

Control mechanisms in the corporate governance of state-owned enterprises (SOEs): a comparison between Brazil and Portugal

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Abstract

This study aims to identify how external and internal control mechanisms of corporate governance, typically used in the private business sector, are applied or transformed for the public sector in state-owned enterprises (SOEs). Based on a review of the agency problem and the mechanisms proposed for its mitigation in the business context, the study analyzes the governance situation of SOEs in Brazil and Portugal, with a view to comparing the solutions adopted in the two countries and the needs for development. In addition to sharing common history and cultural foundations, these countries are characterized by a low investor security environment and fragility of dispute settlement mechanisms; by concentrated ownership structures; and by capital markets still insufficient to pressure corporate behavior, conditions which weaken the market mechanisms of external control and amplify the influence of the peculiarities of SOEs' internal governance issues. The analyses point to significant recent advances in SOEs' governance practices, but identify challenges yet to be addressed.

Keywords: State-Owned Enterprises. Corporate Governance. Control Mechanisms. Brazil. Portugal.

Mecanismos de controle na governança corporativa das empresas estatais: uma comparação entre Brasil e Portugal

Resumo

Este estudo visa a identificar como mecanismos de controle externo e interno da governança corporativa, tipicamente considerados no setor empresarial privado, são aplicados ou transformados para o setor público nas empresas estatais. A partir de uma revisão do problema de agência e dos mecanismos propostos para sua mitigação no contexto empresarial, este estudo analisa a situação da governança das empresas estatais no Brasil e em Portugal, com vistas a comparar as soluções adotadas nos dois países e as necessidades de desenvolvimento. Além de compartilhar histórias e fundamentos culturais comuns, esses países são caracterizados como ambientes de pouca segurança aos investidores e fragilidade de instrumentos de solução de litígios, por estruturas de propriedade concentradas e por mercados de capitais ainda insuficientes para pressionar o comportamento das empresas, condições que fragilizam os mecanismos de mercado de controle externo e amplificam a influência das peculiaridades das questões internas de governança das estatais. As análises apontam significativas evoluções recentes nas práticas de governança das estatais, mas identificam desafios que ainda precisam ser direcionados.

Palavras-chave: Empresas estatais. Governança corporativa. Mecanismos de controle. Brasil. Portugal.

Mecanismos de control en la gobernanza corporativa de las empresas estatales: una comparación entre Brasil y Portugal

Resumen

Este estudio pretende identificar cómo los mecanismos de control externo e interno de la gobernanza corporativa, típicamente considerados en el sector empresarial privado, son aplicados o transformados al sector público en las empresas estatales. A partir de una revisión del problema de agencia y de los mecanismos propuestos para su mitigación en el contexto empresarial, el estudio analiza la situación de la gobernanza de las empresas estatales en Brasil y Portugal, con miras a comparar las soluciones adoptadas en los dos países y las necesidades de desarrollo. Además de compartir historias y fundamentos culturales comunes, estos países se caracterizan por un ambiente de poca seguridad a los inversores y fragilidad de instrumentos de solución de litigios, por estructuras de propiedad concentradas, y por mercados de capitales aún insuficientes para presionar el comportamiento de las empresas, condiciones que debilitan la efectividad de los mecanismos de mercado de control externo y amplifican la influencia de las peculiaridades de las cuestiones internas de gobernanza de las estatales. Los análisis apuntan significativas evoluciones recientes en las prácticas de gobernanza de las estatales, pero identifican desafíos que aún deben ser dirigidos.

Palabras clave: Empresas estatales. Gobernanza corporativa. Mecanismos de control. Brasil. Portugal.

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INTRODUCTION

After a decline in importance of state-owned enterprises (SOEs) in the world because of the collapse of the Soviet Union, it is possible to observe an increase in their importance thanks to the diffusion of managerialist paradigms and models in public administration. This indicates the need to build more robust research lines around these companies. According to Bruton, Peng, Ahlstrom et al. (2015), SOEs represent about 10% of the world's gross domestic product (GDP), approximately 20% of market capitalization. In addition, combined sales of the 204 largest SOEs totaled US\$3.6 trillion in 2010-2011, equivalent to more than 10% of the aggregate sales of the 2000 largest global companies (KOWALSKI, BÜGE, SZTAJEROWSKA et al., 2013).

However, there are still few systematic studies on SOEs in general, as well as on SOEs corporate governance in particular (DAISER, YSA and SCHMITT, 2017). Grossi, Papenfuß and Tremblay (2015) demonstrate the gap in studies on SOEs governance, pointing out that governance and management deficits remain a major challenge in many countries. In addition, there are doubts about models, mechanisms, tools and processes that authorities and state councils could use to promote the effective, efficient and sustainable delivery of public services.

The governance guidelines for SOEs proposed by the Organization for Economic Co-operation and Development (OECD) can be understood as a response to the needs of national states to undertake better solutions to the governance of these enterprises. The importance of the guidelines was defended by OECD: "with many countries experiencing lower economic growth and finding their fiscal space diminished, governments face growing challenges to ensure well-functioning SOE sectors" (OECD, 2015, p. 7).

Certainly, the fact that these enterprises originated within the state demands particular analysis and solutions in terms of corporate governance issues. Differences in mission and objectives, measurement of effectiveness, financing possibilities and business diversification, legal conditions in aspects such as bankruptcy and indebtedness, characteristics and limitations in personnel policies and selection, succession and incentives for administrators, among others, are elements that reconfigure the role of governance actors and transform the principal-agent relationship. Despite these differences, the parallel of SOEs governance with that of private companies is useful because it represents sharing knowledge and learning, deepening the understanding of differences.

It is worth noting that, given the international diversity that brings different terms to identify SOEs, the concept of state-owned enterprises used here follows the definition proposed by the OECD (2015, p. 14): "any corporate entity recognized by national law as an enterprise, and in which the state exercises ownership" in full or by a majority of political rights, and such possession may also be exercised by subnational bodies, such as states or municipalities. Thus, SOEs are companies and, as such, have typical corporate governance issues, be it in the conflicts between owners and collective decision processes, or in agency problems in the relation shareholders-managers. The main objective of this study is to identify how external and internal control mechanisms of governance applied in the private sector are also applied or transformed in the public sector to solve agency problems.

As for methodology, this study compared the effectiveness of these control mechanisms for SOEs in the context of Brazil, an emerging country in Latin America, and Portugal, a developed country, member of the European Union – both countries subject to similar cultural contexts (FONTES FILHO and PIMENTA, 2016). The analysis of governance in emerging countries should consider that the principal-agent conflict is subordinated to the principal-principal conflict, because of the dominance of a concentrated ownership structure. In the case of emerging countries, the unstable institutional environment makes the enforcement of agency contracts more costly and problematic, with less protection for minority shareholders (YOUNG, PENG, AHLSTROM et al., 2008). In addition, the external mechanisms such as competition in the market for corporate control and in the executives job market are fragile (HU, TAM and TAN, 2010; DHARWADKAR, GEORGE and BRANDES, 2000). Therefore, examining the discipline in terms of governance of SOEs in both countries allows the comparison of the solutions in these two markets showing similarities, but distinct institutions.

The first part of this article presents a theoretical framework on governance and internal and external mechanisms to control the agent's behavior. After that, the differences between the contexts of the countries are analyzed, as well as how these mechanisms are transformed and operate in order to solve agency problems of national SOEs.

CORPORATE GOVERNANCE AND CONTROL MECHANISMS

There is a long list of potential governance problems in state-owned enterprises. The majority of them are possibly derived from the controller's political and public nature. In the absence of specific mechanisms or barriers to safeguard the autonomy of SOEs in the face of frequent changes in the political system, their governance presents both the typical agency problems and the principal – the state itself – problems, since the state is influential in the enterprises' activities. In Brazil, for example, the political system characterized by coalition presidentialism (ABRANCHES, 1988) imposes frequent changes in the direction and objectives of SOEs, or direct and non-compensatory participation in the implementation of public policies, subordinating their management to the instability of coalitions and temporary public demands.

Becht, Bolton and Röell (2002) understand that corporate governance problems derive from the investor's interest in exercising control of the company in a different way to the managers, a problem amplified by dispersed ownership that can be cause for conflicts of interest among shareholders, creating a problem of collective action. The authors argue that 05 mechanisms can mitigate this problem: i) partial concentration of ownership and control in the hands of one or a few big investors; ii) hostile takeovers and proxy voting disputes; iii) delegation and concentration of control among the board of directors; iv) alignment of managerial interests with investors, through contracts regarding compensation of executives; and v) clearly defined fiduciary duties for Chief Executive Officers (CEOs).

The literature on internal and external corporate control mechanisms has been guided by the search for the alignment between the various interests of managers and shareholders (WALSH and SEWARD, 1990). Recent efforts to understand and mitigate the agency's conflicts have broadened the analysis of the effectiveness of control mechanisms in inducing managerial actions aimed at valuing the company, separating between internal and external controls. Internal controls include the board of directors, the mutual monitoring of managers, the direct participation of managers on the property, the executive remuneration schemes, especially variable bonuses, the overseeing role played by large shareholders and the use of debt financing. External controls include the pressures exerted by the market for corporate control (and the possibility of corporate takeovers), the executive job market and the product market (AGRAWAL and KNOEBER, 1996).

The principal-principal conflict, defined as the inconsistency of objectives among the groups of shareholders in a company, particularly among controlling and minority shareholders, induces top executives to become representatives of the interests of the controlling shareholder (LI and QIAN, 2003; YOUNG, PENG, AHLSTROM et al., 2008). Although such conflict is studied more in emerging economies and little studied in the public sector, it can better express the problems of governance in SOEs, where, even in situations of participation of private ownership, the state acts in a hegemonic way and often with little interest in accommodating private interests.

As discussed by Young, Peng, Ahlstrom et al. (2008), governance mechanisms should be considered together, complementing or replacing each other to keep managerial opportunism under control. The authors add that in emerging economies, product markets, labor markets, procurement markets, and other external factors are corrupt or ineffective, and thus not as operative in governing executives, which requires more effective internal control mechanisms. However, the lack of institutional support for the board of director's performance (the main mechanism of internal governance in developed economies) makes it fragile for monitoring and controlling, reinforcing the need to rely on the shareholder or controller group to oversee managerial opportunism.

Bringing the analysis to the control mechanisms of SOEs, it is worth considering that state ownership brings problems to the company, because of the characteristics of the national market and its labor and commercial relations as well as greater political exposure. This context, distinct from that which permeates private companies, presents specific challenges to SOEs such as subjecting managers to the instability of political agreements and coalitions, less space for managers' remuneration and policies regarding incentives such as variable bonuses. Other challenges are the controller (political) interference in management, including absorbing public policy costs, which makes it difficult to evaluate the results of the business and effectiveness of the company and administrators; lack of specialized monitoring from the state towards the business, as well as other problems listed by the OECD (2015). On the other hand, SOEs are not private companies and, therefore, cannot be insulated from the legitimate interest of politics since this interest is related to the company's mission. The following section discusses, in depth, the control mechanisms related to reducing agency problems, considering the context of SOEs.

DIFFERENCES OF GOVERNMENT PROBLEMS IN STATE-OWNED ENTERPRISES IN COMPARISON TO PRIVATE COMPANIES

The Definition and Control of Government Objectives

Typically, SOEs do not aim to make a profit, and should pursue other objectives, generally being stakeholder-oriented companies, except those where there are private partners or if the enterprise is in a process of privatization. In this case, the state's position is temporary, which justifies the acceptance of profit as a fundamental objective. However, when this partnership is permanent, at some point the interests of private shareholders and other interests (which justify the presence of the state as a shareholder) may become conflicting.

In companies where the state is the sole owner, there are situations where they are considered pure stakeholder-oriented companies (e.g. hospitals). Concerning companies that provide competitive services, their situation is less obvious. The state may act in open markets to support economic development or attain social objectives, to correct market failures, to minimize or eliminate situations of abuse of market power, or to reduce externalities or the consequences of excessive risk-taking in strategic sectors. However, this does not exempt the company from seeking profit, even if it is to ensure its solvency and sustain its growth. These are situations in which the achievement of financial results is subject to restrictions, dictated by interests of economic or social policies.

In the case of pure stakeholder companies, it is assumed that resources (always scarce) are used with rationality, and that therefore public services are rendered efficiently. However, this efficiency appears as a restriction and not as an end to management and corporate governance. Thus, unlike most private companies, SOEs do not have a single objective and must satisfy multiple stakeholders, which creates a set of problems arising from potential conflicts, because at some point the different objectives may compete among themselves. In addition, the multiplicity of objectives poses difficulties in evaluating the performance of the company or manager (JENSEN, 2001), since it allows a weak performance in one perspective to be justified by the result achieved in others. These problems may eventually be present in some private companies, such as cooperatives, but are absent in the prototype of a profit-maximizing private company.

Absence or Limitation of Control Mechanisms

External Control

Managers of companies listed on the stock exchange are supervised both internally, by the audit and by the company's governing bodies, and externally by shareholders, investors, creditors, rating agencies and analysts. Such monitoring constrains management, obliging it to be accountable, provide explanations and reduces its discretionary power.

The goods and services market is a determining factor for the quality of the company's management. There is a general understanding that the level of competition increases companies' performance in two ways. First, competition leaves less room for superfluous spending or non-maximizing acts and agents have a less favorable environment for extracting income (TIROLE, 2006). Second, it makes it easier to assess the performance of managers by comparison with their peers. While in the first case it seems reasonable to accept that the disciplinary effect also operates in SOEs, it is not possible to say that SOEs behave in the same way as private companies when it comes to the impact of competition in evaluating the performance of managers. In reality, when SOEs are called upon to support economic development or other social objectives, or when they are required to correct market failures or minimize situations of abuse of market power, it is impossible to establish a fair comparison between SOEs and their private competitors, and the yardstick is lost.

Another disciplinary effect usually aimed at the market is the issue of bankruptcy. The disciplinary effect of the threat of bankruptcy – which may not even be possible, as in the case of Brazil – does not operate in SOEs with the same intensity as is felt in private companies. Consequently, the monitoring of SOEs in the debt market tends to be less active than that of private firms.

In addition, SOEs are safe from the market for corporate control. They are not, therefore, companies whose control can be acquired by means of a takeover, losing the disciplining effect and the monitoring that could be exercised by potential investors.

Finally, since the companies are not listed in the stock exchange, the monitoring of financial analysts is lost. As these analysts seek to measure the value of the company, they not only carry out some scrutiny on their past performance and current position, but also provide information on alternative paths for future development. Such scrutiny, which in the case of listed companies ends with a recommendation to buy or sell, brings constraints to the company's performance and has consequences on the behavior of managers (JENSEN, 2005). This monitoring does not exist in the case of companies totally owned by the State, present only in mixed capital companies, that is, SOEs with private participation in capital.

Internal Control

Companies' internal control occurs at the level of their governance bodies, namely the general assembly, the board of directors and the Fiscal Council or similar. In addition, companies are subject to external and internal audits.

The general assembly of completely state-owned enterprises differs from that of private companies (and in particular of public companies) for three reasons: the number of actors supervising the company – shareholders – the incentive for monitoring and the level of information and knowledge. A greater number of shareholders will increase the likelihood of more effective control over the life of the company, although shareholder dispersal also reduces the level of incentive of each shareholder to monitor the company's life (free rider), an advantage for state and other concentrated control companies. As for motivation, due to the absence of incentives (namely ownership) for the agent (politician) that controls the agent (manager), less vigilant surveillance than that of private shareholders is to be expected. Finally, because politicians and their advisors are not specially qualified to appreciate the conduct and performance of SOEs – especially considering the intensive turnover in public offices – it is expected that, from the point of view of knowledge and information, SOEs are at a disadvantage when compared to private companies. It should be clarified in this last point that the issue is not the competence of government technicians, but mainly the effect of turnover and political changes on the capacity of state bodies and agents to accumulate sufficient knowledge about the company that allows minimizing information asymmetries with the managers.

With regard to the administrative and supervisory bodies, the guidelines of good corporate governance point towards a clear separation between management functions (those performed by the executives) and the functions of supervision, control and monitoring of managers' actions (those performed by non-executive directors). In this context, the coordination of non-executive directors' work by the board is of great importance. Hence in many countries it is considered good practice that the functions of Chairman and CEO be separated.

SOEs can also have executive and non-executive managers, under terms that are considered good practice for private companies. There are, however, some additional difficulties worth considering. First of all, the issue of independence. Good practices require that some managers are independent, not only in their relationship with directors, but also with shareholders. In the case of SOEs, independence should be assessed in relation to executives and to political power. However, because managers are chosen by those with political power, independence could be compromised by an eventual subordination to the political groups external to the company and outside of the company's formal hierarchy.

Finally, it should be noted that agents react to incentives. The lack of ownership rights in SOEs by managers and politicians leads to the inexistence of incentives stemming from ownership of residual rights.

In addition, in these companies, there may be no monetary incentive to pursue targets related to efficiency when managers' remuneration is not tied to performance. In the absence of such incentives, other forms of private extraction of benefits may emerge. For example, companies can avoid layoffs so as not to create political and electoral constraints. The consequence is decisions are made that can lead to financial fragility and poor allocation of resources. Managers and politicians can also avoid making investment decisions that involve risk, as well as dedicate little time and effort to the company, spend excessive resources for their own benefit or reach more serious situations in the areas of corruption and other illegalities.

Contractual incentive mechanisms can be created for the direct agent. The remuneration setting based on the agent's performance is one of these mechanisms, although it is a process still limited because variable remuneration packages often stimulate pernicious behavior (JENSEN, 2005). Moreover, it has not yet been possible to create noise-free incentive mechanisms that compensate for merit rather than fortune, or that evenly compensate merit and penalize demerit (BERTRAND and MULLINATHAN, 2001).

In addition, in the case of SOEs, incentive mechanisms in remuneration have to deal with additional constraints. The attraction of qualified managers entails the payment of at least their opportunity cost, which often exceeds what citizens consider reasonable. This creates a constraint on the political decision-maker, who will have to take on the electoral burden of paying a price that voters tend to consider high. The lack of will of the political agent to support this cost may lead to hiring less able managers.

In the listed companies, the compensation package usually includes three components: salary, bonuses and incentives based on stocks or options, the last two are variable and related to the results achieved. However, the stakeholders-oriented nature of SOEs (even SOEs listed on stock exchanges), makes it much more difficult to define and measure performance, and consequently much more complicated to draw remuneration packages that compensate for this performance (JENSEN, 2001). In addition, the creation of incentive mechanisms implies that a significant part of the remuneration is variable and dependent on the performance of the manager. This can also lead to, in case of success, a compensation for the manager reaching amounts that are socially unsustainable.

Finally, regarding the politicians who exercise the rights of shareholders (both as agents and on behalf of the State), incentive mechanisms for remuneration are totally non-existent. Cases are unheard of – probably because it would be socially unacceptable – where politicians' remuneration depends on the performance of the state companies they are responsible for.

COMPARING CORPORATE GOVERNANCE CONTROL MECHANISMS IN STATE-OWNED ENTERPRISES IN BRAZIL AND PORTUGAL

Brazil

In Brazil, state-owned enterprises must be created by a specific law and classified as such when the capital stock is wholly owned by the Federal Government, the states, the Federal District or by municipalities, or when the capital stock is mixed, since the public entities hold the majority of shares with voting rights and are constituted as a corporation and subject to corporate law (Law 6404/1976).

The analysis in this study is focused on the total of 150 SOEs (in October 2017) directly or indirectly owned by the federal government, 102 of which indirectly controlled, subsidiaries of SOEs (BRASIL, 2017). In addition, of these SOEs, 48 are from the energy sector, 35 from oil and derivatives, 15 from commerce and services, and 14 from the financial sector. The group of SOEs totals 516.3 thousand employees and total assets of R\$ 4,678.4 billion (approximately US\$ 1.5 trillion). The three largest federal SOEs, listed on the Stock Exchange, had a market value of R\$ 262.2 billion (US\$ 84 billion), with Petrobras alone accounting for 63% of that value.

The supervision, governance, management and control of federal SOEs follow a threefold mandate and the social statute disciplines various governance functions. The main command over the SOE is located in a supervisor ministry, defined according to the area of activity and disciplined in Decree 8872/2016, whose typical duties are to define and monitor the execution of the SOEs objectives and, in general, appoint the majority of the members of the board of directors and of the executive board.

The coordination of the Global Expenditure Program, the Investment Budget proposal, and the definition of personnel policies of the federal SOEs, are subordinated to the Ministry of Planning, Budget and Management. Through a specific secretariat (Secretariat for Coordination and Governance of State-Owned Enterprises – SEST), this Ministry monitors the appointment of Board members who represent the federal government, as well as the provision of economic and financial information on the SOEs (Decree 9035/2017).

Finally, the National Treasury Secretariat of the Ministry of Finance is responsible for managing the portfolio of the federal government, which includes stockholding. This role requires actions aimed at asset management, and corporate actions, such as participation in shareholder assemblies, in addition to appointing a member in the audit committees of companies where the federal government is a shareholder.

In 2007, in line with the state governance proposals presented by the OECD, the Inter-ministerial Commission on Corporate Governance and Management of Equity Interests of the Union (CGPAR) was created, composed of the Ministers for Planning and Finance; and the Chief of Staff of the President. The purpose of CGPAR is to deal with issues related to the corporate governance of the SOEs and the administration of equity interests of the Union, thus allowing an integrated view of the portfolio. In addition, the participation of the employees' representatives as SOEs Board members (Law 12353/2010) has been a practice since 2010.

An important point to note about the governance structure of SOEs is that, according to corporate law, they must have an audit committee with the role of supervising the acts of the managers and verifying compliance with legal duties and statute, as well as giving an opinion on the annual report of the administration. The audit committee is a permanent operating body in SOEs (Law 6404/1976). In addition, since the enactment of Decree 8945/2016, which regulated Law 13303/2016 regarding SOEs owned by the federal government, these enterprises should follow risk management and internal control practices, presenting structures for this purpose; as well as submitting to internal audit and having a Statutory Audit Committee (article 15), as an auxiliary body of the Board of Directors (article 38).

Law 13303/2016 introduced profound changes in the structures and dynamics of governance in Brazilian SOEs, providing for their legal statute and rules for the appointment of directors, including appointment of independent members, and for their corporate regime. In fact, the very edition of this new law signals a still fragile structuring of the control mechanisms of corporate governance in the country. Thus, the lack of independence of the boards, the lack of minimum professional experience of the board members, the appointment of politicians to the administrative and supervisory bodies, the need for releasing the Annual Governance Statement showing the objectives regarding public policy and operational and financial data, and the compulsory implementation of compliance and risk departments, as well as a statutory audit committee, indicate the weaknesses present in the state system.

Reviewing the typology of the mechanisms by Agrawal and Knoeber (1996), the new legal framework brings significant advances in the board's capacity for action and in strengthening the commitment of managers and their focus on the company's results, by implementing the remuneration based on performance, particularly in SOEs without private participation. By bringing a delimitation to the exercise of the social function of the SOE, connecting its operation to the principles stated at the legal authorization that established the enterprise, Decree 8945 (Article 27) prevents this social function from being treated improperly to deprive the company of its corporate purpose or interest (FRAZÃO, 2017).

The success of these changes, however, has yet to be proven. Comparing with the internal mechanisms, exclusively, it is possible to identify weaknesses related to incentives, monitoring of executives, and board's performance.

Although aligned with the international best practice recommendations on governance, the participation of 25% of independent board members in the governance bodies may not be sufficient to reduce any negative influences of the controlling state and avoid the use of the SOE to execute public policies which are not linked to its corporate purpose. Also, in the case of remuneration of executives, since most SOEs are not incorporated as a corporation, the use of stock-based incentive instruments is limited. Moreover, by the very nature of SOEs – often monopolist – it may not be possible to define adequate benchmarks to parameterize the remuneration policy.

It should be added that the aforementioned social function and the nature of stakeholder-oriented companies of the SOEs contribute to multiple, diffuse and externally established corporate objectives, which are different from the maximization of the return as a parameter for private managers. Two criticisms show the fragility in the controls introduced by this process. For Jensen (2001), it is logically impossible to maximize in more than one dimension, whereas for Menon and Umapathy (1987), the control problems faced by SOEs depend significantly on the degree of complexity of their objectives and on the extent to which outputs can be measured. As a consequence, the difficulty in monitoring the performance of SOEs creates room for criticism of managers and politicization in defining their purposes.

Another instrument listed by Agrawal and Knoeber (1996), the use of debt financing, also proves to be fragile for SOEs, since the contracting of a long-term credit operation is subject to the approval and limits of the State, given its potential impact on the balance of public accounts. By limiting the availability of free cash flow (BECHT, BOLTON and RÖELL, 2002) and favoring the performance of creditors as external monitors, indebtedness policies are important tools to inhibit agency problems (JENSEN, 1986). However, they are shown to be fragile in the SOEs, because of the subordination of SOEs to the limits posed on public indebtedness, in an aggregate way, and by the protection of SOEs bankruptcy in Brazil (Bankruptcy Law, Law 11101/2005, article 2).

In the perspective of external mechanisms, the differences between Brazilian state-owned enterprises and private companies are more explicit. There are 27 SOEs listed on the stock exchange (B3, formerly BM&FBovespa), of which 07 are federal, and of these, only 04 are subject to shareholder activism, a condition that has become one of the most important external governance mechanisms in the Anglo-Saxon context (GUO, LACH and MOBBS, 2015). Another 144 federal SOEs are not listed, with SOEs remaining the sole shareholders, i.e., there is no shareholder pressure. Even in the listed companies, the state remains the controlling shareholder, holding the majority of shares with voting rights, significantly reducing the power of the other shareholders. Thus, the transparency and oversight of market agents shows a reduced potential for external control of SOEs. On the other hand, a capital market still under development does not register cases of hostile acquisition, eliminating, then, this potential mechanism of external control.

Comparing the institutional context of BRICS countries (Brazil, Russia, India and China), Estrin and Prevezer (2011) analyzed that Brazil has fairly good formal governance indices and shareholders' rights, coupled with a consolidated rule of law and low risk of expropriation, with improvement of corporate governance codes. However, there is a weak judiciary and weaker investor rights than the average of the other BRICS countries. Brazilian law allows for many appeals, so even very trivial cases end up in higher courts with huge delays.

Two other external control mechanisms pointed out in the governance literature, the executive job market and competition in the market for products and services, are also of little relevance to Brazilian SOEs, at least until this moment, as the new legislation is under implementation. The monopoly nature of the business, or the exclusive link to a ministry or service rendering body (monopsony), virtually eliminates the pressures of the goods and services market on the company and weakens the insertion and competitiveness of state executives in the labor market. Exception can be made in specific cases where there are market references, particularly in the area of SOEs listed on stock exchanges, such as banks and energy sources, or large SOEs.

In summary, few of the mechanisms discussed by Agrawal and Knoeber (1996) offer protection to SOEs regarding problems of agency. On the other hand, the conception of pros and cons in the configuration of Brazil introduces the possibility of greater control over the performance of SOEs by other powers, such as the Court of Audit of the Union (TCU), entity linked to the Legislative Branch. As Law 13303/2016 states:

Article 85. The external and internal control bodies of the three (3) spheres of government shall supervise state-owned and mixed-owned enterprises related to each one of the spheres, including those companies domiciled abroad, as to the legitimacy, cost-effectiveness and effectiveness of the application of their resources, from the accounting, financial, operational and equity point of view.

This is an external control mechanism with adequate power and competence to oversee the state-owned enterprise, and it is a control mechanism that is not available for private companies.

Portugal

In Portugal, the public business sector covers the state business sector and sector of the local government-owned enterprises. The latter includes specifically the businesses owned by autonomous regions, municipalities, associations of municipalities and metropolitan areas.

The state business sector, is comprised of state-owned enterprises and investees. The concept of a state-owned enterprise includes: (i) State-owned enterprises i.e. business organizations in the form of a limited liability company under commercial law, in which the State or other governmental entities may exercise dominant influence; and (ii) public law corporate entities,

which are public legal entities, with a business nature, created by the State to carry out its purposes (Decree-Law 133/2013). The investees are companies in which the State, or any other public entity, holds a permanent direct or indirect participation, provided that all public holdings do not give rise to a dominant influence. In Portugal, mixed-capital companies can be both public companies in which the State has a dominant influence but does not have all of the capital, and investee companies, where the State's position is not only a minority, but has no dominant influence.

In fact, the state owned business sector is formed by both sophisticated financial institutions and small municipal-owned enterprises. In addition, it includes companies producing goods and services that compete with private operators and public service providers, such as hospitals or the Treasury and Public Debt Management Agency, which is responsible for managing public debt, originally a public institute. There are therefore companies that are fully stakeholder-oriented, and companies that compete in the open market with shareholder companies that should have added concerns with their economic and financial performance.

The Portuguese SEOs does not exceed 70 companies. However, its economic importance is evident in the fact that a large number of companies show negative net results (although many are beneficiaries of state transfer revenues), and in their level of indebtedness. In fact, adding the net results reported for the 66 companies analyzed (PORTUGAL, 2016) to the net results obtained in 2016 by TAP and CGD, the amount of losses is almost € 2.4 billion. In addition to these 66 companies TAP's indebtedness level (as of 31 December 2016) total debt reaches € 33.5 billion (18.1% of Portugal's GDP). The social importance of this business universe is also very clear, for example, in the large number of companies in the health and transport sectors, both heavily deficient and heavily indebted.

In Portugal, SEOs have to be subordinated to the strategic and sectorial guidelines defined by the government. In addition, it is mandatory to commit with a management contract that sets objective, quantified and measurable annual targets. Of course, the absence of full contracts (GROSSMAN and HART, 1986) means that despite this range of instruments, there is still a margin of discretion in the hierarchy of objectives and stakeholders to be favored in each concrete decision.

Regarding governance structures, the law allows corporate bodies to be adjusted to the size and complexity of each company, and any of the types provided for by the private law ("one size does not fit all") may be adopted. It turns out, however, that sometimes the choice of the model seems not to obey the complexity of the company, but to the political influence of the chosen CEO. The law allows for both situations: the single manager (a hypothesis never or rarely adopted) and the non-executive manager, an increasingly frequent situation in which the board plays a similar role to that practiced in companies listed on stock exchanges. In addition, non-executive managers become part of specialized committees, which is recognized as good governance practice.

In general, both the process of choosing (by political power) the heads of corporate bodies of companies, and their competence, are subject of skepticism. It is a choice based on political power. However, after defining the appropriate profile for the position by the government, candidates must be evaluated by the Recruitment and Selection Committee for Public Administration (CReSAP), a public administration body that is responsible for assessing the merits of candidates for public managers, and which theoretically plays a similar role to that of appointment committees of private companies.

Therefore, in Portugal, as in the case of Brazil, there is a concern in adopting – formally – corporate structures and procedures for the selection of managers and members of the supervisory bodies in terms consistent with best practices of corporate governance. However, doubts remain about its effectiveness. Recent advances and setbacks in the definition of the governance model of the largest state-owned enterprise, CGD, have demonstrated that the number and profile of non-executive managers depends more on political reasons rather than a clear and sustained view of the role of these agents in corporate governance. The fact that CReSAP confines itself to a bureaucratic and legalistic role, instead of appreciating the substance of the qualifications and the profile of those appointed by the political power, also raises doubts about the efficiency of the process of selection and selection of the managers, especially independent managers.

The law stipulates that the remuneration of public managers cannot exceed the salary of the Prime Minister, even if companies in competitive sectors can benefit from exceptions to this limitation. This is a restriction on the design of remuneration packages, which are used (in private companies) to encourage performance and attract qualified managers.

takeovers, and the degree of competition in the market is variable. While some companies operate in the market, most suffer partial competition. For example, state-owned enterprises providing health-care exercise certain services on an exclusive basis (since they are not offered by the private sector), while others are exercised in competition with other companies.

The absence of control by the capital market is somehow compensated by a double layer of supervision and by the obligation of these companies to follow a set of good practices in corporate governance.

SOEs, in addition to internal supervising bodies, are subject to scrutiny by the Technical Unit (an administrative entity whose mission is to provide adequate technical support to the government, in terms of monitoring good practices in governance and considering the economic and financial balance of the sector) and the Finance General Inspection, without disregarding the functions and powers of the Court of Auditors.

As for the rules of good corporate governance, these are based largely on the OECD Guidelines, and are divided into 4 groups: obligations and responsibilities of the shareholder; obligations and responsibilities of public business sector; preventing conflicts of interest; and dissemination of information. With regard to this latter aspect, in addition to information that must be disclosed by the companies on the website of the Technical Unit, they must prepare and disclose annual reports on good practices in corporate governance. In turn, the Technical Unit analyzes the corporate governance and prepares an annual report on the performance of good governance practices by listed companies.

FINAL CONSIDERATIONS

After long privatization cycles, state-owned enterprises remain solid institutes and are widely present in many countries, while their corporate governance remains a major challenge for governments (DAISER, YSA and SCHMITT, 2017). Particularly in Brazil, several recent events involving corruption in large SOEs show the need to strengthen this governance and expand the study on the topic, since fewer than 05 related articles were identified in the Spell database that groups the articles of the Brazilian administration journals.

Despite their importance and prevalence in the economic sector of several countries, the necessity or the existence of SOEs is called into question by fundamentalist market ideologies. However, as noted by the OECD (2015), many countries – like China (with more than 140,000 SOEs) and Singapore – still rely heavily on SOEs. New developmentalist approaches emerge, proposing that the state must go beyond solving obstacles and market failures to play a more positive role in identifying paths to development.

However relevant this issue may be, this study was not intended to discuss the role or relevance of SOEs, but rather, to discuss that their existence as a reality requires efficiency in performance and effectiveness in results. In this sense, good corporate governance practices are fundamental to minimize the problems of command and control in these companies, contributing to increase their transparency and accountability. Many constraints still have to be overcome in terms of control mechanisms, but recent developments show that advances are possible and can minimize agency problems.

Comparing state environments in Brazil and Portugal, it is observed that there is a great (at least formal) concern with the adoption of mechanisms considered as inductors of good corporate governance. First of all, in both countries there are mechanisms that aim to identify (for each company) the goals to be achieved. In the case of Brazil, unlike what is happening in Portugal, the participation of employees' representatives in the boards of directors of SOEs (Law 12353/2010) also allows internalizing the expression of these stakeholders' will.

In addition, it is evident the concern in adopting models of corporate bodies that are in line with best practices. In both countries, the law requires SOEs to adopt a governance model that ensures the effective separation of executive management and supervisory roles. In both countries there are non-executive directors, with a role similar to the one performed by this type of agent in private companies, in accordance with good practices.

There is also a concern to adopt selection mechanisms – Eligibility Committee in Brazil and CReSAP in Portugal – that prevent the choice of managers and their supervisors from meeting purely political criteria.

At the level of internal mechanisms, there seems to be a difference between the two countries regarding the role of compensatory incentives. In fact, although variable remuneration mechanisms are not prohibited in Portugal, the imposition of the Prime Minister's salary as a ceiling creates constraints on the alignment of interests between the agent and the principal. At this point, for Portugal, it must be concluded that sociopolitical reasons overlap with what good practices in corporate governance recommend. In Brazil, these limits are less stringent, especially for listed companies, with total executive compensation of more than R\$ 2 million per year, or 66 times the federal public service compensation ceiling, as in the case of Petrobras.

Regarding external mechanisms, its relevance in the control of SOEs in both Brazil and Portugal appears to be ineffective for most of them. Even indebtedness policies, with their disciplining effect, have little impact on shaping SOEs governance.

There seems to be a concern in both countries for adopting some of the typical elements of the capital market, strengthening the mechanisms of external and internal control. This is the case of the disclosure of information, the subjection of companies to external auditing processes and the auditing of the courts of accounts. In Portugal, added to these mechanisms is the subjection of these companies to specific rules of corporate governance, and the compliance to the rules is subject to annual examination by a public administration body. While in Brazil the new legal status of the SOE (Law 13303/2016), the SOE Governance Program and the development of a specific code of governance for SOEs show the recent importance given to the issue.

However, recent experience based both on the problems registered in several SOEs in Brazil and on the lack of consistency in the solutions adopted in Portugal, show that the approximations to the standards of private companies regarding government models and selection procedures can be more formal than substantial. As analyzed by Lazzarini, Lisboa, Melo et al. (2015) for the Brazilian case (which bears a great resemblance to Portugal), problems such as the excessive discretion in the use of SOEs to achieve political objectives, capture and use of SOEs as a mechanism for transferring subsidies and business opportunities for private groups, lack of transparency and lack of access to reliable data and clarity about the objectives pursued by SOEs, lack of control over the performance of the state-owned enterprises achieving their objectives, and particularly in Brazil, the problems of corruption, evidence the urgency of the theme and how much progress still needs to be made.

REFERENCES

- ABRANCHES, S. Presidencialismo de coalizão: o dilema institucional brasileiro. **Dados**, v. 31, n. 1, p. 5-38, 1988.
- AGRAWAL, A.; KNOEBER, C. R. Firm performance and mechanisms to control agency problems between managers and shareholders. **Journal of Financial and Quantitative Analysis**, v. 31, n. 3, p. 377-397, 1996.
- BECHT, M.; BOLTON, P.; RÖELL, A. Corporate governance and control. In: CONSTANTINIDES, G. M.; HARRIS, M.; STULZ, R. M. (Ed.). **Handbook of the Economics of Finance**, v. 1, p. 1-109, 2003.
- BERTRAND, M.; MULLAINATHAN, S. Are CEOs rewarded for luck? The ones without principals are. **The Quarterly Journal of Economics**, v. 116, n. 3, p. 901-932, 2001.
- BRASIL. **Boletim das empresas estatais federais**. Brasília, DF: Ministério do Planejamento, Desenvolvimento e Gestão, v. 3, 2017. Available at: <http://www.planejamento.gov.br/assuntos/empresas-estatais/publicacoes/boletim_ee_edicao_03.pdf>. Accessed on: 6 Oct. 2017.
- BRUTON, D. G.; PENG, M. W.; AHLSTROM, D.; STAN, J.; XU, K. Xu. State-Owned Enterprises around the World as Hybrid Organizations. **The Academy of Management Perspectives**, v. 29, n.1, p. 92-114, 2015.
- DAISER, P.; YSA, T.; SCHMITT, D. Corporate governance of State-owned enterprises: a systematic analysis of empirical literature. **International Journal of Public Sector Management**, v. 30, n. 5, p. 447-466, 2017.
- DHARWADKAR, B.; GEORGE, G.; BRANDES, P. Privatization in emerging economies: an agency theory perspective. **Academy of Management Review**, v. 25, n. 3, p. 650-669, 2000.
- ESTRIN, S.; PREVEZER, M. The role of informal institutions in corporate governance: Brazil, Russia, India, and China compared. **Asia Pacific Journal of Management**, v. 28, n.1, p.41-67, 2011.
- FONTES FILHO, J.; PIMENTA, R. C. Práticas de administração pública no ambiente cultural dos países de língua portuguesa. **Revista Portuguesa e Brasileira de Gestão**, v. 15, n. 1, p.31-48, 2016.
- FRAZÃO, A. **A função social das empresas estatais função social das empresas estatais**, 2017. Available at: <<https://jota.info/colunas/constituicao-empresa-e-mercado/a-funcao-social-das-empresas-estatais-19042017>>. Accessed on: 5 Oct. 2017.
- GROSSI, G.; PAPPENFUß, U.; TREMBLAY, M.-S. Corporate governance and accountability of State-owned enterprises: relevance for science and society and interdisciplinary research perspectives. **International Journal of Public Sector Management**, v. 28, n. 4/5, p. 274-285, 2015.
- GROSSMAN, S. J.; HART, O. D. The costs and benefits of ownership: a theory of vertical and lateral integration. **Journal of Political Economy**, v. 94, n. 4, p. 691-719, 1986.
- GUO, L.; LACH, P.; MOBBS, S. Tradeoffs between internal and external governance: evidence from exogenous regulatory shocks. **Financial Management**, v. 44, n. 1, p. 81-114, 2015.
- HU, H. W.; TAM, O. K.; TAN, M. G. Internal governance mechanisms and firm performance in China. **Asia Pacific Journal of Management**, v. 27, n. 4, p. 727-749, 2010.
- JENSEN, M. C. Agency costs of free cash flow, corporate finance, and takeovers. **The American Economic Review**, v. 76, n. 2, p. 323-329, 1986.
- JENSEN, M. Value maximization, stakeholder theory, and the corporate objective function. **European Financial Management**, v. 7, n. 3, p. 297-317, 2001.
- JENSEN, M. C. Agency costs of overvalued equity. **Financial Management**, v. 34, n. 1, p. 5-19, 2005.
- KOWALSKI, P. et al. **State-owned enterprises: Trade effects and policy implications** (OECD Trade Policy Paper no.147). Paris: OECD, 2013. Available at: <[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC/WP\(2012\)10/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC/WP(2012)10/FINAL&docLanguage=En)>. Accessed on: 12 Sept. 2017.
- LAZZARINI, S. et al. **Empresas estatais no Brasil: uma proposta de reforma institucional**. 2015. Available at: <<http://politica.estadao.com.br/noticias/geral,empresas-estatais-no-brasil-uma-proposta-de-reforma-institucional,1701280>>. Accessed on: 10 Mar. 2017.
- LI, J.; QIAN, C. Principal-principal conflicts under weak institutions: a study of corporate takeovers in China. **Strategic Management Journal**, v. 34, n. 4, p. 498-508, 2013.
- MENON, K.; UMAPATHY, S. Control systems for state-owned enterprises. **Annals of Public & Co-Operative Economy**, v. 58, n. 3, p. 287-303, 1987.
- ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT – OECD. **OECD Guidelines on Corporate Governance of State-Owned Enterprises**. 2015. Available at: <<http://dx.doi.org/10.1787/9789264244160-en>>. Accessed on: 2 Oct. 2017.
- ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT – OECD. **State-owned enterprises in the development process**. Available at: <<http://dx.doi.org/10.1787/9789264229617-en>>. Accessed on: 14 Sept. 2017.
- PORTUGAL. **Boletim informativo do setor empresarial do Estado**. Lisboa: Ministério das Finanças, 2016. Available at: <<http://www.utam.pt/boletins-trime.html>>. Accessed on: 12 June 2017.
- TIROLE, J. **The theory of corporate finance**. Princeton/Oxford: Princeton University Press, 2006.
- WALSH, J.P.; SEWARD, JK. On the efficiency of internal and external corporate control mechanisms. **Academy of Management Review**, v. 15, n.3, p. 421-458, 1990.
- YOUNG, M. N. et al. Corporate governance in emerging economies: a review of the principal-principal perspective. **Journal of Management Studies**, v. 45, n. 1, p. 196-220, 2008.

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