Institutional reputation and the oversight of Brazilian Federal Court of Accounts over independent Regulatory Agencies*

Reputação institucional e o controle das Agências Reguladoras pelo TCU

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ABSTRACT

This paper tackles the oversight dynamics between Independent Regulatory Agencies and Federal Court of Accounts in an empirical basis. This dialogue encompasses three steps: control, reaction, and assessment. Documents produced in each steps purports the following results: (1) Federal Court of Accounts' recommendations are binding, for their obedience is ordinarily expected; (2) Independent Regulatory Agencies are deferent to Federal Court of Accounts' recommendations, but Aneel; (3) technical units of Federal Court of Accounts and Independent Regulatory Agencies dispute the rightness of regulation. The reputational theory explains why the Court tend to follow strictly the former.

KEYWORDS

Independent Regulatory Agencies — Federal Court of Accounts — regulation oversight — deference — institutional reputation

RESUMO

O presente artigo se volta à análise do controle das Agências Reguladoras pelo Tribunal de Contas da União em uma perspectiva empírica, considerando o diálogo institucional travado entre essas instituições. Este é um diálogo marcado por três etapas — controle pelo TCU, reação da Agência e checagem desta reação pelo TCU —, cuja análise dos documentos produzidos nesse processo permitiu alcançar as seguintes constatações: (i) as recomendações do TCU têm caráter mandatório, pois o TCU tem a expectativa de que elas sejam observadas pelas Agências; (ii) é alto o grau de deferência das Agências Reguladoras às recomendações do TCU, ressalvada a Aneel; e (iii) não raro a unidade técnica do TCU rivaliza com a unidade técnica da Agência sobre decisões relacionadas com as atividades-fim das Agências, preferindo o colegiado pela orientação da unidade técnica. Aplicamos a teoria da reputação institucional para explicar o cenário da preferência da cúpula do TCU pela interpretação técnica de suas unidades técnicas.

PALAVRAS-CHAVE

Agências Reguladoras — Tribunal de Contas da União — controle da regulação — deferência — reputação institucional

1. Introduction: control of the Regulatory Agencies under observation

The public administration today is immersed in a scenario of increasing numbers of mechanisms to control public management. The traditional institutions of control operate in public management and can lead to the transfer of responsibilities from the administrative sphere to the control sphere. At the end of the day, the controlling entity takes the place of a bureaucratic body in deciding important issues of public policy, regulation and budgetary allocation.

The question of the replacement of the public power by its controller can be approached from a number of different perspectives. In this paper we shall analyze the application of the theory of reputational organization to Brazilian public bureaucracy using as an example the way that the Federal Court of Auditors (local acronym TCU) controls the Regulatory Agencies. We shall work on the assumption that the responsibility for regulation is transferred to the Federal Court of Auditors because the latter's technical unit is more trusted than the Regulatory Agencies. As a consequence, the independence and autonomy of Regulatory Agencies are conditioned by the control of the Federal Court of Auditors.

Its institutional reputation — a set of beliefs about the capacity for organization, intentions, history and mission of an institution in the eyes of its audience[1] — frequently determines the degree of autonomy and discretion which the institution enjoys. Daniel Carpenter proposes four dimensions for measuring the reputation of an institution, namely: reputation for performance (does it complete its tasks?), moral reputation (is it committed, flexible and honest?), procedural reputation (are standard procedures followed?) and technical reputation (does it have the technical capacity required to deal with complex situations?).[2] And so the sounder these facets of the institution's reputation are, the greater its degree of freedom of action and the fewer its limitations.[3]

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1 Cf. CARPENTER, Daniel. Reputation and power: organizational image and pharmaceutical regulation at the FDA. Princeton: Princeton University Press, 2010. pg. 45.

2 CARPENTER, Daniel; KRAUSE, George. Reputation and public administration. Public Administration Review, v. 72, pg. 26, 2012.

3 Peter H. Schuck considers that trust in public institutions is an element of fundamental importance for the development of public governance. Thus one of the big challenges of government, he says, is to increase the confidence of private citizens in its actions, otherwise the public perception that administrative bodies and entities are not legitimate will put

This theory was applied originally to the political bureaucracy, but its application in the field of administrative law can help reflect on the way the law is constructed. Specifically on the topic of administrative control, this is a fertile area and studies have already been made about the institutional reputation and the judicial control of the public power. Here we shall try to present a theoretical approximation between the results obtained in this survey and the empirical studies carried out by the Watchdog on Public Administration.

In this paper we shall take the Plenary Session of the Federal Court of Auditors to be the audience and each of the Regulatory Agencies and the Court's technical area as the players in the control of the Regulatory Agencies by the Federal Court of Auditors. Using empirical investigation, a method which we shall describe below, we shall identify the key parameters of this control. The theory of institutional reputation does not provide a complete analysis of the control of the Regulatory Agencies by the Federal Court of Auditors, a complex activity which is permeated by diverse interests, but it certainly contributes to the debate.

2. Methodology

To analyze the research hypothesis presented above, we mapped the institutional dialogue between Regulatory Agencies and the Federal Court of Auditors. We selected eight federal Regulatory Agencies: the National Telecommunications Agency (Anatel), National Civil Aviation Agency (Anac), National Water Transport Agency (Antaq), National Land Transport Agency (ANTT), National Electrical Energy Agency (Aneel), National Health Surveillance Agency (Anvisa), National Health Agency (ANS) and National Petroleum Agency (ANP).

The method designed consists of three observation fronts: (1) analysis of decisions of the Federal Court of Auditors for the purpose of understanding how it controls the Regulatory Agencies; (2) analysis of the responses of the Regulatory Agencies to the demands of the Federal Court of Auditors; and (3) analysis of the decisions of the Federal Court of Auditors on the responses to

government action at risk. The mechanism to deal with this challenge, the author suggests, is to boost the results of government action. Cf. SCHUCK, Peter H. Why government fails so often. And how it can do better. Princeton University Press, 2014. pg. 11-18.

the control submitted or executed by the Regulatory Agencies. For each area of analysis we constructed a table: (1) control table, (2) reaction table and (3) assessment table.

We checked the institutional dialogue between Regulatory Agencies and the Federal Court of Auditors from an empirical analysis of the audit decisions of the rendered in the year of 2014. We consulted the Federal Court of Auditors website for final and unappealable decisions and identified all the appellate decisions in 2014 that mentioned the Regulatory Agencies selected. This search was not based on a timeframe, but only on the acronym or the full name of each of the Regulatory Agencies, and we then selected those dated 2014 manually. The final sample contains 159 appellate decisions.

The selected appellate decisions were analyzed and details entered in the control table, seeking in particular to identify the determinations and recommendations of the Federal Court of Auditors to the Agencies and the degree of intervention in their core activities. We completed the control table with data from each appellate decision, and this served as a basis to find the responses of the agencies to the Federal Court of Auditors determinations, as well as any comments by the Court on these reactions.

The next step was to find the reaction of the selected Regulatory Agencies to the recommendations and determinations of the Court, whether formal or operational. We consider a reaction to be formal when the Agency gives notice of meeting the Court's determination or recommendation in an official document. An operational reaction occurs when the Court's wishes lead to some structural or behavioral change in the Agency, which may or may not be documented.

We analyzed the comments of the Regulatory Agencies on Federal Court of Auditors decisions by studying official letters, memorandums, management reports, reports on specific activities, internal audit reports, accountability reports and so on. The reaction table was completed on the basis of this information.

For the assessment table, we cataloged further declarations on the appellate decisions listed in the control table. The data for this analysis was found by matching the process number and topic mentioned in the control appellate decision with the Agency name.

The information was entered in the tables so as to make the research results easier to understand. Our analysis was focused on the tables and on the overall content of the documents collected. The results of the survey are given below.

3. Empirical study: the main topics of analysis of the control of the Regulatory Agencies by the Federal Court of Auditors

In this section we analyze more closely the interaction between Federal Court of Auditors and Regulatory Agencies from the perspective of control.

The first point to be made is on the possibility of standardizing the various dynamics of control of the Regulatory Agencies by the Federal Court of Auditors. Considering the number of Regulatory Agencies and the different regulations, would it be sufficient to present a "general overview"? Or, on the contrary, would the research group be oversimplifying a complex reality and jeopardizing a more sophisticated analysis?

Since the purpose of the research is to consider the hypothesis that the independence and autonomy of the Regulatory Agencies are limited by Federal Court of Auditors, we think it is enough to focus our attention on the key issues of this control. In spite of the diversity of the Agencies and of the regulatory objectives, we identified common topics in Federal Court of Auditors control of all the Regulatory Agencies investigated. It is natural, therefore, that these topics should be key in representing the manner of interaction between Federal Court of Auditors and Regulatory Agencies. Complexity will be preserved because the examples collected empirically illustrate a scenario as close as possible to the real one, while the exceptions and peculiarities will be equally highlighted.

The following were the recurrent issues in our analysis of control of the Regulatory Agencies by the Federal Court of Auditors: (i) the recommendations are mandatory by nature, since the Federal Court of Auditors expects them to be observed by the Agencies while the latter also feel bound, such that quite often they are referred to as determinations; (ii) there is a high degree of deference by the Regulatory Agencies to the Federal Court of Auditors recommendations, of whatever nature, with the sole exception of Aneel; and (iii) there is a fundamental difference between the technical unit of the Federal Court of Auditors and its board, which has direct consequences on the control of the regulation; incidentally, there is sometimes rivalry between the Federal Court of Auditors technical unit and an Agency's, and then the board has to decide between them.

3.1 Normative "recommendations": how does the Federal Court of Auditors control regulation?

The Federal Court of Auditors' responsibilities for control are expressly defined in the Federal Constitution, in Article 71. The list of responsibilities contained in this article is a long one, reinforcing the view that the constituent assembly sought to strengthen the institutions of control. The list of constitutional responsibilities includes supervision, such as the verification of the correctness of staff admissions or retirements,[4] opinions such as the analysis of the accounts of the president of the Republic,[5] judgments, such as the judgments on the accounts of those responsible for public assets or rights,[6] sanctions, in particular the application of fines,[7] and advisory, for instance information provided at the request of the National Congress.[8] In parallel with these responsibilities, there are others which the institution refers to as its corrective function.

According to the Court's own definition, the corrective function comes into play in cases of illegality or irregularities committed by public bodies or entities. In such cases the Federal Court of Auditors sets a deadline for compliance with the law. The corrective function derives directly from Article 71, section IX, of the Constitution, according to which the Federal Court of Auditors has the responsibility of "setting a deadline for the body or entity to take the steps necessary to comply fully with the law, if illegality is discovered". The mechanism for exercising this responsibility is inspection, ex officio or on request, whereby the public body or entity is inspected, usually as the result of a complaint filed with the Federal Court of Auditors.

Also in the language of the Federal Court of Auditors, the Constitution also provides for an educational function, in respect of the dissemination of information about how the Court operates and recommendations for measures of administrative efficiency. Operational auditing is the mechanism par excellence for exercising its educational responsibility, in accordance with Article 71, section IV of the Federal Constitution:

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4 Cf. Article 71, item III of the Constitution of the Federative Republic of Brazil.
5 Cf. Article 71, item I of the Constitution of the Federative Republic of Brazil.
6 Cf. Article 71, item II of the Constitution of the Federative Republic of Brazil.
7 Cf. Article 71, item VIII of the Constitution of the Federative Republic of Brazil.
8 Cf. Article 71, item VII of the Constitution of the Federative Republic of Brazil.

> Article 71, item IV of the Federal Constitution "on its own initiative, or that of the Chamber of Deputies, the Federal Senate, technical commissions or commissions of enquiry, to carry out inspections and **audits** of an accounting, financial, budgetary, **operational** or patrimonial nature, of the administrative units of the Legislative, Executive and Judicial Branches and the other entities listed in item II". [our emphasis]

The Federal Court of Auditors' own interpretation of this article, with substantial backing from the doctrine, is that the Federal Constitution attributes to the Court a unique function of guidance to the administrative bodies and entities on how to operate within the parameters of legality in order to optimize results.[9] Thus this new responsibility attributed to the Federal Court of Auditors by the Constituent Assembly of 1985-86 is in line with the criteria of legality, legitimacy and economy provided for in Article 70, main section, of the Constitution.[10] The Federal Court of Auditors therefore derives from Article 71, section IV, of the Constitution, legitimate responsibility to examine the core activity of administrative bodies and entities, even if the law expressly confers autonomy and independence on them, as is the case of the Regulatory Agencies.

Observation of the decisions of the Federal Court of Auditors concerning the Regulatory Agencies indicates that operational auditing is the mechanism most often used to control regulation. Equally important, due to the works undertaken for the World Cup and the Olympic Games, are the monitoring, or supervision, and the auditing of programs, particularly concessions of infrastructure. This scenario applies particularly to Anac: all the cases analyzed were of monitoring tenders — such as the process for concession of Galeão and Confins airports — and existing concessions, and monitoring the

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[9] "On giving the Federal Court of Auditors the power of control through operational auditing, the constituent assembly used this powerful instrument to ensure, as never before in Brazil's legal history, the possibility of realizing the principles of efficiency and efficacy. Rationalization and quality should, therefore, be watchwords against bureaucratic control and merely accurate bookkeeping; the essence prevailing over the form." FERNANDES, Jorge Ulisses Jacoby. Tribunal de Contas do Brasil: jurisdição e competência. Belo Horizonte: Fórum, 2016. pg. 303.

[10] And this is how in its Internal Regulations the Federal Court of Auditors defines one of its auditing fronts: "Article 239. Auditing is the instrument of supervision used by the Court to: [...] II — assess the performance of the bodies and entities under its jurisdiction, as well as of the systems, programs, projects and activities of government, as to their economy, efficiency and efficacy". TCU Resolution 246/2011.

works for the 2014 World Cup. Other instruments of control by the Federal Court of Auditors over the Regulatory Agencies are consultations and the rendering of accounts.

In most cases of control of the Regulatory Agencies being exercised by the Federal Court of Auditors on request, the instrument used is that of representation. A complaint led to Appellate Decision No. 2.305/2009, which referred to the number of political appointments in the Regulatory Agencies. The Federal Court of Auditors upheld the case brought by the career civil servants in the Agencies and made the following recommendations: (i) within 180 days, compensation of political appointees in ANTT to be adjusted, taking as a benchmark the numbers of jobs determined in Annex II-B of Decree 4.130/2002 and the current compensation table; and (ii) within 30 days, Antaq, Anvisa, Aneel, ANTT and ANP to submit to the Federal Court of Auditors a detailed timetable showing how they proposed to comply with the determinations of the appellate decision.

However the cases of control on request are the exception; generally the Federal Court of Auditors controls the Regulatory Agencies ex officio, on its own initiative. There are two important consequences of this finding by the survey.

First of all, the Regulatory Agencies are on the Federal Court of Auditors' control radar. In spite of the amount of public expense and the administrative bodies and entities that could be under the control of the Federal Court of Auditors, a large portion of the control it wields is focused on regulation and the Regulatory Agencies. The importance of the responsibilities of the Regulatory Agencies, their visibility, the sums involved in the concession agreements and the impact of regulation on the public may be the factors that explain why the Regulatory Agencies are on the Federal Court of Auditors' control agenda. However to understand why the Federal Court of Auditors controls the Regulatory Agencies requires further investigation.

An obvious example: the audit reports on the governance of the Regulatory Agencies, which are regularly issued ex officio by the Federal Court of Auditors.[11] In the most recent one, in 2015,[12] the Federal Court of Auditors assessed the governance of the Agencies on the basis of the transparency and neutrality with which their decisions are made, and of their

[11] The first operational audit of the governance of the Regulatory Agencies was in 2009 (TC 012.693/2009-9).

[12] Cf. TC 031.996/2013-2.

internal administrative organization, with special emphasis on vacancies in management positions in the Regulatory Agencies.[13]. The recommendations made to ANTT, Antaq, Anac, ANP, Anatel and Aneel, were the adoption of an analysis of regulatory impact, the introduction of a risk management policy, definition of a monitoring procedure and review of organizational strategy, nominating the persons responsible for each stage; and making their institutional websites more friendly; and a rule was issued setting the deadline for submitting a report on responses to contributions received at public hearings or consultations.

Secondly, the fact that control of the Regulatory Agencies by the Federal Court of Auditors is not usually requested points to the disposition of the Federal Court of Auditors to control the Regulatory Agencies. The autonomy and independence that are a feature of the Regulatory Agencies would, in principle, point to a more circumspect control, focusing only on non-core activities. However, the Federal Court of Auditors itself takes the initiative in controlling the Regulatory Agencies, and in the end this puts into perspective the limits of control. In the long run, the Regulatory Agencies are treated no differently from the administrative bodies and entities that depend on public funding. On the contrary, the Federal Court of Auditors makes a point of controlling the Regulatory Agencies.

The institutional argument is that only the non-core activities of the Regulatory Agencies are controlled, not the core activities. In an official presentation by Sefid to the Federal Prosecutor's Office, the role of the Federal Court of Auditors in controlling the Regulatory Agencies was defined as follows: "it is the job of the Federal Court of Auditors to monitor the activities of the regulatory entity, not to regulate the market".[14] In a climate favorable to control, however, the Regulatory Agencies are closely controlled, and this also applies to their core activities. This means that, in practice, the Federal Court of Auditors ends by taking an active part in regulation and frequently exercises regulatory responsibility in the place of the Agencies.

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[13] "Since good governance practices are fundamental for good performance by the agencies and, consequently, for the quality of the services regulated, the Court carried out the audit here referred to, assessing the governance of the agencies that regulate infrastructure on the following criteria: a) the conditions for their decision-making processes to be transparent and to produce technical decisions free from interference; and b) the use of an organizational strategy to guide management and leverage fulfillment of public policy." Justice Rapporteur Raimundo Carneiro TC No. 031.996/2013-2.

[14] Available at: <www.mpf.mp.br/atuacao-tematica/ccr3/eventos/vii-encontro-docs/xi-encontro/anexos-l/tcu>.

The following is a list of the types of recommendation included in the final and unappealable decisions which make up the sample of our survey:

a) Determination of the structuring of a Regulatory Agency

In relation to Anac, in the cases of Viracopos, Guarulhos and Brasília airports, the Federal Court of Auditors identified shortcomings in the management of the concessions which the technical unit deemed to be due to the existence of two departments responsible for monitoring them. Accordingly the technical unit recommended, in its report, the creation of a new department with responsibility for managing the airport concessions centrally.[15]

b) Addition of elements to the regulatory agenda

As a peculiar feature of the Federal Court of Auditors' control of Anvisa, we found that the aim of a number of recommendations was to reinforce compliance with rules issued by the Agency. It is fair to state, therefore, that the Court itself acts as a sort of "enforcer" of Anvisa's regulations, obliging various public or private players to adopt its resolutions and abide by them. A textbook case is provided by the determinations and recommendations of the Federal Court of Auditors on the electronic applications for company outsourcing, and the regulation of a new rule concerning clinical practices.[16] In this case, the Federal Court of Auditors recommended that Anvisa should issue a technical standard.

c) Definition of content of regulation

The Federal Court of Auditors tends to "invoke" regulatory responsibility by inspecting criteria relating to efficiency and also issuing real judgments with regulatory content, such as in appellate decision 798/2014, when it "determined that the National Health Agency (ANS) should demand reimbursement to the SUS by the operators, without recognizing any time limit (statute of limitation), only with respect to collections initiated (with the dispatch of an ABI) after March 31, 2009 [...]".

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15 Cf. TCU Appellate Decision No. 0548/2014.
16 TCU Appellate Decision No. 0326/2014.

Or, in another case, under Appellate Decision 1.546/2014, when it determined that the ANS "within a period of one hundred and eighty (180) days from notification of this appellate decision, should prepare a schedule of implementation of a system of reimbursement to the SUS, prioritizing the processing and collection of the most recent outpatient procedures of moderate and high complexity".

d) Definition of assumptions for economic and financial feasibility studies for tenders

In Appellate Decision 2.301/2014, the Federal Court of Auditors issued an injunction suspending the publication of the terms of an auction for the 700 MHz band and approved the tender with reservations. For subsequent tenders, it recommended that Anatel should adopt assumptions compatible with the different scenarios of study, and include in the calculation of the cost of third party capital the various possibilities for raising finance.

e) Regulation of the management reports of the Regulatory Agencies

An important function of the Regulatory Agencies is to communicate with the market regulated and its participants, in particular the users. Traditionally, one of the methods of communication is the report on activities, a tool widely used by other administrative bodies and entities. Due to the special nature of the functions they perform, the administrative bodies and entities design the document in such a way as to render accounts to the public as effectively as possible.

Under its normative powers, the Federal Court of Auditors issued IN 63/2010 to regulate the manner of preparing management reports with a layout that was convenient for the Court. Thus the management report, which traditionally had been aimed at informing the public in general of the activities of an administrative body or entity during the year, was turned into a standard document for checking by the Federal Court of Auditors. In the judgments we analyzed, we found that the Federal Court of Auditors determined that certain items should be included in these management reports. An example is Appellate Decision 842/2012, in which the Court determined that the Regulatory Agencies should show fines collected separately in these reports. In Appellate Decision 1.665/2014, relating to the monitoring of the determinations of the said Appellate Decision 842/2012, it was recognized

that the recommendation had not been followed, and the excuse that it was difficult to extract the information was not accepted. In this second judgment, the Federal Court of Auditors determined that the report should indicate that the information was not accessible.[17]

In the case of the ANP, we found that the principal instruments of institutional dialogue between the Agency and the Federal Court of Auditors are the Management Reports issued annually by the entities inspected, in compliance with IN 63/2010. Under this Normative Instruction, the Agencies are required to include in their management reports a chapter specifically intended for "meeting the requirements of control bodies".

All the examples given above point to an activist Court of Accounts, which puts itself in the position of regulator and quite frequently takes an active part in regulation and public infrastructure contracts. Support for this assertion is provided precisely by the nature of the recommendations: rather than suggestions, they are effectively determinations.

The provision of Article 71, section IV, of the Constitution that the Federal Court of Auditors can carry out operational audits does not however mean that: (i) the operational audits will be the same for all the administrative bodies and entities, since by their nature they may require different control models; (ii) operational audits may be directed at the core activities of the Regulatory Agencies; or (iii) its recommendations are to have the nature of determinations, with an expectation that the diktats of the Court will be obeyed and pressure on the body or entity to observe its recommendations.

The Constitution set up two distinct regimes of interaction between the Federal Court of Auditors and administrative bodies and entities. The first is the inspection regime, supervisory in nature and relating to illegalities or irregularities. The second is the operational audit regime, which is collaborative in nature. In the first case, a recommendation is effectively a command, an order, and complying with it means redeeming legality. In the

[17] "9.2 to determine to the National Water Agency (ANA), the National Civil Aviation Agency (Anac), the National Telecommunications Agency (Anatel), National Electrical Energy Agency (Aneel), National Oil, Natural Gas and Biofuels Agency (ANP), National Supplementary Health Agency (ANS), National Land Transport Agency (ANTT), National Health Surveillance Agency (Anvisa) and the Superintendence of Private Insurance (Susep) that, in relation to the determination contained in subitem 9.6 of Appellate Decision 482/2012-TCU -Plenary Session (inclusion of a specific section on the topic "collection of fines" in the management reports for the years 2012 to 2016), if they cannot record all the information called for in the said instructions, to include an explanatory note, in the same section of the management report, with detailed reasons for the lack of the information." Appellate Decision 1.665/2014.

operational audit regime, however, a recommendation is nothing more than a suggestion, and disobeying it does not lead to any sanction because it does not represent conduct contrary to the law. It is simply a measure of efficiency. So a recommendation under an inspection regime is a determination, while a recommendation under an operational audit regime is a suggestion. This distinction is even more important when the administrative entity is a Regulatory Agency, endowed with autonomy and independence.

The Federal Court of Auditors, however, makes no distinction between the two regimes. The recommendations it makes are effectively determinations, and in most cases it imposes a deadline for compliance. It should be noted, however, that no sanctions are imposed for failing to comply with recommendations. Analyzing each phase of the dialogue, there is expectation on the part of the Federal Court of Auditors that its recommendations will be complied with, while the Agencies, with the exception of Aneel, feel themselves bound to follow the Court's determinations.

Other points of note are the fungibility of the instruments used and the lack of distinction between the expressions "recommendation" and "determination". The cases analyzed consisted of representations, the monitoring of concessions, account rendering and development, in addition to different types of auditing: quality, compliance and operational. Whatever the instrument used, if it deems it opportune, the Federal Court of Auditors' decision will be the same. The differences are more in the way that a case begins than in the decision. In fact, there is no clear difference between decisions. For example, the types of auditing signify the following in practice: the agency must be made aware that its method has weaknesses; the development of a method is recommended; and specific norms must be prepared.[18] In short, a recommendation can be distinguished from a determination only because a different word is used.

Issuing commands to the bodies and entities controlled as a determination or a recommendation is a practical issue, aimed at enhancing the Federal Court of Auditors' operational control. The practice of "recommendation" is not provided for in the Organic Law of the Federal Court of Auditors (Lotcu). It is recognized in the Court's Internal Regulations,[19] but without the

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[18] Respectively, TCU Appellate Decision No. 8.666/2011, 436/2014 and 2.889/2014.

[19] Article 250, item III, of the TCU Internal Regulations reads as follows: "Article 250. When analyzing a proceeding on the monitoring of acts and contracts, the Court rapporteur shall: [...] III — recommend the adoption of measures when opportunities for improvement in

necessary system that would support the use of recommendations. This lack of a system has led the Federal Court of Auditors to make recommendations or determinations by means of different formulas, in particular notification.20

Other formulas are also used, such as clarifications. In Appellate Decision 1.809/2016, in relation to a motion for clarification filed against an audit report[21] which issued recommendations and determinations about reversionary assets linked to a fixed switched telephone network (STFC), one of the most sensitive elements in modeling projects and allocating investments in the telecoms sector. On confirming the decision appealed against, the Federal Court of Auditors issues clarifications, which are nothing more than interpretative additions to its previous determination. In its attempt to explain the meaning of commands it had issued in an audit on the safeguarding and inspection by Anatel of reversionary assets in the telecoms infrastructure, the Federal Court of Auditors ended by setting further determinations. Of the five clarifications in the decision on the appeal, at least three deserve special mention:

> 9.2. to clarify to Anatel that:
> 9.2.1. the definition of reversionary assets given in Article 3 IV, of the Reversionary Assets Control Regulations (RCBR), issued by the regulatory agency is considered adequate by the Federal Court of Auditors;
> [...]
> 9.2.3. your alternative proposal for implementing the determination contained in item 9.2.1 of the appealed decision is not accepted by the Federal Court of Auditors;
> [...]
> 9.2.5. in principle, any future amendments you may make to the Reversionary Assets Regulations will not exempt you from complying with the determinations contained in the appellate decision in question.

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performance exist, forwarding the documents to the appropriate technical unit for compliance with the determinations to be monitored" (our emphasis).

20 This is the case, for example, with Appellate Decision 2.135/2017, where the Federal Court of Auditors presents its determinations to Anvisa as a notification: "9.8. to notify the National Health Surveillance Agency (Anvisa) of the following irregularities and shortcomings, for it to adopt internal measures to prevent similar occurrences in the future: 9.8.1. failure to forward a draft of the PDTI for resolution by the Executive Board and addressing the points for notification, treating them as true determinations."

21 Appellate Decision 3.311/2015.

We would also emphasize the Federal Court of Auditors' strong conviction that its interference in regulation, to a certain extent actually replacing the rules observed by the Agencies with solutions formulated by its technical unit, is beneficial for the public administration. The Court believes that its interference will improve the quality of regulation.[22]

The central issue in the debate is now the following: why does the Federal Court of Auditors confuse recommendations with determinations? The "juridical reputation" of the Court determined by the Constitution ends up by placing the controller in a privileged position in relation to the Regulatory Agencies. Added to this is the fact that the Regulatory Agencies belong to the Executive Branch, whose reputation, when compared to that of the controllers, tends to be significantly lower. Consequently the Federal Court of Auditors expands its power of sanction into a field where, because (i) the Regulatory Agencies possess autonomy and independence; (ii) nothing illicit has happened; and (iii) there is simply a difference of interpretation or regulatory technique, it should only be making recommendations.

3.2 Deference of the Regulatory Agencies to Federal Court of Auditors recommendations

In the previous section we analyzed how in practice the Federal Court of Accounts uses its recommendations to the Regulatory Agencies to impose determinations relating to their core activities, meddling in the regulatory functions that they perform. This is one side of the coin. The other side is to find out precisely whether or not the Regulatory Agencies obey the controller's determinations. Empirical research indicates that, except for

[22] We give as an example the following passages intended to legitimize the intervention of the Federal Court of Auditors in the structuring of the Regulatory Agencies and in the way in which they exercise their regulatory responsibilities: "73. In respect of the technical analysis of investments, the initiative of the Court will lead to improvements in future concessions of public services handled by Aneel. [...] 78. The benefits of the control relate to an increased expectation of control and an improvement in the way Aneel operates". TCU Appellate Decision 3.025/2014 (our emphasis). Also, "we mention that the benefits of control initiatives resulting from this engagement are considered qualitative and are consistent with items 56.5 (improving the quality of public services rendered), 56.8 (increasing the efficiency of the structure, in procedures or in exercising powers and responsibilities) and 56.9 (improving administrative management/ organization, in the method of operation) in the attachment to Segecex Ordinance 10/2012. (an excerpt from the report of the Technical Unit)". TCU Appellate Decision 2.579/2014 (our emphasis).

occasional exceptions that we shall analyze in due course, the determinations of the Federal Court of Auditors on the Agencies' core activities are strictly observed. In other words, the Regulatory Agencies defer to the Federal Court of Auditors' decisions.

3.2.1 How deference to Federal Court of Auditors control by the Regulatory Agencies operates

An important finding of this survey is that the Regulatory Agencies do, in general, defer to the determinations of the Federal Court of Auditors that directly affect their organic structure and the way they perform their regulatory functions. This means that the Federal Court of Auditors plays a major role in the economic regulation of the regulated sectors to the extent that its guidance tends to prevail, even if a Regulatory Agency has a different interpretation of a particular set of norms or divergent views on the best regulatory strategy to deal with a particular practical issue.

In the case of Antaq, for example, there was no resistance to the Federal Court of Auditors' recommendations for extending deadlines.[23]

This interpretation by the ANP is proved when we analyze its Management Report for 2014, since in a number of appellate decisions the Court issued recommendations, whereas in its 2014 Management Report ANP refers to them as determinations.

In respect of deference, the ANTT Management Report for 2014 is very detailed, indicating point by point what was done during the year in respect of Federal Court of Auditors determinations. One example is the case of an operational audit investigating the procedure for monitoring highway concessions.[24] A number of determinations were issued about investigating the responsibilities both of the concessionaires and of the Agency staff involved, in addition to changes in the way these processes function internally — more specifically, as a rule appeals in administrative proceedings were to cease having a suspensive effect. In the Management Report for 2014, there is mention of various official letters and memorandums being sent to the

[23] An example is the request for an extension by Codesa, the lessee of a port, which was also granted.

[24] Cf. TCU Appellate Decision 3.237/2013 and 2.888/2014.

Federal Court of Auditors in response and, as can be observed, the measures have been being implemented.[25]

The ANTT obeys decisions of the Federal Court of Auditors even when they are recommendations or related to future cases. An example of recommendations is the audit of monitoring of highway concessions.[26] Here, in addition to the determinations which the Agency claimed it was obeying, there were also recommendations. And as the 2014 Management Report indicates, the fact that they were recommendations made no difference to the Agency. Of the 14 recommendations, the Agency considered that it had complied with six, while the others were under analysis or in the process of being complied with. The Federal Court of Auditors monitored the case in 2015, but only in respect of the determinations.[27] In other words, even with the Federal Court of Auditors emphasizing only the fulfillment of determinations, the Agency spent time and money in implementing the recommendations as well.

The deference to Federal Court of Auditors determinations is undeniable. An analysis of the ANS 2014 Management Report[28] indicates in a special chapter on meeting the requirements of the control body, in the field compliance with Federal Court of Auditors resolutions completed during the year, that the ANS takes the Court's recommendations to be obligatory. There is no show of resistance or attempt at dialogue, since the field critical analysis of the positive/negative factors facilitating/jeopardizing the adoption of measures by the Manager was always completed with the phrase there were no critical factors for adopting measures by the manager.

These examples are some of many showing deference to Federal Court of Auditors control over the Regulatory Agencies, where the determinations of the controller are usually accepted. A more thorough analysis shows that there is no effective dialogue on obedience to the control, which would be seen from time to time if there was resistance.

It is to be expected than a Regulatory Agency, endowed with autonomy and independence, should care for its regulatory powers and do everything

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[25] It mentions Official Letters 81/2014/DG/ANTT, 798/2014/DG/ANTT, 896/2014/DG/ANTT, 1043/2014/DG/ANTT and 810/2014/DG/ANTT; and Memos 24/2014/SUREG and 776/2014/SUINF. The amendment of Article 59 of the regulations attached to Resolution 442/2014, which gives a suspensive effect to all administrative appeals, is one of the points under discussion.

[26] Cf. TCU Appellate Decision 3.237/2013.

[27] By means of AC-TCU 31/2015.

[28] Available at: <www.ans.gov.br/aans/transparencia-institucional/prestacao-de-contas/relatorios-de-gestao>. Accessed on: Jul 4, 2016.

it can to preserve them. For this reason it is essential that the Agencies seek dialogue with the controller, whatever institution is involved. On receiving a determination from the controlling body, the Regulatory Agencies should analyze it and reach a decision on whether or not to comply with it, taking into account the practical implications of compliance. This is institutional behavior in defense of legal powers: even if a determination is accepted, because the Agency is inclined or legally obliged to do so, dialogue with the controller strengthens the Agency's institutional capacities and safeguards its regulatory powers.

We found no evidence of this desire for dialogue with the controller in the cases of deference of the Regulatory Agencies to the determinations of the Federal Court of Auditors which we analyzed. On the contrary, the Federal Court of Auditors recommendations are promptly accepted for the simple fact that "they are Federal Court of Auditors recommendations". There is no discussion on the legal validity or appropriateness of the recommendation to the regulatory agenda or the public policies implemented by the Agencies through regulation. The recommendations are simply accepted, and this is similar to what happens when arguments of authority are used.

Compliance with the Federal Court of Auditors recommendations is a matter for congratulation for the Regulatory Agencies, which define it as a goal to be attained. When we analyze the Agencies' activity reports, we find specific items intended to indicate compliance with Federal Court of Auditors recommendations. This is partly due to the fact that the activity reports are subject to IN TCU IN No. 63/2010, as we have mentioned. However, we must not lose sight of the fact that the implementation of the determinations of the Federal Court of Auditors by Regulatory Agencies is held to be efficient behavior that enhances regulatory governance.

One could list numerous reasons to explain the high degree of deference to the Court's recommendations, such as (i) an agency's fear of having its rendering of accounts judged irregular; (ii) lack of expertise in carrying on its core activity, resulting in tacit acceptance of a recommendation; (iii) belief that the Federal Court of Auditors is in fact exercising jurisdiction when it issues its decisions; (iv) concern that managers may be held individually responsible and, finally, (v) fear that the Court of Accounts may take some energetic action that could prejudice the Agency's management/structural organization.

Managers can in fact be held responsible if the accounts of entities supervised are judged to be irregular, and they may face prosecution for administrative improbity (Law No. 8.429/92, Article 11). Similarly, another

important effect is that agents acting improperly can be banned from office, if funds have been misused causing losses to the public purse and provided that the action was deliberate.[29]

The external control of the Federal Court of Auditors over the Regulatory Agencies has also affected the internal management of the Agencies and their powers. The number of appellate decisions with determinations and recommendations, which the controller assumes will be observed, has led to several of them setting up a special department to deal with these requirements, or rationalizing their method of institutional dialogue with the Federal Court of Auditors. An example of this is the creation by Anvisa of a Plan of Action for the appellate decisions issued by the Federal Court of Auditors in 2015.[30]

The 2015 rules supplementing IN 2013 also affect the method of notifying the Regulatory Agencies, by introducing a series of address points. Thus, for example, the onus for collecting information required by the Agency's internal audit department is placed on the department that drafts the activities report. Complying with this duty means that the Agency has to carry out an internal audit annually, which is not an obligation under any formal law, but an imposition of the Federal Court of Auditors itself.[31]

The extent to which Federal Court of Auditors control impacts on the internal affairs of the Regulatory Agency is important, because the Watchdog's purpose is not just to record the institutional dialogue between them, but also the quality of this dialogue. In the last resort, does this control system benefit the core regulatory activity? One of the effects of doing things by rote mentioned by Lipisky is precisely the tendency for formal responses, which are of lower quality and less likely to resolve concrete problems.[32] It is the case that routines are introduced in the Brazilian Regulatory Agencies because of aspects of our public bureaucracy, such as the shortage of funds, the heavy workload and the lack of legal certainty arising from unclear rules on what

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29 Cf. Article 1, item I, g, of Supplementary Law 64/1990.

30 Cf. Activity Report, p. 130.

31 In the case of Anvisa, for example, in 2015 the Internal Audit unit started informing the Planning Advisory unit, which drafts Anvisa's Annual Management Report, about matters for which the latter was responsible.

32 Cf. LIPSKY, Michael. Street-level bureaucracy: dilemmas of the individual in public services. Anniversary, expanded, updated edition. New York: Russell Sage Foundation, 2010. pg. 99 et seq. For an introduction to the concept in the Brazilian context, cf. PALMA, Juliana Bonacorsi de. Agentes públicos de linha de frente: a ponta criadora do direito administrativo. In: WALD, Arnoldo; JUSTEN FILHO, Marçal; PEREIRA, Cesar Augusto Guimarães (Org.). O direito administrativo na atualidade. Estudos em homenagem ao centenário de Hely Lopes Meirelles. São Paulo: Malheiros, 2017. v. 1, passim.

to do in specific circumstances, which leave the staff with significant margins of discretion.

But routine is also a strategy to deal with Federal Court of Auditors control. Anvisa is a case in point: its Internal Audit Unit instructs its technical units to adopt the subservient behavior found in our survey in all institutional dialogue:

> The guidelines include a request to managers to use wording that is clear and objective, and sufficiently detailed for the measures adopted to be understood, since this information will be included in the Agency's documents of accountability.[33]

Although the instructions do not say that all the recommendations and determinations must be accepted by Anvisa, it is clear that this is the standard behavior expected. It is clear because the strategy does not mention arguments about resisting the interference of the Federal Court of Auditors, such as restating the purpose of a regulation, attaching a regulatory process, the rules of institutional responsibility that preserve a regulatory decision or preparing a more effective and qualified dialogue with the factual and legal reasons for not taking any action in the concrete case. It simply states that some action will be taken by the Agency on the instructions of the Federal Court of Auditors.

So what we have is a typically Brazilian mixture of routine with fear of the controller that significantly affects the institutional functioning of the Regulatory Agencies. It is no surprise, therefore, that the result of our survey on the reaction of the Regulatory Agencies to Federal Court of Auditors control is that no recommendation or determination goes without a reply.

Routine and fear result in low-quality motivation in the institutional dialogue between Federal Court of Auditors and Regulatory Agency.

3.2.2 Resistance of Regulatory Agencies to accepting the recommendations of the Federal Court of Auditors

Only in exceptional cases have the Regulatory Agencies opposed Federal Court of Auditors recommendations. These are one-off events, where

[33] Anvisa Activity Report 2015, p. 217.

the circumstances and the peculiarities of the case led to resistance by the Regulatory Agencies to the controller's determinations.

Since resistance to control is not standard practice for the Regulatory Agencies, in these cases the burden of argument is significant.

Precisely because of "defying" the Federal Court of Auditors, the reasons of the Regulatory Agencies are robust, stressing in particular the practical difficulties of complying with a determination addressed to them or explaining that similar measures are already being taken by the Agency. Thus human resources or budgetary difficulties in implementing the recommendation are presented, regulatory alternatives are indicated or deadlines are negotiated with the Federal Court of Auditors, because not enough time has been given to implement a recommendation.

Two appellate decisions in 2014 relating to the ANTT examined a motion for clarification[34] and are examples of resistance to Federal Court of Auditors recommendations. One of them, in fact, was a material inaccuracy in the control and supervision of a highway concession.[35] In the other case, ANTT proposed further discussion of the matter, relating to a railway concession, and to a certain extent succeeded, with the Federal Court of Auditors withdrawing some of its determinations.[36] For example, in the motion, the Federal Court of Auditors reexamined the use of a different table for each state where a concession was in operation, thus affecting the price. In simple terms, depending on which table was used, the value of the concession was higher or lower. In the motion, it was decided that the table used should be that of Mato Grosso, where most of the concession was located. This pattern of occasional resistance, with the filing of a motion for clarification, also arose in a case where the Agency was required to design a method for real estate valuation for a highway concession.[37] Lastly, a case led to a request for reexamination, where ANTT seems to have disagreed with a decision preventing a highway concessionaire from charging a fee to users of automatic toll services.[38]

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[34] Cf. TCU Appellate Decision 293/2014 and 3.588/2014.

[35] TCU Appellate Decision 3.588/2014 corrected No. 2.888/2014. One of the determinations of the latter was for information to be sent on 36 stretches of railway, when in fact this information had already been provided to the TCU: information was needed on stretches other than these 36.

[36] Such as the motion examined in TCU Appellate Decision 293/2014, relating to TCU Appellate Decision No. 3.697/2013.

[37] Cf. TCU Appellate Decision 1.043/2014.

[38] TCU Appellate Decision 1.008/2014, as indicated in the ANTT Management Report for 2014.

In Appellate Decision 1.995/2014, the Federal Court of Auditors recommended that Anatel should include Infraero as a minority partner in companies to be incorporated for future concessions. This recommendation was adopted in the case of Fiscobras but not in tenders for concessions issued subsequently.[39]

There was a single case where Antaq made an initial attempt to have a decision adjusted in order to avoid having to adopt the obligations imposed. This was an appellate decision[40] about the preservation of the economic and financial balance of a leasing agreement for an area in a port. This document relates to monitoring determinations issued in a previous appellate decision,[41] which had not been complied with in 2014. What is different about this conflict is that Antaq tried to enter into dialogue with the Federal Court of Auditors. Because earlier determinations had not been complied with, the Court insisted on a system of monitoring. The non-compliant Agency applied for an extension to the deadline to implement the demands, and this was agreed by the Federal Court of Auditors. However, at the end of the extended period, the measures had still not been implemented by Antaq, which then applied for a further extension. The Federal Court of Auditors once again accepted the request, but due to the continued failure to comply, imposed further determinations on the Agency, and condemned the director in charge at the time to pay a fine.[42]

An intense dialogue then began, with the Agency trying to justify its repeated failure to comply with the determinations by arguing that the Federal Court of Auditors was responsible, because it had not published documents that would bind Antaq. In addition, the Agency demanded a reexamination of the decision to fine the former manager. This single case of resistance by Antaq to Federal Court of Auditors recommendations reflects concern with the losses that the agency and one of its former directors could suffer, but it does not question the interference of the Federal Court of Auditors in its core activity. In general, in the institutional dialogue between Antaq and Federal Court of Auditors, there is clear deference by the Agency to the Court's determinations.

It is important to emphasize that there is no legal challenge to the recommendations. The Regulatory Agencies do not question the Federal Court

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[39] Offer document for concession of the airports of Salvador, Fortaleza and Florianópolis, published on June 9, 2015.

[40] Cf. TCU Appellate Decision 732/2014.

[41] Cf. TCU Appellate Decision 4.273/2010.

[42] TCU Appellate Decision 1.149/2015.

of Auditors' legal power to impose mandatory recommendations on them and to set deadlines for compliance. Nor do they suggest that the Federal Court of Auditors' interpretation of a particular norm is illegal or that the actions of the controller goes beyond the limits of its powers. In short, resistance to Federal Court of Auditors recommendations is limited to practical difficulties in complying with them, rather than for any other reason related to limits of control or safeguarding regulatory powers, including any suggestion that the agency's interpretation of a norm may be more correct than the controller's.

Appellate Decision No. 482/2012, for example, required Anatel to include an item in its management report about the collection of fines, which was reaffirmed in Appellate Decision No. 1.665/2014, monitoring the earlier decision. In response, Anatel included the following dialogue in its management report for 2013:

> Justification for non-compliance: AUD analysis: Since the information requested was included in the 2012 Annual Report (pp 49/52), we consider that the requirement is being met. We suggest a new assessment of the availability of the information requested in May 2014.[43]

In the case of the regulation of herbicides,44 Anvisa's resistance to the Federal Court of Auditors recommendations consisted of the indefinite postponement of compliance, until internal solutions had been implemented. However there is no questioning as to merit: the Agency defers in all other respects. There is still a combination of the agency's need to provide a quick, deferential response to the Federal Court of Auditors and its fear of sanctions of some kind. There is not much evidence for this, but it overlaps with the hypothesis of significant control by the Federal Court of Auditors over the core activities of the Agencies.

Aneel is the only Regulatory Agency analyzed that does not behave in the way described above, since our survey showed that it is markedly less deferential than the others. As an example, we would mention its response to Appellate Decision No. 2.316/2014 (concerning delays in deliveries of works and mismatched delivery dates for generation and transmission equipment) and to Appellate Decision No. 1.587/2014 (Cemig tariff review). In both cases,

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43 ANATEL. Relatório de gestão do exercício de 2013, 2013. pg. 187.
44 Cf. TCU Appellate Decision 2.597/2014 and Official Letter 92/2015 CG/Gadip/Anvisa.

Aneel consigned compliance with the recommendations to the background, while constructing an interesting argument against the Federal Court of Auditors' decisions. However it is the case of works for electricity generation and transmission that best typifies Aneel's resistance to the recommendations of the Federal Court of Auditors.[45]

In this case, the Federal Court of Auditors took account of delays in completing works and mismatched on-stream timing of electricity generating and transmission equipment, and decided, based on the principle of efficiency, to call for changes in the conduct of some public administration entities, among them Aneel.

As usual with the appellate decisions on Aneel analyzed in this survey, the vote of the Court simply repeats the conclusion of the report, with very little legal content. The legal content is normally shown only in the report drafted by the technical unit, in this case the Secretariat for Oversight of Privatization and Regulation of Energy and Communications (SefidEnerg). The following recommendations were addressed to Aneel:

> 1. Adoption and forwarding to the Federal Court of Auditors of the decision of the Executive Board in respect of the delay in the Madeira plants and the claim of the Santo Antônio plant, in relation to Aneel Proceeding 48500.001273/2008 (the concessionaire was claiming compensation for its payments of Charges for the Use of a Transmission System and postponement of regulated contracts until the definitive transmission system started commercial operations);
> 2. Drafting and forwarding to the Federal Court of Auditors, in a joint action with the Ministry of Mines and Energy and in combination with other electricity sector agents, of studies based on previous auctions showing the length of time actually taken for the concessionaires to install electricity generation and transmission equipment, together with the causes of any delays, so as to be able to adjust the planning stage of future auctions and adopt more realistic deadlines for the different types of undertaking;
> 3. An assessment, jointly with the Ministry of Mines and Energy (MME), of the appropriateness of adopting criteria for measuring the practicality of proposals for concessions of electricity services, based on the ancillary application of Law No. 8.666, of June 21, 1993.

[45] Cf. TCU Appellate Decision 2.316/2014.

It was also recommended that Aneel's generation and transmission data banks should be linked, since the data bank of the Superintendence for Monitoring Generation Services is not linked to the data bank of the Transmission Management System. This link would make it possible to identify which transmission undertakings would need to be concluded before a particular generating plant could come on-stream.

Aneel, in its Management Report for 2014, responds to the Federal Court of Auditors' demands by asserting that its staff had already had a meeting with the MME, since certain determinations required joint action between the Ministry and the Agency. Aneel requests an extension of the deadline to comply with the determinations to be fulfilled jointly with the MME. In addition, the Agency says it has lodged a request for reexamination of the determination concerning the Executive Board's decision about the delay in the Madeira plants and the claim of the Santo Antônio plant. Aneel simply fails to make any response to the other Federal Court of Auditors' recommendations, limiting itself to a comment that there will be a response when the determinations have been fulfilled.

4. Technical unit versus ministers: who is the Federal Court of Auditors?

The Federal Court of Accounts consists of nine members ("ministers") who sit on a decision-making body — the Plenary Session. One third of them are chosen by the president of the Republic, with the approval of the Federal Senate, and two thirds by the National Congress.[46] However, the Federal Court of Auditors' structure is more complex that a simple description of the collegiate body suggests.

First of all, the fact that the Plenary Session is formally the senior body of the Federal Court of Auditors does not diminish the importance of its other bodies of control of the public administration. Specifically in relation to the purpose of our research, two other institutions are relevant: the Public

[46] Cf. Article 72, paragraph 2 of the Constitution of the Federative Republic of Brazil.

Prosecutor's Office attached to the Federal Court of Auditors[47] [48] and the External Control Secretariat (Secex). The inspection of the public service concessions, a central aspect of the Regulatory Agencies analyzed, is the job of the Privatization Monitoring Secretariat (Sefid). Sefid is divided into three Directorates among which the sectors are distributed. Thus the concessions and other contracts involving the electricity and petroleum sectors come under the First Directorate (SefidEnergia); the postal and telecommunications sectors are monitored by the Second Directorate; and the transport sectors — land, water and passenger — are the specific responsibility of the Third Directorate (SefidTransp). Nowadays the 2nd and 3rd Directorates operate jointly, as Sefid Energy and Telecommunications.

Briefly, we have SefidEnergia monitoring Aneel, ANP and Anatel, while SefidTransp looks after ANTT, Antaq and Anac. It is also the case that Anine is subject to monitoring by SecexRJ and both ANS and Anvisa come under SecexSaúde.[49]

Recently Sefid's name was changed to Privatization Monitoring Secretariat, and its members are auditors. Sefid's duties are defined in Article 42 of TCU Resolution No 214/2008, which governs the internal Secretariats:

> Article 42 of TCU Resolution No. 214/2008
> The specific area of operation of the Privatization Monitoring Secretariat is inspecting and evaluating the grant of public works and services and the economic activities of the infrastructure sectors, the execution of their contracts, the **regulation of the sector, the performance of the regulatory entities** and the privatization of state companies. [our emphasis]

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[47] The Public Prosecutor's Office attached to the Federal Court of Auditors consists of the prosecutor-general, three sub-prosecutors-general and four prosecutors, with the responsibility of helping the Federal Court of Auditors with its supervisory duties, and with a seat on the Plenary Session.

[48] In only one appellate decision, No. 3.023/2014, is there a statement by the Public Prosecutor's Office: "Representation formulated by the Telephony Working Group of the Third Coordination and Review Chamber of the Federal Prosecutor's Office (MPF), on the need to determine the legality and legitimacy of the actions of the National Telecommunications Agency (Anatel) relating to monitoring fixed phone contracts, specifically in respect of undertaking studies on sanctions imposed by the Agency on Fixed Switched Telephone Service (STFC) concessionaires". TCU Appellate Decision 3.023/2014, Plenary Session, Justice Rapporteur José Jorge.

[49] Cf. Memorandum-Circular 3/2013/Semag.

Although Sefid works very closely with the Public Prosecutor's Office, the figure of the auditor is in the forefront.

The job of an auditor of the Federal Court of Auditors is a permanent position and is specifically mentioned in the Constitution because of its importance for the functioning of the Court. First of all, the Constitution defined a system of rotation in the appointment of the ministers: one minister is appointed freely by the president of Republic, while two others must be nominated from "auditors and members of the Public Prosecutor's Office attached to the Court", with a list of three names selected for seniority and merit.[50] The constitutional precept indicates the importance of the position of auditor in the context of control by the Federal Court of Auditors, and points to close synergy and involvement between ministers and auditors.

Another constitutional precept equally important for our analysis is Article 73, paragraph 4, which gives auditors the same safeguards and limitations as ministers. In addition, a judgment function is expressly conferred on the auditors of the Federal Court of Auditors by the Constitution. Because of its importance we are quoting the paragraph in full:

> Article 73, paragraph 4 of the Federal Constitution.
> The ***auditor,*** when ***substituting*** a Minister, will have the same safeguards and limitations as the latter and, when exercising the other responsibilities of the ***judiciary,*** those of a justice of the Regional Federal Court.

Thus the participation of the auditors in the deliberations of the Plenary Session is not just a fact, but a dynamic with constitutional backing which gives them equal safeguards, depending on the nature of the function exercised. The auditors can be substitute ministers, taking their place if they are temporarily absent or if there is a vacancy. Currently the Federal Court of Auditors has four substitute ministers.

The auditors also have the responsibility of acting as rapporteurs for proceedings that are important for the control of the Regulatory Agencies. Accordingly, Article 15, section I, m, of the Federal Court of Auditors Internal Regulations determines that it is the responsibility of the Plenary Session to resolve on the operational audit reports; it follows that these are drafted by the auditors in charge of operational audits. In practice, the auditors play an

[50] Cf. Article 73, paragraph 2, item I of the Constitution of the Federative Republic of Brazil.

important part in controlling the Regulatory Agencies, since the ministers are guided by the reports they produce, and because the relationship between the two is a close one.

Empirical research shows that this arrangement has a direct effect on the manner in which the Federal Court of Auditors controls the Regulatory Agencies. Specifically in this type of control, the principal body is the technical body, i.e. the auditors, not the Plenary Session. The fact is that the reports prepared by the auditors are more than a summary of an audit, but rather the motivation for control, since the ministers' arguments are simply a reproduction of the technical arguments included in the report. It is clear that there is a difference in motivation between the votes of the ministers and the report of the auditors.

They are based primarily on the reports of the technical unit responsible, and there is practically no explanation of the reasons for the votes per se. When, exceptionally, a vote appears well founded, what we find is a faithful reproduction of the arguments included in the report. The ministers do not themselves contribute new facts, arguments or perspectives on cases, but merely follow the position of the technical unit.

The fact is that the final decisions of the Court of Accounts defer to a large degree to the positions of its technical body. One can see, in fact, that the reasons given for the ministers' vote tend to be weak ones, which do not establish a correlation between facts, evidence, explanations and conclusion. This state of affairs makes it impossible to identify a precise ratio decidendi which would establish a causal nexus between the object of analysis and the determination/recommendation issued.[51]

So, we infer, in short, that decisions are taken in the technical unit itself, not in the Plenary Session.

The control of the way the Regulatory Agencies are structured or of the infrastructure projects which they monitor is in practice exercised by the technical unit. The core activity of a Regulatory Agency is analyzed by the auditors, and this is why the Federal Court of Auditors' control is from the viewpoint of these auditors, rather than of the Plenary Session itself. Added to this is the fact that the genesis of the recommendations is a report drafted by the auditors and technical agents, such that the Plenary Session merely endorses these determinations and thus makes them enforceable.

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[51] In TCU Appellate Decision 0424/2014, for example, no reason was given for the vote and the decision of the Plenary Session was based entirely on the technical report.

The subjective content of Brazilian legislation on external control of the efficiency of the money spent by public entities leads to distortions that adversely affect the interpretation of the Court's limitations. Along these lines, to take an example, the interpretation of Article 70 of the Constitution combined with articles 230 and 239, II, of the Federal Court of Auditors Internal Regulations,[52] has a pernicious effect on the Agencies' regulatory activity, since it induces them to accept the Court's recommendations without question, as if they were determinations, or rather, as if they were true legal provisions. Clearly, the Court, in its operational inspections,[53] analyzes and indirectly exercises the Agencies' regulatory activity when it controls their behavior through determinations/recommendations.

In some specific cases, however, the ministers did not follow a report. For example, in one case out of six involving Anac the vote went against the report. Congress asked for a third runway to be included in the Galeão project, but the technical unit did not support the proposal. Its argument was that the Agency's autonomy should be upheld, especially as public hearings and consultations on the issue had already been held. The ministers, however,

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[52] Article 70 of the Constitution, for example, provides that the accounting, financial, budgetary, operational and patrimonial fiscalization of the government and its direct and indirect administration entities, as to legality, legitimacy, economy, application of subsidies and waiver of revenues, shall be exercised by the National Congress, through external control, and by the internal control system of each branch, giving the Federal Court of Auditors a collection of responsibilities which, if interpreted wrongly, would permit it to interfere in the core functions of the Regulatory Agencies. So much so that the Federal Court of Auditors has given itself the power to supervise public sector entities on the criterion of efficiency, having indicated in its Internal Regulations,, Article 230 (Chapter III - Supervision), that the Court, in the exercise of its attributes, may on its own initiative inspect the bodies and entities under its jurisdiction, in order to verify the legality, economy, legitimacy, efficiency, efficacy and effectiveness of actions, contracts and administrative facts (our italics), taking it upon itself, when using the audit mechanism, to evaluate the performance of the bodies and entities under its jurisdiction and that of the systems, programs, projects and activities of government, as to the economy, efficiency and efficacy of the operations (Article 239, item II, TCU Internal Regulations, our emphasis).

[53] Operational supervision, one of the corollaries of Article 70 of the Constitution of the Federative Republic of Brazil, has taken on an interpretative role, at least in respect of the Court of Auditors itself, in the sense of attributing to the Court the responsibility to monitor the efficiency, effectiveness and efficacy of the public policies adopted by government bodies. In this sense, operational supervision, in the Court's view, "corresponds to the introduction of modern program auditing techniques, with a view to assessing the effectiveness of public management. This one word, when added to the text of the Constitution, legitimized and unleashed profound changes in the manner of operation of the Brazilian Courts of Accounts, led and inspired by the Federal Court of Auditors". LIMA, Luiz Henrique. Controle externo: teoria, jurisprudência e mais de 500 questões. 4th ed. Rio de Janeiro: Elsevier, 2011. pg. 30.

decided to accept Congress's request and to forward the recommendation to Anac, but without giving reasons for their decision.

So in studying Federal Court of Auditors control it is of prime importance to understand which component of the Court is in charge: the Plenary Session or the technical unit. In the case of control of the Regulatory Agencies by the Federal Court of Auditors, empirical research indicates that the content of control is defined by the technical unit: the Plenary Session endorses its recommendations and they become the Federal Court of Auditors' recommendations. So it is to the technical body that the Regulatory Agencies must address their dialogue about regulatory control by the Federal Court of Auditors.

5. Final considerations

By means of this investigation we have been able to identify the patterns of control practiced by the Federal Court of Auditors over Brazil's federal Regulatory Agencies and, in this way, take a position on the subject of our research. We found that this control is wide-ranging, covering not just the organizational structure of the Regulatory Agencies, but also, and in particular, their core activities. We have confirmed our theory: the autonomy and independence of these Regulatory Agencies are limited by the Federal Court of Auditors because its determinations affect their core activities and are promptly obeyed by the Agencies, without major disputes. As examples of control decisions, we mention: decisions imposing methods of regulatory action, such as the amounts of fines imposed; decisions that define the method of dialogue with the public, by standardizing the format of published figures and activity reports; decisions affecting the organizational structure of the Agencies, by determining the appointment of managers, for example; and decisions to suspend or annul actual regulatory decisions.

This method of control is based on the Federal Court of Auditors' view of the Agencies' reputation: a negative view of the Regulatory Agencies and a positive view of the Federal Court of Auditors itself.

More specifically, taking into account the complexity of the method of control of the Regulatory Agencies by the Federal Court of Auditors, in which the technical unit plays a major part, we find that the technical bodies of the Federal Court of Auditors, consisting of auditors, are greatly relied upon by the Plenary Session. Rather than verifying the reliance of the ministers on the analyses of the technical staff, we have preferred to investigate the legal

regime that shapes the institutional dialogue between Agencies and Federal Court of Auditors, and to evaluate primary sources of public management, in particular the Appellate Decisions issued by the Federal Court of Auditors. We have shown that the technical bodies of the Federal Court of Auditors, often in conjunction with the Public Prosecutor's Office before the Court of Accounts, are more highly thought of by the Plenary Session of the Federal Court of Auditors than the Regulatory Agencies.

In terms of legal regime, we note that the position of auditor has an important place in the institution of the Federal Court of Auditors and is in a close relationship with the Plenary Session. Indeed, the Federal Constitution provides for the appointment of ministers who are career auditors. Furthermore, our empirical analysis of the final and unappealable decisions of the Federal Court of Auditors on the Regulatory Agencies shows that it is the technical unit of the Federal Court of Auditors, not the Regulatory Agencies, on which the Plenary Session relies for its institutional capacity to indicate the most efficient methods of regulation and regulatory governance. Consequently, the legal responsibility originally conferred on the Regulatory Agencies has been transferred to the Federal Court of Auditors. Perhaps this institution is not Brazil's primary regulator, but we have empirical backing for asserting that it plays an active part in regulation in Brazil, and this may place doubts on legal certainty and the stability of the rules of the regulatory game.

The factors listed below show that trust is deposited in the Federal Court of Auditors technical unit to the detriment of the Regulatory Agency: (i) the exercise of control over the core activities of the Regulatory Agencies is not based on law, and there is no indication of any normative precept that authorizes external control over the structure of the Agencies or over regulation; (ii) the regulatory process of the Agencies is not examined; (iii) the analyses of the technical unit are accepted by the Plenary Session, but its reasons for voting are generally very different from those listed in the technical unit's report; (iv) the recommendations drafted by the Federal Court of Auditors' technical unit are endorsed by the Plenary Session and passed on to the Regulatory Agencies in the form of determinations; (v) the Federal Court of Auditors does not differentiate between recommendations and determinations, and this, in practice, means that recommendations function effectively as determinations, with deadlines and monitoring or subsequent supervision; (vi) the technical unit plays an important role in regulation because, in the view of the Plenary Session of the Federal Court of Auditors, its challenges improve regulation and operations by the Regulatory Agencies; (vii) different interpretations

between the technical unit and Regulatory Agencies are resolved by the Plenary Session in favor of the former, resulting, in a significant number of cases, in a declaration of illegality of action or omission by the Regulatory Agencies; and (viii) the Regulatory Agencies are extremely deferential to Federal Court of Auditors recommendations, with the exception of Aneel, and institutional dialogue is feeble.

The trust deposited in the technical unit by the Plenary Session of the Federal Court of Auditors determines, as we have suggested, the transfer of the regulatory powers of the Regulatory Agencies to the Federal Court of Auditors itself. This is an issue of fundamental importance for the development of the regulated sectors and even affects the real role of the Regulatory Agencies in the economy. It is time to reassess the practice of control over these Regulatory Agencies and its impacts, positive and negative, on regulation.

References

BINENBOJM, Gustavo. Uma teoria do direito administrativo. Direitos fundamentais, democracia e constitucionalização. Rio de Janeiro: Renovar, 2006.

CARPENTER, Daniel. Reputation and power: organizational image and pharmaceutical regulation at the FDA. Princeton: Princeton University Press, 2010.

_____; KRAUSE, George. Reputation and public administration. Public Administration Review, v. 72, pg. 26-32, 2012.

FERNANDES, Jorge Ulisses Jacoby. Tribunal de Contas do Brasil: Jurisdição e competência. Belo Horizonte: Fórum, 2016.

GONÇALVES NETO, Luiz Alonso. O controle da regulação — limites ao controle do Tribunal de Contas aos atos de Agências Reguladoras. Interesse Público, Belo Horizonte, v. 43, pg. 199-235, 2007.

JORDÃO, Eduardo. A intervenção do TCU sobre Editais de Licitação não publicados — controlador ou administrador? Revista Brasileira de Direito Público, Belo Horizonte, v. 47, pg. 209-230, 2014.

KOMESAR, Neil. In search of a general approach to legal analysis: a comparative institutional alternative. Mich. L. Rev., v. 79, pg. 1350-1392, 1981.

LIMA, Luiz Henrique. Controle externo: teoria, Jurisprudência e mais de 500 questões. 4th ed. Rio de Janeiro: Elsevier, 2011.

LIPSKY, Michael. Street-level bureaucracy: dilemmas of the individual in public services. Anniversary, expanded, updated edition. Nova York: Russell Sage Foundation, 2010.

MONTEIRO, Vera; ROSILHO, André. Agências Reguladoras e o controle da regulação pelo Tribunal de Contas da União. In: PEREIRA NETO, Caio Mário da Silva; PINHEIRO, Luís Felipe. Direito da infraestrutura. São Paulo: Saraiva, 2017. v. 2, pg. 25-62.

OLIVEIRA, Rafael Carvalho Rezende. Agências Reguladoras, diálogos institucionais e controle. Revista de Direito Público da Economia, Belo Horizonte, v. 49, pg. 159-189, 2015.

PALMA, Juliana Bonacorsi de. Agentes públicos de linha de frente: a ponta criadora do direito administrativo. In: WALD, Arnoldo; JUSTEN FILHO, Marçal; PEREIRA, Cesar Augusto Guimarães Org). O direito administrativo na atualidade. Estudos em homenagem ao centenário de Hely Lopes Meirelles. São Paulo: Malheiros, 2017. v. 1, pg. 681-700.

PEREIRA NETO, Caio Mario da Silva; LANCIERI, Filippo; ADAMI, Mateus Piva. O diálogo institucional das Agências Reguladoras com os Poderes Executivo, Legislativo e Judiciário: uma proposta de sistematização. In: SUNDFELD, Carlos Ari; ROSILHO, André (Org.). Direito da regulação e políticas públicas. São Paulo: Malheiros, 2014. pg. 140-185.

ROSILHO, André Janjácomo. Controle da administração pública pelo Tribunal de Contas da União. Thesis (doctorate) — Faculdade de Direito, Universidade de São Paulo, São Paulo, 2016.

SCHUCK, Peter H. Why government fails so often. And how it can do better. Princeton University Press, 2014.

SUNDFELD, Carlos Ari; CÂMARA, Jacintho Arruda. O Tribunal de Contas da União e a regulação. Fórum de Contratação e Gestão Pública, Belo Horizonte, v. 194, pg. 73-79, 2018.

_____; MONTEIRO, Vera; ROSILHO, André. O valor das decisões do Tribunal de Contas da União sobre irregularidades em contratos. Revista Direito GV, São Paulo, v. 13, pg. 866-890, 2017.

ZYMLER, Benjamin. O papel do Tribunal de Contas da União no controle das Agências Reguladoras. Fórum Administrativo — Direito Público — FA, Belo Horizonte, v. 11, pg. 3-7, 2002.