Companies with state participation and the accounting control*

Empresas com participação estatal e o controle de contas

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ABSTRACT

The article reconstructs the evolution of administrative legislation and accounting legislation and jurisprudence in Brazil regarding the concept of public administration, with the aim of understanding, over time, the difficulties, controversies and options regarding the criteria for, by on the one hand, consider companies with different levels of state capital (minority, equal, majority or exclusive; with voting or nonvoting rights) as integrated into the indirect public administration and, on the other hand, as subject to account control. The finding of the research is that, despite the shortcomings and divergences that have occurred over the years, as well as some rhetorical fluctuation, the criterion of considering excluded from both indirect public administration and the control of accounts, companies in whose capital or

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control there is nonmajority state participation, which are legally configured as private sector companies.

KEYWORDS

Federal Court of Accounts — accounting jurisdiction — stateowned enterprises — minority shareholder government — participating companies

RESUMO

O artigo reconstrói a evolução da legislação administrativa e da legislação e jurisprudência de contas no Brasil relativamente ao conceito de administração pública, com o objetivo de entender quais têm sido, ao longo do tempo, as dificuldades, polêmicas e opções sobre os critérios para, por um lado, considerar empresas com diferentes níveis de capital estatal (minoritário, igualitário, majoritário ou exclusivo; com direito a voto ou sem direito a voto) como integradas à administração pública indireta e, por outro lado, como submetidas ao controle de contas. A constatação da pesquisa é que, a despeito das insuficiências e divergências havidas no decorrer dos anos, bem como de alguma flutuação retórica, tem prevalecido, na legislação e na jurisprudência de contas, o critério de considerar excluídas, tanto da administração pública indireta como do controle de contas, as empresas em cujo capital ou controle haja participação estatal não majoritária, as quais se configuram juridicamente como empresas do setor privado.

PALAVRAS-CHAVE

Tribunal de Contas da União — jurisdição de contas — empresas estatais — estado acionista minoritário — empresas participadas

Introduction

This article outlines the evolution of administrative legislation and accounting jurisprudence in Brazil in relation to the concept of public administration, in order to understand, historically, the difficulties, controversies and criteria in considering companies with different levels of state capital (minority, equal, majority or exclusive; with or without voting rights), in indirect administration and, on the other hand, subject to audit control (by the audit courts).

The topic involves the legal characteristics of state entities and the peculiarities of their legal regime, in comparison with non-state entities, as well as the concept of resources subject to the control of audit courts.

There are different rules in the legal system for: legally incorporated and legally incorporated organizations; entities with economic and non-economic purposes; private and public law entities; and non-state entities (private sector) and public sector entities. Each requires exclusive, respective normative organizational models.

The term state-owned company, although not used directly by the Federal Constitution and general legislation, is used in the legal and administrative sphere to designate organizations with four characteristics: legal incorporation; economic purposes; basic structuring according to private law; and state character.

Legal incorporation, which makes the company a legal entity (not simply an organ that is part of a larger organization), guarantees autonomy, i.e., the capacity for self-administration and assumption of obligations in its own name.

The professional exercise of activity for economic purposes (production or circulation of goods or services) characterizes the entity as a business enterprise, distinguishing it from non-profit entities, whether private sector or foundations or public law entities.

The fact that, in its basic structure, it adopts a business function and acts independent of State powers, means that the entity has a private law personality, distinguishing it from public law entities, i.e., political-administrative entities (Union, states, Federal District and municipalities), their agencies and public law foundations.

Further, due to a special link, of an organic and stable nature, the entity is subject to indirect public, not private sector, administration. Thus, there is a certain degree of hybridism, of private and state law (state-private in character).[1]

State-owned companies are subject to a range of standards (the state regulatory system), which does not extend to private sector companies. Integration in indirect public administration, with a stable organic link to the public sector, characterizes the legal condition of state-owned companies, compared with those in the private sector.

This system includes rules that, for example, oblige state-owned companies to secure contracts through bidding (CF, art. 22, XXVII, and art. 173, § 1, III), hold public tenders (CF, art. 37, head paragraph w/ c inc. II) and be subject to

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[1] SUNDFELD, Carlos Ari. A participação privada nas empresas estatais. *In*: SUNDFELD, Carlos Ari (Coord.). *Direito administrativo econômico*. São Paulo: Malheiros, 2000. p. 265.

inspection by the Audit Courts (CF, art. 70, head paragraph, and art. 71, II) and the Legislative Branch (CF, art. 49, X).[2]

A fundamental issue, therefore, is identifying which factors determine the existence of an organic link between the public sector and a company, an issue which has generated divergent approaches.

The aim of this article is to identify and make sense of them. To this end, it is divided into two parts.

The first part analyzes the normative options in force in Brazil regarding characterization of companies that are part of indirect public administration, consistent with criteria developed since the 1960s through general legislation on administrative organization. The conclusion is that rules on administrative organization have remained constant in the sense that, to consider a company part of indirect public administration, there must necessarily be majority state participation in its voting capital.

The second deals with the historical evolution of legislation and accounting jurisprudence on the criteria for a company to be subject to the control of the audit courts. The conclusion is that, over time, the rules on accounting control the rules on administrative organization, although the Federal Court of Auditors (TCU) has not always adapted to this trend.

1. Definitions of positive law relative to business models and the public sector

Here, we examine how positive law characterizes companies that are part of indirect public administration, unlike companies that, despite receiving state capital, are not considered state companies.

This part is divided into four sections. Initially, the concepts of public company, semi-public company and subsidiaries are examined (1.1). Next, we analyze the situation of state (minority) participation in the capital of a private sector companies (1.2), as well as the situation of state participation (also minority) in the control of a private sector company (1.3). Finally, the expression company "controlled" by the public authority is considered, highlighting

[2] ARAGÃO, Alexandre Santos de. *Empresas estatais*: o regime jurídico das empresas públicas e sociedades de economia mista. Rio de Janeiro: Forense, 2017. p. 161 e ss.; e BEDONE, Igor Volpato. *Empresas estatais e seu regime jurídico*. Salvador: Juspodivm, 2019. p. 173 e ss.

challenges of the past, before the 1988 Constitution, and those of today, since Law No. 13,303, of 2016, the *Lei das Estatais* (1.4).

1.1. Public companies, semi-public companies and subsidiaries

According to current legislation, what makes a company "state-owned", i.e., part of indirect public administration?

The answer seems simple: whether it fits into the concept of a public company or semi-public company. Depending on the fit it will either be a state-owned or a private sector company.

Both public companies and semi-public companies can have subsidiaries. These are controlled companies, in whose capital state companies participate in terms of an amount sufficient to guarantee a voting capital majority; if the participation of the state-owned company is a minority, the company in which it participates will not be a subsidiary.[3]

Subsidiary companies are also state-owned companies: either public (if there is no private capital) or semi-public (where there is, in their capital, minority participation from the private sector), subject to the specific rules of the respective category. Subsidiaries are not a third species of state company, but a subspecies of the public or semi-public company. The *Lei das Estatais* identified this when, in its contents, and in the head paragraph of art. 1, it listed, as subject to its provisions, these two types: public companies and semi-public companies (implicitly including among them the respective subsidiaries).

Thus, in distinguishing private sector companies, the concept of state-owned company is linked to two others: public and semi-public company.

The *Lei das Estatais*, in addition to formulating these concepts, included the idea of a company controlled by public authorities (which will be public, if the capital is all public, or semi-public, where there is minority private capital). As a result, in national law, although the Constitution uses other expressions to designate companies that are part of indirect administration, all of them are accommodated in the concepts of public and semi-public company.[4]

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[3] JUSTEN FILHO, Marçal. A Lei 13.303/2016, a criação das empresas estatais e a participação minoritária em empresas privadas. *In*: JUSTEN FILHO, Marçal. *Estatuto jurídico das empresas estatais*: Lei 13.303/2016. São Paulo: Revista dos Tribunais, 2016. p. 50-53.

[4] SUNDFELD, Carlos Ari; SOUZA, Rodrigo Pagani de; PINTO, Henrique Motta. Empresas semi-estatais e sua contratação sem licitação. *In*: SUNDFELD, Carlos Ari (Org.). *Contratações públicas e seu controle*. São Paulo: Malheiros, 2013. p. 122-124.

The explanation, adopted by some authors, that companies controlled by public authorities, but not created or authorized by law, are not public or semi-public companies, but a third type, equivalent to the others, has lost ground.[5]

Brazilian administrative legislation has tried to make sense of these two concepts, establishing by law an exact, mathematical criteria, not vague or indeterminate formulas. These are concepts of strict law, properly legal, leaving no room for creativity.

According to the *Lei das Estatais*, a public company is one "whose share capital is fully owned by the Union, the States, the Federal District or the Municipalities", even with minority participation of indirect administration entities in its voting capital (art. 3).

A semi-public company is a company in which there is private capital, "the majority of whose shares with voting rights belong to the Union, States, Federal District, Municipalities, or the indirect administration entity" (art. 4, head paragraph).

These concepts are, concerning the nature of the entities or the distribution of capital, the same as were already included in the law on the general organization of federal public administration established by Decree-Law No. 200, 1967 (and maintained when revised by Decree-Law no. 900, 1969).

These are exact concepts, based on mathematical criteria (completeness and majority) and referring to other equally determined criteria (capital, shares with voting rights, Union, states, Federal District, municipalities, indirect administration entities). In the language of practitioners, these are determined legal concepts, the application of which involves direct observation, not discretion or personal judgment.[6] Depending on these options in the law, the character of a state entity accords with the composition of the company's voting capital.

Aside from this, the *Lei das Estatais* reiterated the option of including, as a defining criterion for public and semi-public companies, creation authorized "by law", as stated in art. 5, II and III of Decree-Law No. 200, of 1967. A more appropriate option, however, may have been to provide legal authorization as a requirement for the regularity of the institution or the assumption of the company by the State, according to art. 37, XIX of the Constitution.

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[5] SCHIRATO, Vitor Rhein. *As empresas estatais no direito administrativo econômico atual*. São Paulo: Saraiva, 2016. p. 53-54.

[6] ENTERRÍA, García de; FERNÁNDEZ, TomásRamón. *Curso de direito administrativo*. 1. ed. bras. a partir da 16. ed. esp., revisão técnica de Carlos Ari Sundfeld. São Paulo: Revista dos Tribunais, 2014. v. I, p. 466.

The risk of the creation by law option as an aspect of state-owned companies is to suggest the interpretation—adopted by many, after Decree-Law No. 200, of 1967—that there would be other public-private capital companies, controlled mostly by the State , but which, not corresponding to the legal concept of semi-public companies, were created without legal authorization, with a regime totally or partially different from the regime of other state-owned companies (public companies and semi-public companies).[7]

The 1988 Constitution sought to overcome the problem of entities not created by law escaping the rules applicable to state-owned companies, stating that aspects of their regime also extend to "companies controlled, directly or indirectly, by public authorities" (e.g. art. 37, XVII; art. 164, § 3; art. 202, § 4). It thus defined that, whether created by law or not, such companies should be understood as state-owned companies, indirect public administration entities, equally subject to its regime.

But there lacked a legal rule that, in accordance with Decree-Law No. 200, of 1967—still in force today for the Union, but not directly applicable to subnational entities—, applying this, in general, for the states, Federal District and municipalities. This was addressed by § 6 of art. 1 of the Law on State-Owned Companies—avoiding the gap which, once again, would exist due to the linking of the concepts of public and semi-public companies to creation authorized by law.

Thus, in conclusion, creation by decision or legal authorization is a requirement for the validity of state-owned companies, but this has no conceptual impact on the legal regime: all those with majority state-owned voting capital will be considered equally, even when not derived from law (as was common before the 1988 Constitution).

1.2. State participation in a private sector company

State companies and private sector enterprises are different families, subdivided into species. Public companies and semi-public companies are species of the state company. Companies with state participation and without state participation are species of the private sector.

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[7] In this sense, see, EIZIRIK, Nelson. *A lei das S/A comentada*. São Paulo: Quartier Latin, 2011. v. III, p. 301.

State investment in a private sector company may have varied motivations, such as financial support for a sector of the economy, use of state shareholding power for regulatory purposes or concerted action between the state-owned company and the company invested in.[8]

A business company does not leave the private sector when it receives minority public investment. The legal model is different: a private sector company with state participation.[9] The Constitution, in art. 37, XX, expressly provided for this, when it required legal authorization to enable simple "participation" of state entities (authorities, foundations, public companies, semi-public companies and their subsidiaries) in a "private company".

The mere relationship between the capital of a state-owned company and a private company does not transform the latter into a subsidiary of the former. According to constitutional norms and the *Lei das Estatais*, to be a subsidiary—and, in this capacity, part of the indirect public administration—the invested company must be majority-controlled by the state-owned company.

When exercising its rights as a partner over a private company, the state shareholder will observe specific governance and control rules, provided for in § 7 of art. 1 of the *Lei das Estatais* (regulated by articles 7 and 8 of Federal Decree No. 8,945, 2016), and will not be able to invoke art. 238 of the Brazilian Corporation Law to require from the private company, through appointed advisors or directors, pursuit of public interest at the sacrifice of profit.[10]

The invested private company will not be subject to administrative and ministerial supervision, nor be part of the public investment budget, nor subject to public bidding and contracting legislation, and will not be directly supervised by the Legislature. And, as will be discussed in section 2, its administrators, not being public agents, will not report to the Court of Auditors, nor be affected by its determinations and sanctions. In short, the common private regime applies to private companies with state participation and not the state regulatory model.

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8 For this last case (participation in concerted action) it makes sense to talk about a semi-public company. This is only for the application of special reciprocal contracting rules, not for the invested private company to be subject to the state regulatory block. (Sundfeld, Souza e Pinto, Empresas semiestatais e sua contratação sem licitação, *op. cit.*, p. 111-122).

9 On the specialty of the link between the state-owned company and the public sector, as well as its distinction from other more fragile ones that the State can establish with private sector companies, see SUNDFELD, Carlos Ari. Uma lei de normas gerais para a organização administrativa brasileira: o regime jurídico comum das entidades estatais de direito privado e as empresas estatais. *In*: MODESTO, Paulo (Coord.). *Nova organização administrativa brasileira*. Belo Horizonte: Fórum, 2010. p. 5565.

10 PINTO JÚNIOR, Mário Engler. *Empresa estatal*: função econômica e dilemas societários. São Paulo: Atlas, 2010. p. 192.

1.3. State participation in the control of private sector companies.

May a state entity exercise control of a private sector company in which it has a minority stake without affecting its legal qualification?

Due to the characteristics of joint-stock companies, such a situation may occur, whether the state-owned company is associated with other shareholders or not. One case is that of minority state participation in a block: by shareholder agreement, the votes of the state-owned company would join those of other shareholders, from the private sector, in a joint exercise of voting rights. Another case is that of temporary or occasional state control: based on minority participation in a company with dispersed capital, the state-owned company would be preponderant in social deliberations and elect more administrators, until such power was challenged by a shareholder or diverse group. In none of these cases would the investee company be integrated into the indirect public administration as, in the first, there would not be majority state control and, in the second, permanent state control.

Calixto Salomão, discussing the notion of control in Corporate Law, faced with the alternatives of majority and minority control, defends the need to adopt the notion of majority control, which ensures stability, whenever the legal discipline, applied coherently, requires "consolidation of a legal position".[11] This criterion makes sense for state-owned companies, allowing them to float in and out of indirect public administration according to the state shareholder, with their minority shareholder rights, whether or not they prevail over the rest of the shareholders at each meeting.

Paragraph 7, art. 1 of Lei das Estatais expresses this. Referring to cases of simple minority participation of a state entity in the capital of a private company, it describes them in terms of "participation in a business company in which the public company, semi-public company and its subsidiaries do not hold controlling interest". The rule refers to the hypothesis that the participation of state-owned companies does not grant permanent and majority control but at the same time does not prevent them from exercising occasional or shared control.

The state-owned company, as distinct from a private sector company, currently consists only of public and semi-public companies (with respective

[11] Annotation and work of COMPARATO, Fábio Konder. *O poder de controle na sociedade anônima*. 4. ed. Rio de Janeiro: Forense, 2005. p. 67-71.

subsidiaries)—and in both, according to arts. 3 and 4, head paragraph, of the State Law, state participation in voting capital must be a majority and, therefore, permanent. Simple minority state participation in the voting capital or in the control of a private company is insufficient for its nationalization, due to the lack of an organic link. Private sector companies are subject to common law.

1.4. Company under state control

Regarding corporate composition, according to arts. 3 and 4, head paragraph, of the State Law, what constitutes state-owned is ownership of the majority, if not all, voting capital by state bodies: political-administrative entities, local authorities, state foundations under public or private law, public or semi-public companies. In such cases, a company is said to be under state control.

§ 6 of art. 1 of the Lei das Estatais states: "a company, including a special purpose company, that is controlled by a public or semi-public company covered in the head paragraph is subject to the regime provided for in this law". What does the expression "controlled" mean here? Can there be a state-owned company whose control does not depend on a majority of votes?

Since at least Decree-Law No. 200, 1967, art. 5, II and III, whose precepts coincide with those of the current law, the criterion of the need for a majority in voting capital has been adopted in general to identify state-owned companies and subject them to the state regulatory model.[12] Thus, for the purposes of § 6 of art. 1 of the Lei das Estatais, a controlled company is one in which a state-owned entity holds the majority of the voting capital.

This criterion was maintained in legal texts after the 1988 Constitution, of a general nature regarding public administration. Art 2, II, of Supplementary Law No. 101, 2000 (Fiscal Responsibility Law), defined a controlled company as: a company whose main voting capital belongs, directly or indirectly, to a Federation entity".[13]

The Lei das Estatais provides, in identifying a company as a semi-public, that control is exercised with a majority voting capital. Art 4, after linking, in the

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[12] Even before the emergence of this general rule, the various laws or statutes of state-owned companies already provided for the reservation of all or a majority of voting shares for the State. See SCHWIND, Rafael Wallbach. *O estado acionista*: empresas estatais e empresas privadas com participação estatal. São Paulo: Almedina, 2017. p. 100-101.

[13] For an analysis of the legal norms defining companies controlled by a state entity, including for purposes other than those covered in this article, justifying other types of concepts, see Sundfeld, Souza e Pinto, Empresas semiestatais e sua contratação sem licitação, *op. cit.*, p. 111-122.

head paragraph, the concept of semi-public to state majority in voting capital, identified the holder of this capital as a "legal entity that controls the semi-public company", alluding to the "controlling shareholder" and the "power of control".[14] The main idea, contained in these expressions from in § 1, is conveyed in the head paragraph, which alludes precisely to the majority of votes.

Corporate Law No. 6,404, of 1976 defined a "controlling company" as the "holder of voting rights that permanently ensure preponderance in corporate deliberations and the power to elect the majority of administrators" (art. 243, § 2).

At least in the case of state-owned companies, according to art. 4 of the Lei das Estatais and the laws that preceded it, in the same sense, it follows that the notion of permanent preponderance, which in the Law characterizes the controlling company, is linked to the holding of the majority of votes.[15] If so—even though, logically, there may be other ways of achieving preponderance and maintaining it—they will not considered in terms of characterizing the company as state-owned. The specific law (Lei das Estatais) would be exhaustive.

In other words, in a simplified way, a state-owned company is a company permanently and majority controlled by a state entity.

In other, specific, legal or regulatory contexts, such as competition law and telecommunications law, a more comprehensive notion of corporate control, conceived from a functional point of view, is used to consider the status of a subject who does not have a majority of votes, or is not even a shareholder of the company. In these contexts, the notion of control has undergone legal adjustments to protect other public purposes.[16] But it does not seem to make sense to transpose this comprehensive notion in the identification of semi-public companies (or those controlled by public authorities, directly or indirectly) as there are express and determined rules in art. 4 of the Lei das Estatais. If there is no lacuna, the analogy is unfeasible (art. 4 of LINDB—Decree-Law No. 4,657, of 1942).

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[14] This does not mean that, in semi-public companies, the power of control cannot, based on shareholder agreement, be in part shared between the majority state-owned company and relevant minority shareholders, as demonstrated by Sundfeld in, A participação privada nas empresas estatais, op. cit. For a current overview of the subject, Schwind *O estado acionista*, *op. cit.*, p. 118 e ss.

[15] CARVALHOSA, Modesto. *Comentários à lei das sociedades anônimas*. 4. ed. São Paulo: Saraiva, 2009. v. 4, t. I, p. 363.

[16] Sundfeld, A participação privada nas empresas estatais, *op. cit.*, p. 283-285.

It is interesting to note the historical and normative context that, around half a century ago, gave rise to the notion of a "entity controlled by a public company or semi-public company".

Decree-Law No. 200, 1967, adopted a restricted concept of a semi-public-capital company, as an entity created by law (art. 5, III). As a result, some scholars began to refer to other entities controlled directly or indirectly by the State as companies that, although not created by law, had a majority state voting capital. The Supreme Court (STF) itself came to adopt this solution, in analyzing the nature of Banrio—Crédito Imobiliário S/A, whose majority capital belonged to a state bank (Banrio), deciding that it was not subject to the Court of Justice. The Public Treasury of Rio de Janeiro, in its jurisdiction only included semi-public economy companies, not other companies controlled by the State.[17]

In December 1976, the Lei das Estatais was passed, with a section dealing with semi-public companies (chap. XIX). Art. 235, § 2, seemed to exclude second-tier subsidiaries (and onwards) from the concept of semi-public companies. After establishing, in the head paragraph, that "semi-public economy corporations are subject to this Law, without prejudice to the special provisions of federal law", an exception was identified: "§ 2. Companies in which the majority or minority shares are semi-public economy, are subject to the provisions of this Law, without exceptions provided for in this Chapter".

The precept caused confusion.[18] If the company under the majority control of a semi-public company did not itself fit into the concept of a semi-public company (second degree onwards), what was it? A private sector company? This seemed inconsistent with the criterion of majority state control, which until then was adopted (including in Law No. 6,223, 1975, mentioned later, in part 2) to identify a company as state-owned. It also raised the risk that, through the simple creation of subsidiaries, the semi-public company would pursue its activities far from public standards and supervision.

The conceptual solution that sought, from then on, to address this was to understand that, even though they were not semi-public companies (a character denied them in § 2 of article 235 of the Brazilian Corporation Law), the subsidiaries of any degree of semi-public company (under majority control,

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[17] Federal Supreme Court (1st class), Extraordinary Appeal 91.035, rapporteur Soarez Muñoz, June 26, 1979.

[18] Fran Martins suggested, referring to art. 235 as a whole, "that the current law has increased the existing confusion surrounding the nature of semi-public economy companies." (MARTINS, Fran. *Comentários à lei das sociedades anônimas*. Rio de Janeiro: Forense, 1979. v. 3, p. 193).

direct or indirect) should be considered state-owned, to be classified in the generic category of companies controlled by a state entity.[19]

Law No. 6,525, 1978—also referred to in part 2—, without using the expression (controlled companies), expressly endorsed this understanding. The rewritten art. 7 of Law No. 6,223, 1975, and the new head paragraph of the article reaffirmed the submission, to public supervision, typical of state-owned companies, of all private law entities with a voting majority held by an "indirect administration entity".

Therefore, all subsidiaries, of any degree, of state-owned companies (under their majority control) should be considered state-owned companies, even if not labelled semi-public companies.

But this did not mean private sector enterprises controlled in a minority way by a state-owned company (without even being a partner) should be considered State controlled—state-owned companies. § 3 of art. 7 of Law No. 6,223, 1975 (included in the Law of 1978), had excluded companies with state minority participation from control of the audit courts.

The 1988 Constitution, referring to public companies, semi-public companies, and their subsidiaries, considered it important to include in the same public regime "companies controlled, directly or indirectly, by public authorities" (e.g.: art. 37, XVII), it seemed to invoke the concept of controlled companies typical of legislative history, which had presupposed majority ownership of the company voting capital by a state entity.

§ 6 of art. 1 of the State Law conveys there was no intention to extend the regime of state companies to private sector companies under in which a state entity holds a simple minority stake. Therefore, only companies controlled by state-owned companies with a majority stake in their voting capital are subject to this regime.

2. Account control skills and companies

We will now consider the historical evolution of accounting legislation and jurisprudence on the criteria for subjection to control by audit courts, and their compatibility with the administrative organization norms discussed in part 1.

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[19] In this sense, GRAU, Eros. *Elementos de direito econômico*. São Paulo: Revista dos Tribunais, 1981. p. 102.

This section is divided into three parts: a historical overview, starting from the 19th century, of the organic criteria for account control in Brazil (2.1); the internal divergences within the TCU, and its clashes with the other Powers in the 1960s and 70s over the concept of a state-owned company and the extent of the responsibility for controlling accounts (2.2); the most current decisions of the TCU, in light of the 1988 Constitution, in relation to state participation in private sector companies (2.3).

2.1. The organic criteria and account control competencies

The legal system establishes the extent of accounting control competence based on general criteria, provided for in the Constitution, and special hypotheses, provided in law.

As a general criterion, the 1988 Constitution grants the TCU authority to assess "accounts of administrators and others responsible for money, goods and public costs of direct and indirect administration", as well as "those who give rise to the loss, misplacement or other irregularity that results in loss to the public treasury" (art. 71, II).

Thus, the general performance of the TCU is established based on organic criteria. Its competence covers: parties obliged to render accounts, that is, (1) entities linked, in a stable manner, to the state body ("direct and indirect administration entities"); and, within the scope of these entities, (2) individuals who perform the functions of "administrators and other responsible for public money and assets"; with the aim of, in addition to applying sanctions, also holding accountable those who (3) "cause the loss, misplacement or other irregularity resulting in damage to the public treasury".

As for special hypotheses, according to the Organic Law of the TCU, it has jurisdiction over "those who are accountable to it or whose acts are subject to its supervision by express provision of Law" (Law No. 8,443, 1992, art. 5, SAW).

This is the case of autonomous social services (such as Senai), which, despite never organically integrating public administration, have been subject, by express determination of law, to inspection by the TCU for many decades (Law nº 2,613, of 1955, art. 11). This is also the case of public consortia of a private law character, which, although not part of the indirect administrations of any of the consortium entities (unlike public law consortia, which are part of these administrations), are subject, by express legal provision, to supervision of the audit courts (Law No. 11.107, 2005, articles 6 and 9).

This organic criterion, as a guideline for TCU general competence, dates to the creation of the court itself, in 1890.

Decree 966-A, 1890, the first to provide for a court of accounts, endowed it with power to "judge annually the accounts of all those responsible for accounts, regardless of the ministry to which they belong" (art. 4, § 3). Decree No. 1,166, 1892, the first Organic Law of the TCU, established its jurisdiction over "accounts of all departments, employees and other persons of responsibility who, singularly or collectively, have administered, collected or spent public assets belonging to the Republic" (art. 31, § 1). The organic element appeared in the granting of competence over departments, employees and any other person of responsibility, regardless of the ministry to which they belonged; and in the definition of those who were responsible for managing, collecting or spending public money.

In the 1920s, the organic criterion was reinforced by legislation. Decree No. 4,536, 1922 (with the force of law), which organized the Union Accounting Code, provided that "all those responsible, in law or in fact, for money and other assets of the Union, for which they must respond, even if they reside outside the country, are subject to the jurisdiction of the Court of Auditors" (art. 87).

The Code sought to clarify the role of "those responsible for public assets", defining them as "employees in charge of payments, collection or custody of public funds, responsible for any Union assets" (art. 83, head paragraph). The law determined that "the ministries will send to the court a complete and detailed list of all those who have received, administered, spent or stored assets belonging to the Union, detailing the respective persons responsible for the departments to which they belong" (art. 88, head paragraph).

The Regulations of the Court of Auditors (Presidential Decree No. 15,770, 1922), based on the Union Accounting Code, further reinforcing the organic criterion, allowed the accounts control the competence to "process, judge in a single instance and review the accounts of all departments, employees and any responsible persons who, individually or collectively, have received, administered, collected and spent public money, third-party deposits or values and assets of any kind, including material, belonging to the union" (art. 31 , I).

The text that, following the Code, regulated it (Decree no. 15,783, 1922) addressed the issue through a non-exhaustive list of functions considered specific to those "responsible for public assets".[20] This Regulation made "the

[20] Art. 880 of this regulation provided that "those responsible are subject to accountability before the Court, including: treasurers, payers, storekeepers, administrators, tax offices, warehouses

manager of public funds and all those with Union assets under their custody and administration" accountable (art. 28, I), adding "whoever is not a public servant must also indicate the cause and origin of the management in fact and present a current account of the operations carried out" (art. 128).

The organic element was clear in prescribing that those responsible, also called employees, belonged to departments, subject to ministries, which together made up the entire federal public administration.

2.2. The concept of a state-owned company and the extent of accounting control competence

We will now explore how, from then on, the legal system adapted the competence of the TCU, based on organic criteria, to transformations of the administrative apparatus—notably with the creation, according to state standards, and for the exercise of public functions, of entities with their own legal personality. Based on normative history, as well as court decisions, we observe the tensions that exist in reconciling the competence of accounts control with a State in transformation.

The organic criterion had initially been shaped in a normative environment of centralization of administrative apparatus. The 1922 Union Accounting Code had expressed the objective of "centralization of accounting services" (Chapter I). In this context, even services with some degree of administrative and financial autonomy, such as essential services (Post Office, Telegraph, railways, etc.), were formally part of the "central administration" entity.

However, from the 1930s onwards, public administration underwent a series of transformations that resulted in the decentralization of the administrative machinery and, more so, diversification, outside of it, of the exercise of public functions. The legislator created entities with their own legal personality, such as local authorities, autonomous social services and professional supervisory councils.

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and foremen, of their own and of the company's farms, Union workers, the storerooms, the clavicular workers, the commissioners, surgeons and pharmacists of the Navy, purchasing agents, directors of munitions and hospitals, masters and foremen of the workshops of civil and military industrial establishments, port captains, lighthouse workers, treasurers of savings banks and relief banks, engineers of telegraph districts, administrators and post offices workers, telegraph and railway stations funded by the Union, those in charge of consulates and all others other persons responsible in any way covered in art. 876".

These new forms of exercising public functions raised doubts about TCU competence. Which would be subject to its supervision? The adoption of the organic criterion of competence, associated with the lack of systematic legislation defining what "public administration" would be, caused controversy, which lasted for years and would only be systematically resolved after 1967, following Decree-Law No. 200.

In 1967, the military government issued relevant administrative organization rules. The main pillars of the reform were the 1967 Constitution, promulgated on January 24, and Decree-Laws No. 199 and 200, February 25, which dealt, respectively, with the functioning of the TCU and the organization of the federal administration.

Beginning with reform of the administrative structure, Decree-Law No. 200 established an organization for the entities of the federal public administration, in terms of "direct administration", consisting of "services integrated into the administrative structure of the Presidency of the Republic and the Ministries"; and "indirect administration", which "comprises the following categories of entities, endowed with their own legal personality: a) local authorities; b) public companies; c) semi-public economy company". Subsequently, one more category was included: "d) public foundations".

Decree-Law 200 includes definitions for each of these entities. As for state-owned companies—after the 1969 reform, with Decree-Law No. 900—, the text states:

> Art. 5 […] II—Public Company—an entity endowed with legal personality under private law, with its own assets and the exclusive capital of the Union, created by law for the exercise of economic activity the Government exercises by force of contingency or administrative convenience, that may take any of the forms admitted by law.
> III—Semi-public Economy Company—an entity endowed with legal personality under private law, created by law for the exercise of economic activity, in the form of a corporation, whose shares with voting rights belong mostly to the Union or Indirect Administration entity.

In relation to extension of TCU competence, the 1967 Constitution provided for "judgment of the accounts of administrators and others responsible for public goods and assets", also applying "the rules of financial and budgetary supervision […] to the local authorities" (art. 71, § 5). Thus, the approach of the

1946 Constitution (art. 77) was repeated, seeming to leave organs and entities not included in the public administration or organized as autonomous bodies outside account control.

Maintenance of this model in the 1967 text was not accepted in all quarters, generating argument in the National Congress, exercising its constituent function. A central topic in the discussions about the TCU was precisely the extension of its supervisory powers over entities of what is now known as indirect public administration.

The draft Constitution, in its section dedicated to the courts of accounts, had been quite broad in terms of TCU competence.[21] It provided that "inspection by the court covers autonomous bodies, parastatal entities and semi-public-capital companies whose management falls to the Union" (art. 140, § 2). But this proposal for more comprehensive competences was rejected, leaving the TCU control only over bodies and authorities.

Decree-Law No. 199, 1967, in turn, established the new Organic Law of the TCU providing it with the competence to "judge the regularity of the accounts of administrators and others responsible for public assets" (art. 28) and "when there is an express legal provision, [of] administrators of indirect or other entities" (art. 33, head paragraph).

Thus, this law did not provide for broad control by the TCU over indirect administration entities, although it did allow specific laws to determine other cases of inspection of the accounting body. This scenario was criticized, especially concerning the lack of control over state-owned companies.[22]

But the truth is that the issue of inspecting public company accounts had already been impacted by legislative innovations even before the administrative reforms of 1967. Law No. 4,320, 1964, which established the general rules of financial law, had extended its remit to entities that today are known as public companies, that is, "companies with financial and administrative autonomy whose capital belongs entirely to the Public Power" (art. 107, sole paragraph). The logical consequence of this submission would be the incidence of account control of public companies.

Likely reflecting this, laws enacted during the military government provided for control by the TCU. The *Serpro* law, 1970, for example, in its original wording, already provided that the public company "shall send, to the Court of Auditors,

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[21] BRASIL. Senado Federal. *Anais da Constituição de 1967*. Brasília, 1968. v. 1.

[22] Observed by SPECK, Bruno. *Inovação e rotina no Tribunal de Contas da União*. São Paulo: Konrad Adenauer, 2000. p. 72

its accounts relating to the previous year, accompanied by the activity report" (Law No. 5,615, 1970, art. 12, § 2).

Certain public companies were subject to TCU control following the logic of a specific legal hypotheses. However, the same did not happen with semi-public companies, which generally remained outside TCU jurisdiction.

In reaction to this, the TCU issued, in 1967, Resolution nº 44, with the justification of "regulating the application" of the new rules on external control. Despite the terms of Decree-Law No. 199—which had subjected only local authorities to account control, except for other express legal provisions, such as those existing for public companies—, this resolution referred to the possibility of the court requesting "documents and reports by entities of indirect administration" (art. 12).

Regulatory innovation has generated controversy. In 1970, faced with the "omission to require financial statements from indirect administration bodies", a debate arose at the TCU regarding the extent of its competence "in light of the legislation then in force with regard to public companies and semi-public-economy companies". [23]

The understanding that prevailed was that the TCU would, regardless of specific legal provisions, have jurisdiction over all public companies, but not semi-public-capital ones. The basis was that, although "ordinary law […] does not derive jurisdiction of the court to assess the accounts of those responsible for decentralized administration entities, in general", the Constitution would attribute the TCU jurisdiction over any "responsible for public assets and values", so that the central question was "knowing whether the entity should be considered a public asset or value". And there should be a distinction in treatment between public companies and semi-public companies, since, in semi-public companies, "inflows of money from the Union are combined with the participation, in the capital, of inflows of money from individuals", which "is enough […] to establish the non-existence of a characteristically public patrimony". The same would not happen with public companies, "since, [as] for these companies in which private resources cannot participate", the management of public assets, subject to the jurisdiction of the Court of Auditors, was "well characterized". Public companies would therefore be subject to the supervisory powers of the TCU, while for semi-public companies, special laws would be necessary.

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[23] BRASIL. Tribunal de Contas da União (plenário). Processo 33.256/68, relator Vergniaud Wanderley, 7 de abril de 1970, ata 19/70.

Although most court ministers supported this understanding, there were dissenting voices. Minister Vergniaud Wanderley opposed the control of public companies, affirming that the competence of the TCU covered entities of indirect administration only "when there is an express legal provision".[24] Thus, "there is […] no basis" in favoring "the jurisdiction of this court in relation to administrators of any public assets and values, including those of all indirect administration entities".[25] The court technical staff expressed an opposing view: that the TCU jurisdiction should reach not only public and semi-public companies, but also companies with minority state participation. The idea was that the "submission of such entities is dictated […] by the public interest revealed in their constitution and identified both by their objective and by the State's participation in their capital, […] regardless of whether it holds all or part of it (there is no public interest)".[26]

The final understanding—that the TCU, although not responsible for semi-public companies, would have jurisdiction over public companies, despite not being mentioned in Decree-Law no. 199, 1967—imported, to some extent, in the application of the organic competence criterion. Firstly, in Decree-Law No. 200, 1967, public companies were formally understood as members of the state body. Further, in practice, federal public companies, in addition to being created through Union capital, had been receiving amounts via the public budget. In this way, the understanding that the administration of public companies (an organic part of the State) would involve public resource functions seemed plausible.

In 1973, the TCU consolidated this majority understanding—that, regardless of express law, it would have jurisdiction over public but not over semi-public-capital companies. Precedent 5 provided that "semi-public companies, except as expressly provided by law, are not subject to accountability". Precedent 6 established that "public companies are subject to accountability for the annual management of their administrators, […] regardless of the provision of ordinary law that establishes it".

Thus, at least within the TCU, the controversy over the extent of its jurisdiction over state-owned companies appeared to have been resolved. But in the following years the topic gained new momentum relative to discussions in the Legislative Branch.

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[24] This was the text of art. 33, *head paragraph*, of Lei Orgânica do TCU,1967 (Decree/Law No.199).
[25] This is the position of the rapporteur in case 33.256/68, op. cit.
[26] This was the position defended by the TCU technical staff within the scope of process 33.256/68, op. cit.

The National Congress also responded to the 1967 reforms. Bill No. 8, 1972, was proposed in the Federal Senate, regulating the "form of financial supervision, by the National Congress, of public administration bodies". The project provided, for example,

> that Congress could request from the Federal Court of Auditors information, opinions, documents, data, and analyzes, from federal administrative bodies or units, as well as autonomous bodies, foundations, public companies and semi-public economy companies. [art. 1]

It also provided Congress to order the TCU "to carry out ordinary or extraordinary inspections of any of the bodies or units and other entities" (art. 2).

The project was approved by the Senate in 1973, but it was a few years before the Chamber of Deputies analyzed it and proposed a text, which became Law No. 6,223, 1975:

> Art. 7º. Public entities with legal personality under private law, whose capital belongs exclusively or mainly to the Union, State, Federal District, Municipality or any entity of the respective indirect administration, are subject to financial supervision by the Court of Auditors, without prejudice to the control exercised by the Executive Branch.

This rule expressly resolved three issues, with general effect for audit courts at various levels of the Federation, in accord with Decree-Law No. 200, 1967. First, it formalized external control of accounts over public companies, in line with TCU practice. Second, it assigned external control of semi-public-capital companies to the audit courts. Third, it reaffirmed, of a general nature for states and municipalities, the criterion for identifying semi-public-economy companies: majority state capital.

The enactment of this law prompoted new controversies in the TCU the following year, as to the extent of its jurisdiction over subsidiaries of state-owned companies, as well as over private sector companies with minority state participation. The first dispute arose here, originating from a consultation formulated by the ministers of Telecommunications and Mines and Energy regarding organization of semi-public-capital company accounts processes linked to the respective ministries.

The central question was "whether, in public entities governed by private law organized as joint-stock companies, in which there is a controlling company, the inspection will allow a single annual accounting of this holding company, which will encompass investments made in first-tier subsidiaries".[27] Although its specific scope involves the problem of whether second-tier subsidiaries and beyond were subject to accounting control, the consultation triggered a broader debate about which agents should be accountable to the TCU. There was doubt, above all, about the possibility of the court directly supervising companies in which the State participated as only a minority shareholder. Two positions were assumed.

The first supported the presence, in some way, of resources of public origin as a criterion for controlling accounts, understanding that companies with minority state participation—therefore, not part of indirect public administration—were also subject to the court.[28] According to this understanding, the 1969 Constitution, establishing the jurisdiction of the TCU (art. 70, § 1), "does not distinguish, among those under jurisdiction, public or private entities, personalized or not, natural or legal persons", so that "control is legitimized in the sole presence of public resources and assets."[29]

The second, which prevailed, accepted the criterion provided for by law (ownership of a majority share), maintaining that court jurisdiction did not encompass companies in which public authorities had only minority participation.[30] In this regard, "if there was an association of private capital (semi-public economy company), a legal definition, as a public asset, of this combination became necessary to lead to court interference". [31] Indeed "the definition came […] with Law 6,223, 1975, which established the criterion of ownership of a majority share, prescribing a reasonable distinction—of content and not of form—without going against […] the principle established in the Law."[32]

The latter understanding prevailed, and the majority of ministers decided that "if the participation is minority, […] the hypothesis of remittance of accounts

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27 See BRASIL. Tribunal de Contas da União (plenário). Processo 000.987/76, relator Luiz Octavio Gallotti, 15 de junho de 1976, ata 42/76.

28 This understanding is in the opinion prepared by the MP with the TCU, accompanied by court ministers.

29 Brasil, Processo 000.987/76, *cit*.

30 This understanding is implicit in the vote of minister Luiz Octavio Gallotti, rapporteur of the case, accompanied by the majority of the court's plenary.

31 Brasil, Processo 000.987/76, *cit*.

32 Ibid.

does not arise".[33] In light of this case, in 1976 the TCU formulated Precedent 75, to consolidate the prevalent understanding:

> The competence conferred on the Federal Audit Court by art. 7 of Law No. 6,223, of 14/07/75, is not conditioned to the legal nature attributed to the supervised entity, nor its creation by law or presidential act; nor is it restricted to the direct or primary shareholding of the Union and entities under its indirect administration, comprising, instead, the so-called second or third degree subsidiaries, but without the obligation to send annual accounts for entities in which there is only a minority interest.

Precedent 75 initially clarified that the criterion for identifying the state-owned company was not the legal form, the creation by law or the first-degree link between the company and the political-administrative entity (in this case, the Union). Therefore, entities of subsequent levels would also be considered state-owned, i.e., companies majority controlled by another company that was majority controlled by the Union, and so on. To characterize a company as part of the public administration, state participation, necessarily majority, could be either direct (through the political-administrative entity itself) or indirect (through indirect administration entities).

In the final part, the summary also clarified that only minority state participation (direct or indirect) in a company would not be the reason for its submission to accounting control. It implicitly recognized, therefore, the non-state nature of the company with only minority state participation. The expressions used in the summary may have caused doubts regarding the extent of the TCU jurisdiction—notably stating "but without the obligation to send annual accounts for entities in which there is only a minority interest". There is still varied interpretation of this summary in that court jurisdiction would indeed cover companies with minority state participation, but, in this case, there would not be a need to "remit annual accounts".[34]

However, the discussions around the issue make it clear the position that prevailed in the TCU was that its jurisdiction would not impinge on companies with only minority state participation.[35] Apparently, the reference

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[33] Ibid.

[34] See BORGES, Jéssica Suruagy Amaral. *Estado acionista minoritário e seu controle pelo Tribunal de Contas da União*. Rio de Janeiro: Lumen Juris, 2019

[35] Regarding the limitation, in this case, of the jurisdiction of the Court of Auditors, in the view of the STF and the TCU, see Borges *O controle do estado acionista minoritário pelo Tribunal de Contas da União*, *op. cit.*; e SILVA, Maria Hermínia Penteado Pacheco e. O controle das empresas estatais. *In:* DAL POZZO, Augusto Neves; MARTINS, Ricardo Marcondes (Coord.). *Estatuto jurídico das empresas estatais*. São Paulo: Contracorrente, 2018. p. 315-323.

to the "remittance of accounts" concerns the content of the consultation that gave rise to the entire discussion, which dealt with the procedure for sending accounts to the TCU. After Summary 75, a new controversy would arise in the TCU, linked to the legal concept of a semi-public-capital company, which gave it the opportunity to express some opposition to the defining legal norms of their competencies.

The doubt was over the possibility of the court inspecting companies in which the public authorities appear to hold exactly half of the shares, and not a majority of the capital, as provided by law for characterization of a semi-public company. The central case of the controversy involved the company Lloyd Libra Navegação S.A., in which public and private origin shares pertained in an identical proportion (50%).

In the TCU plenary, the extent of its control was addressed, in view of the nature of the activity undertaken by the entity in question. In this sense, "maritime trade is a matter of unusual relevance for the State, so much so that the Constitution establishes […] that navigation for the transport of goods is exclusive to national ships". Thus, "the public interest is manifest and must be taken into account".[36]

But what prevailed was another understanding, which expanded the court role, vis-a-vis the legal concept of a semi-public enterprise as a company with majority state capital, as well as the requirement, by art. 7 of Law No. 6,223, 1975, of majority state capital to trigger account control. It was argued that: "whether majority, equal to that of private capital, or minority, participation of public resources in the shareholding composition, there would be an obligation to render accounts to the court".[37] In this way, "the entity […] is under the jurisdiction of the Court, since public resources make up its share capital, notwithstanding […] the shareholding percentage held". The rationale of this understanding, relative to the laws, was the "public nature of the resources, and not their arithmetic expression, giving rise to Court control, concerning the entities manipulating them, whatever the legal nature of the organizations which apply them".

In the end, by majority vote, the court decided, "in a normative manner", that "public entities, with legal personality under private law, in which there is equal participation by the Union, are also subject to financial supervision by

[36] It was the understanding of the rapporteur in this case. BRASIL. Tribunal de Contas da União (plenário). Processo 039.664/76, rapporteur Ewald Pinheiro, 30 June 1977, 44/77.

[37] The Public Prosecutor's opinion with TCU support, *ibid*.

the TCU". The only dissenting vote argued that Law No. 6,223, 1975, would have expressly excluded companies with state participation equal to private participation from TCU jurisdiction.

This dissenting protection, by the auditor, prompted a reaction from the Executive, which submitted Presidential Message No. 1, 1978, to the National Congress, proposing changes to Law No. 6,223. The main change would be the inclusion of the following instrument:

> Art. 7º […] §3º The Union, State, Federal District, Municipality or entity of the respective indirect administration that participates in the capital of a private company holding only half or a minority of the common shares will exercise the right of supervision guaranteed to the minority shareholder by the Law of Joint Stock Companies, such participation not constituting a reason for the inspection [by audit] provided for in the head paragraph of this article.

The matter generated intense debate in the Legislature. In support of the proposal, the rapporteur in the Semi-public Committee criticized the TCU decision: "according to this court's interpretation, the mere equal participation of Union capital with private capital would be sufficient to subject financial and budgetary management to control by the court of accounts and by the National Congress", which "unequivocally results in the distortion of objectives proposed by the applicable legislation by the applying authorities".

In response to the presidential intervention, an amendment was proposed which, going far beyond what the TCU had decided, sought to extend jurisdiction of the audit courts to all "legal entities governed by private law […] with Union, State, Federal District, or Municipal capital, or of any entity of the respective indirect administration".[38] The supporters of this proposal expressly argued that the presidential text "removes from the inspection of the control of accounts all companies in which the State has an equal or minority interest in common shares", as well as "private law entities in which the State participates with preferred shares, even if this participation is majority in terms of share capital".

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[38] This is the content of Amendment 1, proposed by senator Itamar Franco (BRASIL. Congresso Nacional. *Diário do Congresso Nacional*, Brasília, ano XXXIII, n. 21, p. 881 e ss., 4 abr. 1978).

In the end, a favorable position prevailed in Congress towards the proposal sent by the President's office, and in 1978 Law No. 6,525 was enacted, with a new wording of art. 7 of Law No. 6,223, 1975, focusing on accounts control only of entities whose totality or majority of shares were in the hands of indirect management, expressly exempting companies in which it held only half or a minority:

> Art. 7º – Entities with legal personality under private law, whose capital the Union, State, Federal District, Municipality, or any entity of the respective indirect administration holds all or majority shares, are subject to supervision of the competent Court of Auditors, without prejudice to the control exercised by the Executive Branch.
> §1º – The supervision provided for in this article will respect the peculiarities of the entity›s operation, limiting itself to verifying the accuracy of the accounts and the legitimacy of the acts, and will consider its objectives, business nature and operation according to the methods of the private sector economy.
> §2º – The imposition of standards not provided for in general or specific legislation is prohibited.
> §3º – The Union, State, Federal District, Municipality or entity of the respective indirect administration that participates in the capital of a private company holding only half or a minority of the common shares will exercise the right of supervision guaranteed to the minority shareholder by Corporation Law, that participation not being a reason for the inspection provided for in the head paragraph of this article.

In this way, the legislative response deauthorized the dissenting movement undertaken by the TCU to expand its competence and reaffirmed the organic criterion, as it had been established by Decree-Law No. 200, 1967: a company in which state participation in voting capital is equal to or lower than that of non-state shareholders is not a semi-public company—and, therefore, does not form part of indirect public administration.

At the time of this legislative response, this criterion had already been affirmed by the legislator in 1975 (in the general law on financial and budgetary supervision) and, as noted earlier, reaffirmed in 1976 (in the Brazilian Corporation Law). Following the 1988 Constitution, it was consolidated in 2000 (in the Fiscal Responsibility Law) and in 2016 (in the State-Owned Companies Law).

2.3. TCU current understanding of the extent of its powers regarding state participation in private sector companies

In general, the TCU has been consistent in applying the idea that, in cases involving a private company with only minority state participation, its supervision will not directly affect it, but only the state shareholder entity.[39]

Some statements by the TCU indeed suggest it considers itself competent to directly control even private entities with minority state participation.[40] However, even in these cases, the court has been careful not to issue direct orders to private companies, addressing, as is correct, the state company that participates in its capital;[41] thus, the court suggestion that it does not have jurisdiction over these private companies, which it also does not formally classify as state-owned companies.

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[39] For example, in a case involving minority participation by the state-owned enterprise Imbel in the company Engesa, the court plenary session qualified the latter as a "stock company, private entity, and, therefore, not covered by this TCU", and limited control only to operations affecting its constitution, involving acts of the state-owned company itself. (BRASIL. Tribunal de Contas da União (plenário). Decisão 220/2000, relator Guilherme Palmeira, 05 de abril de 2000).

[40] The following judgments given by the TCU plenary serve as examples: 2609/2011, rapporteur Aroldo Cedraz, November 28, 2011 (following TCU Precedent 75); 1344/2015, rapporteur André Carvalho, June 3, 2015 (revised, after the edition of the State Law, by 1226/2018, rapporteur Benjamin Zymler, May 30, 2018, referred to below); and 2616/2018, rapporteur José Múcio Monteiro, September 20, 2018 (a generic allusion to the constitutional competence of the TCU, defends direct supervision over companies in which there is minority state participation, but chosen according to ad hoc criteria, for each case — item 23).

[1]n the 2022 case, the TCU plenary again issued a decision in which the grounds for the rapporteur vote contradict Precedent 75 (judgment 2706/2022, rapporteur Bruno Dantas, December 7, 2022). The rapporteur maintained that "given the existence of material control in a given partnership (dominant influence), these entities will be subject to the principles to which public administration is subject, as well as to supervision by control bodies". In the dispositive section, the ruling determined in relation to state-owned companies that "the concept of material control established in art. 116, c/c art. 243, § 2, of Law 6.404/1976, must be applied to subsidiaries, including joint ventures, signed through strategic partnerships with the private sector, with the objective of verifying the existence of control authority of the state entity, even if shared." Notwithstanding, the ruling did not issue directives to private sector companies in which there was state participation.

[41] As Jéssica Suruagy Amaral Borges shows, based on a survey of all TCU rulings on the subject between 1992 and 2018 (Borges, Estado acionista minoritário e seu controle pelo Tribunal de Contas da União, op. cit., p. 97 and s.). Furthermore, none of the rulings handed down by the TCU plenary after this period contained a determination directed at private companies. See (in addition to 2706/2022, cit.): 494/2019, rapporteur Vital do Rêgo, March 13, 2019; 1616/2019, rapporteur Marcos Bemquerer, July 10, 2017; 1272/2019, rapporteur Raimundo Carreiro, June 5, 2019; 1177/2019, rapporteur Marcos Bemquerer, May 22, 2019; and 1333/2022, rapporteur Vital do Rêgo, June 8, 2022.

In 2015, the TCU issued a ruling[42] determining the observance of rules of a public nature (of bidding, contracting and budgetary) in enterprises without any state participation, but which, in the court's understanding, would be "business companies controlled, in fact, directly or indirectly", by a state-owned company,[43] due to "factual links that identify the predominance of interest and control by the state-owned company, characterizing a relationship in which the specific company appears as a mere controlled company, independent of legal formalization".[44]

The ruling invoked § 6 of art. 1 of the State Law, according to which "companies controlled" by a public company or semi-public companies are subject to this law.

With this notion of de facto controlled company, the TCU introduced a legal deviation, to, in general, reviewing Summary 75, detach the legal concept of state-owned company from the traditional requirement (now in article 4 of the State-Owned Companies Law), i.e., the requirement for state control based on majority voting capital? Would the existence of de facto subsidiaries of state-owned companies have been recognized, even without the presence of corporate participation?

The text of the operative part of the ruling, using an indeterminate concept—that of a company subject to de facto state control, as covered by § 6 of art. 1 of the Law on State-Owned Companies—suggests it. But the analysis of the ratio decidendi, based on the characteristics of the case, shows that this is not the case.

The TCU had found that, arising from a chain of contracts, a certain gas pipeline, although formally owned by a private company (without state participation and with a specific purpose—SPE), was in fact an enterprise totally controlled by a state-owned company, through its officials. The state-owned company had not only carried out the initial financial modeling and structuring of the financial and engineering project. Even after SPE formal involvement, the state-owned company was also responsible for selecting the contractor responsible for the project and managing the entire construction. The SPE had no real involvement in this regard; it only formalized the payments, under the orders of the state-owned company. Furthermore, the gas pipeline was intended for use by the state-owned company. In short, the TCU found

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[42] Brasil, *Acórdão 1344/2015*, *cit.*; revisto, após a edição da Lei das Estatais, por *id.*, *Acórdão 1226/2018*, *cit.*

[43] Item 9.1.1.2, revised by ruling 1226/2018, cit.

[44] Item 9.1.1.

that, in fact and in every respect, the enterprise belonged to the state company, which managed it in its entirety, through its own officials. The SPE operated as a simple vehicle, without real autonomy.

Thus, it may be said, if an enterprise belongs to a state-owned company, in all respects, it must be implemented and managed by its officials in compliance with the rules of public law that bind them, especially those of bidding and public contracting.

Taking this into account, the court, without declaring it, resorted to the idea of a simulated legal transaction, which appears to confer rights on a hypothetical entity (Civil Code, art. 167, § 1, I), concluding vis-à-vis irregularity. And, instead of determining invalidation of the deal, it chose to let it exist with the configuration intended to be concealed, i.e., the configuration of the contract of the state company itself, not of the private company (option admitted by the head paragraph of article 167 of the Civil Code).

Thus, the TCU decision does not exactly concern the problem of the concept of corporate control (if necessarily majority, or also minority) for the purposes of characterizing a company as state-owned. This pertains to the concept of a state-owned company contract, subject to its own bidding and contracting regime. It is important to note that, in this case, the TCU did not issue any determination to the SPE, but rather to the state-owned company. Therefore, the SPE was not considered a de facto subsidiary of the state-owned company, a legal entity that does not exist.

The general legal guidance that can be drawn from this TCU ruling is that a contract that, although formally concluded by a private company, is controlled, in every respect, by the state-owned company, should be considered a state-owned company contract, whose performance is to be concealed. Although the situation justified the use of de facto control (by the state-owned company) of the contract (by the private company), the TCU erred in invoking, as the basis of its determinations, § 6 of art. 1 of the State-Owned Companies Law, suggesting it would consider the SPE itself as de facto state controlled company. In fact, it did not do so because, as highlighted, it did not determine anything concerning the private entities of the SPE.

The observation, therefore, is that the TCU, despite the rhetorical rebellion, remains faithful to the current legal concepts (Decree Law no. 200, 1967, Law No. 6,223, 1975; S/A Law, 1976; Fiscal Responsibility Law, 2000; and State Law, 2016) and its Summary 75, considering as semi-public companies, subject to its direct control, only companies in which state participation in the voting capital is a majority.

3. Conclusion

This reconstruction of the evolution of administrative legislation and accounting jurisprudence in Brazil, concerning the possibilities and limits of control over companies, shows the challenge of reconciling a stable accounting competence and a public administration in constant transformation.

The general formula implemented by the national legislator, and maintained for many decades, is based on organic criteria. The model was tested intensely due to the proliferation of state-owned companies, as well as State minority participation in private companies.

The finding is that, despite insufficiencies and divergences, as well as some rhetorical fluctuation, there is a prevailing criterion to consider companies in whose capital or control there is non-majority state participation, which are legally configured as private sector companies, as excluded from both indirect public administration and of accounting control.

However, the consolidation of the administrative organization through Decree-Law No. 200, 1960, and delimitation of TCU competence (over public companies and semi-public-capital companies) through Law No. 6,223, 1975, were seemingly insufficient in stabilizing accounting competence—with the TCU showing signs of expansion in relation to companies with minority State participation.

In this context, Law No. 6,525, 1978, expressly removed private companies in which the State holds half or less of the shares from accounting jurisdiction, prohibiting the extension of this jurisdiction to enterprises with minority state participation. As observe, this prohibition has been observed in practice—despite rhetorical nods from the TCU that it would have direct jurisdiction over companies with minority state participation.

This finding is not trivial, since, in other areas, in which the laws have not expressly established negative rules of jurisdiction, the TCU tends to expand its operations more freely, to reach entities not organically included in public administration. This is the case of supplementary bodies sponsored by state entities, especially state-owned companies (such as the Postal and Telegraph Social Security Institute—*Postalis*).[45]

[45] On this topic, see SUNDFELD, Carlos Ari; ROSILHO, André. Tribunais de Contas e entidades fechadas de previdência. *Interesse Público*, n. 132, p. 151-172, 2022.

Thus, the Brazilian experience concerning accounting control over different forms of State action seems to suggest that, in addition to the definition of positive rules of competence, express legal prohibitions may be the best path to stability and predictability.

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