

**INTEGRITY AND  
TRANSPARENCY  
IN BRAZIL'S  
STATE-OWNED  
ENTERPRISES**

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Norwegian Ministry  
of Foreign Affairs

# INTEGRITY AND TRANSPARENCY IN BRAZIL'S STATE-OWNED ENTERPRISES

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# ABOUT THE INITIATIVE

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The Integrity Initiative for Brazilian State-Owned Enterprises (SOEs) is part of Transparency International – Brazil’s Emerging Markets Integrity Programme, which aims to transform the Brazilian business landscape so that it may adopt high standards of integrity and exert a positive influence on the practices of regional businesses and those of the Global South.

The report “Integrity and Transparency in Brazil’s State-Owned Enterprises” is the result of a partnership between FGV Rio Law School and Transparency International – Brazil and was made possible through funding from the Norwegian Ministry of Foreign Affairs and the support of Royal Norwegian Consulate General in Rio de Janeiro.

The initiative’s purpose is to take the best international practices, especially the OECD’s Guidelines on Corporate Governance of State-Owned Enterprises, and point out which directions Brazil’s SOEs could follow in order to improve several aspects pertaining to Integrity, such as compliance, transparency, corporate governance and institutional relations.

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# INTRODUCTION

The process of fighting corruption often leads to paradoxical public perceptions – the larger the revelations about corruption schemes, the more frustrated the public becomes with the current institutions. This was shown by the “Portraits of Brazilian Society” survey, which identified corruption as the main problem in Brazil for 2016, according to 65% of the population<sup>1</sup>. Similarly, Transparency International’s *Corruption Perception Index* indicates that perceptions of corruption in Brazil have taken a turn for the worse over the past five years, despite this period seeming to be the most intense and effective when it comes to counter corruption schemes in the country’s history<sup>2</sup>.

Recent reactions by the public and institutions have reflected the widespread sentiments displayed in the unprecedented protests of a few years back<sup>3</sup>.

At the centre of this troubled scenario, brought to light by Operation Carwash (“Operação Lava Jato” in Portuguese), we can find Brazil’s state-owned enterprises (SOEs), especially Petrobras. The fact that these companies, which are important reference points for the Brazilian population, were the targets of corruption schemes carried out over the last decades has had an impact on Brazilian society. As a result of

the various institutional and legal changes that have taken place in recent decades, it has also served as a starting point for developing anti-corruption mechanisms designed specifically for these entities. This paper aims to contribute to this analysis.

The perception that SOEs are subject to excessive political influence is pervasive in Brazilian society. A survey conducted by Ernst & Young revealed that 91% of Brazilians believe that state-owned enterprises are overly influenced by politics. This figure goes along with the results found in the 24 countries where the survey was conducted. Nevertheless, 43% of Brazilians believe that SOEs are better at providing services than private companies, and “only” 60% said that SOEs are less efficient than private ones. These numbers place Brazilians among the biggest defenders of SOEs<sup>4</sup>.

Brazil’s Congress sought to respond, in its own way, to the public perception of just how serious corruption is with a record number of anti-corruption legislation. In 2015 alone, more than 140 anti-corruption-focused propositions were put forward by federal representatives and senators, mainly concerning regulations for public bidding processes, campaign financing, active and passive corruption, and crimes against public administration<sup>5</sup>.

- 1 “Retratos da Sociedade Brasileira: problemas e prioridades para 2016” [“Portraits of Brazilian Society: problems and priorities for 2016”], CNI indicators, year 5, number 28, January 2016, Confederação Nacional da Indústria [Brazilian National Confederation of Industry]. Sample details: 2,002 interviews conducted in 143 municipalities. Period of the survey: December 4 to 7, 2015. The margin of error is estimated at 2% on the findings made on the survey sample. The confidence interval used is that of 95%.
- 2 Brazil scored 43 points in 2012 and dropped to 40 points in 2016. Despite some improvement between 2015 (38 points) and 2016 (40 points), the topic that best summarises the past few years, which coincide with the progress made by Operation Carwash and its outcomes, is that the perceptions of corruption worsened. Full survey at: CORRUPTION PERCEPTIONS INDEX 2016. Available at: <[https://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](https://www.transparency.org/news/feature/corruption_perceptions_index_2016)>. Accessed on: June 16, 2017.
- 3 A survey conducted by Instituto Ipsos verified that, for 67% of interviewees, corruption was the main motivation for street protests carried out in the beginning of 2015. VALOR ECONÔMICO. **Corrupção, e não impeachment, é motivo de protesto, diz pesquisa**. Brasília, March 13, 2015. Available at: <<http://www.valor.com.br/politica/3953322/corruptcao-e-nao-impeachment-e-motivo-de-protesto-diz-pesquisa>>. Accessed on: June 16, 2017.
- 4 ERNST & YOUNG. **Government as best in class shareholder**. 2010. Available at: <[http://www.ey.com/Publication/wvLUAssets/Government\\_as\\_is\\_best\\_class\\_shareholder/\\$FILE/Government%20as%20in%20best%20class%20shareholder\\_FINAL.pdf](http://www.ey.com/Publication/wvLUAssets/Government_as_is_best_class_shareholder/$FILE/Government%20as%20in%20best%20class%20shareholder_FINAL.pdf)>. Accessed on: May 6, 2017.
- 5 Between 1992 and 2016, the most frequent subject matters of the bills presented at Brazil’s Congress were: public bidding processes (17.9%); campaign financing (11.2%); active and passive corruption (8.3%); administrative misconduct (7.6%); crimes against the public administration (7.3%); and unjust enrichment (5.5%). MOHALLEM, M.; RAGAZZO, C. **Diagnóstico institucional: primeiros passos para um plano nacional anticorrupção**. Rio de Janeiro: Escola de Direito do Rio de Janeiro da Fundação Getúlio Vargas, 2017, p. 130. Available at: <<http://hdl.handle.net/10438/18167>>. Accessed on: June 16, 2017.

Brazilian SOEs occupy a particular place in the eyes of the public and in Brazilian political and economic history. Petrobras is a particularly important national symbol, often related to Brazil's national economic potential and sovereignty. The privatisation processes that certain sectors of the economy underwent during the 1990s were controversial in part because of these perceptions<sup>6</sup>. Thus, the unearthing of strong evidence that some Brazilian SOEs were involved in corruption scandals, especially the findings of Operation Carwash, had a definitive impact on the public's perception of just how affected these entities were.

The search for answers, coming from all parts of society – which, in almost every case, is accompanied by calls for reforms –, at times ignores the causal effect of past reforms on present breakthroughs, which are not always apparent. The response time of reformed institutions, or the time it takes for new laws to be effectively implemented are longer than one might wish. However, analysing the many recent Brazilian legislative changes helps to understand the instruments currently available to, at the very least, start prosecuting part of the corruption and crimes against the public administration cases that have gained notoriety in the press in the judicial sphere.

In terms of impact, some laws deserve special mention, namely: the Access to Information Law (12.527/2011) and the Criminal Organisations Law (12.850/2013), as well as the so-called 2015 Electoral Mini-Reform (13.165/2015), which

established maximum amounts for campaign financing. In addition to these, a Supreme Court ruling (ADI 4650), also from 2015, which adopts the constitutional interpretation that prohibits corporate donations for electoral campaigns is also worthy of mention.

More specifically related to SOEs, two innovations stand out: the Brazilian Anti-Corruption Law (12.846/2013) and the Brazilian SOEs Law (13.303/2016). While the first, by addressing corporate accountability in corruption cases, provided an important incentive to develop integrity programs within companies, the second brought innovations to the monitoring, governance and transparency mechanisms of SOEs in a broader manner. One of the objectives of this paper is to understand the impacts of these legislations on said companies' environment and to point out where there might still be room for improvement.

In addition to legislative developments, the changes in Brazilian jurisprudence, which made public and private agents liable for certain types of conduct that were previously not considered illegal, are also worth noting. The adoption of “dominion over the act” theory, as well as the “wilful blindness” doctrine, expanded the reach of criminal sanctions, especially when addressing corruption cases, and influenced the implementation of integrity programs in state-owned and private companies<sup>7</sup>.

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6 During Fernando Henrique Cardoso's two terms, “between 1995 and 2002, privatisation revenues at all government levels amounted to US \$ 78.6 billion [...]. Of the total revenue, 80% corresponded to the sale of infrastructure-related companies, 14% to the industrial sector and 6% to equity interests. In infrastructure, the privatisation of telecommunication companies accounted for about 38% of total revenues and electricity companies about 28% (74% of those being state-level distributors)”. WERNECK, R. *Consolidação da estabilização e reconstrução institucional, 1995-2002*. In: **A ordem do progresso: dois séculos de política econômica no Brasil**. 2. ed. Rio de Janeiro: Elsevier, 2014, p. 341.

7 The theory of “dominion over the act” (from German jurist Claus Roxin's original German term “Tatherrschaft”) states that any person who, even if they do not directly commit a criminal offence, decides and orders one of their subordinates to perform it, is the author, and not merely a participant, of said offence. The theory argues that the infraction's instigator is not a mere participant, because their actions are not restricted to cajoling or instigating the offending agent, since there was a hierarchical and subordinated relationship between them, not one of mere “resistible” influence. In turn, the “wilful blindness” doctrine proposes that cases in which there is the effective knowledge of the elements that constitute the crime and those in which there is the intentional or contrived ignorance of such elements should be equated, with the same effects of fault-based liability being applied. This is due to the concept of culpability, which cannot be applied at a lesser degree to someone who, being perfectly able of becoming aware of any malfeasance, chooses to be ignorant of it.

Furthermore, this paper will present a general review of the literature on integrity and transparency in SOEs in Brazil, as well as national legislation and international and domestic recommendations on the subject. It does not intend to exhaust the subject matter, but to serve as a starting point for further discussions on the topics at hand, which were selected from bibliographic research and meetings held with the National Advisory Group for Brazil's State-Owned Enterprises' Integrity Initiative<sup>8</sup>.

Thus, this paper is organised as follows: firstly, the particular political conditions of the

Brazilian reality will be presented, delving into how they influence the functioning of SOEs, together with the constraints that pertain to the intended reforms; then, the main characteristics of Brazilian SOEs will be outlined, with emphasis on the institutional structure and the fundamental role they play in the national economy; subsequently, the points considered most relevant to the subject at hand will be discussed in more detail: (i) governance; (ii) compliance and integrity; (iii) transparency; (iv) institutional relations; and (v) internal controls.

## STATE-OWNED ENTERPRISES AND BRAZIL'S POLITICAL CONTEXT

There is no doubt that there have been normative breakthroughs in Brazil regarding areas that are central to the fight against corruption, such as campaign financing and penalties for private companies. There are, however, questions about the legislation's ability to meet the specific needs of SOEs, not only in relation to the existing regulatory framework, but also (and perhaps mainly) because of the practices that currently place these companies at the centre of strategies and schemes devised to form and guarantee political majorities in local and state-level parliaments or in Brasilia.

The relationship between the executive branch and the legislative branch, in any sphere of Brazil's Federation, has undergone remarkable transformations since the promulgation of the 1988

Constitution. Understanding this constant adaptation and reforming of institutional interests is essential for the role SOEs play in order for them to not be limited merely to their economic and organisational elements, however important they may be.

Brazil's so-called coalition-dependent presidential administration is structured so that "ministerial offices are distributed among parties, aiming to obtain parliamentary majorities"<sup>9</sup>. Although the public often sees this relationship as a *quid pro quo* exchange that deviates from republican values, it is important to note that the model itself, apart from its constitutional design, is not illegal. Angelina Figueiredo and Fernando Limongi compare the practice to the regular formation of governments in parliamentary government systems:

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8 The National Advisory Group for Brazil's State-Owned Enterprises' Integrity Initiative was created within the framework of the partnership between FGV Law School Rio and Transparency International – Brazil, and is comprised of employees from several Brazilian SOEs, who work in the areas of compliance, risk analysis, legal affairs and integrity. Counselling and monitoring in the development process of this report was only one of the Group's many roles.

9 FIGUEIREDO, A.; LIMONGI, F. Bases institucionais do presidencialismo de coalizão. In: *Executivo e Legislativo na nova ordem constitucional*. Rio de Janeiro: Editora FGV, 2001, p. 33.

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Upon taking office, the president composes their administration much as a prime minister would, that is, by distributing ministries — offices — to parties willing to support them, thus ensuring the formation of a parliamentary majority. Once the administration has been composed, political benefits of all kinds are [...] distributed to members of the government's coalition parties. In return, the Executive branch gets the votes it needs in Congress, threatening and, if necessary, using the withdrawal of the aforementioned benefits as punishment to those who do not support the coalition<sup>10</sup>.

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Just as important as government-aligned parties taking up ministerial offices are the negotiations about budget allotment grants and the allocation of positions within SOEs, notably those with the largest economic value. Therefore, SOEs are also instrumentalised by their controllers as a way of building and preserving parliamentary support. In fact, SOEs are as important as some (federal-level) ministries, and many analyses of the subject matter limit themselves simply to the allocation of offices in order to determine the importance of a particular party. By doing this, they end up concealing just how much SOEs are preferred over smaller ministries: “state-owned enterprises — and management positions at the pension funds linked to them — are crucial in parties’ rationales and often are enough to accommodate the interests of entire factions and parties”<sup>11</sup>.

Coalition-leading parties do not always have instruments for controlling their affiliated parties so

as to form a parliamentary majority. On the contrary, the absence of mechanisms for monitoring and sharing responsibilities is one of the oversights that took place during the course of the current model's development. The consequence of the administration distributing strategic positions with implicit separation of responsibilities has been parties using it to strengthen their positions in specific cases, while giving less importance to technical proficiency or previous work experience in each company's respective sector when filling positions within them.

Given their financial volume, it is not uncommon for serious cases of corruption to be directly related to SOEs: “the main corruption ‘scandals’ reported in recent years were made possible because of partisan control of positions of trust in SOEs”<sup>12</sup>. Garcia Lopez highlights core elements that increase risks involving SOEs with regards to corruption:

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It is within state-owned enterprises, the sector that is less subject to public transparency and scrutiny by bureaucratic supervisory bodies, that the connection between politics, extraction of public resources and political parties is most intense [...]. Although economic motives pervade power struggles across all sectors of the Federal Government, their intensity varies and, in the case of state-owned enterprises, takes on a level of relevance that eventually becomes the epicentre of some of the biggest cases of organised corruption ever recorded<sup>13</sup>.

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10 Ibid.

11 LOPEZ, F. G.; PRAÇA, S. Critérios e Lógicas de nomeação para o alto escalão da burocracia federal brasileira. In: LOPEZ, F. G. (org.) **Cargos de confiança no presidencialismo de coalizão brasileiro**. Brasília: IPEA, 2011, p. 121.

12 LOPEZ, F. G. (org.) **Cargos de confiança no presidencialismo de coalizão brasileiro**. Brasília: IPEA, 2011, p. 24.

13 Ibid, p. 25.

To further complicate matters, the low impact of voter pressure on SOEs' heads needs special attention. Political agents occupying elected positions, even if subjected only to mercurial democratic pressures, run the risk that any potential failures during the exercise of any given function may mean electoral defeat in the following years. However, this is not the case with "high-ranking civil servants and administrators,

whose rise to office and career advancement is independent of voter support"<sup>14</sup>

With the main purpose of mitigating the harmful impact of any SOEs' directors or boards of directors appointed without proper qualification for the role or whose interests are distant from their company's purpose, Brazil's Congress approved the State-Owned Enterprises Law (13.303/2016), the impact of which will be this paper's object of analysis.

## THE PRESENCE OF STATE-OWNED ENTERPRISES IN BRAZIL'S ECONOMY

Firstly, terminological considerations are in order. The concept of SOEs that will be applied here encompasses government companies<sup>15</sup>, mixed-capital companies<sup>16</sup> and companies controlled directly or indirectly by the government, such as subsidiary companies<sup>17</sup>. It therefore fits into the broader concept of SOEs, as established by the Organisation for Economic Co-operation and Development (OECD)<sup>18</sup>.

The number of SOEs, understood as those in which the government holds, directly or indirectly, most of the voting capital stock, is already indicative of the importance of these

organisations' performance in the country, at the federal level.

Brazil is itself an outlier when it comes to SOEs' share in the economy. An OECD survey conducted in 2014, assessing 34 countries, showed an average of 62 SOEs per country<sup>19</sup>. In Brazil, at the federal level alone, there are 154 SOEs, according to the Ministry of Planning's Coordination and Governance Secretariat for State-Owned Enterprises<sup>20</sup>. Out of all these companies, Brazil's government exercises direct control over 48 and indirect control over 106<sup>21</sup>.

14 BORGES, A.; COELHO, D. O preenchimento de cargos da burocracia pública federal no presidencialismo de coalizão brasileiro: análise comparada de dois ministérios – ciência e tecnologia e integração nacional. In: LOPEZ, F. G. (org.) **Cargos de confiança no presidencialismo de coalizão brasileiro**. Brasília: IPEA, 2011, p. 73.

15 Which article 5 of Decree-Law 200/67 defines as: "An entity with legal personhood under private law, with its own property and capital coming exclusively from the Federal Government, created by law for performing economic activities to which the Government is compelled, due to administrative contingency or convenience, which may take any form permitted by law." The Brazilian Mail Company ("Correios") and INFRAERO are examples of public companies.

16 Which article 5 of Decree-Law 200/67 defines as: "An entity with legal personhood under private law, created by law for the performance of any given economic activity, set up as a corporation, whose voting shares are majoritarily owned by the Federal Government or by the Indirect Administration entity set up for it." Petrobras and SABESP are examples of mixed-capital corporations.

17 MADAUAR, O. **Direito administrativo moderno**. São Paulo: Revista dos Tribunais, 2013, p. 101.

18 "For the purpose of the Guidelines, any corporate entity recognised by national law as an enterprise, and in which the state exercises ownership, should be considered as State-Owned Enterprise". OECD. **OECD Guidelines on Corporate Governance of State-Owned Enterprises**. Paris, 2015, p. 14. Available at: <<https://www.oecd.org/daf/ca/OECD-Guidelines-Corporate-Governance-SOEs-2015.pdf>>. Accessed on: May 5, 2017.

19 OCDE. **The Size and Sectoral Distribution of SOEs in OECD and Partner Countries**. Paris: OCDE, 2014. Available at: <[http://www.keepeek.com/Digital-Asset-Management/oecd/finance-and-investment/the-size-and-sectoral-distribution-of-soes-in-oecd-and-partner-countries\\_9789264215610-en#page1](http://www.keepeek.com/Digital-Asset-Management/oecd/finance-and-investment/the-size-and-sectoral-distribution-of-soes-in-oecd-and-partner-countries_9789264215610-en#page1)>. Accessed on: May 1, 2017.

20 SEST. **Boletim das Empresas Estatais Federais**. Brasília: Ministry of Planning, 2017, p. 5.

21 These 106 SOEs over which the federal government exerts control are subsidiaries of seven federal-level SOEs (Petrobras, Eletrobras, Banco do Brasil, BNDES, Caixa, Correios and Telebras).

Federal SOEs are distributed among various sectors of the economy, but there is greater concentration in the energy (49) and oil and derivatives sectors (36). As a result, most federal SOEs (87) are linked to the Ministry of Mines and Energy<sup>22</sup>.

Their share of the federal budget also confirms just how important they are. Out of a total 76.2 billion BRL approved for investment by federal SOEs, 56.5 billion were carried out, representing 74.2% of that total. It is true that the investment levels of federal SOEs have been falling since 2013, when they reached the record of 113.5 billion BRL being carried out. The net worth of federal SOEs at the end of 2016 amounted to a substantial 500 billion BRL<sup>23</sup>.

SOEs also represent one of the country's largest employers. In 2016, they employed more than 530 thousand people directly, apart from indirectly creating millions of jobs<sup>24</sup>.

In addition, they also play an important role in the stock market. There are 30 SOEs listed on the São Paulo Stock Exchange (Bovespa), be they state or federal-level. They account for approximately a quarter of the daily traded volume. Of these, eight are members of Ibovespa, Bovespa's main stock index: Banco do Brasil, BB Seguridade, CESP, CEMIG, COPEL, Petrobras ON, Petrobras PN and SABESP<sup>25</sup>.

SOEs are subject to more than just Brazil's norms and standards. Many of them, such as

Petrobras, SABESP, CEMIG, COPEL and Eletrobras, have shares traded on the New York Stock Exchange, subject to the rules of the United States Securities and Exchange Commission. The internationalisation processes of many of these companies, with substantial investments in other countries, also make them subject to international standards of governance, transparency and institutional relations.

A survey by the Development Bank of Latin America, for example, indicated that Latin American publicly-traded SOEs perform up to 50% better on the index developed for governance and transparency than closed SOEs do<sup>26</sup>.

In this regard, the World Bank shows that the submission of SOEs to the rules of the stock market is something positive, seeing as they provide for stricter requirements regarding the appointment of independent board members, fairer treatment of minority shareholders as well as broader and timelier accountability procedures, for example. Exposure to further scrutiny by market analysts, the specialised press and rating agencies would also be positive<sup>27</sup>.

In addition to the relevant ministries, the Coordination and Governance Secretariat for State-Owned Enterprises (SEST) plays a role in the administration of federal SOEs. An organ of the Ministry of Planning, SEST's jurisdiction and purpose are provided for in article 40 of Decree No. 8,818 of 2016. It succeeded the

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22 Ibid, p. 24

23 Ibid, p. 7, 26.

24 Ibid, p. 18.

25 MOTA, P. L. E se as estatais não pertencessem ao Ibovespa? **Terraço Econômico**. February 22, 2016. Available at: <<http://terraoeconomico.com.br/e-se-as-estatais-nao-pertencessem-ao-ibovespa-3>>. Accessed on: May 3, 2017.

26 DEVELOPMENT BANK OF LATIN AMERICA. **Transparency in the Corporate Governance of State-Owned Enterprises in Latin America**. Corporación Andina de Fomento, 2015, p. 41. Available at: <<http://scioteca.caf.com/bitstream/handle/123456789/845/CAF%20N20%20ENGLISH%20FINAL.pdf?sequence=1&isAllowed=y>>. Accessed on: May 7, 2017.

27 WORLD BANK. **Corporate Governance of State-Owned Enterprises**: a toolkit. Washington, D.C.: World Bank, 2014, p. 43. Available at: <<http://documents.worldbank.org/curated/pt/228331468169750340/Corporate-governance-of-state-owned-enterprises-a-toolkit>>. Accessed on: May 5, 2017.

Department of Coordination and Governance of SOEs, which until then performed most of its functions. These include: (i) coordinating the preparation of federal SOEs' investment budget; (ii) promoting the articulation of SOEs' policies, proposing guidelines on personnel,

governance and budget policies; (iii) carrying out the appointment, as well as coordinating and guiding the actions of the representatives of the Ministry of Planning placed in the companies' boards; and (iv) voting (as directed by the government) at SOEs' shareholder meetings<sup>28</sup>.

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<sup>28</sup> Decree nº 8,818 of July 21, 2016, article 40; Decree nº 89,309 of January 18, 1984, article 3.

# GOVERNANCE

States have several reasons to support corporate governance principles in SOEs, seeing as they play a leading role in their respective sectors, and should serve as an example for private companies. The betterment of private companies via the promotion of corporate governance-related good practices in SOEs is, thus, a welcome side effect. Compliance with global standards and norms becomes increasingly necessary in a scenario in which SOEs are becoming increasingly more international, wherein transnational networks

gain strength. The reduction of business risks and the improvement of business practices generate benefits for SOEs and, consequently, for the public as a whole. Even (and especially) achieving public policy goals depends on sound, well-organised and sustainable SOEs<sup>29</sup>.

According to the Brazilian Institute for Corporate Governance (IBGC, the “Instituto Brasileiro de Governança Corporativa” in Portuguese), corporate governance is:

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The system by which companies and other organizations are managed, monitored and encouraged. It involves the relationships between shareholders, the board of directors, the executive management, supervisory and control bodies and other stakeholders. Good corporate governance practices convert basic principles into objective recommendations, aligning different interests with a view to preserving and optimizing the long-term economic value of the organization, facilitating its access to resources and contributing to the quality of management, its longevity and the common good<sup>30</sup>.

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Governance rules for SOEs must strengthen oversight and monitoring organs – assemblies, boards and internal monitoring structures – and define the rules for relationships between different actors in a clear manner. They must also increase transparency and accountability mechanisms pertaining to the relevant stakeholders<sup>31</sup>.

In regional terms, Brazilian SOEs have good comparative indicators regarding governance and transparency. The Transparency in the Corporate Governance of State-Owned Enterprises Index, a ranking prepared by the Development Bank of Latin America, places Brazil's SOEs in the region in third place, second only to Peruvian and Colombian companies<sup>32</sup>.

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29 DEVELOPMENT BANK OF LATIN AMERICA. **Corporate Governance in Latin America: Importance for State Owned Enterprises – SOEs**. Corporación Andina de Fomento, 2012, p. 23-4. Available at: <<http://scioteca.caf.com/bitstream/handle/123456789/367/corporategovernancelatinamerica.pdf?sequence=1&isAllowed=y>>. Accessed on: May 6, 2017.

30 IBGC. **Code of best practices of corporate governance**. São Paulo, 2016. Available at: <<https://conhecimento.ibgc.org.br/Lists/Publicacoes/Attachments/23610/IBGC-CMPGEN-Vers%c3%a3o%20Final.pdf>>. Accessed on: March, 2019.

31 DEVELOPMENT BANK OF LATIN AMERICA. **Corporate Governance in Latin America: Importance for State Owned Enterprises – SOEs**. Corporación Andina de Fomento, 2012, p. 11. Available at: <<http://scioteca.caf.com/bitstream/handle/123456789/367/corporategovernancelatinamerica.pdf?sequence=1&isAllowed=y>>. Accessed on: May 6, 2017.

32 This index is based on five factors: “The index consists of five pillars based on the OECD (2006), the World Bank (2006), and the CAF (2010) guidelines for SOEs: i) the legal and regulatory framework to which SOEs are subject; ii) the ‘25 4 Afterwards’, the database was revised in September and December 2014 and January through February 2015 to minimize possible errors. Any error that remains is the full responsibility of the authors, the degree to which the designated representative of the ownership effectively exercises his role; iii) the existence and equitable treatment of minority shareholders (if any); iv) transparency and disclosure of information; and v) appointment of the Board of Directors”. DEVELOPMENT BANK OF LATIN AMERICA. **Transparency in the Corporate Governance of State-Owned Enterprises in Latin America**. Corporación Andina de Fomento, 2015, p. 37. Available at: <<http://scioteca.caf.com/bitstream/handle/123456789/845/CAF%20N20%20ENGLISH%20FINAL.pdf>>. Accessed on: May 7, 2017.

The point of convergence for governance-related analyses and recommendations in SOEs, international organisations, as well as non-governmental and academic organisations is the need to clearly distinguish the role of the State as the partial or sole owner of said enterprises and its role in regulating a given sector of the economy and determining public policies.

## RELATIONSHIP WITH THE STATE

The way in which the State controls the companies it owns is therefore one of the most relevant aspects of understanding them. The World Bank has analysed a myriad of arrangements whereby the State exercises ownership over said companies and concludes that the best one is precisely that which distributes between different entities the following types of roles: the State as entrepreneur and the State as regulator<sup>33</sup>.

Brazil's dual model distances itself from this ideal one. At the federal level, a sectorial

This separation is necessary to minimise conflicts of interest, especially in those sectors where SOEs compete with private companies. In such cases, uncertainty over said roles can lead to market imbalances due to the inherent advantages of SOEs, such as favourable tax regimes, financial or material subsidies, and other forms of state-provided advantages.

ministry with jurisdiction over the related subject area shares responsibilities with a second ministry – in this case, the Ministry of Planning, via SEST. Brazil's Federal Inter-ministerial Committee on Corporate Governance and Equity Interest Management (CGPAR, the "Comissão Interministerial de Governança Corporativa e de Administração de Participações Societárias da União" in Portuguese) also plays an important role<sup>34</sup>. This model, however, has several shortcomings:

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The [dual] model also has its weaknesses. Finance ministries often focus on budgetary and financial issues but may lack the authority and power the line ministries have over SOEs, as well as the capacity to act as an owner and strong advocate for SOE reforms. Moreover, the dual mode, like the decentralised model, allows for continued dispersion of other key ownership functions, such as board nominations, planning and investment decisions, and monitoring performance<sup>35</sup>.

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The World Bank argues that there are more appropriate governance models, a goal towards

which several countries are ostensibly heading. The centralised model – in which only one entity

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33 The centralised model also has the advantage of minimising the room for political interference, increasing the potential for professionalisation, promoting coherence and consistency when applying corporate governance standards to all SOEs, enabling better management of State assets and achieving greater transparency and accountability by supervising and monitoring the performance of SOEs. WORLD BANK. **Corporate Governance of State-Owned Enterprises: a toolkit**. Washington, D.C.: World Bank, 2014, p. 78. Available at: <<http://documents.worldbank.org/curated/pt/228331468169750340/Corporate-governance-of-state-owned-enterprises-a-toolkit>>. Accessed on: May 5, 2017.

34 Instituted by Decree nº 6,021/2007, CGPAR is comprised of the Ministers of Finance, the Chief of Staff and the Minister of Planning, which heads the Committee.

35 WORLD BANK. **Corporate Governance of State-Owned Enterprises: a toolkit**. Washington, D.C.: World Bank, 2014, p. 73. Available at: <<http://documents.worldbank.org/curated/pt/228331468169750340/Corporate-governance-of-state-owned-enterprises-a-toolkit>>. Accessed on: May 5, 2017.

acts as agent and majority shareholder on behalf of the government and monitors all SOEs – has been adopted in recent years by Indonesia, China and Chile, and has been in force in developed countries such as the United Kingdom, Finland and Norway<sup>36</sup>.

The World Bank, however, suggests some possibilities for specific reforms to these more traditional models – which is to say, the decentralised model, where only the sectorial ministry has a commanding role over the SOEs, and the dual model, an alternative that is more palatable, politically speaking. They are as follows: (i) limit the role of sectorial ministries to the more central functions of an owner (voting at meetings and overseeing the performance of SOEs); (ii) develop concrete barriers against political interference in business decisions; (iii) grant more autonomy to SOEs and empower their boards of directors so they take on greater responsibilities; (iv) strengthen the monitoring units of finance ministries; (v) devise and put

in place systems to monitor and compare the performance of sectorial ministries concerning their role as owners; among other suggestions<sup>37</sup>.

The issue that creates difficulties specifically in the relationship between the State as monitor/owner and SOEs is the myriad ways in which the State exercises some form of power over said companies. Among these, we may find the following examples: (i) as entities that are administrated indirectly, SOEs are subject to administrative scrutiny; (ii) as commercial entities, SOEs depend on how controlling shareholders or unitholders exercise their prerogatives; (iii) seeing as they either conduct business activities or provide public services, SOEs are also subject to regulatory bodies or entities, in the same way as private companies<sup>38</sup>.

Each of these forms of exercise of power is subject to its own logic and to specific organisms within the state.

## THE STATE AS ADMINISTRATOR

SOEs are subject to ministerial supervision, specifically by the ministry whose purview covers their economic sector (or, in the case of states and municipalities, the secretariat). This ministerial supervision implies a form of political control, which is performed mainly through the appointment and removal of the heads of SOEs, as well as a form of administrative control, done either through their ability to revise and

reconsider certain decisions or their obligation to follow guidelines.

However, these controls cannot be exercised without limitation. It is precisely with the aim of limiting the exercise of political control that the State-Owned Enterprises Act introduced requirements for the appointment of SOEs' directors and board members<sup>39</sup>. Minimum requirements include qualifications, which is to

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36 Ibid, p. 82.

37 Ibid, p. 74-5.

38 ARAGÃO, A. *Empresas estatais: o regime jurídico das empresas públicas e sociedades de economia mista*. São Paulo: Forense, 2017, p. 319.

39 The limitations on the possibility of removing nominees from these positions also follow this logic, such as, for example, in Law No. 11,652 of 2008, which assigned mandates to the Empresa Brasileira de Comunicações' directors. The SOEs Act, however, did not expand the use of mandates for said companies' directors, and Provisional Presidential Decree No. 744 of 2016 repealed Law No. 11,652 in these respects, so this has not been an alternative that has been applied in Brazil.

say, certain characteristics that are required of all appointees, such as academic background, professional experience<sup>40</sup> and restrictions which

reinforce independence in performing their roles, such as not being leader of a party (article 17, §2).

## THE STATE AS OWNER

The balance between pursuing the public interest and concerns for economic performance depends on the clarity given to the state's role as owner and entrepreneur.

There are opposing views on the priority of different goals, according to differing views on the role of the State in the economy. The search for a balance between them is a pursuit that faces practical and political obstacles, and this paper does not intend

to suggest which one should be the prevailing view. Ultimately, it is the voters' choice. What is intended to be signalled is that, regardless of the choices (political and economic), they must all be transparent, to the benefit of both citizens and other economic agents that depend on the economic performance of SOEs, as minority shareholders.

This is why the Brazilian Institute for Corporate Governance suggests that:

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The management of each corporate entity should ratify and disclose a property and ownership policy [...] which shall define and justify the purposes of the State as shareholder, provide for the adoption of corporate governance good practices, and grant operational autonomy to the management of the MCC [Mixed-Capital Company] so that it has the means to achieve its established corporate goals and objectives. The document should also inform the State's strategic positioning concerning aspects such as areas or sectors of investment and development<sup>41</sup>.

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This concern over transparency also involves the decision-making processes by which the State's property rights will be exercised. It is imperative that society is aware of the distribution of jurisdictions among governmental organs and entities, and how it defines the conduct of SOEs

– even in determining the votes of directors appointed by the government. In addition, it is essential that any costs in pursuing public policies be reported in advance and in a transparent manner, as well as the expected (positive or negative) returns<sup>42</sup>.

40 Law No. 13,303/2016, article 17 – “The members of the Executive Board and those appointed to the positions of director, including chairperson, general manager and chief executive officer, shall be chosen from citizens of sound reputation and outstanding professional expertise, and must meet, alternatively, one of the requirements listed in subitems ‘a’, ‘b’ and ‘c’ of item I and, cumulatively, the requirements of items II and III: I – have professional experience of at least: **a)** 10 (ten) years, in the public or private sector, in the public company or mixed-capital corporations’ area of operation, or in a related area, or **b)** 4 (four) years in the exercise of at least one of the following positions: 1. senior management or leadership position in a company of similar size or purpose to that of the public company or mixed-capital corporation in question, wherein a senior management position is understood as being in the company’s two (2) highest non-statutory hierarchical levels; 2. at-will appointed position or function of public trust equivalent to DAS-4 level or higher in the public sector; 3. position of teacher or researcher in the public company or mixed-capital corporation’s areas of operation; **c)** 4 (four) years of experience as an independent professional directly or indirectly linked of the public company or mixed-capital corporation’s area of activity; II – have an academic background that is compatible with the position to which they were appointed; and III – not fit the ineligibility cases provided for in item I of the head provision of article 1 of Complementary Law No. 64 of May 18, 1990, as amended by Complementary Law No. 135 of June 4, 2010”.

41 IBGC. *Boas práticas de governança corporativa para sociedades de economia mista*. São Paulo, 2015, p. 13. Available at: <[http://www.ibgc.org.br/userfiles/2014/files/Arquivos\\_Site/Caderno14.PDF](http://www.ibgc.org.br/userfiles/2014/files/Arquivos_Site/Caderno14.PDF)>. Accessed on: April 10, 2017.

42 Ibid, p. 13-4.

These issues should guide the relationship of the State as the owner with minority partners and other shareholders. More specifically, the OECD recommends that (i) all shareholders should be treated equally; (ii) the level of transparency must be very high, including ensuring that all are provided information simultaneously; (iii) there be

an active policy of consultation and communication with shareholders; (iv) the participation of minority shareholders in decision-making bodies should be facilitated; and (v) transactions between the State and SOEs, as well as those between the SOEs themselves, should be conducted in terms consistent with the market<sup>43</sup>.

## THE STATE AS REGULATOR

In addition to acting as administrator and owner, the State plays a third role, which exerts influence on the activities of SOEs in a way that should not be underestimated. As a regulator of several sectors of the economy, when determining the regulatory policies applicable to all agents operating in that sector, the State will affect the activities of SOEs and their prospects. As obvious examples, we have the resolutions issued by the National Petroleum Agency (ANP, the “Agência Nacional do Petróleo” in Portuguese), which affect Petrobras, and decisions by the National Electric

Energy Agency (ANEEL, the “Agência Nacional de Energia Elétrica” in Portuguese) which impact Eletrobras’ plans.

Therefore, the exercise of regulatory powers conducted independently of the exercise of ownership is essential to ensure not only a level-playing field for all actors involved<sup>44</sup> – private and public – but also greater decision-making autonomy for regulators, who will be enabled to make decisions based on the general public interest, not on possible impacts on the affected SOEs.

## THE EXECUTIVE BOARD

In the context described above, the Executive Board plays an essential role in ensuring the balance between these roles, especially that of administrator and that of owner. It is responsible for ensuring that SOEs meet their public interest objectives as laid down in the legislation that outlined them, but also for ensuring the financial health and the company’s efficient and rational operation. In this sense, the Board acts as a mediator for the company and the partners, informing the latter of relevant facts

and monitoring the performance of the former’s board of directors<sup>45</sup>.

Board members must act autonomously and independently. Essential measures include preventing them from getting into conflict of interests situations and ensuring that they receive adequate compensation. The composition of the Board, ideally, will respect not only the diversity of professional experiences and academic backgrounds, but will also seek to encompass

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43 OCDE. *OECD Guidelines on Corporate Governance of State-Owned Enterprises*. Paris, 2015, p. 22. Available at: <<https://www.oecd.org/daf/ca/OECD-Guidelines-Corporate-Governance-SOEs-2015.pdf>>. Accessed on: May 5, 2017.

44 IBGC. *Boas práticas de governança corporativa para sociedades de economia mista*. São Paulo, 2015, p. 12-3. Available at: <[http://www.ibgc.org.br/userfiles/2014/files/Arquivos\\_Site/Caderno14.PDF](http://www.ibgc.org.br/userfiles/2014/files/Arquivos_Site/Caderno14.PDF)>. Accessed on: April 10, 2017.

45 *Ibid*, p. 16.

multiple socio-cultural backgrounds, ensuring the participation of women<sup>46</sup> and minorities.

The Board performs its functions by outlining strategies and overseeing the management of daily activities, based on the mandates and objectives set by the government. It is also responsible for establishing performance

goals (and verifying the results), as well as identifying risks (and minimizing them)<sup>47</sup>. In this sense, the Executive Board plays a key role in establishing SOEs' Integrity Programs, ensuring that transparency and fighting corruption are top guidelines for said companies in all their activities.

## PRIVATE-SECTOR EFFORTS FOR IMPROVING GOVERNANCE

B3, the company that manages the São Paulo Stock Exchange, released in September 2015 the SOEs' Distinction in Governance Program. The program

[...] aims to contribute to the restoration of the relationship of trust between investors and SOEs by relying on the alignment of various interests. Investors are interested in the efficient and sustainable allocation of their resources; civil society and State-Owned Enterprises' employees care about the maintenance of income and employment; finally, the Federation's entities are interested in the viability of public interest investments with capital market financing.

The purpose of this program is to act as an incentive mechanism, by certifying SOEs in specific categories, to improve institutional practices. It had, however, part of its purpose impaired by the enactment of the State-Owned Enterprises Act – until 2017, no SOE had requested membership to the program – which required a readjustment of its terms. Finally, in May 2017, the new version of the program took into consideration the terms and requirements imposed by the Act and changed the membership and certification mechanism.

The program revolves around four lines of action, which have not been changed by the 2017 reformulation. They pertain to transparency, internal controls, the Executive Board and the Supervisory Board, as well as to corporate governance in general.

Due to the changes made, there has been an increase in interest by SOEs in participating in the program, as evidenced by the certification of Petrobras and Banco do Brasil in August 2017.

46 Gender diversity is important, not only for ensuring women's representation in decision-making spaces, and for providing SOEs' female employees with a symbolic demonstration of the possibility of rising in the ranks, but also because greater diversity produces a more balanced and rational decision-making process. YOSHINAGA, C. Diversidade de gênero nos conselhos tende a levar a decisões mais racionais. **Poder 360**. São Paulo, September 22, 2017. Available at: <<https://www.poder360.com.br/opiniao/economia/diversidade-de-genero-nos-conselhos-tende-a-levar-a-decisoes-mais-rationais/>>. Accessed on: September 23, 2017.

47 OCDE. **OECD Guidelines on Corporate Governance of State-Owned Enterprises**. Paris, 2015, p. 70. Available at: <<https://www.oecd.org/daf/ca/OECD-Guidelines-Corporate-Governance-SOEs-2015.pdf>>. Accessed on: May 5, 2017.

# COMPLIANCE IN STATE-OWNED ENTERPRISES

Transparency International defines compliance as the procedures, systems or departments within public agencies or private companies that ensure all legal, operational and financial activities are in conformity with current laws, rules, norms, regulations, standards and public expectations and states that corporations must be held responsible for actions of their employees, agents, foreign subsidiaries and for lack of adequate supervision of compliance programs<sup>48</sup>.

Thus, it is possible to see that compliance goes far beyond simply complying with formal and informal rules. Its objective is to guide the entire behaviour of an institution, as well as that of its employees<sup>49</sup>. It applies to all types of organisations, including, of course, SOEs. One could argue that market expectations concerning good conduct

from SOEs, one that seeks sustainable profits for social, environmental and economic development, are even higher.

At the international level – and many SOEs operate across Brazilian borders, as noted – compliance becomes even more essential for detecting and preventing violations of anti-corruption rules. For one, the greater distance from control centres, be they internal or external, represents a significant challenge for companies. Furthermore, the existence of multiple applicable laws and regulations makes it difficult for the agents themselves and the company to understand what behaviour is, or is not, expected of them.

In short, compliance efforts aim to mitigate the risks – legal, regulatory and reputational – to which the institution and its employees are subject.

## SPECIFIC RISKS

An effective integrity program, tailored to the specific characteristics of SOEs and their business models, necessarily involves a risk-based approach<sup>50</sup>.

Said risk-based approach differs from the norm-based approach, which aims to apply the same standards to all circumstances. A risk-based approach allows liable actors to identify sensitive points that require the most attention and to act in a preventive manner. At the same time, applying

the rules in proportion to existing risks allows an institution to avoid implementing unnecessary measures and procedures that are merely formal and are not truly relevant. Implementing complex control mechanisms for low-risk circumstances is costly and inefficient.

Effective policies and procedures require a thorough understanding of the company's business model, including its products and services, third parties, customers, government interactions, and

48 TRANSPARENCY INTERNATIONAL. **Anti-corruption Glossary**: Compliance. Available at: <<https://www.transparency.org/glossary/term/compliance>>. Accessed on: September 23, 2017.

49 RIBEIRO, M. C. P.; DINIZ, P. D. F. *Compliance e lei anticorrupção nas empresas*. **Revista de Informação Legislativa**, v. 52, n. 205, 2015, p. 88.

50 One of the main drivers of the risk-based approach is the Financial Action Task Force on Money Laundering, which employs it to combat money laundering and terrorist financing. For more details, cf. FATF (also known as GAFI). **The FATF Recommendations**: International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation. Paris, 2012. Available at: <[www.fatf-gafi.org](http://www.fatf-gafi.org)>. Accessed on: September 10, 2017.

industrial and geographic risks. Risks a business may need to address include: the nature and extent of transactions with foreign governments, including payments to foreign employees, third parties hires, gifts, travel and entertainment expenses and donations.

## INTEGRITY PROGRAM

The Integrity Program can be understood in this context as a specific compliance program composed primarily of anti-corruption measures<sup>52</sup>.

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The Integrity Program, within a legal entity, consists of a set of internal mechanisms and procedures for auditing, integrity and incentivising the reporting of irregularities and the effective application of codes of ethics and conduct, policies and guidelines to detect and remedy deviations, frauds, irregularities and unlawful acts committed against the national or foreign public administration.

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The CGU defines the Integrity Program within SOEs as “a set of measures aimed at preventing, detecting and remedying the occurrence of fraud and corruption in companies, designed and implemented in a systemic manner, with the board’s approval and under the coordination of a liable area or person”<sup>53</sup>.

Indeed, in preparing its Implementation Guide for the Integrity Program for SOEs, the CGU took an important step in the dissemination of this anti-corruption mechanism. More than that, it offered a step-by-step path on how to establish and implement an effective integrity program.

The Brazilian Office of the Comptroller General (CGU, the “Controladoria-Geral da União” in Portuguese) recommends that specific training programs be offered to public agents that work with the activities that are considered to be more sensitive, according to their process of risk mapping<sup>51</sup>.

Article 41 of Decree No. 8,420/2015 (which regulates the Brazilian Anti-Corruption Act) defines it thusly:

The first step would be the effective commitment of a given SOE’s senior management, including directors and board members, to the program. This commitment needs to be demonstrated by approving, supervising and monitoring the program’s development and implementation. Allocating required resources also represents an important (and necessary) sign that top management is committed to the success of the integrity program<sup>54</sup>.

Successful development of the Integrity Program also depends on the effective participation of all relevant stakeholders, like employees, suppliers and interested third parties. In addition to contributing with their particular views and experiences, these

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51 CGU. **Guia de Integridade Pública**: orientações para a administração pública federal: direta, indireta e fundacional. Brasília, 2015, p. 18. Available at: <<http://www.cgu.gov.br/Publicacoes/etica-e-integridade/arquivos/guia-de-integridade-publica.pdf>>. Accessed on: April 15, 2017.

52 CGU. **Programa de Integridade**: diretrizes para empresas privadas. Brasília, September 2015. Available at: <<http://www.cgu.gov.br/Publicacoes/etica-e-integridade/arquivos/programa-de-integridade-diretrizes-para-empresas-privadas.pdf>>. Accessed on: September 23, 2017.

53 CGU. **Guia de Implementação de Programa de Integridade nas Empresas Estatais**: orientações para a gestão de integridade nas empresas estatais federais. Brasília, December 2015. Available at: <[http://www.cgu.gov.br/Publicacoes/etica-e-integridade/arquivos/guia\\_estatais\\_final.pdf](http://www.cgu.gov.br/Publicacoes/etica-e-integridade/arquivos/guia_estatais_final.pdf)>. Accessed on: September 23, 2017.

54 Ibid, p. 13.

actors' participation will help with the acceptance of the program's requirements, since, being engaged from the beginning, they may also commit to its success and constant improvement.

The Integrity Program's application is systemic, involving areas like Internal Auditing, Risk Management, Human Resources, Internal Affairs, Legal, Accounting, Internal Controls, Documents Management and Ethics Committee, among others. This decentralised application does not imply that there is not a unified body, responsible for developing, implementing, maintaining, evaluating and improving the program<sup>55</sup>. On the contrary, the existence of this unit is fundamental.

This is why the CGU recommends that "the internal body responsible for the Integrity Program must have the degree of independence necessary to make decisions and implement the actions required for their proper implementation and should, whenever possible, report directly to the

top of the hierarchy"<sup>56</sup>. This instance will be primarily responsible to conduct periodic risk analyses and to use the identified problems and difficulties to improve the program. Since it will also be in charge of investigating irregularities, it is essential that mechanisms will be put in place to protect those responsible against any potential retaliation and punishment<sup>57</sup>.

There are several elements that should make up the Integrity Program of a SOE, some of which – like conflicts of interest, codes of conduct and those concerning public bidding processes – will be discussed in more detail during other sections of this paper. In addition it is also worth mentioning other topics – such as the implementation of channels for reporting misconduct, the regulation of lobbying activities and the process of holding individuals and legal entities responsible for committing irregularities – which also merit further examination<sup>58</sup>.

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55 Ibid, p. 20.

56 Ibid, p. 21.

57 Ibid.

58 For more details on these topics, cf. CGU. **Guia de Implementação de Programa de Integridade nas Empresas Estatais**: orientações para a gestão de integridade nas empresas estatais federais. Brasília, December 2015. Available at: <[http://www.cgu.gov.br/Publicacoes/etica-e-integridade/arquivos/guia\\_estatais\\_final.pdf](http://www.cgu.gov.br/Publicacoes/etica-e-integridade/arquivos/guia_estatais_final.pdf)>. Accessed on: September 23, 2017.

## EVALUATING THE INTEGRITY PROGRAMS

According to Decree No. 8,420/2015, the Integrity Programs of legal entities will be evaluated according to the following criteria (article 42):

- the senior management of the legal entity's commitment, including the boards, verifiable by visible and unequivocal support for the program;
- codes of conduct, codes of ethics, integrity policies and procedures applicable to all employees and managers, regardless of their position or function;
- codes of conduct, codes of ethics and integrity policies extended, when necessary, to third parties, such as suppliers, service providers, intermediary agents and associates;
- periodic training on the Integrity Program;
- periodic risk analyses to make necessary adaptations to the Integrity Program;
- accounting records that reflect accurately and thoroughly the legal entity's transactions;
- internal controls that ensure that the company's financial reports and statements are drafted promptly and reliably;
- specific procedures to prevent fraud and illicit acts in the context of public bidding processes, as well as in the execution of administrative contracts or in any interaction with the public sector, even if they are intermediated by third parties, such as paying taxes, being subjected to inspections or obtaining authorisations, licenses, permits and certificates;
- independence, structuring and authority for the internal body responsible for implementing the Integrity Program and enforcing compliance;
- channels for reporting irregularities, open and made widely known to employees and third parties, and mechanisms for the protection of whistleblowers;
- disciplinary measures in case of violation of the Integrity Program;
- procedures that ensure the prompt interruption of any detected irregularities or violations, and the timely remediation of the damages generated;
- appropriate hiring processes and, depending on each case, supervision of third parties, such as suppliers, service providers, intermediary agents and associates;
- investigation, during mergers, acquisitions and corporate restructuring processes, of any potential irregularities or illicit acts, or if any of the legal entities involved are vulnerable to them;
- continuous monitoring of the Integrity Program aiming at improving the prevention, detection and combating of the illicit activities provided for in the Anti-Corruption Act; and
- transparency of the legal entity regarding donations to candidates and political parties.

## CODES OF ETHICS AND CONDUCT

Some of the more important governance elements used by SOEs are the mechanisms that regulate the conduct of their employees. The IBGC, for example, highlights the importance of having a Code of Ethics and Conduct capable of “fostering transparency, regulating the organisation’s internal and external relations, managing conflicts of interest, protecting physical and intellectual assets, and consolidating corporate governance good practices”<sup>59</sup>.

In addition, the Code of Ethics and Conduct is also a good instrument for establishing and regulating channels for whistleblowers, through which the company can be given opinions, criticism, receive complaints and anonymous tips. The IBGC emphasises that this channel must be operated independently and impartially, which will ensure discretion and confidentiality<sup>60</sup>. Similarly, the CGU argues that “the creation of communication channels through which civil servants and citizens can report misconduct carried out by people within the organisation is indispensable to ensuring compliance with public interest and maintaining public integrity”<sup>61</sup>. They should also address the policy of receiving or offering free-samples, gifts or hospitality.

The Code of Ethics and Conduct should be widely divulged and both internal and external audiences should be aware of it, especially customers and suppliers. Only in this way can it

be expected to effectively guide the performance of employees and other stakeholders. Making it available online is one step that can facilitate its dissemination. Employees may be required to sign a document in which they declare that they know about and adhere to said code, after specific and risk-oriented training<sup>62</sup>.

The CGU also recommends that each public entity sets up a Code of Conduct or Ethics, in the sense that it would help guide the moral choices of the civil servants. There already exist the Federal Executive Branch’s Code of Professional Ethics for Civil Servants and the Code of Conduct of for Federal-level Senior Management<sup>63</sup>, which bind the employees of federal SOEs. The first one also determines the development of ethics committees, responsible for giving guidance and advice on specific workplace ethics issues<sup>64</sup>. After all, it is not enough to set the expected standards of conduct, it is also necessary to monitor if employees comply with them and to discipline those that do not.

In addition, the code must remain up to date and effective, and be revised periodically. Those that adopt the code should be aware of this updating process and, if necessary, engage in periodic retraining sessions. These codes have a legal basis, namely such relevant normative statutes as the Public Servants Act, the Conflicts of Interest Act, which will be discussed below, and Decree No. 7,203, of 2010, on nepotism.

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59 IBGC. **Boas Práticas de Governança Corporativa para Sociedades de Economia Mista**. São Paulo, 2015, p. 34-5. Available at: <[http://www.ibgc.org.br/userfiles/2014/files/Arquivos\\_Site/Caderno14.PDF](http://www.ibgc.org.br/userfiles/2014/files/Arquivos_Site/Caderno14.PDF)>. Accessed on: April 10, 2017.

60 IBGC. **Boas Práticas de Governança Corporativa para Sociedades de Economia Mista**. São Paulo, 2015, p. 35. Available at: <[http://www.ibgc.org.br/userfiles/2014/files/Arquivos\\_Site/Caderno14.PDF](http://www.ibgc.org.br/userfiles/2014/files/Arquivos_Site/Caderno14.PDF)>. Accessed on: April 10, 2017.

61 CGU. **Guia de Integridade Pública**: orientações para a administração pública federal: direta, indireta e fundacional. Brasília, 2015, p. 37. Available at: <<http://www.cgu.gov.br/Publicacoes/etica-e-integridade/arquivos/guia-de-integridade-publica.pdf>>. Accessed on: April 15, 2017.

62 IBGC. **Boas Práticas de Governança Corporativa para Sociedades de Economia Mista**. São Paulo, 2015, p. 35. Available at: <[http://www.ibgc.org.br/userfiles/2014/files/Arquivos\\_Site/Caderno14.PDF](http://www.ibgc.org.br/userfiles/2014/files/Arquivos_Site/Caderno14.PDF)>. Accessed on: April 10, 2017.

63 The application of this code to all Federal Government representatives on the boards of directors of federal SOEs and companies in which the Union participates as a minority shareholder was established by CGPAR Resolution 10.

64 CGU. **Guia de Integridade Pública**: orientações para a administração pública federal: direta, indireta e fundacional. Brasília, 2015, p. 16-8. Available at: <<http://www.cgu.gov.br/Publicacoes/etica-e-integridade/arquivos/guia-de-integridade-publica.pdf>>. Accessed on: April 15, 2017.

## CONFLICTS OF INTEREST

Law No. 12,813 of 2012, also known as the Conflicts of Interest Act, was an important legislative innovation of recent years. Aiming to regulate possible conflicts of interest situations related to positions within the Federal Executive Branch and potential impediments to the exercise of those positions, it explicitly applies to the chairpersons, deputy-chairpersons and directors of public enterprises and mixed-capital companies (article 2, III). It also implicitly applies to occupants of positions in SOEs that hold “inside information capable of bringing economic or financial advantage to the public agent or to a third party” (article 2, sole paragraph).

The Electronic System for Preventing Conflicts of Interest (SeCI, the “Sistema Eletrônico de Prevenção de Conflito de Interesses” in Portuguese) was developed with the purpose of instrumentalising the Conflicts of Interest Act, especially the provisions regarding the need for prior consultations and authorisation requests for engaging in private activities. This system forwards consultations and requests to the CGU and the Public Ethics Committee as outlined in the competences provided for in that legislation.

Launched on June 10, 2014, SeCI has received 3,178 requests to date<sup>65</sup>. Of these, 1,344 applications, or 42% of the total, were made by public agents acting in SOEs, divided between 712 queries on conflict of interest and 632 requests for authorisation to engage in private activity.

Over this period of almost 4 years, the number of requests grew from 171 in 2014 to 492 in 2015, and to 515 in 2016. In the first four months of 2017, SeCI received 166 requests. Looking at the number of requests by originating company, some parts of the data draw attention. The company from which the largest number of requests originated is Caixa Econômica Federal, with 577 requests, followed distantly by Banco do Nordeste do Brasil and the Federal Data Processing Service (“Serviço Federal de Processamento de Dados” in Portuguese), with 139 and 136 requests, respectively. Federal SOEs with a large number of employees, such as Banco do Brasil (113 requests) and Petrobras (81 requests), had surprisingly low numbers of requests<sup>66</sup>.

In addition to this comprehensive mechanism, the CGU recommends that SOEs focus on the creation of internal mechanisms to prevent conflict of interest situations. The establishment of rules for the relationship of public agents with stakeholders – individuals and private institutions, customers, suppliers and service providers – is important to avoid the possibility of favouritism<sup>67</sup>. Although Brazil’s Congress has not yet tackled the issue of regulating lobbying, it is possible (and recommended) that SOEs themselves develop internal mechanisms to prevent abuse of power, bribery and corruption scenarios.

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65 Date of verification: May 4, 2017.

66 Information provided by the Ministry of Transparency, Supervisory and Control, within the context of the suit originated from access to information request number 00075000540201776.

67 CGU. **Guia de Integridade Pública**: orientações para a administração pública federal: direta, indireta e fundacional. Brasília, 2015, p. 26. Available at: <<http://www.cgu.gov.br/Publicacoes/etica-e-integridade/arquivos/guia-de-integridade-publica.pdf>>. Accessed on: April 15, 2017.

## PUBLIC BIDDING PROCESSES

Brazil's Constitution makes distinctions on the treatment that is to be given to bids and contracts signed by the direct, local and foundation-related administration, and those conducted by public enterprises, mixed-capital companies and their subsidiaries. This distinction emerged from Constitutional Amendment No. 19 of 1998, which established that public enterprises and mixed-capital companies, when carrying out economic activities, are subject to the provisions made in article 173, §1, III<sup>68</sup>.

The objective was to ensure that SOEs, those that perform any kind of economic activity, had less strict or formal rules, in order to provide them with greater administrative flexibility, given the competition regime imposed on them. As Marçal Justen Filho points out, “the public law regime [for public bidding contracts] entails difficulties that are an overwhelming burden on SOEs”<sup>69</sup>. However, the constitutional provision for the existence of two separate bidding regimes, introduced in 1998 under the purview of Public Administration, had not yet been implemented in July 2016, when the SOEs Act came into force.

In the meantime, jurisprudence and doctrine moved in the direction that would eventually be

adopted by the SOEs Act<sup>70</sup>. The Federal Accounting Court (TCU, the “Tribunal de Contas da União” in Portuguese), in turn, settled the matter by confirming the understanding that state-owned enterprises – public enterprises and mixed-capital companies (those that perform economic activities) – would be exempt from complying with the General Regime for Public Biddings (Law No. 8,666, from 1993) when performing their main economic activities<sup>71</sup>. Conversely, in the contracts involving their other activities, they should observe the provisions contained in Law No. 8,666, of 1993, which could only be waived in situations where there were proven to be business obstacles significant enough to impair the SOE's activities.

The discussion then turned to the applicability of this legally binding understanding to SOEs acting as public service providers on a competitive basis. Marçal Justen Filho<sup>72</sup> and José Eduardo Cardozo<sup>73</sup> were in favour that the exception described above should be extended beyond just SOEs that perform economic activities. The SOEs Act enshrined this understanding by exempting, even the public service companies, from the obligation of entering public bidding processes in cases where the awarding of the contract is

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68 Article 173, § 1: “The law shall establish the legal status of the public companies, the mixed-capital corporations and their subsidiaries that conduct the economic activity of producing or trading goods or providing services, providing for: III – bidding and contracting of works, services, purchases and dispositions of property, observing the principles of public administration”.

69 JUSTEN FILHO, M. A contratação sem licitação nas empresas estatais. IN: \_\_\_\_\_ (org.) **Estatuto jurídico das empresas estatais**. São Paulo: Revista dos Tribunais, 2016, p. 285.

70 Between 1998 and 2016, specific rules also emerged for some SOEs, expressly exempting them from complying with the Public Bidding Processes Act. This was the case for Empresa Brasileira de Comunicações (article 25, Law No. 11,625, of 2008), Eletrobras (Law No. 11,943, of 2009) and Petrobras (Decree No. 2,475, of 1998). The State-Owned Enterprises Act repealed the latter two, and the first was never used. PEREIRA, C. A. G. Processo licitatório das empresas estatais: finalidades, princípios e disposições gerais. IN: JUSTEN FILHO, M. (org.) **Estatuto jurídico das empresas estatais**. São Paulo: Revista dos Tribunais, 2016, p. 350.

71 This interpretation was enshrined, for example, in Appellate Decisions numbers 121-1998 and 624-2003, especially in the opinion given by Justice Benjamin Zymler in the latter Decision. The central point of the argument was that the bidding requirement for a company's core activity could ultimately require, for example, that BR Distribuidora bid for the disposal of the fuel it trades. The legal logic followed that the Law, by assigning certain goals – in this case, business performance in a competitive environment –, also provides the necessary means for its accomplishment.

72 JUSTEN FILHO, M. **Comentários à Lei de Licitações e Contratos Administrativos**. São Paulo: Revista dos Tribunais, 2014, p. 39.

73 CARDOZO, J. E. O dever de licitar e os contratos das empresas estatais que exercem atividade econômica. IN: \_\_\_\_\_; QUEIROZ, J. E. L.; SANTOS, M. W. B. (coord.) **Direito administrativo econômico**. São Paulo: Atlas, 2011, p. 1292.

related to the company's corporate purpose (article 28, paragraph 3)<sup>74</sup>.

In general, it can be stated that, with the State-Owned Enterprises Act, more specific and appropriate rules were established for bidding processes and contracting public enterprises and mixed-capital companies, regardless of the nature of the activity performed (whether they provide public services or perform economic activities).

Consequently, Law No. 8,666 of 1993 ceased to apply to these entities, except in the cases expressly described in Law No. 13,303 of 2016 (concerning sanctions for misconduct and a few tiebreaker criteria for public biddings). One innovation introduced by the State-Owned Enterprises Act is that of applying joint liability in direct contracting cases where excessive and abusive prices are charged. Following the norms of article 30, paragraph 2, all parties responsible for awarding such contracts, as well as the supplier or service provider, will be held accountable. An explicit definition for overpricing and billing fraud was also introduced (art. 30, §1), in order to establish stricter criteria for the assessment and suppression of these phenomena<sup>75</sup>.

However, public contract auctions, as regulated by Law No. 10,520 of 2002, will be the preferred form of bidding for public enterprises and

mixed-capital companies in cases of acquisition of common goods and services.

It is worth noting that Law No. 13,303 incorporated many procedures from the Differentiated Contracting Regime (DRC, "Regime Diferenciado de Contratações" in Portuguese). Moreover, it is worth noting that, in cases where the bidding process was waived, the SOEs Act establishes limits of 100 thousand BRL for engineering works and services and 50 thousand BRL for other purchases and services – amounts that are reasonably greater than those provided for by the Public Bidding Processes Act. The SOEs Act also allows these exemption limits to be changed to reflect cost variation, as determined by the public enterprise or mixed-capital company's Board of Directors, allowing different amounts for each company (article 29, § 3). There are no limits set for this variation.

Law No. 13,303 of 2016 is regulated by Decree No. 8,945 of 2016, which established that information from SOEs relating to bids and contracts, including those relating to pricing bases, must be stored in updated electronic databases with real-time access to the federal government's external and internal control organs<sup>76</sup>.

It should be noted that bids and contracts present specific risks that need to be addressed by the Integrity Programs.

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74 Law No. 13,303, of 2016, article 28 §3 – "Public companies and mixed-capital corporations are exempt from complying with the provisions of this Chapter in the following situations: I – direct commercialisation, providing or performing of products, services or public works, by the companies mentioned in the head provision, specifically related to their respective corporate objects".

75 PEREIRA, C. A. G. Processo licitatório das empresas estatais: finalidades, princípios e disposições gerais. In: JUSTEN FILHO, M. (org.) **Estatuto jurídico das empresas estatais**. São Paulo: Revista dos Tribunais, 2016, p. 340.

76 Decree No. 8,945, of 2016, article 46: "Information from SOEs about bids and contracts, including those about price bases, will be contained in up-to-date electronic databases with real-time access to the Federal Government's external and internal supervisory bodies. § 1º The audited financial statements of the SOE will be made available on the company's website, including in editable electronic formats. § 2º The minutes and other files resulting from ordinary or extraordinary meetings of SOEs' Executive Boards or Supervisory Boards, including recordings and filming, if there are any, shall be made available to the supervisory bodies whenever requested, as part of the auditing work. § 3º Access by control bodies to the information to which this Chapter referred shall be restricted and individualised".

## PRACTICAL RECOMMENDATIONS FOR BIDDING PROCESSES

The CGU's Public Integrity Guide offers some practical recommendations that are specially applicable for SOEs:

- Establishing internal regulations to oversee the relationship between civil servants and suppliers of goods and services and to determine, in a transparent manner, the selection criteria for those suppliers and their access to decision-makers in the bidding process;
- Evaluation of the proportion of acquisitions made by direct contracting – waiving or not requiring bidding – and the number of contract amendments being added, and what changes they make in relation to the initial contract;
- Provisions should be made for the separation of functions – authorisation and approval of operations, execution and control, as well as accounting. Thus, the same person will never have overlapping roles and attributions;
- Setting up of time limits for the performance of key activities such as purchasing and bidding;
- Some requirements may also be imposed – in the request for proposals, or even in the contract to be signed – which reflect the public administration's commitment to integrity and, as such, serve as an end in and of itself as a public policy instrument to encourage adopting anti-corruption measures. This is the case of the commitment to integrity in public-private relations, including the creation or application of its Integrity Program, pursuant to Decree No. 8,420 of 2015, which regulated the Anti-Corruption Act;
- It is recommended, whenever possible and in accordance with the risk of the operation, to verify whether the individual or legal entity has any history of involvement in harmful acts against the Public Administration.
- Verifying information about the partners, managers and administrators of the bidding companies is a procedure that can greatly contribute to the goal of preventing any disreputable companies from entering the bidding, as well as to prevent several other types of fraud. The use of this information facilitates the investigation of suspected bid fraud and helps in ascertaining the contract integrity risk rating, as discussed in this session.

# TRANSPARENCY

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The IBGC considers transparency, as well as accountability, to be some of the pillars of

corporate governance. In this sense, transparency is understood as

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More than the obligation to divulge information, it is the desire to provide stakeholders with all the information that is valuable to them, rather than only information required by laws or regulations. Proper transparency results from an environment built on trust, both internally and in the company's relationships with third parties. Beyond the organization's financial performance, it should also contemplate other factors (including intangible factors) that guide managerial action and lead to the preservation and optimization of the organization's value<sup>77</sup>.

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In the context of SOEs, transparency has broader functions than just those concerning the fight against corruption. It is absolutely essential for citizens to monitor the use of public resources in terms of efficiency, taking into account the existence of alternative forms of organising state activity and its interference in the economy.

Because SOEs play roles that go beyond merely commercial ones, which is to say, they are instruments for carrying out public policies, a correspondingly significant level of transparency is

needed to ensure the said instrument's efficiency towards the intended purpose. Transparency mechanisms will allow the public and other monitoring institutions, be they political or legal, to reap the results achieved after investing resources and effort. After all, the performance of SOEs often undermines the competition regime due to the exceptional advantages they have over private competitors.

In this context, Transparency International signals that:

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The government's ownership entity should establish consistent and aggregate reporting on SOEs and produce an annual aggregate report, as a key transparency tool directed to parliament as well as the media and general public. It should provide information on the financial performance, main financial indicators and value of SOEs, as well as the general statement of the state's ownership policy and its implementation, including information on how the ownership function is organised. This report should also contain individual reporting on the most important SOEs<sup>78</sup>.

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77 IBGC. **Code of best practices of corporate governance**. São Paulo, 2016, p. 20.

78 TRANSPARENCY INTERNATIONAL. **Anti-corruption help desk: Transparency of state-owned enterprises**. Berlin, February 15, 2013. Available at: <[http://www.transparency.org/files/content/corruptionqas/Transparency\\_of\\_state\\_owned\\_enterprises.pdf](http://www.transparency.org/files/content/corruptionqas/Transparency_of_state_owned_enterprises.pdf)>. Accessed on: May 6, 2017.

Along the same lines, the OECD states that SOEs must achieve a high level of transparency and be subject to the same accounting, public

awareness, compliance and auditing standards as listed companies.

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SOEs should report material financial and non-financial information on the enterprise in line with high quality internationally recognized standards of corporate disclosure, and including areas of significant concern for the state as an owner and the general public. This includes in particular SOE activities that are carried out in the public interest<sup>79</sup>.

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The OECD also provides a list of information and documents to be made publicly available, such as (i) a statement on the objectives of the SOE and the fulfilling thereof; (ii) financial and operational results, with particular emphasis on costs incurred in achieving public policy objectives; (iii) the corporate governance, ownership and voting structure; (iv) the compensation amounts paid to the members of the Board of Directors and chief executives; (v) information on the board members, namely their qualifications, what their recruitment process was like, the roles they perform; (vi) future material risks and plans to minimise them; (vii) financial and other types of assistance received from the State; among others<sup>80</sup>.

Applying this concept to SOEs, the interpretation of “stakeholders” should be as broad as possible, bearing in mind that their primary function is to serve the public interest.

As noted, transparency is one of the cornerstones of B3’s SOEs’ Distinction in Governance Program. In this context, the main measures to be adopted are disclosing internal policies and corporate bylaws on the internet, improving the Reference Forms’ content, releasing

an Annual Corporate Governance Letter, developing an information disclosure policy and the production of an integrated or sustainability report. It is important to note the concern over defining and disclosing the objectives of the SOE in question and the State’s role in managing said company, as a way to enable monitoring whether the purported public interest was served further down the road<sup>81</sup>.

At the domestic level, the Access to Information Act (Law No. 12,527/2011) undoubtedly represents the main Brazilian legal framework regarding the realisation of the right to access to information. This right had already been recognised by both the Federal Constitution<sup>82</sup> and international treaties ratified by Brazil<sup>83</sup>. However, it was only with the enactment of this legislation that the right of access to information began to be effectively realised.

The Access to Information Act’s applicability to SOEs is not a point of contention. After all, article 1, II, explains that the following entities are subordinated to that legislation: “agencies, public foundations, public enterprises, mixed-capital companies and other entities controlled directly or indirectly by the Union, states, the Federal District and municipalities”. Thus, there is no doubt that

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79 OCDE. *OECD Guidelines on Corporate Governance of State-Owned Enterprises*. Paris, 2015, p. 24. Available at: <[https://www.oecd-ilibrary.org/governance/oecd-guidelines-on-corporate-governance-of-state-owned-enterprises-2015\\_9789264244160-en](https://www.oecd-ilibrary.org/governance/oecd-guidelines-on-corporate-governance-of-state-owned-enterprises-2015_9789264244160-en)>. Accessed on: May 5, 2017.

80 Ibid.

81 BM&F BOVESPA. *Programa Destaque em Governança de Estatais*. São Paulo, September, 2015. Available at: <[http://www.bmfbovespa.com.br/pt\\_br/listagem/acoes/governanca-de-estatais/](http://www.bmfbovespa.com.br/pt_br/listagem/acoes/governanca-de-estatais/)>. Accessed on: May 5, 2017.

82 Federal Constitution of Brazil, article 5, XXIII.

83 International Covenant on Civil and Political Rights, article 19 (American Convention on Human Rights, article 13).

SOEs are subject to the transparency and public disclosure obligations imposed by Law 12,527 of 2011<sup>84</sup>. It is simply the implementation of a constitutional provision, specifically concerning transparency, which states “the law shall regulate the relations of public enterprises with the State and society” (article 173, §3).

On an important note, the system created by this legislation treats transparency and access to

information as rules that can only be suspended in exceptional cases, which must be provided for in the legislation, after being duly justified.

The Access to Information Act does not tackle this special treatment given to SOEs, which derives from the fact that many of them operate in the competitive market. It was, however, the object of Decree No. 7,724/2012, which regulates said Act and states that:

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Article 5 § 1: The disclosure of information, made by public enterprises, mixed-capital companies and other entities controlled by the Federal Government acting in a competitive basis, subject to the provisions made in article 173 of the Constitution, shall be subject to the respective rules of the Securities Commission to ensure its competitiveness, corporate governance and, where applicable, the interests of minority shareholders.

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However, one must interpret this provision bearing in mind the fact that, in Brazilian law, regulations cannot impose new restrictions that were not established in the original piece of

legislation it intends to regulate. After all, the CGU has already consolidated the legal understanding that:

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Any limitation on fundamental rights must be interpreted restrictively, as it is not possible to increase the list of exceptions to the principle of maximum disclosure except by law, according to the prevailing legal interpretation in the nation and to inter-American interpretations [...]. In this sense, a different interpretation does not seem justified to us, except for any that would apply article 5, §1 of Decree 7,724/2012 to obligations of active transparency, leaving the cases contained in articles 22, 23 and 32 of Law 12,527/2011 as the only exceptions to the maximum disclosure principle<sup>85</sup>.

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The Securities Commission has some relevant rules, the scope of which covers SOEs. For example, Normative Instruction No. 358/2002 provides for

the obligation of publicly traded companies to disclose any acts or facts deemed important<sup>86</sup>. Normative Instruction No. 480/2009, in turn, makes

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84 This has also been enshrined as the constitutional principle regulating the Public Administration's functioning, as per article 37 of the Federal Constitution.

85 Excerpt from the ruling given by the Ministry of Transparency, Supervisory and Control, within the context of the suit originated from access to information request No. 99902.000049/2013-99.

86 Article 2 of Normative Instruction No. 358/2002 details this thusly: “For the purposes of this Instruction, any decision made by the controlling shareholder, deliberation by the general meeting or the management bodies of the publicly traded company, or any other act or fact of a political-administrative, technical, business or economic-financial nature is deemed relevant, as well as any decision related to its business that may have a significant influence on: I – the quotation of securities issued by the publicly traded company or others referenced to them; II – investors’ decisions to buy, sell or hold those securities; III – investors’ decisions to exercise any rights inherent to the condition of the holder of securities issued by the company or others referenced to them.”

explicit the need to divulge information, general or otherwise, on the compensation of members of the Board of Directors, the Supervisory Board and the Board of Executives. Regarding the issue of compensation, federal SOEs must also comply with Inter-ministerial Ordinance No. 233, of May 25, 2012, which deals with the procedures for disclosing this information.

Still regarding aspects related to active transparency, it is worth mentioning the Inter-ministerial Commission for Corporate Governance and the Management of Corporate Equity's Resolution No. 5, of September 29, 2015. This resolution states that federal SOEs are required to disclose a series of relevant information on an organised, easily accessible, official website. They are as follows:

- I – originating act or law;
- II – corporate bylaws;
- III – the institution's mission statement, principles and values;
- IV – code of ethics;
- V – how capital stock is composed;
- VI – composition of the executive board;
- VII – composition of the board of directors and supervisory board;
- VIII – excerpts from the general meetings minutes, depending on each case;

- IX – yearly financial statements from publicly traded companies, accompanied by supervisory board and the independent auditors' opinions;
- X – yearly management report;
- XI – quarterly financial statements;
- XII – social report, if there is any;
- XIII – relevant facts and releases made to the market, if there are any; and
- XIV – abridged curriculum vitae of the corporate management and supervisory bodies' members<sup>87</sup>.

These obligations are enforceable by both the CGU and the Supervisory Board of the respective companies.

Transparency rules specific to SOEs have recently been introduced into the country through the State-Owned Enterprises Act<sup>88</sup>. These are mostly active transparency norms<sup>89</sup>. Special mention must be made to its article 8, IV, which intends to consolidate an important practice: the elaboration of information disclosure policies, that is, proactive planning of what types of information will be disclosed, how to disclose it, etc. Said disclosure must be permanent and cumulative, referring to both current and past information<sup>90</sup>. Thus, in this arrangement, planning becomes a tool

87 CGPAR Resolution No. 5, of September 29, 2015, article 1. Available at: <<https://www.legisweb.com.br/legislacao/?id=304267>>. Accessed on: May 5, 2017.

88 Without prejudice to the Securities Commission rules, as explained by article 8, §3, of the SOEs Act.

89 Law No. 13,303/2016, article 8 – “Public companies and mixed-capital corporations must at least comply with the following transparency requirements: I – drafting of a yearly letter, signed by the members of the Executive Board, outlining the company in question's commitment to achieving public policy objectives, in compliance with the collective interest or the imperative of national security which motivated the authorisation for its creation, with a clear definition of the resources to be used for this purpose, as well as the economic and financial impacts of achieving these objectives, measurable through objective indicators; II – adaptation of the corporate bylaws to the legislative authorisation for the company's creation; **III – timely and up-to-date disclosure of relevant information, in particular when related to the activities performed, supervisory structure, risk factors, economic and financial data, the management's comments on corporate governance performance, policies and practices, and descriptions of the composition and compensation of the company's administration;** IV – elaboration and dissemination of an information disclosure policy, in accordance with current legislation and best practices; V – drafting of a dividend payout policy, pursuant to the public interest that justified the creation of the public company or mixed-capital corporation; VI – dissemination, in a note explaining the financial statements, of the operating and financial data of activities related to the achievement of collective interest or national security purposes; VII – elaboration and dissemination of a policy regarding transactions made with related parties, in accordance with the demands of competitiveness, compliance, transparency, fairness and commutativity, which shall be reviewed at least annually and approved by the Executive Board; VIII – extensive dissemination to the general public of an annual corporate governance letter, which consolidates in a single written document, in clear and direct language, the information referred to in item III; IX – annual dissemination of an integrated or sustainability report”. **Bolded emphasis added.**

90 CARDOSO, A. G. Governança corporativa, transparência e compliance nas empresas estatais: o regime instituído pela Lei nº 13.303/2016. IN: JUSTEN FILHO, M. (org.) *Estatuto jurídico das empresas estatais*. São Paulo: Revista dos Tribunais, 2016, p. 101.

that allows for demanding and enforcing higher levels of transparency in each case.

One issue concerning limitations on the transparency obligations of SOEs – as well as other public administration bodies – that has been settled is that of restricted access to personal information, that is, information that may expose the privacy and intimacy of individuals. Law No. 12,527 itself, in its article 31, provides for this exception with the purpose of preserving these constitutional rights and values (article 5, X, of the Federal Constitution)<sup>91</sup>. Other exceptions provided for in the legislation refer to information protected by the principles of legal confidentiality and banking and industrial secrecy<sup>92</sup>.

As far as SOEs are concerned, industrial secrecy is at the heart of the debate: what information, once disclosed, can compromise company strategy and offer competitors an advantage? At this point, SEST disclaims any liability, stating it “has no legal jurisdiction to identify what information may or may not affect ‘competitive advantages’, which should be analysed on an individual basis by the state-owned enterprise itself.” In fact, it seems to have prepared a specific document (“SEST and the Access to Information Act”) in order to formalise the suggestion that “access requests always be directed to the state-owned enterprise in question”<sup>93</sup>. This is a clear demonstration of the dual model’s adverse effects.

Active and passive transparency are, naturally, complementary elements. Increasing active transparency actions by spontaneously

disclosing as much relevant information as possible has the effect of minimising the number of requests for access to information, reducing the costs associated with processing them<sup>94</sup>. This information, however, must be divulged in an organised, open, centralised and accessible format for the majority of the population, otherwise it may prove insufficient in the light of the Access to Information Act and the State-Owned Enterprises Act’s legal requirements. It is noteworthy that the contemporary challenge for transparency will be the implementation of a new generation of instruments that allow for more friendly access to content and, above all, the viability of handling the information offered. Another cutting-edge topic in transparency is the implementation of open data policies, in line with the guidelines of Decree No. 8,777 of 2016, done in observance of the particulars of each SOE.

With regards to passive transparency obligations, federal SOEs are subject to the CGU’s Citizens Information Service system, while state and municipal SOEs have (or should have) been developing similar mechanisms, so as to comply with article 9, I, of Law No. 12,527/2011.

In addition to working as a court of appeals for access to information requests, the CGU also plays a role in promoting compliance with the law. It presented, for example, a list of the least responsive federal agencies on requests for access to information cases, including three SOEs: Centrais Elétricas de Rondônia SA, Centrais de Abastecimento de Minas Gerais SA and Companhia das Docas do

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91 Law No. 12,527 of 2011, article 31 – “The processing of personal information must be done in a transparent and respectful manner with regards to the privacy, personal lives, honour and image of individuals, as well as individual freedoms and guarantees. Paragraph 1. The personal information to which the article refers, relating to privacy, personal lives, honour and image: I – shall have restricted access, regardless of confidentiality classification and for a maximum of 100 (one hundred) years from their date of production, to legally authorised public agents and to the person to whom they refer; and II – may have its disclosure or access authorised by third parties via legal provisions or express consent of the person to whom they refer”.

92 Decree No. 7,724 of 2012, article 6, I.

93 SEST. **SEST e a Lei de Acesso à Informação (LAI)**. Brasília, September 29, 2016. Available at: <[http://www.planejamento.gov.br/assuntos/empresas-estatais/publicacoes/160929\\_sest-e-a-lei-de-acesso-a-informacao.pdf](http://www.planejamento.gov.br/assuntos/empresas-estatais/publicacoes/160929_sest-e-a-lei-de-acesso-a-informacao.pdf)>. Accessed on: May 5, 2017.

94 CGU. **Guia de Integridade Pública**: Orientações para a administração pública federal: direta, indireta e fundacional. Brasília, 2015, p. 30-2. Available at: <<http://www.cgu.gov.br/Publicacoes/etica-e-integridade/arquivos/guia-de-integridade-publica.pdf>>. Accessed on: April 15, 2017.

Estado da Bahia. The so-called “name and shame” practice was accompanied by effective intervention by the CGU in extreme cases<sup>95</sup>.

In order to simplify the process of requesting information and avoid duplicated requests, the State-Owned Enterprises Act itself provides, in its article 8, §4, that “documents resulting from

the fulfilment of the transparency requirements contained in clauses I through IX of the article’s head provision shall be publicly and permanently disclosed on the internet”.

However, it is important to make a distinction between SOEs operating on a competitive basis and those that do not:

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The CGU adopts the understanding that public enterprises, mixed-capital companies and their subsidiaries are not required to respond to requests for information when said information may result in an advantage for their competitors, compromising their business strategy, corporate governance, or the interests of its shareholders<sup>96</sup>.

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The issue of industrial secrecy is thus a legitimate motivation for rejecting requests for access to information, and may only be invoked by companies operating on a competitive basis. Still, it cannot be invoked in all cases and must have good foundations, as per each specific case.

Thus, it is clear that exceptions to the Access to Information Act should be interpreted restrictively to prevent their effective implementation and operation.

In terms of passive transparency, it is worth noting that responses to requests submitted to SOEs are rarely overruled by the CGU. In other words, out of all the cases in which appeals were made to the CGU, only a small number was sustained. Ever since the e-SIC webpage was implemented in May 2012, 1,600 appeals have been submitted to the CGU (up until May 15, 2017), only 98 of which (6.12%) were fully sustained, with 44 (2.75%) being partially sustained<sup>97</sup>.

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95 RODRIGUES, P. CGU lista os órgãos e empresas estatais mais omissos em pedidos de informação. **Poder 360**. Brasília, January 17, 2017. Available at: <<http://www.poder360.com.br/brasil/cgu-intervem-para-melhorar-transparencia-de-orgaos-e-empresas-estatais/>>. Accessed on: May 4, 2017.

96 BENTO, L. V.; BRINGEL, P. O. M. Limites à transparência pública das empresas estatais: análise crítica da aplicação da Lei de Acesso à Informação (Lei nº 12.527/2011) a empresas públicas e sociedades de economia mista. **XXIII COMPEDI/UFPB**, 2014, p. 13.

97 Information obtained through Access to Information Request No. 00075.000570/2017-82. In terms of comparison, the average success rate for appeals to the Ministry of Transparency, Supervisory and Control is 5.55% (total deferrals) and 2.3% (partial deferrals).

# INSTITUTIONAL RELATIONS IN STATE-OWNED ENTERPRISES

The political relationship between the Legislative branch, the Executive branch and SOEs has already been discussed in the first lines of this paper. In this section, the analysis will

focus mainly on the control mechanisms available to the aforementioned branches of government concerning institutional relations and the operation and administration of SOEs.

## LEGISLATIVE BRANCH

The starting point for exercising this control is obtaining the mandatory authorisation from Congress (at the national level), Legislative Assemblies (at the state level) or City Councils (at the municipal level) for the set up of any public enterprise or mixed-capital company. This authorisation is a requirement imposed by the Federal Constitution (article 37, XIX), which determines that, in order to set up each SOE, and to define its areas of activity, a specific, ad-hoc law must be enacted<sup>98</sup>.

Another form of the Legislative branch's control over SOEs refers to the approval of their annual budgets and the control of budget execution. This control is based on the determination that the annual budget law will comprise both "the investment budget of companies in which the Union directly or indirectly holds the majority of voting capital" (article 165, §5, II, of the Federal Constitution) as well as the fiscal and social security budgets (article 165, §5, I and III). This important distinction, however, must be clarified in order to understand the variation in the scope of this budget control.

SOEs are considered dependent when they do not have an investment budget, their budget resources, originating from the National Treasury, is coming from the fiscal or social security budget (article 165, §5, I and III)<sup>99</sup>. In turn, independent SOEs are those whose resources derive from the SOEs' Investment Budget (OI, the "Orçamento de Investimento das Empresas Estatais" in Portuguese), and not directly from the National Treasury. By being allocated to the OI, the expenses of independent SOEs are ensured greater administrative and financial autonomy. The organ responsible for the elaboration of the OI is SEST, the aforementioned organ of the Ministry of Planning. The main practical implication of this differentiation is that dependent SOEs are subject to the same tax restrictions as the rest of the direct public administration, mainly via the Fiscal Responsibility Act, which has already been recognised by the Federal Accounting Court itself (Appellate Decision 357-2015)<sup>100</sup>.

It should also be noted that transfers of public funds to cover a possible operational deficit of independent SOEs are allowed only

98 However, legislative authorisation will not be required in order to approve a role structure or create new positions within a SOE — these are functions that may be carried out through internal acts. SOEs are, therefore, outside the scope of article 61, §1, II, of the Federal Constitution. ARAGÃO, A. **Empresas estatais: o regime jurídico das empresas públicas e sociedades de economia mista**. São Paulo: Forense, 2017, p. 367.

99 Some examples of dependent SOEs are Conab, Codevasf and Embrapa.

100 ARAGÃO, A. **Empresas estatais: o regime jurídico das empresas públicas e sociedades de economia mista**. São Paulo: Forense, 2017, p. 285-7.

in exceptional situations. Conversely, any such financial transfer to the State must be reimbursed by the State<sup>101</sup>. Finally, with regard to budgetary aspects, internal and external credit operations of all entities controlled by the federal government are also subject to the Senate's approval, which also includes SOEs (article 52, VII, Federal Constitution).

As an ancillary organ of the Executive Branch, the Federal Accounting Court also plays an important role in monitoring SOEs. Using both objective<sup>102</sup> and subjective<sup>103</sup> criteria, all types of SOEs are subject to the control of the Audit Courts. The SOEs Act also acknowledged this<sup>104</sup>, which enshrined the understanding that such controls should be compatible with their economic activities, however. This is what article 90 of the SOEs Act says: "the actions and deliberations of the controlling body or entity may not interfere

in the management of public enterprises and mixed-capital companies which are submitted to it, nor in the exercise of their powers or in the definition of public policies"<sup>105</sup>.

The logic behind this legal device is that the controls provided carry risks and expenses that are not applicable to competing (private) companies. The resulting competitive disadvantages, which go beyond internal management and encompass the relationships of SOEs with their trading partners, must be minimised precisely to prevent that the entire purpose of monitoring and controlling – ensuring that the actions of public agents are always economically efficient – from becoming jeopardised.

Alexandre de Aragão agrees with this understanding:

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It is necessary, on one hand, that the SOEs' external controls not be removed *tout court*, but, on the other hand, they should be exercised in a manner compatible with the need to ensure as much equality and competitiveness as possible for their market operations, allowing for the highest possible level of efficiency<sup>106</sup>.

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Accordingly, it is incumbent upon the Audit Courts, by virtue of their external control functions, a significant portion of responsibility for overseeing SOEs with regard to the aspects related to legality, legitimacy, economicity, as well as to the proper application of financial and budgetary resources. These courts act to ensure

transparency about risks and opportunities, to issue recommendations to those using public resources and to demonstrate and punish conducts, processes and decisions carried out outside the law and the principles governing Public Administration.

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101 *Ibid*, p. 287.

102 Federal Constitution, article 70, sole paragraph – "All natural or legal persons, be they public or private, who use, collect, store, manage or administer public assets, property and securities, or those assets for which the Federal Government is responsible, or persons who, on the Federal Government's behalf, take on obligations of a pecuniary nature, shall perform their due diligence as it pertains to accountability transparency".

103 Federal Constitution, article 70, head provision – "The Federal Government's accounting, financial, budgetary, operational and patrimonial inspections, as well as those conducted by direct and indirect administration entities, concerning the legality, legitimacy, economicity, application of subsidies and revenue waivers, will be exercised by the National Congress, through external controls, and by the internal control system of each government branch".

104 Law No. 13,303, of 2016, article 85 – "The external and internal control bodies of the 3 (three) spheres of government shall supervise public companies and related mixed-capital corporations, including those based abroad, with regards to the legitimacy, economicity and effectiveness of the application of their resources from an accounting, financial, operational and equity standpoint".

105 This idea is reinforced by articles 49 and 50 of Decree No. 8,945 of 2016.

106 ARAGÃO, A. *Empresas estatais: o regime jurídico das empresas públicas e sociedades de economia mista*. São Paulo: Forense, 2017, p. 372.

They are institutions invariably linked to the fight against corruption. In this regard, in terms of strategic initiative, the Federal Accounting Court created the Project for Combating Deviations and Irregularities and the Secretariat for Special Infrastructure Operations (“Seinfra Operações”, in Portuguese). The Project for Combating Deviations and Irregularities, created in October 2015, is headed by the General Council for External Controls over Services Essential to the State (“Coordenação-Geral de Controle Externo dos Serviços Essenciais ao Estado”, in Portuguese) and is supported by the Secretariat of Methods and Support for External Controls (“Secretaria de Métodos e Suporte ao Controle Externo”, in Portuguese). Its role is to map and disseminate

good practices in the fight against fraud and corruption in Public Administration, in order to provide optimal responses and actions related to ethics management and to the conduct of senior management; the transparency and accountability of their activities; the reporting channel and procedures for the determination, implementation and revising of preventive and detaining controls; the role of the internal audit and risk management unit; the punishment of those responsible for fraud and damages compensation; among other actions. At a later stage, the project is prepared to elaborate, under the purview of External Controls, norms with guidelines for conducting monitoring actions focused on combating fraud and corruption.

## THE SECRETARIAT FOR SPECIAL INFRASTRUCTURE OPERATIONS

Seinfra Operações, created in January 2016 with 20 experienced auditors, began its work prioritising the inspections and instructions related to Operation Carwash. Their work today includes hiring processes at Petrobras, as well as Eletronuclear’s constructions contracts, acquisitions and services. The different context is reflected in the fact that the court responsible for conducting Operation Carwash has provided the Federal Accounting Court with information from investigations, seeking to prevent, detect and hold corrupt practices accountable. Because of this, the Secretariat is responsible for monitoring all matters in the infrastructure sector related to the leniency agreements arising from the Anti-Corruption Act.

It is worth noting that the Fiscal Responsibility Act gave the Audit Courts greater prerogatives for carrying out fiscal management control. The courts also became competent to oversee the total amounts spent on personnel, inactive staff and pensioners, and consolidated and securities debts, with the aim of ensuring they do not exceed the legally prescribed limits. They are also responsible for alerting the branches of government and relevant organs whenever

they uncover facts that compromise the costs and results of programs or even evidence of irregularities in budget management (article 59 of the Fiscal Responsibility Act).

The Audit Courts’ efforts seek to promote accountability to society, as well as the accountability of public agents in cases of illegal or illegitimate spending, and also the effective pursuit of public policies laid out by the government branches and their agencies.

## JUDICIARY BRANCH

The mechanisms for monitoring SOEs available to the Judiciary branch follow the principle of non-objection of jurisdictional control, inscribed in the Federal Constitution (article 5, XXXV). This means that there are multiple instances in which courts may interfere with the performance of SOEs – instances wherein minority shareholders rise up against the controlling State (or vice versa), as well as citizen control actions in the face of Public Administration, which encompasses SOEs (for example, citizen suits<sup>107</sup>). Also included are legal challenges to public bidding processes, public civil actions, among others.

In any case, it is necessary to reiterate the aforementioned consideration brought by article 90 of the SOEs Act: the Judiciary shall not interfere in the management of public enterprises or in the exercise of their functions, nor in the definition of public policies. One must infer a corollary, that of always deferring to the top administrator's decisions, whenever said administrator acts logically within reason, legality, transparency and other principles that guide the performance of public agents. It is the application of the “business judgment rule”, which states that the decisions made by managers enjoy a strong presumption of legitimacy and good faith<sup>108</sup>.

## OPERATION CARWASH AND PETROBRAS

Recent events have given rise to a new dynamic in the relationship between SOEs and the Judiciary branch. Operation Carwash (“Operação Lava Jato”) is, so far, responsible for returning more than 700 million BRL to Petrobras’ coffers, with funds from plea-bargain deals and leniency agreements. Furthermore, the company is the co-plaintiff, along with the Public Prosecutor’s Office and the Federal Government, in 13 administrative misconduct actions and assistant to the prosecution in 33 criminal proceedings. Thus, a scenario is drawn in which the criminal prosecution system has assisted in the recovery of resources diverted from the company by the now-dismantled corruption schemes. As new scandals in other SOEs are uncovered, this cooperation mechanism is likely to be replicated.

107 Express provision of Law No. 4,717 of 1965.

108 ARAGÃO, A. *Empresas estatais: o regime jurídico das empresas públicas e sociedades de economia mista*. São Paulo: Forense, 2017, p. 374.

# INTERNAL CONTROLS

Special mention must also be given to SOEs' Supervisory Board and to the Office of the Comptroller General, as components of the systems of prevention, detection and punishment of acts that violate the ethics and integrity of SOEs, exercising important control functions of said companies.

The purpose of the Supervisory Board is to supervise the administrators' actions, ensuring that business management meets the SOE's objectives. In said companies, it is mandatory to have such a board, which must always be operational. It is considered an independent control and inspection body, as well as an important agent in the company's governance system.

In general, it can be said that it is up to the Supervisory Board to express its opinion on matters of interest to the company, suggesting changes, when necessary, or pointing out any irregularities found. The scope of its supervisory activity includes checking for compliance with legal and statutory obligations, but is not limited to just analysing and examining financial statements, as it encompasses the entire economic and financial situation of the entity to which it pertains<sup>109</sup>. Board members must act in harmony with other corporate governance bodies, in particular the Audit Committee and the internal auditing department, as such bodies provide this Board with a continuous view of business risks and weaknesses, as well as the Company's internal controls.

The SOEs Act eliminated any potential questions about the mandatory nature of the Supervisory Board's functioning in SOEs.

Specifically in its article 13, IV, the Act established that any law authorising the creation of a public enterprise or mixed-capital company should also provide for the constitution and operation of its related Supervisory Board. Nevertheless, it did not give a detailed explanation of the issue, preferring instead to reference the Corporations Act (Law No. 6,404/1976).

The composition of the Board must balance the participation of controlling and non-controlling partners. Once nominated, however, board members should work autonomously from the members who nominated them and secured their election<sup>110</sup>. It is recommended to avoid political party nominees and that the recruitment process is transparent and rigorously based on characteristics such as sound reputation, academic background, experience in accountability and technical training in areas relevant to the company's activities and its management, with adequate compensation.

The State-Owned Enterprises Act, however, did not impose the same restrictions that it placed on the appointment of administrators to the members of the Supervisory Board, only signalling that they should be "residents of the country, with an academic background compatible with the exercise of the function, having exercised, for a minimum term of three (3) years, a management or advisory position in the public administration, or a position of supervising advisor or manager in a company" (article 26, paragraph 1).

Board members have the same duties as the managers and are responsible for damages resulting from oversights and shortcomings in the

109 WONTROBA, B. G. O Conselho Fiscal nas empresas estatais, de acordo com a Lei nº 13.303/2016. In: JUSTEN FILHO, M. (org.) *Estatuto jurídico das empresas estatais*. São Paulo: Revista dos Tribunais, 2016, p. 241.

110 IBGC. *Boas Práticas de Governança Corporativa para Sociedades de Economia Mista*. São Paulo, 2015, p. 27. Available at: <[http://www.ibgc.org.br/userfiles/2014/files/Arquivos\\_Site/Caderno14.PDF](http://www.ibgc.org.br/userfiles/2014/files/Arquivos_Site/Caderno14.PDF)>. Accessed on: April 10, 2017.

performance of their duties and acts committed at fault, under ill intent or in violation of law or the corporate bylaws, in accordance with articles 153 through 156 of the Corporations Act. The legal responsibility of the board members stems from their legal duties and the different regulatory, administrative and criminal rules to which they are subject<sup>111</sup>.

## GOOD PRACTICES FOR THE SUPERVISORY BOARD

The Brazilian Institute for Corporate Governance suggests some good practices for SOEs' Supervisory Boards:

- In order to ensure the full functioning and execution of the tasks assigned to it, an agenda should be established, with a yearly schedule for meetings, which will also include the information to be sent to the counsellors to inform their activities;
- It is important that there be internal procedures regulations, which provide for the organisation and scheduling of meetings;
- A close, but not subordinate, relationship must be established between the Supervisory Board and the Audit Committee so that the flow of information necessary to carry out the Board's activities is permanent and unobstructed.

In addition to the interaction of SOEs with the relevant sectorial ministry and the Ministry of Planning, it is also worth mentioning another relationship, still within the purview of the Executive

branch: the relationship between SOEs and the Office of the Federal Controller-General in the exercise of yet another form of internal control.

As the central body of the Internal Controls System, the Internal Affairs System and the Federal Executive Branch's Overseer Units, the Office of the Comptroller General has a wide range of competencies that cover SOEs in various aspects. In general, it is responsible for "taking the necessary steps to defend public assets, as well as conducting internal controls, public audits, indictments, corruption prevention and fighting, supervisory activities and increasing management transparency within federal public administration" (article 1, I, Decree No. 8,910, 2016).

The Office of the Comptroller General may therefore perform audits and inspections regarding all direct and indirect federal public administration organs, including SOEs. It is authorised to institute disciplinary administrative procedures and administrative accountability procedures, which aim to assess the liability of individuals and legal entities, respectively, for irregularities, and to punish on them.

It is worth mentioning that the work of the Office of the Comptroller General in many cases helps the work of other bodies when it comes to institutional integrity. Reports and investigation are sent or even produced jointly with the Federal Police, the Federal Audit Court and the Public Prosecutor's Office.

The Office of the Comptroller General also has the power to provide regulatory guidance and technical supervision, as well as to coordinate the actions of the bodies that make up the Internal Controls System and to assess the adequacy of internal controls and risk management within each agency and federal public entity.

<sup>111</sup> Especially article 165 of Law No. 6,404 of 1976.

In a more proactive and motivated perspective under the Anti-Corruption Act, the Office of the Comptroller General has sought to encourage the adoption of integrity programs by public and private companies, acknowledging good practices and recommending actions aimed at preventing, detecting and addressing acts of fraud and corruption. In this regard, it is worth mentioning the publication of the Guide for Implementing Integrity Programs in SOEs and the Guide for Public Integrity.<sup>112</sup>

Regarding transparency, the Office of the Comptroller General is responsible for monitoring compliance with the Access to Information Act, including by SOEs. Thus, in addition to managing the mechanism for making requests for access to information, the Office of the Comptroller General promotes the training of public agents, as well as concentrates and consolidates the publication of classified and declassified information (article 68, Decree No. 7,724, of 2012).

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<sup>112</sup> The publications of the Office of the Comptroller General are available at <<https://www.gov.br/cgu/pt-br/centrais-de-conteudo/publicacoes>> Accessed on: April 10, 2017.

# CONCLUSION

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There is no denying the advances that Brazilian SOEs have gone through with regards to governance. Parts of them are due to the evolutionary process that Brazilian law has undergone, which naturally affected these companies. This process refers to the Anti-Corruption Act, the Access to Information Act and the Conflicts of Interest Act, among others. In addition to these laws, the institutional improvement of control mechanisms, embodied, for example, in the evolution of the Office of the Comptroller General, also played an important role.

It is also important to highlight the particular advances in the situation of SOEs, among which the State-Owned Enterprises Act is undoubtedly the most relevant. Provided for in the Federal Constitution, Brazil's Legislative branch took almost 30 years to fulfil the basic imperative necessary to standardise the treatment of the country's SOEs. The rules related to integrity, transparency and governance programs were important steps in the fight against corruption in said companies.

Despite these advances, challenges remain. This paper sought to address both challenges and advances, based on a review of the literature produced on the topic and, more importantly, on the experience shared by employees of SOEs working in the areas of governance, compliance and risk within the Integrity Initiative's Advisory Board for SOEs.

There is disagreement about the roles of SOEs in the economy. Furthermore, difficulties in reconciling their functions are frequent – economic efficiency/profitability and the achievement of public policies. Divergences and difficulties have placed the debate on SOEs and the Brazilian State's model permanently at the centre of the national political debate.

The prominent position that SOEs continue to occupy in the Brazilian scenario means that they will play an important role in forming political coalitions that allow the consolidation of the support bases of any chairperson presiding over Congress. The restrictions on board member appointments imposed by the State-Owned Enterprises Act seek to address this issue. However, a broader discussion on the governance structure and the exercise of State power in SOEs remains elusive. Thus, the World Bank's suggestion to adopt the centralised model remains difficult.

In addition to these, technical difficulties still remain for the implementation of the standards already created. The diversity of Brazilian SOEs – small, medium and large; municipal, state and federal; public enterprises and mixed-capital companies – makes the establishment of rules applicable to all of them and their enforcement a challenge for monitoring entities and for civil society. The current period of economic crisis and difficulties in national public accounts also aggravates this scenario.

This work is expected to be a starting and reference point for new initiatives and research that seek to understand how SOEs are effectively responding to domestic and international regulatory advances, as well as the responses they offer to the urgent need for improving their corruption-fighting mechanisms. In this regard, Transparency International's publication of the "10 Anti-Corruption Principles for State-Owned Enterprises" represents a welcome opportunity to trigger these efforts.<sup>113</sup>

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113 Released by Transparency International in 2017 the "10 Anti-Corruption Principles for State-Owned Enterprises" provides guidance to SOEs of all types and sizes on integrity, transparency and anti-corruption best practices. Available at: <[http://files.transparency.org/content/download/2162/13663/file/2017\\_SOE\\_Principles\\_Report\\_EN.pdf](http://files.transparency.org/content/download/2162/13663/file/2017_SOE_Principles_Report_EN.pdf)>. Accessed on: March 21, 2020.

