Corporate governance in the State-owned Companies Law: outstanding aspects about transparency, risk management and compliance*

Governança corporativa na Lei das Estatais: aspectos destacados sobre transparência, gestão de riscos e compliance

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ABSTRACT

The State-Owned Enterprises Law arises in a troubled but not unprecedent moment of Brazilian politics, followed by revelations of unlawfulness linked to stated-owned enterprises, with the aim of establishing mechanisms that make these companies less susceptible to corruption scandals. A task that isn't not easy due to the organizational complexity of the companies and their economic expressiveness in the national market. Three major blocks stand out in the law: corporate structure; corporate governance and contracting (bidding and contracts). The study aims to address aspects of corporate governance, presenting several practices that bring state companies closer to the most current practices of private sector governance. The article presents practices of disclosure, risk management and compliance, defining its contours, limits and possibilities, with the purpose of contributing to the most appropriate application of the new law. Finally, there is a conclusion of the establishment of the State-Owned Enterprises Law, when it brings the question of corporate governance to the political-normative epicenter of state-owned enterprises, with rules of transparency, risk management and compliance programs that improve the instruments and management mechanisms for combating and preventing corruption. The method and technique used are, respectively, the deductive and monographic, and the bibliographic research, with the analysis of related legislation and the doctrine about the subject.

KEYWORDS

State-Owned Enterprises Law — corporate governance — corrupt practices — risk management — disclosure — compliance

RESUMO

A Lei das Estatais surge em um momento conturbado, mas não inédito, da política brasileira, com seguidas revelações de ilicitudes ligadas a empresas estatais, com a pretensão de estabelecer mecanismos que tornem essas empresas menos suscetíveis a escândalos de corrupção. Uma tarefa nada fácil, diante da complexidade organizacional das empresas e sua expressividade econômica no mercado nacional. Destacam-se na lei três grandes blocos: estrutura societária, governança coorporativa e contratação (licitações e contratos). O estudo pretende abordar aspectos de

governança corporativa, apresentando diversas práticas que aproximam as estatais das práticas mais atuais de governança do setor privado. No artigo são apresentadas práticas de transparência, gestão de riscos e compliance, definindo seus contornos, limites e possibilidades, com a finalidade de contribuir para a mais adequada aplicação da nova lei. Por fim, há conclusão pelo acerto na instituição da Lei das Estatais, quando traz a questão da governança corporativa para o epicentro político-normativo das empresas estatais, com regras de transparência, gestão de risco e exigência de programas de conformidade que aprimoram os instrumentos e mecanismos de gestão e combate/prevenção à corrupção. O método utilizado é o dedutivo e monográfico e a técnica de pesquisa bibliográfica, com análise da legislação relacionada com a doutrina sobre o tema.

PALAVRAS-CHAVE

Lei das Estatais — governança corporativa — corrupção — gestão de riscos — transparência — compliance

1. Introduction

The enactment of Law No. 13.303, on June 30, 2016, which came to be called the Government-owned Companies Law or Legal Bylaws of Government-owned Companies, filled a legislative gap of almost 18 years, since Constitutional Amendment No. 19, of June 4, 1998, amended paragraph 1 of article 173 of the 1988 Constitution of the Federative Republic of Brazil. It determined which law should apply to the legal bylaws of government-owned companies, government-controlled companies and their subsidiaries which produce or sell goods or supply services.

Conceived at a troubled time in Brazilian politics, but not a particularly unusual one, in the midst of a situation of repeated revelations of illegality in government-owned companies, the aim of the law is to introduce mechanisms to make these companies less susceptible to corruption scandals. It serves as a legislative response by the National Congress to Brazilians' perception of the seriousness of corruption.

In fact, the recent and recurrent corruption scandals which appear daily in the news and have attracted international attention, reinforce the idea that there are no sound rules of corporate governance, in particular those that

would protect the government-owned companies from unlimited government intervention or the interference of powerful interests (financial, corporate, domestic, foreign and so on).

This is not an easy or prosaic task, especially because of the organizational complexity of the companies and their economic importance in the domestic market. In a universe of companies whose control is exercised by the State, there are 149 in the federal sphere alone, of which 101 are indirectly and 48 directly controlled. They operate mainly in the sectors of energy (47) and oil and derivatives (35). In budgetary terms, in 2017 91.5 billion Reais of investments were approved, with 34.3 billion Reais having been spent by the third quarter. These companies are also major employers, with a joint total of 506,852 full-time staff and an impressive number of indirect employees.

An analysis of the new law identifies three main divisions, namely: corporate structure, corporate governance and contracting (biddings and contracts).

Taking the specific subject of this study, in terms of corporate governance the new law offers a number of normative provisions which bring the government-owned companies closer to the more recent — and up to a point more successful — governance practices of the private sector. This is undeniably an issue of major importance and topicality in Brazil's legal, political and economic scenario.

This alone is important and topical enough to justify study, and calls for more in-depth debate and the introduction of legal instruments that can prevent government-owned companies being used or hijacked by various interest groups, to the detriment of the public interest and in defiance of the constitutional and infraconstitutional legal framework.

This aim of this study is precisely to analyze the corporate governance practices introduced by the Government-owned Companies Law, and to propose a thorough study of its details, limits and possibilities in order to apply it fully. To this end, we shall start with an introduction to corporate governance, to put the matter in context and help towards an understanding of the law's provisions; and then we shall discuss its application and analyze corporate governance practices. In the final section we shall comment on the impact of introducing and reinforcing corporate governance in government-owned companies. This is the outline of our study, which first addresses the basic notion of corporate governance.

2. The notion of corporate governance

As a quick recap, we should recall that the development of the big US corporations, and the consequent pulverization of their capital, led to a division between capital and management/control which, as was to be expected, led to conflicts between the controllers of an organization (the administrator/manager) and the owners (the shareholders). This situation led to a debate on the remodeling of company management, with the aim of setting limits between owners and administrators and managing the conflict more effectively.[1]

Definitive change was brought by a series of accounting scandals, fraud, embezzlement, leaks of privileged information, misappropriation of huge sums of money and other forms of corruption,[2-3] involving multinationals (transnationals) which in recent decades have hit the headlines,[4] adding to doubts about their balance sheets and their true commitment to transparency. This pointed to a need to implement corporate governance — a sort of paradigm for model company management.

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1 Explained as follows: "The agency relationship is the relationship between shareholders and managers. The fact is that the managers have their own interests and seek to maximize them, and when they do, their decisions can be contrary to the interests of the shareholders: these are what are called agency conflicts. An agency conflict is the possibility of a difference of interests between shareholders and managers, where the one tries to take advantage of the other in a specific situation". NASSIFF, Elaina; SOUZA, Crisomar Lobo de. Conflitos de agência e governança corporativa. Caderno de Administração da Faculdade de Administração da PUC/SP, São Paulo, v. 7, No. 1, pg. 1-20, 2013. Available at: <https://revistas.pucsp.br/index.php/caadm/article/view/9496>. Accessed on: May 31, 2018.

2 For a historical review of the supposed roots of corruption in Brazil, see: FAORO, Raymundo. Os donos do poder. Formação do patronato político brasileiro. 3rd ed. São Paulo: Globo, 2001; HOLANDA, Sérgio Buarque de. Raízes do Brasil. 26th ed. São Paulo: Companhia das Letras, 1995. For an interesting and sophisticated critical reading of the subject, see: SOUZA, Jessé. A elite do atraso: da escravidão à Lava Jato. Rio de Janeiro: Leya, 2017; SOUZA, Jessé. A tolice da inteligência brasileira: ou como o país se deixa manipular pela elite. São Paulo: Leya, 2015.

3 On this issue, on September 15, 2016, 98 anticorruption proposals were under consideration in the Senate and 344 in the House of Representatives. In this context, see: MOHALLEM, Michael Freitas; RAGAZZO, Carlos Emmanuel Joppert. Diagnóstico institucional: primeiros passos para um plano nacional anticorrupção. Rio de Janeiro: Escola de Direito do Rio de Janeiro da Fundação Getulio Vargas, 2017, pg. 20. Available at: <http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/18167/Diagn%C3%B3stico%20institucional%20%20reduzido.pdf?sequence=4&isAllowed=y>. Accessed on: May 31, 2018.

4 In particular the scandals of Enron (2001), WorldCom (2002), Siemens (2006), the Madoff case (2008), Lehman Brothers (2008) and Petrobras (2014). On this subject see: ESTADÃO. Os maiores escândalos corporativos do século 21. Estadão: Estado de São Paulo website. Available at: <http://economia.estadao.com.br/galerias/geral,os-maiores-escandalos-corporativos-do-seculo-21,22419>. Accessed on: May 31, 2018.

By corporate governance we mean a system or set of rules for control and management to which a specific corporate organization is subject. It is possible too, and quite common, to associate it with a set of mechanisms that seek to perfect the performance of corporations in protecting their stakeholders.[5]

Along these lines, the literature on the subject offers a large variety of definitions, mostly related with the structures of power, state regulation, and protection of shareholders' rights and those of employees and other stakeholders. The following definition is given by the Brazilian Institute of Corporate Governance (IBCG):

> Corporate governance is a system whereby companies and other organizations are managed, monitored and incentivized, involving relationships between partners, the board of directors, the executive board, supervision and control bodies and other stakeholders. Good corporate governance practices convert basic principles into objective recommendations, aligning interests with a view to preserving and optimizing the long-term economic value of the organization, facilitating its access to funds and contributing to its management quality, its longevity and the common good.[6]

The Organization for Economic Cooperation and Development, for its part, defines corporate governance as follows:

> [...] a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined. Good corporate governance should provide proper incentives for the board and management to pursue

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5 COMISSÃO DE VALORES MOBILIÁRIOS. Recomendação da CVM sobre governança corporativa. Available at: <www.cvm.gov.br/export/sites/cvm/decisoes/anexos/0001/3935.pdf>. Accessed on: May 31, 2018.

6 INSTITUTO BRASILEIRO DE GOVERNANÇA CORPORATIVA. Código de melhores práticas de governança corporativa. São Paulo: IBGC, 2015. 20.

> objectives that are in the interests of the company and its shareholders and should facilitate effective monitoring.[7]

Clearly it is a very broad concept that comprises mechanisms calling for and ensuring respect for the law — in its broad sense — and for a company's internal regulations. Corporate governance practices are underpinned by basic principles which, if properly applied, boost confidence both within a company and from the outside. This study is limited in scope, and so here we shall present only a few of these principles,[8] for the purpose of illustration.

In the United States the Sarbanes-Oxley Act was issued in 2002. Also referred to as Sarbox or SOX, it rewrote the rules of corporate governance, and is recognized as the law with the most impact on the world's capital markets since the creation, in 1934, of the U.S. Securities and Exchange Commission (SEC).[9] We talk about global repercussion because the act applies to subsidiaries of multinationals listed on US stock exchanges but operating in other countries, and also to foreign companies with shares traded on the US market in American Depositary Receipts (ADRs). So it also affects Brazilian companies, at the moment precisely 25 of them,[10] including the following government-owned companies: Petrobras, Eletrobras, Companhia de Saneamento Básico do Estado de São Paulo (Sabesp), Companhia Energética de Minas Gerais (Cemig) and Companhia Paranaense de Energia (Copel), all of them equally subject to the Government-owned Companies Law.

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7 OECD. Organization for Economic Co-operation and Development. Principles of corporate governance. Paris: OECD, 2004. p. 11. Available at: <www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf>. Accessed on: May 31, 2018.

8 On the subject of principles, see: CRISTÓVAM, José Sérgio da Silva. Princípios constitucionais: razoabilidade, proporcionalidade e argumentação jurídica. 2nd ed. Curitiba: Juruá, 2016. For a critical analysis of possible excesses in applying the theory of principles, see: CRISTÓVAM, José Sérgio da Silva. A teoria da ponderação de princípios na encruzilhada do decisionismo judicial: limita-me ou te devoro! Revista Sequência, Florianópolis, No. 75, pg. 219-245, Apr. 2017. Available at: <https://periodicos.ufsc.br/index.php/sequencia/article/view/2177-7055.2017v38n75p219/34028>. Accessed on: May 31, 2018.

9 The US Securities and Exchange Commission (created by the Securities Act Exchange of 1934), in response to the financial crisis of 1929. It is a federal agency with broad powers to regulate and supervise the US capital markets.

10 U.S. SECURITIES AND EXCHANGE COMMISSION. Foreign companies registered and reporting with the U.S. Securities and Exchange Commission: December 2015. Available at: <www.sec.gov/divisions/corpfin/internatl/foreigngeographic2015.pdf>. Accessed on: May 31, 2018.

In its text, as the literature explains,[11-12] the SOX lists four key elements: compliance, accountability, disclosure and fairness.

Also of importance for improving corporate governance are the anticorruption regulations, in particular the US Foreign Corrupt Practices Act (FCPA), introduced in 1973, and the UK Bribery Act, which was enacted in 2010 and is considered to be an even wider and stricter version of the FCPA. These laws obliged companies to implement truly effective governance instruments or face sanctions.

In Brazil, corporate governance has been constantly reformulated, to reflect the economic policies in force from time to time, and, particularly in recent years, in line with the requirements of the Brazilian capital market. The following laws and regulations are important: Law 6.404/1976, which provides for joint-stock companies; the first edition of the IBGC Code of Corporate Governance,[13] of 1999; the introduction of different segments and the Corporate Governance index (IGC) by the São Paulo Stock Exchange (BM&FBovespa) in 2000 and 2001, respectively; the manual issued by the Brazilian Securities Commission (CVM) in 2002; the Law of Money Laundering as amended by Law 12.683/2012; the Anticorruption Law (Law 12.846/2013); and the Government-owned Companies Law (Law 13.303/2016), which has had a big impact because of the importance of the government-owned companies in Brazil's economy.

Similarly to the Sarbanes-Oxley Act, the IBGC lists the basic principles as being: disclosure, equality, accountability and corporate responsibility.

Another event of importance in Brazil was the enactment, on November 22, 2017, of Decree 9.203,[14] which provides for the governance policy of the direct

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11 POLIZEL, Caio. Governança corporativa na educação superior. São Paulo: Saraiva, 2012. pg. 17.

12 BLOK, Marcella. Compliance e governança corporativa: updated in accordance with the Brazilian Anticorruption Law (Law 12.846) and Decree-Law 8.412/2015. Rio de Janeiro: Freitas Bastos, 2017. pg. 203-204.

13 Created in 1995, the purpose of Instituto Brasileiro de Conselheiros de Administração [Brazilian Institute of Board Members], or IBCA, was to train qualified professionals to sit on boards of directors. In 1999 its range of objectives was widened, its name was changed to Instituto Brasileiro de Governança Corporativa [Brazilian Institute of Corporate Governance], or IBGC, and it became the national reference in corporate governance.

14 BRAZIL. Office of the President of the Republic. Decree 9.203 of November 22, 2017. Provides for the governance policy of the direct federal public administration, its autonomous entities and foundations. Available at: <www2.camara.leg.br/legin/fed/decret/2017/decreto-9203-22-novembro-2017-785782-publicacaooriginal-154277-pe.html>. Accessed on: May 31, 2018.

federal Public Administration,[15] its autonomous entities and foundations. With the aim of clearing up some misconceptions about this issue, the decree sets parameters for the operation of federal entities and provides added legal certainty.

It includes interesting elements related to governance, for example in item III of article 2, which defines public governance as "a set of mechanisms of leadership, strategy and control put into practice to assess, guide and monitor management, with the aim of conducting public policy and providing services of interest to society".

Along the same lines, article 3 of the same decree defines the principles of public governance as follows: capacity to respond; integrity; reliability; regulatory improvement; accountability and responsibility; and transparency. There is a clear relationship between these principles and the ones inherent in corporate governance, which we listed previously, and we can safely say that the initiatives of public governance in the decree are, in short, the same as corporate governance initiatives.

So good corporate governance and ethical practices progress from being a mere differential to becoming an obligation. And, in line with these basic principles, it is essential to understand that the concept translates the idea of better management of a business environment by attributing responsibility, describing processes and identifying clearly the results obtained. These are elements which lead to real transparency in business and, as a consequence, more security and credibility.

Having given this short overview of the notion and scope of corporate governance, we shall now go on to analyze how the situation has changed since the enactment of the Government-owned Companies Law.

3. Corporate governance under the Government-owned Companies Law

Recent years have brought heated and in-depth debate about perfecting the corporate governance practices of Brazilian government-owned companies. This is due to a large number of factors, in particular: the impact of this

[15] To avoid semantic confusion, we are using the phrase in small letters — public administration — only for administrative activity, and in capitals — Public Administration — to refer to the set of legal entities that can carry out administrative activity. In this context, see: RIVERO, Jean. Direito administrativo. Translated by Rogério Ehrhardt Soares. Coimbra: Almedina, 1981. pg. 13.

segment on the budget; their presence in key sectors of the domestic economy; the fact that they provide essential public services and fulfill public policy;[16] their operations in the international market, which is highly regulated[17] in relation to governance; risks of corruption; the risk of political pressure; and a visible increase in the expectations of society relating to the observation of high standards of ethics, efficiency, transparency and sustainability.[18] Indeed, it is possible to identify a movement towards realizing high standards of corporate governance, and implementing a responsible and transparent corporate environment which complies with constitutional and infraconstitutional norms and by working in the public interest justifies maintaining the system.

3.1 Some comments on the areas affected by the Government-owned Companies Law

Although there is an entire legal framework applying to government-owned companies, the dimension of the practical reality ("lifeworld")[19] does not appear to indicate any lessening of the segment's exposure to the risks common to the corporate environment, let alone the risks of party political interference; and this is probably due to the lack of effective governance

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[16] For an analysis on the subject of public policy, see: BUCCI, Maria Paula Dallari. Direito administrativo e políticas públicas. São Paulo: Saraiva, 2002; COMPARATO, Fábio Konder. Ensaio sobre o juízo de constitucionalidade de políticas públicas. Revista de Informação Legislativa, Brasília, yr. 35, No. 138, pg. 39-48, Apr./Jun. 1998; CRISTÓVAM, José Sérgio da Silva; CATARINO, João Ricardo. Políticas públicas, mínimo existencial, reserva do possível e limites orçamentários: uma análise a partir da jurisprudência dos tribunais no Brasil. In: GOMES, Marcus Livio; ALVES, Raquel de Andrade Vieira; ARABI, Abhner Youssif Mota (Coord.). Direito financeiro e jurisdição constitucional. Curitiba: Juruá, 2016. pg. 115-144.

[17] The aims of this paper do not go so far as a discussion of the nuances, limits and details of State regulamentary and regulatory functions. On the differences between the regulamentary and regulatory functions of the State, see: JUSTEN FILHO, Marçal. Curso de direito administrativo. 11th ed. revised, updated and expanded edition São Paulo: Revista dos Tribunais, 2015. p. 114.

[18] Reconstructing the concept of sustainability, Juarez Freitas introduces a new paradigm that goes beyond economic, social and environmental dimensions, adding an evaluative or ethical dimension of development and a legal-political dimension, which he takes to be interdependent and indivisible between themselves. The term thus evolves in scope into something multidimensional. On this subject, see: FREITAS, Juarez. Sustentabilidade: direito ao futuro. 3rd ed. Belo Horizonte: Fórum, 2016. pg. 60-79.

[19] The expression "lifeworld", used here, is not necessarily as complex as in Habermas's theory. On this subject, see: HABERMAS, Jürgen. Direito e democracia: entre facticidade e validade. 2nd ed. Rio de Janeiro: Tempo Brasileiro, 2003.

practices. For these reasons the Government-owned Companies Law[20]-[21] is at pains primarily to set rules and precepts for corporate governance, in three overall areas: transparency, control and risk management.

These issues are not new, and were addressed in a series of resolutions approved between 2010 and 2016 by the Interministerial Commission for Corporate Governance and Management of Federal Corporate Shareholdings (CGPAR).[22] This fact, far from being negative, underlines how essential corporate governance is for upgrading the performance of the government-owned companies.

The main section of article 1 of the Government-owned Companies Law starts with a description of its scope, which covers all government-owned companies, government-controlled companies and their subsidiaries, in every federal sphere, in the states, the federal district and the municipalities, in manufacturing, trading and services, even if their operations are subject to a federal monopoly or they provide public services.

Paragraph 1 of the same article creates an exception, with different treatment being given to smaller government-owned companies (with gross operating revenues of less than R$90 million), on the argument that certain governance requirements make more sense and should only be a requirement for large government-owned companies. In short, if the executive branch did

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[20] Regulated for federal purposes by Decree 8.945, of December 27, 2016. BRAZIL. Office of the President of the Republic. Decree 8.945, of December 27, 2016. Regulates, for federal purposes, Law 13.303, of June 30, 2016, which provides for the legal bylaws of government-owned companies, government-controlled companies and their subsidiaries, at federal, state and municipal level. Available at: <www2.camara.leg.br/legin/fed/decret/2016/decreto-8945-27-dezembro-2016-784146-normaatualizada-pe.html>. Accessed on: May 31, 2018.

[21] Regulated in the states by the following decrees: Alagoas, Decree No. 52.555/2017; Bahia, Decree No. 17.302/2016; Ceará, Decree No. 32.112/2016; Distrito Federal, Decree No. 37.967/2017; Goiás, Decree No. 8.801/2016; Mato Grosso, Decree No. 793/2016; Minas Gerais, Decree No. 47.105/2016 and Decree No. 47.154/2017; Pará, Decree No. 1.667/2016; Paraíba, Decree No. 37.337/2017; Paraná, Decree No. 6.263/2017; Pernambuco, Decree No. 43.984/2016; Rio de Janeiro, Decree No. 45.877/2016; Rio Grande do Norte, Decree No. 26.633/2017; Rio Grande do Sul, Decree No. 53.433/2017; Santa Catarina, Decree No. 1.007/2016; São Paulo, Decree No. 62.349/2016; Sergipe, Decree No. 30.623/2017. This survey undertaken by Luciano Ferraz. On this subject, see: FERRAZ, Luciano. Estatuto das empresas estatais e governança corporativa no Brasil. In: GOMES, Carla Amado; NEVES, Ana Fernanda; BITENCOURT NETO, Eurico. A prevenção da corrupção e outros desafios à boa governança da administração pública. Lisbon: Instituto de Ciências Jurídico-Políticas, 2018. pg. 134. Available at: <http://icjp.pt/publicacoes/pub/1/15804/view>. Accessed on: May 31, 2018.

[22] For a detailed study on this subject, see: MINISTÉRIO DO PLANEJAMENTO, DESENVOLVIMENTO E GESTÃO Resoluções Ministério do Planejamento, Desenvolvimento e Gestão. Available at: <www.planejamento.gov.br/assuntos/empresas-estatais/legislacao/resolucao>. Accessed on: May 31, 2018.

not impose rules (article 1 paragraph 3),[23] the government-owned companies in question would not be subject to the following governance practices: risk management and internal controls; creation of a committee to assess board directors; guidelines for drafting the statutes; rules for appointing managers; and regulations applying to the board of directors and the fiscal council.

In fact, this legislative posture does not seem at all unreasonable, but it still deserves some comment!

In its desire to please the public and the market,[24] the law ended up by creating a common regime for corporate governance, a true case of "one size fits all", ignoring the fact that the government-owned companies have very different constitutions and operate in very different sectors, and as a result even those that are similar in size have had considerable difficulty in implementing the governance practices/policies.[25] [26] So it does not seem that the only criterion to be taken into account should be gross operating revenues, and the legislators would do well to consider the nature of the agents involved.

To take a case in point: BB Elo Cartões Participações S.A., a wholly-owned subsidiary of Banco do Brasil, in its management report[27] describes itself as a small government-owned company. But we have to remember that the financial market, because of its special risks, is very highly regulated; it depends on the trust of its depositors and participants to ensure its future;

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[23] At federal level, regulation was by means of articles 51 to 57 of Decree No. 8.945, of December 27, 2016, which imposed on smaller companies some governance rules from which they had originally been exempted by the Law of Government-owned companies. Brazil, Decree No. 8.945, of December 27, 2016, op. cit.

[24] The reference to the market, here and elsewhere in the text, is not made with any type of inadvisable romanticism about the abstract dimension of the economic and financial agents that populate the complex structure of contemporary capitalism, for instance as an instrument through which "private reason" can take the public sector by storm. In this context, see: BELLUZZO, Luiz Gonzaga; GALÍPOLO, Gabriel. Manda quem pode, obedece que tem prejuízo. São Paulo: Contracorrente, 2017.

[25] On this subject, see: ARCOT, Shidhar R.; BRUNO, Valentina G. One size does not fit all, after all: evidence from corporate governance. World Bank Group, London, Feb. 2006. Available at: <http://siteresources.worldbank.org/INTFR/Resources/Valentina_Bruno_Feb_8.pdf>. Accessed on: May 31, 2018.

[26] On this subject, see: HOFSTETTER, Karl. One size does not fit all: corporate governance for controlled companies. North Carolina Journal of International Law and Commercial Regulation, North Carolina, v. 31, No. 3. Available at: <http://scholarship.law.unc.edu/ncilj/vol31/iss3/1>. Accessed on: May 31, 2018.

[27] BB ELO CARTÕES PARTICIPAÇÕES S.A. Relatório da adminsitração. Available at: <www.valor.com.br/sites/default/files/upload_element/05-03_bb_elo_cartoes_27_alt1_pi006020_balanco_p.pdf>. Accessed on: May 31, 2018.

and, naturally, it is also very competitive. These elements require certain rules of governance.

It would seem that the legislation would have been more effective if it had outlined minimum conditions of corporate governance, common to all government-owned companies, leaving room for more flexible or stricter rules depending on the sector and the circumstances in which each of them operate.

Another point worth mentioning is the provision for a method of auditing minority government holdings (article 1 paragraph 7), which the law did not previously provide for and which was therefore subject to legal uncertainty. The auditing method calls for the use of governance and control practices. This is because it is essential to have a policy for preserving public capital invested in private companies, and this requires the implementation of compliance and integrity programs, adapted to the size of the company and the sector of activity.

Although coming twenty years too late, the new law seeks to provide instruments and mechanisms capable, in the final analysis, of contributing to more efficiency by government-owned companies in achieving their ends, in particular through the application of standards of transparency and rules of corporate governance. We shall address these issues next.

3.2 The requirements for transparency: the Annual Letter on Public Policy and Corporate Governance and Code of Conduct and Integrity

Aimed at preventing conflicts of interest and controlling strategic decisions, there is no doubt that the provisions on governance are among the strong points of the Government-owned Companies Law.

In regard to transparency, minimum requirements are set — formal and material ones (article 8) —, which must be constantly observed. Various practices are listed: the annual letter from the Board of Directors; bringing bylaws into line with the law; disclosure of material information; information disclosure policy; dividend distribution policy; disclosure of operating and financial data on activities aimed at collective interests or national security; disclosure of the policy for transactions with related parties; the annual corporate governance letter; and an integrated report or sustainability report.

We should mention in particular the Annual Letter on Public Policy and Corporate Governance,[28]signed by the board directors, initially covering the "commitment to achieve the objectives of public policy [...] in accordance with collective interests or with the imperative of national security which justified their creation being authorized, clearly defining the resources [...] and their economic and financial effects [...] using objective indicators" (article 8, I).

As can be seen, the law is concerned to retrieve the central political and normative justification — the very nub of the reasons for government-owned companies to continue to exist —, obliging them to describe the collective interest or national security imperative on which their business purpose is based, in accordance with article 27 of the Government-owned Companies Law. Paragraph 1 of article 8 states that the public interest of a government-owned company, "subject to the reasons for its legal authorization, is evidenced by the alignment of its objectives with public policy, as detailed in the annual letter". This makes it necessary to review the core activities of the government-owned companies and analyze their efficiency,[29] which is a recurrent topic in the debate on state intervention in the economy.

In describing the resources to be used, it is advisable to record their origin: a contract with the federal government, state, federal district or municipality; company cash reserves; public funds; or private financing. Economic and financial effects must be given in detail, using the objective indicators on which the decision to invest to comply with public policy was based. In this context we should mention Decree 8.945, of December 27, 2016: in paragraph 5 of article 35, it says that variable management compensation, based on achievement of targets and results in executing the business plan and long-term strategy, and thus in our opinion, must be included in the annual letter, with the corresponding indicators that affect it.

In regard to corporate governance (article 8, VIII), the annual letter must give timely, up-to-date and material details "of operations, the control structure, risk factors, economic and financial data, comments of the managers on performance, corporate governance policies and practices and details

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[28] This designation — in our view the correct one — is used by the Ministry of Planning, Development and Management, the Ministry of Finance, Bovespa and the Brazilian Securities Commission (CVM), and has been copied by the government-owned companies in drafting their letters.

[29] For an analysis of the principle of administrative efficiency, see: GABARDO, Emerson. Eficiência e legitimidade do Estado: uma análise das estruturas simbólicas do direito político. Barueri: Manole, 2003.

of the membership and compensation of management" (article 8, III). It is important to note the mention of risk factors, because the mapping of risk is recognized as an essential — and complex — step in developing an effective program of governance.

To explain: risk, in the corporate context, relates to threats to the values of an organization, whether economic, market-related, operational, legal, regulatory or reputational. Risk factors, in turn, are events that can cause a risk to materialize: for example, more dealings between a particular government-owned company employee and public authorities can lead to the risk of corruption materializing.[30] As Francisco Schertel Carvalho and Vinicius Mendes rightly point out, "the more complex and diversified the structure of an organization, the greater are the risks involved".[31]

In fact, the more staff there are, the more difficult it is to control compliance with the rules, and it becomes advisable for the government-owned company to introduce a risk management policy.[32] If such a policy exists,[33] the letter must give its objectives and strategies, including, for example, the organizational structure of the policy; the risks it is intended to guard against; and the instruments of protection.

Finally, in relation to corporate governance, it is essential for the letter to give (article 8, III): a description of management membership and

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[30] To all appearances, government-owned companies should also pay attention to risk factors relating to their suppliers, customers, the sectors of the economy in which they operate, regulation, social and environmental issues and legal claims.

[31] CARVALHO, Francisco Schertel; CARVALHO, Vinicius Marques de. Compliance: concorrência e combate à corrupção. São Paulo: Trevisan, 2017. pg. 134.

[32] On this subject, see: COIMBRA, Fábio Claro. Estrutura de governança corporativa e gestão de riscos: um estudo de casos no setor financeiro. Dissertation (doctorate in administration) — Universidade de São Paulo, São Paulo, 2011. Available at: <www.teses.usp.br/teses/disponiveis/12/12139/tde-16082011-132703/publico/FabioClaroCoimbra.pdf>. Accessed on: May 31, 2018.

[33] The problem of risk management is central to the debate on corporate governance and integrity programs in government-owned companies. For the purposes of this study, and with no pretensions to completeness, we would mention that risk management involves processes related to planning, organization, direction and control of the material and human resources of the company, so as to minimize the risk and uncertainties inherent in its core activities. For a detailed, in-depth analysis of the matter, see: CASTRO, Rodrigo Pironti Aguire de. Compliance e gestão de riscos nas empresas estatais. Belo Horizonte: Fórum, 2018.

compensation;[34] economic and financial data with remarks on performance;[35] and the policies and practices of corporate governance. One of the pillars of these policies and practices is the Code of Conduct and Integrity, an important instrument of supervision and control, which we shall discuss next.

3.3 Supervision and control

In dealing with supervision and control, article 9 provides that companies must have a compliance and risk department, a Statutory Audit Committee and an internal audit department (reporting to the Audit Committee or the Board of Directors).[36]

A compliance and risk department is what is generally known as a compliance program,[37] which the law now expressly requires of government-owned companies. Originally part of the financial system, compliance now plays a major role in companies and institutions, particularly those subject to a high degree of control and regulation. As Marcio Pestana explains, it is the practice

> [...] of supervision and of respect for and effective fulfillment of ethics, contemporary moral and social values, and restrictions and limits set by law, represented by a set of practices demanded and expected of

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[34] On this topic, see the provision of Decree No. 8.945, of December 27, 2016: Article 19 A government-owned company must:

I — disclose all forms of compensation of managers and fiscal councilors in detail and individually. Brazil, Decree No. 8.945, of December 27, 2016, op. cit.

[35] In this context, see: Article 23 [...] paragraph 2 The Board of Directors shall undertake an annual analysis of fulfillment of targets and results of the execution of the business plan and long-term strategy, failing which its members shall be liable for omission. The Board must publish its conclusions and report them as appropriate to the National Congress, the State Houses of Representatives, the Legislative Chamber of the Federal District or the Municipal Councils, and to the corresponding courts of auditors if any. Brazil, Law 13.303, of June 30, 2016, op. cit.

[36] In this context, see: Article 9 [...] paragraph 3 Internal audit must:

I — report to the Board of Directors, directly or through the Statutory Audit Committee;

II — be responsible for ensuring the adequacy of the internal controls, the efficacy of risk management and governance processes and the reliability of the process of collecting, measuring, accumulating, recording and reporting events and transactions, for the preparation of the financial statements. Brazil, Law 13.303, of June 30, 2016, op. cit.

[37] Simply as an example, the term compliance, originating in the English language from the verb to comply, has no exact corresponding term in Portuguese, but can be translated by the idea of "being in conformity", "being in accordance with something" or "fulfilling something".

> companies in the inter-relationships which they establish every day in economic and social circles.[38]

However, the legislator appears to have been careless in relation to the term compliance area, which only appears in one article (article 9 paragraph 4), and in other articles is referred to as the "area responsible for verifying the fulfillment of obligations and of risk management".

This apparent lack of care may be due to a certain overlapping of the functions of compliance with those of internal audit. This is because the law (article 9 paragraph 3 II), says that internal audit is responsible for "adequate internal controls, effective risk management and governance processes, and reliable procedures for collecting, measuring, classifying, accumulating, recording and reporting events and transactions, for the purpose of preparing the financial statements".

The situation is confirmed when the law, in listing the responsibilities of the Statutory Audit Committee — the body to which the internal audit department reports —, refers to internal control, risk management and governance processes (see paragraph 1 of article 24).[39]

A reading of these provisions confirms that many of the activities described are characteristic of a compliance program, which leads us to the following preliminary conclusions: 1. even without express reference in

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[38] PESTANA, Marcio. Lei anticorrupção: exame sistematizado da Lei 12.846/2013. Barueri: Manole, 2016. pg. 79.

[39] In this context: Article 24. [...] paragraph 1 The Statutory Audit Committee, in addition to other duties provided for in the bylaws of the government-owned company or government-controlled company, shall: [...]

III — oversee the activities in the areas of internal control, internal audit and drafting of the financial statements of the government-owned company or government-controlled company;

IV — monitor the quality and integrity of the internal control mechanism, the financial statements and the information and measurements published by the government-owned company or government-controlled company;

V — assess and monitor risk exposure of the government-owned company or government-controlled company, with the power to call for detailed information on policies and procedures relating to:

a) management compensation;

b) use of the assets of the government-owned company or government-controlled company;

c) expenses incurred on behalf of the government-owned company or government-controlled company;

VI — assess and monitor, jointly with management and the internal audit area, the propriety of transactions with related parties; Brazil, Law 13.303, of June 30, 2016, op. cit.

the Government-owned Companies Law, the Statutory Audit Committee is responsible for supervising the compliance area; either 2. the internal audit area only handles compliance area matters when it is important for the financial statements; or 3. internal audit works on a random, temporary basis, identifying non-compliant aspects after the fact, while compliance does the same thing as a permanent routine in order to avert operating risks.[40]

The fact is that, whichever option is chosen, the division of responsibilities between the areas will certainly give rise to discussion, and care must be taken not to void the advances brought by the law in question.

Similarly, paragraph 1 of article 9 refers to the need to draft and publish a Code of Conduct and Integrity — otherwise known as a Code of Ethics —, indicating the corporate governance practices adopted, to serve as an instrument listing the fundamental ethical principles to be observed by all the staff of a government-owned company, in other words "a way of making an organization's adherence to the rules explicit and formal", because the "primary purpose of the code is to make it clear to every member of the staff that the company is concerned about and cares for the law and that it wants to be a place where the corporate culture is created and expands to reflect this concern".[41]

Although the practice has already been adopted by some companies, particularly because of Law 12.846, of August 1, 2013,[42] the Government-owned Companies Law provides expressly for the need to draft and publish such a Code. First the risks have to be assessed and mapped, and the laws and regulations applying to the company's operations identified, and both the form and the content of the code will vary. Good practice recommends that the key actions and interactions of the government-owned company should be addressed, both with other government employees and with

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40 CANDELORO, Ana Paula P.; RIZZO, Maria Balbina Martins de; PINHO, Vinícius. Compliance 360º: riscos, estratégias, conflitos e vaidades no mundo corporativo. São Paulo: Trevisan Editora Universitária, 2015. pg. 34.

41 Francisco Schertel Carvalho and Vinicius Marques de. Carvalho, Compliance, op. cit., pg. 136.

42 Law 12.846/2013 provides for the administrative and civil liability of legal entities for action contrary to the public administration, national or foreign, and its article 7, VIII, refers, as a cause to be considered in applying sanctions, to "the existence of mechanisms and internal procedures of integrity, auditing and incentives to reporting irregularities and the effective application of codes of ethics and conduct in legal entities". BRAZIL. Office of the Chief of Staff. Law 12.846, of August 1, 2013. Provides for the administrative and civil liability of legal entities for action contrary to the public administration, national or foreign, and other matters. Available at: <www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/lei/112846.htm>. Accessed on: May 31, 2018.

distributors, trading partners and users of the service. It also suggest that the code should include a message from senior management of the company about its importance; that accessible language should be used; that it should be objective; and that there should be a question and answer section. It should also be noted that paragraph 1 of article 9 specifically relates to the legal content of the Code of Conduct and Integrity.[43]

Subject to these practical and legal aspects, one could say that the Code of Conduct and Integrity is the instrument for a government-owned company to document its first steps in the direction of integrity and compliance in terms of its social function.

The monitoring of government-owned companies by the State and by society is provided for in articles 85 to 90 of the Government-owned Companies Law. These provisions go into detail about external and internal control of government-owned companies in the three spheres of government "as to the legitimacy, economy and efficacy of the application of their resources, from the accounting, financial, operational and patrimonial viewpoints" (article 85, main section). The topic had been openly addressed in the 1988 Constitution itself (articles 70, 71 and 74).[44] The legislator also addressed the question of control of transnational companies (article 85, paragraph 3), in line with international anticorruption laws (FCPA and UK Bribery Act).

In turn, article 86 of the law provides for rules of transparency — an inseparable element of corporate governance — relating to the information

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[43] In this context: Article 9[...] paragraph 1 [...]

I — principles, values and mission of the government-owned company or government-controlled company, and guidance on preventing conflicts of interest and corrupt or fraudulent acts;

II — internal instances responsible for updating and applying the Code of Conduct and Integrity;

III — whistleblowing channel for receipt of reports from inside or outside the company about violations of the Code of Conduct and Integrity or other obligatory internal ethical standards;

IV — protection mechanisms to prevent any type of reprisal against whistleblowers;

V — sanctions applicable in the event of violation of the rules of the Code of Conduct and Integrity;

VI — regular training, at least once a year, on the Code of Conduct and Integrity, for staff and management, and on the risk management policy for management. Brazil, Law 13.303, of June 30, 2016, op. cit.

[44] BRAZIL. Constitution (1988). Constitution of the Federative Republic of Brazil: enacted on October 5, 1988. Brasília, DF, Oct. 5, 1988. Available at: <www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm>. Accessed on: May 31, 2018.

to be provided by the control bodies on biddings and contracts,[45] including those relating to basic prices, which "shall be included in up-to-date electronic data banks to which the competent control bodies shall have real-time access" (article 86, main section).

In addition, audited accounting statements must be published on the government-owned company website; minutes and other documents from annual and extraordinary shareholders' meetings, board meetings and fiscal council meetings must be made available on request, and access will be restricted to the control bodies; information protected by banking, strategic, commercial or industrial secrecy must be identified as such, according to criteria detailed in the regulations; and employees divulging information improperly will be subject to administrative, civil and criminal sanctions; and full, up-to-date details of the execution of contracts and of the budget must be available for public scrutiny online every month (although delays of up to two months are permitted in disclosure, which in our view should be only in exceptional circumstances).

Nevertheless, we would point out that, even with all these rules, the law is right in seeking to preserve a certain degree of autonomy for the government-owned companies, providing that the supervision "must not lead to a partial or total removal of the autonomy conferred by law, [...] and the supervisor is not authorized to interfere in their management or functioning, but must respect the limits of the legislation" (article 89), and the actions and resolutions of the controlling entity "may not represent interference in the management of government-owned companies or government-controlled companies subordinated to it, nor encroachment on the exercise of their responsibilities or the definition of public policy" (article 90).

On the other hand, it is fair to question whether these guarantees really succeed in assuring the essential, indispensable degree of autonomy of the government-owned companies, to preserve their legitimate internal interests

[45] On the rules for bidding procedures and contracts in the Government-owned Companies Law, see: CRISTÓVAM, José Sérgio da Silva; PIOVESAN, Filipe da Silva. A nova lei das estatais e a aplicação de sanções nos contratos administrativos: uma análise comparativa com a Lei Geral de Licitações. Revista Interesse Público, Belo Horizonte, yr. 19, No. 104, pg. 77-97, Jul./Aug. 2017; GUIMARÃES, Edgar; SANTOS, José Anacleto Abduch. Lei das estatais: comentários ao regime jurídico licitatório e contratual da Lei 13.303-16. Belo Horizonte: Fórum, 2017; JUSTEN FILHO, Marçal. Estatuto jurídico das empresas estatais: Lei 13.303/16 "Lei das Estatais". São Paulo: Revista dos Tribunais, 2016.

and their own objectives in the public interest[46] and national security imperatives that justified their creation and their continued existence. The aim of the law is to provide mechanisms to help with fiscalization and control, but without appearing to descend into the hazardous and almost always surreptitious chipping away at the autonomy of the government-owned companies. The truth is that, in our country, this is a necessary concern.[47] It is almost a Sisyphean task, endlessly attempting to reduce/prevent meddling of every sort (internal, external, domestic/national or even alien/foreign), sometimes hidden under the discourse of supervision, in order to interfere perversely and negatively in the management of the government-owned companies.

3.4 The managers of the government-owned companies

Another innovative and high-impact aspect of the law relates to the new parameters for nominating managers and directors of government-owned companies, and the creation of an Eligibility Committee and a Statutory Audit Committee. The function of the former is to check the compliance of the process for nominating and assessing managers and fiscal councilors (article 10), while the second has an advisory role for management control by the Board of Directors (articles 24 and 25), attainable through operational autonomy and budgetary endowment, subject to the limits approved by the board itself (article 24, paragraph 6).

As mentioned above, the advent of the Government-owned Companies Law has introduced certain requirements for candidates to membership of

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[46] For the purposes of this study, one can say that the "concept of public interest overlaps with the unconditional values assured by the Constitution, as provided for in the undisputable concept of fundamental rights and the centrality of the principle of human dignity (personalization of the constitutional order)". On this debate and the construction of a legal and administrative regime common to the paradigm of a democratic Administration, based on the constitutional principles which uphold human dignity, the democratic rule of law and republican principles, see: CRISTÓVAM, José Sérgio da Silva. Administração Pública democrática e supremacia do interesse público: novo regime jurídico-administrativo e seus princípios constitucionais estruturantes. Curitiba: Juruá, 2015. pg. 117. And on the debate about the notion of public interest, see: GABARDO, Emerson. Interesse público e subsidiariedade: o Estado e a sociedade civil para além do bem e do mal. Belo Horizonte: Fórum, 2009; HACHEM, Daniel Wunder. Princípio constitucional da supremacia do interesse público. Belo Horizonte: Fórum, 2011.

[47] For a well-documented and sophisticated analysis, including from a historical perspective, of the factors underpinning Brazilian society, the relations between the State and the private sector, and all the connections between the two, see: COMPARATO, Fábio Konder. A oligarquia brasileira: visão histórica. São Paulo: Contracorrente, 2017.

the board of directors and the executive board (board member, chairman, managing director and CEO),[48] substantially reducing discretion and diluting purely political and partisan interference and pressure.

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[48] In this context: Article 17. Board members and nominees for the position of officer, including president, managing director and CEO, shall be chosen from citizens of unblemished reputation and well-known expertise, or alternatively one of the requirements "a", "b" or "c" of section I must be fulfilled, in addition to full compliance with sections II and III:

I — to have professional experience of at least:

a) ten (10) years in the public or private sector, in the area where the government-owned company or government-controlled company operates or in an area related to the one to which they have been nominated as senior managers; or

b) four (4) years holding at least one of the following positions:

1. officer or senior manager in a company of a similar size and business purpose to that of the government-owned company or government-controlled company, with "senior manager" being understood to mean a position in one of the company two (2) highest non-statutory levels;

2. a position of trust equivalent to DAS-4 or higher, in the public sector;

3. teacher or researcher in the area where the government-owned company or government-controlled company operates;

c) four (4) years' experience as a self-employed professional in an activity directly or indirectly linked with the area where the government-owned company or government-controlled company operates;

II — to have educational qualifications compatible with the position in question; and

III — not to be ineligible as provided for in item I of the main section of article 1 of Supplementary Law 64, of May 18, 1990, as amended by Supplementary Law 135, of June 4, 2010.

paragraph 1 The statutes of a government-owned company, government-controlled company or their subsidiaries may provide for the arrangement of civil liability insurance for managers.

paragraph 2 The following may not be nominated as board members or officers:

I — representatives of the regulatory authority to which the government-owned company or government-controlled company is subject, a Minister of State, Secretary of State, Municipal Secretary, the holder of a position, with no permanent connection to the public service, of a special nature of senior management or advisory in the public administration, a statutory manager of a political party or the holder of a mandate in the legislative branch of any federal entity, even if on leave from the position;

II — a person who, in the last thirty-six (36) months, has been a participant in the decision-making area of a political party or in work linked to the organization, structuring or running of an election campaign;

III — a person with a position in a union;

IV — a person who has signed an agreement or partnership to supply, purchase, demand or offer goods or services of any nature, with the controlling shareholder of the government-owned company or government-controlled company during the three (3) years preceding the date of nomination;

V — a person who has or may have any sort of conflict of interest with the controlling shareholder of the government-owned company or government-controlled company or with the company itself.

paragraph 3 The prohibition included in section I of paragraph 2 applies also to relations by blood or affinity, up to the third degree, of the persons mentioned therein. Brazil, Law 13.303, of June 30, 2016, op. cit.

Even if prudence requires that we should not get carried away in our analysis/ expectations for the application and effect of these rules, it seems fair to recognize that, at least to some extent, meeting technical requirements will lead to a new level of professional qualification in government-owned companies, so as to encourage the technical skills of their career staff who, in the future, will be able to take on important positions in the company's management.

Another important effect of these new appointment rules is that senior management of government-owned companies will probably be more committed to corporate governance, in particular the implementation of compliance programs — a case of "tone at the top" (or "tone from the top") which implies involvement and absolute/unrestricted support from the company's senior management. If this is not the case, the program will be generally doomed to failure. It is the people at the top who must ensure the success of a compliance program, taking responsibility for introducing into the company's routine work a series of elementary factors, which include leadership, exemplary conduct and turning words into action.

The independence of managers from external interference is described as follows by Transparência Internacional Brasil:

> Government-owned companies are subject to supervision by the ministry in charge of their areas of operation (or by the department in charge, in the case of states and municipalities). This ministerial supervision implies a form of political control, mainly through the nomination and dismissal of managers of the government-owned companies, and of administrative control, either by being able to reverse decisions or by the obligation to follow guidelines. These controls, however, are limited. It is precisely in order to limit the exercise of political control that the Government-owned Companies Law introduced demands and requirements for appointing officers and directors of government-owned companies.[49]

[49] TRANSPARÊNCIA INTERNACIONAL BRASIL. Integridade e transparência das empresas estatais no Brasil. Rio de Janeiro: Fundação Getulio Vargas (FGV), 2017. p. 15. Available at: <http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/20342/Integridade%20e%20Transpare%CC%82ncia%20de%20Empresas%20Estatais%20no%20Brasil.pdf?sequence=1&isAllowed=y>. Accessed on: May 31, 2018.

The imposition of technical qualifications and impediments for conflicts of interest reduce the effect of mainly political criteria (political and partisan, to be more precise!) in appointments to membership of government-owned company boards and management. It must be remembered that the Board of Directors is the principal management body of a government-owned company, and as a result inappropriate interference in these bodies has a serious impact on how the company operates and its pursuit of its institutional purposes.

4. Final considerations

We cannot overlook the fact that the risk of corruption has haunted the corporate world for years — the scandals have included Lockheed (1976), Enron (2001), WorldCom (2002), Siemens (2006), the Madoff case (2008), Lehman Brothers (2008) and, more recently, Petrobras (2014).

In Brazil, specifically among the government-owned companies, the risk is considerable to say the least.[50] This is because, in addition to the risks inherent in the market segment where they operate, their close relationship with the government structure leads to political interference which can perfectly well be legitimate and proper, but can also consist of inappropriate and illicit meddling. Relations between the market and politics is always complex, dynamic and highly susceptible to the risk of corruption. This unstable situation is made worse by the importance of the government-owned companies in the country's economy and the jobs market. It is undeniable that a corruption scandal involving a big government-owned company can have disastrous effects on the domestic market, the economy and society as a whole.

The Government-owned Companies Law qualifies and raises the level of debate about corporate governance in the public sector, aimed at encouraging a corporate culture of compliance and transparency, by adopting useful

[50] There may be room for more analyses and comments, but the fact is that a 2017 survey found that for 55% of the population, corruption is Brazil's main problem. On this subject, see: CONFEDERAÇÃO NACIONAL DA INDÚSTRIA. Gerência Executiva de Pesquisa e Competitividade. Retratos da sociedade brasileira. No. 41. Brasília: CNI, 2018. Available at: <https://static-cms-si.s3.amazonaws.com/media/filer_public/d8/80/d8809d69-ae2c-47f2-8a4b-30cde9d92b11/retratosdasociedadebrasileira_41_problemasepriorididadespara2018_v1.pdf>. Accessed on: Mar. 15, 2018. According to Transparency International, Brazil is placed 96th in the ranking for the perception of corruption, its worst result since 2012. On this, see: TRANSPARENCY INTERNATIONAL. Corruption perceptions index 2017. Available at: <www.transparency.org/news/feature/corruption_ perceptions_index_2017>. Accessed on: May 31, 2018.

mechanisms and instruments such as a compliance program which should introduce best practices into government-owned companies, notwithstanding the significant costs involved.

The law may not have given due prominence to the issue of compliance, but nowadays it is impossible to talk about the results of corporate governance without an effective compliance program to improve relations between shareholders, customers, suppliers, regulators and stakeholders, and in the case of the government-owned companies to bring them closer to the public and to serve as an instrument of transparency and operating control. In short, when we talk about corporate governance we are talking about compliance.

In addition to all this, the legal framework of the government-owned companies now imposes minimum requirements and limitations on the appointment of directors and officers, giving them more independence and closing a gap in the law. In addition, the new method of appointment to these positions calls for more commitment by senior management ("tone from the top") to good corporate governance, one of the pillars of a compliance program, since it is clear that the higher up the corporate ladder an employee may be, the greater the risk he poses to the government-owned company, and therefore risk mitigation must be speedier and stricter. Otherwise the compliance program is fated to failure.

In short, from the issues and aspects briefly discussed here, it seems clear that, although some criticism is in order, the Government-owned Companies Law has brought some major improvements.It is right to have brought the issue of corporate governance to center stage in the political and normative treatment of government-owned companies, with rules for transparency and risk management and a requirement for compliance programs to enhance the management instruments and mechanisms for preventing and combating corruption. This is a debate which still has far to go in Brazil, and it requires maturity, balance and a minimum of social and political intelligence, so as not to be hijacked by the domestic or even foreign interests that can so easily infiltrate the fabric of the state.

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