Luiz Paulo Ribeiro da Costa
Corporate Governance and Compliance in Brazilian and Portuguese State-Owned Companies: Does it really add value to public enterprises?

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Universidade do Minho
Escola de Direito

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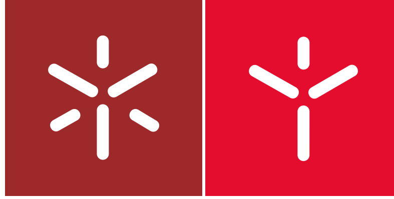

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Dissertação de Mestrado
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Trabalho realizado sob a orientação de
Professora Doutora Maria Isabel Celeste M. Fonseca
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abril de 2020

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I dedicate this work to the memory of my mother and to the future of my children!

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Assinatura:

Resumo

Corporate Governance and Compliance in Brazilian and Portuguese State-Owned Companies: Does it Really Add Value to Public Enterprises?

As empresas estatais têm importância significativa para as economias e sociedades brasileira e portuguesa porque estão muito interligadas com os setores produtivo e de prestação de serviços. No entanto, o papel das empresas estatais nas economias desses países está em permanente escrutínio, porque tanto Brasil quanto Portugal lançaram mão desta forma de organização para atuação estatal tendo por fito a prestação serviços públicos e intervenção na economia. Porém, há casos em que a criação ou mesmo a existência de tais empresas estatais carecem de devida motivação e justificativa segundo os requisitos constitucionais e legais para tal. Existem razões jurídicas, sociais e econômicas para a existência de empresas estatais. Este trabalho pretende demonstrar que há uma obrigação legal para as empresas estatais implementarem programas de conformidade e governança e que a adoção destes programas baseados em integridade, transparência, eficiência, prestação de contas produz efeitos no sentido de agregar valor financeiro e não-financeiro aos empreendimentos públicos, de forma a afetar positivamente a perceção do mercado, clientes e contribuintes sobre as empresas estatais. Para atingir seus objetivos e responder à pergunta do título, o trabalho tratará dos conceitos de administração pública, interesse público, interesse das partes interessadas, responsabilidade social corporativa, princípios constitucionais relativos às empresas estatais, poderes reguladores estatais e não estatais, governança corporativa, compliance, hard law e soft law. No final, espera-se fornecer uma resposta adequada para resolver a questão e concluir que os programas de governança corporativa e conformidade podem afetar o mercado e o valor reputacional das empresas. Portanto, este trabalho se concentrará na aplicação das regras de governança e conformidade nas empresas estatais em Portugal e no Brasil, tentando demonstrar como as boas práticas de gestão das empresas podem ser uma maneira de aumentar o valor das empresas públicas, valorizando o ativo do Estado, fomentando investimentos, proporcionando maior eficiência e qualidade aos serviços prestados e, pelo menos, evitando perdas e passivos judiciais e administrativos.

Palavras-chave: Empresas Estatais – Governança Corporativa – Compliance – Interesse Público – Transparência – Responsabilidade – Eficiência – Dever de Boa Administração – Regulação – Soft Law

Abstract

Corporate Governance and Compliance in Brazilian and Portuguese State-Owned Companies: Does it Really Add Value to Public Enterprises?

State-owned companies are significant for the Brazilian and Portuguese economies and societies because they are very interconnected with the productive and service provision sectors. However, the role of state-owned companies in the economies of these countries is under constant scrutiny, because both Brazil and Portugal have used this form of organization for state action with the aim of providing public services and intervention in the economy; however, there are cases in which the creation or even the existence of such state-owned companies lack due motivation and justification according to the constitutional and legal requirements for this. There are legal, social and economic reasons for the existence of state-owned companies. This work intends to demonstrate that there is a legal obligation for state-owned companies to implement compliance and governance programs and that the adoption of these programs based on integrity, transparency, efficiency, accountability has effects in the sense of adding financial and non-financial value to public enterprises in order to positively affect the perception of the market, customers and taxpayers about state-owned companies. To achieve its objectives and answer the title's question, the dissertation will address the concepts of public administration, public interest, stakeholders' interest, corporate social responsibility, constitutional principles relating to state-owned companies, state and non-state regulatory powers, corporate governance, compliance, hard law and soft law. In the end, it is expected to provide an adequate answer to resolve the issue and conclude that corporate governance and compliance programs can affect the market and the reputational value of companies. Therefore, this work will focus on the application of governance and compliance rules in state-owned companies in Portugal and Brazil, trying to demonstrate how good company management practices can be a way to increase the value of public companies, valuing the State's assets , encouraging investments, providing greater efficiency and quality to the services provided and, at least, avoiding losses and liabilities.

Keywords: State-Owned Companies – Corporate Governance – Compliance – Public Interest – Transparency – Accountability – Efficiency – The Duty to Good Administration – Hard Law - Soft Law – Regulatory Powers

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Abbreviations

B3 - B3 S.A. – Brasil, Bolsa, Balcão

BOVESPA - Bolsa de Valores do Estado de São Paulo (B3 former name)

BRL – Real (Brazilian Currency)

CEO – Chief Executive Officer

CGU – Controladoria Geral do União

CMVM – Comissão do Mercado de Valores Mobiliários

CSR – Corporate Social Responsability

CVM – Comissão de Valores Mobiliários

IBGC – Instituto Brasileiro de Governança Corporativa

IPCG – Instituto Português de Corporate Governance

LLC – Limited Liability Corporation

OECD – The Organisation for Economic Co-operation and Development SA

SA – Sociedade Anônima

SGPS - Sociedades Gestoras de Participações Sociais

SOE – State-Owned Enterprise

I – Introduction [1]

This work intends to address compliance and governance programmes applied to State-Owned Companies in order to analyse the consequences of this programme's adoption in their financial and non-financial value. Does proper management regarding corporate governance and integrity requirements bring efficiency and effectiveness to those undertakings in a way that positively affects market, client and taxpayer perception towards State-Owned Companies adding reputational and financial value to them?

The object of study will be the legal aspects concerning Brazilian and Portuguese State-Owned Companies and to plainly achieve the purposes of this work, it will be divided into four parts. We will take a closer look at the State-Owned Companies listed in the stock exchange market and the necessity driven from this feature related to corporate governance, compliance and good practices towards a better and more professional management aiming not only at a more efficient company to deliver its social object, but also a more valued corporation regarding its shares.

Considering this essay's aforementioned division into parts, the first one is this introduction and it will be asserted that the Brazilian and Portuguese economies resort to State-Owned as a means of fostering investments, as well as replacing the lack of private investments in several sectors. State-Owned Companies became a way to achieve economic and social development, and, because of that, these state undertakings have come to be primarily involved with infrastructure, public services, and financial business.

The second part will focus on the legal framework of both countries regarding the State-Owned Companies and their place within public administration, constitutional roots, legal boundaries, and obligations.

The third part will explore the compliance and corporate governance programme, its definitions, the way how State-Owned Companies are bound to embody and implement it, and its legal and non-legal sources. So, in a relevant way, this work intends to demonstrate how corporate governance is both a factor for the implementation of more efficient and society-oriented public policies, and a cause to prevent agency costs, to decrease the governments' political influence in State-Owned Companies through a programme of directors and professional managers' appointment. All this, by means of

1 Disclaimer: all the following citations of Brazilian and Portuguese books, articles and pieces of legislation were freely translated by this dissertation's author. The laws cited in this dissertation are subject to change. It is recommended that the reader always looks for the most up-to-date versions.

transparency and effective use of the business judgment rules where the managerial body must explain their decisions concerning technical and business aspects, as well as the risks involved.

In this same part, there will be a section that will consider how soft law in its main forms, alongside the legislation itself, imposes corporate governance and integrity programmes on State-Owned Companies, such as the State-Owned Company requirements on listing on the stock exchange and the obligations that its shares might be up for negotiations in security markets, and how having a compliance and corporate governance programme implemented could attract private investors, maybe a share price appreciation factor, and an instrument for better service provision towards community interests. In conclusion, it will be shown that the adoption of those corporate schemes should add value to State-Owned Companies' reputation among stakeholders, reflecting in their market value.

In the final section, the fourth part, the conclusion will attempt to show how corporate governance and compliance policies can add value to State-Owned Companies—possibly through a valorisation of the shares—preventing agency costs, risks and losses, increasing the entrance of more private shareholders, and fostering investments mitigating the achievement of the public goals of that kind of operations.

It is essential, in the introductory part, to show how State-Owned Companies are meaningful to both Brazilian and Portuguese economies. The numbers show the relevance which reflects the economic and social importance of State-Owned Companies. Brazil, according to the Ministry of Economy[2], has 134 Federal Companies (disregarding companies owned by the Federative States and Municipalities) which in 2018 correspond to assets amounting to BRL (Brazilian currency) 4.717,33 billion, a net income (2018) of BRL 71.51 billion, having paid dividends in the amount of BRL 11.84 billion (2018); Portuguese State-Owned Companies follow the same path as seen in the information provided by the Ministry of Finance[3], which demonstrates that Portugal has an equity portfolio of Euro 43.1 billion in direct participation in companies on which the State exerts influence by controlling the majority of the capital stock or at least participating as a significant shareholder.

Moreover, the numbers tell that State-Owned Companies play a significant role in both countries' economies and are deeply intertwined with the production and service rendering sectors. Nonetheless, the State-Owned Companies' role in those countries' economies are in permanent scrutiny because Brazilian and Portuguese States resorted to this form of state actuation to render public services

2 Retrieved June 20, 2019, from http://www.panoramadasestatais.planejamento.gov.br/QvAJAXZfc/opendoc.htm?document=paineldopanoramadasestatais.qvw&lang=en-US&host=QVS%40srvbsaiasprd07&anonymous=true.

3 Retrieved June 20, 2019, from http://www.dgtf.pt/ResourcesUser/SEE/Documentos/Carteiras_participacoes_Estado/31_12_2018/carteira_principal_31_12_2018.pdf.

or intervene in the economy but sometimes they lack motivation or justification to exist under constitutional and legal requirements; furthermore, whereas there are legal, societal and economic reasons for State-Owned Companies, they lack governance, professionalism, and fail to deliver their expected outcomes.

Due to the relevance of State-Owned Companies and regarding the economic area in which some of them are inserted, some State-Owned Companies are listed in the stock exchange market, which attracts regulations and soft law instruments to their governance, to build confidence through transparency.

A note must be issued: the stock exchange market listing is a way to lever investments from the private sector for State-Owned Companies and, in consequence, it reduces the contribution of taxpayers' money to state-owned corporations; another consequence that arises from being listed in stock exchange market is related to regulatory and governance matters, because there is a significant amount of integrity and transparency features that must be followed by the State-Owned Companies which want to be listed.

As previously mentioned, a legal framework for Brazil and Portugal regarding State-Owned Companies will be outlined – how they can be created and how they are managed. From that legal framework perspective, this work will focus on the necessity of implementation of corporate governance and compliance programmes in State-Owned Companies regarding the Brazilian and Portuguese legal systems as a way of accomplishing public interest, to respect the stakeholders, and to be seen as reliable, honest, transparent, trustworthy and well-managed companies, thus increasing their value.

In a scenario where the States act as incorporators, several concerns emerge. One of the most important is how the State-Owned Companies are managed and governed because they deal with public money, public interests, and must achieve public goals, and they often suffer from political influence and lack of professionalism. Furthermore, the political power can be harmful to State-Owned Companies, and this shows how governments frequently deal with the controlling position of political forces and appointments for the managerial bodies of the enterprises. This fact can bring some agency costs reflecting the balancing difficulty among government interest, public interest, shareholders interest, and other stakeholders' interests.

Stakeholders' interest is a concept that will permeate this entire work, and a proper definition for it is conveyed by the jurist Pedro Rebelo de Sousa[4], who asserts that there are three main stakeholders' groups (primary, public and secondary):

> Clarkson defines primary stakeholders as those without which the company does not survive (shareholders, investors, employees, customers and suppliers), along with those considered public stakeholders: governments and communities, offering infrastructure and markets, whose laws and regulations need to be obeyed; moreover, for which taxes and other obligations are due. In addition, secondary stakeholders are those who affect or influence, and are affected or influenced by the company, but are not directly involved in transactions with it, nor are they essential to its survival. Such interaction, however, does not rule out the possibility of having to build long-term, lasting relationships, with all concerned.

After the digression on the definition of *stakeholder*, it is valid to assert that the conflicts of interest regarding political commitments, proper governance, markets' expectations, clients and community interests can affect investor confidence, driving them away from open mixed-capital companies due to lack of transparency, information disclosure, and political interference. This is mainly due to the promoting of public interest and its limitations vis-a-vis profitability, as well as the strong political component inherent to the state, which makes it difficult to accurately calculate the risk of such investment.

Therefore, as a controlling shareholder of a public company, it is the State's duty to manage it to fulfil the intended public purposes because a State-Owned Company can only be created to serve a specific public intent. Nevertheless, if it is the case, the intentions of private investors are also to be met so that they can have the return of their investments, along with the state itself, which recons the well use of its resources and even its gains. The financial rewards of the State-Owned Companies in the form of dividends are, like taxes, revenue that can be reinvested in the public interest and alleviate public finances.

Considering the need to balance the two sides of the same coin, the rules of governance lead to ensuring that the State will operate within certain limits and that what at first sight may appear to be a legal burden may, over time, prove to be advantageous by avoiding improper influences, promoting

4 Sousa, Pedro R. de (2018). Corporate Governance – 15 Anos e os Novos Desafios Reflexão Sobre Sustentabilidade e Multiplicidade de Constituintes. In Pinto, José C. (Coord.), *et al.*, *A Emergência e o Futuro do Corporate Governance em Portugal - Volume II do Instituto Português de Corporate Governance* (pp. 335-341). Coimbra: Almedina. pp. 338-339.

professionalism and transparency that can lead to a valuation of the company in terms of market and reputation, and even avoiding losses and civil liability.

Regarding the necessity—in fact, the obligation—of having a corporate governance and compliance programme in State-Owned Companies, corporate compliance programmes must be deemed to act like an investor-welcoming quality seal, through which the investor perceives the company as a good and riskless option to invest and profit from, even in the face of necessary public investments that may be harmful to the company's revenue.

Moreover, eventually, a State-Owned Company does not have private shareholders, but governance benefits can be grasped as public money welcoming seal: it means that the State will invest in its enterprise to fulfil public interest and will probably obtain yields from it.

Thus, good corporate governance, with rules of transparency, integrity, accountability, and the duty to provide information in compliance with the precepts of legality, efficiency, morality, impersonality, and professionalism, can be a catalyst for investments and risk and loss prevention. State-Owned Companies always deal with the clash between the shareholder´s (whether the State or a private investor) main interest on profit and the demand from the society for constant—and quite often meagre—public investments. Should the company adopt corporate governance programmes, the managerial choices would be more transparent and justifiable, explaining the reason to invest or not to invest in a given place, or to provide or not to provide a given service.

Besides, improving corporate governance practices, transparency, and reducing uncertainties provides the conditions for a more accurate "pricing" of securities, with important implications for the reduction of the cost of capital and the generation of value for companies, controllers, and investors. For instance, there is a soft law tool in Brazil that aims to implement governance and compliance programmes in State-Owned Companies, and such embodies a market's concern. This tool was created as a B3 (Brasil, Bolsa, Balcão SA - Brazilian Stock Exchange) Programme which is based on the companies' listing at securities market in levels regarding the implementation and application of compliance and governance programmes in State-Owned Companies, meaning that the higher the level of listing at the stock exchange, the higher the internal level of governance and compliance.

A study by Ponemon Institute LLC[5], titled *The True Cost of Compliance*, surveyed 46 large companies and concluded that the absence of a Compliance programme might be highly harmful, showing that the implementation of such a programme is strongly advised to avoid liability.

5 Ponemon Institute LLC (2011). *The True Cost of Compliance – Benchmark Study of Multinational Organizations*. Traverse City: Author. Retrieved September 16, 2019, from https://www.ponemon.org/local/upload/file/True_Cost_of_Compliance_Report_copy.pdf.

The fact is that the lack of compliance programmes, especially in the current hugely competitive scenario, alienates investors and increases the risk of involvement in fraud and corruption, as well as the risk of fines and penalties imposed by the authorities. By contrast, a compliance programme can reduce risks, increase efficiency, and attract good private investors to relieve the State and the taxpayer's finances. It is not merely rhetoric: the need for the adoption of compliance is real; however, it is necessary to observe that the establishment of a programme that contemplates only fundamental aspects without actually representing effectiveness in its application can generate as many risks as not having it.

State-Owned Companies must have a compliance programme not only to prevent liabilities, but also to fulfil their obligations as part of the public administration and to achieve their public goals, to be accountable for their actions and the actions of their managers as well, to conduct business with the less possible political influence, and to prevent corruption. Finally, the establishment of compliance programmes for companies that aim to stand out in their area of activity and perpetuate themselves in the market is irreversible. Similarly, it creates a healthier business environment in a virtuous context.

So, State-Owned Companies must earnestly implement good governance programmes to be recognised as more trustworthy, honest, transparent, and well-managed, and thus being considered an effective investment option for the private sector. As important as this, it necessary to be more accurate in terms of public purposes achievement in order to ensure a cheap and reliable source of financing in the cases where there are private shareholders or, when they are all incorporated with public funds, to have a better, more efficient management in respect to the public money invested and to the public money owners—the people.

Hence, this work will focus on the application of governance and compliance rules in State-Owned Companies and its legal framework in Portugal and Brazil, trying to demonstrate how good company management practices can be a way to increase the value of public enterprises, valuing the State asset, fostering investments, providing more efficiency to the services rendered and, at the very least, preventing losses and liabilities.

II – State-Owned Companies in Brazil and Portugal

II.1 – State-Owned Companies Are Part of the Public Administration

At first, it is crucial to find a notion for the Public Administration concept and its consequences to the dissertation object itself. However, this dissertation will deal only with the issues regarding State-Owned Companies and their location on the public administration. Therefore, the topic of public administration will be narrowed to a path that leads to the State-Owned Companies' legal nature, its place in the public administration (Brazilian Federal Indirect Administration and Portuguese State Indirect Administration), and the keynote of this work: the necessity—or rather, the obligation—to formalise, orchestrate and put in force compliance and good governance programmes and the consequences of these acts as an instrument to add value in State-Owned Companies; this will be the second part of the dissertation object.

The definition of Public administration often embodies the means, personnel, functions, and assets organised to achieve finalities, goals. As the object is the public administration, those goals must meet the public interest. Professor Paulo Otero[6] taught that the

> Public administration finds its functional vocabulary in three central concepts: Public Interest, Binding Effect, Responsibility.
>
> The public interest functions as a teleological dimension of all administrative activity: Public Administration has its cornerstone in the pursuit of the public interest.
>
> The binding effect reveals the normative parameters of organic, procedural-formal, material, and teleological conformity of administrative action: Public Administration is the servant of normativity.
>
> Accountability provides control over the results or effects of administrative conduct, intending to gauge effective respect for the public interest and binding: by its actions and omissions, the Public Administration must always "be held accountable".

Concerning the aforementioned concepts to pursue and fulfil the public interest, Public Administration must comply with the law; it means it can only act when the law authorises it. Public Administration is bound with the legislation. Moreover, Public Administration must be held accountable

6 Otero, Paulo (2013), *Manual de Direito Administrativo-Volume I* (2nd Reprint). Coimbra: Almedina. p. 63.

for its actions once it deals with public assets, public goods and public money, which are financed and supported in general by the taxpayers, at the same time the ultimate legitimation anchor to the Public Administration exercise of its power and the final object of its actions.

To achieve the public goals, some organisation is required, and it is set up, as a rule, by a Constitution which gives the powers to the Public Administration act, informs of its structure, competences, and what kind of entities can be created to provide the public interest. So, the State creates several entities and bodies, considering the diversity and the volume of affairs in a community, its needs, and the necessity to organise the delivery of the public services.

Concerning the multitude of goals, needs, interests, and regional and economical peculiarities, the Public Administration organises itself by dividing those entities into direct public administration and indirect public administration. Both the Brazilian and Portuguese legal framework and doctrines adopt the concepts of direct and indirect administration.

The Brazilian Constitution, in Article 37[7], establishes the separation between direct and indirect public administration, though the constitutional text inscribes the concept. Similarly, the Portuguese Constitution also expressly mentions the idea of direct and indirect administration in Article 199, paragraph d[8], where it can be read:

> Article 199
>
> (Administrative competences)
>
> In the exercise of its administrative functions, the Government has the powers:
>
> d) To direct the state's departments and services and all the activities under its direct administration, civil and military, to superintend the indirect administration, and to exercise oversight over the latter and the autonomous administration.

The common distinction between direct and indirect administration lies in the proximity of the competences granted by the Constitution to the State Powers. Direct administration encompasses those administrative activities which are exercised directly from the Executive, Legislative, and Judiciary Powers – and the entities created below them and under hierarchical tutelage, control, and supervision. On the other hand, indirect administration can be defined as "the set of public entities, with their legal

7 *Brazilian Federal Constitution of 1988*: Article 37. The governmental entities and entities owned by the Government in any of the powers of the Union, the states, the Federal District and the Municipalities shall obey the principles of lawfulness, impersonality, morality, publicity, and efficiency, and also the following: (...). Retrieved September 24, 2019, from https://www2.senado.leg.br/bdsf/bitstream/handle/id/243334/Constitution_2013.pdf?sequence=11&isAllowed=y.

8 *Constitution of the Portuguese Republic*. Retrieved September 24, 2019, from https://www.parlamento.pt/Legislacao/Documents/Constitution7thRev2010EN.pdf.

personality and administrative and financial autonomy that carry out an administrative activity aimed at the accomplishment of State purposes"[9].

Professor Diogo Freitas do Amaral[10] summarises the concept when he states that "the 'direct state administration' is the activity performed by services integrated within State legal person, whereas 'indirect state administration' is an activity which, although developed for the realisation of state purposes, is performed by public legal persons distinct from the state."

Therefore, State-Owned Companies are part of indirect administration because they have, as mentioned, their own personality, in most cases private legal personalities, and independent administration and budget, as well as one of their most important features: they are not under the State's tutelage, but rather under supervision, as the State is the controlling shareholder. Moreover, the oversight is performed with the instruments of company law.

Regarding State-Owned Companies, the State uses private legal regime instruments, authorised by administrative law, as an organisational method and as a way of acting to achieve public interest. It means, as Professor Pedro Costa Gonçalves[11] asserts, a "privatisation of applicable law". This privatisation happens when the State creates a specific entity vested with private legal personality to act in its behalf, intervening in the economy to provide public services or to compete in the competitive market under private legal regime but simultaneously under administrative law rules once de activity is conducted by an entity which is part of Public Administration even being a subject with private personality.

Professor João Pacheco de Amorim[12] corroborates the idea and explains the issue through the expression *formal privatisation*. This concept conveys the idea that the Public Administration resorts to private legal regime to pursue and achieve public interest, encompassing, in addition to the Constitutional Principles regarding public administration, the criteria of effectiveness, commitment to the outcomes, and corporate governance, among other entrepreneurial requirements. To furthermore illustrate, the aforementioned author also brings the concept of *material privatisation*: it occurs when the State sells its participation in the social capital of a State-Owned Company or the company is thoroughly sold to private investors; moreover, there is a final concept, named *functional privatisation*, when the State proceeds to concede a service or activity to a private agent or entity—in this case, the State remains as the service or activity owner, it only allocates the exercise of it.

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9 Oliveira, Fernanda P. and Dias, José E. F. (2013). *Noções Fundamentais de Direito Administrativo* (4th Ed). Coimbra: Almedina. p. 65.
10 Amaral, Diogo F. do (2010). *Curso de Direito Administrativo Vol I* (3rd Ed., 5th Reprint). Coimbra: Almedina. p. 228.
11 Gonçalves, Pedro C. (2019). *Manual de Direito Administrativo – Vol. 1*. Coimbra: Almedina. pp. 126-127.
12 Amorim, João P. (2014). *Direito Administrativo da Economia – Vol. I (Introdução e Constituição Económica)*. Coimbra: Almedina. pp. 89-90.

As it could be understood from Professor Isabel Fonseca's[13] lesson, the State relies on incorporating companies to achieve specific public purposes. Among several reasons for that, it is possible to enumerate the size of the state, the legal-bureaucratic obligations to edit any act or other activity, corruption, and a certain inefficiency leading to the need for a resizing of the state apparatus to achieve greater efficiency.

Because of that (but not only), the State makes use of state-owned enterprises to intervene in the economy to achieve public purposes, which allegedly is a faster and less costly manner to reach and fulfil public interest. Henceforth, it is relevant to affirm that a company is not an instrument for the exclusive realisation of private interests itself. Therefore, no matter whether the capital that forms the company is public or private, there will always be, in both cases, more or fewer obligations to serve the general good and to develop the economy.

We now digress on the profitability of State-Owned Companies, Brazilian or Portuguese. When one resorts to a company to attain some goals (sell a product, provide a service, or fulfil a public finality), the profit aspect must be monitored because only with profits can a company endure and adequately meet its objectives. Nevertheless, State-Owned Companies must be subject to profitability assessment.

In his work, Pedro Vicente[14] brings a historical overview of the Portuguese legislation regarding the profitability of State-Owned Companies. The author mentions that the past and already revoked legislation, such as the Decree-Laws no. 260, of 1976, no. 75-A, of 1977, and no. 29, of 1984, expressly predicted the mandatory remuneration over the capital invested by the State on the public undertakings to ensure the economic and financial viability of the company.

The now in force Decree-Law no. 133, of 2013, does not mention anything about the investment return or profitability. The same happens in the Brazilian legislation. However, incorporation presupposes profitability. Activity is set up with management, organisation, technical and human resources to produce and sell a good or to provide a service in a way to obtain profit to perpetuate the company's existence. Although when the State resorts to an entrepreneurial form to provide public goals, it implies profitability.

Pedro Vicente states in his mentioned work on the profit subject at State-Owned Companies:

13 Fonseca, Isabel Celeste M. (2019). *Direito Administrativo I: Roteiro Teórico-Prático* (1st Ed.). Braga: ELSA.

14 Vicente, Pedro (2015). *Corporate Governance e Setor Empresarial Público em Portugal: Contributo Para um Normativo Regulador.* Coimbra: Almedina. pp. 26-28.

It is therefore assumed that an investment by the State or another public entity should correspond to the return on that effort, meaning the return on the investment and its effective recovery through profit as a result. Even though this may mean a form of self-financing or the allocation of the resulting funds to public interest projects.[15]

Profit may not be the most important achievement, in fact, it is relevant enough to be ignored in the name of the public interest; also, as profitable as a company might be, it is its task to fulfil the public interest that justifies its creation. Costs will be eased because there will be more resources to reinvest, and, consequently, State-Owned Companies will need less public money—or none at all—from the general budget. Being a state company can even be better: as the State is a shareholder, it endows the inherent rights and may receive dividends. State-Owned Companies can be an instrument to improve the State's revenue, in any case. Profitability, therefore, can be assumed as fulfilment of efficiency requirements; so, it is compliance with both countries' Constitutions.

To converge with this dissertation object, good governance and compliance programmes can be relevant tools for profitability and, in the case of State-Owned Companies, to combine profits with the public interest.

That said, it is appropriate to assert that profits will always be significant, but they must be pursued with the current constitutional order in view. Furthermore, this current constitutional order allows the public administrations of Brazil and Portugal to use the incorporation of companies (which will be state-owned) through their performance and promote national development and the common good of society.

Hence, the company is an instrument available to the public administration since the law allows it in order to fulfil the circumscribed public purposes which justify the creation of that specific State-Owned Company. About public goals and public interest, the OECD (Organisation for Economic Co-operation and Development)[16] definition enlightens the subject as follows:

Public policy objectives. For the purpose of this document, public policy objectives are those benefitting the general public within the SOE's own jurisdiction. They are implemented as specific performance requirements imposed on SOE's and/or private enterprises other than

15 Vicente, Pedro (2015). *Corporate Governance e Setor Empresarial Público em Portugal: Contributo Para um Normativo Regulador.* Coimbra: Almedina. p. 27.

16 OECD (2015). *OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition.* Paris: OECD Publishing. Retrieved November 15, 2019, from http://dx.doi.org/10.1787/9789264244160-en. p. 15.

the maximisation of profits and shareholder value. These could include the delivery of public services, such as postal services, as well as other special obligations undertaken in the public interest. In many cases, public policy objectives might otherwise be achieved via government agencies, but have been assigned to an SOE for efficiency or other reasons. Ad-hoc interventions by governments in the actions of SOE's should not normally be considered as part of an enterprise's public policy objectives. Public policy objectives can either be pursued separately from, or in combination with, economic activities.

Rafael Wallbach Schwind[17] follows the OECD reasoning towards State-Owned Companies, outlining the following:

> This means that the creation of state-owned enterprises reflects a conscious decision by the state, duly authorised by law, to employ the state-owned enterprise technique in the performance of economic activities by promoting them through legal entities specially created for this purpose, and at least partly integrated by state capital.

Furthermore, considering the exercise of entrepreneurial activity by the State, whose performance is delimited by the postulates of efficiency, publicity, transparency, honesty and morality, proportionality and reasonableness, it is, therefore, inescapable that this entrepreneurial action should take into account the principles of proper management and governance. In this sense, Professor Sofia Tomé D'Alté[18] states that

> This duty of good management stems from the principle of effectiveness that should guide public performance, whether administrative or corporate, although it is true that for various reasons it may become more noticeable in the latter. Regardless of this, we can say that this duty of good management should be assumed as a general rule of public performance.

Rafael Wallbach Schwind[19] follows this line in order to conclude that:

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17 Schwind, Rafael W. (2017). *O Estado Acionista: Empresas Estatais e Empresas Privadas com Participação Estatal*. São Paulo: Almedina Brasil. p. 46.

18 D'Alté, Sofia T. (2007). *A Nova Configuração do Sector Empresarial do Estado e a Empresarialização dos Serviços Públicos*. Coimbra: Almedina. p. 314.

19 Schwind, Rafael W. (2017). *O Estado Acionista: Empresas Estatais e Empresas Privadas com Participação Estatal*. São Paulo: Almedina Brasil. p. 57.

In any case, the use of corporate costume by the State does not mean placing the *res publica* in an inferior situation. From a certain angle, it is just the opposite. The adoption of the entrepreneurial technique derives from the realisation that it has characteristics that are better suited for the performance of specific activities. Thus, far from intending to place *res publica* in a position of inferiority, the State's adoption of entrepreneurial rationality derives precisely from the understanding that this form of intervention is the most appropriate for specific purposes—and therefore, in principle, it will be the best one and will provide for the achievement of particular objectives set by the legal system.

To corroborate that, it is worth to mention the Portuguese legislation on Local State-Owned Companies (although these types of State-Owned Companies are not the object of this study) because it states the prohibition to create such an enterprise without specific and sufficient motivations and reasons; even more, if the intended object of the Municipal State-Owned Company can be accomplished by the direct administration efficiently and without costs, the creation of the undertaking will be illegal. The Law of Local Enterprises, no. 50 of 2012, in its Article 6[20] states this general principle:

Article 6

General principle

1. The incorporation of local undertakings and the participations provided for in Articles 1 (3) and 3 shall be based on the best pursuit of the public interest and, in the case of the establishment of local undertakings, also on the desirability of a management subtracted from direct management due to the technical and material specificity of the activity to be developed.

2. The activities carried out by local companies or affiliated entities may not be pursued by the participating public entities pending their outsourcing and to their exact extent.

3. For the purposes of the preceding paragraph, consideration shall be given to the activity specifically pursued by the local companies or the affiliated entities.

If a note can be made, this legal commandment should be enlarged to engross all types of Portuguese State-Owned Companies, not only local ones. Even if national State-Owned Companies must

20 *Law no. 50 of 2012*. Legal Regime of Local Public Enterprises and Local Partnership. Retrieved December 17, 2019, from https://dre.pt/web/guest/legislacao-consolidada/-/lc/117639377/201912171606/diploma?p_p_state=maximized&did=67570784&rp=indice.

abide by constitutional and legal requirements, that is not enough because a prior professional opinion is also required so that the Government can decide well informed. However, it is a non-binding opinion. Having said that, it is possible that the opinion could be disregarded over political wishes; Article 10, numbers 1 and 2, of the Decree-Law no. 133, of 2013[21], make it clear:

> 1. The incorporation of public companies in the State business sector takes place under the terms and conditions applicable to the constitution of commercial companies and always depends on authorisation from the members of the Government responsible for the areas of finance and the respective sector of activity, preceded by a prior opinion of the Technical Unit, under the terms of the following numbers.
> 2. The prior opinion is a preparatory, non-binding act, which must precede the decision to set up any public company and is issued based on technical studies that assess, namely, the economic and financial viability of the entity to be constituted, and identify the quality and efficiency gains resulting from the exploitation of the activity in a corporate manner.

It is essential to assert that the creation of a state-owned enterprise by the Public Administration must adhere to all inherent legal and constitutional principles and this intervention on the economy must be in accordance with the primary public interest, meaning the interests of the public and of society, for the welfare of all; yet, one cannot forget that the public administration has intentions of its own and that if they are valid they must be fulfilled.

Noting that the public interest is the beacon, both the Brazilian and Portuguese Constitutions expressly determine the obedience of all public administration to the principles that those Constitutions order, namely legality, transparency, free enterprise, proportionality, open competition, and efficiency[22]; some more can be added to these, as the ones listed in the Article 266[23] paragraph 2 of the Portuguese Constitution which are equality, justice, impartiality, and good faith. Those principles are for sure a guideline to a better public administration, one that accomplishes its goals and favours the primary public interest over the secondary interests of public administration.

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21 *Decree-Law no. 133 of 2013*. New Legal Regime for The Corporate Public Sector. Retrieved January 23, 2020, from https://dre.pt/web/guest/legislacao-consolidada/-/lc/58582281/view?p_p_state=maximized.

22 Fidalgo, Carolina B. (2017). *O Estado Empresário: Das Sociedades Estatais às Sociedades Privadas com Participação Minoritária do Estado*. São Paulo: Almedina Brasil. p. 73.

23 *Constitution of the Portuguese Republic*. Article 266 (Fundamental principles): 1. The Public Administration shall seek to pursue the public interest, with respect for all those citizens' rights and interests that are protected by law. 2. Administrative organs and agents are subject to the Constitution and the law, and in the exercise of their functions must act with respect towards the principles of equality, proportionality, justice, impartiality and good faith. Retrieved September 24, 2019, from https://www.parlamento.pt/Legislacao/Documents/Constitution7thRev2010EN.pdf.

Therefore, the incorporation of a State-Owned Company is underlying the public interest and designates specific public purposes. However, the realisation of these general purposes is best achieved with autonomy from the State and a certain distance from governmental influences. However, state-owned enterprises will always be subject to State oversight because it exerts dominant influence over those undertakings, and they are an instrument for achieving the general welfare.

Both Brazilian and Portuguese Corporate Law provide that state-owned enterprises are subjected to the corporate legislation and, if they are publicly traded on the stock exchange, they also have to respect the relevant laws and the capital market regulator and the regulations of the stock exchanges themselves. This means that the State, as a controlling shareholder, has the same duties as any other private controlling shareholder although only the State may direct the activities of the company to serve the public interest that justified its incorporation.

It is relevant to emphasise that both Constitutions demand for the creation of State-Owned Companies the very existence of public interest and the respect towards public administration principles such as legality. Thus, the combination of, on one hand, the stakeholders interests, the exercise of control with all the limitations imposed to protect the minority, and the capital market itself, and, on the other hand, the right to impose public interest means that only current legislation cannot prevent this conflict of interest, and there should be clear governance rules that favour good management practices, with a focus on standards of ethical conduct, transparency, professionalism of the board, risk prevention and accountability, considering that political-state influence will always exist, but it must have a measure—sustainability and permanence of the State-Owned Company—in order to allow for the financial return and the right fulfilment of its corporate purposes.

In this case, the private sector, when investing in the State-Owned Company, and the general public as well, should be aware that the controlling entity for conducting the company's business may give priority to the public interest, even if it impairs its financial return. On the other hand, this same public body undertakes to observe all the different rules, including those that restrict its power, or which give it fiduciary duties, as well as the regulations issued by the regulatory body of the capital market.

Moreover, as Paulo Otero[24] asserts, the privatisation of the public administration cannot be an escape from legality and submission to the Constitution. Whereas it is correct to empower the State with more efficient instruments to achieve its goals, it does not mean that the biding of the Public Administration to the law is lost nor can it be diverted by corporate arrangements made by the State to

24 Otero, Paulo (2013), *Manual de Direito Administrativo-Volume I* (2nd Reprint). Coimbra: Almedina. p. 31.

provide public services, foster some investment or develop some region among other reasons that may justify the creation of a State-Owned Company.

For that matter, when the Public Administration is under the private law it can never be the same as a particular party would be under the same private law. Due to this, when the private legal regime is authorised to be used by the Public Administration, private law will be affected by public law and put in force pursuant to administrative law principles and dispositions.

The Public Administration must comply with rigid boundaries that are set up by the persecution of the public interest and the guaranties assured to the private sector as well. Further, the existence of internal programmes of good governance and compliance in State-Owned Companies can be said to make public investment feasible and legitimate. The reason is that the principals of administrative and corporate law governing this type of undertaking, which soft-law instruments are good example of, become attractive to investors and improve general confidence that public money is being well spent. Such programmes require greater transparency in the conduct of business, better and more technical rationale for decision making, transparent procedures and objectives to enforce and comply with laws and punish deviations, as well as rules where the competences of each corporate body are expressly defined, which reduce margins of uncertainty. Some factors lead the investor to put money into a venture, and honest, transparent management is undoubtedly a motivator.

State-Owned Companies, which are part of the public administration, should perform their business more rigorously. In addition to the minimum required by current legislation, good governance and compliance standards are an essential factor for the excellent management of the company.

When public money is at stake, it is expected that it must have the proper command to promote the efficiency and delivery of useful services always regarding transparency and accountability.

Concerning the mixed public and private legal regime that govern State-Owned Companies, both in Portugal and in Brazil, these undertakings as part of public administration can only be created and function on a law basis. The creation of this kind of public enterprise must comply with the constitutional requirements, which are very similar when one assesses the legal framework of both countries.

For that matter, both legal systems from Brazil and Portugal do not exclude the duties and responsibilities ascribed to any controlling shareholder, and those duties entail that the legislation also demands inescapable obedience to the public administration precepts, principles, and obligations. State-owned enterprises must satisfy the requirements of collective interest and must comply with the principles of public administration and the public interest that justifies its creation.

Thus, the nature of these state-owned enterprises is a State form which, at the same time, removes much of the rigidity of the regime of public law and grants freedom guarded by the law, since State enterprises are legal entities of private law. There is a "peculiar regime" [25] in force on state-owned enterprises in which intertwines the public and the private legal regimes.

So, being a company, there will be some autonomy of will and freedom of management; direct guardianship of the government will not apply, merely supervision and exercise of shareholder control in the form of the Commercial Law.

However, on this private construct, there is a mantle—the regime of public law which will prevail whenever the public interest is at stake in the face of other business interests. State-Owned Companies, even being part of the Public Administration, have private personalities, although they must comply with the public administration principles.

When the state decides to create a State-Owned Company, intervening in the economy for reasons of collective interest or national security that are now not worth investigating (our focus is not the reason for their creation, but the way the state undertakings are managed), it must watch out to meet the precepts of public administration, but must also bear in mind that this method of State action has been implemented to bring with it certain autonomies and freedoms that direct administration does not possess and that only the private regime grants.

As has already been stressed, the private regime applies for State-Owned Companies, although less private than for those pure private companies, because they are part of the public administration. This brings a higher duty of accountability, efficiency, and prevalence of public interest above the individual, but all of these must meet the result-oriented management determined by Portuguese and Brazilian law. The managerial body is, by law, committed and bound to financial and non-financial outcomes set up by the policymakers[26], and they have the entrepreneurial form of state action to achieve public interest better.

So, the creation of State-Owned Companies under this peculiar private regime demonstrates that the State intends to achieve a specific public purpose in a more specialised, rational, and depoliticised manner, as Márcio Pestana[27] explains, and then he goes on affirming that the principles of specialisation, rationalisation and depoliticisation apply to State-Owned Companies.

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25 Pestana, Márcio (2010), *Direito Administrativo Brasileiro* (2nd Ed). Rio de Janeiro: Elsevier. p. 51.

26 Portuguese Decree-Law no. 133, of 2013, in its articles 24, 25 and 39, and the Brazilian Law no. 13.303 of 2016, in its articles 8, I and 23, determines the management commitment to implement the policies and achieve the results established by the State as controlling shareholder and the ultimate policymaker authority. The mentioned legislation was retrieved January 24, 2020 from https://dre.pt/web/guest/legislacao-consolidada/-/lc/107738401/202001231353/73450719/diplomaPagination/diploma/2?did=58582281 and http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/lei/l13303.htm, respectively.

27 Pestana, Márcio (2010), *Direito Administrativo Brasileiro* (2nd Ed). Rio de Janeiro: Elsevier. p. 57.

This means that the state-owned enterprise must focus on its social object which reflects the public interest that justified the State-Owned Company's creation; to achieve the bylaws' goal the corporation must adopt the best management and operational practices, which implies the adoption of the principle of rationalisation, *i.e.* the activity will be performed in an organised manner to obtain the best possible result at the lowest possible cost; regarding rationality, proportionality and efficiency this proper management will certainly accomplish at one time the public interest and the State itself as controller shareholder and, eventually, of its private partners.

Finally, there is the principle of depoliticisation, which means that the decision-making process and the decisions adopted must follow technical and business rigour. Management must be professional and removed from political inflexions related to the government rather than state interests.

A State-Owned Company must have an autonomous administration subjected to the business judgement rule, which does not free it from its public duties and the governmental supervision that must be exercised according to the formalities determined by the law when referring to the Corporate Commercial Law about the exercise of the shareholder's majority powers, that, in this case, is in the State hands.

In that particular matter of the State's role in a public enterprise, the Organisation for Economic Co-Operation and Development (OECD) in its guidelines for State-Owned Companies' governance mentions that "there should be a clear separation between the state's ownership function and other state functions that may influence the conditions for state-owned enterprises, particularly with regard to market regulation."[28]

It is not for any another reason that laws that regulate the management of State-Owned Companies have emerged over time, namely concerning corruption, governance, transparency, requiring more excellent technical and professional knowledge by managers.

Indeed, this work tries to demonstrate that a corporate governance programme should depoliticise the State-Owned Companies' board, because the more technical, professional, attentive to public purposes, rule-abiding, and endowed with the instruments of good governance, the more profitable and public interest-focused the state-owned enterprise will be. For this reason, and in more detail, a compliance programme and corporate governance rules must be enforced in State-Owned Companies. It is an ethical-constitutional commandment.

28 OECD (2015). *OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition*. Paris: OECD Publishing. Retrieved November 15, 2019, from http://dx.doi.org/10.1787/9789264244160-en. p. 20.

The stated legal systems provide tools to exert the management powers in a company, but considering that the companies now under study are part of the administration, the rules of corporate governance and compliance regarding the duties of loyalty, honesty, morality, legality, publicity and transparency, risk and agency costs prevention are also as crucial as the favourable legislation to give right directions to State-Owned Companies towards public interest.

Hence, a panoramic view was given to place the State-Owned Companies into the public administration, and because it is an instrument to reach the general welfare, through a so-called privatisation of public administration, the next step will be the assessment of how both the Portuguese and Brazilian legal systems deal with the creation and the functioning of State-Owned Companies.

II.2 – Brazilian and Portuguese Legal Framework for State-Owned Companies

The incorporation of State-Owned Companies has a constitutional ground in Brazil and Portugal, as seen in Article 173 and the followings of the Brazilian Federal Constitution and Article 80, 81 and 82 in the Portuguese Republic Constitution, respectively.

Also, in both countries, State-Owned Companies are ruled by the Corporate Law and some specific Administrative Law norms; besides, some soft law instruments are a source of proper governance. Regarding this matter:

- In Brazil, there is Law no. 6.404, of 1976 (the Public Limited Liability Companies Law) and Law no. 13.303, of 2016 (State-Owned Companies Legal Regime).
- In Portugal, the legislation about corporate issues relating to State-Owned Companies is the Decree-Law no. 133, of 2013 (State-Owned Companies Legal Regime) and in the Decree-Law no. 262, of 1986 (the Companies Law).

II.2.1 – Brazilian Legal Approach to State-Owned Companies

As seen in the previous chapter, State-Owned Companies in Brazil are part of the indirect public administration because the Federal Constitution determines that. Furthermore, the Federal Constitution is the legal basis of the State-Owned Companies' possibility to exist. They can only be incorporated by the State due to a constitutional authorisation, which enables the ordinary legislator to enact a specific law to create a State-Owned Company. It demands a more profound analysis.

The Brazilian Federal Constitution establishes, in its chapter concerning the economic order, that "the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice."[29]

The Brazilian Republic's economic order, considering the constitutional wording above transcript, is founded on the principles of the free enterprise and private property. Nonetheless, all the components of the Republic must comply with human dignity, social welfare, and the private property must observe the requirements of its social functions.

Having said that, the Constitution admits State intervention on the economy but only in the face of a proper legislation enacted by the parliament law and comprising two situations: to accomplish the relevant collective interest and due to reasons of national security. The head of Article 173 of the Brazilian Constitution confirms the previous affirmation: "With the exception of the cases set forth in this Constitution, the direct exploitation of economic activity by the State shall only be allowed whenever needed to the imperative necessities of national security or a relevant collective interest, as defined by law." [30]

Thus, according to the Brazilian Constitution, it is possible to assert that the State can and must intervene on the economy, but the central role in exerting an economic activity belongs to the private

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29 *Brazilian Federal Constitution of 1988*, article 170: the economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard for the following principles:

I – national sovereignty;

II – private property;

III – the social function of property;

IV – free competition;

V – consumer protection;

VI – environment protection, which may include differentiated treatment in accordance with the environmental impact of goods and services and of their respective production and delivery processes;

VII – reduction of regional and social differences;

VIII – pursuit of full employment;

IX – preferential treatment for small enterprises organised under Brazilian laws and having their head-office and management in Brazil.

Sole paragraph. Free exercise of any economic activity is ensured to everyone, regardless of authorisation from government agencies, except in the cases set forth by law. Retrieved September 24, 2019, from https://www2.senado.leg.br/bdsf/bitstream/handle/id/243334/Constitution_2013.pdf?sequence=11&isAllowed=y.

30 *Brazilian Federal Constitution of 1988*, article 173rd: with the exception of the cases set forth in this Constitution, the direct exploitation of an economic activity by the State shall only be allowed whenever needed for the imperative necessities of the national security or for a relevant collective interest, as defined by law.

Paragraph 1. The law shall establish the legal system of public companies, joint-stock companies and their subsidiary companies engaged in economic activities connected with the production or trading of goods, or with the rendering of services, providing upon:

I – their social function and the forms of control by the State and by society;

II – compliance with the specific legal system governing private companies, including civil, commercial, labour, and tax rights and liabilities;

III – bidding and contracting of works, services, purchases, and disposal, with due regard for the principles of government services;

IV – the establishment and operation of boards of directors and of boards of supervisors, with the participation of minority shareholders;

V – the terms of office, the performance appraisals, and the liability of administrators.

Paragraph 2. The public companies and the mixed-capital companies may not enjoy fiscal privileges which are not extended to companies of the private sector.

Paragraph 3. The law shall regulate the relationships of public companies with the State and society .

Paragraph 4. The law shall repress the abuse of economic power that aims at the domination of markets, the elimination of competition and the arbitrary increase of profits.

Paragraph 5. The law shall, without prejudice to the individual liability of the managing officers of a legal entity, establish the liability of the latter, subjecting it to punishments compatible with its nature, for acts performed against the economic and financial order and against the citizens' monies. Retrieved September 24, 2019, from https://www2.senado.leg.br/bdsf/bitstream/handle/id/243334/Constitution_2013.pdf?sequence=11&isAllowed=y

sector once the free enterprise principle is in force. Moreover, when one speaks about this principle, the State intervention on the economy must be limited. In her work, Carolina Barros Fidalgo[31] quotes the Brazilian Supreme Court Justice Marco Aurelio de Mello once voted in a Non-Compliance with a Fundamental Precept Action No. 46 (*Ação de Descumprimento de Preceito Fundamental* is the name of the procedure in the Portuguese language):

> The State must act, yes, but in a subsidiary way, in order to ensure proper conditions for the growth of the economy and the better development of the capacities of each individual, guaranteeing equal opportunities and enabling the duties of continuity, universality, and efficiency in obtaining public services...to comply with the principle of subsidiarity means that what can be accomplished satisfactorily by private undertakings should not be assumed by the state...The performance of the State in the economic activity should occur only when it shows failure or insufficiency so that the public power acts towards correcting the imperfections that the market alone is not able to digest.

The Brazilian Justice statement transcribed above shows the constitutional interpretation regarding the role of the State in the economy, the subsidiary role concerning the private sector. Now, it becomes an express law commandment through a recently enacted legislation, Law no. 13.874, of 2019, which institutes the declaration of rights of economic freedom and establishes free market guarantees. It rules in its Article 2, item III[32], now exposing the tacit constitutional principle of subsidiarity, that the State intervention in the economy will be subsidiary and exceptional.

Thus, the rule in Brazil is to let the entrepreneurial and economic activity in the hands of the private initiative. However, as asserted before, the State must intervene when it is necessary to ensure the public interest and must comply with ethical governance postulates.

In the same line of understanding, Paulo Otero, quoted by Carolina Barros Fidalgo[33], ascertains that

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31 Fidalgo, Carolina B. (2017). *O Estado Empresário: Das Sociedades Estatais às Sociedades Privadas com Participação Minoritária do Estado*. São Paulo: Almedina Brasil. p. 79.

32 *Law no. 13.874 of 2019*. Institutes the Declaration on the Rights of Economic Freedom; establishes free market guarantees; amends Laws 10.406, of January 10, 2002 (Civil Code), 6.404, of December 15, 1976, 11.598, of December 3, 2007, 12.682, of July 9, 2012, 6.015, of December 31 December 1973, 10.522, of July 19, 2002, 8.934, of November 18, 1994, Decree-Law no. 9.760, of September 5, 1946 and the Consolidation of Labour Laws, approved by Decree-Law no. 5.452, May 1, 1943; repeals Delegated Law no. 4, of September 26, 1962, Law no. 11.887, of December 24, 2008, and provisions of Decree-Law no. 73, of November 21, 1966; and makes other arrangements. Retrieved October 10, 2019, from https://legis.senado.leg.br/norma/31412289/publicacao/31432011.

33 Fidalgo, Carolina B. (2017). *O Estado Empresário: Das Sociedades Estatais às Sociedades Privadas com Participação Minoritária do Estado*. São Paulo: Almedina Brasil. p. 67, nn. 144-145.

> According to the principle of the pursuit of the public interest, the exercise of the State shareholder function by the creation of ex novo mixed capital companies or the participation in the capital of existing private companies is not shown unless the purpose of the particular activity is to pursue public goals. Either for the services it provides, for the goods it produces, or, finally, for the collective needs it wishes to satisfy.

So, the Brazilian Constitution allows, under specific requirements, the State's intervention on the economic sector through State-Owned Companies; the most important is that the creation must happen under an enacted law. Whereas the private sector has the autonomy to conduct its actions, the Entrepreneur-State has allowed freedom granted by law. The State—hence, State-Owned Companies—must do their business within the boundaries of the legislation.

Now, when the governmental decision to incorporate and create a State-Owned Company is made, by issuing an administrative decision and requesting to the Parliament to enact an authoritative law to create a public undertaking, the private sector guarantees must be observed; worth saying, the State-Owned Companies will not have any significant advantage over the private enterprise with which it competes, as the Constitution stipulates in Article 173, mentioned and cited above.

To create a State-Owned Company, the Parliament must pass a specific piece of legislation authorising the Government to incorporate a Company. This authoritative law must encompass and demonstrate that this new State-Owned Company fulfils the constitutional requirements for its creation, and must express its corporate object and objectives.

In order to meet a Constitutional request and to consolidate the legal regime applicable to Brazilian State-Owned Companies regarding mostly to its creation, incorporation, management, accounts, auditing, shareholders relationship and procurement the Law no. 13.303, of 2016, acknowledged as The State-Owned Companies Law, was edited for both public companies and mixed-capital companies with the object inscribed in its Article 1, which affirms:

> This Law provides for the legal status of the public company, the mixed capital company and its subsidiaries, covering any public company and mixed-capital company of the Union, the States, the Federal District, and the Municipalities that operate production or

commercialisation of goods or the rendering of services, even if the economic activity is subject to the Union's monopoly regime or the rendering of public services[34].

This piece of legislation reaffirms and details the Constitutional rules over State-Owned Companies. The State must comply with the legal regime imposed by this norm, and when it decides to intervene in the economy by creating a corporation, this Law no. 13.303, of 2016, will be the guideline.

Once the decision is made, the State-Owned Companies in Brazil must adopt one of two forms allowed by the Constitution and by the legislation: The Mixed Capital Company and the Public Company. They will both be private legal entities, with their assets, management, workers, facilities, and may act in competition with other private companies, or they can be created to provide public services.

The main difference between those kinds of entrepreneurship by the State is related to the funds used to constitute their share capital. Public Companies are created with public funds only, however, as already stated, they are still a legal entity independent from the Government. They will have their legal personality, and they are constituted as a private legal entity under the form of a Corporation, with shares of capital which in this case will be owned exclusively by the State and will not be listed at the stock exchange market.

On the contrary, the Mixed-Capital Company is incorporated with a combination of public and private capital and the Company may be listed at the stock exchange market, and the shares can be negotiated there. However, the controlling shareholder can only be the State. Articles 3 and 4 of the State-Owned Companies Law[35] admits the creation of two types of State-Owned Companies in Brazil:

Article 3: Public Company is the entity endowed with legal personality of private law, with its creation authorised by law and with its assets, whose capital stock is wholly owned by the Union, the States, the Federal District, or the Municipalities.

Sole paragraph - Provided that the majority of the voting capital remains the property of the Union, the State, the Federal District or the Municipality, the participation of other legal entities governed by domestic public law, as well as bodies of indirect administration, shall be admitted to the capital of the public enterprise. Union, States, Federal District, and Municipalities.

34 *Law no. 13.303 of 2016*. Provides for the legal status of the public company, the mixed capital company and its subsidiaries, within the scope of the Union, the States, the Federal District and the Municipalities. Retrieved January 24, 2020, from http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/lei/l13303.htm.

35 *Law no. 13.303 of 2016*. Provides for the legal status of the public company, the mixed capital company and its subsidiaries, within the scope of the Union, the States, the Federal District and the Municipalities. Retrieved January 24, 2020, from http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/lei/l13303.htm.

> Article 4: The company of mixed economy is the entity endowed with juridical personality of private right, with its creation authorised by law, in the form of a corporation whose shares with voting right belong to the Union, the States, the Federal District, the Municipalities or the indirect administration entity.

Concerning mixed capital companies, the Law no. 13.303, of 2016, provides that the public legal entity that controls the mixed-capital company has the duties and responsibilities of the controlling shareholder, established by Law no. 6.404, of 1976[36], which is the Brazilian Corporate Law.

However, the controlling powers must not be exerted regarding private interests and profits only: they need and have to be exercised in the company's attention, respecting the public interest that justified its creation and the subsequent registration of the mixed-capital companies at the Brazilian Securities Commission, being subjected to the provisions of the Securities Act (Law no. 6.385, of 1976), as the 1st and 2nd paragraphs of Article 4 of the Law no. 13.303 of 2016 establishes. To corroborate this, it's worth to bring up Mario Engler Pinto Junior[37] assertation on the subject:

> In the case of Brazil, a symbiotic relationship between public interest and lucrative purpose in the mixed-economy enterprise is not based on any hermeneutic construction, but stems from the express legal norm, more specifically from Article 238 of Law no. 6.404, of 1976. Admittedly, the provision only authorises the State, as a controlling shareholder, to influence the company's actions to ensure the fulfilment of its public mission, without this being an abuse of controlling power. However, the legitimation of state conduct only acquires logical meaning if it is in the interest of the controlled company, which, in turn, presupposes the broadening of the concept of social interest to incorporate valid public policy or market order objectives. From the legal point of view, the public interest penetrates within the company. However, it is not a matter of any public interest, but only of that provided for in the law authorising the constitution of the company and reproduced in the bylaws, or that derives at least from the differentiated way of exercising the economic activity inserted in its field of activity.

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36 *Law no. 6.404 of 1976*. Corporate Law Regarding Public Limited Liability Companies. Article 238. The legal entity that controls the mixed capital company has the duties and responsibilities of the controlling shareholder (Articles 116 and 117) but may guide the company's activities in order to meet the public interest that justified its creation. Retrieved October 28, 2019, from http://www.planalto.gov.br/ccivil_03/LEIS/L6404consol.htm.

37 Pinto Jr., Mario E. (2013). *Empresa estatal: função econômica e dilemas societários* (2nd ed). São Paulo: Atlas. pp. 315-316.

All State-Owned Companies, even public companies or companies of mixed-capital not listed at the stock exchange market, whose shares cannot be and are not in the stock market, must comply with the Brazilian Securities Commission Law regarding bookkeeping and the obligation to submit to independent audit. Moreover, they must comply with transparency duties, corporate governance rules related to the managerial and audit bodies, internal control, and supervision, as seen in Article 7 of Law no. 13.303, of 2016[38].

Notwithstanding the duties cited above, the Brazilian State-Owned Companies are subject, by law, to external instruments of control, mainly the one exerted by the Audit Courts, which are part of the Legislative Power. It is essential to affirm that this State-Owned Companies Law (Law no. 13.303, of 2016) was a milestone for the Brazilian legal system because it sets the obligation for those companies to have compliance programmes and good governance (which will be seen later in this dissertation, as it is the main object of the work), as ordered in Article 6 of the mentioned legislation. It may also be seen as a constitutional duty because, as this dissertation will try to prove, compliance and governance are transparency, honesty, legality, and efficiency corollaries. For now, the intention was solely to demonstrate the legal framework in force in Brazil regarding State-Owned Companies.

II.2.2 – Portuguese Legal Approach to State-Owned Companies

One of the fundamental tasks of the Portuguese State is to promote people's "well-being and quality of life"[39]. To achieve this primary goal simultaneously with other finalities, the State may adopt the corporative form to act and to pursue the public interest. Of course, this way of acting must have the same constitutional ground, as seen in the Portuguese State-Owned Companies, and it has had its first authorisation to exist in the Portuguese Constitution in Article 80 which regulates the economic sector enumerating the principles it is subject of:

> Society and the economy shall be organised based on the following principles:
> a) The subordination of economic power to democratic political power;
> b) The coexistence of the public, private and cooperative and social sectors in the ownership of the means of production;

38 *Law no. 13.303 of 2016*. Provides for the legal status of the public company, the mixed capital company and its subsidiaries, within the scope of the Union, the States, the Federal District and the Municipalities. Retrieved January 24, 2020, from http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/lei/l13303.htm.

39 *Constitution of the Portuguese Republic*. Article 9, Paragraph d. Retrieved September, 30, 2019, from https://www.parlamento.pt/Legislacao/Documents/Constitution7thRev2010EN.pdf

c) Freedom of entrepreneurial initiative and organisation, within the overall framework of a mixed economy;

d) The public property of natural resources and the means of production, in accordance with the collective interest[40].

That constitutional ruling affirms that the Portuguese Public Administration may intervene in the economic sector using the corporative arrangement when it states that the production means can be private or state-owned. Although the State being the owner of the production means that the collective interest and the free enterprise principle must be considered.

These limitations to the State Power are guarantees to the private sector that the State will not act in an abusive way. On the contrary, the State must work to "ensure the efficient operation of the markets, in such a way as to guarantee a balanced competition between enterprises, counter monopolistic forms of organisation and repress abuses of dominant positions and other practices that are harmful to the general interest."[41]

It is the economic aspect of the State intervention in the economic branch which shows that in Portugal, as in Brazil, the economy is the field of the private sector, although the State can—and must—intervene to balance it to ensure social justice, equality, and development, hindering the abuse of dominant positions, regulating areas, promoting competition, fostering investments, among other functions and objectives.

In short, in some sectors and under some conditions, the State incorporates a company to pursue the people's welfare and the public interest; those are the principle, limit, and foundation to the State's intervention in the economy as an entrepreneur.

Regarding the State's direct intervention in the economy, João Pacheco Amorim[42] asserts that it occurs under the principles of coexistence, proportionality, and subsidiarity. Pursuant the Portuguese Constitution, in Articles 61, no. 1, and 81, paragraphs b and c, among others, the public and private sectors must coexist in the Portuguese economy; to make his point, the author explains that "It is therefore also cautioned (and even within specific parameters,...) a 'freedom' of public economic initiative within a 'mixed economy' (that is, an economy in which operators—suppliers of goods and services, whether private or public—compete)".

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40 *Constitution of the Portuguese Republic*. Article 80. Retrieved September, 30, 2019, from https://www.parlamento.pt/Legislacao/Documents/Constitution7thRev2010EN.pdf

41 *Constitution of the Portuguese Republic*. Article 82, Paragraph f. Retrieved September, 30, 2019, from https://www.parlamento.pt/Legislacao/Documents/Constitution7thRev2010EN.pdf

42 Amorim, João P. (2014). *Direito Administrativo da Economia – Vol. I (Introdução e Constituição Económica)*. Coimbra: Almedina. pp. 189-190.

Thus, the Portuguese Constitution allows the State to directly intervene in the economy by owning production means, mainly through State-Owned Companies. The States' license to act with a corporative branch derived from the Constitution; hence, it will be a discretionary power to act on the economy when it must observe strict requirements to do so. Discretion means that there are legal and juridical limitations to act and the major one is that the State can only incorporate an enterprise if, and only if, its objective is to accomplish specific public interest.

Private entities, therefore, have a broad fundamental right to free enterprise; the State has a competence, an assignment conferred by the Constitution and the laws, to motivate and justify, within limits imposed by the legal system itself, to pursue the public interest. In this regard, it is possible to affirm that there is a public economic initiative, which is exercised not freely, but within parameters of discretion, as Professor Amorim explains in his work cited above; he goes further, and citing Romero Hernández asserts that

> the end (the public interest) justifies the means (the creation of such undertakings) only when the principle of proportionality presides over them. The public interest is determined here as a concept when there is such congruence that the allocation of resources and the programming leading to the creation of such a company is clearly called for by a proportionate and congruent situation. More than ever, here, the administrative decision must be preceded by adequacy and motivation.[43]

Consequently, as Professor Amorim develops his juridical analysis, this obedience to the principle of proportionality means that the state cannot—and should not—intervene in the economy at will. The State only acts in the economy when necessary and justified, leaving this function to the private sector when its presence is not socially or economically justified. This leads to a notion of a market economy, albeit social, but where the State acts in a subsidiary manner, in accordance with the principle of subsidiarity.

As an entrepreneur, the State is allowed by law to incorporate public corporations as part of the indirect public administrations, as seen before in this dissertation. It is right to affirm that there are other types and forms inside the indirect Public Administration that the State can use, such as Public

43 Amorim, João P. (2014). *Direito Administrativo da Economia – Vol. I (Introdução e Constituição Económica)*. Coimbra: Almedina. pp. 196-197.

Institutes, Public Foundations, or Public Establishments, although this work focuses only on the entrepreneurial form: State-Owned Companies.

Thus, regarding the constitutional fundaments and prescriptions enabling the State to incorporate undertakings to accomplish public goals under corporate and private rationales, the Decree-Law no. 133, of 2013, was enacted pursuant to the Constitution, which updated the legislation on public enterprises in conformity with the European Union Law. The above-mentioned Decree-Law sets up the State Corporate Sector, and it only admits the creation of State-Owned Companies under technical, economic, financial justifications and, most important, those must comply with public interest and a public purpose. Unless those conditions are adequately showed it would not be allowed to incorporate a State-Owned Company, and if the Government insists on that path, the incorporation act will be illegal and null, as seen in Article 10 of the Decree-Law in comment. Therefore, willingness alone is not enough to create a company as it is in the private sector: it must come together with public, proportional, reasoned, and proper motivation.

Apart from this extreme nullity, the State use of these State-Owned Companies has several economic, technical, and legal justifications and, regarding its foundation, Sofia Tomé D'Alte[44] presents reasons to justify why legal forms of public law are preferable over the private ones and at the same time enumerates advantages of the private types over the public, such as:

1) Unquestionable integration in Public Administration;
2) Submission to the fundamental principles guiding public performance;
3) Possibility to use, however, the Private Law;
4) Greater control by the Government over the activity performed;
5) System coherence;
6) Symbolic value.

Maria João Estorninho[45] in *A Fuga para o Direito Privado (The Escape into Private Law)* shows the State's motivations to resort to the private law regime, which are:

1. From the point of view of its creation:

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44 D'Alté, Sofia T. (2007). *A Nova Configuração do Sector Empresarial do Estado e a Empresarialização dos Serviços Públicos*. Coimbra: Almedina. p. 257 and 260.

45 Estorninho, Maria J. (2009). *A Fuga para o Direito Privado: Contributo para o Estudo da Actividade de Direito Privado da Administração Pública* (2nd Reprint). Coimbra: Almedina. pp. 59-66

a) The easiness in the creation and extinction of institutions, since the imposition of the juridical-public forms difficults, for example, the foundation of companies.

2. From the point of view of its autonomy:

a) The fact of theoretically favouring the decentralisation and autonomy of created beings;

b) The possibility of creating and clearly delimiting their own and autonomous areas of responsibility;

c) A supposed lower permeability to partisan political influence.

3. From the 'static' point of view, *i.e.* from the point of view of your organisation:

a) The release of the rules of an organisation governed by public law.

4. From a 'dynamic' point of view, *i.e.* from the point of view of its performance:

a) The possibility of adopting more flexible, less bureaucratic, faster and supposedly more transparent and effective decision and action processes;

b) Subjection to the principles of market economy and, thus, to competition;

c) Stronger link to profitability and economy;

d) The possibility of diversification of goods and services to be offered on the market;

e) Simplifying the hiring of staff that becomes freer and more flexible.

5. From a financial point of view:

a) The diversification of the means of financing (including through cooperation with private investors);

b) The possibility of reducing administrative costs;

c) The possibility of benefiting from tax advantages.

6. From the point of view of external relations:

a) Easiest cooperation and joint efforts among various public entities;

b) The susceptibility to appeal to civil society and the use of private initiative;

c) The easiest exchange with foreign entities or persons.

The lists cited above cannot be separately read. As affirmed, State-Owned Companies lie on a legal regime that combines both worlds, public and private, and when the State resorts to this form of organisation and intervention in the economy, it tries to extract the inherent benefits from them. State-Owned Companies are part of the indirect public administration, which is positive because along with its private personality comes the weight of the State.

Nevertheless, this weight must be fully measured because on one hand it ensures that a corporation must have a social profile and not emphasise only the profit; on the other hand, this weight can be harmful when the government and all these politics exert more than supervision over the public enterprises.

The public-private balance is a tool to bring together some management autonomy, corporate accountability directly over the management, faster procedures on the decision-making process, and, by far, the possibility to relieve the public vault by attracting private capital to invest in public activities with public finalities.

Thus, even if the State-Owned Company is not linked to an economic activity in a competitive regime and has as its object the provision of a public service–whose ownership belongs to the State and whose supply must be in some way linked to it (*e.g.* concession)–, the business arrangement to achieve a public purpose, given the justifications presented above, can be the optimal solution for efficient and effective delivery.

Of course, several conflicts and problems arise from this delicate balance between these two different legal regimes; here, one can, once more, affirm how vital compliance and good governance programmes are essential to State-Owned Companies because they reinforce the controls, principles, and methods of a management that is more efficient and focused on the public interest .

It is important to affirm that the State-Owned Companies are part of the indirect public administration and must comply with its principles inscribed in the Constitution in Article 266. For that matter, they obviously must adhere to the principles of legality, equality, impersonality, adequacy, reasoning, and efficiency.

As asserted above, there is neither complete private freedom nor complete administrative biding because State-Owned Companies are in a peculiar regime of consented liberty, although the State-Owned Companies may solely be incorporated when the law authorises it, and under motives and arguments on the choice to create a company instead of creating a body inside public administration.

The business arrangement as an instrument for the achievement of public purpose is stamped in the configuration of the State Business Sector; because of the private regime, even if mitigated by the impact of the public law regime, it can meet society's goals more quickly with management and financial autonomy, more significant commitment to economic and environmental sustainability, personal responsibility of managers, and accountability. Sofia Tomé D'Alte explains and criticises the use of the private corporate form when the state is the sole shareholder, but accepts it when it is a mixed economy company because

> [W]hen the State uses the corporate form to associate with private shareholders, as in this case, in addition to having a substantive justification (for example, using private financing for the exercise of a specific activity), it is possible to verify that the State's action is itself capable of being better controlled because it will have to rely on the functioning of the company's internal system, which will imply that the decisions made are managed among several shareholders and bondholders due to the operation of the decision-making process being based on the participations held by each of them[46].

Nevertheless, it is possible to assume that even when the State is the only shareholder, it must act likewise because this sole proprietorship company is subject to the same corporate patterns of management, financial responsibility, and accountability. The inexistence of a private shareholder may reduce the possibility of external supervision; however, the default legislation sets of controlling tools are the same for every State-Owned Company, regardless of the number of shareholders.

As we will analyse ahead in this dissertation, the inexistence of a private shareholder does not hamper the incorporation of State-Owned Company with public funds exclusively, because it must take into account the mandatory establishment of compliance and good governance programmes which prescribe—in conjunction with the already existent legislation—unremovable corporate duties that bring personal liability to the managers if the temptation arises to act against the legal system, take reckless decisions, or accept political influences rather than the acceptable ones made through the proper corporate channels and processes. The controlling instruments exist and need to be implemented not only formally, but materially in concretion.

After the considerations above, there is no doubt that the Constitution allows State intervention in the economy; moreover, it is a duty because one of the State's functions is to provide some services and it must foster and grant development. There are forms and types of State intervention in the economy and the entrepreneurial form is one of the most important ones; in Portugal, regarding the Constitutional duties and allowances, the State Corporative Sector was created by law – Decree-Law no. 133, of 2013.

The Portuguese Ministry of Finance defines the State Corporative Sector as below:

46 D'Alté, Sofia T. (2007). *A Nova Configuração do Sector Empresarial do Estado e a Empresarialização dos Serviços Públicos*. Coimbra: Almedina. p. 264

The State Corporative Sector is part of the Public Corporative Sector, whose legal regime was approved by Decree-Law no. 133/2013, of 3 October. The State Corporative Sector is made up of all the productive units of the State, organised and managed in a corporative way, integrating the public companies and the participated companies. Public enterprises are (i) business organisations incorporated in the form of limited liability companies under the terms of commercial law, in which the State or other public entities may exercise, directly or indirectly, a dominant influence; (ii) public corporate entities. Participated companies are business organisations in which the State or any other public bodies, whether administrative or corporate, hold a permanent interest, directly or indirectly, provided that all public holdings do not give rise dominant influence. There is dominant influence in any of the following situations: (a) possessing a holding in excess of the majority of the capital; (b) having the majority of voting rights; (c) having the possibility of appointing or dismissing the majority of the members of the administrative or supervisory body; and (d) having qualifying holdings or special rights that enable a decisive influence on the decision-making processes or strategic options adopted by the company or subsidiary. Permanent holdings are those that do not have purely financial objectives, without any intention of influencing the orientation or management of the company by the participating public entities, provided that their ownership is longer than one year. The State Corporative Sector is responsible for the establishment and management of fundamental public infrastructures of a business nature and the provision of essential public services, as well as a diverse set of other instrumental functions in various sectors and domains. The State Corporative Sector is currently part of a wide range of State-Owned and not-State-Owned Companies, whose activity covers the most diverse areas of business, constituting an essential instrument of economic and social policy. In addition to direct holdings, the State holds a significant set of indirect ones, mostly integrated into economic groups or holdings such as Parpública - Participações Pública, SGPS, SA, and Caixa Geral de Depósitos, SA[47].

The Decree-Law no. 133, of 2013 regulates not only State-Owned Companies, which are the Public Companies, but the so-called Participated Companies. Public Companies might be vested in two forms regarding their legal personality: (i) Public Corporations under private type that can be entirely

47 Retrieved October 1, 2019, from http://www.dgtf.pt/sector-empresarial-do-estado-see/o-que-e-o-sector-empresarial-do-estado-see-

controlled by the State or have mixed-capital also controlled by the State, and the (ii) Public Corporations under public form, which are the Public Corporate Entities that have public legal personality.

Here, it is relevant to state that this dissertation, for objectiveness purposes, will only address the public companies with private legal personalities where the State either has the majority of the shares or exert dominant influence through other means. It will be so because otherwise, the dissertation object would be extensive and not focused on how compliance and good governance programmes are essential for State-Owned Companies to attract private investors and add value to the enterprises. Private investors can only be the State's partners in public companies subject to the private regime, under private legal personality, and incorporated under the Commercial Code.

Article 1 of the Decree-Law no. 133 of 2013 establishes the objectives of the legislation and creates a supervisory body to monitor and track the management and the functioning of those companies. Article 2[48] determines that "the state-corporate sector is comprised of state-owned and participated companies" and the legislation gives the definitions of State-Owned Companies and of Participated Companies in Articles 5 and 7, which are bellow transcribed:

> Article 5
>
> Public companies
>
> 1. Public companies are business organisations constituted in the form of a limited liability company under the terms of commercial law, in which the State or other public entities may exercise, directly or indirectly, a dominant influence under the terms of present Decree-Law.
> 2. Public companies are also considered as entities with a business nature regulated in Chapter IV.
>
> Article 7
>
> Participated Companies
>
> 1. Participated Companies are all business organisations in which the State or any other public entities, whether administrative or corporate, hold a permanent interest, directly or indirectly, provided that all public holdings do not give rise to dominant influence under Article 9.

48 *Decree-Law no. 133 of 2013*. New Legal Regime for The Corporate Public Sector. Retrieved January 23, 2020, from https://dre.pt/web/guest/legislacao-consolidada/-/lc/58582281/view?p_p_state=maximized.

2. Permanent holdings are those that do not have purely financial objectives, without any intention of influencing the orientation or management of the company by the participating public entities, provided that their ownership lasts longer than one year

Article 14[49] of the Decree-Law no. 133, of 2013, makes it clear when it says that "the public companies are governed by private law, with the specificities resulting from this Decree-Law, other legal diplomas that have preceded the legislation in matter, and legal statutes". It means that the public companies are subject to the private legal regime-with the exception of the Public-Corporate Entities, and embody private legal personalities, even though the public regime also applies to them as affirmed before simply because the State is part of it.

Thus, the legislation gives the features that establish the framework for a company to be considered under the State Corporate Sector, and the same law asserts that those State-Owned Companies must comply with the tax and labour systems as if they were private companies. Herein, one must infer that what makes a company state-owned is the fact that the State plays a role of control, majority, and dominance.

The Decree-Law no. 133, of 2013, pursuant to Article 2, Paragraph b of the European Union Directive no. 2006/111/CE[50], sets up the features that make a company a public company. The Article 5 above copied states that there will be a public company whilst the State "exercise, directly or indirectly, a dominant influence under the terms of present Decree-Law". The Decree-Law explicitly brings the definitions of the control and dominance instruments as seen in Article 9, paragraph 1[51]:

Dominant influence

1. There is a dominant influence whenever the public entities referred to in Articles 3 and 5 are, concerning the companies or entities owned, incorporated, or created in any of the following situations:

a) Holding shares in excess of the majority of the capital;

b) Having the majority of voting rights;

c) Having the possibility of appointing or dismissing the majority of the members of the administrative or supervisory body;

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49 *Decree-Law no. 133 of 2013*. New Legal Regime for The Corporate Public Sector. Retrieved January 23, 2020, from https://dre.pt/web/guest/legislacao-consolidada/-/lc/58582281/view?p_p_state=maximized.

50 *Directive no. 2006/111/CE*. Regarding the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings. Retrieved October 7, 2019, from https://eur-lex.europa.eu/eli/dir/2006/111/oj.

51 *Decree-Law no. 133 of 2013*. New Legal Regime for The Corporate Public Sector. Retrieved January 23, 2020, from https://dre.pt/web/guest/legislacao-consolidada/-/lc/58582281/view?p_p_state=maximized.

d) Having qualifying holdings or special rights that enable them to have a decisive influence on the decision-making processes or strategic options adopted by the company or subsidiary.

This concept of dominant influence is crucial to understand not only how a company might be labelled as state-owned, but also how the State will exercise its control. From this controlling exercise role emerges the necessity—rather, the duty—to enact internal instrument to implement good governance and compliance programmes aimed at transparent, efficient, and honest management, with a focus on risk prevention and on agency costs mitigation.

Finally, the Decree-Law no. 133, of 2013, also rules over corporate governance, transparency, and efficiency towards the right to a reasonable administration principle. The legislation on State-Owned Companies conveys the notion that compliance and corporate governance are mandatory to the public undertakings, but the law sets the default regime; some improvements must be held inside those public companies to pursue the public interest at the minimum possible cost and with maximum effectiveness.

In short, we proceeded to an overview of the State Corporate Sector in Portugal as part of the public administration and as a tool to grant the public interest with more celerity, autonomy, agility, and adaptability to the public needs. It is a way to have a proper administration subjected to the public interest and, if possible, with profit, to let the public finances struggle with the State essentials.

II.3 – Chapter Conclusions

This first part of the work sought to position State-Owned Companies as members of the indirect public administration in the legal system of Brazil and Portugal, demonstrating that they have a constitutional root that prompts the existence of specific ordinary laws regulating their creation and functioning, adopting a regime of private law to be exercised by the public administration, which must maintain the postulates inherent to it. It had an explicit purpose to establish the very object of the dissertation, the compliance and good governance programmes in State-Owned Companies.

In other words, State-Owned Companies are an element of confluence between public and private law, which is in a conflicted path, but tending to harmonisation. In this sense, it is relevant to assert that in the constitutional frameworks of both countries the principle of subsidiarity concerning the State's intervention in the economy is a reality.

It is possible to say that there is a public economic initiative, but it is neither free nor a fundamental right as it is for the private sector. João Pacheco Amorim[52] dwells on the issue, albeit the coexistence between the public and private sectors in the economy, this does not imply neutrality and a state right of free initiative; in fact, the state can only intervene directly in the economy under the Constitution and the laws. Therefore, it is possible to mention the principle of subsidiarity in the constitutional-economic aspect:

> It must be noted in this matter that the Constitution in itself is not restricting the public economic initiative...; the principle of subsidiarity of direct economic intervention by the public authorities in economic activity would have been surpassed. And yet it is evident that this power of public economic initiative, like any public power (even discretionary), cannot ignore other implicit limits arising from the constitutional text. Well,...it will always constitute a limit arising directly from the constitution either to the creation of public companies (or the acquisition of existing companies) by the public authorities or to the nationalisation of private companies. In fact, the State and other territorial entities do not have a real fundamental right of free economic initiative for the mere pursuit of a profitable end...: otherwise, there would be danger that the public power would end up "occupying a space of freedom reserved for the citizen" (Rolf Stober).

The matter of the public economic initiative and the principle of subsidiarity is thus surpassed.

When the State incorporates an undertaking, it is undeniable that there is an encounter of legal regimes and it can be fruitful in acting in the public interest in an autonomous, responsible, accountable, and result-oriented way to deliver to the user—perhaps we may say client—the state service they expect. Jacques Chevallier's[53] lesson is valuable in the sense that

> The postulate that public management, placed at the service of the general interest, could not be measured in terms of effectiveness gave rise to the idea that the administration is obliged, as all private companies, to improve their performance and reduce their costs continuously; it is bound to carry out its missions under the best possible conditions,

52 Amorim, João P. (2014). *Direito Administrativo da Economia – Vol. I (Introdução e Constituição Económica)*. Coimbra: Almedina. p. 195.

53 Chevallier, Jacques (2009). *O Estado Pós-Moderno* (3rd Ed.). Belo Horizonte: Fórum. p. 84

> ensuring the quality of its services and making the best use of the means at its disposal. The difference with private enterprise tends to disappear.

This bridge between public administration and private law has brought with it the need to combine public and private regulation as far as it welcomes the latter, particularly in what regards to management. It is perceived in State-Owned Companies as having private legal personality, especially when there are private partners and an obligation to meet public needs, should give way to an interest in profit. In this sense, it is worth mentioning Pedro Vicente, [54] who, in his work, summons the lessons of Mark Bevir in *Governance - A Very Short Introduction* (2012):

> In this field, it is the constitution of State-Owned Companies, revealing the fascination that the private sector has exercised...about the form of organisation of public administration and the definition of public policies in general....
>
> Public institutions are today dependent on other civil society organisation as well as national and international markets. 'The public sector...has shifted away from the bureaucratic hierarchy and towards market and networks', as Bevir points out, in an explicit approximation to the practices of private institutions: 'the new governance...combines established administrative arrangements with features of the market...combining administrative systems with market mechanisms. It is also Bevir who states that '...novel forms of mixed public-private or entirely private forms of regulation are developing', referring to an approximation of the public and private sectors regarding governance.

The assertion above shows not only the reasons for the State to resort to the corporation arrangement to achieve its goals, but also demonstrates how a State-Owned Company must be managed to pursue and reach the established objectives. As Professor Pedro Costa Gonçalves[55] affirms, it is "private clothing" over a "public body", meaning that Public Administration authorised by administrative law resorts to private law to accomplish public interest.

However, it is not an excuse to run away from the constitutional principles that inform public administration and its conducts. In this sense, there was an inflexion where public law regime advances on the private field once occupied by Public Administration to mediate abuses and to reinforce the ultimate

54 Vicente, Pedro (2015). *Corporate Governance e Setor Empresarial Público em Portugal: Contributo Para um Normativo Regulador.* Coimbra: Almedina. p. 83.

55 Gonçalves, Pedro C. (2019). *Manual de Direito Administrativo – Vol. 1*. Coimbra: Almedina. p. 127.

purpose of it, which is to fulfil public interest regarding efficiency, flexibility, and responsiveness. It's worth citing the aforementioned author's lesson:

> In relation to other activities carried out under the private law regime (*e.g.* providing public services, activities involving access to public resources or the distribution of public benefits), it is essential to combine the private law regime with public law principles and values (*e.g.* specific binding by the regime of law, freedoms and guarantees; subjection to "public service laws"). From this combination stems a legal regime which, in fact, is no longer a purely private law, but rather a "modified private law"...The private law used by bodies integrated in the Public Administration is not a pure private law, but rather a legal regime that, resulting from private law, supports the overlap of principles and values of public law, namely those inscribed in the Constitution as fundamental principles of Public Administration (*e.g.* pursuit of public interest, proportionality, impartiality).[56]

In this regard, this confluence of private and public law is played in the State-Owned Company stage concerning the public interest which will make this *date* more pleasant once it combines the celerity, agility, and efficiency of the private sector with the duties of a proper public administration, guided by legality and public welfare goal. It can be a private undertaking that takes into consideration the public interest in the first place, balancing the profit needs with the public access, continuity, and perpetuity.

Though this encounter must be surrounded by some legal cushions—the default legislation with its minimum requirements alongside internal and managerial soft norms towards good governance—in a way not just to balance the private and public interests, but to have a State-Owned Company which acts in its daily business life in a responsible and accountable manner.

Nonetheless, the managerial companies' bodies are empowered to set up internal rules to show a virtuous institutional image and actions as well, which tells more about the companies' posture towards the community, workforce, management, and shareholders. The step further is the implantation of compliance and good governance programmes inside this State-Owned Companies' system.

Considering that the State is the main shareholder of State-Owned Companies, it is even more critical to implement corporate governance features because the company is dealing with public

56 Gonçalves, Pedro C. (2019). *Manual de Direito Administrativo – Vol. 1*. Coimbra: Almedina. pp. 144-145.

money, subject to constitutional principles regarding the legality, efficiency, pursuing public interests, and the need for tending to public assets.

Now that the State-Owned Companies were set in the right place inside the indirect public administration, the dissertation will follow on to define good governance and compliance, to verify when, how, and why those programmes are mandatory for State-Owned Companies, and to observe how they can arrange a more efficient management towards a better delivery of public services and goods reflecting on the companies' market value and on the investment's return to the State and eventually to the private investors as well.

III – Corporate Governance and Compliance

III.1 – Definitions of Corporate Governance and Compliance

After dealing with the legal concepts regarding State-Owned Companies in both Brazilian and Portuguese legal systems and their places within indirect public administration, this dissertation will address corporate governance and compliance definitions and how these concepts must be brought to the State-Owned Companies' management to improve the fulfilment of the constitutional and legal principles of the Public Administration, not forgetting that State-Owned Companies, as part of Public Administration, are an instrument for achieving public welfare.

In that way, being a tool to accomplish public goals, public companies must be managed as corporations, even in the face of losses or non-profitable activities or services. However, such a tool must be used by the State wisely, because State-Owned Companies can be the solution for the State to address a problem and, therefore, provide for the society. The State can only resort to State-Owned Companies if the answer is technically and legally supported due to the fact that one creates a company to render goods or services efficiently and effectively to obtain gains or, at least, not to lose.

To be more accurate, the creation of a State-Owned Company must be sustained by the manifest necessity of its existence to fulfil public goals with profit or non-losses. Otherwise, the incorporation of an undertaking is not justified because the main reason to form a company is to make a productive arrangement to provide goods or services with profitability. State-Owned Companies may admit not to profit, but the losses must be well justified and cannot last for an extended period. If this is not the case, the State must make use of other instruments at its disposal, such as autarchies, agencies and departments.

Thus, if the incorporation of a State-Owned Company is technically, financially, and legally justified, the enterprise has to comply not only with the legislation in force but to do more by implementing corporate governance programmes towards a better, transparent, honest, productive process to perform public finalities. It is essential to resort to Ronald J. Gilson[57], citing the Business Roundtable (an association for Chief Executive Officers of North America's largest companies), who defines corporate governance as "the corporation operating system", and proceeds with the citation transcribed below:

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57 Gilson, Ronald J. (2016). From Corporate Law to Corporate Governance. In Jeffrey N. Gordon and Wolf-Georg Ringe (Eds), *The Oxford Handbook of Corporate Law and Governance [Part I Theoretical Approaches, Tools, and Methods]* (pp. 3-27). Oxford: Oxford University Press. Retrieved January 20, 2019, from https://books.google.pt/books?hl=pt-PT&lr=&id=H1ZYDwAAQBAJ&oi=fnd&pg=PP1&dq=The+Oxford+Handbook+of+Corporate+Law+and+Governance+%5BPart+I+Theoretical+Approaches,+Tools,+and+Methods%5D.&ots=Ca2KqL3By0&sig=3sDqz0ERUx2yRztl_eaMY5cNfXM&redir_esc=y#v=onepage&q=The%20Oxford%20Handbook%20of%20Corporate%20Law%20and%20Governance%20%5BPart%20I%20Theoretical%20Approaches%2C%20Tools%2C%20and%20Methods%5D.&f=false. p. 8.

> A good corporate governance structure is a working system for principled goal setting, effective decision making, and appropriate monitoring of compliance and performance. Through this vibrant and responsive structure, the CEO, the senior management team and the board of directors can interact effectively and respond quickly and appropriately to changing circumstances, within the framework of solid corporate values, to provide enduring value to the shareholders who invest in the enterprise.

The State-Owned Companies' scenario can resort to the corporate governance concept cited above. In this sense, the public enterprise is a working system built to achieve a principled goal, which is the public interest. This goal must be reached through a decision-making process based on the guiding principles of Public Administration (legality, proportionality, impersonality, honesty, transparency, efficiency, the right to a proper administration, among others) settled on a professional structure. The professional structure must be arranged in a way that responds as quickly and as efficiently as possible to the social needs that motivated the incorporation of a State-Owned Company.

For that, there must be a managerial system of monitoring and focused on excellent results which have to be the achievement of the public interest with profitability, or without losses, as to enhance value—not only financial, to the State's treasury, but to the citizens, the primary goal of every State and Government. Therefore, the value will be added, and all the shareholders will be satisfied: direct shareholders (the State or its private partners) and indirect ones (as seen before, citizens who fund the State through taxes).

As stated, State-Owned Companies are autonomous entities of the public administration that have adopted the corporate form under the legal personality of private law, most often looking to imprint a management style based on social and financial results; those two pursued results are thus clear and apparently contradictory missions to accomplish, when, in fact, they are not, nor should they be controversial.

Professor Diogo Freitas do Amaral[58] conveys this approach of State-Owned Companies by highlighting the two dimensions: the financial one (after all, a company is created to make profit or, at the very least, not to have losses, thus contributing to the economic and financial balance of the State) and the second one, the social aspect (meaning that a State-Owned Company is created to contribute to the achievement of public purposes with the satisfaction of the citizens).

58 Amaral, Diogo F. do (2010). *Curso de Direito Administrativo Vol I* (3rd Ed., 5th Reprint). Coimbra: Almedina. pp. 343-344.

To complement the reasoning, it is worth to recall a final comment on the issue, made by Professor Pinto Junior[59], about the ponderation over profit and public interest in the Brazilian Corporate Law (Law no. 6.404, of 1976) in its Article 238:

> An ethical and legal managers' performance is in the company's interest, which is not limited to meeting the shareholders' financial expectations, but also includes the preservation of the company as a productive unit and the accomplishment of the social function directed to the related public. In the case of a mixed capital company or a sole proprietorship, the interest of the company also involves the public mission recognised by Article 238. The paradigm of congruence between the actions of managers and the social interest also applies to the state enterprise; however, in this case, the social interest must be understood with due breadth, as it is not limited to the generation and sharing of profits among shareholders.

Professor Freitas do Amaral[60] adds that the law provided the public administration with the tools to run a company by allowing it to manage with the instruments given by the private law, mainly Corporate Law:

> [B]ecause state-owned enterprises—by the nature of their object, by the specific nature of the activity to which they are engaged—are organisms that need great freedom of action, high flexibility, and flexibility in the way they operate....
> However, these methods, these forms, these management techniques are precisely those practised in the private sector, which characterise the management of private companies and which private law itself recognises and protects as typical forms of private administration....
> That is why the legislature has been led to acknowledge that state-owned enterprises can function successfully and adequately only if they can legally apply proprietary methods.

Considering that governance framework, nowadays, citizens (understood as a shareholder and a client of the State-Owned Companies) does not want only the legal conduct of the administration. There is more: society wants and needs results.

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59 Pinto Jr., Mario E. (2013). *Empresa estatal: função econômica e dilemas societários* (2nd Ed.). São Paulo: Atlas. p. 445.
60 Amaral, Diogo F. do (2010). *Curso de Direito Administrativo Vol I* (3rd Ed., 5th Reprint). Coimbra: Almedina. pp. 351-352.

The right for an ethical administration principle, which is established expressly in the Portuguese Constitution and tacitly in the Brazilian Constitution under the efficiency principle, is the main motto to corporate governance of State-Owned Companies. In this sense, Ana Flávia Messa[61] offers a critical lesson conciliating governance with the constitutional right for a proper administration:

> Several authors, in a unitary conception, deal with administrative reforms, conditioned by the historical context, social complexity, and orientation of the political power, saying that although there are several models of administrative modernisation, in response to the excesses and neglect in public management, there is a common objective: the search for proper management in their behaviours, as a process of implementing methods and techniques to improve administrative systems
> The right for proper administration is born, then, as a rational project towards administrative performance, imposing duties in the exercise of administrative competences, and limiting state arbitrariness. Its creation also emerges as a form of the authority's orientation concerning decision-making processes.

Furthermore, the corporate governance definition cannot and may not waive the full adoption of such an important principle as the right to a proper administration, which is very much linked with the transparency duties and the obligation not only to provide the mere objective inscribed in the bylaws of a State-Owned Company but to render it with quality and efficiency through a transparent, professional, and effective management that can deal with the several stakeholders involved and, yet, combine the public interest with an entrepreneurial philosophy which encompasses no only the service provided or the good delivered, but how it is delivered as well as the results expected. In that context, an excellent definition of Corporate Governance is given by the Brazilian Institute for Corporative Governance[62]:

> [T]he system by which companies and other organisations are directed, monitored, and encouraged, involving relationships between partners, the board of directors, executive committee, supervisory and control bodies, and other parties interested. Good corporate governance practices translate basic principles objective recommendations, aligning

61 Messa, Ana Flávia (2019). Transparência no Âmbito da Administração Pública. In Carvalho, Maria Miguel, Messa, Ana Flavia and Nohara, Irene Patrícia (Coord.), *Democracia Econômica e Responsabilidade Social nas Sociedades Tecnológicas* (pp. 7-34). Braga: Escola de Direito da Universidade do Minho. pp. 15-16

62 Instituto Brasileiro de Governança Corporativa (2017). *Compliance à Luz da Governança Corporativa*. São Paulo: Author. Retrieved October 21, 2019, from https://www.legiscompliance.com.br/images/pdf/ibgc_orienta_compliance_a_luz_da_governaca.pdf. p. 10

interests to preserve and optimising the long-term economic value of the organisation by facilitating its access to resources and contributing to the quality of the organisation's management, its longevity, and the common good.

Beyond the definition, the Brazilian Institute[63] sets up corporate governance basic principles, which are:

- Transparency: It is the desire to make all information available to the interested parties, not only the one imposed by the provisions of laws or regulations. It should not be restricted to economic and financial performance, also considering other factors (including intangible ones) that guide the management action, and that lead to preserving and optimising the value of the organisation.
- Equity: It is characterised by the fair and isonomic treatment of all partners and other stakeholders, taking into account their rights, duties, needs, interests, and expectations.
- Accountability: Governance agents should be accountable for their performance in a clear, concise, understandable, and timely manner, fully assuming the consequences of their acts and omissions and acting diligently and responsibly within their roles.
- Corporate Responsibility: Governance agents should watch over economic and financial viability of organisations, reduce the negative externalities of its business and its operations and increase the positive ones, regarding , in its business model, the various capitals involved (financial, manufactured, intellectual, human, social, environmental, reputational, etc.) in the short, medium and long term.

Thus, the governance system and its principles are made not only for the private sector, but also for the public sector, and imported by the public administration mainly in its entrepreneurial aspect, when the State embodies the corporative methods and forms to intervene in the economy because corporate governance must be a structure where compliance regime emerges not only to obey the laws and regulations but also to be greater than that.

Professor Pedro Costa Gonçalves[64] deepens this thought when he asserts the manager's duty of care and its implication over the duty to provide good administration, *i.e.* the public administrator

63 Instituto Brasileiro de Governança Corporativa (2017). *Compliance à Luz da Governança Corporativa.* São Paulo: Author. Retrieved October 21, 2019, from https://www.legiscompliance.com.br/images/pdf/ibgc_orienta_compliance_a_luz_da_governaca.pdf. p. 11

64 Gonçalves, Pedro C. (2019). *Manual de Direito Administrativo – Vol. 1.* Coimbra: Almedina. p. 193.

must act in the most opportune, reasonable, proportional, and efficient manner possible, not strictly adhering to the law but going further, complying with rules of conduct and ethical precepts that result in a quality provision that takes into account transparent and accountable processes aiming to obtain financial and social results that correspond to the public interest. The author's exact words are:

> Public administration is not only subject to rules and law; it is also subject to a requirement to act in a convenient and timely manner: in addition to being legal and compliant with the law, the Administration's action must be correct (rational); Public Administration, therefore, has a duty to manage well, to carry out "good governance". In fulfilling this duty, the administrative agent is obliged to follow the best practices, to apply the most appropriate techniques, to choose the best alternatives and to adopt the solutions that give the best results, proven by experience.

Hence, corporate governance should be understood as a process of fulfilling the duty to provide proper administration, where the various stakeholders act within transparent and ethical rules meant to achieve the public interest obtaining the best possible results through practices which enshrine honesty, transparency, accountability, responsivity and responsibility towards the public, the tax-payer money, the shareholder money considering the mixed-capital companies, the markets, among other actors.

Proper management reflects on a corporate governance programme because it will emerge in the State-Owned Companies' results, not only financial, but social as well. Both outcomes must be on the radar of the public manager committed as a director or another managerial function within a State-Owned Company because if the State chooses to incorporate to render one of its obligations towards the society, it must encompass not only the easiness of the private regime compared to the public regime but the commitment to a result which might be either profit or no-losses.

Otherwise, there is no sense in incorporating a company to give financial loss only to escape the public legal regime. If it is the case, corporate governance will be poisoned form the beginning. So, a compliance programme is mandatory to operationalise the corporate governance spirit and intentions. One must first define what compliance is: once again, the Brazilian Institute for Corporate Governance shed light on the topic when it stated that "compliance is understood as the permanent pursuit of consistency between what is expected of an organisation—respect for rules, purpose, values, and

principles that constitute your identity—and what it actually practises on a daily basis"[65]. Herein follows Pedro Vicente[66] in his work on compliance, which the author defines as

> The strict observance of the set of norms to which societies are, in some way, linked, has, in principle, a direct relationship. It is why compliance, as 'the set of disciplines to enforce legal and regulatory standards, policies and guidelines established for the business and activities of the institution or company, as well as for avoidance, detection, and treatment of any deviation or non-conformity that may occur' has become increasingly important in corporate life.

Within the conceptualisation brought by the aforementioned author, compliance appears as an instrument of corporate governance that must be under constant analysis through a dialogue between the means and the ends. Most important, a responsible management, a management under corporate governance precepts, will not focus only on the intended and obtained results but also on the methods and procedures adopted to achieve its purpose.

As part of public administration, in the context of State-Owned Companies, compliance should inform the management of the company and be interconnected with its internal processes, as well as bring an essential ethical component not only complying with the law and the principle of legality, but going further ahead. In this sense, the governance must fulfil its legal duties, and the social, environmental, community ones, not forgetting, of course, the responsibilities to comply with the corporate purpose and obtain positive financial result.

To reaffirm the statement above, the good governance of the state-owned enterprise must be based on a compliance programme—but in a broader sense, that is, an integrity programme, which encompasses the legality aspect, duties of transparency and management effectiveness as well as aspects of social responsibility.

Furthermore, this integrity programme should not be an end in itself. It must go beyond attaining finalist, operational, and financial goals and results, establishing clear decision-making procedures that are consistent with the company's mission and values.

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65 Instituto Brasileiro de Governança Corporativa (2017). *Compliance à Luz da Governança Corporativa*. São Paulo: Author. Retrieved October 21, 2019, from https://www.legiscompliance.com.br/images/pdf/ibgc_orienta_compliance_a_luz_da_governaca.pdf. p. 8

66 Vicente, Pedro (2015). *Corporate Governance e Setor Empresarial Público em Portugal: Contributo Para um Normativo Regulador.* Coimbra: Almedina. pp. 78-79

Also, the integrity programme imposes an accountability duty and because of that must provide consequences for deviations and acts contrary to good, honest, and transparent management. Notably, a compliance programme provides a means of auditing whether a decision that turned out to be bad for business was merely wrong or was the result of bad faith.

Nonetheless, studies[67] have shown that corporate governance coupled with an integrity programme adds value to companies, as decisions will be made in a technical-professional environment and are expected to be influenced not only by shareholders but also by corporate social responsibility precepts, which ultimately increases the market's and the society's perception of the company, impacting even the value of the shares or avoiding legal and administrative suits, managers' liability, payment of fines and indemnities, among other impacts.

Hence, compliance could not be understood as mere obedience to the letter of the law. It goes further, as explained by Beate Sjåfjell and Linn Anker-Sørensen in *The Duties of the Board and Corporate Social Responsibility (CSR)*[68]:

> Legal compliance in terms of complying with the law protecting social and environmental interests is clearly and unequivocally a duty of the board. This may seem obvious. However, by moving directly on to discussing CSR as beyond legal compliance ignores the fact that legal compliance is not a matter of course, and that it involves issues that require further discussion. Focusing on legal compliance as a core CSR duty may raise awareness to the lack of compliance. Further, true legal compliance entails complying with the spirit of the law and not just the letter. Cutting corners, boiler-plate compliance and assessing the financial risk of non-compliance being detected is not true compliance. Conversely, a board may and should insist to the shareholders of the company that true compliance is indeed a legal duty, albeit that this may not always be what gives the highest quarterly bottom-line results. To ensure true compliance, a proper due diligence in social and environmental matters is required so as to integrate these issues into the core risk management of the company.

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67 Ramji, Dina (2011). *A Governança Corporativa nos BRIC: A Sua Influência no Desempenho dos Mercados Acionistas.* Lisboa: ISCTE. Retrieved October 15, 2019, from http://hdl.handle.net/10071/4157.

68 Sjåfjell, Beate and Anker-Sørensen, Linn (2013) The Duties of the Board and Corporate Social Responsibility (CSR). In Hanne Birkmose, Mette Neville & Karsten Engsig Sørensen (eds.), *Boards of Directors in European Companies – Reshaping and Harmonising Their Organisation and Duties* (University of Oslo Faculty of Law Legal Studies Research Paper Series No. 2013-26 and Nordic & European Company Law Working Paper No. 10-40). Oslo: Kluwer Law International. Retrieved January 25, 2019, from https://ssrn.com/abstract=2322680. pp. 10-12.

Compliance entails fulfilling, ethically and legally, the legislations and the social responsibility which every company has towards the surrounding community and the stakeholders. A well-established compliance system gives the tools to face conflicts and the guidelines for the relationships that arise within a company among boards, employees, and third parties. Compliance should be a commitment. It can be said that

> [A] compliance system should be understood as a set of interdependent processes that contribute to the effectiveness of the governance and that permeate the organisation, guiding the initiatives and actions of governance agents in the performance of their functions. At its foundation, the basic principles of corporate governance should be supported, in turn, in the constant practice of ethical deliberation. In short: according to the best corporate governance practices, compliance should be addressed from the point of view of moral reflection as a mechanism for compliance with laws, internal and external standards, protection against misconduct and preservation, and economic value generation. Thus, the compliance system should be understood as a set of interdependent processes that contribute to the effectiveness of the governance and that permeate the organisation, guiding the initiatives and actions of governance agents in the performance of their functions. At its foundation, the basic principles of corporate governance should be supported, in turn, by the constant practice of ethical deliberation[69].

So, corporate governance will only be as productive as the compliance programme, and they must dialogue, but without forgetting the principles that inform them. In this context, the management method of state-owned enterprises must adopt a responsible and responsive stance, where "it is not just about achieving the end, but about the combination of state efficiency and the best possible outcome, with the assumption of state responsibilities in conducting this solution with civil society."[70]

Corporate governance, therefore, imposes responsibility on the State-Owned Company manager, but also enforces the duty for the company to act according to criteria of attention not only to legislation, but also to intangible assets such as market and customer perceptions (which, after all, are the owners of the state company).

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69 Instituto Brasileiro de Governança Corporativa (2017). *Compliance à Luz da Governança Corporativa*. São Paulo: Author. Retrieved October 21, 2019, from https://www.legiscompliance.com.br/images/pdf/ibgc_orienta_compliance_a_luz_da_governaca.pdf. p. 11.

70 Castro, Rodrigo Pironti Aguirre de and Gonçalves, Francine Silva Pacheco (2018), *Compliance e Gestão de Risco nas Empresas Estatais.* Belo Horizonte: Fórum. p. 73

The Organisation for Economic Co-operation and Development (OECD) lists the main principles of corporate governance, and they are intertwined with compliance rules. These principles encompass the concepts within the definitions of corporate governance and compliance programmes already demonstrated. The principles give concretion to the definitions. The main OECD[71] principles are:

> The corporate governance framework should promote transparent and fair markets and the efficient allocation of resources. It should be consistent with the rule of law and support effective supervision and enforcement.
> The corporate governance framework should be developed with a view to its impact on overall economic performance, market integrity and the incentives it creates for market participants and the promotion of transparent and well-functioning markets.
> The legal and regulatory requirements that affect corporate governance practices should be consistent with the rule of law, transparent and enforceable.
> The division of responsibilities among different authorities should be clearly articulated and designed to serve the public interest.
> Stock market regulation should support effective corporate governance supervisory, regulatory, and enforcement authorities should have the authority, integrity and resources to fulfil their duties in a professional and objective manner. Moreover, their rulings should be timely, transparent and fully explained.
> The corporate governance framework should protect and facilitate the exercise of shareholders' rights and ensure the equitable treatment of all shareholders, including minority and foreign shareholders.
> Related-party transactions should be approved and conducted in a manner that ensures proper management of conflict of interest and protects the interest of the company and its shareholders.
> The corporate governance framework should provide sound incentives throughout the investment chain and provide for stock markets to function in a way that contributes to good corporate governance.
> The corporate governance framework should recognise the rights of stakeholders established by law or through mutual agreements and encourage active co-operation

71 Retrieved October 10, 2019, from https://www.oecd-ilibrary.org/docserver/9789264236882-en.pdf?expires=1570715025&id=id&accname=guest&checksum=1F62FB6D67C0C0AFCB9433370037519E.

between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises.

The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.

The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders.

The corporate governance definition which encompasses all the principles transcribed above was given by Coutinho de Abreu, cited by Sofia D'Alte[72] , as "the complex of rules (legal, statutory, jurisprudential, deontological), instruments and issues concerning the administration and control (or supervision) of companies."

Thus, corporate governance and compliance programmes have as a firm purpose of deterring—better put, avoiding—corruption and deviances through ethical, concrete and measurable tools; moreover, those governance procedures must not only intend to punish, they have to promote, ease, and value honest behaviour. It should be a better approach to achieve an ethical, honest, and transparent corporate administration. It is therefore necessary to reflect on repressive and promotional aspects of the law; Kempfer and Batisti[73] address the issue properly:

> In an eminently repressive order to prevent an unwanted action, it can be made difficult, impossible, or disadvantageous. Symmetrically, a promotional order seeks to make the desired action necessary, easy, and advantageous. This technique is called encouragement, which is nothing more than seeking to influence the desired behaviour (no matter whether it is commissive or omissive) by facilitating it or giving it pleasant consequences.

We can say that corporate governance, together with the compliance programme, forms a set of rules aimed at regulating the exercise of power, management, decision-making, and risk measurement in an environment of transparency and commitment to stakeholders seeking to value

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72 D'Alte, Sofia T. G. (2018). Conceito de Corporate Governance e sua Possível Aplicação no Modelo dos Hospitais E.P.E. In Gonçalves, Pedro C., *et al.*, *O Governo da Administração Pública* (Reprint) (pp. 117-143). Coimbra: Almedina. p. 118.

73 Kempfer, Marlene and Batisti, Beatriz M. (2017). Studies Regarding Compliance as a Means to Prevent Corruption in Public Entities: Ethics, Administration Science and Law. *Revista do Direito Público – Universidade Estadual de Londrina Vol. 12, No. 2* (pp 275-309). Retrieved June 11, 2019, from http://dx.doi.org/10.5433/1980-511X.2017v12n2p273. p. 292

creation. In the case of State-Owned Companies, this creation of value involves not only the fulfilment of public purposes, but also the achievement of the expected financial and social results.

In this section, the main definitions of corporate governance and compliance were given with the purpose of setting up a foundation to build the edifice of this dissertation whose intention is to analyse the rules of corporate governance and compliance in State-Owned Companies and how they are essential to these State undertakings to achieve its public goals with efficiency, transparency, and honesty through proper management.

III.2 – Corporate Governance, Transparency, and Integrity

Acquainted with the definitions and principles, it is necessary to emphasise that the postulates of good governance should be applied to State-Owned Companies, because it is the duty of the public manager to do so in view of the teleological factor of the constitutional and legal determinations surrounding the issue, notably towards efficient and effective delivery of the public finalities that justified the incorporation of a State-Owned Company with economy of resources.

Per those terms, it is relevant in matters of governance and compliance to understand that the State-Owned Companies must be endowed with proper managerial and financial instruments to tackle the public missions embodied by public enterprises. For that, a compliance and integrity programmes must come together to grant and force the adoption of these necessary tools of corporate governance not only to achieve the desired result but to do so regarding the role of the companies within a community, its workers, suppliers, shareholders, and the company itself. Those would be the more significant objectives of corporate governance and compliance programmes.

It is essential to mention that deviations from ethical postulates, inattention to the public interest, and corruption have a financial impact and, in addition to these added costs, there are also social ones, and there is a thinning of the corporate culture that will eventually cause immense financial, economic, and reputational damage.

Thus, as State-Owned Companies, dealing with public assets and having the pursuit of the public interest as their objective, they must incorporate in their values and their mission the principles of honesty, morality, transparency, efficiency, and legality. Principles are positive values in the legal system, and to achieve these values, the rule regarding State-Owned Companies determined that they should implement and carry out corporate governance and compliance programmes towards ethical management.

Therefore, ethical management would privilege and encourage both socially and morally accepted and legally permitted conduct. When implemented, this type of management intends that ethics, honesty, morality, and legality are incorporated and rooted in the corporate culture so that it becomes a positive habit in constant improvement. The ethical element will guide decisions, materially, and formally. The company's social object and its results must be achieved according to purposes engaged in honesty and serving the interest of the community.

Having cemented that, it is a duty of State-Owned Companies to engage in corporate governance and compliance programmes in which transparency and integrity are potent principles and instruments to impose good governance in order to accomplish the proper administration duty.

Professor Ana Flavia Messa[74] explains the importance of transparency to corporate governance and to Public Administration—in this case, to State-Owned Companies:

> In the final aspect, transparency works as a quality in administrative action, as an instrument of good management, as it improves accountability, reduces corruption and, consequently, greater quality in the provision of public services is achieved. Part of the doctrine mentions dimensions of transparency: a) politics: transparency is a public policy embodied in a set of public actions promoted to guarantee visibility and fairness within the scope of public management; b) legal: transparency is the access to information and its dissemination in the means provided by the legislation; c) economic: transparency is a way of reducing information asymmetries in order to allow a better alignment of interests between agent and principal, to then generate profits and greater investments in the business world.

To the extent that companies engage in professional economic activity aimed at producing and distributing wealth, ethical concerns should be limited to this scenario, as "what is expected is to have controls capable of detecting misconduct and not be condescending to acts that do not reflect ethical action."[75] That said, the company must act objectively to construct and implement such controls based on transparency and integrity which involve procedures, internal rules, policies, codes of conduct and integrity, and corporate education, all focused on the pursuit and attainment of an entrepreneurial culture based on ethical action, compatible with the prevailing legal order and socially recommended.

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74 Messa, Ana Flavia (2019). *Transparência, Compliance e Práticas Anticorrupção na Administração Pública.* São Paulo: Almedina Brasil. p. 39.

75 Kempfer, Marlene and Batisti, Beatriz M. (2017). Studies Regarding Compliance as a Means to Prevent Corruption in Public Entities: Ethics, Administration Science and Law. *Revista do Direito Público – Universidade Estadual de Londrina Vol. 12, No. 2* (pp 275-309). Retrieved June 11, 2019, from http://dx.doi.org/10.5433/1980-511X.2017v12n2p273. p. 283

So, three goals must guide Corporate governance:

a) Establishment of management structures with setting of conditions to exercise them;

b) Establishment of a set of transparency and control standards including Risk Management, Code of Conduct and Compliance, including in the accounting area;

c) Transparency and control specific to the bidding area and contracts.[76]

Such actions are, in fact, legally enforceable in Portugal and Brazil, and corporate governance instruments for State-Owned Companies should seek beyond the minimum required for effective attention to the public interest. That is, the State-Owned Company delivers its results promptly, efficient, without corruption, with minimal political influence, respecting the environment, customers, suppliers, and employees. Hence, those instruments are meant to be proper corporate governance and integrity programmes.

Therefore, the contribution of Professor Isabel Celeste Fonseca[77] on the matter of governance and compliance can be retrieved in her work concerning integrity pacts and conduct codes on public procurement because the principles therein mentioned apply throughout public administration and State-Owned Companies as well insofar as the corporate governance and integrity programmes' goals are quite the same as those pursuant to public procurement.

It's important to bring up the recommendation[78] from the Corruption Prevention Council, a body linked to the Court of Auditors of Portugal, issued in October 2019 concerning public procurement, but which may also apply to all Public Administration regarding the mandatory observation of transparency.

In such a way, Professor Isabel Fonseca explains that integrity programmes promote stakeholders' reliance in the company and its management decisions, increase the capacity to receive investment, and grant better quality decisions implying either reduction of costs or improvement of gains due to the transparent decision-making process. At the same time, a constant amelioration of the corporate processes is achieved because the programmes mentioned are also designed to make risk assessment, not only to predict perils but to prevent them by proposing changes aimed to benefit

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76 Kempfer, Marlene and Batisti, Beatriz M. (2017). Studies Regarding Compliance as a Means to Prevent Corruption in Public Entities: Ethics, Administration Science and Law. *Revista do Direito Público – Universidade Estadual de Londrina Vol. 12, No. 2* (pp 275-309). Retrieved June 11, 2019, from http://dx.doi.org/10.5433/1980-511X.2017v12n2p273. pp. 299-300

77 Fonseca, Isabel Celeste M. (2017). Das Modas da Contratação Pública, Códigos de Ética e Pactos de Integridade: Um Must-Have Contra Corupção. In Gomes, Carla A., *et al.*, *Nos 20 Anos dos Cadernos de Justiça Administrativa* (pp. 203-220). Braga: Cejur-Centro de Estudos Jurídicos do Minho. pp. 219-220.

78 Retrieved January 29, 2020, from http://www.cpc.tcontas.pt/documentos/recomendacoes_cpc.html.

corporate governance, being, in the end, essential ethical tools that contribute to cultural changes towards honesty, good practices and social responsibility.

III.3 – State-Owned Companies, Corporate Governance, and Compliance

Public Administration progressed from pure public legal regime towards private law; this occurs whenever the corporate form is used to pursue the public interest. Such aspect has consequently brought with it the need to combine the normative regulation of public law with that of private law. So, this shift towards private law is very much due to the impositions of a more dynamic management system—faster, malleable to change, committed to efficiency and results—that led the State to make use of companies for specific purposes.

Thus, in addition to the control and governance systems that administrative law already provided for in the bureaucratic system of public management, the reception of the private mode of corporate governance became imperative. So, there was a mitigation of the public regime in favour of a more private one concerning the management of State-Owned Companies, in such a way that the managers have some freedom while still having to fulfil a series of rules and processes to grant both the shareholders' interests and the public interest.

Nowadays, Public Administration must be understood in its democratic aspect. Professor Ana Flavia Messa[79] addresses the issue affirming that a Democratic Public Administration must rely on an instrumental feature which regards the very management and the necessity to resort to governance tools to fulfil public interest. There is a material feature as well which is related to the public administration's values and its concretisation towards an administration that properly provides public interest; these values are: "inclusion, surveillance, innovation and consensus".

The author explains each one of these values, summed up as follows: Inclusion presupposes the participation of citizens in the construction of administrative will and public interest; this participation, in turn, leads to innovation, as new tools must be available for public administration and citizens to exercise this management informed by the popular participation through governance procedures, where surveillance and consensus come from; this is because surveillance imposes a duty on management to set a procedural approach to its acts and decisions, thus allowing accountability, auditing and evaluation of expected results, which translates into greater stakeholder confidence and, through the procedures

79 Messa, Ana Flavia (2019). *Transparência, Compliance e Práticas Anticorrupção na Administração Pública.* São Paulo: Almedina Brasil. pp. 45-46.

aforementioned, consensus, because the public administration moves from one-sided management to a management that weighs several interests, not only those of the administration itself but those of the community, consumers, workers, the market, among others.

It is, therefore, a responsive public administration and so should state companies aiming at reputational and financial gains be, in the sense that they provides services in a transparent manner and are subject to the supervision of society, possible investors, shareholders and regulators, with the main purpose of providing quality service, producing the financial and non-financial results expected by the stakeholders.

It is worth to cite message conveyed in Pedro Vicente's work when he quotes *The Cadbury Report* (United Kingdom, 1992):

> The country's economy depends on the drive and efficiency of its companies. Thus, the effectiveness with which their boards discharge their responsibilities determines Britain's competitive position. They must be free to drive their companies forward but exercise that freedom within a framework of effective accountability. This is the essence of any system of good corporate governance.[80]

Hence, the corporate governance postulates must embody the commitment to comply. The compliance notion goes beyond the black-letter law fulfilment: it encompasses transparent and result-oriented management, considering not only the shareholders' interest but the public finalities that motivated the creation of the State-Owned Company.

Pinto Junior[81] states that the public interest motto is present within the State-Owned Company; it must be well rooted in its actions and decisions, and it is shown when a corporate decision-making process is brought to light; moreover, this process is subject to the Business Judgment Rule. So, corporate governance must focus on the decision-making procedure to assure its compliance with the law, the corporative objectives, and the public finalities.

All the organisational governance systems must be enacted bearing in mind the mission and values of the Company, and the procedures must be mandatory, transparent, as to scrutinise the motives and reasons for making one decision instead of another.

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80 Vicente, Pedro (2015). *Corporate Governance e Setor Empresarial Público em Portugal: Contributo Para um Normativo Regulador.* Coimbra: Almedina. p. 46.

81 Pinto Jr., Mario E. (2016). *Exercício do Controle Acionário na Empresa Estatal Comentários à Decisão da CVM no Caso Eletrobrás* (Research Paper Series n. 144). São Paulo: FGV Direito SP. Retrieved October 28, 2019, from https://ssrn.com/abstract=2716310 or http://dx.doi.org/10.2139/ssrn.2716310.

With that in mind, corporate governance must not be linked only to the shareholder's financial interests because it does not satisfy the current requirements of compliance. The profitability is significant and, as acknowledged before, it cannot be ignored by the public manager when guiding a State-Owned Company's destiny. However, when it concerns public assets, the public interest must and should be in a position of equality—not of superiority—regarding profitability.

Both the Brazilian and the Portuguese law prescribe that notion regarding the respect for social responsibility and bound to the public interest, as it is determined by Article 49 of the Portuguese Decree-Law no. 133, of 2013, and Article 27 of the Brazilian Law no. 13.303, of 2016. In both cases, State-Owned Companies are commanded to observe the public and social interests. The law prescribes that and writes down this determination to not only make a statement, but also to be, obviously, met. That happens because there is a social and behavioural component in this declaration; otherwise, it would be left to a treacherous voluntary criterion.

Assuming that compliance and corporate governance are hard to implement and to endure, because they presuppose scrutiny, transparency, and depoliticisation, which implies undermining political power in favour of a professional and committed management, the law is right when it determines the stakeholders' primacy and does not leave it to the State Agents to voluntarily do so. Here, the lesson passed on in the 18th century by James Madison[82], one of the founding fathers of the United States of America, is still valid:

> But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.

82 Madison, James (1787/1788). Article No. 51 - The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments. In Madison, James, Hamilton, Alexander and Jay, John. *The Federalist Papers*. Retrieved October 31, 2019, from https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-51.

In this sense, corporate governance and compliance are necessary programmes because humanity depends on legal instruments that remove uncertainty from the people's field of action by establishing what can and cannot be done. The law is a regulator of human life and must exist because no one is immune to corruption, an argument corroborated in the 18th century: "men are not angels".

Hence, to assure that State-Owned Companies, and all other companies, are bound to accomplish their corporate purpose and to respect the collective interest in the light of their social function, the following parameters are required: good and reasonable legislation, supervision, liability, accountability, soft law instruments (*e.g.* integrity pacts, lending contracts, stock exchange listing requirements, social media and press vigilance, so on so forth), and community oversight of the companies.

It is relevant to mention that even when the policymakers consider creating a State-Owned Company, the ethical, reasonable, and technical argument must be present because an enterprise like that can justify its existence in professional, legal, technical, and public rationales only. Aside from that, it will be a mere escape from the public regime to the private one, which is unconstitutional in the legal framework of both countries.

In that context, corporate governance and compliance requirements emerge as a component of this system where good faith and ethics are the paths to follow, moreover in a world where the globalisation of the markets and the free movement of the money makes profitability more relevant than corporate responsibility to measure the success of an enterprise.

Nevertheless, it is licit to assert that unbalanced bonuses and prizes for the managers that improve the value of the shares lead to an atmosphere where corporate governance, compliance and, integrity are relegated to a second plan or, worse, to a place where those fundamental ethical components of management are used as propaganda.

Consequently, it is valid to affirm that profit and financial sustainability are essential and must be pursued, but it must comply with the public interest and social responsibility; private shareholders of State-Owned Companies must be aware of that, and the Brazilian Corporate Law in its Article 238[83] determines that, although, "this does not exempt the State from being clear and transparent about the public policy objectives it intends to achieve through the state enterprise, and how this may impact the outcome over time", as seen in Pinto Junior[84].

83 *Law no. 6.404 of 1976*. Corporate Law Regarding Public Limited Liability Companies. Article 238. The legal entity that controls the mixed capital company has the duties and responsibilities of the controlling shareholder (Articles 116 and 117) but may guide the company's activities in order to meet the public interest that justified its creation. Retrieved October 28, 2019, from http://www.planalto.gov.br/ccivil_03/LEIS/L6404consol.htm.

84 Pinto Jr., Mario E. (2016). *Exercício do Controle Acionário na Empresa Estatal Comentários à Decisão da CVM no Caso Eletrobrás* (Research Paper Series n. 144). São Paulo: FGV Direito SP. Retrieved October 28, 2019, from https://ssrn.com/abstract=2716310 or http://dx.doi.org/10.2139/ssrn.2716310. p. 12.

Although even State-Owned Companies are authorised by law to, in certain situations, admit losses in the name of a public interest achievement, the Company and its managerial body must comply with corporate law duties regarding the exercise of control, the respect for the shareholders' minority, fiduciary duties and obedience to the market regulator.

Therefore, a critical factor in proper management is its role in mitigating conflicts of interest between shareholders and management concerning financial expectations and the need to consider the final public interest, not to mention the other interests involved. Corporate governance should concern all: those involving employees, suppliers, the community, among others.

Thus, a company must be committed not only to its results but also to the impact it has on its surroundings. To accomplish this, companies must have governance that imposes transparency and accountability within a decision-making process that primarily considers the fulfilment of the collective interest, but also, over time, financial sustainability and the survival of the company.

III.3.1 – To Be in Compliance

Therefore, a constant process of monitoring and evaluating management acts and managers, as well as the risks involved, must be designed in the company. Corporate governance and compliance programme must be assimilated in a corporate culture because

> There is a strong tendency to characterise compliance as an operational ("being in compliance") rather than a strategic ("being compliant") activity, aligned with organizational identity and ethical behaviours. To be in compliance is to comply with internal legislation and policies by mere obligation or to reduce any penalties if the organisation is punished. Being compliant is the conscious and deliberate compliance with the law and domestic policies, guided by the principles and values that make up the identity of the organisation, aiming at its longevity. Therefore, we also seek to emphasise as the purpose of the compliance system integrity, not in the strict sense of measures aimed at preventing illicit acts, but as the coherence between thought, discourse, and action, seeking to strengthen culture and the reputation of the organisation.[85]

85 Instituto Brasileiro de Governança Corporativa (2017). *Compliance à Luz da Governança Corporativa*. São Paulo: Author. Retrieved October 21, 2019, from https://www.legiscompliance.com.br/images/pdf/ibgc_orienta_compliance_a_luz_da_governaca.pdf. p. 13

From now on, it is possible to affirm that "to be in compliance" is not only to fulfil the law determinations, but also to observe the commitments made to shareholders, to the markets, and to the community in general. Regarding this, the state-owned enterprise must not only be law-abiding but must also seek other instruments, such as contracts, integrity agreements, internal regulations, codes of conduct, and soft law mechanisms to demonstrate and truly live up to its inexorable public responsibility.

To this extent, both Portugal and Brazil have specific legislation towards State-Owned Companies, as analysed before in this work. Portuguese law regarding State-Owned Companies and its governance is the Decree-Law no. 133, of 2013; the Brazilian one is Law no. 13.303, of 2016.

Both Brazilian and Portuguese laws on State-Owned Companies stipulate a mandatory minimum standard of corporate governance when establishing the supremacy of ethical conduct, professional requirements necessary to be elected or appointed to management positions, the separation of management functions from oversight functions, transparency duties, publicity, integrity, accountability, guidelines to resolve conflicts of interest, and the referral to the national anti-corruption and corporate laws.

This whole legal framework, as already stated, imposes minimum standards; However, public administration acting in the form of state-owned enterprises must go further, because going beyond means lowering costs, earning the trust of customers and markets, investors, suppliers, and the staff itself. This path to a step further over the legal minimum is arduous but rewarding.

So, State-Owned Companies cannot be managed solely to achieve financial results, but also to meet service delivery goals. The means to achieve such ends are also taken into account, as these companies are required by law to practise corporate social responsibility through the principles of corporate governance and an integrity programme that runs through: transparent and real financial statements; risk management; conflict of interest resolution programme; broad transparency; motivation; technical justification of decisions through clear decision-making procedures; an internal policy regarding investor relations, related parties and shareholders observing duties of respect towards minority shareholders; implementation and permanent revision of the code of ethics and conduct; precise posture from the highest administration to the lowest level of anti-corruption; and morality-promoting functions.

These are, nowadays, the inescapable duties of state-owned enterprises and business life itself. Those duties force adherence to good governance regardless of the existence of legislation. Lenders in loan agreements require the maintenance of covenants and impose a financial cost to do so (the better the governance, the cheaper the loan), the stock exchanges also require management and integrity standards for stock market listing, clients expect the service to be well rendered at fair price and respectful

of consumer rights and the environmental cause. The Brazilian and Portuguese legislation obliges such behaviours from State-Owned Companies and their management as well, as it can be observed in Article 49 of the Portuguese Decree-Law no. 133, of 2013[86], and Article 27 of the Brazilian Law no. 13.303, of 2016[87]. These laws set up new corporate governance standards for State-Owned Companies:

> Article 49
> Social responsibility
> Public enterprises should pursue objectives of social and environmental responsibility, consumer protection, investment in professional enhancement, the promotion of equality and non-discrimination, environmental protection, and respect for the principles of legality and business ethics.
>
> Article 27
> The public enterprise and the mixed-economy society shall have the social function of realising the collective interest or of meeting the imperative of national security expressed in the legal authorisation instrument for its creation.
> Paragraph 1. The realisation of the collective interest referred to in this article shall be oriented towards the attainment of economic well-being and the socially efficient allocation of resources managed by the public enterprise and the mixed economy company, as well as to the following:
> I. Economically sustained expansion of consumer access to the products and services of the public enterprise or mixed-economy company;
> II. Development or use of Brazilian technology for the production and supply of products and services of the public company or mixed economy company, always in an economically justified manner.
> Paragraph 2. The public company and the mixed capital company shall, under the terms of the law, adopt practices of environmental sustainability and corporate social responsibility compatible with the market in which they operate.

86 *Decree-Law no. 133 of 2013*. New Legal Regime for The Corporate Public Sector. Retrieved January 23, 2020, from https://dre.pt/web/guest/legislacao-consolidada/-/lc/58582281/view?p_p_state=maximized.

87 *Law no. 13.303 of 2016*. Provides for the legal status of the public company, the mixed capital company and its subsidiaries, within the scope of the Union, the States, the Federal District and the Municipalities. Retrieved January 24, 2020, from http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/lei/l13303.htm.

A corporate integrity programme should include all these practices. Professor Isabel Fonseca, addressing the issue of integrity pacts for public procurement, also leaves the door open for its application in corporate governance programmes. The sensitive aspect of any integrity and governance agenda is to deal with risks involved and possibilities for deviations. In this context, Professor Isabel Celeste Fonseca[88] adds that:

> Without prejudice to the application of the law in force in each system, these instruments, despite their weak binding density, are included in measures to promote social and ecological values and actions to prevent fraud and corruption, corresponding nowadays to the fashion tendency of the clean and healthy worries in providing public service and being generally in community life, which are required...by citizens, all around the world.

With corporate governance and compliance tools, the public administration can, at last, complete its shift towards a corporative legal private regime, endorsed nonetheless by the Administrative Law as a mandatory requirement. Those are essential instruments to avoid or diminish the market's inefficiency regarding State-Owned Companies and public service rendering because the path from the pure public legal regime to the private regime is neither soft nor comfortable.

As José Eduardo Figueiredo Dias[89] explains, the intention was to remove the state from the economy, either by privatising State-Owned Companies or by transforming public agencies into State-Owned Companies but with legal personality under private law, leaving the task of regulatory and public policy formulation to the State. However, detrimental side effects, such as monopolistic abuse of economic power, reduced regulation, and inadequate and expensive service provision, among others, were perceived. Consequently, the movement of imposing result-oriented governance emerges, using efficient and ethical processes, with attention to social responsibility. It was therefore found that the regulatory instruments have changed. The State remains the regulator, but it performs the task using, in addition to traditional forms of enforcing binding rules, administrative authorisations and other strategies softer but no less effective regulatory methods that are embodied in the duties of transparency, publicity, evaluations, audits, mandatory ethical commitments, which sometimes the market itself (such as banks, employees, suppliers, shareholders, stock exchanges, the community) imposes.

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88 Fonseca, Isabel Celeste M. (2017). Das Modas da Contratação Pública, Códigos de Ética e Pactos de Integridade: Um Must-Have Contra Corupção. In Gomes, Carla A., *et al.*, *Nos 20 Anos dos Cadernos de Justiça Administrativa* (pp. 203-220). Braga: Cejur-Centro de Estudos Jurídicos do Minho. p. 216.

89 Dias, José E. F. (2017). Inovação e Reforma na Administração Pública. In Gomes, Carla A. *et al.*, *Nos 20 Anos dos Cadernos de Justiça Administrativa* (pp. 235-252). Braga: Cejur-Centro de Estudos Jurídicos do Minho. pp. 242-243

The system imperfections concerning to State-Owned Companies and public service corporate governance and compliance programmes became an obligation because the law by itself is not enough to solve the deviances and malpractices. The commitment to an ethic, efficient, and socially responsible public administration and service provision comes from the combination of contracts and regulatory integrity instruments incorporated voluntarily or by the market, the consumer, labour, among other stakeholders. The lack of governance and compliance instruments lead the companies, in general, to an inefficient production method where profit and high premium bonuses are more important than the long-term existence of the undertaking.

To reinforce the aforementioned reasoning, we resort to Martin Wolf[90] (*Financial Times*'s Chief-Analyst) in an interview to the Brazilian newspaper *O Globo* when he detailed the public services crisis throughout Latin America and the riots that followed in various countries in the region in the final months of 2019. One of the reasons for that crisis was the weakening or lack of a corporate governance concerning all stakeholders. It is the demonstration that the preponderance of one stakeholder over the others can negatively impact the entire system, not only the enterprise. The transcription of the interview excerpt is below:

> Rentist capitalism is a system in which business and financial elites live mainly from monopoly and monopolistic competition. Rentism, more precisely, is when income is beyond and above what is necessary to attract the supply of relevant goods, services, or factors of production [these factors include capital itself, labour, and the means of production, including land]. The rise of monopoly came for different reasons: weak enforcement of competition rules, excessive protection of intellectual property, weak corporate governance and lavish rewards for corporate management, diminished union effectiveness, widespread exploitation of tax havens, and, above all, the predatory financial market growth. Reforms will be needed in all these areas to reverse this situation.

The rentism mentioned in this interview is the evil face of the shareholder theory, one of various corporate governance theories. Roughly speaking, this theory states that the prevalence of the profit interest of the shareholder means that the company will be focused on its performance, that only a

90 Wolf, Martin (2019). *América Latina Vive Entre Elites e Populistas Predadores*. Londres/Rio de Janeiro: O Globo. Retrieved October 28, 2019, from https://oglobo.globo.com/mundo/america-latina-vive-entre-elites-populistas-predadores-diz-analista-chefe-do-financial-times-24044970.

well-managed company produces profits, and that proper management would benefit all the other actors involved.

However, this system ended up degenerating into an almost exclusive concern with profit prevailing over more critical issues, *e.g.* the health of the employees, attendance of the public interest even without the prospect of direct and immediate return, or environment.

In this regard, Pedro Vicente[91] quotes Freeman, who states: "Every business creates, and sometimes destroys, value for customers, suppliers, employees, communities, and financiers. The idea that business is about maximizing profits for shareholders is outdated and doesn't work very well, as the recent global financial crisis has taught us."

So, because of the realisation of interests other than those embodied by the shareholder must be met and considered in business performance, the imperatives of a positive, full corporate governance are imposed.

For this reason, as it has already been seen, the national laws seek to affirm norms that aim to induce transparency, morality, integrity, and social responsibility in companies, mainly when these companies are controlled by the state, which has to manage well in the interests of the public and not focus solely on profit.

Besides, it is essential to affirm that in a company there is a separation between shareholder and board, and between management and supervision. This construction, in addition to being governed by corporate and State-Owned Company legislation, which requires professionalism and independence from the members of the board, also determines the duties of loyalty and care.

The purposes of the aforementioned divisions between the subjects involved in running a company are, first, to ensure that management is professional and that it pays attention not only to the interests of shareholders, but also that of the company itself; second, to prevent conflicts of interest from promoting deviations and defile transparency and probity in the conduct of business.

The management of a corporation is meant to be professional because it raises the possibilities of success; shareholder nominees often conduct the management. Corporate legislation establishes duties and obligations for the shareholders, managers, related parties and so forth, to ensure minimum standards for the companies' proper and sustainable functioning. One of the essential law commandments is the setup of the board of directors and the managers' fiduciary duties.

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91 Vicente, Pedro (2015). *Corporate Governance e Setor Empresarial Público em Portugal: Contributo Para um Normativo Regulador.* Coimbra: Almedina. p. 43

III.3.2 – Corporate Governance and Fiduciary Duties

The primary corporate fiduciary duties are loyalty and care towards the company. These duties are lawful and are not limited to maximising results. Also, being loyal and caring means avoiding deviations and meeting the requirements of the company's social function, the public interest, and the ethical, technical, and reasonable conduct of the company's business concerning various segments involved.

In this regard, we cannot assume that the interest of the shareholder prevails in a State-Owned Company; because the State is the main shareholder and the holder of dominant influence and if its interest overrides the others, the mission of meeting the primary public interest—which is the people's interest, not the interest of the Public Administration or the Government's—is being distorted.

Both Brazilian and Portuguese Corporate Laws establish the management's fiduciary duties, which play a supplementary role in issues regarding State-Owned Companies, mainly when it deals with management, the shareholders' rights, or corporate conflict of interests, among other topics.

The Portuguese Decree-Law no. 262, of 1986, in its Article 64[92] and the Brazilian Law no. 6.404, of 1976, in Articles 153, 154, and 155[93] establish the fiduciary duties and prescribe liability when those duties are overruled. The letter of the law is clear about it:

Article 64

Fundamental Duties

1. The managers or directors of the company must observe:

a) Duties of care, revealing the availability, technical competence and knowledge of the company's activity appropriate to their responsibilities and employing in that context the diligence of a careful and orderly manager; and

b) Duties of loyalty in the interest of the company, considering the long-term interests of the partners and considering the interests of other relevant subjects for the sustainability of the company, such as its employees, customers, and creditors.

Article 153

92 *Decree-Law no. 262 of 1986.* Corporate and Companies Law. Retrieved October 31, 2019, from https://dre.pt/web/guest/legislacao-consolidada/-/lc/34443975/view?p_p_state=maximized.

93 *Law no. 6.404 of 1976*. Corporate Law Regarding Public Limited Liability Companies. Article 238. The legal entity that controls the mixed capital company has the duties and responsibilities of the controlling shareholder (Articles 116 and 117) but may guide the company's activities in order to meet the public interest that justified its creation. Retrieved October 28, 2019, from http://www.planalto.gov.br/ccivil_03/LEIS/L6404consol.htm.

The manager of the company shall, in the performance of their duties, employ the care and diligence that every active and prudent person usually uses in the running of their own business.

Article 154

The manager shall perform the duties conferred by law and the bylaws to achieve the purposes in the interest of the company, fulfilling the requirements of the public good and the social function of the company.

Paragraph 1. The director elected by a group or class of shareholders has the same duties towards the company as the others, and may not, even in defence of the interests of those who elected him, fail to fulfil these duties.

Article 155

The manager shall serve the company with loyalty and keep secrecy about its business.

As seen in Portuguese and Brazilian laws, the board's fiduciary duties mandate that the State-Owned Company is managed towards financial sustainability, not indebtedness, among other factors that induce profitable purposes. However, these same standards require that the company and its management also pay attention to social demands, consumer rights, the environment, ethics, and honesty. Within this context, the duties of care and loyalty go beyond the walls of the company, as Frederick Alexander[94] mentions in his work:

> But once the assets are invested in a business enterprise, a host of other stakeholders quickly become relevant. In addition to its shareholders, a corporation has workers, costumers, and neighbours. These are just some of the more obvious stakeholders. The operations of a corporation may create wealth and opportunity that benefits individuals around the globe, and future generations as well. By the same token, it may create risks to the global community by using a supply chain with human rights abuses, or create hazards to future generations by wasting scarce resources or emitting environmentally harmful substances.

94 Alexander, Frederick H. (2018). *Benefit Corporation, Law and Governance: Pursuing Profit with Purpose.* Oakland: Barret-Koehler Publishers. p. 21.

Therefore, the public administration creates State-Owned Companies to use tools of co-operative efficiency, speed, flexibility, and professionalism to serve public purposes that led to the constitution of the State-Owned Company.

The management of those companies must encompass a scope of respect towards the several stakeholders, not just because every company today has moral obligations (even imposed by costumers, social media image, fear of bad publicity, whatever the reasons may be). Moreover, because a State-Owned Company embodies public administration functions and must observe with all its force the public interest, here, there must be a broader sense to understand the management's loyalty and care towards the company; in the end, those duties must encompass the stakeholders' interest because neither the company itself nor the shareholders are alone anymore.

III.3.3 – Managerial Professionalism, Autonomy, and Supervision

The corporate dress, therefore, aims to distance State action from Government action, *i.e.* public enterprise aims for a professional management, as free as possible from political influences. This professionalism of the manager has, consequently, the duty of proper governance, accountability of their acts, and responsibility for them within the system of business judgment rules. It is responsive and accountable management that is committed to the public interest, profit, environmental sustainability, and the company itself.

The State-Owned Companies' managers, either in Brazil or Portugal, are meant to be professionals, with an unblemished reputation, requiring experience and technical knowledge. There are also prohibitions and impediments to avoid conflicts of interest or political influences on management. Both the Brazilian and the Portuguese law, to induce as much independency as possible, stipulate that the State, as the controlling shareholder, must respect the policies of choosing and appointing managers, and this policy should provide for the choice of professionals with a clean background and with technical feedback for the function.

There are even prohibitions for political agents, partisans, and unions to assume management positions in State-Owned Companies. However, the ethical and professional component is a significant factor for the appointment and election by the general assembly of state-owned enterprises for such positions (as seen in Portuguese legislation: Article 21 of the Decree-Law no. 133, of 2013, and the Decree-Law no. 71, of 2007. In Brazilian legislation, it is predicted in Articles 14, 16 and 17 of Law no. 13.303 of 2016). All this combined with the corporate duties required by both corporate laws.

The State-Owned Companies management professionalisation and autonomy does not waive public supervision and some control exerted in the terms of the law. However, issues can arise from this, sometimes, conflicting situation regarding autonomy and monitoring because the State and Public Administration are vested with immense, but not unlimited, power, so controlling abuse may exist. Thus, for proper corporate governance, autonomy must be issued as more important than control—as long as the managing business is professional, of course. There will always be tension.

To illustrate this assertion, it is worth to invoke the rulings on the Judgment of The Court of Justice of the European Union in case C-557/10[95] about control and autonomy in State-Owned Companies, paragraphs 38 and 39, here transcribed:

> Paragraph 38. As the Advocate General observed in point 33 of his Opinion, while it is true that Article 5(3) of Directive 91/440 allows the Member States to lay down general policy guidelines, the fact remains that, in order to meet the objective of management independence of railway transport undertakings, the State must not exercise any influence over the individual decisions made by those undertakings concerning the transfer or acquisition of shares.
> Paragraph 39. Furthermore, by making any individual decision to acquire or transfer shares in companies subject to government approval, the Portuguese legislation has subjected CP to external political control which does not correspond in any way to the procedures and means of action and control available to shareholders in an ordinary joint-stock company.

Professor Pedro Costa Gonçalves skilfully educates on the topic concerning the tension between autonomy and supervision and its role in corporate governance. The author proclaims that the separation between politics and management is crucial to good governance, and it leads to management autonomy and its duties regarding accountability and responsibility for the results.

Although the State's supervision over the undertakings is mandatory, it must be carried out without damaging the management's autonomy. Moreover, these two sides are in constant dialogue; they act complementarily. The agents must hold different functions. However, they pursue the same purpose.

95 Retrieved November 5, 2019, from http://curia.europa.eu/juris/document/document.jsf;jsessionid=58B9A1F49E587D7621DE329C50D20DE9?text=&docid=128902&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=373184

The political aspect deals with programmes and policymaking and, the State-Owned Companies' managerial bodies is entrusted to manage the enterprise according with professional features to achieve the committed goals. It is relevant to cite the passage[96] for a better understanding:

> Rather, it is a matter of distinguishing and separating a task of political direction...consisting of the definition by political agents of the missions, priorities, action programmes, objectives, and goals of administrative organisations, including verification or control over the degree of achievement of the intended results, on one hand, and a management task developed by managers and administrative leaders, validating the autonomous identification and selection of identified objectives as well as their effectiveness, efficiency and achievement. In this regard, it is up to the policy to define "what" to do (in the context of a strategic definition of purposes) and the administration must deal with the "how" to do it (within an operational framework of developing concrete competences).

The controlling shareholder, the State, will have the prerogative to appoint the number of managers allowed by the law and the State-Owned Companies' statute. The Executive Branch, in this case, will represent the State and, of course, will make the nominations for the board in consideration of ideology, political background, and affinities. It is not a problem per se, since the professional criterion prevails.

III.3.4 –Result-Oriented Management as a Corporate Governance Requirement

After analysing the tension between autonomy and supervision in State-Owned Companies, it is accurate to affirm that the corporate governance of a state-owned enterprise must, therefore, be held accountable for the results that they do or do not produce.

Moreover, the results cannot be concerned solely with the financial outcome, which is undoubtedly essential and even justifies the incorporation of the state enterprise to alleviate the public coffer. The results must encompass the public goals attributed to that specific State-Owned Company.

96 Gonçalves, Pedro C. (2018). Ensaio Sobre a Boa Governação da Administração Pública a Partir do Mote da "New Public Governance". In Gonçalves, Pedro C., *et al.*, *O Governo da Administração Pública* (Reprint) (pp. 7-33). Coimbra: Almedina. p. 12.

So, an evaluation must be carried out to verify whether the State-Owned Company's managers accomplish their objectives or not. The management demands performance and results, and if they are not fulfilled, there will be consequences.

It is what is called a responsible and responsive administration, and it must aim at the interest of the main shareholder and of the client. The shareholder and the client are the same—the public, the citizens for whom the public services are provided; and for better provision, the State creates State-Owned Companies. So, the company must implement corporate governance and compliance programmes regarding those standards of loyalty and care towards the long-term existence of the enterprise and its impacts on the community, *i.e.* the citizens who will be at the same time the State-Owned Company's client and owner.

The client concept as a new way to see the utility user was already exposed in this work. Now, the other aspect is to view the community as the shareholder—an indirect shareholder because the State is the company's controller.

Whereas private companies can and must target profit as their primary objective, State-Owned Companies must take into account not only that, as affirmed several times in this dissertation, but they must also be responsible and responsive to satisfy the community's needs and expectations in a transparent and accountable form because it is at the same time the shareholder and the client.

Both ends of the corporate purpose—the investor and shareholder on one side, and the consumer on another—are the reason to implement a governance programme because there are the profitability and the consumers' rights and the right for a proper administration. Jacques Chevallier[97] reflects on the issue:

> Indeed, like private companies, management must best manage the means allocated to it; but effectiveness is appreciated fundamentally concerning the degree of achievement of the objectives set by the ones elected and not solely in terms of financial "profitability". Public management will aim to improve "public performance" by enabling management to achieve the goals set by the political authorities at a minimal cost. This way, it is invited to a permanent productivity effort aimed at reducing costs but without degrading the quality of the benefits.

97 Chevallier, Jacques (2009). *O Estado Pós-Moderno* (3rd Ed.). Belo Horizonte: Fórum. p. 85

The State, in state-owned enterprises, exercises dominant influence and therefore determines the direction of the enterprise. Being the State the holder of shares, these shares are public goods; being public goods, citizens own the shares—after all, all public assets exist to serve a public purpose in favour of the community[98].

Thus, it is lawful to the state that the citizens, when it comes to State-Owned Companies, will be the indirect shareholder and investor in addition to being a public utility client, since it is the taxes that they pay that finance the state's activity and which served for, at least, constituting the initial capital of the state enterprise. It is in the name of the community that the State incorporates a company.

Public interest legitimises the existence and purpose of the state enterprise. For this reason, the State cannot act deleteriously (it is undeniable that the State often misbehaves, and its representatives act in the name of other selfish interests).

That is to say, it is the public money that is used for the constitution of the initial capital stock of the state enterprise. However, public money is an abstraction because the sum of private funds obtained by the state through the collection of taxes from taxpayers constitutes it. It is the lesson given by Margaret Thatcher cited by Pedro Vicente[99]: "There is no such thing as public money; there is only taxpayers' money".

The state-owned businesses should aim to meet the public interest and purpose that justified their creation and should do so as efficiently as possible in order to gain—or not to lose. This efficiency goes through a transparent corporate governance programme, where managers must be accountable and liable for their actions (otherwise, they will be punished administratively and judicially), demonstrating that decisions were made according to defined, unpoliticised processes, whose risks were measured and assessed and whose results were presumed—considering corporate governance as a programme where compliance and social responsibility flourish so that shareholders and customers will enjoy benefits.

This view of the utility user as a customer and as the indirect shareholder is crucial because they become more active and more rights are conferred to their protection. The consumer wants the best service at the lowest cost, and the investor wants the most significant gain with maximum efficiency.

Hence, the consumer/investor, being the first and last target of state action, has the right, and the State must employ a socially responsible, transparent, impersonal, technical, and professional governance system focused on the public purpose and the company's results.

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98 Vicente, Pedro (2015). *Corporate Governance e Setor Empresarial Público em Portugal: Contributo Para um Normativo Regulador.* Coimbra: Almedina. pp. 72-73.

99 Vicente, Pedro (2015). *Corporate Governance e Setor Empresarial Público em Portugal: Contributo Para um Normativo Regulador.* Coimbra: Almedina. n. 138. p. 59.

Therefore, corporate governance must be understood by State-Owned Companies as a way of defending civil society and the public interest, given that efficient, responsible, transparent, and result-oriented management achieves its intended purpose more efficiently.

Investing public money in a state-owned enterprise must be efficient, reasonable, technically justified, and legally founded, and the management of this enterprise must secure those same assumptions as well as those inherent in the principles of good governance; with regard to this, Kempfer and Batisti[100] affirm that

> The creation and strengthening of internal control bodies through corporate governance rules and risk management practices translates efforts for transparency and control in the most critical and sensitive aspects of the corporate structure of public companies and mixed capital companies. They represent a legal advance for the prevention and combat of corruption. The experience of the private enterprise that honours ethics has been incorporated into state-owned companies. It is the law dialoguing. By these ways, we can see the approximation of public and private interests.

That said, the mere transplantation of private concepts of management to the public administration does not solve the society's numerous problems. It is an illusion. However, public administration must resort to those private managerial tools to improve its management, which must aim at the public interest as well as at the financial return.

Sometimes, the financial return alone cannot guide the decision-making process: sensibly, State-Owned Companies are forced to inject money where there will be no profit but the duty to serve the public interest so imposes. To this end, governance must be transparent and the decision-making process well-structured, as to justify this action that combines effort and corporate structure with the public interest.

Here, achieving the public interest with a profit or without loss is state-owned enterprise success. For this reason, corporate governance should, by acting ethically, transparently, and correctly, aim at the company's success considering other stakeholders.

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100 Kempfer, Marlene and Batisti, Beatriz M. (2017). Studies Regarding Compliance as a Means to Prevent Corruption in Public Entities: Ethics, Administration Science and Law. *Revista do Direito Público – Universidade Estadual de Londrina Vol. 12, No. 2* (pp 275-309). Retrieved June 11, 2019, from http://dx.doi.org/10.5433/1980-511X.2017v12n2p273. P. 303.

Thus, the management of the company when seeking to achieve the public interest at the same time values state investment and the citizens, the client and owner of State-Owned Companies, as seen earlier, inasmuch as "all power emanates from the people"[101] and will be exercised on their behalf.

III.3.5 – Comply or Explain

Taking all the above reasoning in an account, State-Owned Companies have the mandatory lawful duty to implement a corporate governance programme encompassing a compliance structure. The letter of the law sets up several obligations for the State as a shareholder and for the managers, given that, when exerting their managerial functions, they embody a public role as well. Moreover, a compliance programme must encompass the requirements of legality, transparency, accountability, risk assessment and administrative and judicial liability.

In that aspect, it is valid to recall the Brazilian Office of the Comptroller General's guideline to implement such programmes in State-Owned Companies, and the mainline is the care towards the public money, the public interest, and the client/investor, who is the collectivity itself. It is because such programmes seek better, transparent, auditable decision-making processes where the ethical component prevails to minimise deviations and prevent losses. The main motivations listed by the Brazilian Comptroller General[102] are these:

> A well-developed integrity management policy within an entity increases the chances that public officials will make decisions based on technical criteria rather than on particular interests, thereby increasing the quality of those decisions. Taking care of integrity management can also help improve citizens' trust in government. While the mere adoption of integrity measures cannot be assumed to impact public confidence indices automatically, it is highly unlikely that citizens regularly confronted with integrity violations will trust the institutions and companies where such violations occur....
>
> It is necessary to understand that an integrity management policy is a tool to support the manager, which can help you more quickly and safely achieve the ultimate goals of your business. Integrity management is a component of good governance, a precondition that

101 *Brazilian Federal Constitution of 1988:* Article 1, Sole paragraph: All power emanates from the people, who exercise it by means of elected representatives or directly, as provided by this Constitution retrieved November 5, 2019, from https://www2.senado.leg.br/bdsf/bitstream/handle/id/243334/Constitution_2013.pdf?sequence=11&isAllowed=y

102 Controladoria-Geral da União Brasil (2015). *Guia de Implantação de Programa de Integridade em Empresas Estatais*. Brasilia: Author. Retrieved June 15, 2019, from https://www.cgu.gov.br/Publicacoes/etica-e integridade/arquivos/guia_estatais_final.pdf/@@download/file/Guia_Estatais_FINAL.pdf. pp. 9-10.

gives the entity's other activities legitimacy, reliability, and efficiency. In short, it is important to have mechanisms in place to detect and correct misconduct and wrongdoing in order to remedy any damage to the image and public property, but it is equally important to invest in preventive measures to prevent such misconduct. In recent years, the governance and, specifically, compliance measures adopted by companies around the world have gained prominence, consolidating among the public the notion that these companies are not only obligated to generate profits for their companies' shareholders but also broader obligations to society. Currently, it is part of the positioning and image strategy of large companies to demonstrate that they are socially and environmentally responsible, which increasingly includes demonstrating their commitment to preventing fraud and corruption. In the case of State-Owned Companies, this commitment to act in a socially responsible manner is not only linked to a corporate positioning and image strategy but, intrinsically, to their responsibility as a public resource manager, committed to the principles of management.

Considering the Brazilian Comptroller General's statement, it´s valid to affirm that a compliance programme within corporate governance should contain internal mechanisms and procedures, the main ones being constant auditing for the detection and resolution of irregularities and deviations, codes of conduct and integrity, risk analysis to improve decision-making and to better define policies, investments and acts aimed at achieving the public purpose that bounds state-owned companies by its bylaws.

Thus, the public manager is legally bound to implement and enforce such corporate programmes because by constitutional and legal commandment the manager must act taking into account the principles of legality, morality, efficiency, transparency towards the public goals and, also, it means that it is necessary to scrutinise the way to achieve the public finalities.

The processes and the motivations must be legitimate, which means that they must be comply with social, economic, financial, labour, and environmental standards. The most critical issue here is that those management standards are binding for every person who deals with the State-Owned Company and even more for the upper directive bodies. The tone, the example, comes from the top. In the matter of compliance and corporate governance, the upper management plays a significant role because they must exert their leadership with an ethical compass, promoting honest and transparent behaviour patterns.

Regarding State-Owned Companies: obviously, they are owned by the state and are subject to a certain degree of political influence (which has to be limited to the minimum and must be exercised through statutory and legal clauses and regulations); the compliance and governance commitments must be permanent and in constant evolution, implemented through company policies that should be widely publicised and incorporated into the bylaws, the internal regulations, the budgetary procedures, and so forth. Below, we transcribe Rodrigo Pironti and Francine Gonçalves's[103] lesson contained in their work on features that every good corporate governance and compliance programme must provide:

> [I]t is indicated that the normative provisions of the state enterprise, according to their respective competences, include:
>
> 1. Importance, activities and objectives of the integrity programme;
> 2. Attributions, duties and obligations of the board of directors and executive officers to enable the smooth running of the integrity programme;
> 3. Creation of statutory risk management, compliance and audit committees;
> 4. The entity's risk management and compliance practice;
> 5. Definition and independence of the compliance area;
> 6. Forecast of specific budget and resources for the compliance area;
> 7. Provisions on the maintenance and monitoring of the integrity programme and its continuous improvement;
> 8. Interactions between the entity's three defence lines[104];
> 9. Provisions on disciplinary proceedings and those responsible for them.

Thereby, these normative provisions have the ultimate objective of imprinting the commandments for an ethical, honest, and transparent conduct into the corporate culture of State-Owned Companies.

103 Castro, Rodrigo Pironti Aguirre de and Gonçalves, Francine Silva Pacheco (2018), *Compliance e Gestão de Risco nas Empresas Estatais.* Belo Horizonte: Fórum. pp. 22-23

104 When the authors, Rodrigo Pironti and Francine Gonçalves, refer to a corporate governance model that addresses three defence lines, this is a programme that should involve the entire corporation. The first line of defence against deviations and illegalities is the operational area of the company and its managers (the sector most directly linked to the company's core activity), because they are the ones who effectively perform the services and decide how they will be provided, hired, etc. The second line of defence should be integrated by the sectors that support the development and monitoring of the core activity. This second line of defence is where control and risk analysis, governance and compliance policies are formatted. This second level assists top management in effectively implementing health programmes. Finally, the third line of defence consists of internal audit, which must have autonomy and independence to conduct its work, protected from political influences and accountable to shareholders and senior management.

For that matter, it is crucial to emphasise one of the essential characteristics of all these normative rules: the *comply or explain* principle. This principle is referred to in any work about corporate governance and compliance where transparency and a stakeholder primacy are the primary standards.

This principle is linked with the principle of transparency because, by law, State-Owned Companies in Brazil and in Portugal must publicise their commitments, mission, goals and the general means for their attainment. Furthermore, the obligation emerges to adopt corporate policies towards shareholders, related parties, social communication, environmental commitments, conduct, and ethics internal codes, among other regulations that a company must enact. When the company makes those statements and publicises it, they become the company and its managerial body's lawful obligations.

Because it is an obligation, the administrative branches must comply with these commitments or explain why they did not. It leads to the decision-making process and the business judgment rule, as it determines a proper procedure showing all the motivations, the risks, the gains and the losses of corporate decisions, which must be followed—if it's not possible to do so, there must be an explanation.

As said above, both the Brazilian and Portuguese legislation towards State-Owned Companies predicts these managers' duty to comply with, or explain why they did not, a mission or rule, as the Article 45 of the Portuguese Decree-Law no. 133, of 2013[105], and Article 8 of the Brazilian Law no. 13.303, of 2016[106], predict. The articles transcriptions are below:

> Article 45
>
> Transparency
>
> 1. Annually, each company informs each shareholder and the general public of how its mission has been pursued, the extent to which it has achieved its objectives, the manner in which its social responsibility, sustainable development policy and terms of public service delivery and the extent to which their competitiveness has been safeguarded, in particular through research, development, innovation and the integration of new technologies into the production process.
>
> Article 8

105 *Decree-Law no. 133 of 2013*. New Legal Regime for The Corporate Public Sector. Retrieved January 23, 2020, from https://dre.pt/web/guest/legislacao-consolidada/-/lc/58582281/view?p_p_state=maximized.

106 *Law no. 13.303 of 2016*. Provides for the legal status of the public company, the mixed capital company and its subsidiaries, within the scope of the Union, the States, the Federal District and the Municipalities. Retrieved January 24, 2020, from http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/lei/l13303.htm.

> Public companies and mixed capital companies shall comply with at least the following transparency requirements:
>
> I. Drafting of an annual letter, signed by the members of the Board of Directors, setting out the commitments to achieve public policy objectives by the public company, the mixed capital company and its subsidiaries, in compliance with the collective interest or the imperative of national security that justified the authorisation for their respective creations, with a clear definition of the resources to be used for this purpose, as well as the economic and financial impacts of the achievement of these objectives, measurable through objective indicators. ...
>
> III. Timely and up-to-date disclosure of material information, especially related to the activities carried out, control structure, risk factors, economic and financial data, management comments on corporate governance performance and policies, and description of the composition and management compensation.

The letter of the law does not expressly present the duty to comply or explain. The law determines the duty to expose the missions, the objectives, the commitments on sustainability, social responsibility, the financial disclosures, and so on.

However, it can be fully understood from the law that the companies must publicly state their intentions, plans and the means to accomplish their goals regarding the public policies entailed to them, considering social responsibility and sustainability. It is important to affirm that the statement bounds the managerial bodies and the company as well and, if they do not accomplish it, they consequently have the duty to explain.

Insofar as the State-Owned Companies are part of the Public Administration, all the managers are bound to their own declarations and statements. The managers must make the motives and the motivations that led them to a decision explicit; those motives and motivations rest on those corporate statements that the law orders.

The managerial branch must comply not only with the law, but also with those rules that they voluntarily agreed or stipulated. Professor Pedro Costa Gonçalves[107] enlightens the matter explaining that "when they anticipate and announce the way the Administration proposes to act, they create a self-binding effect, and, in principle, they have the effect of prohibiting *venire contra factum proprium*."

107 Gonçalves, Pedro Costa (2019). *Manual de Direito Administrativo – Vol. 1*. Coimbra: Almedina. p. 432.

The importance of this *comply or explain* principle stems from the fact that State-Owned Companies are part of the public administration and they deal with public money; they are bound to their original public purpose, and they must endure and be sustainable to grant the continuity of the public service that they provide. For the State-Owned Companies to embrace the principles, there are three main goals, as Pedro Vicente[108] declares:

- The cross-application of the principle on all companies in the public business sector, forcing the levelling of differences in the evolution and sophistication of means of implementation concerning good corporate governance, and, in particular, in management, supervision and auditing, concerns:
- Determine that the lack of explanation, substantiated and documented, leads to non-compliance with the recommended good management practices.
- It obliges companies to clearly express their opinion on the corporate governance annual report about their economic and financial situation, measuring the degree of compliance with the objectives.

The *comply or explain* principle is a crucial factor for corporate governance and compliance programmes to be effective and concrete. As State-Owned Companies deal with public assets, acting accordingly to ethical-legal standards is a legitimising imperative. To act ethically, it is important to comply with all regulations, law, soft law and explain the actions, plans and expected outcomes to the stakeholders. So, the mentioned principle is a corollary to the stakeholders' primacy system.

So, we recall the concept of enlightened shareholder value described by Paul Davies[109]; this concept is not quite like the stakeholders' primacy: it is an improved shareholder primacy concept and, in this governance system, the stakeholders' interest will be taken into account only if it promotes the success of the company, which is the benefit of the shareholders. Nevertheless, this concept is interesting because it allows the directors to, at least, balance the stakeholders' interest in the decision-making process, as seen below:

> [I]n promoting the success of the company for the benefit of its members, the director:
> In doing so [must] regard (amongst other matters)

108 Vicente, Pedro (2015). *Corporate Governance e Setor Empresarial Público em Portugal: Contributo Para um Normativo Regulador.* Coimbra: Almedina. p. 99.

109 Davies, Paul L. (2008). *Gower and Davies' Principles of Modern Company Law* (8th Ed.). London: Sweet & Maxwell. pp. 508-509.

a) The likely consequences of any decision in the long term,

b) The interests of the company's employees,

c) The need to foster the company's business relationships with suppliers, customers and others,

d) The impact of the company's operations on the community and the environment,

e) The desirability of the company maintaining a reputation for high standards of business conduct, and

f) The need to act fairly as between members of the company.

Note that in valuing the company and its earnings, one can never forget the duties related to the social function and the responsibility towards the community and the environment of maintaining the good reputation of the company, even in a shareholders' primacy-based system.

Still, all these factors, in the Brazilian and Portuguese systems, are central to corporate governance because the law orders it. So, integrity programmes are mandatory for State-Owned Companies as a way to consecrate their public roots. Ethical and transparent business management is, thus, a must-have; it seeks to combat deviations, inefficiencies or undue political influences by fostering professionalism, meeting clear, public, and achievable goals combined with the duty to be held accountable and liable for negligent, reckless, unlawful acts, or even due to wilful misconduct.

For this reason, corporate governance and compliance are a determining factor in how the community deals with companies and vice versa. Thus, bearing in mind that when the state uses the entrepreneurial form to accomplish its functions, it seeks agility, flexibility, and efficiency; however, these requirements must be achieved under the cloak of legality, transparency, and honesty—only then will the civil service be fully exercised and can deliver the expected financial and social results.

Through good corporate governance and integrity programmes, the management of State-Owned Companies is therefore expected to be responsive and responsible; they must act by listening to, and understanding, social demands, and this action must include a decision-making process based on ethics, transparency, and focused on the public interest inherent to the state enterprise. Good decisions must thereupon be technical and professional and are usually based on risk data and analysis, therefore tending to be reasonable, proportionate, and subject to scrutiny and audit.

Such programmes—where transparency, the public interest, the centrality of the society, and accountability, are the cornerstones of proper management—translate into confidence, efficiency, and risk reduction, thus increasing the possibility of valuing the company.

Hence, despite the existence of specific legislation, corporate governance is imperative and must consider first and foremost the public interest, although the financial result and the sustainability of the company itself are very relevant.

From a constitutional point of view, corporate governance and compliance programmes are mandatory for State-Owned Companies; the legislation under constitution only reaffirms the commandment for an honest, transparent, efficient, depoliticised State-Owned Company, aimed at the public's interest.

In the following chapter, this dissertation will analyse, how hard law and soft law are sources for corporate governance and compliance concerning State-Owned Companies.

III.4 – Law, Soft Law, and Other Avenues to Compliance and Corporate Governance

Corporate governance with a compliance programme and all its features is mandatory for State-Owned Companies, as the previous chapter demonstrated. Moreover, corporate governance in State-Owned Companies must encompass the interests of other stakeholders, not only the shareholders'. The law orders it when it establishes that the corporate decisions will consider environmental issues, consumer rights, public interest, and, of course, profit.

The stakeholder's primacy in State-Owned Companies is a clear pattern, and it could not be different once those companies are part of the public administration, whose main objectives are to defend and privilege the public interest and community needs.

When corporate governance and compliance are mentioned and demanded, the regulatory powers derived from the law, state or private regulatory entities and soft law, are irrefutable sources. The present chapter will address the issue of the sources of corporate governance and integrity programmes.

III.4.1 – Co-Regulation – State and Non-State Regulatory Powers

State-owned enterprises are a mode of state intervention in the economy; this originates the figure of the state-entrepreneur, parted with another significant state role, which is the regulatory one; and as we can see "through regulation, the state orders new economic agents, stimulates competition

and other constitutional principles, increases the efficiency of regulated services, and eventually increases the market value of public and/or private companies".[110]

An important note: the term *regulation* used here and applied to the field of corporate governance encompasses both cogent and statutory state regulation, as well as non-compulsory regulation whose adoption produces practical effects with legal consequences. Thereby, we can affirm that regulation encompasses law, regulatory acts from regulatory agencies, and soft law from several sources. Then, the co-regulatory phenomenon occurs when Public Administration joins forces with other non-estate entities to implement and enhance regulation and orientations towards proper corporate governance, integrity, and welfare[111]. So, it is right to assume that:

> Attention is drawn to this new aspect of contemporary regulatory practice, namely, the convergence between state and non-state entities and agents, with the purpose of articulating interventional proposals to solve existing economic issues. Collaboration between state and non-state bodies in the establishment, organisation, and implementation of regulatory systems is presented as that particular element that characterises them as co-regulatory manifestations.[112]

Nonetheless, though the law is the primary source for corporate governance and integrity issues regarding State-Owned Companies, there are other normative origins from where governance requirements are harvested. Yet, state regulation has a strong effect on enterprises, and it could not be otherwise because law enacted from the competent State entity is compulsory binding. However, soft law regulation, or non-state regulation, can be as strong and produce effects due to its voluntary basis and consensual confection.

Both state and non-state regulatory systems have their importance and value and became indispensable: one completes the other. The first embodies the State powers whereas the latter embodies market technicalities—its objectiveness through specific matters appropriately treated according to the inherent peculiarities. We can say that there are regulatory checks and balances between the two systems.

110 Magalhães, Andréa (2018). A Regulação de Empresas Sob Controle Estatal: Há Regulação Relutante no Brasil? In Aragão, Alexandre S., Pereira, Ana Carolina M. and Lisboa, Letícia L. A. (Coord.), *Regulação e Infraestrutura* (pp. 109-139). Belo Horizonte: Fórum. p. 109.

111 Magalhães, Andréa (2018). A Regulação de Empresas Sob Controle Estatal: Há Regulação Relutante no Brasil? In Aragão, Alexandre S., Pereira, Ana Carolina M. and Lisboa, Letícia L. A. (Coord.), *Regulação e Infraestrutura* (pp. 109-139). Belo Horizonte: Fórum. p. 122.

112 Leite, Diogo L. de B. (2013). *Regulação Policêntrica: A Regulação Não Estatal como Alternativa à Regulação Estatal*. Master Thesis, University of the State of Rio de Janeiro, Rio de Janeiro, Brasil. p. 155.

This research addresses issues concerning regulation towards State-Owned Companies and how regulatory measures in the field of corporate governance and compliance are mandatory for these public undertakings, as well as how it can add value to them.

For that matter, State-Owned Companies are the addressee of the regulatory measures, and it means that the State plays two different roles that can bring conflicts: on one side there is the Entrepreneurial State subject to the state and non-state regulations, and on the other side the Regulatory State, which has the attribution to supervise, audit, and even punish the regulated entities.

The primary intention of regulation on state-owned enterprises is to prevent their political capture, avoiding conflicts of interest by keeping the roles played by the state in this area as far as possible; the controlling shareholder state—the state that forms public policies in its political dimension—and the regulatory state. The goal is the professionalisation of state-owned enterprise management combined with the greatest possible autonomy and independence from the government's the regulatory power. Andréa Magalhães[113] introduces the term *reluctant regulation* to refer to the formally independent and autonomous—albeit politically captured—regulatory power.

Through this *reluctant regulation*, Governments could obtain some advantages by establishing regulatory favours which can be described as state actions in favour of a regulated state entity in a variety of ways, such as granting more comfortable guarantees and financing, raising tariffs, and creating competitive barriers.

These regulatory favours can increase the State-Owned Company's profit by enhancing dividends to be received by the state. There will, therefore, be some leniency with inefficiency in the name of financial advantage, which at first improves profit and even attracts investors, because reluctant regulation emphasises the belief that the Entrepreneur-State is the ultimate guarantor of the state enterprise (after all, in this scenario, there is confusion among the roles of the shareholder, the manager, the entrepreneur, and the regulator) and will follow this path to achieve more gains. However, if the financial aspect predominates, meeting the public interest will be harmed.

Considering the Brazilian and Portuguese legislation on the subject, it is possible to add that this modality of regulation and the privilege of profit over public interest—when they should at least be at the same level—is illegal because the law states that the governance of state-owned companies must take into account the considerations of all stakeholders involved.

113 Magalhães, Andréa (2018). A Regulação de Empresas Sob Controle Estatal: Há Regulação Relutante no Brasil? In Aragão, Alexandre S., Pereira, Ana Carolina M. and Lisboa, Letícia L. A. (Coord.), *Regulação e Infraestrutura* (pp. 109-139). Belo Horizonte: Fórum.

However, under the ethical-legal postulates of isonomy, morality, and respect for the public interest, regulation must be effectively independent and depoliticised. The more so, the less political interference there will be and the clearer the compartmentalisation of state functions regarding state-owned enterprises and regulatory power. Thus, the state's presence in a company will be reduced to the legally described shareholder and controller functions.

Regulation aimed at state-owned enterprises should seek to clarify the various functions of the State since the government implements public policies and may even influence the market and its operation. Thus, these attributions must be clearly laid down by the law so that the stakeholders and the society are aware of the actions of the state.

That said, responsive governments, mindful of the various political and social segments, will accept and implement regulation as it should be; on the other hand, "the regulatory commitment is less credible, as political powers can more easily overturn administrative decisions".[114]

The regulatory powers over State-Owned Companies came from state and non-state regulations which can be designated as hard law and soft law, respectively. The fact is that regulation of State-Owned Companies is necessary because, alongside social pressure, it gives corporate governance and integrity the guidelines for those enterprises, imparting the sense that they are at the same level of other economic actors and are not in the Public Administration position to be self-sufficient and far from the administered.

III.4.2 – Hard Law

Being part of the public administration assigns the legality principle to State-Owned Companies; hence, the law is a primary source of corporate governance for State-Owned Companies. The Portuguese and Brazilian legislation regarding State-Owned Companies set the standards evidencing the stakeholder's primacy (Article 49 of the Portuguese Decree-Law no. 133, of 2013, and Article 27 of the Brazilian Law no. 13.303, of 2016, as seen in footnotes 87 and 88 of this dissertation, respectively).

The same norms concerning State-Owned Companies in both countries (Portuguese Decree-Law no. 133, of 2013, and Brazilian Law no. 13.303, of 2016) refer to the respective Corporate Laws of each nation: the ruling on corporate relationships between shareholders and management and between

114 Magalhães, Andréa (2018). A Regulação de Empresas Sob Controle Estatal: Há Regulação Relutante no Brasil? In Aragão, Alexandre S., Pereira, Ana Carolina M. and Lisboa, Letícia L. A. (Coord.), *Regulação e Infraestrutura* (pp. 109-139). Belo Horizonte: Fórum. p. 113.

those towards the company itself. Regulatory Agencies and its regulations are also part of this primary legal source once it, as well the law, in its formal sense, has the power to enforce penalties.

Among its various functions, corporate law has the power to bring State-Owned Companies to a corporative system in which they are not mere governmental entities. They become corporations—so, legal duties and controls are inherent to it, such as limitations to controlling powers, respect towards shareholder minority, external and independent audit, financial transparency and international accounting standards, the separation between management and supervision through a Board of Directors and a Supervisory Board, professional and depoliticised management, among other features.

Corporate law also has the power to establish rules for conflict resolution and agency costs between the different segments of the company's management. In this regard, the State, as a regular controlling shareholder, submits itself to the same law as all other shareholders. On the outset, it is necessary to add that both the Brazilian and Portuguese laws (Brazilian Law no. 13.303, of 2013, and Portuguese Decree-Law no. 133, of 2013) determine that the management of State-Owned Companies must rely on professionals of technical opinion and unblemished reputation; the shareholder is bound to that.

The controlling shareholder—the State—must act accordingly to the respective corporate laws when exercising the controlling powers; *i.e.* the State, when it is in the role of controlling shareholder of a State-Owned Company, does not have special powers, which are otherwise conferred on the Public Administration. The controlling shareholder should preserve the autonomy of management—after all, the law determines the behaviour that must be followed; that of appointing honest and professional managers, and, if so, the decisions taken may follow the same technical and ethical standards.

That autonomy may lead to conflicts, and the State, as a controlling shareholder, has the power to exercise a dominant influence[115] over the company as Portuguese legislation prescribes; differently, Brazilian law mentions the attributes to exert the so-called controlling powers. Dominant influence and exercise of controlling powers are legal concepts very much alike.

Brazilian Corporate Law – Law no. 6.404, of 1976, attributes in its Article 116 the duties of the controlling shareholder, and Article 117 establishes non-exhaustive clauses regarding the causes of controlling shareholder power abusiveness. The Portuguese Corporate Law, Decree-Law no. 262, of 1986, does the same in Articles 72 and 83. Both cited legislations propose it this way:

115 See footnotes 50 and 51.

Brazilian Law no. 6.404 of 1976[116]

Controlling shareholder duties

Article 116

A controlling shareholder is a natural or legal person or group of persons bound by a voting agreement, or under common control, who:

a) Holds the rights of a partner that permanently assures them of the majority of the votes in the resolutions of the general meeting and the power to elect the majority of the directors of the company, and

b) Effectively uses its ability to direct social activities and guide the operation of the company's organs.

Single paragraph. The controlling shareholder must use power to make the company realise its purpose and fulfil its social function, and has duties and responsibilities towards the other shareholders of the company, those who work in it, and to the community in which it operates, whose rights and interests one must loyally respect and heed.

Responsibility

Article 117

The controlling shareholder is liable for damages caused by acts committed with abuse of power.

Paragraph 1. The following are modalities of abusive exercise of power:

a) To guide the company for a purpose that is foreign to the corporate purpose or detrimental to the national interest, or lead it to favour another company, Brazilian or foreign, to the detriment of the participation of minority shareholders in the company's profits or assets, or the national economy;

b) To promote the liquidation of a prosperous company, or the transformation, incorporation, merger, or split of the company to obtain, for itself or others, an improper advantage, to the detriment of other shareholders, those who work in the company, or investors in securities issued by the company;

c) To promote changes to the bylaws, issuance of securities or adoption of policies or decisions that are not intended for the company's interest and are intended to cause harm

116 *Law no. 6.404 of 1976*. Corporate Law Regarding Public Limited Liability Companies. Retrieved October 28, 2019, from http://www.planalto.gov.br/ccivil_03/LEIS/L6404consol.htm.

to minority shareholders, those who work in the company, or investors in securities issued by the company;

d) To elect a manager or inspector known to be morally or technically unfit;

e) To induce, or attempt to influence, an administrator or a taxpayer to perform an illegal act or, in breach of its duties defined in this Law and the bylaws, to promote, against the interests of the company, its ratification by the general meeting;

f) To contract with the company directly, through another person, or through a company in which it holds interest, under favourable or unfair conditions;

g) To approve or induce to approve irregular accounts of administrators, as a personal favour, or to fail to investigate a complaint that they must know or should know, or that justifies suspicion of irregularity;

h) To subscribe shares, for the purposes of the provisions of Article 170, with the realisation in assets external to the corporate purpose of the company.

Paragraph 2. In the case of subparagraph and paragraph 1, the administrator or supervisor who performs the illegal act shall be jointly and severally liable with the controlling shareholder.

Paragraph 3. The controlling shareholder who holds the position of the administrator or fiscal officer also has the duties and responsibilities of the office.

Portuguese Decree-Law no. 262, of 1986[117]

Article 72

Responsibility of the members of management towards society

1. Managers or directors shall be liable to the company for damages caused to them by acts or omissions performed in breach of legal or contractual duties unless they prove that they have acted without fault;

2. The liability is excluded if any of the persons referred to in the preceding paragraph proves that they worked in informed terms, free from any personal interest and according to the criteria of business rationality;

3. Managers or directors who have not participated in, or voted overdue, are not equally liable for damages resulting from a collegial resolution, in which case they may draw up their

117 *Decree-Law no. 262 of 1986.* Corporate and Companies Law. Retrieved October 31, 2019, from https://dre.pt/web/guest/legislacao-consolidada/-/lc/34443975/view?p_p_state=maximized.

statement of vote within five days, either in the respective minutes book, either in writing to the supervisory body, if there is any or before a notary or conservative;

4. A manager or administrator who had not exercised the right of objection conferred by law, when he was in a position to do so, shall be jointly and severally liable for acts to which he could have objected;

5. The responsibility of managers or directors towards the company does not take place when the act or omission based on the resolution of the partners, even if annullable;

6 - In companies with supervisory bodies, the favourable opinion or consent thereof shall not free the members of the Board of Directors from liability.

Article 83

Joint liability of the partner

1. A shareholder (by himself or together with others to whom he is linked by shareholder agreements), who has the right to appoint a manager by virtue of the articles' provisions of association without all the partners deciding on such appointment, shall be jointly and severally liable with the company person designated by him, whenever he is responsible under this law to the company or the partners, and there is guilt in the choice of the designated person.

2. The provisions of the preceding paragraph shall also apply to legal persons elected for social office, concerning persons designated or represented by them.

3. The partner who, by the number of votes available to them (alone or through others to whom they are linked by shareholder agreements) has the possibility of electing manager, administrator, or member of the supervisory body, responds jointly with the elected person; the latter shall be guilty of choosing, whenever liable under this law to the company or its members, provided that the votes of that shareholder and the aforementioned have taken the decision and less than half of the votes of the other members present or represented at the meeting.

4 - A member who has the possibility (either by contractual arrangement or by the number of votes available to them, and alone or together with persons to whom they are bound by shareholder agreements) to remove or make manager, director or member of the board of directors redundant, to supervise and to use its influence to determine if a practice or omission has occurred. Nevertheless, if such member acts in complicity, then the same will

have to jointly and severally respond by its actions, incurring in liability to the company or partners, under the terms of this law.

The legislation's articles transcribed above define the controlling shareholder as the one who exerts a dominant influence on the company's management and strategies; the law also expresses the requirements of the dominant influence. Given those legal definitions, the exercise of control and dominant influence over a corporation finds its limits in the legal clauses concerning the abusive exercise of those powers. From the reading of the legal texts, corporate governance features impose those limitations, such as management professionalism and commitment towards corporation objectives and its binding duty on public interest.

Here, corporate governance is a crucial tool to grant healthy management regarding agency costs. It is a shareholders' right to elect pursuant legal and statutory commandments in the managerial body of the company. This right must encompass the duty to choose someone who will be a professional and honest manager committed to the company's best interests and the stakeholders' interests as well.

However, conflicts of interest could arise within this relationship among shareholders, managers, the company, and stakeholders, on behalf of the use of dominant influence or from its abuse. Thus, the exercise of dominant influence by the State—the controlling shareholder—must obey the legal command that State-Owned Companies which have the duty to be managed according to the public interest, to the requirements of maximum compliance with environmental laws, labour, consumers, among others, without the respect for the social function of the state company.

So, the controlling shareholder in exercising its dominant influence cannot deviate from such requirements under penalty of committing an abuse of influence and therefore being held responsible for it. As stated by Rui Pereira Dias in his work when he argues about the action of the controlling partner with regard to the abuse of the predominant position and the exercise of dominant influence: " Therefore, a functional understanding of which relevant actions should be valid in this context, bearing in mind any influence that, according to its nature and intensity, is adequate to determine the injurious action of the administrator, thus emphasising and asserting art. 83, no. 4".[118]

Hence, the act will be considered abusive and outside the limits determined by law whenever it deviates from the objectives imposed on the State-Owned Company and the governance requirements stipulated for its managers.

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118 Dias, Rui P. (2007). *Responsabilidade por Exercício de Influência sobre a Administração de Sociedades Anónimas - Uma análise de Direito Material e Direito de Conflitos*. Coimbra: Almedina. p. 101.

It's thereby worth to go back to this chapter's beginning when it is affirmed that corporate governance originates from the company and is implemented by the company and for the company (not only, but mainly). It is so because shareholders must comply with legal and ethical orders regarding the managers' nominations and towards the *ex-ante* commitments concerning public interest, transparency, efficiency, and professionalism.

This is due to the corporate governance and compliance programme having ethics and consideration of the interests of partners and other stakeholders as central metrics. Accordingly, corporate governance applies to both the company's external relations and to regulate acts and facts internal to it and its management.

Thus, the relationship of the partners with the company and its managers should be encompassed by the norms of corporate governance affirmed in the legal order as much as by regulations, contracts, and other rules, without sanctioning the now existing power. Therefore, the choice of managers by partners and the position of managers when implementing internal governance policies will be exercised by the dominant influence of the State (the controlling shareholder) which should observe the primary source of governance and integrity requirements that is the law—that is, abuse of the power of control will occur whenever the partners act contrary to, or tend to be contrary to, the assumptions of respect for the corporate purpose of the company, good and efficient management focused on environmentally responsible management aware of their role as employees, consumers, suppliers, financial markets, and lenders.

It can be argued that the legal provisions concerning the abuse of dominant influence serve to protect the company and its managers and to enforce good governance postulates. Considering that the social function of the company and respect for the public interest, the duties of proper public administration and environmental, consumer, labour, accounting, financial professional ethical behaviours, among others, are obligations that the shareholders and managers of the companies should have, this becomes especially significant dealing with State-Owned Companies given the component of the public law regime because they are present in the legislation. Likewise, it can be sustained that the duties of loyalty and care towards the company stipulated in the corporate laws of the countries under study are on the same level.

It is relevant to declare that dominant influence applies only to the relationships among shareholders, managers, and the company because, in this case, it is ruled by Corporate Law and State-Owned Companies law, as Rui Pereira Dias[119] shows:

> Still in the context of the question of whether dominant influence has a broader characteristic, as advocated by the prevailing doctrine the mentioned concept requires a more general understanding; although the legal concept requires generality in its applicability, it excludes from the definition a set of potentials dominant influencers, such as creditors, customers or suppliers; notwithstanding the importance that their conduct may have in determining corporate direction..., they will rarely have an influence on all corporate activity, and therefore we would (also) have to exclude the legal concept of dominant influence a priori from the instruments of non-legal-corporate domain.
>
> It must be verified at a teleological level if the corporate regulation provided for in the controlling relationship...is intended to protect the company or its shareholders from any harmful external intervention, as may be the case of a foreign influence resulting from a dependence conditioned by the market...
>
> This is clearly not the case, since the legal regime,...is manifestly intended to obviate the risk inherent to the interpenetration within corporate spheres, with the consequent possibility of instrumentalisation serving the interests of one another, and it absolutely does not concern extrinsic interference.

For that matter, it is essential to affirm that the dominant influence here is the one related to corporate relationships regarding shareholders, managers, and the companies' purposes. Although it is undeniable that stakeholders other than shareholders or managers exert dominant influence, this dominant influence is not the one expressed in the Corporate Law concerning how the controlling shareholder—the State—enforces its will at the general meetings and onto managers.

Nevertheless, the term is the same (dominant influence) but the nature of it is different. The dominant influence exerted by stakeholders outside the corporate relationship happens when the clients, lenders, stock exchange quotations, community, and environmental issues push the company into a situation or into a decision-making process.

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119 Dias, Rui P. (2007). *Responsabilidade por Exercício de Influência sobre a Administração de Sociedades Anónimas - Uma análise de Direito Material e Direito de Conflitos*. Coimbra: Almedina. p. 89-90

Thereby, this other type of dominant influence exerted by factors exogenous and foreign to the relationship between shareholders and company management can be understood as inserted in the list of secondary sources for the adoption and implementation of corporate governance and integrity programmes.

Through these important stakeholders interested in the company's destinies, the corporation may be compelled to adopt specific rules, standards, ways of acting, investing, and interacting with the environment and the community that, although not expressly written in the law, may constitute themselves in the public interest to be considered in that particular space and moment. It is so because, as the letter of the law has shown, it imposes the stakeholders' primacy for State-Owned Companies on the conduct of their businesses, and it cannot be denied that the influence of society[120] is an essential factor in the behaviour of people and the company.

Corporate governance, therefore, will feed from a source other than the law so that the postulates of attention to the public interest and the social function of the company are met. Moreover, here, the *comply or explain* principle is required because, as the law determines it, a State-Owned Company must always consider other stakeholders' interests in its decisions.

The decision-making process must also consider these interests, not only those of shareholders or managers. It should be noted that the law requires that this dominant external influence must be recognised and heard (within the requirements of responsive administration) but does not require such interests to be adopted. Of course, this balancing of interests should be guided by the company's perpetuity, its results, and the fulfilment of the public interest.

However, the duty to consider these other interests of these so-called dominant influencers remains undeniable, and corporate governance plays a prominent role because the interests that involve business (shareholders, managers, the market, financiers, employees, customers, the environment) must be weighed in a technical and professional manner, and the company should explain the reasons to choose one path or another taking into account the interests involved. There are, therefore, two dominant influences: one exerted by the controlling shareholder and one external to this corporate relationship.

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120 A short article published by Vera Cherepanova on the FCPA Blog, whose title is "'Social norms' are a powerful (and overlooked) compliance tool". In the article, the author explains how the social environment plays a significant role in the decision-making process. The author explains that our decisions are based on two systems. The first is called System 1, which is "intuitive, rapid, largely automatic, and driven by processes including habit, emotion, and social influence". The second is System 2, which is "slow, conscious, reflective, and most resembles what we think of as "rational choice". The author states that these two thinking systems are crucial to the decision-making process, and an "important consequence of the reliance on System 1 thinking is that we blindly follow the crowd and adopt their norms. Therefore, the environment within which we find ourselves plays a significant role in shaping our decisions and choices. This understanding stresses the importance of context and environment and re-gears the issue of unethical conduct away from 'good' or 'bad' individuals to 'good' or 'bad' systems in which individuals operate". Finally, the author mentions a study made in the United Kingdom to show how "the social norm message was almost twice as effective as the enforcement salience message", which means that social behaviour can be an effective instrument alongside the law to enforce desirable ethical behaviours. Retrieved November 13, 2019, from https://fcpablog.com/2019/11/12/social-norms-are-a-powerful-and-overlooked-compliance-tool/

The first, when considering a State-Owned Company, is governed by the corporate branch of law and is also bound by the duty to act in the public interest and those involved and implies remedies against the abuse of dominant influence.

The second type of dominant influence does not give influencers the right to litigate based on abuse of the controlling power of the company, but it does provide the right to demand the company to be managed taking into account the interests of the community. These outside influencers may, without better judgment, require the State-Owned Company to listen to them when their interests are at stake and satisfactorily explain to everyone why such a claim was accepted or not.

The OECD, in its guidelines for State-Owned Companies' corporate governance, deals with the matter which is crucial to a successful and committed corporation dealing with balancing the various interests that surround it. The law orders State-Owned Companies to take the stakeholders' interest into account and balance it with other interests. So, to be coherent with the duties of transparency, honesty, and implementation of public interest, State-Owned Companies must write down and publicise its policies towards stakeholders, as the OECD advises (the OECD guidelines should be embodied themselves by the State-Owned Companies as governance code):

> SOEs should acknowledge the importance of stakeholder relations for building sustainable and financially sound enterprises. Stakeholder relations are particularly important for SOEs, they may be critical for the fulfilment of public service obligations whenever these exist and as SOEs may have, in some infrastructure sectors, a vital impact on the macroeconomic development potential and on the communities in which they are active.
> Moreover, some investors increasingly consider stakeholder related issues in their investment decisions and appreciate potential litigation risks linked to stakeholder issues. It is therefore important that the ownership entity and SOEs recognise the impact that an active stakeholder policy may have on the enterprise's long-term strategic goals and reputation. SOEs should thus, in consultation with the ownership entity, develop and adequately disclose clear stakeholder policies.[121]

In this line of thought, corporate governance and the compliance programme within must encompass a disclosure of financial and non-financial situations within the company because, as

121 OECD (2015). *OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition*. Paris: OECD Publishing. Retrieved November 15, 2019, from http://dx.doi.org/10.1787/9789264244160-en. p. 20.

previously mentioned, State-Owned Companies are legally bound to the other parties' interests further than its shareholders, managers or employees. Thereupon, corporate governance must contain instruments so that the company can meet the interests of third parties in balance with the need to meet its corporate purpose and the interests of its shareholders.

These procedures, actions, and their results are measurable and auditable so that the company and its managers can prove that there is, effectively, attention to stakeholder interest in conducting business. In this regard, Muchlinski[122] states that:

> The activities of large corporations attract the attention not only of financial stakeholders but also of other groups and interests, the latter may require information of an order different from the contained in the firm's financial statements. Thus, according to Choi and Mueller, social disclosure or accounting 'refers to the measurement and communication of information about firm's effects on employee welfare, the local community and the environment. In contrast to traditional reporting methods, social responsibility disclosures embrace non-financial as well as financial performance measures. Social disclosure challenges the notion that a corporation is not responsible to the community at large for its actions. The demand for social disclosure places corporations in a position more like that of a provider of public services that must explain and account for its actions in the light of broad conceptions of the public interest.

Therefore, providing clear and qualified information on the subject becomes an essential rule for a company to be considered as fulfilling its obligations. The company must not only provide transparency, in the legal form and on the legal deadlines, its financial information, but must also make a social disclosure. Consequently, social disclosure provides itself proof that the company follows a large bundle of situations involving daily business life and the consequences of corporate activities and adopts measures to ensure that its corporate purpose is met, considering these externalities, vital as it is for the success of the company and its reputation within the community and the market.

Duties regarding corporate social responsibility, and honest, transparent, efficient governance, are thus a legal obligation, and their non-compliance leads to the civil liability of shareholders and managers for abuse of control and misconduct in heading the business in disagreement with the interests of the company and the public interest that justified the creation of the state-owned enterprise.

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122 Muchlinski, Peter T. (2007). *Multinational Enterprises and The Law* (2nd Ed). New York: Oxford University Press. p. 375

Hence, the exercise of control and management acts must be subject to the assumptions of corporate governance that must be implemented according to what the legal order expressly mandates regarding the obligation to respect the public interest and the primacy of stakeholder interest. Also, due to the globalisation of the economy, there may be losses or situations that exceed the boundaries of national jurisdiction leading to a company, its partners, and managers being sued abroad[123].

Regarding corporate governance and compliance programmes in State-Owned Companies—despite the fact that they are part of public administration, have private legal personalities, and are operating within the economy among other actors and competitors subject to the same legal framework—the law is not the unique source for governance; the market itself, the community, and other non-governmental entities have the legitimate interest in intervening in the process to improve governance, efficiency, and the quality of the service provided, so they design non-state and voluntary legal instruments, which are not initially binding, known as soft law.

III.4.3 – Soft Law

The law, which is the primary source and establishes a mandatory corporate social responsibility for State-Owned Companies, nearly obliges these enterprises to resort to secondary sources to implement and carry out its corporate governance and compliance issues; soft law derives its importance from this. Once more, Pedro Vicente's[124] (quoting Câmara, 2012) work collaborates to enlighten the subject:

> In the normative aspect, corporate governance has sources of different nature. On one hand, laws, in the formal sense and regulations; on the other, "soft law is equally relevant, as they involve social norms devoid of public sanction—deontological norms, recommendations and rules of good conduct,"...It is in this context that we find the codes of corporate governance, which are broadly defined as "the systematised sets of advisory nature concerning good corporate governance."

123 Petrobrás (the Brazilian Oil and Gas State-Owned Company and one of the biggest companies in Brazil, listed in Brazilian and American stock exchanges) case can confirm the assertion that international jurisdiction reaches claims based on a lack of corporate governance and compliance. The case is: American bondholders and shareholders sued Petrobrás in American and European, instead of Brazilian, Courts because of the company's lack of corporate governance and compliance programmes. The lack of corporate governance allowed several corruption acts within the company's management that caused severe losses to the American bond and share bearers. It shows at once that, on one hand, lack of compliance and corporate governance programmes are harmful to companies; on the other hand, the existence of those programmes, if well implemented and enforced, could attract investors and add value to the company. Retrieved November 13, 2019, from https://www.conjur.com.br/2019-set-06/tribunal-eua-confirma-homologacao-acordo-petrobras and from https://valor.globo.com/empresas/noticia/2018/09/20/justica-da-holanda-permite-acao-coletiva-contra-petrobras.ghtml.

124 Vicente, Pedro (2015). *Corporate Governance e Setor Empresarial Público em Portugal: Contributo Para um Normativo Regulador.* Coimbra: Almedina. p. 88, nn. 200-201.

The secondary source for corporate governance regulation lies in self-regulation instruments, which are, in general terms, known as soft law instruments. For that matter, the laws enacted by the legislative power do not suffice to build a secure, dependable and reliable legal framework concerning corporate governance, since the social dynamic is faster than the State's bureaucratic structures to respond to the social needs.

Moreover, the enacted legislation assumes that State-Owned Companies and the stakeholders around them—and for whom they must work—will write down self-regulatory rules pursuant the legal minimum standards encompassing ethical, behavioural, and social accepted norms to fulfil the need of proper corporate governance which is ethic, legally bound, and aimed at the public interest.

The term soft law refers to quasi-legal instruments which do not have legal binding force under a perspective, or whose binding force is somewhat "weaker" than the binding energy of traditional law, often contrasted with soft law by being referred to as "hard law".

Jacques Chevallier[125] offers a proper explanation about the soft law phenomenon, which gained prominence in the corporate governance field, mainly because it is a way to rise the stakeholders' interest and imprint it into the company's culture, turn them into internal regulations or contracts clauses in which standards of governance and integrity are agreed upon. It is a negotiated law instead of a mandatory law, hence the name soft law.

> A new conception of law, characterised by the reflux of the elements of coercivity and unilaterality (G. Zagrebelsky, 2001), has appeared in contemporary societies. Rather than resorting to traditional legal commands, one tends to appeal to softer techniques concerning a 'non-authoritative legal direction of conduct' (P. Amselek, 1982): the texts indicate 'objectives' that would be desirable to achieve, set 'directives' that should be followed, make 'recommendations' that would be well respected, but without giving them binding force; even if the norm exists, it no longer has an imperative character, and its application depends, no longer on submission, but on the adherence of the recipients.

Because the issue analysed in this work is corporate governance in State-Owned Companies, there are two concomitant branches: one concerning administrative law and all its binding force and power, and another regarding the corporate side, the private aspect assumed by Public Administration

125 Chevallier, Jacques (2009). *O Estado Pós-Moderno* (3rd Ed.). Belo Horizonte: Fórum. p. 166

once it goes entrepreneurial. The law is often monolithic, hard to change and quite slow to keep up with the necessary agility that business life demands.

Therefore, soft law instruments are a very efficient manner to make State-Owned Companies get down from the Public Administration pedestal to the plains where businesses are conducted, and services are provided. With this in mind, it is valid to affirm that "in systems of government the law is hard, in systems of governance the law is soft" [126].

As Ana Flavia Messa[127] imparts, the convergence of actors and interests favours more transparent governance and management towards expected accomplishments because it embraces the stakeholders and accepts their contributions, regarding their interests as well in the decision-making processes:

> The convergence of actors, social groups and institutions involved in public action with the aim of defining common goals, removing society from the adverse effects of the top-down tradition that has developed within the core of representative democracies, results from a democratic deepening based in premises committed to achievements beyond voting. In this context, as it is necessary to lead a democratic life in addition to establishing means for concretely exercising democracy, including the implementation of ends and results, the citizens' active participation in shaping and achieving the public interest is necessary.

In this path, soft law translates the implementation of a democratic public administration in the way that society, through its organised entities, enacts nonbinding rules, mainly due to social effectiveness because those norms address the citizens' ethical and efficiency wishes towards public interest and its concretization.

It is stated that soft law has no binding force. However, it is not entirely true because soft law does not have an innate compulsoriness as a law enacted by Legislative Power or by who has the legal competence to do so.

The law predicts every single one, even when it is not known; on the other hand, soft law instruments, although not naturally predictive, can become binding once one adheres to them. Soft law is a corporate governance instrument with which one chooses to engage voluntarily.

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126 Mörth, Ulrika (2004). Introduction. In Mörth, Ulrika (Coord.), *et al.*, *Soft Law in Governance and Regulation – An Interdisciplinary Analysis* (pp. 1-9 and pp. 198-200). Northampton: Edward Elgar Publishing. p. 1.

127 Messa, Ana Flávia (2019). Transparência no Âmbito da Administração Pública. In Carvalho, Maria Miguel, Messa, Ana Flavia and Nohara, Irene Patrícia (Coord.), *Democracia Econômica e Responsabilidade Social nas Sociedades Tecnológicas* (pp. 7-34). Braga: Escola de Direito da Universidade do Minho. pp. 19-20.

Despite the lack of binding force, soft law conditions the performance of management—and, therefore, of State-Owned Companies—whether it voluntarily adheres to such regulations or when the activity itself requires compliance with such rules. The conditioning exists and it is so relevant that the non-observance of these non-legal rules can give rise to the manager's responsibility for omitting the duty of care, as already exposed in this work.

It is even relevant to state that the duty of care, required by the corporate law, translates into a management based on technical, auditable, procedural, and publicised arguments, nevertheless they must not disregard these quasi-legal rules since their objective is the specific regulation activity, its relationship with stakeholders and even with corporate governance. Obedience to such non-legal rules together with the law, as Pedro Costa Gonçalves[128] clarifies, results from a "duty of good administration."

For instance, once a company or even a person complies to a soft law instrument (*e.g.* a Stock Exchange Listing Code of Governance), they publicly state this engagement on that system, so this soft law rules became binding to those who agree to comply with that specific soft law. Therefore, soft law does not have the same binding power of law; to bind a company, a soft law instrument (governance code, integrity code, environmental commitment, etc.) must be accepted and internalised by it, regarding the procedures in force. Mona Aldestam affirms that soft law sets up "rules of conduct with no legally binding force (but) are often politically binding which sometimes leads to legal effects"[129].

When a State-Owned Company adheres to a soft law commitment, it is bound to the rules within. There is a contractual aspect involved because there is an offer made by the organisation that produced the soft law instrument, the acceptance, the intention to create legal relations, the capacity, and the formalities.

The engagement rationale expresses that, in good faith and under a proper business judgement assessment, nobody hires unless that brings some benefits; of course, there will be onuses, such as costs with new procedures, personal and training, so forth. Therefore, one hires expecting yields and looking to fulfil some obligations and duties.

Thus, it is neither ethical nor legal to adhere to a commitment under the soft law system expecting to be rewarded by the initiative, and at the same time does not make sincere and effective efforts to achieve the foreseeing goals. So, soft law is binding and, as a contract, it is not wrong to affirm that the instrument agreed upon should have some penalty clauses for the faulty adherent.

128 Gonçalves, Pedro Costa (2019). *Manual de Direito Administrativo – Vol. 1*. Coimbra: Almedina. pp. 192-193.

129 Aldestam, Mona (2004). Soft Law in the State Aid Policy Area. In Mörth, Ulrika (Coord.), *et al.*, *Soft Law in Governance and Regulation – An Interdisciplinary Analysis* (pp. 11-36). Northampton: Edward Elgar Publishing. p. 17.

It is worth to recall the lesson from Göran Ahrne and Nils Brunsson[130] on soft law binding force:

> The concept of binding may at first glance seem to relate to the rule followers and their chances of avoiding compliance, but in fact the concept is used to describe the situation and activities of the rule setter. Soft law is issued by rule setters who do not have the right to formulate legally binding rules, or by rule setters who have that right but choose not to exert it.

A question regarding the legitimacy of soft law then arises. This happens because, after all, soft law instruments, as a rule, are issued by those without legislative competence. Soft law, most of the times, comes from civil society organisations and entities.

Being bold, we can affirm that it is like a form of direct exercise of legislative power from civil society without the direct intervention of the State. In this case, the notion conveyed by Ulrika Mörth[131] is valid given that leap from "government by the people" (through elected representatives) to "government of the people" occurs through soft law.

Ana Flavia Messa[132] corroborates the self-made regulation in collaboration with State regulation as a consequence of an open and transparent public administration that urges societal participation:

> The final proposal for the transformation of Public Administration—carried out in administrative reforms, proposing the adoption of good administration—is the need for an Open Public Administration, with a broader view of the emancipatory role of the citizens, in order to encourage interference and the society's control over fundamental administrative decisions.
>
> In order to achieve this "collective capacity" of the Public Administration to achieve public results and be responsive to the wishes of citizens, it is necessary to develop an open way of conducting public management. For this purpose, transparency is the attribute of

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130 Ahrne, Göran and Brunsson, Nils (2004). Soft Regulation from Organizational Perspective. In Mörth, Ulrika (Coord.), *et al.*, *Soft Law in Governance and Regulation – An Interdisciplinary Analysis* (pp. 171-190). Northampton: Edward Elgar Publishing. p. 171.

131 Mörth, Ulrika (2004). Conclusions. In Mörth, Ulrika (Coord.), *et al.*, *Soft Law in Governance and Regulation – An Interdisciplinary Analysis* (pp. 1-9 and pp. 198-200). Northampton: Edward Elgar Publishing. p. 198.

132 Messa, Ana Flávia (2019). Transparência no Âmbito da Administração Pública. In Carvalho, Maria Miguel, Messa, Ana Flavia and Nohara, Irene Patrícia (Coord.), *Democracia Econômica e Responsabilidade Social nas Sociedades Tecnológicas* (pp. 7-34). Braga: Escola de Direito da Universidade do Minho. pp. 16-17

administrative action that can improve the dialogue and interaction between the Public Administration and the society.

The societal interference in State-Owned Companies through non-state regulation, resorting to self-regulatory rules is, at the same time, the cause and consequence of the public administration's openness because since there is acknowledgement about matters regarding public administration and its challenges, more solutions can arise from this transparency—and from transparency, accountability and outcome, scrutiny arises too.

Therefore, it can be an efficiency gain on corporate governance matters because groups, organisations, and entities from civil society or even from governmental sources or policymakers produce more specific and more objective rules aimed more directly at the stakeholders' interests and always regarding an ethical presuppose. That way, soft law appears to be a more accomplishable rule because it targets the same subjects that made the norms.

For example, a particular stock exchange enacts a corporate governance code that every company which wishes to be listed there must adhere to and strictly follow. There are mutual interests encompassed: on one hand the companies that want to be listed and are eager for investments; on the other hand, the stock exchange, which is a company itself, wants more profit, more market share and volume, looking to achieve it by enhancing transparency and confidence.

The stock exchange is a corporation which will be subject to the code that it, itself, imposes on the listed companies. There is a professional understanding about the financial markets, the corporate and business world, and the rules towards share and bond market participation, shareholders' rights, corporation duties, and so on, will be more accurate. There is an increase in legitimacy and enforceability because the norms are produced by the markets' actors towards them. This way, Abel Sequeira Ferreira[133] shows that:

> When one reflects on corporate governance, one thinks of issues related to the economic system, the characteristics of the capital market, and the corporate culture of each state. In most respects, this is due to the concern with phenomena of cultural change, mentality and business behaviour; the assimilation of which will be all the more successful if it is voluntary.

133 Ferreira, Abel S. (2018). A Soft Law e a Juridicidade dos Códigos de Governo das Sociedades. *Revista de Direito das Sociedades, No. 1* (pp. 181-227). pp. 199-200.

Therefore, when based on a full consultation and discussion process, the process of drafting the recommendations should seek to accommodate the broadest possible contributions in order to capture all the sensitivities and respect the specificities of the debate in relation to each legal and economic order.

Moreover, soft law is not a denial of hard law—as Ferreira[134] states, "soft law is law, a different law, but still law". In legal systems, such as the Brazilian and Portuguese ones, every document, contract, rule, or statement must be pursuant to the legal framework in force in order to be valid; otherwise, it will be illegal and surely non-binding.

The Brazilian Securities Exchange Commission—the market regulator (Comissão de Valores Mobiliários - CVM)[135]—goes further and enumerates some advantages of adopting soft law tools on the corporate governance field on a voluntary basis alongside with proper law (perhaps by social requirement).

It is possible to affirm that the full adoption of corporate governance, which rules on a voluntary basis (perhaps by social requirement), may have better practical effects on the implementation of a compliant and accountable management. On account of soft law rules being designed by the same group of people, institutions or corporations which these same laws regulate, the *pacta sund servanda* principle will legitimise the compliance to the voluntary regulation. Thus, the level of obedience to these voluntary regulations may be higher once its own legitimacy and credibility lies on volition to abide by them.

Soft law in corporate governance field is an essential instrument to implement and materialise ethical standards of proper and righteous management, leading to a positive business and enhancing the scenario.

This is relevant because stakeholders, clients, and suppliers can—and should—demand transparency regarding the company's accountability the legal eco-friendly environmental situation; in the case of State-Owned Companies, they may even demand less governmental influence by asking for more independent managers committed to the stakeholders' interests.

134 Ferreira, Abel S. (2018). A Soft Law e a Juridicidade dos Códigos de Governo das Sociedades. *Revista de Direito das Sociedades, No. 1* (pp. 181-227). p. 200.

135 CVM-Comissão de Valores Mobiliários (2017). *Direito do Mercado de Valores Mobiliários* (1st Ed.). Rio de Janeiro: Author. Retrieved December 16, 2019, from https://www.investidor.gov.br/portaldoinvestidor/export/sites/portaldoinvestidor/publicacao/Livro/Livro_top_Direito.pdf. p. 187

III.4.4 – The Relationship of Hard Law and Soft Law With Each Other and With State-Owned Companies

Having established those two branches as sources of corporate governance (formal law and regulations in one hand, and soft law on the other) this dissertation will now analyse the main aspects of those two complementary sources, how they relate to each other, and how they impose corporate governance requirements on State-Owned Companies.

Professor Pedro Costa Gonçalves[136] considers the respect for soft law instruments a good practice that stems from administrative law authorisation as a way to ensure a responsive public administration which must adopt and follow those rules towards an administration that is more transparent, accountable, and grantor of public interest:

> In simple terms, we have, therefore, a requirement placed by the legal order for the Administration to comply with and consider criteria outside the law, non-legal, criteria of good administration. A blend is thus present, a contact between the legal and the non-legal, between legality and merit.
> This interconnection—which results from a legal rule imposing the respect for a non-legal rule—seems to consider as a legal devaluation the fact that the Administration does not manage well, ignoring good practices and precedents with good results, codes of conduct, ethical and moral standards, as well as not following the input of opinions that it decides to collect, or having an untimely or inconvenient performance.

To be integrated into the State-Owned Companies, corporate governance and compliance programmes originate from the company and are implemented by the company and for the company, paraphrasing Abraham Lincoln and his famous *Gettysburg Speech* during the American Civil War (which stated that governments come from the people, are managed for the people and by the people). So, the OECD's recommendation to State-Owned Companies to adhere to governance codes or regulations is essential. In this regard, the international organisation guides the adoption of integrity and governance codes, assuming them as binding as laws, even when they are not:

136 Gonçalves, Pedro Costa (2019). *Manual de Direito Administrativo – Vol. 1*. Coimbra: Almedina. pp. 198-199.

> Most countries have corporate governance codes for stock-market listed enterprises. However, their implementation mechanisms differ significantly, with some being merely advisory, others being implemented (by stock markets or securities regulators) on a comply-or-explain basis, and yet others being mandatory. It is a basic premise of the Guidelines that SOEs should be subject to best practice governance standards of listed enterprises. This implies that both listed and unlisted SOEs should always comply with the national corporate governance code, irrespectively of how "binding" they are.[137]

The OECD's recommendations themselves can be described as soft law regulations as well, and although they are not previously binding, the adhesion to these recommendations is favourable given that the directives on corporate governance are in accordance with the best practices and States and Companies embrace them in a co-regulatory system where the public interest is pursued.

It means that it is the company itself, through its competent bodies, that decides to implement such programmes to have binding force and validity in its internal and external legal relations and business, aiming at the ethical and legal conduct of it. However, the statement brings with it a considerable abstraction because the company, as conceived in the legal systems around the world (the Brazilian and Portuguese cases being no different), is a legal fiction, a creation of Law to characterise and confer legal nature and personality to the combination of efforts by various individuals (individuals and corporations) to form a productive arrangement to sell goods and provide services with profit purposes. It is the people—the partners, the managers—who give life to the company, who set its course, without forgetting the employees, suppliers, customers, and the community.

That said, managers are the human face of the company, because they are the legal representants of the corporation and must do what is better for the enterprise. Moreover, under law and statute, they have the tricky function of balancing the interests of the partners with those of other interested parties in order to, in the case of State-Owned Companies, make a profit or avoid losses and satisfy the public interest to which it is linked.

Thus, the definition of the corporate governance and integrity programme requirements goes through the legal commandments and other rules to which the companies' directors and shareholders are bound. This set of rules, state and non-state ones, can be called regulation, as asserted before.

137 OECD (2015). *OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition*. Paris: OECD Publishing. Retrieved November 15, 2019, from http://dx.doi.org/10.1787/9789264244160-en. p. 54

The law acknowledges and predicts the high relevance of the stakeholders' primacy in corporate governance. That leads to the assumption that this stakeholder's primacy makes State-Owned Companies embody and implement some governance features from a source other than the law—as mentioned before, the soft law source.

Social pressure (the effective pursuit of quality public service to be provided by a company that has transparent, responsive, and accountable management) is causing State-Owned Companies to adhere to voluntary and self-regulatory systems.

For this reason, in addition to the laws issued by the state, which alone can no longer perform their conforming power, social dynamics end up using private self-regulatory instruments, which depart from the minimum provided for laws issued by the legislature to deepen governance standards in order to deter or mitigate corruption, to impose efficiency, and also to enhance and enforce the respect for the interests that surround any companies today (interests related to the environment, consumers, workers, among others). In this regard, it is crucial to understand the subject through Marcílio Barenco Corrêa de Melo's[138] eyes:

> Regarding this, we are not talking about elements of 'escape' to Private Law under the justification of Public Law being an obstacle to the effective control of deceptive conduct. We are facing a reinforcement solution, endowed with impersonality and transparency, leading to a previous state of protection of trust...From the success, speed, and efficiency of neophyte private market self-regulation techniques, the theory was a new source of autonomous law ('mini-systems of collective government') was born, which meets the creation of market and public interest protection.

Whereas state-owned enterprises contain a high level of private and public law elements in their creation, existence, and administration, self-regulatory instruments that reinforce the content of formal law are adopted to complement and deepen ethical and market commitments in order to demonstrate the integrity of its purposes and actions by means of transparent, honest, and efficient business management looking to tend to the public interest without neglecting the relevant financial issues.

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138 Mello, Marcílio B. C. de (2018). *Os "Selos de Integridade": Uma Perspectiva de Boa Prática no Sistema Anticorrupção do Direito da Contratação Global.* Article, University of Minho, Braga, Portugal. pp. 12-13

Business done without corruption costs less because it avoids overpricing and enhances trust, which leads to lower credit price levels and increases the company's reputation among stakeholders due to the fact that corporate's commitment to fairness, proper management and transparency becomes concrete.

Besides, it is crucial to assert that, to be enacted, formal legislation demands a slow legislative procedure subject to several externalities; so, the blackletter of the law should and must be limited to a minimum and more critical standards because the legislation can't keep up with the market's and even society's changes.

Thus, soft law instruments are complementary to law and detail it; moreover, they are simpler and faster to be updated in time to adapt to the market changes. On this path, for the Brazilian Securities Exchange Market Regulator[139] (CVM - Comissão de Valores Mobiliários) soft law instruments are essential for corporate governance alongside proper law. In the Regulator's words, it is so due to:

> In this system, state regulators usually edit norms of a more general nature, pointing out the bases of regulation and looking to standardise the behaviours that, in the regulator's understanding, are more relevant to the proper functioning of the market. As it should be, state regulation is subjected to more significant formalities and, therefore, is not always able to immediately follow the changes in the market. It is commendable the position of the state regulator that avoids going into specific and detailed standards, which can quickly suffer alterations, and need frequent updates....
> Sharing regulatory activity with private actors is understood to reconcile regulatory objectives with the liberal idea of market efficiency. Delegation of part of regulation offers a regulatory balance that maintains the essential benefits generated by competitiveness while the possibility of increased levels of regulation maintains the integrity and pursuit of regulatory objectives to correct what has been universally called failures of the market.

Soft law instruments such as those demanded by lenders in loan agreements require the maintenance of covenants and impose a financial cost to do so (the better the governance, the cheaper the loan); the stock exchanges also require management and integrity standards for stock market listing[140]:

139 CVM-Comissão de Valores Mobiliários (2017). *Direito do Mercado de Valores Mobiliários* (1st Ed.). Rio de Janeiro: Author. Retrieved December 16, 2019, from https://www.investidor.gov.br/portaldoinvestidor/export/sites/portaldoinvestidor/publicacao/Livro/Livro_top_Direito.pdf. pp. 185-186

140 As seen in the Brazilian Stock Exchange State-Owned Companies' certification programme. Retrieved December 17, 2019, from http://www.b3.com.br/pt_br/b3/qualificacao-e-governanca/certificacoes/programa-estatais/

clients expect the service to be well rendered and respectful towards consumer rights and the environment, and at fair price.

Self-regulatory rules and parastatal behavioural norms are an advance statement the state enterprise might embody and they work in addition to legal duties as an asset because they contain recommendations, standards and duties with moral and professional burdens, that deepen the commitment towards legality, morality, and efficiency in management which will translate into value addition to the State-Owned Company.

III.4.5 – Actual Soft Law Instruments

Beyond the fact that State-Owned Companies are subject to Corporate and Administrative Law, the legislation towards these public enterprises in Brazil and Portugal has carried corporate governance instruments and encouraged the adoption of legal tools that broaden the concept, so that state-owned enterprises can be managed with minimal political interference, with efficiency in the implementation of public policies, and tangibly pursue positive financial and non-financial results, bearing in mind the stakeholders' interests.

Thus, State-Owned Enterprises can, and should, adhere to non-state public regulatory programmes. Such programmes can be found in Brazil and Portugal and—to cite only the most relevant—it is possible to mention the Governance Codes of the Portuguese Institute of Corporate Governance (IPCG Instituto Português de Corporate Governance) and its Brazilian counterpart, the Brazilian Institute of Corporate Governance (IBGC – Instituto Brasileiro de Governança Corporativa).

Even the IPCG Code of Governance was adopted by the CMVM (Comissão do Mercado de Valores Mobiliários), the Portuguese capital market regulator, and should be adopted not only by listed companies, but also by those that are not but which seek to respond concretely to the social outcry for socially responsible companies.

Alongside this Governance Codes, and pursuant to them, the corporations are urged to enact codes of conduct to reinforce the commitment to ethical and transparent behaviour of the company and of its employees and managers; these codes of conduct are an instrument for corporate governance and compliance:

> If we are dealing with unethical, abusive, fraudulent and in-breach established competition principles, the company may initially make a short-term profit; however, confidence will be

lost, the customer will prefer competitive products, and investors will choose other investment strategies and then recuperate their image. Public opinion will prove to be a much more difficult, if not almost impossible, task. To minimise the occurrence of such situations as well as conflicts with the ethical principles and values which are defended by the organisations, it is common to see the creation of internal codes of ethical conduct[141].

The more the State-Owned Companies intertwine in the economy, the more transparency and integrity will be demanded from them. A primary confirmation of that assertion lies on the fact that when a State-Owned Company goes public—*i.e.* when part of its capital becomes negotiable in the stock exchange market—the commitment towards corporate governance increases.

This happens because the Company must adhere to rules and regulations in order to be listed in the stock exchange market and, depending on the level at which the company is listed, there is a higher requirement to implement compliance and governance mechanisms.

An excellent example comes from the Brazilian Stock Exchange – The B3 (Brasil, Bolsa, Balcão SA) with the so-called *Novo Mercado*, Level 2 and Level 1 of listing. The regulation[142] sets up several obligations for listed companies, such as management depoliticisation, transparency, integrity, stakeholders' primacy, respect towards minority shareholders or independent and professional members of the board.

Furthermore, the regulation is voluntary, but once the Company adheres to it, it becomes binding, and even subjects the enterprise to penalties and liabilities. There is an inherent legal force to the soft law. Moreover, the B3 has a certification programme, an integrity seal, for State-Owned Companies: it presents four main lines of action towards proper governance: "(i) disclosure and transparency, (ii) internal control structures and practices, (iii) composition of management and Fiscal Council, and (iv) commitment of public controllers"[143].

Dina Ramji[144], in his work, clarifies the rationale behind the creation of this listing levels regarding corporate governance status of the Companies which are in (or want to enter) the stock exchange market. This work corroborates the present dissertation inasmuch it is observed that soft law instruments are more easily created, are tailor-made, and have a practical efficiency that comes from its

141 Barreios, Filipe (2018). Ética Empresarial e Responsabilidade Social: Desafios, Perspectivas e Contributos da Corporate Governance. In Pinto, José C. (Coord.), *et al.*, *A Emergência e o Futuro do Corporate Governance em Portugal - Volume II do Instituto Português de Corporate Governance* (pp. 153-178). Coimbra: Almedina. pp. 157-158

142 Retrieved January 15, 2020, from http://www.b3.com.br/en_us/regulation/regulatory-framework/listing/

143 Retrieved January 15, 2020, from http://www.b3.com.br/en_us/regulation/regulatory-framework/listing/

144 Ramji, Dina (2011). *A Governança Corporativa nos BRIC: A Sua Influência no Desempenho dos Mercados Acionistas.* Lisboa: ISCTE. Retrieved October 15, 2019, from http://hdl.handle.net/10071/4157. pp. 32-33.

voluntariness on adhesion and the gains on reputation and value. It is a market-made soft law instrument for corporate governance and compliance, to ensure better value through transparency and accountability of adherent companies.

> The primary motivation for the origin of the New Market, announced in December 2000, was that Bovespa[145] was able to manipulate instruments and use them to achieve less dependence on the evolution of the institutional conditions of the Brazilian market. This New Market implies adherence to a set of rules that extend shareholder rights and the adoption of a disclosure policy comparable to those of the world's most developed markets. The practice of good governance in institutions appears as a mechanism capable of providing greater transparency to all agents involved, minimising the information asymmetry between directors and shareholders, and allowing non-management shareholders to reduce their losses. A change of this magnitude in the capital structure of companies is not simple for those already listed on Bovespa. The differentiated levels of corporate governance 1 and 2 were created to ensure that all companies—listed and unlisted—would be able to climb to the level of corporate governance required by the market today. Level 1 seeks to ensure greater transparency in disclosure, while Level 2 requires companies to adhere to all obligations under the New Market regulation. The binding of companies, their managers, and their shareholders to these additional commitments occurs through a contract with Bovespa, which also assumes the task of overseeing and ensuring the consolidation of the rules established in the regulation. To complete this structure, the Market Arbitration Chamber was established, through which conflicts can be resolved quickly, accurately, and economically. The basic premise of the Novo Mercado is that the investors' reduced perception of a market's risk positively influences the appreciation and liquidity of the shares. In this case, the perception of lower risk is due to the rights and guarantees granted to the shareholders, and the reduction in information asymmetry between company directors and market participants. A more appropriate pricing/stock price, in turn, stimulates capital openings and new issues, strengthening the stock market as a financing alternative for companies and helping to bring together the interests of entrepreneurs and investors. The greater transparency proposed by Governance pursues a reduction in the cost of capital, as creditors will have greater credibility in the company's data, and shareholders will be willing

145 Bovespa was the former name of B3-Brasil, Bolsa, Balcão SA.

> to invest if they believe that the controlling group or manager will not be able to manipulate the information on its own advantage. In the end, this New Market and Levels 1 and 2 resulted from the attempt to bring investor demand closer to companies. In the good governance practices established by Bovespa, moving to a higher level of governance increases the degree of security offered to shareholders, as well as improves the quality of the information provided by companies. The expected result would be lower stock volatility and above-average market returns. In establishing governance levels, the Bovespa intended that the criteria determined for the different levels maintained a strong correlation with the appreciation and the lower volatility of the shares.

The regulation—both state and compulsory and non-state and voluntary—imposes and induces behaviour. Both forms of regulation provide for sanctions for companies with managers' civil liability. Due to the inductive and enforceable aspects, companies must implement, comply with and enforce a concrete and effective corporate governance, translated into acts of transparency, with accountability based on the decisions taken, mainly because it concerns to State-Owned Companies, whose legal rigour is more demanding than in relation to private companies. After all, they primarily seek public interest; however, this pursuit of public interest must always be reasonable, proportionate and considering of the perpetuity of the state enterprise and its financial and social sustainability.

Regulation is, therefore, a way of inducing and leading the entrepreneurial state towards integrity, aiming to surrender the public interest linked to the state enterprise. In this regard, reluctant, politically captured state and non-state regulation is a problem to be addressed as it targets the secondary public interest and not the primary public interest.

By indicating the pursuit of professional and depoliticised management, transparency as a principle, and accountability with explanations and consequences, regulatory instruments make it reasonable to assume that corporate governance will positively reflect on the value of state-owned enterprises. In her study, Andréa Magalhães[146] cites the OECD's conclusions:

> Due to the relevance of State-Owned Companies in strategic sectors, such as infrastructure and utilities, more efficient and competitive administration has advantages for the entire economy of the country, for other enterprises, and for a large part of the population. State-

146 Magalhães, Andréa (2018). A Regulação de Empresas Sob Controle Estatal: Há Regulação Relutante no Brasil? In Aragão, Alexandre S., Pereira, Ana Carolina M. and Lisboa, Letícia L. A. (Coord.), *Regulação e Infraestrutura* (pp. 109-139). Belo Horizonte: Fórum. p. 122.

owned enterprises represent a substantial share of gross domestic product, employment, and the capital market.

It is essential to mention another element of soft law which is crucial for corporate governance: the loan and financing agreements, debentures and other financial instruments. State-Owned Companies, as a rule, have private personality and should be non-dependent form Public Budget; in other words, State-Owned Companies should live by their own income, from fees, investments, and so on.

Hence, State-Owned Companies are authorised to resort to loans and other forms of public financing. Considering that banks have strong governance and compliance, regarding strict legislation that aims to protect the world's financial and banking systems, lend contracts have clauses with financial, transparency, regulatory and accountability covenants. It is another way to affirm that corporate governance is mandatory for State-Owned Companies and, yet, they can benefit from it because transparent management and clear financial disclosures can lower the financial costs of a loan.

Therefore, regarding those regulatory instruments (be their source state or non-state), soft law and hard law are critical for corporate governance. The regulatory rationale must encompass the features of proper governance, and the regulatory agency and the regulated entities must be professional and depoliticised because the quality of political institutions affects the value of the state enterprise.

So, the more independent and technical the regulatory agency, the more responsive, transparent, accountable, result-oriented and professional State-Owned Company it will induct; for that, the public corporation must be open to the stakeholders and accept their contributions and demands to be as necessary as the shareholders'; a balance and interest ponderation will thus take place in the decision-making processes building the outcomes related to the public interest combined with financial results.

In this regard, "where regulatory agencies are expected to act independently, the market awards a premium for reducing regulatory uncertainty due to increased regulatory commitment"[147], which means that a well exerted regulatory power can translate into a proper corporate governance—in other words, whereas the State keeps its roles parted (regulatory in one side and entrepreneur in the other), the possibilities for a valued State-Owned Companies increase, enabling to ascertain that State-Owned

147 Magalhães, Andréa (2018). A Regulação de Empresas Sob Controle Estatal: Há Regulação Relutante no Brasil? In Aragão, Alexandre S., Pereira, Ana Carolina M. and Lisboa, Letícia L. A. (Coord.), *Regulação e Infraestrutura* (pp. 109-139). Belo Horizonte: Fórum. p. 114.

Companies subjected to an independent regulatory agency performed on average 15% better than private competitors.[148]

III.5 – Corporate Governance and How It Adds Value to State-Owned Companies

Compliance and corporate governance programmes are required to deal with all the influences over State-Owned Companies, rights and duties, and legal and non-legal forms of conduct, to set up parameters and procedures for the corporation's managerial body so that they should manoeuvre in this imbricate environment.

Thus, corporate governance is mandatory for State-Owned Companies due to the Brazilian and Portuguese Constitutional requirements of legality, efficiency, honesty, transparency and the pursuit of public interest as a significant finality.

Moreover, the specific legislation on State-Owned Companies determines that the management must act and produce results pursuing the stakeholders' interests. To balance those interests and to make sure that the management will conduct a decision-making process as transparent, professional, and outcome-oriented as possible, corporate governance plays a significant role by setting up clear procedures that allow control, monitoring and accountability to pursue the two main objectives of State-Owned Companies: the financial and non-financial ones, *i.e.* to seek public interest obtaining profit or enduring no losses, always with ethics standards as guidelines.

After all, the public expects the best possible service at the lowest possible cost; furthermore, the State-Owned Company is not meant to harm the public budget: it exists to alleviate it.

Adding to that, the disclosure of policies, as a transparency aspect, became a relevant tool to run businesses because it sets up strategies, planned investments and expected results beforehand; it also unveils the financial outcomes, the way the relationship between profit and public purpose should be balanced if a conflict arises, the way stakeholders' interests should be addressed, agency costs, among other situations. The rules are previously known and thus there can be more clients and market confidence in the company due the perception of a strong corporate governance system. Ana Flavia Messa[149] reinforces the subject matter by showing the importance of transparency in public administration and its reflexion over corporate governance over State-Owned Companies:

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148 Magalhães, Andréa (2018). A Regulação de Empresas Sob Controle Estatal: Há Regulação Relutante no Brasil? In Aragão, Alexandre S., Pereira, Ana Carolina M. and Lisboa, Letícia L. A. (Coord.), *Regulação e Infraestrutura* (pp. 109-139). Belo Horizonte: Fórum. p. 111.

149 Messa, Ana Flávia (2019). Transparência no Âmbito da Administração Pública. In Carvalho, Maria Miguel, Messa, Ana Flavia and Nohara, Irene Patrícia (Coord.), *Democracia Econômica e Responsabilidade Social nas Sociedades Tecnológicas* (pp. 7-34). Braga: Escola de Direito da Universidade do Minho. pp. 17-18.

More than an objective or parameter of state action, administrative transparency is an actual state obligation that generates citizens' trust in the State, an instrument for conducting public affairs and realizing fundamental rights, in addition to results that demonstrate administrative efficiency, strengthening popular participation, and enabling social control over public administration.

Transparency, though, cannot be an excuse for inefficiency, it is not an end in itself; transparency must be a powerful instrument that allows control and monitoring on one side and accountability on the other side. When the stakeholders are aware of and participate in the decision-making process relying on its professionalism, the confidence in the company increases. In the same degree, the corporation's reputation enhances, which has a significant effect on the company's value.

It is important to mention that there are State-Owned Companies listed in the stock exchange in Brazil and in Portugal, whose shares or other securities are on the market subjecting such companies to the respective regulatory entity. Given that these State-Owned Companies are in the stock and bond markets, a crucial factor to gauge the value gain over existing corporate governance is whether higher levels of transparency and accountability increase the liquidity of these securities.

A compliant company must not experience a share price increase because other factors contribute to that; however, lack of corporate governance and non-compliant conducts may arise as important factors to decrease the share prices or to raise the business' risk of facing liabilities, fines, and even of a severe public relations crisis, by cause of a non-compliant conduct from a wrong corporate governance regime. So, "although compliance costs have increased in recent years, over the years, costs for 'non-compliance' can be much higher for an organisation; they may lead to hefty fines, regulatory sanctions or liability, and loss of reputation"[150].

Thus, corporate governance increases the possibility of valuing the company because transparency, public interest, the centrality of the citizens and accountability are the management's cornerstone, they translated into confidence, efficiency, and risk reduction.

Moreover, as State-Owned Companies (an extension of the Public Administration), their acts must be legitimised by the public interest by considering the stakeholders' interest and providing proper service in accordance with the community demands, professional, and financial justifications.

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150 Barreios, Filipe (2018). Ética Empresarial e Responsabilidade Social: Desafios, Perspectivas e Contributos da Corporate Governance. In Pinto, José C. (Coord.), *et al.*, *A Emergência e o Futuro do Corporate Governance em Portugal - Volume II do Instituto Português de Corporate Governance* (pp. 153-178). Coimbra: Almedina. p. 175

In other words, State exerts dominant influence over State-Owned Companies; it is the corporate law key figure to designate a corporation as state-owned. State-Owned Companies are simultaneously subject to a different kind of dominant influence: the one defined by law and the other with no legal concept, which is the dominant influence exerted by the community and other stakeholders to pressure State-Owned Companies to accomplish their finalities and goals.

This legitimisation comes from regulation, and it also has constitutional roots. The regulation here understood as a legal framework which embodies not only laws or other legal diplomas from government and legislative power, but some set of rules made by private entities, in a self-regulatory path.

There is a co-regulation towards State-Owned Companies to ensure and deepen the constitutional determinations on efficiency, integrity, honesty, transparency, and the right to a proper public administration. Regulation prescribes and inducts State-Owned Companies into a path of proper, transparent and accountable management; it happens not only due to the enforceability of law, but also through self-regulation when (as seen before in this essay) the law is not made by the people's representatives, but the ones who will be bound by it.

The ethical component must grasp it all because it is not admissible that a public company—or anybody—agrees to comply with a specific rule only to achieve a positive image in front of the community. In that regard, both law and soft law have a punishment system which penalises deviations from transparency, lack of accountability, fault in the expected outcomes bearing in mind the public interest and financial results. If a State-Owned Company lacks this legitimising requirement, it is possible to affirm that its justification for existing ceases. So, the lesson on legitimacy given by Pedro Rebelo de Sousa[151] is valid:

> To know the stakeholders is an essential step for ensuring the company's legitimacy towards them, and without long-term legitimacy the continuity of the company's actions can become unsustainable. Consequently, the same can happen referring the ability to adapt and renew such interactions with the stakeholders. To know the stakeholders can be the differential element when assessing what converts a company's successful or unsuccessful actions.

The regulation instruments for State-Owned Companies show a combination of legal regimes—the public and private—under which the public undertaking runs its business, such as public

151 Sousa, Pedro R. de (2018). Corporate Governance – 15 Anos e os Novos Desafios Reflexão Sobre Sustentabilidade e Multiplicidade de Constituintes. In Pinto, José C. (Coord.), *et al.*, *A Emergência e o Futuro do Corporate Governance em Portugal - Volume II do Instituto Português de Corporate Governance* (pp. 335-341). Coimbra: Almedina. p. 340

service providing or competing in economic activities. In such peculiar regime, State-Owned Companies face a more rigorous legal arrangement because despite being companies with a private legal personality, they are also part of public administration and they are incorporated to fulfil specific public interest requirements in a more efficient manner than it would be if directly rendered by the State. The binary legal system upon public enterprises leads to a mandatory corporate governance regime where the stakeholders' interests are a significant concern, as well as the financial outcome expected.

Corporate Governance on State-Owned Companies is legally mandatory in Portugal and Brazil, and corporate governance instruments for State-Owned Companies should aim beyond the minimum required for effective attention to the public interest—*i.e.* the State-Owned Company must deliver its results promptly, efficiently, without corruption, with minimal political influence, respecting the environment, customers, suppliers, and employees. Hence, those instruments are meant to be proper corporate governance and integrity programmes. It brings value to a company, even if it does not translate into financial and market value due to other factors.

One can say, though, that State-Owned Companies were created to formally privatise public administration, leaving the task of regulatory and public policy formulation to the State and encompassing soft law instruments as well.

However, as aforementioned, inefficiencies were observed and, because of that, the movement of imposing result-oriented governance emerges, using efficient and ethical processes and considering social responsibility.

It was therefore found that the regulatory instruments have changed. The State remains the regulator, alongside private entities, but it does so using (in addition to traditional forms of enforcing binding rules) softer but no less effective regulatory methods that embody duties of transparency, publicity, outcome assessment, audits, and ethical commitments. In that sense, soft law that can be created by the State or a private organisation is a regulatory instrument to which the companies adhere in order to meet the stakeholders' wishes or even impositions.

This legal framework, the co-regulatory system, presents itself as a set of instruments to impose, induct, and make corporate governance culturally acceptable and enforced at the State-Owned Companies' business environment, because those companies (more than private ones) have a constitutional commitment towards public interest and the stakeholders.

Nowadays, the target audience of State-Owned Companies is no longer the mere public service user, as such users, because dealing with a state entity publicly owned, are both clients and

inherently owners. So, the demand for efficient management which complies and explain its actions pressures public administration to implement corporate governance in State-Owned Companies.

All the above assertions allow to affirming that State-Owned Companies should neither be demonised by those who believe in the forces of the market as an economic regulator nor be put in a pedestal by those whose creed insists in bestowing on the State the role to provide public service alone. State-Owned Companies exist and, as a public asset, they must be adequately managed, and its creation must be well justified.

All the process—from its creation, through management, up until the service delivery and public interest accomplishment—must be carried out under an ethic veil encompassing transparency, integrity, professionalism and, moreover, the serious mission to satisfy the public interest respecting environmental, labour and consumer aspects.

> To put it simply, the adoption of good corporate governance practices creates the necessary confidence for investors to make decisions on investing their savings in suitable and responsible businesses, as it contributes to maximise external financing capacity (with the inherent reduction of capital costs), to mitigate the risk associated with the activity (and consequently safeguard organisational reputation), and to ensure optimal performance and the organisation's continuity[152].

Hence, corporate governance is imperative and must consider first and foremost the public interest, though the financial results and the sustainability of the company itself are quite relevant as well. From a Constitutional, legal, regulatory and soft law point of view, corporate governance and compliance programmes are mandatory for State-Owned Companies; the legislation under the Brazilian and Portuguese Constitutions only reaffirms the commandment for State-Owned Company that is honest, transparent, efficient, depoliticised, and aimed at the public interest.

> In summary, we can mention that the great benefits of Corporate Governance for companies are an improved institutional image, greater visibility, higher demand for shares, appreciation of shares, and lower cost of capital because it reduces the effective risk to the investor. For investors, there is greater precision in the pricing of shares, improvement of the monitoring

152 Ferreira, Abel S. (2018). Transição e Futuro do Governo das Sociedades do Quadro Atual do Mercado de Capitais Português. In Pinto, José C. (Coord.), *et al.*, *A Emergência e o Futuro do Corporate Governance em Portugal - Volume II do Instituto Português de Corporate Governance* (pp. 13-72). Coimbra: Almedina. p. 14.

> and inspection processes, greater certainty regarding their rights in society, risk reduction for them, the channelling of more savings for the companies' capitalisation, and safer investments...
>
> In short, corporate governance gives creditors greater credibility in the company's outcomes, and shareholders become more likely to invest as the risk of manipulation by specific groups is reduced. The result is that good governance practices are fundamental and essential in any growing market for its development[153].

Corporate Governance for State-Owned Companies is mandatory, not just because the law determines it, but because in order to accomplish public interest with more efficiency it is necessary to regulate the various stakeholders' interests through clear procedures and patterns promoting transparency and accountability as privileged attributes.

It is valid to bring up the newest statement from Business Roundtable, an American association that gathers hundreds of chief executive officers of varied corporations. Until recently, this association firmly believed in the shareholders' primacy.

However, that has changed, and the change is in motion; they show it by stating that the shareholders' interest is no longer the main objective of a private company; they have embodied the stakeholder's primacy on corporate governance. So, what was an option to private companies became a must-have, reinforcing the State-Owned Companies' obligations towards corporate governance that add value and meet the public interest. The statement shows the Americans Chief Executive Officers' commitments in

> Delivering value to our customers. We will further the tradition of American companies leading the way in meeting or exceeding customer expectations.
>
> Investing in our employees. This starts with compensating them fairly and providing important benefits. It also includes supporting them through training and education that help develop new skills for a rapidly changing world. We foster diversity and inclusion, dignity and respect.
>
> Dealing fairly and ethically with our suppliers. We are dedicated to serving as good partners to the other companies, large and small, that help us meet our missions.

153 Ramji, Dina (2011). *A Governança Corporativa nos BRIC: A Sua Influência no Desempenho dos Mercados Acionistas*. Lisboa: ISCTE. Retrieved October 15, 2019, from http://hdl.handle.net/10071/4157. p. 39.

Supporting the communities in which we work. We respect the people in our communities and protect the environment by embracing sustainable practices across our businesses.

Generating long-term value for shareholders, who provide the capital that allows companies to invest, grow and innovate. We are committed to transparency and effective engagement with shareholders.[154]

Regarding the value of State-Owned Companies, it is essential to affirm that the financial value or market value is not the only one to consider: there are social outcomes just as important as that—or even more. The non-financial results add as much value to an enterprise as the financial one.

Of course, the share pricing is a critical factor to determine value and it can by itself justify proper transparent and accountable governance. Nonetheless, alongside the relevance of the market value, the reputational value emerges. Therefore, State-Owned Companies must accomplish, by law, the public interest, act with social responsibility, and encompass the stakeholders' interests, always considering financial and social outcomes.

Corporate governance—with its ethical and legal postulates regarding transparency, accountability, result-oriented conduct concerning communities and investors expectancies—is a crucial element for State-Owned Companies to fulfil their commitments. This dissertation acknowledges that there are several factors which influence the value of a company, but it is certain that well-implemented corporate governance can add value or even hamper or mitigate crises or losses.

In this context, financial outcomes are important, but the fulfilment of the public interest is more; therefore, corporate governance must handle and balance these two aspects, harmonising profitability with the public interest, to add reputational and market value to State-Owned Companies. As Pedro Rebelo de Sousa states:

The commitment between these two visions—the advocacy of maximising the value of the company for the shareholders and the advocacy of multiple stakeholder interests in a logic of social responsibility—will allow us to glimpse a responsible framework for the exercise of Corporate Governance, a reality that is not an exercise of mere formalistic compliance, but a true adherence to a substantiality that makes performance sustainable and accountable[155].

154 Retrived January 21, 2020 from https://opportunity.businessroundtable.org/ourcommitment/

155 Sousa, Pedro R. de (2018). Corporate Governance – 15 Anos e os Novos Desafios Reflexão Sobre Sustentabilidade e Multiplicidade de Constituintes. In Pinto, José C. (Coord.), *et al.*, *A Emergência e o Futuro do Corporate Governance em Portugal - Volume II do Instituto Português de Corporate Governance* (pp. 335-341). Coimbra: Almedina. p. 341

Corporate governance is more than desire and intention, it is an obligation for public enterprises, even if they are not listed in the stock exchange; the market is crucial, but it is not the only nor the main stakeholder. That is because State-Owned Companies deal not only with the State expectations about revenue and income, but the duty to provide quality public service at a reasonable price, regarding decisions made with proportionality, honesty, and truthfully considering public interest.

In this regard, it is important to resort to the work of Ricardo Luiz M. Silva's *et al.*[156] to examine whether the relationship between a corporate governance programme and share price appreciation is related or not. Empirically, the authors demonstrate that there is a positive correlation between greater disclosure and the market value of companies; however, when analysing the numbers sensibly, it was not verified at the time of the research that adherence to governance levels brought an increase in stock liquidity.

There may not even be gains in stock price and liquidity, but there are gains of a different nature because there will be less information asymmetry and better management monitoring, which will be as depoliticised as possible, undoubtedly seeking to reconcile social interests.

Corporate governance on State-Owned Companies is mandatory regarding constitutional commandments in Brazil and Portugal, and it turns into a crucial tool to accomplish public interest because once corporate governance requirements (*e.g.* transparency, accountability, stakeholders' interest primacy) are implemented and accomplished the scrutiny over the management increases, leading to a more responsive company, attentive to the social and environmental needs of the community and also concerned to the financial aspects involved.

The better the governance, the more the confidence on the public undertaking will increase; the results and the confidence from the public and from investors will be achieved enhancing the company's reputational and financial value. It is clear, then, that the improvement of the company's value perceived by the market, the community, the employees, managers and other stakeholders goes through the implementation of corporate governance, leading to more knowledge about the acts and decisions of companies and their managers; after all, these are State-Owned Companies that have the duty to provide information and present results according to the public interest that justified their creation.

156 Menezes Silva, Ricardo Luiz, Ciampaglia Nardi, Paula Carolina, Aversari Martins, Vinícius and Barossi Filho, Milton (2016). *Os Níveis De Governança Corporativa Da Bm&F Bovespa Aumentam A Liquidez Das Ações?* Revista Base (Administração e Contabilidade) da UNISINOS (vol. 13, n. 3, pp. 248-263). Retrieved June 15, 2019, from http://www.redalyc.org/articulo.oa?id=337248025006.

IV – Conclusions

It is time to conclude and to answer the initial question: do corporate governance and compliance add value to State-Owned Companies?

One can answer properly but not at all decisively, because the matter itself is controversial since there are lines of thought that do not believe in the State and in its efficiency to intervene in the economy, whereas others consider that the State's presence in the economy is essential to assure that public services will reach the highest number of people at a fair cost and price.

The controversy over State-Owned Companies stems from the fact that sometimes their aims are not achieved thoroughly and thus make no profit. However, that is a different discussion—for now, the dissertation's conclusions follow:

1. The fact is that there are manifold State-Owned Companies in Brazil and Portugal within Indirect Public Administration, which comprise services and goods providing from oil to energy, from banks to water and sewage.

2. All those public companies and their managerial bodies must conduct the business properly; their acts and objectives must always take into consideration social responsibility, transparency, environmental issues, labour and consumer concerns and, at the same time, they cannot disregard profit, the market, and private shareholders, should there be any. There is a quotidian balance to keep.

3. Corporate governance and compliance instruments are important tools for State-Owned Companies and allow them to provide to the public interest in a more efficient, honest, effective, transparent and accountable manner.

4. State-Owned Companies are important to the Brazilian and Portuguese economies and societies as they are large corporations considering their market share in their industries, their stock exchange relevance, and because they belong to the infrastructure industry: they provide public services, induce investments, and reduce regional and social inequalities.

5. The existence and operation of State-Owned Companies is one of the most important issues for the law, together with other branches of knowledge, on a global scale and more precisely for Brazil and Portugal, countries which rely on such ventures for achieving public purposes more quickly and efficiently.

6. State-Owned Companies have a reason to exist if they are focused on the public interest that originated them and committed to being result-oriented towards the public interest. In that regard, it is important to mention that the Brazilian and the Portuguese Constitutions consecrate the free enterprise

principle as a guarantee to citizens and companies. It means that the State plays a subsidiary role in the economy.

7. Therefore, it is possible to affirm that there is a public entrepreneurial initiative which is different from the free enterprise principle. The public initiative can only be put into practice under the law's permission, accordingly with specific motives and justifications which must be adequate, reasonable and proportional.

8. In specific segments and under certain circumstances, State-Owned Companies are fundamental; in other cases, they should not even exist. However, public corporations have a preponderant role in economies and societies, either by investing where the private sector alone will not do so, or by acting as a market efficiency mechanism.

9. Significant criticism of State-Owned Companies exists today because they were created without complying with the constitutional commands related to serving the public interest and, once created, would not be serving the clientele (the citizens who, as clients/consumers, adopt an active and preponderant position among the various stakeholders, opposing the passive figure of the public service user) and would serve political favours; one is a consequence of the other.

10. A State-Owned Company has to commit to the public interest and also to financial results, although it will penalise citizens by not delivering service or failing in quality, forcing contributions from the public budget to cover losses (which leads to the payment of fees and taxes to maintain the public corporation; the society will pay twice for the same service). So, the public manager who admits losses in a row or fails to address a proper service rendering engaged with the public interest commits reckless management and is subject to liability.

11. Efficient management can combine financial and social results by balancing the interests of different stakeholders, as the law also imposes on State-Owned Companies. In this respect, it is possible to infer a formal privatisation, that is, the adoption of private law instruments in the management of public companies, non-state regulation and self-regulation are beneficial.

12. The means, *i.e.* the processes for achieving the ends, must be inserted in a corporate governance system whose informing principles are, among others, transparency, accountability, integrity and professionalism management, with defined management, inspection, and executive competences. That is the new public management, which comprises aspects from bureaucratic and managerial systems.

13. Another fundamental point is the regulatory power, which should not be politically captured—that would lead to the phenomenon of reluctant regulation, a regulation that grants regulatory

favours at the expense of consumers and taxpayers with a fulcrum on revenue at the expense of the service in question (*e.g.* relief on service provision goals, excessive service fee increase, tax exemptions).

14. Citizens will pay for the inefficiency that results from undue political interference. Through the investigation translated into this dissertation, it became clear that the more professional and less politically captured the management and regulation, the more efficient the service provided will be. To not be politically captured, State-Owned Companies must rely on corporate governance and compliance programmes.

15. A regulatory system regarding proper corporate governance committed with the public interest must comprise state and non-state regulations, such as the law, soft law instruments, and other voluntary adhesion regulations. This system is the co-regulatory one and it is a source of good governance practices, simultaneously granting their effectiveness, because it imposes transparency and accountability which prompts the managerial body to act with integrity, care and loyalty towards the State-Owned Company, its shareholders, and the stakeholders.

16. Good governance is essential for State-Owned Companies to achieve their purposes and must be committed to transparency, accountability, and results; otherwise, State-Owned Companies will exist to meet an unreasonable political will and disconnected from corporate social responsibilities.

17. State-Owned Companies themselves have a robust regulatory power over market inefficiencies, but it must be used not out of political voluntarism, but under a technical, professional and transparent decision-making process.

18. Brazilian and Portuguese State-Owned Companies need to permanently adopt a management style that is responsive, transparent and focused on financial and non-financial results in order to effectively act in a corporate and socially responsible manner. Thus, there will be no unreasonable criticism that will resist a well-provided public service, nor ideology that defends public enterprises despite lousy service. In this regard, proper management, whose performance can deal with social, corporate, consumerist, labour, and environmental responsibilities, can be fruitful for society and can work.

19. Corporate governance is a managerial tool that translates into the companies' decision-making process precepts of transparency and integrity, and for that it must be professional and depoliticised, subject to corporate and social supervision.

20. Corporate Governance is mandatory because it is an instrument to accomplish public interest, and the managerial body of a State-Owned Company is deemed as public agents; they must act in the most opportune, reasonable, proportional and efficient manner possible, not strictly adhering to the law but going further, complying with rules of conduct and ethical precepts that result in a quality

provision that takes into account transparent and accountable processes, looking forward to obtain financial and social results that correspond to the public interest.

21. Corporate governance is also mandatory because public enterprises must comply with state and non-state regulatory instruments, under the guise of transparency and the duty of accountability. That leads to a procedural control of the decision-making process, carried out by the invested authorities to do so and by the citizens as well, in order to meet the results stipulated by the Political Power through balancing and considering the stakeholders' interest.

22. There will be, therefore, more significant external and internal pressure from the interested parties, state and non-state regulators, internal auditing and supervising bodies towards managers who act better regarding duties of loyalty and care, given that they are liable if they fail to achieve public interest. In this regard, corporate governance allows management to be scrutinised through transparency, accountability and the results obtained or not.

23. A well-implemented corporate governance will push the company and its managers to act not just in compliance with the law, but committed to a higher degree of management to truly accomplish public interest, without neglecting finances and the value of the company—which will tend to enjoy greater trust from the society and the market. Corporate governance presupposes fine tuning, an identity of purposes among the management, governance processes, and efficient results.

24. Concerning that, the process must be professional and must take into consideration not only the social character of the investment, but also financial and technical; State-Owned Companies have to demonstrate that they fulfilled their obligation to weigh the various interests inherent to their activity choosing the more reasonable ones regarding the occasion, pursuant corporate law, administrative law, and regulatory rules. Corporate governance is the system that enables and determines those obligations and their fulfilment.

25. Brazilian and Portuguese State-Owned Companies pursuant to both countries' Constitutions are subject to democratic and social control. Consequently, transparency, integrity, and a social and financial result-oriented management arise as inescapable duties. Corporate governance materialises the democratic precepts into enterprise management and operation because most of the acts and decisions will be under social, financial, and governmental scrutiny, which in the end enables the assessment of the management's quality and the expected results, employing objectively and publicly stipulated metrics.

26. Corporate governance is also a protection tool for the management against liabilities or bad evaluations because it allows the managers to show commitment to the public interest through a

depoliticised decision-making process which balances all the interests so as to provide a more effective service pertaining to the reasonable use of the taxpayer's money and natural resources.

27. Concerning the State-Owned Companies' accountability towards several stakeholders, it is legitimate to affirm that when the State opens its public enterprise to private investors, other corporate governance requirements must be embodied, reinforcing the current governance and compliance systems in force at the company because it will be subject to stock exchange regulations and to the shareholders' minority rules. Thus, it is a positive measure to open the State-Owned Company's capital to allow private investors as shareholders.

28. Corporate governance is a legal duty for State-Owned Companies, and it cannot be limited to corporative jargon, internal rules or displays where the company's mission and values are announced. Corporate governance must be lived concretely by the public corporation, and it has to come from several sources—the stakeholders—due to the unavoidable democratic precept; it must also be embodied into the corporate culture as means to give back to those stakeholders a compliant service provision regarding the company's perpetuity, the quality requirements and the financial covenants.

29. Corporate governance, in addition to increasing reputation, is a legal duty that derives from the Constitutional Principles of legality, efficiency, integrity, transparency and the right to proper public administration, as well as duties arising from private corporate law concerned to conflicts of interest, branches of management, respect for minority shareholders, external audit submission, stakeholders' interest, scrutiny from the market and shareholders or bondholders, soft law, and voluntary regulations. Furthermore, it can be affirmed that:

> In short, Corporate Governance is imperative in any company's sphere, as it influences all decisions that the shareholders make regarding their positions. Transparency makes it possible to reduce the risk associated with the investment and to more accurately predict the return on investment, thereby increasing the value of the company, which will ultimately be reflected in the price of its shares on the market.[157]

30. From the beginning, it is observed that State-Owned Companies are relevant to the Portuguese and Brazilian economies and societies. They are compelled to render services with quality, efficiency, respecting the law and aiming at the public interest.

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157 Ramji, Dina (2011). *A Governança Corporativa nos BRIC: A Sua Influência no Desempenho dos Mercados Acionistas.* Lisboa: ISCTE. Retrieved October 15, 2019, from http://hdl.handle.net/10071/4157. p. 50.

31. In order for State-Owned Companies to achieve public interest and its social and financial goals, the work has demonstrated that the political capture of them can harm the corporation because it will be focused on private interests of the government and politicians, instead of the public interest.

32. The solution is to avoid the political capture of corporate governance in public enterprises, encompassing well draft and transparent decision-making procedures, as well as considering the outcomes, risk assessment, professional management committed to the public policy determined by the Political Power and to the stakeholders, a well-established role concerning the State conduct as the main shareholder, permanent external and internal audit, and adherence to better practices concerning to integrity, honesty, legal and responsible management.

33. State-Owned Companies committed to democracy, transparency, efficiency, accountability, professionalism, integrity and, most relevant, to the people and the environment, will experience gains, and the instrument to accomplish the aforementioned commitment is corporate governance.

34. Therefore, through corporate governance, State-Owned Companies can build reputational and financial reliance because the procedures, conducts, and decisions will be accountable and the possibility of corruption and deviance mitigated; this, among other factors, adds value to State-Owned Companies by increasing their market value, the consumers' confidence, and the quality of the public service provision. Corporate governance does increase the State-Owned Companies' value and reflects the real supremacy of the public interest.

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