

TCU initiatives to perfect regulation external control

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PRIVATISATION AND REGULATORY REFORM IN BRAZIL: THE ADVENT OF THE REGULATORY STATE

The privatisation process and the regulatory reform resulted in new institutional arrangements in the public services delivery model in the Brazilian infrastructure sector. The participation of private agents in the telecommunications, oil, natural gas and electricity sectors was a response to the pressures of an international movement to reduce the State as a direct provider of goods and services.

The establishment of this new public administration environment gave origin to a deep change in the role of the State. At the same time in which public companies were being transferred to the control of private investors, this new environment required the strengthening of the institutions responsible for regulating these sectors.

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By reducing its participation in the direct delivery of public services, the State's performance becomes more focused on the transfer of public services exploitation rights over to the private initiative by means of privatisations or the granting of new concessions, permits and authorisations. Following these initiatives, public power is entrusted with the regulation and oversight of the service suppliers.

This conjuncture was the grounds for the amendment of the Brazilian Constitution¹. After the constitutional amendments, between 1996 and 2001, the agencies responsible for the regulation of infrastructure public services were created: National Electricity Regulatory Agency-Aneel (1996), National Telecommunications Agency-Anatel (1997), National Petroleum Agency-ANP (1997), National Land Transportation Agency-ANTT (2001) and National Water Transportation Agency-Antaq (2001).

ROLE OF TCU IN THE PRIVATISATION PROCESSES

The Brazilian Court of Audit - TCU monitored this cycle of the reform of the State. Initially, its performance was carried out mainly by opinions on the procedures adopted in the privatisation processes. In this context, the Court issued internal rules that obligated privatisation managers to supply TCU with documents that allowed for concomitant oversight of such processes. This model of monitoring enabled TCU to act promptly, correcting mistakes in several stages and promoting greater transparency in the procedures adopted by the federal government.

To perform this task, the Court detected a need to capacitate a team of external control specialists. It was verified that the examination of the privatisation process demanded knowledge of topics related to corporate finances, accounting, law and business management and that the approach to these topics was different from that experienced by the TCU technical staff during examination of more common audit procedures.

It was noticed that the success in controlling privatisations demanded an institutional structure that would give support to such capacity building effort. Initially, a work group was formed with analysts dedicated exclusively to the control of privatisation processes. This structure was consolidated by creating a specialised technical unit, the Denationalisation Inspection Secretariat – Sefid, that was integrated into TCU in 2000.

MONITORING OF REGULATORY MANAGEMENT ACTS

The examination of the privatisation processes evidenced the need for TCU to monitor the execution of contracts arising from these processes, mainly the end performance of the regulatory agencies. This new challenge was made easier by the Constitution of 1988 which broadened TCU's mandate to include the possibility of carrying out audits of an operational nature – in addition to traditional accounting, budgetary, financial and asset audits.

When the delivery of public services was preponderantly performed by state companies, the role of external control was based, mainly, on the analysis of the companies' financial reports. The control of the Court focused on the management acts of administrators, relegating to second plan the analysis of the companies' performance as suppliers of public services.

Aiming to monitor and oversee the institutional changes arising from the delegation processes, TCU, by means of internal normative rules, regulated the oversight of public services delegation processes.

The control of delegations is performed in two stages: granting of delegatory act and execution of contract². This granting is a process delimited in time but the conditions set by it remain in effect throughout the term of the delegation, which is normally decades. Thus the criticality of this stage which lies in the verification over a short period of time of all legal aspects, technical, economical and financial feasibility of transferring the public service, as well as the environmental implications inherent to the business in question.

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The execution of the contracts is controlled by means of audits and inspections, in addition to the Consolidated Monitoring Report prepared by the federal granting organs. In the cases of granting of electricity distribution, the periodical tariff reviews, in view of their importance during the execution of the contracts, motivated the issuance of a TCU Internal Rule (no. 43/2002) establishing a concomitant control of procedures adopted by the regulatory agency.

It is worth noting that TCU's role in the control of public services regulation should not be mistaken for the role attributed to the regulatory agencies. The Court, first of all, directs its monitoring at the agency's performance, which does not mean it discards the possibility of also performing audits and inspections directly in the concessionaires and holders of permissions of public services.

The control performed by TCU involves forming an opinion about the results, the economy, efficiency and effectiveness of regulatory bodies' performance. Moreover, it identifies and recommends regulatory management practices that may leverage the performance of those involved, analyses governance of the regulatory regimen and, also, attempts to create a history of regulation policies that serves as the basis for decision making, without, however, overlapping or being confused with the regulator's role.

Recently, with the issuance of Act 11.079, dated 12/30/2004, which covers the norms for hiring public-private partnerships (PPP) within the scope of public administration, TCU started incorporating in its oversight systematics the monitoring of the performance of the PPP contracts.

TCU'S CHALLENGES IN FACE OF THE NEW INSTITUTIONAL ARRANGEMENTS

Due to these systemic privatisation processes and the appearance of complex institutional arrangements in the model of infrastructure public services delivery and while discussing the role to be played by the Brazilian Superior Audit Institution in this new context, it was identified the need to perfect and consolidate TCU's operational capacity aiming to perform a more effective external control in respect of privatisation processes, regulatory reform and federal regulation.

During these discussions it was possible to identify the main causes that seemed to prevent TCU from having a more efficient and effective role when performing its duties related to the external control of federal regulatory activities in the area of infrastructure. These causes are highlighted below:

1. Constitutional Amendments numbers 8, of 08/15/1995 and 9, of 11/10/1995.
2. TCU Internal Rules numbers 27/1988, 43/2002 and 46/2004.
3. This problem was preponderantly characterised by the lack of information on events, editorial releases and specialised publications in the area; difficulty to maintain a regular exchange with specialists and researchers; difficulty to access existing bibliography and also by the fact that most texts were written in a foreign language.
4. As an example that the theoretical and methodological outlines on the subject of regulation and privatisation still require a better consolidated point of reference, one should note recent studies carried out by the World Bank which indicate that that institution is going through a "crisis" on the fragile foundations of privatisation and regulatory processes resulting from it, foundations that the institution itself promoted. The Wall Street Journal, on July 21, 2003, published the following article: "The World Bank, the apostle of privatization, is having a crisis of faith. What seemed like a no-brainer idea in the 1990's – that developing nations should sell off money-losing state infrastructure to efficient private investor – no longer, seems so obvious. Investor who once seemed eager to risk their money on Brazilian power plants or African sewers are pulling back. Commercial banks' power-project financing in the developing world and former eastern bloc nations. Which peaked at \$ 25,9 billion in 1998, totalled just \$ 5,7 billion last year, according to Dealogic, a British data firm. Consumers, felling deceived, increasingly associate privatisation with higher rates for them and higher profits for foreign companies and corrupt officials. The unexpected turn of events has left privatisation enthusiastic at the World Bank wondering what went wrong" (Excerpt from Kessides, 2004:260).

I – In what concerns the acquisition and dissemination of knowledge on regulation and its control:

1. Difficulty to access sources of information on privatisation doctrines, theories and practices, regulatory reform and federal regulation³.
2. Lack of consolidated knowledge on regulatory reform and federal regulation, particularly in domestic literature⁴.
3. Lack of systematic actions aimed at capacity building and specialisation of the technical staff.
4. Absence of a corporate education model which contemplates regulation control.

II – In what concerns systematisation, consolidation and development of methods⁵ and techniques⁶ applied to external control regulation:

1. Shortage of methods and techniques already developed in regulation control⁷.
2. Need for consolidation and systematisation of methods and techniques already employed by TCU in the exercise of regulation control.
3. Difficulty to access the data base and difficulty to obtain knowledge of the information available in the scope of the regulatory agencies⁸.

III – In respect of the organisation, management and planning of regulation control activities:

1. Absence of a clear definition of the role and extent of TCU's control over de regulators⁹.
2. Need for perfecting the models of planning, organisation and regulation external control.
3. Uncertainty regarding the ideal structure needed to efficiently and effectively control regulation.

IV – In respect of the strategy to communicate the regulation control activities:

1. Lack of communication and promotion strategy of the control of regulatory activities that meets the needs of the diverse target audiences, to whom the control information, decisions and recommendations are addressed.
2. Not enough interaction with the public¹⁰ in regard to privatisation and regulation processes.



THE WAYS TO STRENGTHENING REGULATION EXTERNAL CONTROL

Aiming to meet such needs, TCU is developing the “Project for Modernisation of Regulation External Control”, financed by the Inter-American Development Bank – IDB, and technically supported by the Getúlio Vargas Foundation.

The need for a specific project in the area of regulation control resulted from the identification of opportunities to improve the work that was already being performed, not only in areas already under the control of TCU but also on new projects for external control of the federal regulatory activity in the segment of infrastructure.

The project, whose products are represented in Figure 1, was conceived to cover both the actions of diagnostics of TCU’s performance as well as of the performance of regulators, as well as to cover the actions of development and sustainability of work processes created or perfected after the implementation of the foreseen products.

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5. Methods: general procedures found in control tools of TCU that are used in the production and transformation of important information on public management external control. These procedures aim to ensure the accuracy of control information as well as to legally and technically support the determinations and recommendations presented by the Court. The method to be developed must be able to guide the analysts in charge of the control activities related to that object. In the scope of TCU, the methods are explained in the auditing manuals, procedures and guides. Examples of manuals include: Operational audit manual, System audit manual. Procedures include Procedures for bids and contracts, Procedures for analysis of privatisation, among others. Guides include Guide for monitoring via Siafi and Siape extractor.
 6. Techniques: specialised procedures whose use is in harmony with the control methods for collection, analysis and dissemination of more specific information. These techniques must include those already employed by TCU as well as others that will be developed within the scope of the project. Control techniques include, among others: presentation of data, focal group; planning matrix; findings matrix, benchmarking, performance indicators matrix, output mapping, process mapping, RECI analysis, logical framework analysis, stakeholder analysis, SWOT analysis, risk assessment matrix, audit interviews.
 7. This problem results from the complexity of regulatory issues on one hand, and, on the other hand, from the time needed for maturation in order to develop new methods, considering the recentness of the discussions on this matter.
 8. This problem does not concern the legal competence of TCU having access to the information needed to carry out oversight because TCU already has this mandate. It refers to difficulties of a technical-operational nature.
 9. Due to the fact that the role and extent of performance of the regulators are not very well defined (overlap between actions amongst Councils, Ministries and Regulatory Agencies), besides the absence of complete regulatory references per sector, it is difficult to define the control performed by the Court. However, it is worth noting that the role of the controller is not mistaken for the role of the regulator. On the contrary, it complements it in the dimension of accountability and transparency which is essential for the consolidation of regulatory management.
 10. Target audience: persons or entities to whom decisions, recommendations and information resulting from TCU’s performance in the exercise of external control are addressed. The target audience does not refer only to the direct recipients of control information but also to those who may produce a positive impact on the image of TCU as well as help TCU in the performance of its institutional mission of ensuring the effective and regular use of public funds to the benefit of society. Thus, there included are the issues on media impact and social control.

The sustainability of the actions of the Project must be attained by strengthening TCU's relationship with target audiences who are interested in the field of regulation as well as in the strategy for collection and treatment of the data necessary for external control of the regulatory bodies. For this purpose, three products are foreseen:

a) Diagnosis of target audiences – comprehends efforts to improve visibility of TCU's actions related to regulation control. This can be achieved by improving communication with target audiences;

b) Preliminary specification of the information systems that will support automation of Sefid's organisational processes; and

c) Implementation of the Centre for Studies and Regulation – CECR.

The Project is scheduled to be developed in thirty months, but the impact of the products developed has already been having an effect on Sefid's work. Considering that the information produced should be updated, communicated or processed by Sefid, the creation of CECR was provided for. This centre will have the objective of collecting, systematising, disseminating and supporting the generation of information and knowledge on infrastructure regulation and its control.

Besides the products that are being developed with the support of the IDB, with consultations to the Getúlio Vargas Foundation, TCU has already given a graduate course on Regulation Control. In this course, employees who work in this area produced papers that deal with the topic of regulation of public services.

Other products to be developed are a Plan for Corporate Education in Regulation Control and definition of the technical competencies for those who perform in the field of regulation control, to be developed with the support of the Serzedello Corrêa Institute.

By implementing the "Project for Modernisation of Regulation Control", the proposal is to create within the scope of TCU the professional competencies and the technical infrastructure needed to adopt a comprehensive control systematics for the processes of delegation of public services, focused on external control of the regulator. In addition, we expect to receive contributions to perform a direct and critical analysis of the performance of the delegated economic agents in aspects related to the quality of the services delivered, to the financial-economic balance of the contracts and to other factors that will allow for a more comprehensive understanding of the political, economic, and operational model adopted to provide the public services that are the object of federal delegation.

CONTRIBUTIONS OF THE SUPREME AUDIT INSTITUTIONS TO THE SUCCESS OF THE REGULATORY REGIME

TCU understands that the development of new roles for the Superior Audit Institutions is essential to sustain the regulatory regime. The high level of transparency and accountability regarding the regulatory processes must be ensured since the independence of the regulatory bodies – which is essential for them to carry out their roles unbiased – can also lead to undesirable behaviours on the part of those who delegated specific mandates to the mentioned bodies.

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There is a wide range of literature that deals with the processes in which the regulating agent is captured by the regulated body, by specific consumer groups (normally large consumers) or even by political interest groups, in detriment of the regulatory principles of equity, productive efficiency and allocation efficiency.

In the Brazilian case, the Brazilian Court of Audit has acted in an exemplary manner to ensure accountability and in an attempt to improve the regulatory management processes. In this sense, the control body has monitored closely the whole cycle of reform of the State in this area, issuing opinions in all the processes of privatisation and of concession of public services and, later, monitoring federal regulation and the execution of these grants. What is noteworthy is that performance of external control in Brazil has proven to be of extreme importance to the system implemented in order to achieve the objectives of regulatory reform, regarding the aspects of accountability and transparency of the model.

TCU has become the true depository of information on the practices and trajectory of the public policies on regulatory management that started as of the second half of the 1990s in Brazil. It could not have acted differently. Supported by a constitutional mandate to carry out operational audits provided for in the 1988 Federal Constitution – besides the traditional accounting, budgetary, financial and assets audits – the Brazilian SAI did not run from the narrow path to organisational learning aiming at building the capacity of its technical staff to face the challenges foreseen since then.

In view of the institutional changes resulting from the privatisation processes, TCU, by means of internal norms, edited regulations that deal with the oversight of the processes of denationalisation, concession, permission and authorisation of public services. These norms provide for the monitoring of these mechanisms of flexibility of the State in the both in the grant monitoring stage – issuing opinions on the legality and economy of these processes – as in the contract execution monitoring stage, that is, in the regulatory processes resulting from flexibility. TCU's control has proved to be timely and to give important contributions to perfecting the system. Of course it is not an isolated transition effort. There is an irreversible strategic decision to be willing to answer complex questions involving judgement regarding the results, economy, efficiency and effectiveness of the governmental action. Moreover, there is an effort to identify and recommend management practices (regulatory) that may leverage the performance of federal bodies involved, analyse governance of the regulatory regime and, in addition, create a history in regulation policies that serves as a basis for decision making. This basis, even in moments of political transition, was considered important by several decision makers of the political executive branch and by members of the National Congress. Thus, it is advocated that TCU's role should be maintained and intensified with respect to external control of the regulatory regime, once the possibilities of capturing the national regulator increase a great deal in a context where there is a low level of accountability and transparency.

TCU's understanding has been that the external control exercised by SAIs over regulatory agencies is capable of ensuring accountability of regulatory management, as well as contributing to improve the performance of those agencies regarding efficiency, economy, effectiveness and equity in the implementation of public regulation policies. The papers in this area that are mentioned in this journal, in the article by Minister Walton Alencar Rodrigues, "Regulation Control in Brazil", and the processes of strengthening and improvement sought by TCU in its improvement project, as described in the current paper, show, inexorably, the important role of the external control carried out by TCU in the end activities of regulatory bodies and confirm a trend described by several countries that are members of the INTOSAI working group which is to further analysis, evaluations and studies regarding the substance and application of public policies on regulatory management. ■

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