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BRAZILIAN REGULATORY AGENCIES: FUTURE PERSPECTIVES AND THE CHALLENGES OF BALANCING AUTONOMY AND CONTROL

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EXECUTIVE SUMMARY

The creation of regulatory agencies in the 90s was a major change that occurred related to the intervention of the Brazilian State in the economy. Moreover, there was also the end to restrictions on foreign capital and the end of State monopolies.

This paper intends to show that the existence of regulatory agencies in the Brazilian administrative structure is a very controversial issue. After more than 10 years of institutional experience, the regulatory system has changed and improved but it is still a very complex problem to balance autonomy and political control.

This research is divided in seven chapters. Chapter 1 gives a brief introduction of the beginning of the regulatory agencies in Brazil, the main characteristics they have and lists the existing federal regulatory agencies.

Chapter 2 assesses the American experience with regulatory agencies showing how they were created, how they are recognized by the government and the control mechanisms used in the United States. The intention of this chapter is not to compare the American regulatory system with the model adopted in Brazil, but to demonstrate that, as in many other countries, the regulatory agencies in the United States also had the same problems and nowadays their degree of autonomy and independence has considerably changed, even being subject to many control mechanisms.

The Brazilian Regulatory agencies were created in a special legal regime with reasonable independence from the Executive and greater administrative and financial autonomy. The Chapter 3 intends to show that practice differs from theory, as can be illustrated by real examples of the Brazilian Electricity Regulatory Agency - ANEEL. It is known that the degree of autonomy and independence can influence their activities and performance so they must be effective so as to improve the credibility and foster the quality of regulatory outputs.

The Chapter 4 lists some of the control mechanisms (judicial, executive, legislative and social) used in the Brazilian regulatory agencies, also illustrated by examples of ANEEL. It also shows that it is necessary to make the right distinction between the powers

to formulate policies and to implement the regulation, because by not clarifying the prerogatives and boundaries of the Executive and Legislative and of the Regulatory Agent, the current model created some uncertainties, leading to an overlap of competences from both parts and the necessity to analyze a possible institutional conflict between regulatory agencies and the Federal Court of Accounts.

The new legislation that affects the regulatory agencies (either weakening or strengthening them) is the main issue of Chapter 5. It gives a short overview of the Programme for the Strengthening of the Institutional Capacity for Regulatory Management - PRO-REG, the Bill 3,337 of 2004 that is currently being discussed in the Congress and aims to create a general law for the Brazilian Regulatory Agencies and finally the Bill that is also in the Brazilian Congress and aims to reform the Brazilian Competition System that also may affect the agencies.

Chapter 6 identifies and describes regulatory analysis impact that is already being used in many countries and the possible benefits of using it, revealing that the big challenge is how to implement it without menacing the autonomy and independence of the agencies.

Finally, Chapter 7 concludes with some final comments about each of the previous chapters, discussing the situation of the model adopted for regulatory agencies in Brazil, evidencing the necessity of autonomy and independence and what could be expected as the future of these bodies.

The conclusion shows that the big point is the new legislations and the impact they may have on the Brazilian regulatory agencies. The regulatory system in Brazil is very recent and in some cases is still used as political favors. Thus, it is very important to clarify the role and objectives of the agencies because they are essential to attract investments and ensure the development of the country.

CONTENTS

1. INTRODUCTION

1.1. General overview

The creation of regulatory agencies was a result of a deep change in the relation of State and society, particularly with the economic order. Until then, there was no concern with the balance of the sectors that were under the responsibility of the State. It was responsible for the operation of relevant and essential economic activities and the price was set in the political environment. Factors that were assessed did not consider the specific interests of the regulated sector, creating regulatory instability and a barrier to the private action in sectors subject to State intervention.

From the Federal Constitution of 1988, a new model for the Brazilian State was adopted where the holding of direct economic activity was transferred[1] to the private agents. The State began to exercise the functions of oversight and started making rules and regulations to the economic activity. This was the context when began the theoretical and legislative creation of the regulatory agencies.

The administrative reform required the formulation of a new model in which the State assumed regulatory functions, with the main objective to promote competition among private agents. One of the main motivations for the introduction of agencies was the possibility to ensure that the strategic changes happened gradually, avoiding the occurrence of breaks in the horizon of predictability of the investor.

When the model was launched in the 90s, it was following practices used in developed countries and it was considered an institutional change of great importance to our society. The country, which used a model where the infrastructure sectors were managed almost entirely by the public sector, moved to another in which private sector participation has became essential.

The process of change, including deep institutional changes in a society, usually occurs in 3 (three) slow and gradual steps. First the new proposal needs to be tested. Then,

[1] Through privatizations and grants.

the results achieved must be evaluated. Finally, considering that evaluation, it can be modified or not to be improved. The new institutional model introduced with the system of regulatory agencies in Brazil has not been quite completed and it is in the evaluation phase, which has led to many proposals for its improvement.

Hence, the role of regulatory agencies is to achieve a balance and to monitor the service contracts between service providers and users, acting as an impartial body with the objective to harmonize the conflicting interests, consolidating the regulatory function of the State. The responsibilities of the agencies as defined by law must reflect the position on the balance between stability and changes in regulatory policy.

1.2. Brazilian Regulation

Brazil engaged in a very aggressive privatization program during the 90s, which was entitled National Programme for Privatization[2]. Until the implementation of that program, Brazil had only the following regulatory bodies: Central Bank, National Monetary Council, Securities and Exchange Commission of Brazil, National Petroleum Council and Administrative Council for Economic Defense. The regulation was made primarily with the increase or decrease in taxes to benefit some sectors, with the control of mergers and incorporations and with the sale of products in the domestic market to control the prices. Indeed these bodies did not exercise the role of regulator of public services, but the control of economic activities monopolized by the State.

After the establishment of this Program, the State sold, initially, its participation in manufacturing companies and, afterwards, in the infrastructure activities (i.e. telecommunications and electricity). The State removed itself from the productive function

[2] Created by Law 8,031 of April 12, 1990 and later increased by Law 9,491 of September 09, 1997. This was the first step towards the new strategic reorientation of economic development of Brazil, attesting the loss of performance of state and public companies, showing that the privatization would be an instrument for macroeconomic correction of the Brazilian economy. From 1991 to 2001, 68 enterprises owned by the Federal government were privatized.

(losing ownership control in the public utility companies) and began to act more intensively as a regulatory agent.

The publication of the Director Plan of State Apparatus Reform[3] in 1995 made the country consider the issue of regulation. According to that document, the State should reduce its role as an executor of direct service provider to perform the role of regulator.

In fact, regulatory reform in Brazil began in 1995, when the State promulgated the "Law of Concessions" (Law 8,987/95) of public services that affected mainly the telecommunications and the electricity sectors. This Law benefited the users of public services, ensuring them the right to receive from the enterprises all necessary information to protect their interests and the right to oversee them through committees and associations.

The first agencies created were the National Telecommunications Agency - ANATEL, the Petroleum, Natural Gas and Biofuels National Agency - ANP and the Brazilian Electricity Regulatory Agency - ANEEL, all of them for the regulation and control of activities that were previously State monopolies. They were established primarily to ensure just and reasonable tariffs curbing abusive profits, equitable access to infrastructure, good quality service and security of supply. The creation of the regulatory agencies were inspired on international experience, with partial employment of models used in the United States and France, as public entities endowed with independence from the Executive, Legislative and Judiciary.

1.3. Characteristics of the Brazilian Regulatory Agencies

One of the main assumptions of the regulatory model established in Brazil is the impartiality of the regulatory body from 3 (three) areas of interest: government, ensuring the public interest with adequate services and fair rates, business sector, that is always chasing profits and society. It is not an absolute impartiality, since there would be a risk of

[3] Strategic vision document with the projects for reform, from the problems faced by the State, proposing the depoliticization of the bureaucracy, making the work rules more flexible and providing services more effectively, shifting from a Bureaucratic to a Managerial Public Administration in Brazil.

not achieving the expected result, but the search for a balance. All these groups have great influence in the regulatory process, and each one acts according to its own aims.

In summary, the Brazilian regulatory agencies were created to have mainly the following characteristics:

- **Independence:** it is also called autonomy and it is essential to the regulatory bodies. It implies the necessity of objectiveness and neutrality in relation with the involved stakeholders, including the government interests.
- **Impartiality:** the regulatory agencies should remain impartial in relation to the interests of the regulated sector, of the society and of the government. They must exercise their powers with proportionality in order to better achieve the goals with the regulation.
- **Expertise:** the regulator environment must have deep knowledge of the regulated sector. The expertise ensures greater regulatory efficiency and avoids problems of exchange of information between the Agency and the regulated sector.
- **Transparency:** this characteristic is promoted through a wide public knowledge of both regulatory process and decisions. Both the mechanisms of public hearing and public consultation are utilized.

1.4. Brazilian Federal Regulatory Agencies

The federal regulatory agencies, as shown in Table 1, were created during the mandates of presidents Fernando Henrique Cardoso and Luiz Inácio Lula da Silva. Currently there are ten (10) federal regulatory agencies.

Agency	Linked Ministry	Law of Creation	Decree of Regulamentation	Area
Brazilian Electricity Regulatory Agency (ANEEL)	Mines and Energy	Law 9,427, December 26, 1996	Decree 2,335, October 6, 1997	Economic
National Telecommunications Agency (ANATEL)	Communications	Law 9,472, July 16, 1997	Decree 2,338, October 7, 1997	Economic
Petroleum, Natural Gas and Biofuels National Agency (ANP)	Mines and Energy	Law 9,478, August 6, 1997	Decree 2,455, January 14, 1998	Economic
National Health Surveillance Agency (ANVISA)	Health	Law 9,782, January 26, 1999	Decree 3,029, April, 16, 1999	Social
National Water Agency (ANA)	Environment	Law 9,984, July 17, 2000	Decree 3,692, December 19, 2000	Social
National Supplementary Health Agency (ANS)	Health	Law 9,961, January 28, 2000	Decree 3,327, January 5, 2000	Social
National Agency For Waterways Transportation (ANTAQ)	Transportation	Law 10,233, July 5, 2001	Decree 4,122, February 13, 2002	Economic
National Land Transportation Agency (ANTT)	Transportation	Law 10,233, July 5, 2001	Decree 4,130, February 13, 2002	Economic
National Cinema Agency (ANCINE)	Culture	Provisional Measure 2,228, September 6, 2001	Decree 4,121, February 7, 2002	-[4]
National Civil Aviation Agency (ANAC)	Defense	Law 11,182, September 27, 2005	Decree 5,731, March 20, 2006	Economic

Table 1 – Federal Regulatory Agencies

[4] ANCINE doesn`t regulate a specific sector. It is responsible to foster the movie industry.

There are a variety of regulatory agencies and each one is responsible for different areas. Those responsible for issues such as prices, tariffs and conditions of the market make what is called economic regulation. The agencies related to topics such as health and safety make a social regulation, dealing mainly in issues related to rights of users and the quality of services.

For some authors[5], an analysis of these autarchies shows that the model of regulatory agency in the area of infrastructure has been expanded to other sectors unnecessarily. The application of this model in areas of infrastructure is justified by the necessity of autonomy and political independence of the agency in relation to the government to ensure stable rules to attract private investors. In these sectors, the regulation seeks to promote competition in areas of natural monopolies, reproducing as closely as possible the advantages of a competitive market or, alternatively, minimizing the impacts of market failure.

In the social regulatory area, the regulation covers the rights of users and quality of service. It is not to ensure or stimulate the competition, but to organize the market and the competition aiming to protect the rights of users and consumers. The nature of these activities requires much more a supervision role of the State, than the regulation of markets or the promotion of competition.

1.4.1. Brazilian Electricity Regulatory Agency - ANEEL

The Brazilian Electricity Regulatory Agency, created by Law 9,427/1996, was the first regulatory agency established by the federal government. Its powers and

[5] Celso Antônio Bandeira de Mello classifies the federal regulatory agencies in a different way. According to him, the agencies may be classified in 5 (five) different types:
a) Regulatory agency of public services: ANEEL, ANATEL, ANTT, ANTAQ and ANAC;
b) Regulatory agency of incentive activities: ANCINE;
c) Regulatory agency of activities to promote the regulation and oversight of economic activities related to the oil industry: ANP;
d) Regulatory agency of State activities, but available to individuals: ANVISA and ANS;
e) Regulatory agency of common good: ANA

responsibilities are: to regulate and supervise the generation, transmission, distribution and commercialization of electric power, addressing fairly the complaints from agents and consumers, for the benefit of society; to mediate conflicting interests among agents of the electrical sector and between these agents and consumers; to grant, permit and authorize electric-power facilities and services; to promote fair electricity rates; to ensure the quality of services; to enforce investment by agents; and to encourage competition among the operators and to ensure universal access to services. Its stated goal is to "provide favorable conditions for the electricity market to develop in a balanced environment amongst agents, for the benefit of society."

2. THE AMERICAN EXPERIENCE

2.1. The regulatory agencies in the United States

The Regulatory Agencies in the United States originated with the Interstate Commerce Commission, created in 1887 to regulate the services of interstate rail. After that, the regulation of the Public Utilities became the responsibility of authorities that have been created for each specific sector[6], as the Federal Energy Regulatory Commission and the Federal Communications Commission.

In the beginning, the regulatory agencies in the United States had the objective of fighting against monopolies and the unfair competition practiced by the North American railroads. The legal case Munn versus Illinois decided by the Supreme Court of the United States in 1876 legitimated the American regulation. The decision had the following conclusions:

- The State has to be able to regulate the conduct of its citizens, including the exercise of private activities, especially if it affects the community;
- The State regulation is responsible for setting a maximum price to be charged for services necessary to society;
- The exercise of certain activities is not made by the State but by private agents who provide and use that activity;
- Due to American federalism, States have wide legislative powers.

The term Agency in the United States is very broad and it covers any authority of the Government, except the Congress and the American Courts, as described in the Administrative Procedure Act[7] of 1946. Many authors claim that the American right is

[6] There are some exceptions in some cases of social regulation.

[7] The publication of this document was a great milestone in the American administrative law, streamlining the decision-making procedure of the federal administrative entities and ensuring greater consistency and

recognized as the right of the agencies and is regarded as a model for many countries. It has a decentralized organization, with several types of agencies: Regulatory Agency, Non Regulatory Agency, Executive Agency and Independent Regulatory Agency or Commissions.

Regulatory agencies do not confuse with executive agencies. Executive agencies are government agencies operating under a management contract, with limited administrative autonomy. The independent regulatory agencies have as main feature the independence, since are technical bodies, neutral and not subject to political pressures.

The American regulatory agencies have different functions and different activities, what usually corresponds to the historical conditions and have a specific reason to be created. Each regulatory regime reflects a distinct orientation of the policies adopted under it. Three main periods of the history are important: the Progressive Era, the New Deal, and the New Social Regulation

The agencies created in the Progressive Era (which lasted from the 1890s to the 1920s), were concerned mainly with the general character of the economic activity. It was the beginning of federal regulation of business. The regulatory policy in that period dealt with the impacts of trusts and monopoly on society. Some important agencies were created, such as: the Antitrust Division of the Department of Justice and the Federal Trade Commission, with the responsibility to deal with matters of competition and monopoly, the Federal Reserve System and the Interstate Commerce Commission.

In the New Deal period, the agencies had the concern to control specific markets, creating a kind of "stable cartels". The agencies of this period, such as Civil Aeronautics Board and the Federal Communications Commission, are labeled in the economic literature as "producer protection". The focus of the regulation in the New Deal period shifted to protect labor organization

The agencies of the New Social Regulation dealt with the social impact of business. The agencies were created to regulate all industries, and not a specific one. They were concerned with the interest of the society. The Environmental Protection Agency and the

predictability to the procedures they use. It is one of the most important pieces of United States administrative law.

Occupational Safety and Health Administration are examples of "social" regulatory agencies created in this period.

In the United States the independent regulatory agencies were created with the goal of increasing State intervention in the economy. Unlike the American experience, in Europe and Latin America, where the presence of the State in the economy was strongly felt by state companies, the model of independent regulatory agencies was adopted due the processes of privatization, with the decrease of direct State intervention in the economic plan. The historical experience of North American independent agencies also served to guide the worldwide debate on the creation and purpose of regulatory agencies in several countries.

2.2. Independent Regulatory Agencies

The independent regulatory agencies exist in the United States since the end of the nineteenth century. According to Ismael MATA, in the United States, the inspiring principle of the independent regulatory commission was to obtain a technical and independent administration not subject to alternation of public life. The activity of these regulatory agencies has never been immune to political and academic debate about its legitimacy, limits of action and institutional design. The main points of discussion are the delegation of power of Congress to the agencies, their ways of accountability and the control held by the 3 (three) branches and the society.

The role of these bodies was a controversial matter since their origin. Throughout the twentieth century there was much debate about the legitimacy of independent regulatory agencies, with questions of its existence and its institutional design. During the last century there was much controversy and gathering of information on the role of regulatory bodies in the State regulation.

Besides the academic debate, their way of operation generated judicial demands questioning the legality of their activities in the regulamentation and imposition of penalties for economic agents. All this controversy resulted in the spread of these bodies,

harmonization of its procedures through specific legislation and coordination of their actions.

2.3. Control mechanisms used in the American Regulatory Agencies

The Federal Administrative Procedure Act defines the normative structure of the agencies, their powers and duties and all administrative procedures are perfectly described in this document. The issue of separation of powers that is very important and the Supreme Court has already ruled out the incompatibility between the concentration of functions of the commissions with this principle.

There is no doubt that regulatory agencies are subject to judicial control but, in the United States, the main issue is what concerns to the due process of law[8]. The judicial control mechanisms of the agencies were softened towards the confidence in their technical specialty, which ensure the fairness and efficiency of their decisions. This type of control is more neutral and free from political, being based in the law and on public interest.

The social control should be seen within the historical and cultural framework of the United States. The agencies give publicity to its regulatory proposals, enabling the participation of stakeholders, making use of hearings and other forms of communication. Information, participation and accountability are considered key to the decision-making process.

One of the main arguments for the existence of regulatory agencies is related to the technical character of their decisions. In the United States, where what comes from science and technology is legitimate, it is not common to have questions about the decision of the regulators because they are technically skilled and operate based on transparent and accountable procedures. Therefore, the control on the content of decisions is quite limited.

[8] Due Process of Law implies and comprehends the administration of laws equally applicable to all under established rules which do not violate fundamental principles of private rights, and in a competent tribunal possessing jurisdiction of the cause and proceeding upon justice. It is founded upon the basic principle that every man shall have his day in court, and the benefit of the general law which proceeds only upon notice and which hears and considers before judgment is rendered." *State v. Green,* 232 S.W.2d 897, 903 (Mo. 1950).

The focus is to verify whether the procedure adopted was sufficient to ensure the participation of the stakeholders.

The legislative control examines the development of the activities and functions of the agencies. Congress exercises oversight of the performance of these bodies through committees that are endowed with exclusive jurisdiction to identify and punish any deviation from the agency's purpose.

In relation to agencies, the Executive Branch can act in two different ways: binding, in the case of dependent agencies and indicative, in the case of independent agencies. However, even being in an indicative way, the performance of the Executive Branch is important in facilitating the coordination of agencies and assist in formulating policies and principles to be followed. Therefore, being technical institutions, there is less possibility for political control.

Despite the large autonomy that regulatory agencies have, they must submit their legislative acts to the Regulatory Working Group, a central body of the government created in 1993 through the Executive Order Nº 12866[9], which has the function to alert them to acts deemed unnecessary, duplicate or if there is a conflict with government policies. (ARAGÃO, 2004).

The Regulatory Working Group also prepared guidelines on agency use of risk assessment and cost-benefit analysis. Recently it has helped to eliminate 16,000 obsolete pages of the Code of Federal Regulations.

[9] The purpose of the Executive Order Nº 12866 issued on Sept. 30, 1993, by President Clinton was to, "enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public."
According to this Executive Order, the Regulatory Working Group consists of representatives of the heads of each agency that the Administrator determines to have significant domestic regulatory responsibility and the Advisors. The Working Group shall serve as a forum to assist agencies in identifying and analyzing important regulatory issues, the development of innovative regulatory techniques, the methods, efficacy, and utility of comparative risk assessment in regulatory decision-making and the development of short forms and other streamlined regulatory approaches for small businesses and other entities.

3. AUTONOMY AND INDEPENDENCE

What has motivated the creation of the regulatory agencies was the possibility of establishing an administrative body, with high expertise and independence in relation to the political context and governmental structure, which usually are factors that influence the decisions of other bodies of the government.

However, this does not mean that they are immune to the types of control envisaged in the Constitution. Hence, they are subject to Executive control, especially of the Ministerial oversight and of the President of the Republic, which is responsible for the direction of the Federal Administration.

According to Caio Tácito, the autonomy of these agencies is neither under the authority of the Executive nor under the political control of the legislative branch. Due to its technical independence from the government, some authors[10] compare them to a fourth power. Nevertheless, autonomy occurs only in the administrative sphere, where it is possible, in any case, a judicial analysis.

After the change of government in 2003, the President and Ministers of State began to question the design adopted, what initiated a debate on the degree of autonomy of these entities. The President Lula complained many times "that it was unacceptable for an elected president, who has to be accountable to the population, to have less power than a director appointed for a five-year term that cannot be removed from office"[11]. A good explanation could be the fact at that time all agencies were governed by Directors appointed by the previous administration and it could reduce the possibility of implementing Lula's political agenda.

In March 2003, the Brazilian President appointed a commission to discuss a legislative proposal to change the structure of the agencies. Thus, the Executive sent a Bill to Congress in April 2004, proposing significant changes to the previous model, standardizing the design of the existing regulatory agencies.

[10] According to Edson Nunes *et* al, since the 30s, in the USA, due to the activities of the regulatory agencies, they have been called the fourth power.

[11] Luiz Carlos Bresser-Pereira, Folha de São Paulo, August 13, 2007.

The autonomy and independence of regulatory agencies are essential for them to adequately perform its role of regulation in the economic sector for which they were established as the common interest cannot be subject to constant political interventions. Nevertheless, there is not a standard way to measure independence, what make this process even more difficult.

3.1. How to ensure Independence?

The main differentiating element of the regulatory agencies is their independence in relation to the powers of the State. This is due to the importance of protecting them from political influences that are detrimental to the smooth running of the regulated sector.

Thus, the regulatory agencies, in order to reach equality and isonomy, which, because of the complexity and technicality of their acts, can be against many interests, are provided of certain guarantees to ensure that their goals will be effectively achieved. However, it is not easy to have independent regulatory agencies. Unfortunately doesn't exist a trivial formula and there is not a uniform way to conceive and measure it.

It is important to understand the necessity of autonomy and the characteristics which may maximize regulatory effectiveness. The independence of the regulatory agencies must be effective so as to improve the credibility of the agency and foster the quality of regulatory outputs. Some conditions that may contribute to strengthening the independence of agencies include:

- Appointment of Directors with technical background;
- Long Directors' tenure without possibility of reappointment;
- Staggered Directors;
- Collective decision;
- Quarantine after completion of term;
- Budgetary, financial and administrative autonomy;

- Technical staff composed of civil servants;
- Different salary rules to attract and retain well-qualified staff;
- Appeal of decisions only to courts;
- Transparency of the decisions.

3.2. Administrative Autonomy

The fact that indicates the administrative autonomy of regulatory agencies is the mandate for a fixed period of its Directors, which means they can only be removed from office before the deadline by serious misconduct, founded in administrative or judicial proceedings, with warranties of the contradictory and the wide defense.

Administrative autonomy is delegated to the agencies so they can resist the pressures of the Government to execute short-term acts in favor of it, because of the time restrictions imposed by the election cycle. However, the specific laws of the agencies allow the possibility of reappointment to the position of Director. Depending on the situation, it could allow another way to influence these autarchies, as it incentives a Director to avoid confrontation with the government in order to obtain another mandate.

The filling of Directors' positions in the regulatory agencies can be summarized in three steps: Indication by the President of Republic, Senate Plenary approval (after a hearing in the specific Committee) and appointment by the President.

In recent years, the government increased the number of political appointments of Directors of the regulatory agencies, and, in some cases, these positions remained vacant for long periods, showing the lack of priority of the government to define the names. This prejudicial situation to the agencies lowers considerably the quality of the work done by the agencies, overwhelming the board and in some cases, postponing important decisions. Moreover, according to the World Bank, there should be a reduction in Executive's discretion in appointing the directors of agencies by requiring certain legal predictions of technical skills.

Analyzing the specific case of ANEEL, we observe that the lack of definition of names for the board of the agency is a recurring problem. In May of 2005 ended the mandates of the Directors Paulo Pedrosa and Eduardo Ellery, and, to substitute them, were appointed in December of 2005, after 7 months, the Directors Edvaldo Santana and Joísa Campanher. To occupy the vacancies in the board, after the output of the Directors Jaconias de Aguiar and Isaac Averbuch, in December of 2005 and January of 2006 respectively, were appointed in August of 2006, after 8 months, the Directors Romeu Rufino and José Guilherme Sena. Even for the change of director-general, there was an interval of 2 months between the output of Jerson Kelman and the beginning of Nelson Hubner's mandate.

Considering 6 (six) federal regulatory agencies (ANEEL, ANATEL, ANA, ANTAQ, ANTT and ANP), it is possible to verify, through the analysis of the Figure 1, the average number of days of vacancy in the board of Directors. This measure considers the average number of days that each of the 28 posts of Directors of these agencies remained vacant for year, considering the period between the first take office of the Directors in each agency until July 2008.

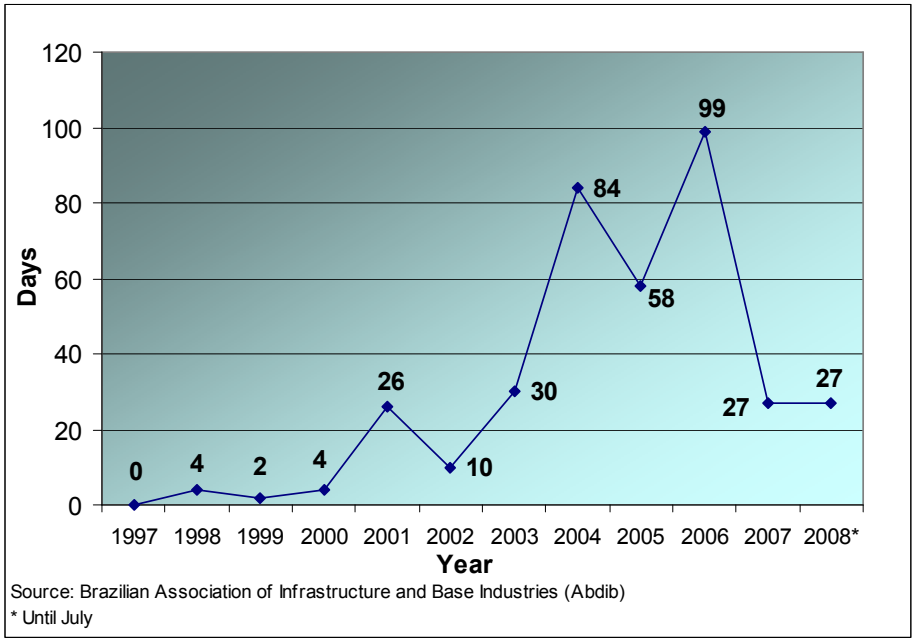


Figure 1 – Average number of days a seat was vacant six regulatory agencies (ANEEL, ANATEL, ANA, ANTAQ, ANTT and ANP) until July, 2008.

It would be very recommended that the legislation creates a mechanism to force the appointment of a replacement for the vacancy a few months before the end of the term, considering the time and steps necessary to appoint a new Director.

In March 2009, the President of the Infrastructure Services Committee of Senate, the Senator Fernando Collor de Melo, presented a proposal, which has already been approved, of changing the selection process driven by that Committee[12] to choose Directors of the regulatory agencies. Among the major changes, there is a requirement of the authorities indicated to the position to submit written documents attesting the professional experience and the technical expertise needed for the job. These changes strengthen the autonomy of the agencies as it minimizes the possibility of political indication and guarantee a board well prepared for the challenges of each sector.

Until the end of his mandate[13], President Lula can still change 21 (twenty-one) Directors of the 10 (ten) Federal Regulatory Agencies. At this time, probably these places will be filled faster than in other opportunities, because that would be a guarantee to ensure the control of the regulatory bodies even if a candidate of another political party wins the presidential elections of 2010.

3.3. Budgetary and Financial Autonomy

Financial autonomy is regarded as the key item to ensure the autonomy of regulatory agencies and to achieve this aim, it was created what is called the "regulation taxes" (or control taxes) charged by the Brazilians federal regulatory agencies. Thus, in theory, the agencies would not depend on the government budget.

However, the financial and budgetary autonomy is not respected in practice, being usually ignored by the Central Government. Although they receive revenue from general

[12] The Infrastructure Services Committee of Senate is responsible to approve the Directors to six agencies: ANEEL, ANATEL, ANP, ANTAQ, ANTT, and ANAC.
[13] Considering the date June 5, 2009 – Newspaper: Valor Econômico.

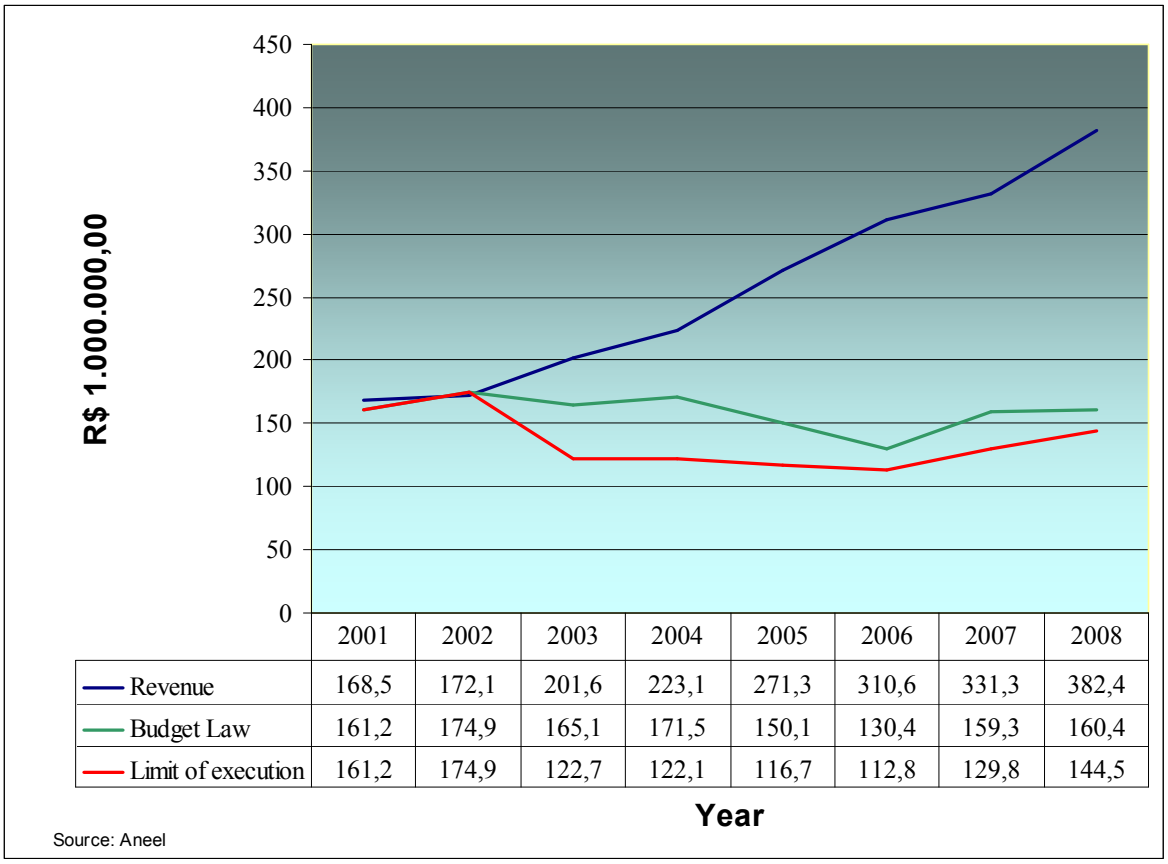
budgetary allocation by the government, these taxes have been collected and transferred to the agencies after a decree of contingency[14].

Unlike other countries, Brazil has a system where the President controls the budget process and may interfere in several stages of this process, which begins with a proposal made by the President to the Congress and ends with the promulgation of the Annual Budget Law.

The analysis of how a regulatory agency is affected by budget constraints is not very simple. In the particular case of Brazil, two additional factors make this examination even more difficult. In the last years, in an attempt to deal with fiscal crisis, the government has reduced the budget execution, imposing strict limits on public expenditures in an effort to reduce the fiscal deficit. Besides that, the annual available data of the regulatory agencies is consequently restricted.

An agency with financial autonomy could never have any restriction in the execution of its budget, and the law should have prohibition to prevent such occurrences. The figure below shows a comparison between the revenue, the annual budget law and the limit of execution of ANEEL since 2001. The analysis of this graph shows that over the years, the revenue collected has increased, however the limit of execution has remained constant. This contingency is also happening with other agencies, although for reasons that are not entirely clear, and has been hampered their activities, undermining the effectiveness of the regulatory regime.

[14] Instrument used by the Executive through which expenditures that have been approved in the budget law are suspended, integrally or partially, and made contingent on the evolution of the fiscal situation.



	2001	2002	2003	2004	2005	2006	2007	2008
Revenue	168,5	172,1	201,6	223,1	271,3	310,6	331,3	382,4
Budget Law	161,2	174,9	165,1	171,5	150,1	130,4	159,3	160,4
Limit of execution	161,2	174,9	122,7	122,1	116,7	112,8	129,8	144,5

Figure 2 - Comparison between the revenue, the annual budget law and the limit of execution of ANEEL since 2001

4. CONTROL MECHANISMS

The regulatory agencies are a body of the government, and, therefore, subject to the commands of the administrator, but with the advantage of being protected against political interference on their performance that should always be technical. Besides that, the regulatory agencies are also subject to some forms of control common to the autarchies.

The control is designed to ensure a better implementation of public service, analyzing the activity with the aim to improve it and prevent abuses of power by the regulatory agencies and should always be based on the principle of legality [15].

4.1. The external control by the Federal Court of Accounts

According to the Federal Constitution, the Federal Court of Accounts is the body that has duty to consider the merits of administrative actions and to assess the economicity of the regulatory agencies. The role of the Court of Accounts is mainly in three areas: financial and budgetary audit, analysis of the administrators' accounts and opinion on the provision of Executive's annual accounts. According to Marcelo Gomes, the audits are comprehensive and, for regulatory agencies, may involve the following subjects:

- Regulatory economy - consists in the reduction of regulatory costs maintaining the quality of results, to both maximize the value collected by the State and to minimize the costs borne by the users;
- Regulatory efficiency - it is the relationship between costs and products or the results of regulation. Implies that the benefit of the regulation does not exceed the costs to execute it;

[15] The principle of legality is the legal ideal that requires all law to be clear, ascertainable and non-retrospective. It requires decision makers to resolve disputes by applying legal rules that have been declared beforehand, and not to alter the legal situation retrospectively by discretionary departures from established law.

- Regulatory effectiveness - degree of achievement of regulation aims and the relationship between the desired results and actual results of regulatory management;

- Regulatory management - consists in the evaluation of accounting systems, planning, relationship with customers, human resources management and evaluation of the agency's relations with other institutions and comparison of its regulatory practices with other countries;

- Quality of service – It is the assessment whether a service or product reaches the expectations. It is measured by user satisfaction in relation to the agencies and to the concessionaires;

- Achievement of targets - evaluation to verify if the targets set to the agency or to the concessionaire, publicly declared or determined by rules, were achieved.

This control to be held by the Court of Accounts is based on the Federal Constitution, which means that their acts of control should be stuck to issues related to resource management and cannot ever discuss the merits of the regulatory decisions because, otherwise, the Court of Accounts would be regulating, in spite of the existence of the regulatory agencies which constitutionally have this function.

In July of 2009, the Chamber of Deputies' Committee on Financial Oversight & Control approved the completion of an audit by the Federal Court of Accounts on some regulatory agencies, among them the Brazilian Electricity Regulatory Agency. The audit was requested by President of the Committee to oversight the agencies regarding their independence, political criteria in decisions, regulatory capacity, coherency and risk management.

4.1.1. The Federal Court and the Regulatory Agencies – Institutional conflict?

The conduct of audits is provided in law. However, what is questioned in many cases is the extrapolation of the Court of Accounts and not a conflict of duties. The Court is not totally immune to political influence and does not have high technical expertise to perform audits in Regulatory Agencies.

From the political point of view, the Court of Accounts is composed of members appointed by Congress and by the President. Moreover, the Chamber of Deputies, the Federal Senate and technical or inquiry committees may request the Court of Accounts to carry out audits and inspections in some issues, what may represent significant political influence. This political context that should not be present in the agencies could bring instability, both to the agencies and to the regulated market, undermining efforts to provide an environment conducive to investment.

The role of the Court of Auditors is also questioned about its technical expertise, as it is one of the main features of the regulatory agencies, and, to deal with very specific and technical issues, the Court should have very well trained professional to audit the agencies.

The Court of Accounts has powers that go beyond the simple control of public accounts and performs tasks of finalist control of the regulatory agencies. This fact can be demonstrated by Art 1 of the Normative Instruction Nº 43 of the Court, which provides the monitoring of the procedures for periodic review of tariff for distribution services of electricity.

> *"Art. 1º Compete to the Federal Court of Accounts to accompany, in all its stages, procedures for periodic review of tariffs of grant contracts of the services of electric energy distribution, driven by the regulatory body of the energy sector."*

The audits of the Court of Accounts are essential, but may conflict with the model of regulation based on independent regulatory agencies. Therefore, it is necessary that the new model be formulated in order to avoid an overlap of competences from both parts, maximizing the performance of the agencies and of the Court, creating a favorable environment to attract private investments. The regulatory agency must provide information directly to the Court of Accounts, which cannot and should not invade its jurisdiction to modify acts of its finalist activity.

The success of Regulatory Agencies depends upon on the independence given to them. As the technical decisions of the regulatory agencies should not be subjected to the analysis of any administrative authority, there is no reason to analyze the subordination to the Court of Accounts or any other body of Public Administration.

4.2. Control of the regulatory agencies in Brazil

Regulatory agencies can be controlled in several ways. However a balance must be found between control and autonomy. The autonomy and independence of the agencies should always be present but it should not consent an uncontrolled self-government bodies, in order to avoid an undesirable rerouting of the strategic aims of delegation.

There are many types of control, such as: Executive control, Judicial control, Legislative control and Social control.

4.2.1. Executive Control

The activity of Regulatory Agencies involves the implementation of public policies and guidelines set by the Legislative branch, creating standards and rules for the regulated sector. Furthermore, the agencies monitor the compliance of the rules through the processes of oversight applying penalties when appropriate.

The Executive control, also known as internal control, is identified by the submission of regulatory agencies on public policies set by central government, which delimit the exercise of their activities. The administrative control via hierarchical appeal[16] is not possible, and the decisions taken by the agencies may not be revised or modified by any other political agent.

A measure that may affect the independence and autonomy of regulatory agencies is a new rule imposed by the government through the Implementing Order nº 164 of the Advocacy-General of the Union, of February 20, 2009. This act prevents the attorneys of the regulatory agencies defending the decisions of these bodies in the higher courts (Supreme Federal Court and Higher Courts of Justice). Thus, the defense of the decisions of the agencies in higher courts is now responsibility for a specific department of the Federal

[16] Consists of requesting a higher authority or the authority which has the power to supervise the original author of the enactment which is being challenged, to revoke or substitute it.

General Attorney Office - PGF, which is linked to the AGU, which is subordinate to the President.

According to the holder of the PGF, Marcelo Siqueira de Freitas, the objective of the measure is to increase the efficiency in the superior courts and to reduce costs. However, this may bring serious damage to the regulatory agencies, as the judicial defense of these autarchies may be subject to political maneuvering of the government. As there is no possibility to revoke a decision of a regulatory agency, the AGU could be targeted to neglect the defense of a decision in STJ and STF aiming to lose its effectiveness.

On June 13, 2006, the President Luiz Inácio Lula da Silva approved an opinion of the Advocacy-General of the Union - AGU[17] (AC-051) allowing the inappropriate hierarchical appeal to the Ministry to which the agency is linked to review its decisions. This opinion interferes decisively in the autonomy and independence of regulatory agencies and it was approved with the argument that "the measurement of the agencies' autonomy and of their conduct as well as directly linked to its institutional purposes is measured primarily by the proper alignment with public policies adopted by the President and the ministries which help him". As the opinion is not endowed with legislative power, it cannot change the law, which makes the act just a kind of administrative law in the Executive, but shows how the President thinks about this issue.

The intention to withdraw the hierarchical independence of agencies and the discussion about the autonomy don't match with the doctrine of Administrative Law. This presidential act is incompatible with the objectives that motivated the creation of those autarchies and contravenes the independent regulatory agent model that was intended to establish in Brazil.

[17] The Advocacy-General of the Union is the institution which, either directly or through a subordinated agency, represents the Union judicially or extrajudicially, and it is responsible, under the terms of the supplementary law which provides for its organization and operation, for the activities of judicial consultation and assistance to the Executive Branch.

4.2.2. Judicial Control

The Regulatory agencies, besides the exercise of administrative function, have a decisional function, solving disputes in the administrative field among sectoral agents and consumers. Despite the fact the Regulatory Agencies have more independence than other bodies, its Directors cannot extrapolate in their actions, since they must respect the principle of legality and other constitutional and administrative principles.

The judicial control is exercised by the bodies of the Judiciary and is a way of preserving individual rights, as it aims to ensure the application of the law in each case. According to Alexandre Santos de ARAGÃO, due the technical expertise given to regulatory agencies and the discretion conferred by law, the decision of the regulatory body must prevail, because otherwise, the matter would be decided by the judiciary and not by the regulatory agency.

The judicial control can never replace the regulatory agency's technical evaluation and this control should be restricted to aspects of the legality of the act, as provided in Article 5°, XXXV of the Federal Constitution: "the law shall not exclude any injury or threat to a right from the consideration of the Judicial branch".

Unlike what is often argued, the intervention of the Judiciary to review the decisions of regulatory agencies is absolutely normal. However it is necessary that this branch be more agile and efficient, as the absence of such features may withdraw the efficacy of the regulatory framework established, since the agencies were created with the objective of improving the performance of the State. It is known that the judicial system in the country is complex, expensive and full of loopholes.

Due the dynamism, social importance and technical character of the decisions of the regulatory agencies, the creation of specialized federal Courts in regulation could help to end the legal regulatory uncertainty. With them, specialized judges would be responsible to analyze the decisions of regulatory bodies, which would greatly reduce the chance of the courts adopt different positioning of the administrative decision. Albeit it doesn't exist in the Brazilian Law, the creation of specialized Courts is a possibility provided in the Constitution and to put it into practice would be extremely useful, as well as in the

regulatory agencies, experts in regulation would be responsible for reviewing each case, making the process more agile and efficient.

4.2.3. Legislative Control

The laws that created the regulatory agencies have granted far-reaching legislative function to them, so the problem is the fact that there is delegation of legislative functions to the Agency, transmitting the power to almost completely take care of certain matters.

The power of regulatory agencies is not unlimited, since there can be no disruption of the separation of powers. Allowing that regulations published by regulatory agencies can amend and repeal laws is contrary to what is provided in the "Democratic Rule of Law". The Legislative branch through this control prevents the regulatory agency to have unlimited power to create standards and rules.

Although the Legislative branch has the authority to halt the executive acts beyond the limits of its legislative delegation, is not authorized to cancel or revoke the regulatory standard even if the regulatory agency overstep its jurisdiction, but only to suspend its effects. In practice the autonomy of regulatory agencies toward the Legislative branch is quite reduced as the legislator may interfere in its legal system and even abolish these bodies.

Other forms of exercise of legislative control are: requests for information on certain subjects and convening of regulators to provide information to Parliamentary Committees of Inquiry[18].

In June of 2009 was created in the Chamber of Deputies a Parliamentary Committees of Inquiry to investigate the procedures used by ANEEL to set the tariff of the companies. The authors argue lack of transparency in the methods of correction and the

[18] Parliamentary committees of inquiry with investigative and judicial powers may be created by both houses (Chamber of Deputies and Federal Senate), jointly or separately, upon the request of one third of their members, to investigate a given matter and for a certain period of time, and their conclusions may be forwarded to the public prosecution service to determine the civil or criminal liability of the offenders (Article 58, paragraph 3 of the Constitution).

need to investigate the technical model followed by ANEEL for setting tariffs for energy in order to explain, for example, why the average rate of electricity in Brazil is higher than in countries of the so-called G7, group of seven most developed countries of the world.

4.2.4. Social Control

It is a complementary type of control and it is justified due to the fact the society is one of the agents involved in the activity of regulation, as service user or consumer of goods. Thus, their interests should also be considered in the activity performed by the agencies, and as it is an interested part, is also responsible for controlling the regulatory activities.

The legislation establishes social control on the basis of public hearings, public consultation, open consultation forum and participation in boards. These mechanisms are a useful tool to increase transparency, efficiency and effectiveness of regulation as well as reducing the costs to it.

The involvement of the society in these processes should not only be allowed but encouraged by the regulator. According to MARQUES NETO, "the existence of mechanisms that provide for participation is not enough. It is necessary that they rise to effective participation. If, nevertheless, it proves insufficient, the agency must reformulate such mechanisms (making them more accessible)."

The participation in these processes for ordinary people is not simple and not as ideal as it was imagined, as it requires availability of time, technical knowledge and accurate information. Thus, due to the fact that usually technical issues are treated and there is great difficulty in understanding the administrative process, the social control exercised over the decisions of the agencies is usually done through associations, represented by its specialists.

5. LEGISLATION AND THE IMPACTS IN THE REGULATORY AGENCIES

5.1. The Programme for the Strengthening of the Institutional Capacity for Regulatory Management - PRO-REG

In 2007 the Civil House of the Presidency of the Republic, working with the Ministries of Finance and of Planning, Budget and Management, proposed to set up the Programme for the Strengthening of Institutional Capacity for Regulatory Management (PRO-REG), created by Decree 6,062, of March 16, 2007.

This Programme that has been developed with the support of the Inter-American Development Bank (IADB), aims to introduce new mechanisms for accountability, participation and monitoring by civil society and at strengthening the quality of market regulation. The following objectives are included in the framework of PRO-REG, as Art. 2º of the Decree:

- To strengthen the regulatory system to facilitate the full exercise of functions by all actors;
- To strengthen the capacities to formulate and analyze public policies in regulated sectors;
- To improve coordination and strategic views between sectoral policies and the regulatory process;
- To strengthen autonomy, transparency and performance of regulatory agencies; and
- To develop and to improve mechanisms for social accountability and transparency during the regulatory process.

In order to implement the PRO-REG, two bodies have been created: a Management Committee and a Consultative Committee coordinated by the Civil House of the Presidency of the Republic.

The PRO-REG, through the Management Committee and the Consultative Committee, as in art 3º, Decree 6,062, should:

- Mobilize the bodies and public authorities involved in the regulatory process;
- Coordinate and promote the implementation of studies and researches and to formulate proposals to be implemented in the agencies and entities involved in the regulatory process;
- Identify and propose the adoption of a model of excellence in regulatory management and to prepare the necessary instruments for its implementation; and
- Technically support the bodies and entities of government in the implementation of measures to be adopted.

As part of the implementation of the Programme for the Strengthening of the Institutional Capacity for Regulatory Management - PRO-REG, it is expected that the Regulatory Impact Analysis - RIA be gradually incorporated in regulatory policy in Brazil.

The OECD experience shows that implementation of the RIA is a process that requires accurate planning, specific resources and objectives of short and medium term. According to the Programme for the Strengthening of the Institutional Capacity for Regulatory Management, the RIA will be implemented in Brazil as part of efforts to improve regulatory quality.

5.2. The Bill 3,337/2004 - The Law of the Brazilian Regulatory Agencies

An issue of fundamental importance for the country's growth is in the Congress: the Bill of the Regulatory Agencies. The Bill 3,337/04 establishes a regulatory framework for regulatory agencies, as nowadays each one follows its own rules.

After more than four years of discussion, the new text of the Law presents advancements in the original proposal of the government, but still contains serious threats that need to be eliminated. A general law for the regulatory agencies is essential for economic growth because it requires clear rules to encourage private investment.

The general Law of the regulatory agencies should not preclude its functioning nor eliminate incentives for regulatory agencies to create additional mechanisms of social participation and transparency. It must provide a clear and better definition of responsibilities among the agencies and other spheres of public power. This measure may reduce the conflict with Ministries and the Federal Court of Accounts. In recent years, these bodies have issued opinions on matters of regulatory nature, as setting tariffs and oversight of companies, assignments that are compatible only to regulatory agencies.

5.2.1. The main challenges

The proposal that was initially elaborated by the government, in 2004, foresaw a "management contract" which meant the financial and administrative capture of the agencies by the government. These mechanisms would give to the Executive the power to define goals and criteria for evaluation of the agencies, whose results would influence the release of resources to regulatory bodies.

Besides that, the first project also treated of the Ombudsman figure that would be a person indicated by the government, with a Director status and with access to all information of the agencies. This text should be modified, because it is very important to maintain the role of the ombudsman as it is, as a channel of communication between agencies and society.

There are some points that must be improved in the system and this new law should address. The first is the necessity for greater coordination between agencies in different sectors. Currently, there are some businesses that must be approved by two or more agencies. The solution would be the agencies signed an agreement defining the jurisdiction of each one.

According to many specialists, another very important point is to ensure the maintenance of the power to grant concessions, permits and authorizations in charge of the regulatory agencies. The transference of the power to grant concessions to the Ministries reflects technical setback, which is contrary to the successful international experience, what has generated much debate. This measure may inhibit the investment because it would

allow greater political influence in decisions that must follow strict technical criteria. Furthermore, it is still important to establish a clear and predictable mechanism of approval by the regulatory agencies of these transfers of concessions, permits and authorizations.

However, the Deputy Minister for Analysis and Follow up of Government Policies of the Presidency of the Republic, Luiz Alberto dos Santos, have been anticipated that this issue is already decided by the government, and the transfer of the power to grant to the Ministries will not weaken the agencies. According to the current president of ANATEL, Ronaldo Sardenberg, agencies are observed to have a set of credentials, such as regulation, oversight and some of them, the award of grants. The loss of any of these tasks could certainly affect them.

In addition, it is necessary to increase the coordination between the agencies and bodies for the defense of competition. Another recommendation for the Law is to ensure means to separate the agency from political influence. In this sense, completing the technical staff of the agencies would be an efficient solution. Finally, all the agencies must seek to give more transparency to the procedures and decisions in order to further the independence and increase the respect with the interested parts.

It is essential that the new General Law of the agencies, in order to ensure the proper functioning of the regulatory model and the stability of operating rules of the regulatory body, in summary, include the following aspects:

- Creation of mechanisms for dealing with the government, improving the control mechanisms, enabling effective independence and autonomy;
- Replacement of the Management Contract for another more efficient mechanism;
- Expansion of the dialogue with service providers and society;
- Improvement of the Ombudsman figure;
- Maintaining with the regulatory agencies the power to perform the procedures for granting, creating a clear and predictable mechanism for approval;
- Reduction of the information asymmetry between consumers and service providers;

- Guarantee of transparency and popular participation;
- Definition of the boundaries between policies, to clarify the roles of government and agencies;

Nevertheless, it is very difficult to assume that regulatory agencies will have administrative autonomy without financial autonomy. The current draft of the Bill indicates that only part of the problems will be fixed, and growing contingency of financial resources that prevents these bodies exercise their functions will not be adequately solved. No one can safely predict what will happen because there will be much debate and discussion, and, certainly, the text of the project will still be changed.

5.3. Brazilian Competition Authorities - Impacts in the regulatory system

It is being discussed in the Congress a Bill that aims to reform the Brazilian Competition System. The proposal changes the relationship and responsibilities of public bodies involved in this issue. The main goal is to create a business environment more dynamic, competitive and fair, especially for the consumer. According to the project, the Brazilian Competition System would be formed by the Administrative Council for Economic Defense - CADE[19] and by the Secretariat of Economic Monitoring Office - SEAE[20].

However, this project takes roles of regulatory agencies and transfers them to these bodies. This proposal may represent a reduction of the autonomy of agencies, as it will be attributed to SEAE skills that are currently exclusive of the agencies and it will be able to comment on any rules issued by the agencies that have relation to competition and revision of tariffs of public services, as provided in Article 19, I of the Bill.

[19] CADE is an independent federal agency, associated with the Ministry of Justice for budgetary purposes. Its role in competition law enforcement is to adjudicate alleged violations of the law and to impose appropriate remedies and fines.

[20] SEAE is responsible for monitoring implementation of the regulation and management models developed by regulatory agencies, sectoral ministries and other similar bodies, issuing opinions, whenever deemed necessary or requested on.

> *"Art. 19. Compete to the Secretariat of Economic Monitoring to promote competition in the government's organs and to the society, with the duty, in particular, of the following:*
>
> *I – to opine, in matters concerning the promotion of competition, on proposed amendments to legislative acts of general interest of economic agents, consumers or users of services subject to public consultation by the regulatory agencies and, where relevant, about the applications for tariffs' revision and the drafts;"*

Another questioned point is that this Bill requires the agencies to provide assistance to the Administrative Council for Economic Defense producing technical reports, which contradicts the principle of independence and autonomy of the agencies, as provided in Article 9º, XIX, § 3º:

> *"§ 3 The federal authorities, the directors of federal autarchy, foundation, public company and mixed economy society and regulatory agencies are compelled to provide, under penalty of liability, all the assistance and cooperation which is requested by Cade, including preparing technical opinions on matters within its competence."*

The discussion on this issue has generated controversy and still needs a more detailed study. Albeit some people insist that these changes will not affect the autonomy of regulatory agencies, members of Congress and of the government have already expressed their discomfort with the privileges granted to these special autarchies. Therefore, this Bill, associated to the Law of the Agencies that is also being discussed could represent a threat to autonomy and independence of the regulatory agencies.

6. REGULATORY IMPACT ANALYSIS

6.1. What is Regulatory Impact Analysis?

Regulatory Impact Analysis is a formal regulatory tool that examines and evaluates the benefits, costs and effects of new or amended regulations. It offers to the decision-makers valuable empirical data and a structure in which they can evaluate their options and the consequences that their decisions may have. The RIA is used to define problems and to ensure that the government action is justified and appropriate. In summary, it is a quality filter in order to grant the best regulation to the society. One of the main items of the RIA is the public consultation, which is a procedure adopted in most agencies in order to give publicity to the decisions and to ensure the participation of the society.

The method of Regulatory Analysis Impacts may be based on various techniques that can be used in an integrated manner and not exclusive, such as comparative cost-benefit analysis, the cost-effectiveness and business impact analysis.

Most OECD countries have adopted Regulatory Impact Analysis as a systematic tool to enhance the quality of new regulations, as shown in Figure 3.

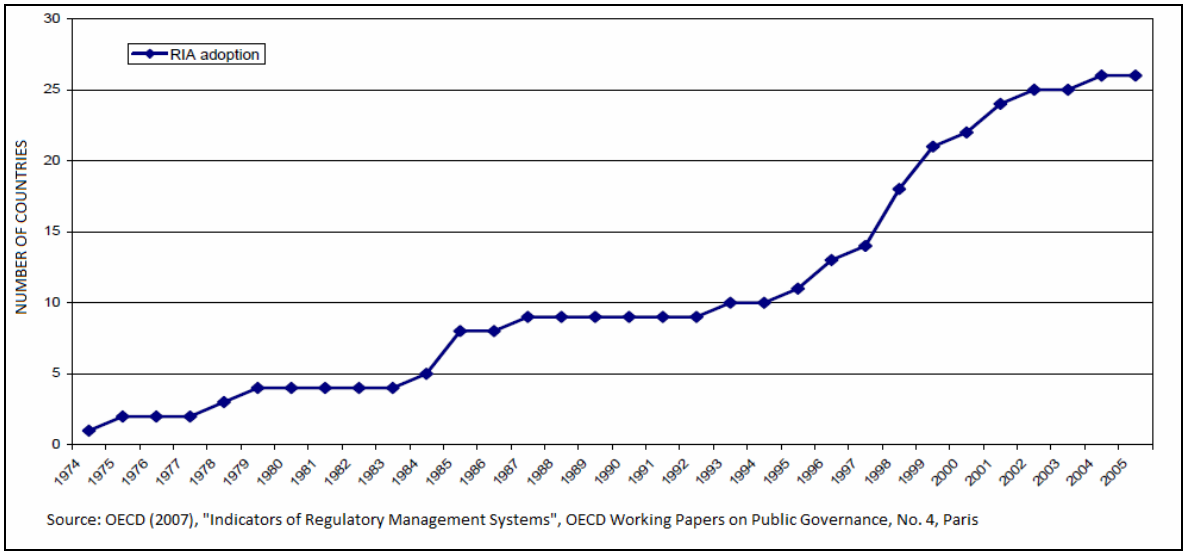


Figure 3 – RIA adoption in OECD countries.

6.2. Benefits of the Regulatory Impact Analysis

According to OECD recommendation, the introduction of Regulatory Impact Analysis is required for the improvement of regulation in Brazil. Thus, it provides high-quality to the end product of regulation obeying the policies of government with the least possible cost to society.

The OECD has suggested that RIA can contribute to economic efficiency by highlighting aspects of regulation which limit consumer choice and the level of competition in an economy. It can also identify potentially anti-competitive or protectionist regulations before they are enacted, improves the quality of governance through the increase of the use of evidence-based decision-making and enhances the transparency and legitimacy of the regulatory process.

RIA has also been associated with a number of other benefits such as:

- The justification for issuing a regulation, identifying the problem or situation to be resolved with the rule;
- The analysis of the risks of the problem for the population or for specific sectors;
- The identification and analysis of possible regulatory alternatives to deal with the problem or situation;
- The improvement of the estimation of costs and benefits of the action.

This tool can reduce the discretionary authority in issuing the regulation, make the policy changes more predictable, provide further legitimacy to the regulatory framework, strengthens the autonomy and independence of regulatory agencies and make the process less expensive.

The RIA makes possible the evaluation of the potential impacts of a political action or a regulatory proposal allowing the analysis of anticipated costs-benefits and cost-

effectiveness. It has been extensively used in the international context in regulatory improvement programs, as in many countries in Europe and North America.

The RIA pilot projects have demonstrated that it improves the quality of regulation. International evidence also suggests that it contributes in a broader level to three inter-related areas: the economy, systems of governance and efficiency of the public service. However, it is important that this process of regulatory impact analysis should not be limited to regulatory agencies, but to the whole regulatory process.

6.3. Does the RIA may affect the autonomy and independence of the agencies?

The implementation of this tool would represent a major advance in the Brazilian regulatory model, since its use in other countries has been effective and has been growing considerably over the years.

However, it is important to observe two aspects to ensure the autonomy and the independence of the agencies. First, this tool should not be used for political purposes and as a way to influence and control the decision of the regulatory agencies. In addition, the administrative structure to conduct the regulatory impact analysis should be clearly defined and should not increase the existing bureaucracy in the public administration. According to the OECD, it should be established a powerful administrative body to undertake the supervision of the regulatory quality what can turn the regulatory process slower.

The Brazilian government intends to make these changes until the end of 2010, during the Lula's administration. Nevertheless, they haven´t already decided neither how this office of regulatory oversight will work nor how its director will be chosen.

Nevertheless, to be truly effective, it is necessary to carefully study the model before applying it, because there are some characteristics (cultural, political, social and economic) that should be considered and the establishment of a model should consider these peculiarities. An unsuccessful attempt may represent a serious weakening of the Brazilian regulatory agencies.

7. CONCLUSION

The main function of Regulatory Agencies is to preserve the harmony between the interests of society, as price and quality, the service providers, as the economic viability of its activity, and the government.

The international experience clearly indicates that regulatory agencies should be considered a body of State, not of Government. Furthermore, they must be guaranteed budgetary, financial and administrative independence and must be used rigid and technical criteria when indicating the Directors. It should also be required that these Directors have no relationship with companies or association with interest in the sector regulated by the agency.

Even though it is still a very controversial issue, the evolution of regulatory process in United States has in fact been shown that it is possible to possible to keep independent agencies democratically accountable by a combination of control mechanisms, such as: clear and defined objectives, judicial review, professionalism, transparency and public participation.

Regulatory agencies were established to have autonomy and independence in relation to the bodies they are linked. Their autonomy in relation to ministries and other government instances and their independence from political pressures are essential to their performance. It is very important to make them properly exercise their duties for the welfare of the State, suppliers of products, service providers and especially for the society.

It can be observed that the budgetary and financial autonomy granted by law to the agencies have been in practice, disrespected by the Brazilian Central Government. Through procedures provided in law, it interferes in the preparation of the budget proposal and administers the funds raised on behalf of entities. It is very easy to see how budget arrangements can be used to compromise not only the effectiveness, but also the independence of regulatory agencies.

Nevertheless, there is resistance to this autonomy because of the administrative centralization and strong hierarchy presented in the Brazilian administrative system. For

this reason, the Brazilian regulatory agencies will hardly reach the level of independence of the American agencies.

The debate on the degree of autonomy of the Brazilian regulatory agencies should be detailed, as provided in legislation. Usually the necessary distinctions between hierarchical control and political control are not made. Thus, this autonomy is often associated with lack of control. International evaluations have shown that the control of the regulatory agencies is achieved through standardization and transparency of its procedures.

The Regulatory Agencies show formal independence but not real independence. There is also lack of coordination and political interference. The regulatory framework in Brazil is very new and indeed it has not had the time to develop a culture of its own. Besides that, due the absence of a clear and comprehensive government policy, there is certain confusion in the overall objectives of the regulatory agencies.

Despite the Executive control, the posture of the present government with the regulatory agencies has been improving since the beginning of its administration. Currently, regulatory agencies have more autonomy when compared to 5 (five) years ago and most of them have already technical staff composed of public servants with competitive salaries. However, the government has been acting on the desire to change the rules of the regulatory system with the intention to significantly reduce their power, what may transform this valuable State instrument in a Government instrument.

It is necessary to set in law for each sector, with precision and detail, which are the tasks of the agencies and which belong to the Ministries, in order to avoid conflicts and disputes. Because of the lack of comprehensive sectoral regulatory frameworks, there are difficulties to define the control to be exercised by the Court of Accounts. The roles of different agencies, according to its peculiarities and the sectors involved, should be established in specific laws rather than in a general law.

The Regulatory Impact Analysis is important to improve regulatory accountability and transparency of the agencies. The standardization of this process will promote greater regulatory accountability, and, when effectively implemented, they will help lawmakers and regulators to make better decisions about regulation. However, it is clear that it may have a dangerous power if used with political reasons to control the regulatory agencies.

The presence of regulatory agencies in the Brazilian economic scenario is an irreversible change. The legitimacy and specificity of the regulatory process must be recognized, so as to make it truly effective. Therefore, it is important to better understand its role and develop strengthening mechanisms and democratic control. The creation of the PRO-REG shows that the government intends to invest in the activities of regulation, strengthening the role of agencies and bodies of the executive that enjoy some autonomy. It will also help to improve the coordination between the development of public policy and regulation and its implementation by those bodies.

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