of about 183 countries, Nigeria ranked 114 in 2008,⁶⁶ 118 in 2009,⁶⁷ 125 in 2010,⁶⁸ 133 in 2011,⁶⁹ 133 in 2012,⁷⁰ 131 out of 185 countries in 2013⁷¹ and 147 out of 189 countries in 2014.⁷² Countries like South Africa, Botswana, Zambia, Morocco, Kenya, Egypt, Ethiopia, Uganda and Tanzania have consistently done better than Nigeria on this index. For instance, in 2011 and 2012, South Africa ranked 36 and 35 respectively. Nigeria did very badly in the ranking until 2018 when it is ranked 145 out of 190 economies and 146 out of 190 countries in 2019.⁷³ Similarly in the 2018 World Economic Forum Global Competitive Report, Nigeria is ranked 115 out of 140 countries.⁷⁴

In 2005, the Infrastructure Concession Regulatory Commission Act was passed to provide a regulatory environment for the attraction of private sector participants to the delivery of infrastructure in Nigeria. This is consistent with the Government policy in fostering public-private partnership (PPP) in infrastructure delivery. In a sector where the Minister has a domineering role,

⁶⁵Doing Business focuses on key areas like starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing contracts, resolving insolvency (formerly closing of business) and employing workers.

⁶⁶*Doing Business 2008*, 6.

⁶⁷*Doing Business 2009*, 6.

⁶⁸*Doing Business 2010*, 4.

⁶⁹*Doing Business 2011*, 4.

⁷⁰*Doing Business 2012*, 6.

⁷¹ *Doing Business 2013*, 11.

⁷² *Doing Business 2014*, 11.

⁷³ *Doing Business 2018*, 4.

⁷⁴ Available at <https://www.proshareng.com/news/Doing-Business-in-Nigeria/2018-WEF-Global-Competitiveness-Report-R/42279#> and that of 2019 accessed 16 November, 2018.

no private sector participant will feel safe to invest. There was therefore the need to confine the Ministers to policy formulation, and empower an independent regulator like the Nigerian Communications Commission and the Nigerian Electricity Regulatory Commission to regulate the key economic sectors. PPP can only thrive where the proper regulatory environment is created.⁷⁵

The National Council on Privatization (NCP) and the Bureau of Public Enterprises (BPE) are known for privatization and commercialization without any regard to their reform activities. The NCP/BPE was involved in the drafting and passage of the following laws:

- a) Nigerian Communications Commission Act, 2003
- b) Debt Management Office (Establishment, etc) Act, 2003
- c) Pension Reform Act, 2004
- d) Electric Power Sector Reform Act, 2005
- e) The Civil Aviation Act, 2006
- f) The Minerals and Mining Act, 2007

Since 2002, the NCP/BPE has been working on the following reform bills referred to earlier, namely,

- i) Federal Competition and Consumer Protection Bill

⁷⁵Nicholas Avery (ed), *Public-Private Partnerships* (London: Global Business Publishing Ltd, 2006); Darrin Grimsey and Mervyn K Lewis, *Public-Private Partnerships* (Edward Elgar Publishing Ltd, 2007); Denton Wilde Sapte LLP, *Public Private Partnerships: BOT Techniques and Project Finance* (2ndEdn, Euromoney Institutional Investor Plc, 2006); J Luis Guasch, *Granting and Renegotiating Infrastructure Concessions: Doing It Right* (The World Bank, Washington, DC, 2004) , HK Yong (ed), *Public Private Partnerships Policy and Practice* (Commonwealth Secretariat, 2010); Gerd Schwartz and Others (eds), *Public Investment and Public Private Partnerships* (Palgrave Macmillan 2008); John D Finnerty, *Project Financing* (John Wiley & Sons, Inc 1996) and Scott L Hoffman, *The Law and Business of International Project Finance* (3rdEdn, Cambridge University Press 2008).

- ii) The Ports & Harbours Authority Bill
- iii) The Petroleum Industry Bill
- iv) The Nigerian Railway Authority Bill
- v) The National Postal Commission Bill
- vi) The National Transport Commission Bill
- vii) The National Roads Fund Bill
- viii) The Federal Roads Authority Bill
- ix) The National Inland Waterways Authority

The aim of these Bills is to open the sectors to private sector participation, provide for a regulatory framework and limit the role of government to policy formulation. Other than these Bills, the Federal Government of Nigeria has used other instruments to reform the key sectors for the purpose of opening them up to private sector participation and the provision of regulators: These instruments include:

a) **The Nigeria Vision 20:2020**

Nigeria Vision 20:2020⁷⁶ is a national effort aimed at growing and developing Nigeria, Africa's most populous nation and bringing her to the league of the world's leading economies by year 2020. One of the ways that Nigeria Vision 20:2020 will transform the economy is investing in infrastructure to create an enabling enablement for growth, industrial competitiveness and sustainable development. The critical policy priorities include increased investment in critical infrastructure by focusing on development of a framework for joint financing of infrastructure projects between the tiers of government

⁷⁶ See the Nigeria Vision 20:2020 of December 2010.

and encouragement of private investments in infrastructure. Another priority is deepening reforms at all levels of government.

b) The National Policy on Public-Private-Partnership (PPP)

The National Policy on PPP was made pursuant to the powers vested in the Infrastructure Concession Regulatory Commission to make regulations.⁷⁷ The Policy objectives include:

- i) Acceleration of investment in new infrastructure and ensuring that existing infrastructure is upgraded to a satisfactory standard that meets the needs and aspirations of the public.
- ii) Ensuring that investment projects provide value for money and that the costs to government are affordable.
- iii) Improving the availability, quality, and efficiency of power, water, transport and other public services in order to increase economic growth, productivity, competitiveness and access to markets.
- iv) Increasing the capacity and diversity of the private sector by providing opportunities for Nigerian and international investors and contractors in the provision of public infrastructure, encouraging efficiency, innovation and flexibility.
- v) Ensuring that infrastructural projects are planned, prioritised and managed to maximize economic returns and delivered in a timely, efficient and cost effective manner.

⁷⁷ See section 34 of the Infrastructure Concession Regulatory Commission (Establishment, Etc) Act 2005. The Policy was subsequently approved by the Federal Executive Council.

vi) Managing the fiscal risks created under PPP contracts within the Government's overall financial and budgetary framework.

c) **The Roadmap for Power Sector Reform, 2010**

The Roadmap for Power Sector Reform was developed by the Presidential Action Committee on Power (PACP). The PACP in turn set up the Presidential Task Force on Power as its engine room. The Roadmap was also derived from the National Electric Power Policy of 2001. The National Policy was followed with the passage of the Electric Power Sector Reform Act, 2005. The Roadmap dealt with the unbundling of the electricity sector into generation, transmission and distribution.

The Roadmap outlines the plan to accelerate the pace of activity with respect to the reforms envisaged under the Electric Power Sector Reform Act 2005 by:

- i) Removing the obstacles to private sector investment and establishment of an appropriate pricing regime. This also involved the creation of an Initial Holding Company, Power Holding Company of Nigeria Plc (PHCN) to assume the assets, liabilities and employees of the Nigerian Electric Power Authority (NEPA); subsequent initial unbundling of PHCN into 18 successor companies and the partial transfer of the assets, liabilities and staff of PHCN; and the establishment of the Nigerian Electricity Regulatory Commission (NERC).
- ii) The establishment of a bulk purchaser – the Nigerian Bulk Electricity Trading Company Plc (NBET). The NBET engages in the purchase and resale of electrical power and ancillary services from independent power producers and from successor companies.⁷⁸ NBET will carry on bulk trading (on behalf of the

⁷⁸ See <http://www.nbet.com.ng/about-us> accessed on 20 February, 2015.

distribution companies) until such time as the industry has developed the settlement, accounting, managerial and governance systems required for successful bilateral contracting.

- iii) Operationalizing the Nigerian Electricity Liability Management Company (NELMCO) as a special purpose vehicle to assume and manage extant assets, liabilities and other obligations that could not easily be transferred from the PHCN to any of the successor companies⁷⁹.
- iv) Contracting out the management of the Transmission Company of Nigeria Plc as investors will be reluctant to make large-scale investments in the upstream and downstream sectors of the electricity industry unless they are confident that commensurate investments in the midstream will also take place.
- v) Granting of concessions by the Bureau of Public Enterprises for the operation of Kainji, Jebba and Shiroro hydro power generating plants.
- vi) Privatization of the thermal generating plants via the sale of a minimum of 51% of the equity to core investors that clearly demonstrate the technical and financial ability to operate and expand each plant.
- vii) The privatization of all distribution companies via the sale of a minimum of 51% of the equity to a core investor.
- viii) The privatization of all generation companies like the distribution companies via 51% core investor sale.⁸⁰

⁷⁹ See <http://www.nelmcong.org/nelmc/index.php/about-us> accessed on 20 February, 2015.

⁸⁰ See other instruments like the Commercialization Framework of the National Council on Privatization, 2008; The Nigeria Lands, Housing & Urban Development Roadmap (Final Draft); the National Policy on Urban Development, Ministry of Lands, Housing

d) **The National Integrated Infrastructure Master Plan, March 2015**

This Master Plan has already been discussed in this chapter.

e) **The Economic Recovery and Growth Plan (ERGP), 2017**

The ERGP has already been discussed in this chapter.

Part VII

The Journey So Far

In the first phase, the enterprises scheduled for privatization – partial and full – include:

- ✓ Savannah Bank of Nigeria Limited
- ✓ Union Bank of Nigeria Limited
- ✓ United Bank for Africa Limited
- ✓ International Bank for West Africa Limited
- ✓ Allied Bank of Nigeria Limited
- ✓ Continental Merchant Bank Limited
- ✓ Nigeria Arab Bank Limited
- ✓ Nigeria Merchant Bank Limited
- ✓ First Bank of Nigeria Limited
- ✓ NAL Merchant Bank Limited
- ✓ Merchant Bank of Africa
- ✓ Federal Mortgage Bank of Nigeria
- ✓ Nigerian Industrial Development Bank Limited

and Urban Development, 2012 and the National Integrated Infrastructure Master Plan (NIIMP), National Planning Commission, August 27, 2014.

- ✓ Nigeria Bank for Commerce and Industry Limited
- ✓ Federal Savings Bank
- ✓ Unipetrol
- ✓ National Oil and Chemical Company Limited
- ✓ African Petroleum Limited
- ✓ Nigerian Airways Limited Nigeria National Shipping Line Limited
- ✓ Nigerian Superphosphate Fertilizer Company Limited
- ✓ National Fertilizer Company Limited
- ✓ Nigeria National Paper Manufacturing Company Limited
- ✓ Nigeria News Print Manufacturing Company Limited
- ✓ Nigeria Paper Mills Limited⁸¹

Others include the sugar companies, cement companies and motor vehicle and truck assembly companies. Out of the 111 SOEs, 88 were privatized.⁸²

It is easy to see, therefore, why in the first phase, the method of privatization adopted was that of offer for sale or private placement. All the enterprises slated for privatization were companies incorporated under the provisions of the relevant company law and did not require any restructuring or repeal of any enabling law before privatization can be carried out.

⁸¹ See the Privatization and Commercialization Act, now repealed.

⁸² See a Presentation to Members of “Just Friends Club of Nigeria” at Its Maiden Annual Lecture on ‘The Federal Government’s Privatization and Economic Reform Programme’ by Benjamin Ezra Dikki, Director General, Bureau of Public Enterprises, Abuja: June 27, 2014.

In the second phase, some of these enterprises were also listed for either partial or full privatization. Realizing the difficulty in privatizing all the enterprises listed by way of offer for sale or private placement, section 13(5) of the BPE Act provides thus:

Where an enterprise is not fit for privatization by public issue of shares or by private placement, the Bureau on approval from the Federal Government shall privatize the enterprise through a willing seller or willing buyer basis or through the process of asset stripping.

This was how Asset Sale became a privatization method adopted from the second phase till date.

In the third phase, the enterprises slated for partial or full privatization include:

- Nigerian Telecommunication Plc⁸³
- Nigeria Mobil Telecommunications Ltd
- National Electric Power Authority
- Port Harcourt Refinery
- Kaduna Refinery and Petrochemicals
- Warri Refinery and Petrochemicals
- Eleme Petrochemicals Limited
- Federal Superphosphate Fertilizer Company Limited
- National Fertilizer Company Limited
- Nigeria Machine Tools Limited
- The steel companies in Jos, Katsina, Oshogbo, Ajaokuta, Delta and IkotAbasi

⁸³ In the first and second phases, NITEL was listed for full commercialization. After its commercialization, it was listed for partial privatization in the third phase.

- Nigerian Coal Corporation
- Nigerian Iron Ore Mining Company Limited
- Daily Times of Nigeria Plc
- NICON Insurance Plc⁸⁴
- Nigerian Reinsurance Plc
- Federal Airport Authority
- Nigerdock Limited
- Nigeria Airways Authority
- Nigeria Paper Mills
- Lafiaji Sugar Company
- The cement companies at Ashaka, Benue, Sokoto, Nkalagu, Calabar and Ewekoro
- The motor vehicles and truck assembly companies in Enugu, Ibadan, Kaduna, Lagos, and Bauchi.⁸⁵

From 1999 when the third phase commenced none of the above enterprise could be privatized by way of offer for sale or private placement and hence the change of strategy from offer for sale to core investor sale. The idea was that the core investor will turn around the enterprises and then offer the shares for sale as was done in the case of Benue Cement Company Plc. Unfortunately, this objective has not been achieved due to various factors including debt overhang, pension liabilities, tax liabilities, staff salaries, unfavourable economic climate and corruption. In the third phase, 148 SOEs were privatized.⁸⁶

⁸⁴ Created out of NICON Insurance Corporation that was earlier slated for full commercialization.

⁸⁵ See the Schedules to the Act.

⁸⁶ See the Presentation by Mr Dikki (n 82).

To assist the privatization process, the Technical Committee on Privatization and Commercialised issued Guidelines on Privatization and Commercialization of Government Enterprises⁸⁷; in 1999, the National Council on Privatization issued the Guidelines on Privatization and Commercialization and in March 2006 issued the Privatization Procedures Manual. These documents clearly set out the sequencing of transactions for offer for sale, debt conversion programme, core investor sale and ‘guided liquidation’ and how Transaction Advisers are to be procured.

With the assistance of development partners like the United States Agency for International Development (USAID), the World Bank and the Department for International Development (DFID), the World Bank Guidelines on the procurement of works, goods and services were used in the privatization exercise.

In giving the word ‘privatization’ its broad interpretation, the NCP/BPE privatized the ports by way of leases (concession) and embarked on all forms of public-private partnerships.

The two main sectors yet to be fully reformed and privatized are the petroleum sector and the extractive industries. In the case of the power sector, after the passage of the Electric Power Sector Reform Act, 2005, the assets and liabilities of the National Electric Power Authority (NEPA) were transferred to the Power Holding Company of Nigeria Plc. (PHCN). NEPA was unbundled into transmission, generation and distribution and 18 successor companies incorporated to carry out these functions.

The employees, assets and liabilities of PHCN have been transferred to the successor companies and the successor companies have, in turn, been privatized. BPE originally entered into a management contract with Manitoba Hydro for the management of the Transmission Company of

⁸⁷ See page 125 of the Final Report of the Technical Committee on Privatization and Commercialization.

Nigeria (TCN), this includes systems operation, market operations and transmission network operations. However, this has been aborted and the TCN has been taken over by the government that now manages it.

BPE has also successfully set up the Nigerian Electricity Bulk Trading Company Plc (NBET) as the principal electricity buyer from the Generation Companies (GENCOs) for sale to the Distribution Companies (DISCOs). NBET became necessary since both GENCOs and DISCOs were being privatised. The GENCOs could indeed under the law sell electricity directly to the DISCOs but at the present stage of our electricity market, that would not make commercial sense as the DISCOs are presently not credit worthy. Their efficiency in collection is very low - less than half of the value of the output received from GENCOs is being collected. Thus, there is a huge payment risk on the part of the DISCOs which would affect investment in GENCOs. As a credit enhancement mechanism for the buyers and indeed the market, it is intended that the World Bank would provide the partial risk guarantee (PRG⁸⁸) to the buyer and as the DISCOs are going private, this would not be possible since the World Bank only deals with sovereigns and not private companies. NBET was set up as wholly FGN-owned, to be the buyer from the GENCOs so that the World Bank would provide the back stop to NBET against payment risk through its PRG. In other words, if NBET buys power from GENCOs and is unable to pay because the DISCOs have not paid it (NBET), World Bank would pay.

Also set up and running is the Nigerian Electricity Liability Management Company Ltd/Gte (NELMCO) headed. This company will assume and manage the industry's liabilities as the

⁸⁸ See Timothy Irwin and Others (eds), *Dealing with Public Risk in Private Infrastructure* (The World Bank, Washington, DC, 1997).

companies are being sold without liabilities. The NCP has given an order transferring all the liabilities of PHCN to NELMCO.

PHCN was incorporated pursuant to the EPSR Act to step into the shoes of NEPA, but now, as a limited liability company not as a statutory corporation. The transfer order was duly made by NCP transferring the assets, liabilities, rights, obligations and employees of NEPA to PHCN.⁸⁹

The GENCOS, DISCOs and TCN Plc (and now NBET and NELMCO) were all formed still pursuant to the EPSR Act as successors of PHCN along functional lines. The NCP has since made transfer orders transferring the assets, liabilities, rights, obligations and employees of PHCN to these companies. Therefore ideally, PHCN should be without assets and liability by now. PHCN presently does not hold any valid licence to engage in any electricity business.

In the case of the petroleum sector, since the NCP/BPE drafted the first version of the Petroleum Industry Bill (PIB) in 2005, there have been many versions that are being harmonized. The harmonized draft PIB has been approved by the Federal Executive Council forwarded to the National Assembly for passage into law. However, this bill has been broken down into four parts, namely, governance, fiscal, host community and miscellaneous matters. The governance bill has been passed but the President has withheld assent. The other bills are still in the National Assembly.

With regard to the commercialization programme, this was done only in the first phase. All attempts to commercialize the River Basin Development Authorities, the National Parks and mortgage institutions in the third phase failed essentially due to lack of cooperation from the relevant authorities concerned.

⁸⁹ See section 4 of the Electric Power Sector Reform Act.

In terms of PPP, the Bureau of Public Enterprises (BPE) started with the Nigerian sea ports. It was realised that there was no legal framework to carry out reforms by way of PPP in the seaports, railways, airways and roads. However, the Nigerian Ports Authority (NPA) Act⁹⁰ empowers the NPA to enter into an agreement with any person for the operation or the provision of any of the port facilities which may be operated or provided by the NPA.⁹¹ Similarly, with the approval of the President, the NPA has the power to alienate, mortgage, charge or lease any property which has been vested in it.⁹² Pursuant to these provisions, the BPE leased the port terminals in Lagos, Calabar, Warri and Port Harcourt. The BPE also realised that the NPA was the landlord of the ports, the manager and regulator.⁹³ Unbundling of the ports became imperative. Accordingly, the BPE drafted the Ports & Harbours Authority Bill, 2003 which is still pending in the National Assembly. Essentially the Bill is meant to unbundle the ports into regulation, ownership and operations. The BPE also succeeded in commencing the transaction for private sector participation in the air ports, starting with Abuja Airport. However, this transaction was aborted after bids had been received, evaluation carried and a preferred investor emerged. Many factors contributed to this including the dispute between the FAAN and the Federal Capital Development Authority (FCDA) as to the owner of Abuja Airport and also the dispute among the investors. In order to avoid the controversy as to whether BPE could carry out PPP transactions, the Infrastructure Concession Regulatory Commission Act was passed in March 2005. This enactment created its own problems especially the fact that some of the public enterprises listed in the Act for

⁹⁰ Act 38 of 1999 now Cap N126, Laws of the Federation of Nigeria, 2004.

⁹¹ *ibid*, s 8(1).

⁹² *ibid*, s 25(1).

⁹³ *ibid*, s 7(b) which provides that the NPA shall maintain, improve and regulate the use of the ports.

privatization and commercialization⁹⁴ are also listed in the Infrastructure Concession Regulatory Commission Act for PPP transactions.⁹⁵ The other problem is that the Infrastructure Concession Regulation Commission is not strictly an economic or technical regulator like the National Commissions Commission or the Nigerian Electricity Regulatory Commission. However, consistent with its statutory mandate, the Commission takes custody of PPP transactions and monitors them to ensure compliance with the terms and conditions of the agreements. It is the view of the author that at some point, the government should merge the two institutions, namely, BPE and ICRC or ensure that they do not have overlapping mandate.

Conclusion

Privatization in its broader sense has been used to reform the economy. However, the reform will be incomplete without institutional reforms in terms of passing the reform bills that have been drafted since 2003⁹⁶. The Federal Government must learn how to retreat from the provision of infrastructure and behave like responsible corporate citizen. She must learn to obey the laws and fulfil any obligation that she has undertaken to fulfil in any of the transaction documents. This is so because in almost all the privatized enterprises, Government has failed to honour her obligations and yet expects the private sector participant to honour its obligation with the threat of nationalizing the enterprise.

⁹⁴ See the Act; the Schedules.

⁹⁵ See the ICRC Act, s 36.

⁹⁶ A clear case is that of the ports. When port services were leased in 2005, it was expected that the Ports & Harbour Bill would be passed into law so that there will be a regulator for the sector. At the moment, the Nigerian Ports Authority is the landlord and regulator without regulatory powers.

As in other parts of the world, privatization in Nigeria has remained emotive and controversial given the differing interests of the stakeholders. This is attributable to the different objectives of privatization. To the Minister of Finance, the interest may be what gets back to the treasury, to the workers and trade unions, how their jobs are protected and pension liabilities paid, to the tax authorities, whether taxes are paid promptly by the privatized companies and to the general public how the economy is being run efficiently.

Privatization is associated with technical efficiency. If privatized enterprises are properly run, there is no doubt that the economy as a whole will benefit. However, since the programme began in 1988, there is no doubt that budgetary allocation to the enterprises has been reduced. Unquestionably, there is a reduction of politically motivated resource allocation or appointment to boards of public enterprises in the Nigerian economy. Admittedly even if the process is correct, supervening economic events can ruin the programme.

It would seem that the Nigerian case is that privatization 'killed' some enterprises. A critical look at the enterprises in 1988 (600 federal and 900 states), 1993 and 1999 will show otherwise. Due to the high debt overhang, Nigeria Airways, National Fertilizer Company of Nigeria (NAFCON), the three Rolling Mills at Jos, Katsina and Oshogbo, Calabar Cement Company Ltd, Bacita Sugar Company and the Newsprint at Oku Iboku were liquidated; Ajaokuta Steel Company, Aluminium Smelter Company and the National Iron Ore Mining Company were not completed; Delta Steel Company, Eleme Petrochemicals and Machine Tools were shut down. Other than PAN and Anambra Motor Manufacturing Company (ANAMCO), all the motor assembly plants were closed down before privatization. Indeed most of the enterprises were technically insolvent but for budgetary allocations and yet staff benefits were being paid and pension contributions and tax

deductions were not remitted. Thus, were the enterprises really national assets or national drain pipes?