Corruption and compliance in state-owned companies: rationality of Brazilian State-Owned Companies Law (13.303/2016)*

Corrupção e compliance nas empresas públicas e sociedades de economia mista: racionalidade das disposições da Lei de Empresas Estatais (Lei No. 13.303/2016)

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ABSTRACT

The Brazilian Law No. 13.303/2016 has disciplined a number of shortcomings about the State-Owned Companies in the Brazilian legal system, namely the legal discipline of mixed-capital companies and public companies. One of these points is the obligation that State-Owned Companies must have compliance and corporate governance policies, with the express prohibition of events involving acts of corruption (article 9, §1o, I, of Law 13303/2016). The Law No. 13.303/2016 reveals the particularity with which the fight against corruption in Brazil has been addressed. The Brazilian Law No. 13.303/2016 inaugurates requirements that had hitherto been practiced in the private and overseas markets, such as the constitution of External Audit Committees, directly linked to the Boards of Directors of mixed economy companies and public companies. Adopting the method of the economic analysis of law, this article shows how the phenomenon of corruption can affect the functioning of the Brazilian state-owned enterprises.

KEYWORDS

Corruption — State-owned enterprises (SOE)— Compliance — corporate governance — economic analysis of law

RESUMO

A Lei nº 13.303/2016, Lei das Empresas Estatais, disciplinou diversos pontos lacunosos no direito brasileiro, nomeadamente a disciplina jurídica das sociedades de economia mista e empresas públicas. Um desses pontos é a obrigatoriedade da existência de políticas de *compliance* e governança corporativa para as empresas estatais, com a vedação expressa da possibilidade de acontecimentos de atos de corrupção (art. 9º, §1º, I, da Lei nº 13.303/2016). A previsão revela a particularidade com que vem sendo tratado o combate à corrupção no Brasil, principalmente no âmbito das empresas estatais. Por outro lado, a Lei nº 13.303/2016 inaugura exigências que até então eram praticadas no mercado privado e no exterior, como a constituição de Comitês de Auditoria Externos, ligados diretamente aos Conselhos de Administração das sociedades de economia mista e empresas públicas (desde que adotem o regime das sociedades anônimas). Adotando o método da análise econômica do direito, o presente artigo aborda como o fenômeno da corrupção pode afetar o funcionamento das empresas estatais brasileiras.

PALAVRAS-CHAVE

Corrupção — empresas estatais — *compliance* — governança corporativa — análise econômica do direito

1. Introduction

State-owned companies provide the State with an important means of reaching its economic objectives when there is a relevant collective interest, or for national security reasons (as set forth in Brazil's Federal Constitution).

Legal disciplining for state-owned companies poses more far-reaching challenges than law applicable to private-sector agents. In principle, appropriate actions for the public administration may be associated with the use of elements typical of private organizations in order to develop activities of relevance to the community.

However, state-owned companies may also facilitate corrupt practices or misappropriation and this possibility has been confirmed by corruption scandals, which has led to a trend towards tighter control over state-owned companies and more oversight. The Brazilian Congress has sought to respond to society's aspirations in this respect by voting a legal framework for state-owned companies.

Law 13.303/2016, or the "State-Owned Companies Law", regulates control, supervision, procurement and administrative contracts for state-owned companies as per prerogative set forth in Article 173, paragraph 1 of the Federal Constitution.

The main objectives of Law 13.303/2016, according to its own explanatory statement, are to implement: *(a)* standards for managing the business of state-owned companies; *(b)* rules for risk management and internal controls while diminishing the occurrence of corrupt practices by setting compliance and corporate governance standards for state-owned companies; *(c)* specific procedures for appointing management, limiting the possibility of political appointees for technical positions; *(d)* rules for contractual arrangements and procurement of goods and services; and, (e) rules for oversight by external control bodies and by society.

The article examines the provisions for consolidation of control and anti-corruption techniques in state-owned companies, especially based on compliance and corporate governance regulations. The specific literature

of the economic analysis of the law has been used to examine challenges imposed by using the state-owned organizational format and initiatives taken to prevent or curb corrupt practices.

The deductive method has been used to analyze the specific provisions of the Brazilian State-Owned Companies Law (Law 13.303/2016) and scrutinize its mechanisms for control, moving from particular instances to draw a general conclusion. In addition, the article looks at the precise extent of control mechanisms required by the State-Owned Companies Law for the struggle to prevent corruption and curb agency conflicts arising from the ownership structure adopted by these entities.

The hypothesis to be tested is that mechanisms for controlling and combatting corruption posed by Law 13.303/2016 could significantly diminish agency conflicts within the scope of state-owned companies, thus diminishing the possibility of corrupt practices occurring. The hypothesis will be tested by individually examining control mechanisms introduced by the State-Owned Companies Law.

Note that control mechanisms introduced by Law 13.303/2016 may be analyzed using agency costs theory, which will enable jurists to take a more comprehensive approach to the legal phenomenon.

2. Corruption and public administration

Susan Rose-Ackerman and Bonnie Palifka note that States control the distribution of benefits by constantly imposing costs for those wishing to obtain these benefits.[1] Funds are distributed by an authority holding discretionary powers. It is not unusual for individuals and businesses to wish to bribe this authority in order to obtain payoffs or kickbacks arising from corrupt practices.[2,3]

Corruption reflects ineffective public institutions and unhealthy relationships between individuals and the State. Organizations are used for

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1 ROSE-ACKERMAN, Susan; PALIFKA, Bonnie. *Corruption and government*: causes, consequences and reform. 2nd ed. Cambridge: Cambridge University Press, 2016. pg. 51.

2 Ibid.

3 Note that both public administration and the private sector may be susceptible to corrupt practices. On the negative moral aspects of corruption in government, see PEREZ, Jesús González. *Corrupción, ética y moral en las administraciones públicas*. 2nd ed. Madrid: Civitas, 2014. pg. 37-49.

personal or third-party enrichment rather than the purposes for which they are intended.[4] Rose-Ackerman and Palifka state that "the existence of a large group of opportunists implies that the institutional environment is a key determinant of corruption risks."[5]

Vito Tanzi sees corruption as associated with government measures taken for spurious reasons but also increasingly clearly found in different parts of the private sector.[6] However, researchers have paid more attention to "bureaucratic corruption" or "grand corruption."[7]

In general terms, state-owned companies are the focus of government efforts to pursue economic activities using legal ownership structures associated with private law.

Maria João Estorninho notes the constant demand for the State to be capable of providing more of the goods and services typically associated with social welfare states, so more flexible organizational structures are required to enable growth. Estorninho highlights this phenomenon of the public administration's "flight to private law."[8]

The following sections analyze certain aspects of corruption in the structures of state-owned companies.

2.1 Opting for state-owned companies

State-owned companies combine aspects typical of public administration associated with market instruments, which is part of the reason for their complexity. By having more flexible controls than those traditionally applied to public administration, especially when they are operating in competitive markets, state-owned companies may act as catalysts for corrupt practices.

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4 Susan Rose-Ackerman e Bonnie Palifka, Corruption and government, op. cit., pg. 51.

5 Ibid., pg. 52.

6 TANZI, Vito. *Corruption and the economy*. Filozofija i Drustvo, Belgrado, v. XXIV, n. 1, pg. 6, 2013.

7 Many authors make a distinction between "grand corruption" and "petty corruption". See Susan Rose-Ackerman and Bonnie Palifka, Corruption and government, op. cit., pg. 124-125.

8 ESTORNINHO, Maria João. *A fuga para o direito privado*. Reimp. Coimbra: Almedina, 2009. pg. 40 e 53. The same conclusion was reached by RIBEIRO, Marcia Carla Pereira. *Sociedade de economia mista & empresa privada*: estrutura e função. Curitiba: Juruá, 1999. pg. 46. FONSECA, Rui Guerra da. *Autonomia estatuária das empresas públicas e descentralização administrativa*. Coimbra: Almedina, 2005. pg. 64-69.

The reasons for state-owned companies being seen as more prone to corruption, according to the OECD, include weaker budgetary constraints and not being subject to bankruptcy law.[9] Many state-owned companies operate in sectors in which they face very little private-sector competition. Added to this is the lack of rules or standards for transparency in relation to their accounts, as well as the absence of a controller or owner; management appointments may be made alternately by executive and legislative branches thus providing jobs to be handed out to members of the executive power's base or governing coalition.[10]

As an alternative to possible misappropriation, while seeing privatization as crucial, Tanzi notes the possibility of corrupt practices arising in this process, as in the cases of Russia's privatization of Gazprom.[11]

Eros Roberto Grau takes a critical view in relation to state-owned companies privatized in Brazil in the 1990s, especially because some were sold to foreign buyers who obtained loans from Brazil's economic development bank (BNDES) on very favorable terms.[12]

In another respect, Vitor Rhein Schirato suggests that privatizations in Brazil followed periods of interventionism or absenteeism in the Brazilian economy, rather like the swings of a pendulum.[13]

In any event, episodes of corruption in state-owned companies undermine the credibility of this type of organization, especially because of the significant collective interests involved in these cases.[14]

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9 FONTES FILHO, Joaquim Rubens; PICOLIN, Lidice Meireles. Governança corporativa em empresas estatais: avanços, propostas e limitações. *Revista de Administração Pública*, Rio de Janeiro, v. 42, pg. 1171, Nov./Dec. 2008. This position is confirmed by article 2, I of Brazil's Restructuring and Bankruptcy Law (Law No. 11.101/2005), under which rules for court-supervised reorganization and bankruptcy are not applicable to state-owned or state-controlled companies.

10 Ibid., pg. 1.171.

11 TANZI, Vito. Corruption around the world: causes, consequences, scope and cures. IMF Staff Papers, Washington, International Monetary Fund, v. 45, n. 4, pg. 564, Dec. 1998.

12 GRAU, Eros Roberto. *A ordem econômica na Constituição de 1988*. 15th ed. São Paulo: Malheiros, 2012. pg. 288.

13 The idea of the swing of the pendulum is described in Caio Tácito's sweeping retrospective on the phenomenon of state intervention in the economy through the use of state-owned companies. Tácito notes that the pendulum started to swing toward interventionism in Brazil's 1937 Constitution: "... successive Brazilian constitutions during the republican era are illustrative episodes of the swing of the institutional pendulum." [our translation] TÁCITO, Caio. O retorno do pêndulo: serviço público e empresa privada. O exemplo brasileiro. *Revista de Direito Administrativo*, Rio de Janeiro, v. 202, pg. 8, out./dez. 1995. Também SCHIRATO, Vitor Rhein. *As empresas estatais no direito administrativo econômico atual*. São Paulo: Saraiva, 2016. pg. 34.

14 In its Criminal Action No. 470 (also known as Mensalão), Brazil's Federal Supreme Court decided that there had been misappropriation of public funds from Banco do Brasil's holding

The next item examines theoretical aspects of corruption in state-owned companies.

3. Agency costs and ownership structure

The conceptual scheme used here is based on Edward Banfield's view of corruption functioning basically in a frame of reference in which an agent serves (or fails to serve) the interests of a principal.[15] The agent is a person who has accepted an obligation (as in an employment contract) to act on behalf of his principal in some range of matters and in doing so an agent must exercise some discretion. The situation includes third parties who stand to gain or lose by the agent's actions.[16]

In order to discipline these relationships, rules play a fundamental role, along with the conventional rules of conduct, whose violation creates the possibility of imposing penalties and costs on those who violate rules, be they social or legal.[17] An agent will be seen as personally corrupted if he deliberately violates or sacrifices the leader's interests for the sake of his own interests. However, if he consciously violates rules and acts illegally or unethically to pursue his leader's interests, he will be officially deemed corrupt.[18]

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in Visanet, even if Visanet's ownership structure was eminently that of an organization subject to private law: "The Visanet Fund is an appendix of Banco do Brasil, an extension of Banco do Brasil. And I had the opportunity to say something that others have misunderstood. I said this: the money from Banco do Brasil- which is part of the public sector, an indirect public administration entity- that was injected into Visanet's financial or economic clout, was not stripped of its status [as public money] by this injection of capital into a private company. This was interpreted as if I were saying that public money can never at any time be stripped of its status as public money. I was referring to Visanet, which actually is an extension of the public sector, so its money is public money. In fact, Visanet's full name is Empresa Brasileira de Meios de Pagamento [Brazilian Means of Payment Company], which shows its special nature; so although its legal personality is governed by private law, as is that of Banco do Brasil, Visanet has legal personality under private law; nevertheless this entity is part of the indirect Public Administration". Apud JUSTEN FILHO, Marçal. As empresas privadas com participação estatal minoritária. *Revista dos Tribunais*, São Paulo, v. 933, pg. 276, 2013.

15 BANFIELD, Edward. Corruption as a feature of governmental organization. *The Journal of Law and Economics*, Chicago, v. 18, n. 3, pg. 587, 0. 1975.

16 Ibid., pg. 587. The agent-corruption model is also seen in German legal theory: MEYER, Olaf. Korruption aus privatrechtlicher Perspektive. In: GRAEFF, Peter; GRIEGER, Jürgen (Org.). *Was ist corruption?*. Baden-Baden: Nomos, 2012. pg. 73.

17 Edward Banfield, Corruption as a feature of governmental organization, op. cit., pg. 587.

18 Ibid., pg. 587-588.

Economic activity, in turn, is organized through different legal institutions such as sole proprietorships, joint stock companies or cooperatives. In this respect, the choice of a business' legal ownership structure is crucial to minimize production costs. The chosen ownership structure must enable low-cost production of goods or services.[19] Companies usually use prefer joint-stock companies or corporations subjected to specific mechanisms for running their businesses.

Regardless of structure, according to Banfield, the main means of minimizing corruption is imposing restrictions. As mentioned above, the agency relationship is characterized by the presence of a delegator using the services of another person, a delegatee. The mere existence of an agency relationship leads to agency costs arising from divergences between the interests of delegatees and delegators.[20] Corruption may be regarded as one of the effects arising from agency conflicts and subject to costs.

Banfield notes that controlling agency costs and opportunistic behaviors may mean that business becomes extremely costly:

> It is evident that the costs of eliminating, or controlling, corruption may on occasion be greater than the gains from doing so. One can imagine a firm's spending itself into bankruptcy in an effort to end corruption or a labor union's sacrificing the advantage of its monopoly position by employing an honest but incompetent business agent.[21]

Shareholder-management relations may involve agency conflicts that produce: i) monitoring and incentive costs; ii) obligational costs; and iii) residual costs.

On the other hand, a business corporation's decision-making process may directly affect any agency costs, depending on the different ownership structure formats.

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[19] This is perhaps one of the main difficulties for an analysis of state-owned companies under Brazilian law. Scholars of administrative law are unable to discern the need for the ongoing study of the corporate structure of state-owned companies.

[20] MACKAAY, Ejan; ROUSSEAU, Stéphane. Análise econômica do direito. Translated by: Rachel Sztajn. 2nd ed. São Paulo: Atlas, 2015. pg. 532.

[21] Freely translated from the original: "It is evident that the costs of eliminating, or controlling, corruption may on occasion be greater than the gains from doing so. One can imagine a firm's spending itself into bankruptcy in an effort to end corruption or a labor union's sacrificing the advantage of its monopoly position by employing an honest but incompetent business agent". Edward Banfield, Corruption as a feature of governmental organization, op. cit., pg. 590.

Business decision-making involves four stages: 1) initiative; 2) ratification; 3) implementation; and 4) monitoring[22] Less complex companies prefer concentrate decision-making in the hands of just one individual. When a company grows and expands, having decisions made by many agents becomes more effective by delegating to people who can manage information more efficiently.[23]

The purpose of dividing roles in a given company is to minimize agency costs while taking into account the particularities of the business itself.[24]

A company that holds an IPO to obtain funds from the public is characterized by the separation between decision-making and risk-taking roles. Publicly listed companies should be used to organize complex activities in which gains from specialization are extremely important.[25]

For joint-stock companies, as a whole, a shareholder's liability is limited to the amount they have invested.[26] The more usual corporate formats operate by organizing a legal entity whose assets are separate from the company's and whose existence is distinct from that of its members[27] and shareholders and managers enjoy limited liability, which facilitates investor's ability to manage risk and obtain benefits arising from diversifying their investments[28] and minimizing monitoring costs.[29]

Therefore, mechanisms that mitigate agency conflicts in business corporations will be analyzed, which is especially important in the cases of state-controlled and state-owned companies organized as joint-stock companies.

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22 Ejan Mackaay and Stéphane Rousseau, Análise econômica do direito, op. cit., pg. 532-533.
23 Ibid., pg. 535.
24 To take just one example, an individual company or sole proprietorship may be used as a means of combining different functions and earnings due to its low level of organizational complexity, organizing activities for small-scale production of goods or services. Ibid., pg. 536.
25 Ibid., pg. 538.
26 This is the precise meaning of Article 1 of Law 6404/1976: "Art. 1. The company or joint-stock company shall have capital divided into shares and partners' or shareholders' liability shall be limited to the issue price of shares subscribed or acquired."
27 27 "Art. 20. Legal entities have separate existence from that of their members."
28 Ejan Mackaay and Stéphane Rousseau, Análise econômica do direito, op. cit., pg. 538-539.
29 Ibid., pg. 548.

3.1 Mechanisms for control of agency conflicts in business corporations

Despite limited liability, shareholders need monitoring because managers may act opportunistically rather than in a company's interest.[30]

I shall now analyze three specific mechanisms for curbing agency conflicts in state-owned company structures.

3.1.1 Board of Directors

Having a Board of Directors lay the foundations for a governance system to reduce transaction costs may be seen as a suitable organizational for minimizing agency costs. The Board of Directors will in principle make for efficient decision-making in favor of society.[31]

Especially in the case of a publicly listed company operating in the financial market, controlling shareholders may sell blocks of shares at whatever price they believe is right, which may lead to more or less constant changes of control. On the other hand, the financial market also allows investors to diversify their holdings and act in a more distanced manner in relation to the company's specific activities.[32]

A company's internal separation (shareholder/manager) creates an agency relationship potentiated by the distinction between ownership of voting shares and those exercising the company's management activity. Potentially, the more shares held by management, the fewer conflicts there will be between management and shareholders. In a company that has a wide-spread shareholder base, managers will not usually hold significant investments enabling their interests to be aligned with those of shareholders as a whole.[33]

In a parent or controlling company, the controlling shareholder or group has the power to decide on key matters by electing a majority of management and taking part in internal decisions.[34]

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30 In the context of unlimited liability, shareholders would hypothetically tend to spend more on company oversight. See ibid., pg. 549.
31 Ibid., pg. 551-552.
32 Ibid., pg. 551.
33 Ibid., pg. 552.
34 Ibid., pg. 558-559.

This controlling power may be abused. Stéphane Rousseau and Ejan Mackaay give the following example: just imagine certain assets in a company controlled by the majority shareholder being sold to another company under its control.[35]

In the specific case of state-owned companies, since controlling power is exercised mainly by the government, the risk of assets being concentrated in the possession of the government may considerably increase the risks of managers acting opportunistically to the detriment of minority shareholders or of the purposes justifying the creation of the state-owned company.[36]

Whether a company is State-Owned or not, its governance rules should protect the interests of all shareholders as the only stakeholders interested in maximizing profits and company value as residual beneficiaries. Governance rules must preserve shareholders' interests as those who have an interest in maximizing the company's valuation.

The Board of Directors has the primary role of reducing vulnerability. It must also facilitate and preserve access to tangible and intangible assets required for the company's business; it must diminish uncertainties for its operations when this collective body is required to report its opinion on their sale or transfer.

The Board of Directors is charged with establishing a bridge between stakeholders and preserving the funds required to run the company's business. In addition, the Board of Directors is a mandatory body as part of the structure of a state-controlled company under Law 6.404/1976, which highlights its importance in the ownership structure itself.[37]

In its supervisory role, the Board of Directors must monitor management's actions and may have its activity backed by independent audits.

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35 Ibid., pg. 560.

36 Vitor Rhein Schirato notes the need to respect the administrative and financial autonomy of state-owned companies: "State-owned companies have a previously established purpose, their own assets and institutional autonomy to carry out their activities. The Direct Administration must control — in the senses that will be explained more explicitly below — state-owned companies, but not use said companies as if they did not have autonomous legal capacity." (our own translation) Vitor Rhein Schirato, As empresas estatais no direito administrativo econômico atual, op. cit., pg. 43-44.

37 "Art. 239. State-controlled companies must have a Board of Directors, and the minority must be assured the right to elect one of the members, if they are not entitled to more of them through the multiple voting process. Sole paragraph. The duties and responsibilities of managers of state-controlled companies are the same as those of listed companies."

3.1.2 Voting rights and control of conflicts

Voting is one of the shareholder's most important individual rights although it may be derogated by suppression, waiver or even recognition of the validity of veto agreements in certain circumstances. The right to vote gives the shareholder the most important powers over a wide range of decisions, including the right to elect board members.

Voting rights also enable shareholders to state their views on transactions that affect the company's structure, thus protecting their rights and interests. Although voting rights are seen as some of the main powers held by shareholders, Article 115 of Law No. 6.404 states that shareholders must exercise their right to vote in the interests of the company and they may be considered abusive if their use is intended to cause losses for the company or its shareholders.

In addition, management have duties to act loyally and honestly. Art. 159 of Law 6.404/1976 enables a company, upon resolution of the general meeting, to file a civil-liability claim against management, which shows that the controlling shareholder must exercise its voting rights in accordance with the business corporation's legitimate interests.

On the other hand, the effectiveness of voting is also affected by some other elements, such as shareholders intervening to curb opportunism shown by management or even controlling shareholders. Any benefits arising from such intervention will favor all shareholders in proportion to their holdings.

3.1.3 Competition

The competitive environment in which the company operates may have a role in sanctioning any opportunistic behavior by management, making it difficult, for instance, for managers who have a blemished reputation to remain in the market.

Luigi Zingales notes that competition could function as a crucial element for corporate governance. Since companies are managed by boards, their members must always be careful to ensure their actions uphold their reputation, since any invitations to sit on another board will depend on their performance and reputation in the market.[38] Hence competition's crucial

[38] ZINGALES, Luigi. Um capitalismo para o povo. Translated by: Augusto Pacheco Calil. São Paulo: BEI Comunicação, 2015. pg. 141.

role is prompting members of a company's management to act properly and ensure their continuing presence in the management market.

As for the company's reputation, the financial market is a fundamental mechanism for steering investments. If a company is to be seen as a good investment option, it must be clear that directors and controllers are subject to the duties of prudence, diligence, loyalty and good faith, as duties arising from the law and company by-laws.

For state-owned companies too, competition may mitigate any acts or measures involving abuse of control.

Schirato warns that even differentiating state-owned companies that perform public service activities from those engaged in economic activities is irrelevant for the current governance arrangements applied to state-owned companies, due to the fact that utilities are competing with other companies engaged in other economic activities.[39]

Based on these assumptions, state-owned companies operating in competitive markets may be subject to the market's effects on giving managers more or less freedom to manage, with potential curbing of abusive actions in agency conflict situations.

4. *Compliance* and corporate governance under the State-Owned Companies Law (Law No. 13.303/2016)

As shown above, a joint-stock corporation's ownership structure presupposes the existence of several mechanisms for control of agency conflicts, thus mitigating corruption risk.

On the same lines, ownership structure is crucial for state-owned companies. As noted above, most state-owned companies are organized as joint-stock companies, which is obligatory for state-controlled companies as per Article 235 *of* Law 6.404/1976,[40] repeated in Law 13.303/2016.[41]

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[39] Vitor Rhein Schirato, As empresas estatais no direito administrativo económico atual, op. cit., pg. 69. There is a similar position in European legal theory; for the above see LAUBADÈRE, André de. *Direito público econômico*. Translated by: Maria Teresa Costa. Coimbra: Almedina, 1985. pg. 468-469. For an opposite view, see Eros Roberto Grau, A ordem econômica na Constituição de 1988, op. cit., pg. 106-124.

[40] "Art. 235. State-controlled joint stock companies are subject to this Law without prejudice of special provisions under federal law."

[41] "Art. 4 A state-controlled company is an entity ascribed legal personality under private law, whose creation is authorized by law in the form of a joint-stock company. The majority

Law 13.303/2016 basically established on mechanisms to control agency conflicts in order to prevent corrupt practices or embezzlement in state-owned companies.

One means of curbing agency conflicts adopted by the law is imposing compliance and corporate governance practices in order to ensure that state-owned companies are duly audited by external agents as well as internally by the State-Owned Companies' management.

Even before regulation of the Federal Constitution through Article 173, paragraph 1, Mário Engler Pinto Júnior had noted that:

> It would be important to seize this opportunity to formulate the future legal status of state-owned companies [...] to recognize the value of the internal governance structure of state-owned companies, namely boards of directors and fiscal councils, thus having them become institutional channels for corporate control.[42]

Law 13.303/2016 highlights the internal structures of state-controlled companies as a means of controlling any corrupt practices that may arise within them.

4.1 Codes of conduct and ethics

Art. 9 of the State-Owned Companies Law sets general rules for the use of internal risk management practices. Paragraph 1 of Article 9 of Law 13.303/2016 requires companies to have a Code of Conduct and Integrity stating "principles, values and mission for state-owned and state-controlled companies, as well as guidelines to prevent conflict of interest and corrupt practices and fraud (item I)", although claiming that having a Code of Conduct or Integrity banning corrupt practices will in itself prevent them is hardly credible.

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of its voting shares belong to the Federal Government, the States, the Federal District, the Municipalities or an entity of the indirect administration. Paragraph 1. A legal entity controlling a state-controlled company has the duties and responsibilities of a controlling shareholder stated in Law No. 6.404 of December 15, 1976 and it shall exercise controlling power in the company's interest obeying public interest that led to its creation. Paragraph 2 In addition to the rules stated herein, a state-controlled company registered with the Brazilian Securities Commission is subject to the provisions of Law No. 6.385 of December 7, 1976."

42 PINTO JÚNIOR, Mário Engler. *Empresa estatal*. 2nd ed. São Paulo: Atlas, 2013. pg. 178.

In a recent example, in the case of Petrobras, most of the agents condemned by the courts for misappropriation were members of the Company's top-level management.[43] Moreover, Petrobras had had a Code of Conduct since 1998, which shows that the mere existence of a document such as a Code of Conduct and Integrity cannot be seen as a typical means of controlling agency conflicts in state-owned companies.

As of 2005, Brazil's publicly listed companies trading in BM&FBovespa's *Novo Mercado* segment have been required to have a Code of Conduct for their business activities as a condition for trading in this segment.[44]

OECD recommendations also call for state-owned companies to have Codes of Conduct and Corporate Governance and anti-corruption practices as crucial aspects required to develop State-Owned Companies.[45]

The Brazilian State-Owned Companies Law must not be seen as an absolute means of preventing agency conflicts, but it does show an option favoring general rules of conduct and ethics to set a general standard of conduct for employees, managers and directors.

4.2 Statutory Audit Committees

The mandatory establishment of a Statutory Audit Committee may be seen as one of the main innovative aspects of Law 13.303/2016. Audit committees were highlighted when the government of the United States amended the

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[43] The Federal Public Prosecutor's Office has stated that members of Petrobras top management convicted by the courts in the context of Operation Carwash include the former directors of its departments for International business (Nestor Cerveró), Supplies (Paulo Roberto Costa) and Services (Renato Duque). See BRAZIL. Federal Public Prosecutors' Office. Court Decisions. Available at: <http://lavajato.mpf.mp.br/atuacao-na-1a-instancia/decisoes-da-justica>. Accessed on: February 7, 2017.

[44] "6.9 Code of Conduct. The Company shall prepare, disclose and send to BM&FBOVESPA a code of conduct stating the values and principles that guide the Company and must be preserved in its relationship with directors, employees, service providers and other persons and entities with whom the Company relates. BOLSA DE VALORES DE SÃO PAULO. Regulamento de listagem, aplicação de sanções pecuniária e cláusulas mínimas estatuárias. pg. 11. Available at: <https://goo.gl/kQPdUm>. Accessed on: February 6, 2017.

[45] The OECD report notes that managements of state-owned companies should develop, implement, monitor and communicate internal controls, ethics and compliance programs, including those contributing to fraud and corruption control. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT. OECD guidelines on corporate governance of state-owned enterprises. 2015. pg. 25. Available at: <www.oecd.org/daf/ca/OECD-Guidelines-Corporate-Governance-SOEs-2015.pdf>. Accessed on: January 28, 2017.

Sarbanes-Oxley Act in 2002 to require audit committees for local and foreign listed companies trading through American Depositary Receipts (ADRs).

Neither Law No. 6.404/1976 nor Law No. 10.303/2001 expressly refer to audit committees. However, Brazil's Securities Commission (SEC) and its Corporate Governance Institute (IBGC) have responded to legislative lacunae and changes taking place in the corporate sector by endeavoring to raise awareness of the important role of audit committees for corporate governance.

The IBGC's Code of Best Practices describes the activity of an audit committee as follows:

> The Boards of Directors should encourage the setting up of Audit Committees to analyze financial statements, promote oversight and accountability for the financial area, ensure that management develops reliable internal controls, that internal auditors do their job well and that auditors conduct their own review to assess the Board's practices and internal audit studies. Audit Committees should also ensure that the organization's code of conduct is complied with.[46]

Law 13.303, Article 24, states that Statutory Audit Committees are an auxiliary body of the Board of Directors,[47] whose primary responsibility is to provide details of the engagement, dismissal and supervision of the state-owned companies's independent and internal audits. Another attribution of the Statutory Audit Committee is to receive anonymous reports involving corrupt practices or acts that violate the company's business and ethical principles.[48]

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[46] INSTITUTO BRASILEIRO DE GOVERNANÇA CORPORATIVA. Guia de orientação para melhores práticas de comitês de auditoria. São Paulo: IBGC, 2009. Available at: <www.ibgc.org.br/userfiles/files/Guia_7_.pdf>. Accessed on: February 5, 2017.

[47] In the case of Petrobras, many of the damaging transactions were approved by its Board of Directors. One of the allegations of the former chair of Petrobras' board of directors was that its members were not required to know of losses that financial transactions could cause for the Company. However, these allegations could not have been made if Petrobras had had a Statutory Audit Committee, but it did not have one until February 2016.

[48] "Art. 24. State-owned companies and state-controlled companies must have as part of their organizational structure a Statutory Audit Committee acting as an auxiliary body for the Board of Directors, to which it shall report directly. [...] Paragraph 2 The Statutory Audit Committee shall have means of receiving reports on matters related to the scope of its activities, including confidential ones internal and external to the public or mixed-capital company. "

Luigi Zingales notes that having a company itself receive internal complaints is one of the cheapest and most effective ways of combating any fraudulent or corrupt practices.[49]

Setting up a Statutory Audit Committee is therefore one of the main means of controlling potential agency conflicts in state-owned companies by strengthening transparency and monitoring of management's acts.

4.3 Fiscal Council in state-owned companies

Under the Brazilian Corporate Law (Law No. 6.404/1976) and State-Owned Companies Law, the duties of Fiscal Councils are different from those of Statutory Audit Committees. In the context of the Corporate Law, Fiscal Councils have the powers to supervise members of management, review management's reports, denounce members of management, analyze financial statements and exercise special roles if the company is liquidated.[50]

Legal theorists have often noted that the role of the Fiscal Council lacks efficacy. The main reasons would be the low level of compensation paid to its members, their remaining remote from business matters and their merely formal reviews of corporate accounts.[51] Some jurists believe there is no need for fiscal councils given the profusion of independent auditors.

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[49] Luigi Zingales, Um capitalismo para o povo, op. cit., pg. 141.

[50] "Art. 163. It is incumbent on the fiscal council to: I — supervise, through any of its members, the acts of management and verify the performance of their legal and statutory duties; II — issue its opinion on management's annual report stating any additional information deemed necessary or useful for general meeting resolutions; III — issue its opinion on proposals made by management bodies to be submitted to general meetings in relation to altering share capital, issuing debentures, bonds or subscription warrants, investment plans or capex budgets, dividend payouts, transformation, consolidation, merger or spin-off; IV — through any of its members, report to the general meeting if management bodies fail to take the necessary measures to protect the company's interests, report any errors, fraud or crimes they discover, and suggest useful measures for the company; V — call an annual general meeting if management bodies postpone such a call for more than one (1) month, and call an extraordinary meeting whenever there are serious or urgent reasons, including placing the matters they deem necessary on the agenda for meetings; VI — on a quarterly basis or more often, analyze balance sheets and other financial statements periodically compiled by the company; VII — examine the financial statements for the fiscal year and comment on them; VIII — perform these duties during liquidation, in view of the special provisions regulating the latter."

[51] CARVALHO, Modesto; LATORRACA, Nilton. *Comentários à Lei de Sociedades Anônimas*. v. III. 2nd ed. São Paulo: Saraiva, 1998. pg. 367.

Evandro Fernandes de Pontes argues that Brazilian companies lack internal oversight culture. In addition, fiscal councils are less important because independent auditors and audit committees are required.[52]

In addition to merely reiterating the criteria for Fiscal Councils required by Law 6.404/1976, there is a new aspect of Law 13.303/2016 in that it requires one of the directors to be a tenured employee of the public administration as per Article 26, paragraph 2 of Law 13.303/2016.[53]

Despite the importance of their attributions under applicable law, the local experience of state-owned companies has shown that Fiscal Councils cannot be seen as a strong means of controlling agency conflicts. In addition, their duties seem to overlap with those of Statutory Audit Committees as defined by the State-Owned Companies Law.

4.4 Board of Directors in state-owned companies

The State-Owned Companies Law does not seem to introduce many innovations in relation to Boards of Directors for State-Owned Companies or in relation to the requirements of Corporate Law.

Art. 18, I, of Law 13.303/2016 determines the Board of Directors' responsibility for approving and monitoring corporate governance-related decisions, which favors the role left to the Statutory Audit Committee as auxiliary to the Board of Directors.

The committee is charged with implementing risk management programs as well as mitigating anti-corruption and fraud risk programs under Article 18, II, of Law 13.303/2016.

Art. 20 of Law No. 13.303/2016 seems to pose an important restriction on use for political purposes and as a source of compensation for agents of state power by prohibiting paid participation of members of the public administration on more than two boards of directors or fiscal councils.

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[52] PONTES, Evandro Fernandes de. *O conselho fiscal nas companhias abertas brasileiras*. São Paulo: Almedina, 2012. pg. 252.

[53] "Art. 26. In addition to the rules stipulated herein, the provisions set forth in Law No. 6.404 of December 15, 1976, concerning their powers, duties and responsibilities, shall apply to members of the Fiscal Council of state-owned and state-controlled companies as shall requirements and impediments for their appointment and compensation, in addition to other provisions established therein ... Paragraph 2 The Fiscal Council shall have at least one (1) member appointed by the controlling entity, who shall be a public servant in a tenured position with the public administration."

In relation to Boards of Directors, the State-Owned Companies Law does not create innovative mechanisms for managing or controlling agency conflicts in State-Owned Companies' relations. However, it lends greater transparency and morality to appointments of board members and their compensation.

4.5 Specific rules for appointments to the board of directors and of executives

The main innovation in relation to the anti-corruption control system in state-owned companies introduced by Law 13.303/2016 appears to be that persons lacking technical qualifications cannot be appointed to the board of directors or executive board, or to the positions of general manager or CEO.

Those appointed must have at least 10 years' experience in the public or private sector, or at least have held positions related to their profession in the public administration or the private sector, or have been independent professionals.[54]

In addition to these restrictions in relation to nominee qualifications, Law 13.303/2016 sets substantive limits for members of the public administration. Members of the public administration or the body to which a state-owned company directly reports for the abovementioned management functions are strictly excluded for the purposes of these appointments.

Restrictions apply to persons who have acted as members of decision-making structures of political parties within the previous 36 months, or hold positions in a labor union organization, or who have been hired by the state-

[54] "Art. 17. Members of the Board of Directors and nominees for the positions of director, including chair person or president, general manager and CEO, shall be chosen from among citizens of unblemished reputation and known expertise, or meeting one of the requirements of subitems "a", "b" and "c" of subparagraph I and cumulatively the requirements of subparagraphs II and III: I — have at least a) ten (10) years' professional public or private sector experience in the same branch of business as the state-owned or state-controlled company, or in a sector related to that for which they are to be appointed, in a senior management position; or b) four (4) years in at least one of the following positions: 1. management or senior position in a company of similar size or type to the state-owned or state-controlled company, senior management meaning a position in the company's two (2) highest non-statutory hierarchical levels; 2. held a discretionary appointment or "position of trust" equivalent to DAS-4 or higher in the public sector; 3. position as educator or researcher in the same areas of activity as the state-owned or state-controlled company; c) four (4) years' experience as an independent professional engaged directly or indirectly in the same area of business as the state-owned or state-controlled company; II — having academic background suited to the position for which they were indicated; and III — not being in any of the non-eligible situations stipulated in subparagraph I of Article 1 of Supplementary Law No. 64 of May 18, 1990, as amended by Supplementary Law No. 135 of June 4, 2010."

owned company, or are in partnerships with it, or any person who may have a conflict of interest with the state company.

Merely for the sake of example, in January 2017, a preliminary injunction issued by the 8th Federal Court of the Federal District in an action filed by the postal services labor union determined that six appointments for vice-president of the Brazilian Postal and Telegraph Service have contravened Law 13.303/2016, and ordered their effects to be suspended immediately. This example shows that the State-Owned Companies Law is now applicable in relation to appointments to the Executive Board and Board of Directors.[55]

The rules are directed against any acts that pose agency conflicts, especially in relation to corruption, in the sensitive relations between public power, political parties, professional management and political management of state-owned companies.

4.6 Provisions in relation to procurement and bidding procedures

The procurement and bidding procedures set forth in Law 13.303/2016 supply guidelines for a specific procurement regime, that is not necessarily connected with the provisions of the General Bidding Procedures Law (LGL) (Law 8.666/1993), and which is restricted to the direct public administration and related foundations and autonomous government entities.

Recalling the argument on the constitutional standing of Petrobras' simplified procurement and bidding procedures, which was declared unconstitutional by the Federal Court of Auditors (TCU), but is currently suspended by a decision of the Federal Supreme Court (STF). The example of Petrobras shows that as of the enactment of Law No. 13.303/2016, state-owned companies now have special procurement and bidding arrangements that departed from those introduced by Law 8.666/1993.[56]

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[55] ALVES, Murilo Rodrigues. Justiça vê 'afronta' à Lei das Estatais e afasta seis executivos dos Correios. Estado de S. Paulo, São Paulo, January 11, 2017. Available at: <https://goo.gl/EeerJX> Accessed on: July 23, 2017.

[56] In this respect, the Federal Supreme Court has ruled the following in a preliminary writ of mandamus judged due to the declaration of unconstitutionality of its simplified bidding regime: "Petrobras being legally submitted to a special bidding regime seems to be justified by the fact that the relativization of the oil monopoly introduced by EC No. 9/95 meant that company started exercising the economic activity of oil exploration in a regime of free competition with private companies awarded concessions for the same activity, which, it should be noted, are not subject to the strict procurement and bidding procedures required by Law 8.666/93. In this respect, therefore, note that free competition presupposes a level

The procurement and bidding procedures set forth in Law 13.303/2016 aggregate solutions for state-owned companies that operate on a competitive basis in order to make them more competitive, cut out red tape and slow progress for certain contracts that are essential for the state company's economic activity.[57]

Especially for companies operating on a competitive basis, it was estimated that procurement rules could be more efficient, if for anything, because not even the strict rules of the Bidding Procedures Law appear as defining elements for agency conflict actions, once again highlighting the risk of corruption.

In relation to the hypotheses of being exempted from bidding procedures by legal authorization, few innovations were posed in relation to the provisions of Law 8.666/1993. For this purpose, Article 29, I and II of Law 13.303 states that bidding procedures are not required for works costing R$100,000.00 or less (engineering) and R$50,000.00 or less for other services as long as there is no payment I installments of the subject matter of the bid, similar to the cases of exemption from bidding under article 24,1 and II of the LGL.

In relation to the arrangement dispensing bidding procedures, namely cases in which bidding is not advisable due to a peculiarity of the product or service to be acquired or due to supplier exclusivity, Law 13.303/2016 has introduced considerable improvements in relation to the LGL's bidding procedure exemptions.

Art. 30, I of Law 13.303 allows direct contracts if materials, equipment or goods can be supplied by only one producer, company or exclusive

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playing field for competitors. The Federal Court of Auditors (TCU) declared that Article 67 of Law 9.478/97 and Decree No. 2.745/98 were unconstitutional, thereby forcing Petrobras to meet the requirements of Law No. 8.666/93. This declaration would appear to contradict constitutional norms, particularly those reflecting the principle of legality, those determining the competences of the TCU (article 71), and those comprising legal arrangements for the oil industry's business operations (Article 177). BRAZIL. Federal Supreme Court. Writ of Mandamus (MS) 28745 MC. Reporting judge Ellen Gracie, date of decision May 6, 2010, published in legal gazette DJe-085 DISCLOSURE May 12, 2010 PUBLICATION May 13, 2010. For the case law position on Petrobras' procurement bidding arrangements, see ARAGÃO, Alexandre Santos de. *Empresas estatais*. Rio de Janeiro: Forense, 2017. pg. 219-224.

57 Marcia Carla Pereira Ribeiro and Paula Ritzmann Torres note that Law 8.666/1993 requires Petrobras to follow procurement rules that would make the company overly inefficient: "Therefore, simplified procurement procedures for goods and services allow more flexibility than the rules stated in Article 37 of the Federal Constitution, which permeate the activities of Public Administration entities." RIBEIRO, Marcia Carla Pereira; TORRES, Paula Ritzmann Torres. O procedimento licitatório simplificado da Petrobras — o dilema jurisprudencial de uma sociedade estatal de mercado. *Revista de Direito Empresarial*, Belo Horizonte, yr. 10, n. 1, pg. 180, Jan./Apr. 2013.

representative. In relation to Article 30, II of Law 13.303, specialized technical services may be engaged directly from companies that are well known for their specialized technical services. Unlike Article 25, of the LGL, the State-Owned Companies Law provides a list showing situations in which bidding procedures may be waived or exempted. The stipulation seems to be merely exemplary with the possibility of extending this list when the requirements for exemption are fulfilled.

The first of these refers to engaging services for technical studies, planning and technical projects or executive designs (article 30, I, "*a*"). The second stipulates cases in which legal opinions, expert reports and evaluations in general are required (article 30, I "*b*"). The third case refers to engaging advisory or technical consulting services and financial or tax audits (article 30, I, *"c").* This latter case is extremely important for state-controlled companies operating in competitive conditions and/or listed in BM&FBovespa's *Novo Mercado* segment in order to maintain their levels of competitiveness.

The fourth hypothesis refers to the monitoring, supervision or management of works or services (article 30, I "*d*"). The fifth exemplary case of exemption or waiver refers to the possibility of engaging law firms to litigate or defend judicial or administrative proceedings (article 30, I "*d*"). Although state-owned companies usually have their own in-house attorneys, most of whom are qualified to defend the company's interests, the complexity of business conducted by state-owned companies may require the services of professionals known for their expertise and recognized legal-technical qualifications.

The sixth hypothesis concerns the possibility of directly engaging staff training services (article 30, I "*e*"). The sixth and last example of the possibility of direct procurement establishes the possibility of directly engaging services to restore artworks or historic heritage assets.

A point to be noted in relation to Law 13.303's direct procurement procedure refers to the well-known specialization requirement that may allow direct procurement, when specialization is shown by studies, experience, publications, organization, equipment, technical staff or other requirements related to the principal's activities. Unlike the LGL, which sets broad criteria to define "known specialization", Law 13.303/2016 concretizes the "well known specialization" concept.

Article 31, paragraphs 1 and 2, of Law 13.303/2016 expressly requires state-owned companies to adopt specific procedures to verify any overpricing or surcharges within the scope of their contracts. Note that Article 31,

paragraph 1, of Law 13.303/2016, requires state-owned companies to verify prices offered by bidders in relation to market reference prices, especially for civil engineering and public-works contracts.

Note that the Federal Court of Auditors has stated that even state-owned companies that have not yet set their Procurement rules should follow the pricing criteria set forth in Law 13.303/2016:

> In so far as the provisions of Law 13.303/2016 are not legally binding for state-owned companies (article 91), they must provide reasonable explanations for contracts signed at over-budget prices, since the maximum admissible price for a bidding procedure allowed under the new legal decree is the estimated contractual price (article 56, item IV).[58]

Concerning the requirement to disclose estimated costs for contracts signed by state-owned companies under Article 34 of Law 13.303/2016, "details of costs and other information needed to prepare bids" are expressly set aside from the bids' confidentiality. Therefore, although the estimated cost of a contract to be entered into by a SOE is confidential, items used in bids, such as spreadsheets, are exempted from the secrecy imposed by Article 34 of Law 13.303/2016.

A recent Federal Court of Auditors (TCU) interpretation in relation to confidential contractual procedure for state-owned companies stated:

> For bidding procedures held by state-owned companies, even if the estimated cost of the contract is confidential, any alteration made to the estimate that involves detailing amounts and other information needed to prepare bids must be disclosed on the same terms and conditions as the original minutes and procedures, thus leading to a new deadline for submitting bids as per Article 39 sole paragraph of Law 13.303/2016.[59]

Note that for cases in which a budget is confidential, there will be no disclosure of unit costs or overall maximum costs for bids, but only estimated amounts. Therefore, this provision differs from Law No. 8.666/1993, which

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[58] BRAZIL. Federal Court of Auditors. Judgment No. 1.549/2017. Plenary Session, Complaint, reporting judge José Múcio Monteiro.

[59] BRAZIL. Federal Court of Auditors. Judgment No. 3.059/2016. Plenary Session, Complaint, reporting judge Benjamin Zymler.

requires disclosure of both unit costs and overall prices. This provision means the criterion is closer to the stipulation in the Differentiated Procurement Public Procurement Regime (local acronym RDC) introduced by Law No. 12.462/2011.

The objective is to have bidders submit costs based on their real situation — which will certainly converge with market practices — without being tied to prices estimated by the managers organizing the bidding procedure. The lawmaker's intention was apparently to allow contractual prices to be effectively shaped and budgeted based on the amounts needed to build a structure or deliver a service rather than by using a spreadsheet that shows only the price quoted in the procurement or tender notice for use as reference.

In relation to Article 32 IV of Law 13.303, the established practice was that state-owned companies should preferably adopt electronic trading or bidding systems. A recent TCU interpretation decided that state-owned companies must comply with preference for electronic bidding procedures when procuring goods and services as per Article 32 IV of Law 13.303/2016:

> [In the present case] the Emgea Competition 01/2016 was found to involve unfair competition in terms of technical type and price, since it was not shown that it was impossible to specify technical and operational criteria that would set reasonable minimum capacity to meet standards for quality, yield and productivity of the services to be contractually obtained, while TCU precedents in relation to the obligation to use bidding procedures, preferably electronically, to procure ordinary goods and services, also given the provisions of Article 32 item IV of Law 13.303/2016.[60]

In relation to bidding procedures, Law 13.303/2016 requires the following stages: i) preparation; ii) disclosure; iii) submission of bids or proposals; iv) analysis; v) confirmation of the effectiveness of the bids; vi) negotiation; vii) qualification; viii) filing of appeals; ix) adjudication; and x) ratification of the procedure's outcome.

In general terms, the bidding procedure stipulated in Law 13.303/2016 is very similar to the arrangement required by the Differentiated Procurement

[60] BRAZIL. Federal Court of Auditors. Judgment No. 2.853/2016, Plenary Session, TC Case No. 020.036/2016-7 — reporting judge Raimundo Carreiro — Minutes No. 46/2016 — Session date: November 9, 2016.

Regime, which poses approximately the same sequence of stages as the State-Owned Companies Law (article 51 of Law 13.303/2016). There is a new aspect in that state-owned companies may negotiate with a contractor to get the best conditions even before adjudication of the goods or services covered by the bidding procedure.

The Differentiated Procurement Regime (RDC) stipulated the possibility of negotiating with bidders but only after initial adjudication (article 26 of Law 12.462/2011). Under regulatory arrangements applicable to state-owned companies, negotiation may take place once the effectiveness of the bid or proposal that came first in the initial adjudication stage has been confirmed.

In addition, just as the RDC does, the bidding procedure as per Law 13.303/2016 allows the possibility of altering the order of stages, thus making bidding procedures more dynamic, and this tendency has been confirmed in several legislative decisions (laws concerning awards of utility concessions and public-private partnerships).

In relation to contracts entered into by state-owned companies, Article 68, of Law 13.303/2016 requires them to be governed exclusively by their contractual clauses and private-law precepts. In this case, note that Law 13.303/2016 states that contractual instruments entered into by state-owned companies produce effect by recognizing that the strictly defined concept for administrative contracts is not applicable to legal agreements entered into by state-owned companies.

In relation to regulatory provisions for Law 13.303/2016 issued by the president of Brazil, Presidential Decree 8.945/2016 does not add anything to the applicability of bidding and procurement to state-owned companies, stating that the "bidding and procurement arrangements as per Law No. 13.303 of 2016 are self-applicable ".

In general terms, the aims of the bidding and procurement arrangements imposed by Law 13.303/2016 was to lend a certain dynamism to bidding and procurement procedures involving these companies, in particular due to the fact that several companies conduct their business under competitive conditions, specifically state-controlled companies. There are some precepts that pose substantial departures from those required by the General Bidding Procedures Law (LGL), thus explicitly recognizing that State-Owned Companies are not bound to use the same procurement criteria as the LGL.

As a general principle, the procurement arrangements for state-owned companies set forth in the bidding procedure is the main means of preventing

illicit contracts for state-owned companies and of potentially minimizing agency conflicts and deviations. By introducing more flexible procurement and bidding arrangements for state-owned companies, lawmakers have favored a more dynamic process for doing business in competitive conditions, while not failing to stipulate instruments devised to prevent overpriced contracts and safeguard against agency conflicts.

5. Conclusions

This article has attempted to show that state-owned companies have the peculiarity of combining elements typical of public administration with structures typical of private law, given their corporate structure. As seen above, agency conflicts in companies may be replicated in state-owned companies as a result of differences between the interests of those holding controlling power and those of other shareholders, and differences between the interests of companies and their managements.

In turn, the basic structure of corruption arises from by existence of agency conflicts between the interests of a delegator agent and a delegatee agent. In state-owned companies, agency conflicts usually arise from interference by the controlling power, i.e. government appointee agents using their position for corrupt practices or to embezzle or misappropriate State-Owned Companies' funds for all sorts of purposes.

When properly used, the typical joint-stock company structure may itself provide mechanisms to curb or prevent agency conflicts in state-owned companies too. The main pillars in this respect are the role of the Board of Directors, the proper exercise of voting rights and the effects of competition.

The regulations of Law 13.303/2016 specifically for state-owned companies selected six basic mechanisms to prevent corrupt practices and consequently curb agency costs and conflicts.

The first requires state-owned companies to adopt a Code of Conduct and Integrity, which is a mechanism that does not directly curb corruption or agency conflicts, but sets guidelines for the conduct of business.

The second mechanism introduced by the State-Owned Companies Law is the obligation to set up Statutory Audit Committees as auxiliary bodies to the Board of Directors, with the potential to significantly mitigate agency conflicts and therefore corrupt practices too.

The third mechanism required by Law 13.303/2016 does not innovate or improve the existing system but concerns the role of Fiscal Councils.

The fourth mechanism focuses on the existence of specific norms for the functioning of the Board of Directors, but does not pose significant innovations in relation to Law 6.404/1976, and therefore does not provide a significant means of curbing corrupt practices or agency conflicts.

The fifth and most important mechanism stipulated concerns the rules for appointing members of boards of directors and executive boards. Members of political parties or persons related to the public administration controlling a State-Owned Company are expressly banned from management positions. Therefore, this measure provides one of the most significant means of curbing agency conflicts in state-owned companies due to the intended distance between governments and managements of publicly-owned or mixed-capital companies.

Finally, the sixth and last mechanism arises from specific regulatory provisions for procurement and bidding procedures by state-owned companies. Although the special rules introduced by Law 13.303/2016 may not establish means of strictly preventing agency conflicts, they do at least lead to more transparency and control for any cases of abuse or overpricing in procurement by public company or mixed-capital companies. Therefore, the hypothesis posed in the introduction to this article is partly confirmed, since not all of the anti— corruption mechanisms stipulated in Law 13.303/2016 are so effective in the fight against corruption, especially in the context of the economic analysis of law or agency relations. As seen in relation to agency conflicts, the instruments introduced by the State-Owned Companies Law do not vehemently combat corrupt practices or agency conflicts, except the specific rules for appointing members of managements or executive boards, given their imposition of political and temporal restrictions on appointments of directors and officers in order to diminish agency conflicts.

In short, by lending more transparency to state-owned companies, I believe Law 13.303/2016 does supply mechanisms for curbing agency conflicts and may thus minimize corrupt practices on condition that the legal measure is not isolated from its social context and that negative informal institutions are overridden by the regulatory determinations analyzed herein.

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