External control of business opportunities for state-owned companies that compete in the market*

O controle externo das oportunidades de negócio das empresas estatais que competem no mercado

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ABSTRACT

The purpose of this paper is to analyze the external control of business opportunities for state-owned companies that operate in competitive markets. These forms of partnerships between public and private companies have different characteristics than the traditional contracts for the provision of services or execution of works, because they involve the search for private partners to perform risky activities and have the purpose of joint development of solutions to the challenges of state-owned enterprises as market agents. At this point, this

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article proposes some parameters for the exercise of external control of such partnerships, considering their nature and specificities, defending the restraint of the controller, with the control focusing on the formation of the commercial link, in addition to the standards of the business judgment rule.

KEYWORDS

state-owned companies — external control — business judgment rule — business risk — business partnerships

RESUMO

Este texto tem por finalidade analisar o controle externo das oportunidades de negócio das empresas estatais que competem no mercado. Essas formas de parcerias entre companhias públicas e privadas possuem características diversas dos tradicionais contratos de prestação de serviços ou execução de obras, pois envolvem a busca por parceiros privados para o desempenho de atividade de risco e que tenham por finalidade o desenvolvimento conjunto de soluções para desafios das empresas estatais como agentes de mercado. Nesse ponto, este artigo propõe parâmetros para o exercício do controle externo de tais parcerias, considerando sua natureza e suas especificidades, defendendo a contenção do controlador, com a possibilidade do controle procedimental da formação do vínculo comercial, além dos parâmetros da business judgment rule.

PALAVRAS-CHAVE

empresas estatais — controle externo — business judgment rule — risco empresarial — parcerias empresariais

> If we want to get out of the current disorder, it will undoubtedly be necessary in the future to deepen the analysis; the notion of control is one of the most inconsistent in our administrative system; of the measures it encompasses, some ascribe total power to the controlled body, inducing errors and irregularities, in view of possible sanctions; others support a real transfer, or at least a division of power, to the benefit of the soi-disant controller [Alberto Venâncio Filho].[1]

[1] VENÂNCIO FILHO, Alberto. A intervenção do Estado no domínio econômico: o direito público econômico no Brasil. Rio de Janeiro: Renovar, 1998. p. 505. (facsimile of the 1968 edition).

1. Introduction: delimitating the topic and diagnosing the problem

One of the characteristic features of state-owned companies in Brazil is their two aspects: while a part of the indirect public administration, they are also market agents, with business concerns, resulting in a complex legal regime. A part of their activities is governed by "norms of public law",[2] respecting rules applicable to public bodies, local authorities and public foundations[3]. Another part observes private company rules, distinct from public administration —so-called "private law norms".

The two dimensions are not irreconcilable and can coexist within the same legal entity, as commercial imperatives may coincide with public objectives.[4] However, this bifocal reality demands interpretive contextualization, given the peculiarities of hybrid regimes.

Currently, state-owned companies enjoy diverse legal relationships with market entities, as purchasers of goods and services provided by private companies, or competitors, or even partners in common ventures, through strategic contracts which expand and improve business activity.

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[2] In our view, the division of the regime in terms of public and private law norms, highlighted by traditional doctrine in Brazil, is artificial, and does not reflect the complexity of current state administrative action. On the one hand, it does not appear in positive law, except for one or two references to such precepts in the integrative interpretation of administrative contracts (art. 54, head paragraph, of Law No. 8,666/93 and art. 89, head paragraph, of Law No. 14,133/2021) and the contracts of state-owned companies (art. 68 of Law No. 13,303/2016). This, however, is far from authoritative regarding the demarcation of public and private law regulations, as is common in administrative law doctrine. What exists, then, is positive law, produced by legislative and administrative bodies, in line with their competences and normative processes, without no real qualitative difference between public and private law norms. This categorization, in fact, encourages an air-tight application of principles, outside the legal parameters prescribed for specific cases, favoring instead a strict conception of the "rules and principles of public law" applicable to the situation in question. Finally, it has no practical utility, given there is no dual jurisdiction in Brazil and the absence of a special civil process to control administrative acts according to "public law norms". Thus, as this classification is somewhat artificial, references to "public law norms" and "private law norms" in the present work will be, as it were, in quotation marks. For a critique of this tendency in Brazilian administrative law to oppose public and private law, cf. SUNDFELD, Carlos Ari. Crítica à doutrina antiliberal e estatista do direito administrativo. In: SUNDFELD, Carlos Ari. Direito administrativo para céticos. 2. ed. São Paulo: Malheiros, 2014. p. 113-144.

[3] In this study we focus on public entities under public law, as they are the closest to an autonomous regime. In this sense, cf. MELLO, Celso Antônio Bandeira de. Curso de direito administrativo. 30. ed. São Paulo: Malheiros, 2013, p. 190-191.

[4] Bilac Pinto, writing in the 1950s, was, therefore, mistaken in the belief that it is impossible to reconcile the two aspects in mixed economy companies, which does not find support in the national context. Cf. PINTO, Bilac. The decline of mixed economy companies and the advent of modern public companies. Revista de Direito Administrativo, n. 32, p. 1-15, 1953.

There are complexities with each interaction, inherent to the specific environment, requiring a sophisticated analysis which considers the type of activity of the state-owned company, the form of interaction with the market, and the market involved.

Ready-made formulas for establishing legal regimes and the consequent analysis of the activities performed—such as the outdated classification into "means" and "ends"—are insufficient to explain the range of functions or serve as a control guide. Watertight categories have didactic force, but do not express the complexity of such hybrid entities.

More than solutions, these designations—often doctrinal, without support in law—do not allow for the complexity of administrative phenomena handled by interpreters and controllers, to the detriment of commercial interests.

Here, we focus on one of these issues—namely, external control of strategic hiring by state-owned companies to improve performance, consolidated with Law No. 13,303/2016.

In this text, our focus is restricted to state-owned companies that compete in the market, as we consider them most affected, in their essence, by disproportionate control. Furthermore, the widespread application of "public law norms" can lead to a rigidity in the legal regime to which they are subject, in comparison with their private competitors.

It is in state-owned companies that compete with private companies that business opportunities are most exploited, since such entities are clearly more incentivized to develop innovation and action strategies that will increase their success.

To fully explore the issue, we have divided the study into three main parts. First, we suggest a new classification of the activities of state-owned companies beyond the traditional separation into "means" and "ends" activities and evaluate its impact on the external control activity of these entities.

In the second part, we analyze the regime of business opportunities available to public and mixed capital companies, in accordance with the rules of Lei das Estatais and specialized doctrine.

Then, we outline proposals for the external control of business opportunities, considering the specificities of partnerships between state-owned companies and their private counterparts, assessing the purposes sought by administrative entities.

Finally, we present our conclusions.

2. An initial consideration: the attempt to classify the activities of state-owned companies beyond the traditional separation into means vs. ends activities and their impact on the external control of state-owned companies

2.1 A proposal for classifying the activities of state-owned companies: activities of an administrative nature and of a typically business nature

As mentioned, state-owned companies are, by nature, bifocal, governed by hybrid legal regulations, with norms typical of the public administration in general (the reputed "public law norms") and norms which in many respects stand opposed to them (the so-called "norms of private law"). The challenge that arises is to define which standards are most applicable to the varied activities carried out by state-owned companies.

Scholars have tried to classify the legal regime into two broad categories: "means activities" and "end activities". These are actions linked to the business objectives of state-owned companies, i.e., the commercialization of goods and services which justified their creation, rooted in the private law regime. The "means activities", in turn, are linked to the ways of achieving those purposes (selection of personnel, hiring of suppliers of goods and services, etc.), directed by the "public law regime", in the interests of protecting the public interest.[5]-[6]

However, we can point to at least five inconsistencies. Firstly, there is no support for it in positive law, since the rules provided for in the Federal Constitution and Law No. 13,303/2016 do not make distinctions between "public" and "private" law or even between "means" and "ends" activities.

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[5] An example of this can be seen in: Mello, Curso de direito administrativo, op. cit., p. 208 e segs.; NIEBUHR, Joel de Menezes. O regime jurídico das oportunidades de negócio para as estatais. In: WALD, Arnoldo; JUSTEN FILHO, Marçal; PEREIRA, César Augusto Guimarães. Direito administrativo na atualidade: estudos em homenagem ao centenário de Hely Lopes Meirelles (1917-2017) defensor do Estado de Direito. São Paulo: Malheiros, 2017, p. 575-591.

[6] This classification, in fact, moved beyond academic debate, guiding the jurisprudence of both the Judiciary and the Audit Courts, as a criterion used to determine, for example, the need for a public tender to decide on the acquisition of certain goods or services, as well as whether the state-owned company assets can be seized. Cf. PINTO, Henrique Motta. Empresa estatal: modelo jurídico em crise? Dissertation (Master's in Law)—Faculty of Law, Pontifícia Universidade Católica, São Paulo, 2010.

Secondly, it creates an opposition of activities that, in some cases, is difficult to classify. Consider, for example, a public bank that makes use of a computer system to offer greater safety for customer data. Is this a means or an ends activity? Interpretations may vary, which, according to the traditional classification, will lead to the application of discrepant regulations ("public law" or "private law"), with important consequences for the contract.

Thirdly, it cannot accommodate the diversity of regimes that affect the various activities of state-owned companies, in the marketing of their goods and services and in their own management with respect to their statutory duties. More than a classification into "public law" and "private law", management of such entities obeys regulations similar to those that govern direct and autonomous administration, while at other times stands apart from them. There are shades of gray in the regulations associated with state-owned companies.

Furthermore, this criterion is not aimed at measuring the ability of state-owned companies to compete in the market. The analysis is not carried out according to competitive logic, but watertight criteria, not provided for by law and which, in most cases, removes the management flexibility that characterizes private companies with whom state-owned companies compete,[7] countering the raison d'être of such entities and the public interest that underlies them.[8]

Finally, it would seem useful to differentiate the form of external control imposed on the two dimensions of state-owned companies and the activities carried out, whether more in line with public administration or with the market in which they operate, competing with private enterprises. We will explore this further, with special attention to the external control of strategic hiring by these entities.

Thus, it is prudent to propose a criterion that, while based on legislation, is more useful for classifying the diverse activities of state-owned companies and their degree of adherence to one of the two aspects that characterize them.

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[7] Cf. MARQUES NETO, Floriano de Azevedo. As contratações estratégicas das estatais que competem no mercado. In OSÓRIO, Fábio Medina; SOUTO, Marcos Juruena Villela Souto (Coord.). Direito administrativo: estudos em homenagem a Diogo de Figueiredo Moreira Neto. Rio de Janeiro: Lumen Juris, 2006. p. 588; SUNDFELD, Carlos Ari; SOUZA, Rodrigo Pagani de. Licitação nas estatais: levando a natureza empresarial a sério. In: SUNDFELD, Carlos Ari (org.). Contratações públicas e seu controle. São Paulo: Malheiros, 2013. p. 92.

[8] According to Floriano de Azevedo Marques Neto: "If the assumption of direct state intervention in economic activities subject to a competitive regime is the existence of public interest (sovereign or relevant collective interest), restrictions on the state action, as a market agent, will harm such interest." Marques Neto, As contratações estratégicas das estatais que competem no mercado, op. cit., p. 584.

To this end, we propose classification into two groups: (i) activities of an administrative nature (in the sense of being part of indirect public administration), which approximates them to the legal regime and the control exercised over direct and autonomous administration; and (ii) activities of a typically business nature, which distances them from such parameters, requiring other normative bases, to restrict competitive harm.

In the first group are activities that reveal the public face of state-owned companies, i.e., the characteristic of public administration, endowed with private law personality and budgetary and managerial autonomy.

This includes, for example, the activities of common and ordinary acquisition of goods and services, subject to tenders, exemption and non-enforceability rules as stated in articles 28, head paragraph, 29 and 30 of Law No. 13,303/2016, with the procedural rules provided for in articles 31 to 67 of the same law. Although state-owned companies may issue their own regulations for tendering, contracts and agreements, adapting the rules of Lei das Estatais to their respective realities, the guidelines are set out in federal regulations, as the head paragraph of article 40 determines that the content of this act must be "compatible with the provisions of this Law".

Also in this group are activities linked to personnel selection, which have stricter rules than those in the private sector, such as the need to hold civil service entrance exams, except for management and advisory positions, which are open to all (art. 37, II, of the CF). In the same regard, Law No. 13,303/2016, in articles 17 and 26, created requirements for directorial appointments and or members of the administrative and fiscal councils, with rules distinct from the private sector, in the light of art. 147 of Law No. 6,404/1976 (SA Law).

These examples show that state-owned company activities are subject to rules without distinction, similar to those of direct municipal administration, although with variations established by legislation to better adapt them to their corporate structure.

In the second group are the activities of state-owned companies that involve typically business operations, distinguishing them from direct and autonomous administration entities, which lack commercial or competitive objectives, public services or otherwise. In this group are typically business management activities, governed by inherent discretion,[9] whose purposes

[9] Business management discretion is linked directly to the openness of the concept of social interest, which varies depending on the situations and challenges confronting state and private company managers. Cf. PINTO JÚNIOR, Mario Engler. Empresa estatal: função econômica e dilemas societários. São Paulo: Atlas, 2010. p. 441.

and limits are guided by the establishing law, company regulations and social deliberations (committee decisions, strategic planning, annual letter setting out the company objectives, etc.).

Indeed, public companies and semi-public corporations produce goods and services in the market, in accordance with the legal and regulatory rules that inform them. Furthermore, in competitive environments, the purpose of such entrepreneurial activities is to create competitive conditions for state-owned companies in relation to their private counterparts, thus removing the public entity obstacles inherent to them.

In fact, the Federal Constitution prohibits state-owned companies from benefiting from tax privileges not extended to private sector companies (art. 173, § 2), a crucial competitive element, and, at the same time, determines these indirect administration entities are subject to the same legal regime as private companies (art. 173, § 1, item II), also essential for competition. Thus, to comply with the principle of free competition among public and private companies, no advantages must be allowed or barriers imposed that would create disparity between competitors in activities of a typically business nature.

It is in the second group of activities that we find, for example, sales operations for key products or services, and strategic contracts between state-owned companies and private companies to improve business activities, reach new customers and markets, aimed at differential efficiency standards, for greater market competitiveness.[10]

It is in this sense that the hypotheses of exempting tenders, in article 28, § 3, items I and II, of the Lei das Estatais, should be understood, as we will analyze in detail later.

This classification of state-owned company activities seems more appropriate than the traditional separation into "means" and "ends" activities, supported

[10] According to Floriano de Azevedo Marques Neto and Juliana Bonacorsi de Palma: "In general, Brazilian state-owned companies seek to develop partnerships with private business with two main objectives in mind: (i) to enable investment alternatives that make public utilities viable or that allow adoption of new business strategies and (ii) to train the state-owned company and, as a result, improve the service it provides by utilizing efficiency tools typical of the private sector. Obviously, these will not always be present at the same time. when establishing partnerships involving state-owned companies, and on other occasions there will be different explanatory variables. However, considering the general functioning of state-owned companies, these elements are the most recurrent" (MARQUES NETO, Floriano de Azevedo; PALMA, Juliana Bonacorsi de. Empresas estatais e parcerias institucionais. Revista de Direito Administrativo—RDA, v. 272, p. 85, maio/ago. 2016).

as it is by the Lei das Estatais, which establishes differing regimes for activities considered administrative in nature and those of a typically business nature.

Rather than deciding whether they are "means" or "ends" activities, subject to the "public law" or the "private law" regime, it is more useful, based on Lei das Estatais, to think in terms of activities closer to the administrative model and others more linked to the typically business approach, regardless of whether they are linked to what conventional wisdom sees as the "ends activity" of state-owned companies.

The relevant distinction, therefore, seems to be in the way in which the State-Owned Company Law separated them, considering the bifocal aspect of such entities. Thus, for certain hypotheses, this standard stipulated the need for tenders or allowed direct contracting, as with direct and autonomous administration entities, even with the provision of specific rules regarding their public nature. For other situations, the law removed all these rules,[11] as with exploitation of business opportunities, in view of market imperatives, whether these opportunities are linked to commercial purposes or not, as we will analyze in more detail.

Furthermore, this classification allows us to explore the nuances applied to state-owned companies by the regime of private competition, without resorting to watertight categories of "means" and "ends". On the contrary, it allows even activities far removed from the public company's purpose to be the subject of strategic contracts, under the business opportunities regime, given their importance for competition in the private sphere.

Finally, the classification proposed seems to best capture the nuances of the regime applicable to state-owned companies, which has its own rules, sometimes closer to those applicable to direct and autonomous administration, sometimes further, but always subject to the guidelines established constitutionally for public administration, albeit with adaptations.[12] Thus, there are no "public law norms" or "private law norms" applicable to state-owned companies in a watertight sense, or even "private law norms derogated from the precepts of

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[11] § 3 of art. 28 of Law No. 13,303/2016 expressly excludes all tenders and direct contracting rules according to the hypotheses provided therein. Cf. ARAGÃO, Alexandre Santos de. Empresas estatais: o regime jurídico das empresas públicas e sociedades de economia mista. 2. ed. Rio de Janeiro: Forense, 2018. p. 245; Niebuhr, O regime jurídico das oportunidades de negócio para as estatais, op. cit., p. 581.

[12] We are dealing with a two-sided entity, not two distinct entities. On adaptation of public administration principles to state-owned companies, cf. Aragon, Empresas estatais, op. cit., p. 182 e segs.; Marques Neto e Palma, Empresas estatais e parcerias institucionais, op. cit., P. 71-74.

public law" as an undefined species. The law established by the legislator seems intentionally malleable concerning the two dimensions of state companies.

2.2 External control based on the proposed classification

The issue of external control[13] of state-owned companies[14] in the current Brazilian scenario, is one of the main challenges for the full exercise of business activities and, thus, the raison d'etre of such entities, with a particular impact on those that compete in the market.

This aspect requires specific analysis regarding the control of direct and autonomous public administration, considering that the original conception of such entities is to follow a different legal regime to that to which other public administration bodies are subject in relation to typical business activities, facilitating economic activities (public services or economic activities in the strict sense) on equal terms with their private counterparts.[15]

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[13] Control here is understood in the sense of supervision, or verification of compliance with previously stipulated rules, according to Odete Medauar's broad conception: "In a broad sense, control means verifying compliance of Public Administration actions with certain parameters, regardless of whether the controller adopts a measure that affects, from a legal point of view, the decision or the agent". (MEDAUAR, Odete. Controle da administração pública. 2. ed. São Paulo: Revista dos Tribunais, 2012. p. 30).

[14] The appropriateness of external control of state-owned companies, especially by the Audit Courts, has already been debated in Brazilian law. In this sense, the STF, already under FC/88, ruled on the impossibility of such control, on the grounds that such private law entities would not be included in the competence attributed to the Courts of Auditors by articles 70, head paragraph, and 71, II and VIII, of the Federal Constitution, but rather to art. 173, § 1º, II, of this decree (cf. MS No. 23,627/DF and MS No. 23,875/DF), 7/3/2002, rapporteur Minister Carlos Velloso. Subsequently, however, the STF recognized the possibility of control of state-owned companies by the Audit Court, ruling on MS No. 25,092/DF and MS No. 25,181/DF, rapporteur ministers Carlos Velloso and Marco Aurélio, respectively, on 10/11/2005. For the analysis of these rulings, cf. SILVEIRA, Henrique Lago da. O controle externo sobre desinvestimentos de empresas estatais: uma análise dos critérios utilizados pelo Tribunal de Contas da União no caso Petrobras. Revista de Direito Público da Economia—RDPE, n. 59, p. 65-69, jul./set. 2017; e FIDALGO, Carolina Barros. O Estado empresário: das sociedades estatais às sociedades privadas com participação minoritária do Estado. São Paulo: Almedina, 2017. p. 328 et seq. Based on these judgments and the literature on the issue (in particular: ARAGÃO, Alexandre Santos de. Empresas estatais e o controle pelos Tribunais de Contas. Revista de Direito Público da Economia—RDPE, n. 23, p. 9-40, jul./set. 2008; MENDONÇA, José Vicente Santos de. Direito constitucional econômico: a intervenção do Estado na economia à luz da razão pública e do pragmatismo. Belo Horizonte: Fórum, 2014, p. 246-247; and MESQUITA, Clarissa Ferreira de Melo. Autonomia e controle das empresas estatais no Brasil. Tese (doutorado)—Faculdade de Direito, Universidade de São Paulo, São Paulo, 2018. p. 132 and others), there is no reason to move away from the Courts of Auditor control of state-owned companies, nor from that of other competent bodies (the Judiciary and Public Prosecutor's Office). The question of how to exercise control of such entities, especially business opportunities, is our concern here.

[15] According to Caio Tácito, writing about semi-public corporations and public companies in the

It is in this respect that national[16] and international[17] doctrine points to the need for an external control system appropriate to these entities, in view of their private enterprise structure and the instrumental role in state and economic organization assigned them.

Thus, both nationally and internationally, there is a need for a balance that allows such entities to carry out their business activities, under the same conditions as their private counterparts, with whom they compete, without neglecting control,[18] and so that they do not escape their statutory function of satisfying the public interest for which they were created, that which justifies the autonomy they enjoy.[19]

1970s: "It is certain that, in both cases, the legal personality of private law is aimed at freeing up administrative and financial management bureaucracy. It is, in short, a repudiation of conventional direct administration control systems, allowing greater operational flexibility and abstention from public accounting processes". TÁCITO, Caio. O controle das empresas do Estado—públicas e mistas. In: TÁCITO, Caio. Temas de direito público. Rio de Janeiro: Forense, 1997. v. 1, p. 713.

16 According to Vitor Rhein Schirato: "The private law nature of these entities, and their operations in a competitive context, demand greater agility. However, greater agility does not mean a lack of control, but rather control focused on results, not means. The effectiveness of the actions of state-owned companies and their performance in Public Administration must always be controlled, allowing for greater freedom in terms of means. However, the balance between freedom of action and control of results still needs to be achieved in the Brazilian reality". SCHIRATO, Vitor Rhein. As empresas estatais no direito administrativo econômico atual. São Paulo: Saraiva, 2016. v. 1.

17 According to Francesco Vito, referring to the Italian context of the last century: "It is easy to see how the problem of control is the crucial issue in all matters. As paradoxical as it may seem, the real issue is that: public enterprises are born of the need to eliminate the controls that burden every state activity; but controls cannot be dispensed with, at the risk of falling short of the goals pursued; so everything rests on the search for controls which are compatible with the conduct of the private entrepreneur." (VITO, Francesco. Il controllo dell'impresa pubblica. In: VITO, Francesco. Il controllo dell'impresa pubblica. Pubblicazioni dell'Associazione Italiana di Scienze Politiche e Sociali. Milão: Società Editrice Vita e Pensiero, 1960 p. 15).

18 Regarding the importance of controlling state-owned companies, Tomas Ramon Fernandez Rodriguez, writing in the middle of the last century, observed: "The assumption of economic activities by the Administration to satisfy the demands of public interest supposes the culmination of an entire evolutionary process of political and economic ideas crystallized in a 'modus vivendi', which characterizes western society: the mixed capital economy system. This invasion by the Administration of the economic sphere and the coexistence of its companies with private companies results in a continuous state of tension that requires constant justification in terms of the existence and performance of public companies. All this determines that the most important problem associated with the public activity of a company is precisely that of its control, that is, affirming its effectiveness based on the public interest which, as a matter of principle, state companies serve". (RODRIGUEZ, Tomas Ramon Fernandez. La organización y el control del sector público industrial en España. In: VERDERA Y TUELLIS, Evelio (ed.; pról.). La empresa pública. Bolonia: Publicaciones del Real Colegio de España en Bolonia, 1970. p. 935-936).

19 As Pedro Paulo de Almeida Dutra notes, "The search for equilibrium between the control and autonomy of the state-owned company inevitably involves considerations that combine independence and an instrumental role, due to the conditioning of the latter over the first. […] Autonomy will therefore be conditioned by this role". (DUTRA, Pedro Paulo de Almeida. Controle de empresas estatais: uma proposta de mudança. São Paulo: Saraiva, 1991. p. 146).

It is, therefore, urgent to calibrate the controlling activity especially over the business activities of such entities, considering the provisions of article 90 of Lei das Estatais.[20]

The classification proposed in the present work seems suitable for calibrating external control, as it focuses on the requirements observed by the respective bodies regarding the actions of state-owned companies. Instead of a monolithic control system, guided by what is considered "public law", it allows contextualization according to the activity carried out, in respect of the typical business management of such entities.

In the case of activities of an administrative nature, state-owned companies pertain to public administration, which seems to call for a more traditional form of control by supervisory bodies, i.e. that usually applicable to similar activities by direct and autonomous administration. The external control of personnel hiring—through competition or otherwise—and the contracting of goods and services, in our view, is close to the external control vis-a-vis the same types of adjustments carried out by direct and autonomous administration.

In effect, acquisition of office supplies for a semi-public corporation or a secretariat must be analyzed according to similar parameters, without, in our opinion, relevant qualitative differences between them that can be removed from the legislation. The same applies to the civil service exams used to select state employees, as well as the analysis of the requirements for the appointment of contracted employees.

In all these cases, there are rules, given their public character, which provide for state-owned company actions, whether in terms of tenders, exemption or non-enforceability, as well as requirements to be followed for the appointment of managers and committee members. Even though there may be—and in practice there are many—doubts regarding the applicability of a given rule in a concrete situation, based on the definition of the need for a public tender, the control logic is similar to that applicable to external control of such types of actions in direct and autonomous administration.

On the other hand, in the case of activities of a typically business nature, whether linked to the corporate purpose, external control, it seems, must move away from the parameters used for direct and autonomous administration, allowing such activities to be supervised according to guidelines closer to the rules applicable to others market agents.

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[20] "Art. 90. The actions and deliberations of the controlling body or entity should not imply interference in the management of public companies and semi-public corporations subject to it nor interference in the exercise of its powers or in the definition of public policies".

The question is linked to the parameters for measuring control, since it does not seem possible that those used for activities of an administrative nature are useful for those of a typically business nature. What is at stake is calibration of control, which should not make public company actions unfeasible nor too costly, to the detriment of their private counterparts. This would lead to a loss of competitiveness, frustrating their raison d'etre.

Therefore, the control parameters must be properly adapted to the market reality in which the state-owned company operates. Analysis of transparency, equality, efficiency and economic viability of a state-owned company that competes in the market appears different for administrative activities than those of a typically business nature. Adaptation[21] of the control criteria for public administration in these cases takes on special significance in the competitive sphere, which, in some cases, demands innovation in management, as well as the assumption of typical business risks, which may be compromised, depending on the bases the control affects.[22]

Such peculiarities suggest the need for a fresh look at the parameters of external control, with special attention to the purposes sought by the state-owned company, and the business oriented decision-making process. We will return to the topic later, regarding the criteria of external control activity of business operations by state-owned companies competing in the market.

3 Business opportunities for state-owned companies: characterization and general regime

The issue of the business operations of state-owned companies is not exactly new.[23] It was deliberated by the Federal Audit Court (TCU), in 1998, in a case involving Petrobras, as noted by Alexandre Santos de Aragão.[24]

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[21] This idea of adapting control according to the peculiarities of administrative acts is not new in Brazil. See JORDÃO, Eduardo Ferreira: Controle judicial de uma administração pública complexa: a experiência estrangeira na adaptação da intensidade do controle. São Paulo: Malheiros, 2016.

[22] On control as a factor inhibiting innovation in public administration, cf. JORDÃO, Eduardo Ferreira. A relação entre inovação e controle da Administração Pública. A&C—Revista de Direito Administrativo & Constitucional, n. 72, p. 143-144, abr./jun. 2018.

[23] In this sense, cf. Marques Neto. As contratações estratégicas das estatais que competem no mercado, op. cit., p. 575-604.

[24] Aragão, Empresas estatais, op. cit., p. 466. As he states, the TCU, in Decision 803/1998, Plenary, ruled: "a) there is no irregularity or impediment for Petrobras to enter into partnership or association contracts with other companies; b) that such contracts represent legitimate strategic action by the State Company in the development and, in parallel, verticalization of its activities, to obtain greater synergy for its investments and added value for its products, allowing gains in scale and maximizing results, in addition to a competitive final price".

The issue gained greater force with the enactment of Law No. 13,303/2016, which led to debate as to its scope and the requirements observed by state-owned companies when forging such links.[25]

To carry out activities of a typically business nature, state-owned companies must behave in a similar way to their private counterparts, adopting rules that allow them to adapt to market changes and contingencies. In such cases, these entities must operate with the flexibility typical of private companies,[26] without neglecting the broad legality that permeates all public administration entities.

In this regard, Law No. 13,303/2016 stipulated a hypotheses in which neither the bidding nor the direct contracting regime—exemption or non-enforceability—will be applicable in the case of the respective procedure provided for in article 30, §3.[27] These are hypotheses in which the contracting carried out by

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[25] It was debated extensively at the Jornada de Direito Administrativo, held in 2020 by the Conselho da Justiça. Of the 40 approved statements, three dealt with the business opportunities of state-owned companies: "Statement 22. The participation of a state-owned company in the capital of a private company that is not part of the Public Administration falls within the hypothesis of 'business opportunities', provided for in art. 28, § 4, of Law no. 13.303/2016, and the decision for such participation must comply with the legal dictates and regulations of the state company concerning this possibility"; "Statement 27. Contracting of a business venture, as provided for in art. 28, § 3, II, and § 4 of Law no. 13.303/2016 must be evaluated according to the practices of the state company sector of activity. The unfeasibility of competition to realize the business venture should be understood as the impossibility of objective comparison, in the case of partnership and corporate restructuring proposals, and as the lack of a competitive procedure, when the opportunity can be offered to all interested parties." The 'unfeasibility of competitive procedure' provided for in art. 28, § 3, inc. II, of Law No. 13,303/2016 does not mean that, to set up a business venture, there is only one party interested in partnership with the state-owned company. It may be that, even with more than one interested party, a competitive procedure is unfeasible."

[26] According to Rafael Wallbach Schwind: "The adoption of the business model by the State is neither irrelevant nor of minor importance. On the contrary. When creating an entity, classifying it as a company, the State assumes that the business model corresponds to the best way of organizing its resources to achieve certain objectives in the public interest. This dignifies the idea that structuring an activity according to business principles corresponds to the most appropriate model for the development of specific objectives. […] What characterizes the business model? It is precisely the fact that it is a flexible organization of production factors, which has necessary and sufficient malleability to respond to the changing demands of its surroundings. In a highly mutable context of economic activities (in which the market configuration changes, prices change, new technologies develop, and there are new demands, among other factors), two requirements are essential: freedom and agility". SCHWIND, Rafael Wallbach. O Estado acionista: empresas estatais e empresas privadas com participação estatal. São Paulo: Almedina, 2017. p. 57.

[27] On the inapplicability of the exemption procedure and non-enforceability for business opportunity contracts, cf. JUSTEN FILHO, Marçal. A contratação sem licitação nas empresas estatais. In: JUSTEN FILHO, Marçal (Org.). Estatuto jurídico das empresas estatais: Lei 13.303/2016. São Paulo: Revista dos Tribunais, 2016. p. 299; MOREIRA, Egon Bockmann. Empresas estatais, contratações diretas e as "oportunidades de negócio". In: PINTO JUNIOR, Mario Engler; MASTROBUONO, Cristina M. Wagner; MEGNA, Bruno Lopes (Coord.). Empresas estatais: regime jurídico e experiência prática na vigência da Lei n. 13,303/2016. São Paulo: Almedina, 2022. p. 247.

the state-owned company is directly linked to its business aspect, that is, of a private law entity operating in the market, normally competitive and with its own dynamics, different from the direct and autonomous administration, prompting the rules provided for in art. 28, §§ 3 and 4,[28] of the aforementioned decree. This has been called tendering inapplicability,[29] not to be confused with the hypotheses of exemption and non-requirement of tenders.

By exempting tenders, the legislator removed the aforementioned process for contracting of an object that, in theory, could be subject to competition. As Marçal Justen Filho notes, "It is, therefore, a question of restricting the scope of another legal norm, which imposed the bidding requirement. Therefore, and notwithstanding the existence of a legal provision providing for dismissal, contracting should be subject to a tender."[30]

Ineligibility represents the unfeasibility of competition for execution of the scope of the agreement, "in cases where the nature of the object, the interest of the Administration or the characteristics of the market are incompatible with the holding of a formal bidding process".[31]

With inapplicability, in turn, absence of bidding pertains to the specific characteristics of the contract, so that "competition may even be viable, but there is no obligation to bid".[32] In other words, it is due to the peculiarities of the contracts arising from the rules set out in items I and II of § 3 of art. 28 of the Lei das Estatais that the hypothesis of inapplicability was established, ruling out the direct contracting procedure set out in art. 30, § 3, concerning cases of waiver and unenforceability (art. 30, § 3).

In this regard, Egon Bockmann Moreira observes that "the inapplicability does not communicate with the rationality of the previous trinomial (bidding

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[28] "Art. 28. […] § 3 Public companies and mixed-capital companies are exempt from complying with the provisions of this Chapter in the following situations: I—marketing, provision or execution, directly, by the companies mentioned in the head paragraph, of products, services or works specifically related to their respective corporate purposes; II—in cases where the choice of partner is associated with their particular characteristics, linked to defined and specific business opportunities, justifying the unfeasibility of a competitive procedure. § 4 Business opportunities referred to in section II of § 3 are considered as the formation and termination of partnerships and other associative, corporate or contractual acts, the acquisition and disposal of participation in companies and other associative, corporate or contractual forms and operations carried out within the scope of the capital market, respecting the regulation by the respective competent body".

[29] Cf. Justen Filho, A contratação sem licitação nas empresas estatais, op. cit., p. 298; Moreira, Empresas estatais, contratações diretas e as "oportunidades de negócio", op. cit., p. 246.

[30] Justen Filho, A contratação sem licitação nas empresas estatais, op. cit., p. 298.

[31] Ibid., p. 299.

[32] Ibid., p. 299.

or dismissal or unenforceability), but installs a quantum genus, prescribed in § 3 of art. 28".[33]

The two hypotheses of tendering inapplicability are directly linked to the market dynamics that led the State to opt for a business model to achieve a collective interest objective.[34] In other words, contrary to the hypotheses of exemption and unenforceability of bidding (arts. 29 and 30 of Lei das Estatais), in the case of § 3 of article 28 the justification for not carrying out the bidding procedure lies in the commercial purpose of the state-owned companies and the reasons that led the State to create them (acting directly in the economy).

The first case involves commercialization of goods, products or services, the company's raison detre, directly linked to corporate purpose.

The second case—pertinent to this study—involves forming a partnership with a private company which will benefit the state-owned company, within the broad spectrum of legal relationships that may be identified as defined business opportunities, i.e. specific and uncommon, motivated by the subjective characteristics of the private entity.[35]

These are cases in which the administrative entity seeks to join forces with a private company to improve its management, obtain financial resources, provide new technologies and other attributes for generating commercial advantages for the state-owned company.[36] Such partnerships are marked by atypical contracts, allowing for greater innovation, with ample freedom for the manager to identify business opportunities and the best contract to achieve its purposes, respecting the principles of transparency, fairness, impersonality, etc.[37]

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[33] Moreira, Empresas estatais, contratações diretas e as "oportunidades de negócio", op. cit., p. 247.

[34] Cf. GUIMARÃES, Bernardo Strobel et al. Comentários à Lei das Estatais (Lei nº 13.303/2016). Belo Horizonte: Fórum, 2019. p. 177; ASSIS, Luiz Eduardo Altenburg de. Oportunidades de negócio na Lei das Estatais: as parcerias e outras formas associativas entre empresas estatais e empresas privadas. Rio de Janeiro: Lumen Juris, 2019. p. 96-97.

[35] Cf. GUIMARÃES, Edgard; SANTOS, José Anacleto Abduch. Lei das estatais: comentário ao regime jurídico licitatório e contratual da Lei nº 13.303/2016—Lei das Estatais. Belo Horizonte: Fórum, 2017. p. 43.

[36] Cf. Marcal Justen Filho. A contratação sem licitação nas empresas estatais…, cit., p. 302.

[37] According to Egon Bockmann Moreira, "with business opportunities, the fundamental premise is to give the manager room to elaborate sui generis ventures, adopt the most effective model, define corporate structures and select a particular partner who can make the objectives viable. As opportunities, they encourage the manager to create new legal businesses, in line with the established law, but not typified by it. Business ventures can be embodied in innovative contracts. […] Law No. 13.303.2016, item II of § 3 of art. 28, granted the public manager negotiating skills, with a high degree of creativity. This applies to identifying the opportunity, shaping and implementing it; without abdicating the principles of transparency, impersonality, modality, economic viability, etc. Indeed, the other axes of the same normative provision—governance and compliance—impede improper practices opposed to the tenets of fairness, efficiency and

Here, arising from these characteristics, is the central distinction between the provision in question and the waiver/ineligibility of tendering. These cases of direct contracting involve adjustments vis-a-vis the hypotheses of incidence provided for in articles 29 and 30 of the Lei das Estatais, which deal, respectively, with waivers and unenforceability.

Although the provision of Article 30 (unenforceability) is more open than that of Article 29 (bidding waiver), concerning cases of competitive unfeasibility, both involve standard contracts, whose objects are described therein, executed according to models previously determined by Law No. 13.303/2016: bilateral, synallagmatic and commutative contracts,[38] long studied and practiced by state-owned companies.

These characteristics mean these agreements are less flexible, dynamic and plastic than business venture contracts, which have the personality of an associative contract, by which the participants pool their efforts to achieve a common goal. In fact, "more than mere structuring of a conventional contract, identification of a business opportunities embodies a technique of legislatively authorized cooperation between different business companies with a common objective through cooperation, collaboration and synergy of efforts".[39]

In this sense, then, item II of § 3, art. 28 mentions the "choice of partner", and § 4 states that business opportunities cover different "associative, corporate or contractual forms", reinforcing the distinction from the hypotheses of non-requirement of bidding for specialized technical services, involving professionals or companies with a particular specialization (art. 30, head paragraph, section II).

The wording of Lei das Estatais regarding business opportunities allows for broad interpretation, "since section II does not include the requirement that they be related to their corporate purpose".[40] Thus, even if a certain activity of the state-owned company is not related to its corporate purpose, it may be characterized as a business opportunity. The legal criterion, therefore, is not that of "ends" or "means activity, but so-called activities of a typically business nature.

Assessing this device, we cannot disregard the possibility that activities not linked to the corporate purpose may be configured as such, enhancing

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legality. This is a new categorization of the state's contracting prerogative." Moreira, Empresas estatais, contratações diretas e as "oportunidades de negócio", op. cit., p. 249 e 251.

38 Ibid., p. 248-249 and 253.

39 Ibid., p. 254.

40 Aragão, Empresas estatais, op. cit., p. 230.

competitiveness[41] and generating efficiency gains for the public company. Thus, the essential feature of such contracting is its utility in increasing the efficiency of the state-owned company, not its corporate objectives.

Still within the contours of these partnerships, selection of the private partner, with or without a competitive process, must follow the criteria of Law No. 13,303/2016, which does not seem to mandate choice of the best company, but the one fit to deliver the object sought by the state-owned company.

The main criterion of Lei das Estatais, then, is not excellence but sufficiency; it is up to the manager to justify the choice of partner in terms of the capacity to achieve the purpose, not proficiency. This type of requirement, subjective and without legal support, has two main drawbacks: it is an awkward barrier, as deciding on the most appropriate partner is near impossible; at the same time, it ultimately transfers to the controller sole competence to determine the best option, according to variable criteria.

If the business opportunity is identified, the tendering procedure is ruled out, which, as Marçal Justen Filho states,

> is a useless solution, since it is not about selecting the most advantageous proposal. […] Identifying the appropriate partner involves a process of dialogue, discussion of common projects, verification of the skills and virtues presented by potential partners and diagnosis of negative points. In the end, the choice depends on weighing up positive and negative aspects;[42]

As with the procedure provided for in art. 30, § 3, of Lei das Estatais, concerning direct hiring.[43]

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[41] Carolina Reis Jatobá Coêlho notes that "[s]uch hypotheses are not exactly what doctrine terms an end-activity, arising from direct execution of the corporate objective, but rather essential activities for the adequate and indirect development of the activity itself, of instrumental importance for competitive action. They are the true object of support for that activity but are not to be confused with it." COÊLHO, Carolina Reis Jatobá. Empreendedorismo estatal: como e quando afastar o procedimento licitatório para viabilizar os negócios das empresas estatais (art. 28, § 3º, inc. II). In: FERNANDES, Murilo Jacoby (Coord.). Empresas estatais: Lei nº 13.303/2016—doutrina e jurisprudência para empresas públicas, sociedades de economia mista, subsidiárias e sociedades de propósito específico. Belo Horizonte: Fórum, 2020. p. 192. In the same sense: Marques Neto, As contratações estratégicas das estatais que competem no mercado, op. cit., p. 588; Moreira, Empresas estatais, contratações diretas e as "oportunidades de negócio", op. cit., p. 254.

[42] Justen Filho, A contratação sem licitação nas empresas estatais, op. cit., p. 304.

[43] MENDONÇA, José Vicente Santos de; BORGES, Daian. Parcerias estratégicas das estatais: aplicação e controle do art. 28, § 3º, inciso II, da Lei das Estatais. Revista de Direito Público da Economia—RDPE, Belo Horizonte, a. 18, n. 71, p. 105, jul./set. 2020.

However, to form such partnerships, "although bidding is not required, it is essential that the unfeasibility of competitive procedures is justified",[44] which raises two points. Firstly, there is the legal recognition that the tendering process does not end all competitive public contracts processes, based on fairness, impersonality and isonomy.[45] The state-owned company may use a procedure specifically designed for this purpose, with rules that differ from those applicable to tenders in general.

Secondly, partnerships may be formed without a competitive procedure, depending on the specific case, when, among other criteria, the following have been demonstrated: (i) the need for agility to ensure the efficiency of the proposal, re. the idea of "opportunity" in the device in question;[46] (ii) protection of the competitive aspect of the state-owned company, in that there may be situations in which initiating a competitive process alerts competitors as to the actions of the entity;[47] (iii) the impossibility of objective comparison between proposals offered by more than one interested party; (iv) the common business purposes shared by the state-owned company and the private company; (v) aspects linked to the contracted private company, such as specific technical capacity, previous experience, ability to take risks, etc.

The lack of need for a tender or other competitive process does not mean that the state-owned company should abandon the choice of a private partner.[48]

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[44] ZARDO, Francisco. O regime jurídico das empresas estatais com participação estatal minoritária. Revista de Direito Público da Economia—RDPE, Belo Horizonte, a. 15, n. 58, p. 74, abr./jun. 2017.

[45] According to Rafael Wallbach Schwind, concerning the choice of partner for the formation of a public-private company: "Initially, it is necessary to consider that bidding is not the only procedure which corresponds to the principles of isonomy, legality, impersonality, fairness, probity and efficiency. Other selection procedures are possible, even if they do not consist of true tendering procedures (a public notice, establishment of a deadline for the presentation of documentation and proposals, and so on)". (Schwind, O Estado acionista, op. cit., p. 281).

[46] As Alexandre Santos de Aragão observes: "The device aims to give the state-owned company agility in its operations in the market, as the formalities entailed in pursuing business opportunities can be an impediment, to competitors, or even to companies in another sector, since in section II there is no requirement that they relate to their corporate purpose. Estatuto das Estatais arrived in good time, with § 3, which reduces the competitive asymmetry of state-owned companies in relation to their private counterparts". Aragão, Empresas estatais, op. cit., p. 230.

[47] This topic is linked to the transparency of state-owned company business operations and the possibility of secrecy in acts that may harm competition with private companies, as provided for in art. 22 of Lei de Acesso à Informação and articles 5 and 6 of Federal Decree No. 7.724/2012, in addition to art. 85 of Lei das Estatais and art. 45 of Decree No. 8.945/2019. A esse respeito, cf. Aragão, Empresas estatais, op. cit., p. 195; MONTEIRO, Vítor; SANTOS, Fabio Gomes dos. Lei de acesso à informação e sigilo nas atividades das empresas estatais. In: CUNHA FILHO, Alexandre Jorge Carneiro da et al. Direito, instituições e políticas públicas: o papel do jusidealista na formação do Estado. São Paulo: Quartier Latin, 2017. p. 617-638.

[48] Regarding the need to proceduralize the choice of the private partner to form a partnership of a corporate nature (public-private company), cf. Schwind, O Estado acionista, op. cit., P. 283-285.

On the contrary, the justification for such a partnership, in all its aspects (the need to cement a legal relationship; the object of the partnership; obligations of the parties; amounts involved; chosen partner, etc.), must be duly expressed and founded in an administrative process, even when dissemination is reserved for a later time, to avoid compromising competition. Thus, the exercise of an activity of a typically business nature is compatible with the need to pay attention to the principles that govern public administration.

In effect, the discretion inherent in business management and the relative subjectivism of the selection—in cases where there is no competitive process—must be justified in the process for subsequent assessment by the control bodies. In this sense, the process may even guarantee deference and non-interference by control bodies in the management of the state-owned company,[49] as determined by art. 90 of Lei das Estatais, as discussed below.

4 External control of business opportunities

Moving on from the general aspects of business opportunities of state-owned companies, we now consider the parameters of external control of the formation of such partnerships i.e., selection of the private entity partner, the precepts involved and the motivating grounds.

As shown below, some parameters come from business law, others pertain to administrative law, although they must be weighed according to the business nature of such opportunities.

We should note that Lei das Estatais allows control over broad aspects of the activities of state-owned companies, related to "legitimacy, economy and effectiveness of the application of its resources, from an accounting, financial,

[49] On the importance of the administrative process as a means of controlling and restraining discretionary acts, Marcos Augusto Perez notes: "it can be said that, in current law, the judicial control of discretion is absolutely linked to the notion of the administrative process: to the effective use of the process as a decision-making vehicle; to the correct and complete instruction of the process; to the impartiality of the decision; and to legal predictability and certainty. In other words, the structuring of the administrative decision-making process must provide the controller with parameters, separating the control of its legality from excess or abuse of jurisdiction. […] The focus of the discretion controller, clearly, is the process, i.e., the understanding of how and why the Administration took the decision, the object of judicial scrutiny, so that, from assessment of its genesis, a conclusion may be drawn as to legality". PEREZ, Marcos Augusto. Testes de legalidade: métodos para o amplo controle jurisdicional da discricionariedade administrativa. Belo Horizonte: Fórum, 2020. p. 238-239.

operational and patrimonial perspective" (art. 85, head paragraph), going beyond the strict control of legality.

Furthermore, article 90 of this Law expressly determines that the "actions and deliberations of the control body or entity cannot imply interference in the management of public companies and mixed-capital companies subject to it nor interference in the exercise of their powers or the definition of public policies".

The challenge is to create parameters for analyzing these aspects in relation to business opportunities—typical business activities—, to calibrate the incidence of external control which, while curbing irregularities, does not constitute interference in the management of such entities.

Thus, external control must be adapted in relation to criteria traditionally analyzed in public contracting by direct and autonomous administration.

Firstly, business opportunities should not be controlled as if they were tenders, or indeed waiver or non-enforceability processes. The Lei das Estatais expressly removed that commercial operation from the regulations of Chapter I of Title II of the aforementioned provision.[50] These are different situations, with an uncommon logic and purpose, shifting the control rationale from one hypothesis to another.

It follows that the importance of dissemination, isonomy and economic viability typical of state company tendering, concerning activities of an administrative nature, differs with respect to business opportunities. Dissemination may be deferred, to preserve the state-owned company's competitive conditions. Isonomy does not have the same content as that required in tenders, as it may be impossible to compare proposals; it is also desirable to choose a partner based on subjective, typically business criteria. Finally, the contract pricing does not follow objective price quotation parameters, and it may even be difficult to establish the market value of the object of the partnership.

These aspects, however, do not excuse the state-owned company manager from motivating the need for the partnership and its elements (amount, term, obligations, selected partner, etc.), which must respect administrative protocol. Greater flexibility in entering into contracts directed at business opportunities must correspond to better quality decision-making, regulating the discretion inherent in the management of such entities.[51]

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[50] Mendonça e Borges, Parcerias estratégicas das estatais, op. cit., p. 106-107.

[51] According to Luiz Eduardo Altenburg de Assis, in establishing such contractual relationships "it is up to the control bodies, within their respective spheres of competence, to analyze the contractual relationship, which involves examining, in light of the principles and rules applicable to these partnerships, the entire procedure, from the structuring of the partnership,

Secondly, control of business opportunities should, arguably, follow the parameters of the business judgment rule, from North American law, whose purpose is to protect the administrator of private companies from personal liability for acts carried out in good faith and within the limits of the competence attributed. Its value lies in preserving managerial discretion, while curbing abuse of power by the legal entity administrator.[52]

Although this rule is predominantly used to assess the manager's personal responsibility, in accordance with § 6 of art. 159 of Law No. 6,404/1976,[53] our focus here is understanding its contours and their application to the external control of business opportunities in state-owned companies.

Four elements may be analyzed regarding application of this rule.[54]

Firstly, the occurrence of a business decision, of a typically commercial nature, guided by business management practices, in the best interests of the company.

This decision should be made with disinterest and independence. Independent means "based on the merits and interests of the company, without any influence on its ability to make discretionary decisions".[55] Disinterested means that "which does not result in a pecuniary benefit to the administrator. This concept has been expanded to include benefits not directly linked to the administrator or to institutions and companies associated with him".[56]

Furthermore, the rule in question imposes on the manager a duty of care, in that the decision must be taken in an informed manner, i.e., based on data concerning the operation to be carried out. The amount of information varies from case to case, but the relevant factor is that the focus of the analysis is not

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through selection of the partner and formalization of a contract which implements this associative relationship, also with regard to the legality and legitimacy of the rights and obligations stipulated in this relationship of an associative nature" Assis, Oportunidades de negócio na Lei das Estatais, op. cit., P. 308.

52 According to Pedro Henrique Castello Brigagão: "Business judgment rules is a central aspect of the liability regime of company administrators. As seen, one of the main challenges facing the legislator in establishing this regime is to find the ideal balance between (i) the necessary prevention of possible abuse of the position of trust held by directors and advisors and (ii) the necessary freedom and discretion they have to manage corporate businesses". BRIGAGÃO, Pedro Henrique Castello. A administração de companhias e a business judgment rule. São Paulo: Quartier Latin, 2017. p. 107.

53 "§ 6º The judge may recognize the exclusion of the administrator's liability, if convinced that he acted in good faith and in the interests of the company."

54 For an in-depth analysis, cf. Brigagon, A administração de companhias e a business judgment rule, op. cit., P. 129 et seq.

55 SADDY, André. Deveres dos administradores, responsabilidades e business judgment rule nas sociedades anônimas estatais. Revista de Direito Econômico e Socioambiental, v. 7, n. 1, p. 99, jan./jun. 2016.

56 Ibid.

on the decision itself, but on the decision-making process that led the state-owned company to form the partnership. "In other words, the judge's concern should be with the conduct of the administrator in reaching the decision, as to whether he gathered sufficient information to support his behavior."[57]

Here, the studies conducted by the state company to formalize the partnership gain importance, including identifying the need, the purpose, the risks to be assumed and mitigated,[58] the format of the partnership signed, the expertise of the private partner chosen, etc.

Such elements must be present in the administrative selection process, competitive or not, to guide the public administrator's choice and show to control bodies, private shareholders (in the case of mixed capital companies) and society in general the legitimacy of administrative discretion exercised by the state company.

Finally, the rule applies to only those managers acting in good faith. Pedro Henrique Castello Brigagão notes that North American case study law has already deliberated the possibility of bad faith in business decisions in terms of "(i) fraud; (ii) gross incompetence in the decision-making process; or (iii) conscious indifference to the company business."[59]

These elements, it is understood, are parameters for the external control activity of business opportunities, since they focus on the decision-making process, not the decision itself. This creates an area of protection for business management against the impact of control of the merits of business negotiations. The focus of control falls on the elements that informed the decision.[60]

Thus, the criteria of the business judgment rule are in line with two central rules for controlling state-owned company activities of a typically business nature: article 90 of Law No. 13,303/2016 and article 22, paragraph 1, of LINDB.[61]

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[57] Brigagão, A administração de companhias e a business judgment rule, op. cit., p. 138-139.

[58] On the relationship between risk-taking and discretion in state-owned companies, cf. CHAGAS, Gabriel Costa Pinheiro. A discricionariedade administrativa nas empresas estatais. São Paulo: Contracorrente, 2021. p. 175-180.

[59] Brigagão, A administração de companhias e a business judgment rule, op. cit., p. 144.

[60] According to Alexandre Santos de Aragão, "In other words, presented with a good faith, plausible and well-founded decision, it is not up to the judicial, arbitration or administrative authority to interfere in business choices, whereby the manager is exempt from responsibility if these standards have been followed, even if the decision results in possible losses". (ARAGÃO, Alexandre Santos de. Business judgment rule e os limites sobre o controle das empresas estatais. In: CYRINO, André; MIGUEIS, Anna Carolina; PIMENTEL, Fernanda Morgan (Coord.). Direito administrativo e corrupção. Belo Horizonte: Fórum, 2020. p. 300-301).

[61] "Art. 22. When interpreting standards on public management, the real obstacles and difficulties faced by the manager and the requirements of the public policies under his or her responsibility will be considered, without prejudice to the rights of those administered. § 1

Through the first, a zone of non-interference control of state-owned company management is created, with deference to decisions taken regularly by the controlled entity, i.e., which have respected the procedural rules analyzed here.[62] This is the logic of deference which "limits the action of the controller, when provoked to alter the weighting of judgments (technical, economic, social and legal) made by the administrative authority, with adequate training and systematically positioned in the legal-administrative organization".[63]

The second provision imposes on the controller the duty to consider the "practical circumstances that have imposed, limited or conditioned the action" of the manager. Again, it requires that the controller analyze the criteria of the business judgment rule i.e., assessment of the information possessed by the administrator when making the decision, the factual framework, etc.

In the same way as with the rule of art. 90 of the Lei das Estatais, the LINDB provision creates a zone of deference for the controller in cases of reasonable management decisions (not optimal, necessarily), taken in duly instructed processes.[64]

In deciding on the regularity of conduct or validity of an act, contract, adjustment, process or administrative rule, the practical circumstances that have imposed, limited or conditioned the agent's action will be considered."

62 Regarding art. 90 of Lei das Estatais and its relationship with business judgment rules, Alexandre Santos de Aragão states: "All business activity presupposes planning, which cannot always be revised and deflected by administrative or political needs that, however noble, do not concern the economic activity carried out by the state company. This logic was embraced by article 90 of Law 13,303/2016, which consolidated the discretionary business management of state-owned companies, including as an expression of the corporate principle of business judgment rule. The law reflected both the adapted incidence of the principle of administrative motivation and the duties of diligence, good faith and observance of the Corporations Act, of joint application and compliance. These duties, therefore, are also covered by the business judgment rule, which, in the case of these companies, substantiates a particular enhancement of the principle of deference. Thus, duly substantiated, the management of state-owned companies respects the principle of deference vis-a-vis a 'controlling body or entity', not interfering 'in the exercise of their powers or in the definition of public policies', under the terms of the art. 90 of the Estatuto das Estatais". Aragão, Business judgment rule e os limites sobre o controle das empresas estatais, op. cit., p. 317-318.

63 Guimarães et al., Comentários à Lei das Estatais (Lei nº 13.303/2016), op. cit., p. 446.

64 According to Alexandre Santos de Aragão, "Following this reasoning, as long as they are sufficiently grounded and instructed from the point of view of transparent business management (business judgment rule), the decisions made by the state-owned company manager demand from control bodies (internal or external, judicial or otherwise) an attitude of deference, not scrutinizing the merits of these management acts or the details of their implementation, which enjoy relative presumption of legitimacy and good faith, so that they should only be rebutted by these bodies in cases of manifest illegality". Aragão, Business judgment rule e os limites sobre o controle das empresas estatais, op. cit., p. 320-321.

It is also worth highlighting that even in an unsuccessful partnership may be considered regular and legitimate, as the previous criteria refer to the quality of the decision-making process in concluding the agreement. After all, the success or failure of the legitimately signed agreement pertains to the business and market arena, so that management actions which follow protocol are not invalidated,[65] given the zone of deference arising from the procedural aspects of the partnership.

Conclusions

Thus, we may conclude that appropriate criteria are necessary for the exercise of external control, considering the business orientation of state-owned company contracting in business ventures and the participation of such entities in a competitive environment with private companies not subject to state oversight bodies and other rules applicable to indirect public administration.

This is not about underestimating the role of external control or weakening it, but rather adapting it to the context of the activity it will affect, which is different—in its foundations and assumptions—from the traditional state-owned company contracts. Thus, contextualization of the controlling activity prompts changes in its parameters, complying with art. 90 of Lei das Estatais, which prohibits controller interference in the management of state-owned companies.[66]

There is, therefore, an increase and an adaptation of external control over state-owned company activities of a typically business nature, legitimizing supervisory activity in the light of applicable legal provisions. After all, control that impedes the legitimate competitiveness of state-owned companies in commercial markets violates the public interest that motivated their creation.

It is understood, therefore, that using the criteria of the business judgment rule and intensifying the administrative process required for partnerships, adapting public administration principles to the logic of the market, is the best way to control the business ventures of state-owned companies.

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[65] Assis, Oportunidades de negócio na Lei das Estatais, op. cit., p. 313.

[66] This was highlighted by the STF in the early 2000s, in the judgement of MS 25181, already noted.

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