Limits of regulatory and contractual asymmetries: the case of Brazil's airport infrastructure*

Limites das assimetrias regulatórias e contratuais: o caso dos aeroportos

*Floriano de Azevedo Marques Neto***
*Marina Fontão Zago****

ABSTRACT

In order to achieve a well-done technical regulation, it is necessary to deeply understand the specificities of one sector chains and activities. However, this regulatory modulation does not authorize unlimited distinctions between equivalent players and activities, otherwise it could violate the equal protection rule and distort competition, with impacts on the quality of the service to be provided to the consumers. This article argues that regulatory asymmetries (herein considered as the enactment of differentiated rules for players within the same sector or even the

* Article received on September 19, 2017, and approved on December 21, 2017.

** Universidade de São Paulo, São Paulo, SP, Brazil. E-mail: floriano@usp.br.
Incumbent professor of Administrative Law at the Law School of Universidade de São Paulo (USP). Professor of the Master's Program, GV Law - Rio. Vice-president of the Brazilian Society of Public Law (SBDP). Attorney.

*** Universidade de São Paulo, São Paulo, SP, Brazil. E-mail: marinazago@usp.br.
Doctorate in state law from the Law School, Universidade de São Paulo (USP). Master's in government administration and policies from the Business Administration School of Fundação Getulio Vargas (Eaesp/FGV). Attorney.

same sectorial chain) should be predicted if and to the extent necessary to implement the sectorial public policy agenda. Furthermore, the article establishes the generic limits of the regulatory asymmetries, and then applies them to a case study: the Brazilian airport infrastructure, formed by different exploitation regimes and concession agreements, which allows us to distinguish the regulatory asymmetries (arising from general and abstract subjection) from the contractual asymmetries (arising from specific and concrete subjection). In conclusion, we argue that regulatory asymmetries that overpass the aforementioned mentioned limits can be challenged with administrative or judicial procedures.

KEYWORDS

Regulatory asymmetry — contractual asymmetry — regulation — airports

RESUMO

Embora uma regulação técnica implique captar e compreender as especificidades das cadeias e das atividades setoriais, essa modulação regulatória não autoriza distinções ilimitadas entre atores e atividades equivalentes, sob pena de se afrontar a isonomia e distorcer a concorrência, com impactos na qualidade do serviço a ser prestado ao consumidor. Este artigo defende que as assimetrias regulatórias (assim consideradas as regras diferenciadas para atores de um mesmo setor ou mesmo de uma mesma cadeia setorial) devem ser previstas se e na medida necessária para efetivar a pauta da política pública setorial. Além disso, o artigo define as balizas, de forma abstrata, para as assimetrias regulatórias, e depois as aplica a um caso concreto: o setor de infraestrutura aeroportuária, que possui diversidade de modelos exploratórios e contratos de concessões, o que permite distinguir as assimetrias regulatórias (decorrentes de sujeição geral e abstrata) das assimetrias contratuais (decorrentes de sujeição específica e concreta). Por fim, concluímos que as assimetrias regulatórias que extrapolam as balizas antes apontadas podem ser contestadas, administrativa ou judicialmente.

PALAVRAS-CHAVE

Assimetria regulatória — assimetria contratual — regulação — aeroportos

I. Introduction: regulatory and contractual asymmetry limits

A technical regulation largely entails knowing the specificities of the chains and activities comprising the regulated sector. The more regulation is able to capture and understand these specificities, the more technical and therefore more efficient and effective it will be.

The need for regulatory modulation, however, does not allow for unlimited distinctions between players and equivalent activities, otherwise it would affront isonomy and distort competition while impacting the quality of service to be delivered to consumers.

Regulatory asymmetries, seen as differentiated rules for players in the same sector or even the same sector chain, should be predicated to the extent required to implement the sector's public policy agenda.

The purpose of this article is to abstractly determine limits for regulatory asymmetries to then apply them to the case of airport infrastructure sector.

The airport sector is quite an interesting case since different operating models and concessions agreements coexist there despite all airports being subjected to the same public and regulatory policies.

In fact, some airports are operated by Infraero on a decentralized basis, while others are operated by the private sector through airport infrastructure concession agreements. In relation to airports under concession, their agreements established different rights and obligations (rather than just the adaptations inherent to the peculiarities of the airport itself) during the different concession awarding rounds.

All these cases are subject to the same sector public policy and one of its premises is competition between airports.

How may this inter-airport competitive angle be harmonized with the different rules that specifically affect each airport? What are the limits of differentiated operating and operating rules for Congonhas Airport (operated by Infraero) and Guarulhos Airport (operated through a concession agreement) if both are competing for passengers? Or between Guarulhos and Confins airports (both are operated through concession agreements, but their contents differ), if they are competing with each other in the cargo market?

This airport sector diversity means we can not only analyze regulatory asymmetries (arising from a general and abstract subjection), but also distinguish them from contractual asymmetries (arising from a specific subjection). Therefore, the airport infrastructure sector case study may

simultaneously outline requirements, fundamentals and limits of regulatory and contractual asymmetries coexisting in a regulated sector. However, rather than examine the case of a specific regulatory standard, this article gauges the limits that should be applied by airport sector regulators for airport infrastructure operating activities.

This article begins by distinguishing between public and regulatory policies to explain that while having discretionary power to manage its various duties, the regulator will always be subject to (among other limits) purposes or goals set by the sector's public policy (topic II).

We shall then delve into the fundamentals and limits of regulatory asymmetries (topic III).

Next, we shall analyze the airport-sector case study to identify the limits this sector's public policy has outlined for the exercise of regulatory activity and any regulatory asymmetries (topic IV).

We shall provide a more detailed explanation as to how these limits may be operationalized for a sector in which different operating regimes and concession agreements coexist, while carefully differentiating *(i)* regulatory policy from operating model, *(ii*) asymmetries resulting from regulation from those arising from contractual relations (topic V).

We shall end the article by addressing the consequences that may arise if regulatory or contractual asymmetries exceed the previously identified limits (topic VI).

II. Objectives of regulation: regulatory agenda set by public policies

The state's regulatory activity is yet another variant of state intervention in the economy. It is indeed substantially different from direct intervention in terms of its premises, objectives and instruments, but it is still a state interventionist action in the private sphere and the economic order.[1]

[1] On the transition from direct to indirect state intervention and their differences in terms of objectives and instruments, we have previously noted: "State action in the economic domain was for a long time marked by direct intervention, meaning production of infrastructure, goods and services directly by the State. This role was carried out by state-owned monopolies or exclusive operators of economic activities seen as essential for the national interest, through the nationalization of economic activities for strategic reasons, such as asserting state sovereignty. Concomitantly with the process of reducing mechanisms of direct intervention in the 1990s, the State began to expand and strengthen instruments for indirect intervention. The point here is no longer the State taking over economic activity itself, but rather its role

In this context, and despite the plethora of duties to be handled by the regulator, the latter is not completely free to manage regulatory activity based on its technical legitimacy. The regulator will be limited not only to a series of typical administrative restraints[2] but also and specifically to the agenda dictated by public policy formulated for the regulated sector.[3]

Public policies are sets

> of rules, principles and acts directed at a specific objective of general interest. Public policies must be established in the governmental space, combining the objectives and principles of the State's policies — as set forth in the Law or the Constitution — with government policies' goals and guidelines, which are necessarily defined on the basis of political mediations.[4]

A sector public policy therefore consists of a set of rules determining the guidelines and goals set by political arenas — especially Congress and, within the limits of legality, by the head of the Executive Branch — to be pursued in a given sector.

Regulatory policies, however, consist of

> [...] the regulatory entity's options for the instruments at its disposal with a view to fulfilling the public policy agenda set for the regulated sector. The definition of regulatory policies involves weighing the need for intervention and its extent. It involves choosing means and instruments that, in the context of regulatory authority, will best work together to efficiently materialize sector public policies.[5]

---

in developing, regulating, monitoring, mediating, supervising, planning, and ordering the economy. These state actions strongly influence (by induction or coercion) the actions of private players in a given segment of the economy - but the State does not directly running these activities." MARQUES NETO, Floriano de Azevedo; ZAGO, Marina Fontão. Parte III — Fomento. In: DI PIETRO, Maria Sylvia Zanella (Coord.). *Tratado de direito administrativo:* funções administrativas do Estado. São Paulo: Revista dos Tribunais, 2014. v. 4, pg. 307.

2 As a type of public function, regulatory activity will be subject to the principles of public administration (as per the Federal Constitution's article 37, main section) and the Constitution's principles (particularly articles 170-181) structuring the economic system.

3 On the limits of regulation, see: MARQUES NETO, Floriano de Azevedo. Limites à abrangência e à intensidade da regulação estatal. *Revista de Direito Público da Economia,* n. 1, pg. 69-93, Jan. 2003.

4 MARQUES NETO, Floriano de Azevedo. *Agências reguladoras independentes.* Belo Horizonte: Fórum, 2005. pg. 86.

5 Ibid., pg. 87.

On formulating and executing sector regulatory policy, regulatory action will be guided by the public policy adopted for the area of activity (i.e. the sector public policy), ensuring and pursuing the targets prioritized for the regulated sector. This is so because rather than being neutral in relation to the regulated sector, regulators intervene to mediate multifaceted interests, such as public interests (universalizing an essential service or supplying a domestic market) and the interests of private players participating in the sector, thus interfering with free enterprise.[6]

In addition to the parameters established in general laws — meaning those that horizontally affect several economic sectors — the regulator, by exercising its regulatory role and formulating and executing its regulatory policy, will also be restricted by the public policy outlined for that particular economic sector, and will be prevented from taking any measures that opposed to this policy's directives. Having to follow sector public policy is therefore one of the parameters for limiting and controlling the so-called "technical discretionary power" wielded by regulatory entities and agents.

Hence our noting that public policy and regulatory policy are distinct but interrelated concepts, and the latter (regulatory policy) must be formulated and implemented on the basis of the limits, guidelines and objectives outlined by sector public policy. In the airport sector, this relationship is expressed in the sectorial framework, as we shall now see.

In this respect, the regulatory agenda will be designed and delimited by the public policy to be pursued for the sector, meaning its objectives, principles, priorities and instruments for implementation. Based on the guidelines outlined by public policy, the regulatory entities — whether an autonomous and independent structure (such as regulatory agencies), or structures within the direct public administration (such as bodies that have specific authority to regulate and supervise the performance of players in a particular sector) — will formulate their regulatory policy and manage their various instruments of intervention, ranging from rule-making to applying sanctions.

---

[6] In this respect, Floriano Azevedo Marques Neto states: "State regulatory mechanisms are not neutral in terms of their consequences for regulated sectors. While managing regulatory competencies, the State arbitrates interests, interferes with the rules of the game for the economy, and affects competitive ranking. In many cases, intervention affects not only sectors directly targeted by regulation but other supply chain stages too, as part of its role in regulating the economy. However, this means that state regulation must be bounded by limits, without which it could gradually eliminate the principle of free enterprise which, in addition to underpinning the economic system (Constitution - article 170 main section) was elected by the constituent assembly as a fundamental principle (see Federal Constitution - Article 1, IV)." Floriano Azevedo Marques Neto, Limites à abrangência e à intensidade da regulação estatal, op. cit., pg. 77.

III. Regulatory asymmetries: fundamentals and limits

Regulatory activity favors and develops the so-called *sector arrangements* creating different legal subsystems that develop based on hermeneutical agendas other than those that may be used to structure other arrangements.[7]

The purpose of *sector regulatory subsystems is* to better understand specificities to pose solutions and instruments that may more efficaciously and efficiently serve the purposes of public policy for a certain economic supply chain. Differences between these sector arrangements are therefore almost inherent to the logic of modern state regulation based on highly technical intervention.

However, within the same subsystem, we may find rules that are applied in different ways, depending on varying characteristics of the activity or the subject operating it. In these cases, state regulation is modulated in that it treats players from the same sector in different ways depending on the *discrimen* (sic) factor specified by regulations, posing specific rights and obligations. As a result, players from the same sector or even from the same sector chain may be subjected to different rules, each bearing varying burdens arising from state regulation. These distinctions are referred to as "regulatory asymmetries" — an expression capable of capturing the many different types and forms of regulatory modulation that may apply to a particular sector.[8]

In fact, the term "regulatory asymmetry" is often used to refer to cases in which the legal system allows an activity to be operated under different legal arrangements, each with its own specific operating rules.[9] In this case, players from the same sector may be subject to different rules and obligations

---

[7] As noted by Floriano de Azevedo Marques Neto: "[...] regulation thus serves as an element of integration across economic, political and legal systems. It does so by identifying regulated subsystems, i.e. the whole comprising users (consumers), the regulatory entity, and goods and processes that compete on an articulated and interrelated basis to operate and grow a given economic activity (around which this subsystem is structured). In any given regulated sector (subsystem), regulation involves building a normative framework of principles, concepts, interests and norms conformed to sector needs and peculiarities." MARQUES NETO, Floriano de Azevedo. Regulação econômica e suas modulações. *Revista de Direito Público da Economia — RDPE*, Belo Horizonte, yr. 7, n. 28, Oct./Dec. 2009. Avaiable at: <www.bidforum.com.br/bid/PDI0006. aspx?pdiCntd=64263>. Accessed on: June 27, 2017.

[8] Brazil's regulatory model follows the European Union's in terms of differentiated legal regimes denoting the concept of regulatory asymmetry.

[9] As per LYON, Thomas P.; HUANG, Haizou. Asymmetric regulation and incentives for innovation. *Industrial and Corporate Change*, v. 4, n. 4, 1995.

depending on the regime under which they operate.[10] Take for example the telecommunications sector (with its dichotomy between services provided in public and private regimes under Law 9.472/1997) and the port sector (with its dichotomy between operating "organized ports" and "port facilities" as per Law No. 12.815/2013).

Regulatory asymmetries may reflect a very wide range of factors that may be (related to the specificities of the activity performed), subjective (involving the service provider's characteristics) or even mixed (combining objective and subjective factors). In this respect, examples are the National Telecommunications Agency's adopting the "significant market power" concept to determine the application of certain obligations to operators in the telecommunications sector (as per Anatel Resolution No. 600/2012 for example), or ANAC Resolution 338/2014 prioritizing market-entry airlines when allocating slots in the aviation sector.

The fact is that *the immediate objective of these asymmetries will always be to satisfy regulatory policy bases on goals set by sector public policy.*

To reach the goals and principles established by a given sector's regulatory framework, regulators may correct market failures by modulating the application of regulations depending on the characteristics of the activity or its service provider.

In most cases, asymmetry will aim to neutralize a dominant operator's situation.[11] The core idea of regulatory asymmetries is fostering competition based on modulating regulation to correct for market failures.[12]

---

[10] This is shown in international civil aviation markets, as per Volodymyr Bilotkach's analysis of regulatory asymmetry in the industry, especially *(i)* regulatory constraints and *(ii)* barriers to entry. In this respect see: BILOTKACH, Volodymyr. Asymmetric regulation and airport dominance in international aviation: evidence from the London-New York market. *Southern Economic Journal*, v. 74, n. 2, pg. 505, 2007.

[11] It was precisely in the case of the telecommunications sector's restructuring in the 1990s, when the sector was opened up to competition and the State ceased to directly provide these services. Some operators were left with the existing network (infrastructure and clientele) and, to neutralize this latent competitive advantage, they were subject to heavy charges for universalization and continuity of service - which were not stipulated to the same extent for operators entering later, who had to build their own network. In this respect, see: *OECD Review of Telecommunication Policy and Regulation in Mexico*, 2012.

[12] Regulatory asymmetry will not always end up fostering competition. On the contrary, it will be an "artificial competitive advantage" determined to give a particular category an edge over other *players* in the regulated market. On this subject, see: FRIEDEN, Rob. Wither convergence: legal, regulatory, and trade opportunism in telecommunications. *Santa Clara Computer & High Tech. L. J.*, v. 18, pg. 171, 2002. According to Frieden, *"la symmetrical regulation has the potential to tilt the competitive playing field in favor of one category of stakeholder over others"* (p. 173). This would be a clear case of *invalid* regulatory asymmetry, since the regulatory purpose

In any case, regulatory asymmetries should always *(i)* be directed toward the end-purposes of sector public policy and *(ii*) be necessary to achieve these purposes. In other words, the differentiation introduced by regulatory asymmetry must be necessary to enable sector objectives to be reached as per their regulatory framework.

Here we come to the main point of this topic: regulatory asymmetries must always be thoroughly explained or justified — as indeed should all regulatory activity, but even more so in the case of differentiations.

By making a distinction that breaches the generalized application rule, asymmetries — whether they are for a certain activity or due to a player's characteristics — require explicit, clear and dense grounds to show their legitimacy. In fact, given the rule of isonomy, the limits of regulatory asymmetries have been noted as one of the main challenges to be addressed by state regulation for the past several years. At the time, it was thought that

> [...] a matter deserving special attention concerns the aforementioned concept of regulatory asymmetry, meaning economic agents being subjected to uneven or varying regulatory effects while competing to operate the same public activity. This question must be compared with concepts dear to administrative law, which of course sets great store on isomeric treatment for entities administered. The point is to the extent to which regulatory asymmetry would be undermining the principle of isonomy.[13]

The role of the State must be subject to the rule of isonomic treatment. Obviously, this does not necessarily mean that everybody will be treated uniformly since distinctions may be required to uphold other values and rights.[14] On the one hand, making distinctions may be admissible as a means

---

would be subverted to favor the particular interests of a certain category of regulated entities, thus jeopardizing sector regulatory equilibrium. The longstanding "deviation of purpose" formula of the Law of Public Civil Action posed the invalidity of any regulatory policy that indiscriminately differentiates its regulated entities. However, Rob Frieden's warning serves as a preventive measure to avoid potential artificial competitive advantages arising from regulatory asymmetry.

13 MARQUES NETO, Floriano de Azevedo. A nova regulação dos serviços públicos. *Revista de Direito Administrativo,* v. 228, pg. 27, 2002.

14 In the words of Celso Antônio Bandeira de Mello's classic explanation [our translation]: "[...] the principle of equality consists of ensuring uniform regulation for persons who cannot (under the Constitution) be differentiated for reasons logically or substantially attuned to any disparity of treatment. There is no guarantee, therefore, that persons differentiated from

of ensuring the material aspect of isonomy, but only clear and explicit reasons would justify distinctions from the point of view of the current legal system — otherwise there would be unjustifiable distinction that will give rise to undue privileges or disadvantages.[15]

In the specific case of regulation, the reasons for allowing regulatory asymmetries in the context of a given regulatory policy must be related to public policy purposes or goals set for the sector.[16] Full, effective and efficient implementation of public policy aims is sufficient (and, from another angle, necessary) to justify regulatory policy decisions, including choices of modulations and distinctions made between a sector's activities and players.

In addition to the rule of isonomy itself, the broad-based grounds for making regulatory distinctions is also required because making distinction within a sector regulatory subsystem adds to the complexity of regulation and requires more care and attention to any impacts, while monitoring compliance too become more difficult. Introducing specificities makes regulation (and particularly its oversight) more complex and more care and attention is needed to identify impacts and institutionalize monitoring mechanisms.

---

others are entitled to the same normative treatment as that which was dispensed when this differentiation has been based on social values stated in the Constitution - they have logical development in the correlation between the discriminating factor and the resulting uneven treatment. The isomeric precept is intended to prevent favoritism or persecution. And curb unjustified appeals that concern a class of persons or entities despite the absence of a rationale capable of justifying a differentiation between them that is compatible with constitutionally approved social values." BANDEIRA DE MELLO, Celso Antônio. Princípio da isonomia. *Revista Trimestral de Direito Público,* São Paulo, v. 1, pg. 82, 1993.

15 *"Governments should generate compelling justifications for establishing different regulatory regimes in view of the potential for such asymmetry to impact the marketplace attractiveness of one service vis-à-vis others."* Rob Frieden, Wither convergence: legal, regulatory, and trade opportunism in telecommunications, op. cit., pg. 202.

16 Asymmetric regulation is justified to the precise extent of sector efficiency, but costs of differentiating regimes must crucially be weighed in this balance since, according to Dennis L. Weismann, any and all regulatory asymmetry policy leads to "corporate costs" for public service providers. These "corporate costs" may be clearly shown in the *business risk matrix* to which private-sector players are subject in a regulated market, in which the stability and equity of the norms that structure it are used as parameters for new sector investments. In the extreme, a regulatory asymmetry policy justified by fostering sector public interests, especially based on measures protecting users, may lead to deleterious effects for the system that are unwanted and were not originally considered. Hence Dennis L. Weismann's warning when analyzing the US telecommunications market-entry rules. As he notes, new entrants are not required to follow residual regulatory obligations imposed on local companies, which leads to a clear market inefficiency, since these suppliers are doubly penalized: while entrants may cream-skim the most profitable services, local providers are required to set prices above market parameters and must provide *facilities* such as pooled infrastructure for new entrants. In this respect, see: WEISMANN, Dennis L. Default capacity tariffs: smoothing the transitional regulatory asymmetries in the telecommunications market. *Yale Journal on Regulation,* v. 5, pg. 159, 1988.

Moreover, asymmetries tend to have particularly heavy impacts in competitive environments — noting here that introducing and encouraging competition has been one of the regulated sectors' cornerstones for many years.

The relevance of regulation capturing tactical diversity is not to be ruled out — but to do so, there must be relevant technical or economic factors to justify such a distinction. In which ways may regulatory asymmetries be justified? There are two possibilities.

Firstly, asymmetry established and overseen by the legislator through the sector regulatory framework, thus formally making public policy choices — as in cases of asymmetries caused by the dichotomy between public and private regimes. This is the simplest way — or from another angle the course that is least likely to lead to disputes over the legitimacy of the distinction being made — since the legislator itself in exercising its democratic legitimacy will have weighed the interests involved (and made its decision).

Secondly, absent explicit legal provision as to the possibility of regulatory distinctions, this path may still be adopted by the regulator exercising its regulatory powers. Here, however, the regulator must be guided by three general limits. Firstly, any distinction must be purposeful or goal-driven: it must be needed to fulfill certain public-sector policy purposes or goals; otherwise it will be extrapolating the limits of regulatory activity, which must always follow parameters set by legislators. Secondly, a distinction must be made strictly to the extent required for the intended purpose to be fulfilled or goal to be reached, safeguarding the subsidiarity and proportionality of state regulation. Thirdly and finally, a distinction must be explicitly decided by the regulator on clear and transparent grounds that justify the need for and adequacy of a measure. In other words, the regulator may (only) adopt regulatory asymmetries if doing so explicitly for thoroughly explained reasons — whenever a distinction is needed for sector public policy purposes.

IV. Limits for regulatory activity (and asymmetries) in the airport sector framework

As shown in the previous topic, regulatory activity — among other limits — is steered by the limits legislators introduce in public sector policy.

In this context, the legal limits of the aviation sector's regulation must be identified, more specifically for airport operations. These limits shape the

sector public policy and pose conditions for state regulation by a regulatory agency or other administrative entities vested with the power to discipline public airport infrastructure use, management and operation. On that basis, one may decide whether regulatory asymmetries would be admissible for a given sector, and if so, how and within which limits.

The regulatory framework for the aviation sector is based on two laws: Law No. 7.565/1986, which enacted the Brazilian Aeronautics Code, and Law No. 11.182/2005, which introduced the National Civil Aviation Agency (ANAC) and determined its authority, among other matters.

In terms of authority, the Aeronautical Code put the Ministry of Aeronautics in charge of airspace coordination, maintenance and inspection (including aviation services and airport infrastructure related activities). This situation remained until Law No. 11.182/2005 restructured the aeronautical sector and in particular introduced a regulatory agency (ANAC) to regulate and supervise "civil aviation and aeronautical activities and airport infrastructure" (Article 2). The Law transferred the main regulatory and coordinating powers for aviation services and aeronautical infrastructure to the Agency — at that time these activities were overseen by the Ministry of Aeronautics. However, the latter retained certain regulatory authority under laws 7.565/1986 and 11.182/2005.

The abovementioned laws state that pursuing the public interest and protecting users are public policy limits and goals for civil aviation (and regulatory policy) as is availability and efficient management of infrastructure with connectivity between airports subject to the same operational standards.[17]

---

[17] Law No. 7.565/1986: "Art. 36, Paragraph 1 In order to ensure uniform treatment throughout the national territory, construction, administration and operation shall be subject to the aeronautical authority's rules, instructions, coordination and control except as set forth in art. 36-A."

Law No. 11.182/2005: "Art. 8 - It is incumbent upon ANAC: XI - to issue rules on airport and civil aircraft safety, carrying and transporting hazardous cargo, including weapons, explosives, military equipment or any other products, substances or objects that may endanger crew members or passengers, or the aircraft itself, or are otherwise harmful to health; XII - to regulate and supervise measures to be adopted by airlines and airport infrastructure operators, to prevent crew members or technical maintenance and operation personnel that have access to aircraft from using narcotics or psychotropic substances that may cause permanent or temporary physical or psychic dependence; XXI - to regulate and supervise aeronautical and airport infrastructure except for activities and procedures related to the airspace control system and aeronautical accident investigation and prevention system; XXVIII - supervise compliance with technical requirements for construction, renovation and expansion of aerodromes and approve their opening to traffic; XXIX - issue rules and standards to ensure compatibility, integrated operation and interconnection of information between aerodromes; XXX - issue rules and determine minimum standards for flight safety, performance and efficiency for airlines and aeronautical and airport infrastructure operators, including equipment, materials, products and processes used and services provided."

Among ANAC's responsibilities, let us note that Law 11.182/2005 established its authority to "take the measures needed to serve the public interest and to develop and promote Brazil's civil aviation, aeronautical and airport infrastructure" (article 8, main section) and, in this respect, "implement civil aviation policy in its sphere of activity" (article 8, I). Specifically in relation to the rules for operating infrastructure, Law No. 11.182/2005 clearly states that decisions must be made by the head of the Executive Branch based on proposals from the Agency, which based on its specialized knowledge, examines alternatives and submits suggestions — although the president has the last word on operating formats (article 3, II).[18] Therefore, ANAC's remit is to implement public policy for civil aviation as determined by the legislator and detailed by the head of the Executive Branch, and regulatory policy formulated by the Agency must comply with limits imposed by public policy.

Note that the regulatory framework *does not envisage any predetermined agenda for regulatory asymmetry in relation to managing or operating airports.*[19]

Furthermore: *airport regulation seems to focus on setting norms and standards that are — as a rule — uniformly applied.* Not surprisingly, laws 7.565/1986 and 11.182/2005 determined several competencies — not all attributed to ANAC, incidentally — related to issuing rules and standards, certifications, homologations and registrations precisely in order to ensure uniform treatment of civil aviation sector players as well as connections between Brazil's airports.

Nor are there any guidelines for regulatory modulation depending on the airports concerned or their operators' subjective criteria. On the contrary: laws 7.565/1986 and 11.182/2005 introduced minimum standards and procedures to be followed by everybody. At most there are a few variants for technical rules that depend on an airport's category and the state of its infrastructure, which may affect their operations and tariffs/fares to be charged.

Nor does the objective of ensuring adequate and safe services for users in itself justify regulatory asymmetries. These needs do not vary between airports or their operators. The infrastructure itself may be affected by technical

---

[18] Law No. 11.182/2005: "Art. 3: In exercising its powers, ANAC shall obey and implement the guidelines, directives and policies established by federal government, especially in relation to: II - determining the airport infrastructure concession model to be submitted to the President."

[19] Which does not mean that there are no asymmetries in relation to other issues. In this respect, for example, there are different rules (obligations and rights) to be applied depending on whether it is a public or private aerodrome.

specificities of course, but this should be captured in the most neutral manner possible by objectively considering the airports' different technical conditions.

In addition to the fact that there is no specific agenda requiring or authorizing regulatory asymmetries in the airport sector's legal framework, *the regulations concerning airport operations do not specify asymmetries between different airports.*

In article 3, II, of Law 11.182/2005, the head of the Executive Branch determined the same limits for concessions at the different airports, as per Decree No. 7.624/2011. There was only one previous decree (Decree 7.205/2010), which specifically addressed "the concession model applicable to the operation of São Gonçalo do Amarante airport" (article 1, main section). However, Decree No. 7.624/2011 determined "the conditions for private enterprise to operate airport infrastructure by means of concession awards," (article 1, main section), as rules to be followed by ANAC when structuring airport concession awards.

Infralegal orders that specifically authorize concessions (as detailed in the next topic) do not pose asymmetries but merely determine certain specificities for each airport — such as the duration of the concession, which varies depending on the period required to amortize investments planned for each project, or technical eligibility required of bidders.

The sector framework does not stipulate explicit points for regulatory asymmetry but it does clearly state that competition between airports is the agenda to be pursued by regulation.

In this respect, political decisions themselves are initially mentioned in the sense of awarding concessions for private enterprise to operate these airports, thus attracting private investment to the sector as per the rules needed to assure the market, free enterprise and competition.

In addition, Decree No. 7.624/2011, which as mentioned above determined general rules for operating airports through concessions, also authorized sector regulation to introduce restrictions for the purpose of protecting competition, as a means of preserving competition between aerodromes. Literally:

> Article 15. In order to ensure [proper] conditions for competition, the concession awarding authority may determine the following restrictions for obtaining and operating concessions, among others, subject to Brazilian Defense of Competition System attributions:
>
> I — rules to preserve competition between aerodromes;
>
> II — provisions for concessionaires providing ancillary services for companies offering air transport services; and

> III — rules for concession operators in relation to areas assigned companies providing air transport services.

On the same lines, National Privatization Council (CND) resolutions authorized airport concession Rounds 2 and 3 and determined that each should be awarded to a different economic conglomerate. The purpose of this rule was to ensure competition between airport operators in the following terms:

> CND Resolution No. 11/2011: Art. 1, § 1 Concessions to operate the abovementioned airports shall be awarded to different economic conglomerates as determined in the Concession Notice.
> CND Resolution No. 15/2013: Art. 3 These airports shall be awarded to different economic conglomerates as determined in the Concession Notice. Sole paragraph. The National Civil Aviation Agency (ANAC) may determine regulatory and antitrust restrictions for participants.

Investment Partnerships Program Resolution No. 5/2016, which authorized the fourth round of concessions, also established restrictions to avoid concentration of airports [operated] by the same economic agents thereby stimulating competition — and expressly authorized ANAC to take antitrust measures by stipulating further restrictions for participation in the concession awards process:

> Art. 4 In relation to antitrust issues, [concessions to operate] airports located in the same geographic region shall be awarded to different economic conglomerates as per the concession notice. Sole paragraph. The National Civil Aviation Agency (ANAC) may determine additional regulatory and antitrust restrictions for participation in the bidding process.

On the same lines, Bidding Process Notice No. 01/2016 for the fourth round included somewhat more detailed restrictions by allowing (but limiting) cross-participation of economic agents in up to two airports in the lot tendered; [concessions to operate] airports located in the same geographic region had to be awarded to different bidders:

> 3.3. One and the same entity, its controlling companies, subsidiaries, affiliates, or entities under shared control, alone or as members of consortiums, shall be awarded no more than two of the airports

> hereof and must follow the rules applicable to the bidding process, in particular those in item 5.25.
>
> 5.25. Only one [concession to operate an] airport in each geographical region may be awarded per bidder.

Moreover, note the discussion held before Round 3 of concessions on barring to economic conglomerates that had been awarded Round 2 concessions from taking part in the next bidding process. At that time, the government insisted on barring them precisely to allow competition between airports. In this respect too, Bidding Process Notice No. 01/2013 established restrictions to prevent existing [Round 2] concession shareholders bidding in the coming rounds.[20]

Competition between airports, including by awarding concessions to different operators, is one of the aims that have been set for public aviation policy and this is reflected in regulatory policy.

In addition to the normative provisions on competition in the purview of public and regulatory policies, note that airports do actually compete among themselves in certain niches of the market. In relation to passenger flights, for example, there is a certain elasticity of substitution between Guarulhos and Congonhas airports. For cargo flights there is competition between Guarulhos, Viracopos and Confins. In this tactical scenario, subjecting the operators of these airports to different rules poses a real risk of distorting competition.

Given this regulatory context in the aviation sector, on exercising their authority related to airport regulation — assigning concessions, rule-making, oversight or sanctioning — ANAC and other regulatory entities should ensure that they preserve isonomy between airports, which should follow fair-competition rules regardless of their operator.

These regulators may exceptionally allow differentiations or distinctions provided there are clear and consistent technical or economic reasons for

---

[20] In this respect: "3.18. The shareholders of Private Shareholders of concessionaires for federal airport infrastructure public services determined by Auction No. 2/2011, their controlling companies, subsidiaries and affiliates shall not be able to take part in this auction separately, nor shall as the subsidiaries and affiliates of the abovementioned shareholders' controlling companies and subsidiaries. 3.19. Private Shareholders of the concessionaires of federal airport infrastructure public service determined by Auction No. 2/2011, their controlling companies, subsidiaries and affiliates may take part, as may the subsidiaries and affiliates of the controlling companies and subsidiaries of said shareholders as consortium members, subject to the provisions hereof 3.19.1. One or more of said shareholders must not hold a stake of 15% (fifteen percent) or more in the Consortium, taking all of its holdings together. [...]".

them, in accordance with the parameters we have listed in the previous topic. Therefore, such a distinction must be *(i)* necessary to attain some of the goals determined by sector public policy; *(ii*) applied strictly to the extent required to fulfill their intended purpose; and, finally, *(iii*) expressly decided and disclosed by the regulator with a through and transparent statement of the reasons for the measure and its adequacy.

V. Different operating models not posing rationale for regulatory and contractual asymmetries

There are currently several models for airport infrastructure operations in Brazil. In general terms, passenger or cargo transport airports may be operated either *(i)* directly by the State or a federal public company (Infraero)[21] or *(ii)* by private sector companies, in which case operators are awarded concessions.

Until recently, airports were exclusively directly operated through administrative decentralization (attributed to Infraero) or federative decentralization (to state governments).

However, in view of the need to expand and improve Brazil's airport infrastructure, over the last decade the government has looked to partnerships in which private enterprise invests to efficiently grow the network (based on competitive logic) by awarding concessions for airport expansion, maintenance and operation services.

In practice, this model has been introduced in stages.

The initial experience was for the airport at São Gonçalo do Amarante (RN). The political decision to award a concession for the airport in question was formalized by Decree 7.205/2010. Based on the parameters set forth in CND Resolution No. 07/2010[22] to award the airport concession, Auction Notice No. 01/2011 was published on May 12, 2011, for the 1st concession round.

In April 2011, the abovementioned Decree No. 7.624/2011 extended the possibility of using the concession model to operate any airport infrastructure by means of a prior bidding in order to award the concession to a private company. These processes were organized in batches, with more than one airport concession being awarded in the same bidding process.

---

[21] Federal public company founded pursuant to Law No. 5.862/1972 to manage existing airports and those being built at that time.

[22] Amended by CND Resolution No. 4/2011.

On the same lines, Civil Aviation Secretariat Order No. 98/2011 and CND Resolution No. 11/2011 authorized the second round of concessions, which involved the airports of Brasília (DF), Guarulhos (SP) and Viracopos (SP). Auction Notice No. 02/2011 was published on December 15, 2011.

CND Resolution No. 15/2013[23] formalized the decision to hold the third round of concessions for the Confins (MG) and Galeão (RJ) airports; Auction Notice No. 01/2013 was published on October 3, 2013.

Finally, Resolution CND 06/2015 recommended adding four international airports — Salgado Filho (RS), Deputado Luís Eduardo Magalhães (BA), Hercílio Luz (SC) and Pinto Martins (CE) — to the National Privatization Program (local acronym PND) "in order to award concessions for these infrastructure assets through Decree No. 8.517/2015. The four airports were included in the Investment Partnerships Program (PPI) through PPI Resolution No. 2/2016 and their concessions were approved by PPI Resolution No. 5/2016. For the 4th round of airport concessions, Auction Notice No. 01/2016 was published on December 1, 2016.

At the same time, Infraero continues to operate other airports that have not been authorized for concessions. Congonhas (SP) and Santos Dumont (RJ) airports continue to be operated directly and exclusively by this state-owned company — whereas Guarulhos (SP) and Galeão (RJ) airports are now being operated under the concession awards. Therefore, Brazil's airport infrastructure is partly run directly and partly through concession agreements.

However, this scenario of different infrastructure operating arrangements does not authorize (or amount to) regulatory asymmetries between airports. Having different types of operating model does not presuppose different regulatory models; having different types of contract does not presuppose different operating models.

One thing is the regulatory model that will be applied to the airport operating business. Regulation will pursue (and be limited to) sector public policy objectives — in this case, protecting the public interest and those of users, efficient management, and interconnected airports in competition with each other. ANAC will be acting as a regulatory entity based on overarching arrangements to which all players in the sector are subject under legally determined authority.

---

[23] Note that this legislation was preceded by CND Resolution No. 2/2013, which recommended that the President adopt the concession model for the airports in question.

Quite another thing is the set of rules for operating infrastructure concessions as part of a contractual relationship between an infrastructure owner (in this case ANAC, representing the federal authority to award concessions) and an airport manager (concession holder). These contractual rules govern obligations to be fulfilled by parties (when interacting with users too) as well as recompense for fulfilling them. Rules contractually agreed between the awarding authority and the concessionaire will apply — subject to applicable laws and regulations of course. ANAC will act on behalf of the concession awarding authority and monitor contractual compliance in the context of specific contractual relations to which ANAC and the concessionaire are subject.

Given this distinction, operating models will be shaped by the sector's regulatory policy choices — which, in turn, will always be confined to the purposes and goals specified by sector public policy. It follows that the existence of two models for operating airports (either directly by Infraero or indirectly by a concession holder) and different concession agreements is not per se sufficient reason to allow regulatory asymmetry, either from the point of view of regulation in general, to which all players are subject, or that of regulatory aspects arising from each contract. On the contrary.

As seen in the previous topic, the current regulatory framework does not set forth any overall grounds for regulatory asymmetries — which should always be explicitly stated, since they allow for distinctions. Neither the laws that introduced sector public policies (7.565/1986 and 11.182/2005), nor the infralegal acts that formalize policy and regulatory decisions specifically for the airport concession model (the abovementioned decrees, resolutions and ministerial orders) pose a regulatory asymmetry agenda. On the contrary: these regulations are general sets of rules that are applicable irrespective of airports or operators: their concern is to ensure competition for market entrants through concession agreements as well as competition between aerodromes.

This gives rise to limitations for both regulatory and contractual asymmetries.

Initially, regulatory policy should as a rule apply equally to all airports irrespectively of their operating models or concession agreements.

The fact of there being two different operating models — directly through Infraero and indirectly through concessions awarded to different operators — does not per se mean that different regulatory policies for these airports would be authorized.

Of course, there may be regulatory asymmetries, but the rationale for making distinctions should be based on technical, economic or user-protection reasons. For example, there may be contractual rules stipulating different stages of completion and investments required, depending on the actual situation at each airport (in fact the CND resolutions did so by specifying different amounts and deadlines for each airport concession to be awarded). In these cases, however, there must be a technical rationale for making distinctions or differentiations and explicitly showing what this will mean in practice.

A cautious approach to identifying needs for technical differentiation is particularly relevant for the competition agenda determined by the regulatory framework, which is clearly shown by its stance in favor of involving private enterprise to operate airport infrastructure. In this respect, there seems to be no basis for regulatory distinctions that would affect airport operators for merely subjective reasons rather than technical ones.

Nor is there any basis for making distinctions against Infraero for being a state-owned company.

Moreover, the pursuit of neutrality in regulation, with the State exercising its powers to protect consumer/user — rather than look after its own interests, including those of state-owned enterprises — is one of the basic reasons for having independent regulatory agencies. The State's regulatory role must therefore be separated from its other roles in the economy, thus pursuing regulatory neutrality in relation to other players in the sector.[24]

Precisely because Infraero competes with other airport operators, its condition as a state-owned enterprise is irrelevant, as is the argument that it is a state-owned company providing public services. In this respect, note that the new State-Owned Companies Law (No. 13.303/2016) subjects all state-

[24] From a past article: "further demarcating this complexity is the fact that the State regulating public services has a threefold role as i) space for formulating public policies whose agendas and goals will dictate how a service is operated; ii) owner of services and affected assets, for which it has a duty of care and in relation to which an operator under a public regime may postulate rights such as balanced contractual relations; iii) regulatory body charged not only with the defense of state interests but with the task of defending users, preserving the general lines of operating the activity and mediating the interests of all agents involved. In fact, it is precisely this tripartite role of the State operating these public utilities that give rise to the emergence of autonomous (or the so-called independent) regulatory agencies as a means of neutralizing the influence of the State's own interests in relation to this activity, immunizing the regulator's activity against hierarchical control, mediator through everyday policy or political action". Floriano de Azevedo Marques Neto, A nova regulação dos serviços públicos, op. cit., pg. 26.

owned enterprises, to the same legal regime regardless of whether they are delivering public services or are engaged in economic activity in the narrow sense of the term.[25] Law No. 5.862/1972 authorized the creation of Infraero but not a privileged regime for the fulfillment of its social purpose — which is expressly stated as "to implement, manage, and industrially and commercially operate airport infrastructure attributed.."(article 2).

There can be no arguing for regulatory asymmetry based on the fact that Infraero is a state-owned company, or because it would presume to enjoy protection for being a state-owned service provider. If there were a differentiated regime due to the need to protect a public service, it would have to be applied to all the other concession operators — since all of them provide the same airport infrastructure operating services.

There is no legal basis for regulatory distinction being applied to Infraero for the mere fact of its being a state-owned companies. On the contrary, the rules for state-owned companies are increasingly explicitly[26] moving to subject them to the same legal regime as private companies, since they all compete with each other in their respective sectors.

The second consequence is the limitation of asymmetries across different concession agreements signed by ANAC and airport concession operators.

Any distinctions should be exceptional and made on solid grounds since they arise from the same regulatory and operating models. Where distinctions already exist, they must be either interpreted very restrictively or eliminated (possibly by rebalancing the agreement), thus avoiding that concession operators (who compete with each other) being in practice subject to different rules.

Note that contractual provisions must comply with both legal and regulatory requirements. However, neither the former (laws 7.565/1986 and 1.1182/2005) nor the latter (infralegal orders authorizing airport concessions in general and in particular) stipulate asymmetries between airports. In other words, neither the sector public policy nor the sector regulatory policy adopts

---

[25] "Art. 1. This Law establishes the legal standing of s companies, state-controlled companies and their subsidiaries, covering all public and state-controlled companies of the Federal Government, States, Federal District and Municipalities that produce or trade goods or services, even if such economic activity is subject to federal monopoly, that is to say providing public services."

[26] Article 173 of the Federal Constitution states: "Art. 173, §1 The law shall establish the legal standing of public companies, state-controlled companies and their subsidiaries engaged in economic activity producing or selling goods or services, ordering: [...] II - compliance with legislation for private companies, including civil, commercial, employment and tax rights and duties."

asymmetries; either between concession and non-concession operated airports or between concession-operated airports themselves. Moreover, these policies have defined competition between aerodromes as a public policy aim for the country's airport infrastructures.

Even if a contract derives from a specific contractual subjection and determines specific relations between parties — in this case, ANAC and each of the concession operators — all concession agreements executed to date derive from the same policy options and regulatory frameworks adopted for the sector and this set of rules does not stipulate distinctions other than the technical characteristics inherent to each airport — for example, differences in terms of deadlines and amounts invested at each airport to be awarded.

From the legal point of view, there are no different regulatory models for airport operations. There is one single general regulatory model for two main operating models: directly by Infraero or by concession operators.

In the latter case, regulations stated the main general limits and goals for concession operators. On this basis, four rounds of concession led to different concession agreements but all were based on the same general regulation.

Of course, there may be specific clauses for certain agreements, depending on the particular features of each airport. Again, we have seen contractual contents evolving when agreements drafted in successive rounds identified rules and obligations that were shown to be inadequate or unreasonable during the execution of the preceding agreements. But precisely because they were all derived from the same regulatory and operating models, all specificities in different agreements must be interpreted very restrictively, depending on the technical specificities of each airport. In other words, ANAC does not have the power to make major distinctions by contractual means since the underlying regulatory framework did not do so.[27]

---

[27] Carlos Ari Sundfeld draws the same conclusion in dealing with a similar case in the telecommunications sector, in referring to the regulatory agency's limits when setting rules in the tender notice and contract: "In short, regulatory restrictions on market access for the sake of protecting and fostering competition, must be established by Anatel in regulations rather than when drafting procedural rules for a specific bidding process. SUNDFELD, Carlos Ari. Restrições regulatórias à participação no mercado são matéria regulamentar e não de edital de licitação. In: SUNDFELD, Carlos Ari. *Pareceres:* direito administrativo econômico. São Paulo: Revista dos Tribunais, 2013. v. I, pg. 152.

VI. Consequences of regulatory and contractual asymmetries that extrapolate regulatory parameters

Regulatory and contractual *asymmetries* are based on, and limited to, the public *policy* agenda which, in the airport regulation context is based on competition between airports and the absence, as a rule, of distinctions between airports or operators. Firstly, regulatory asymmetry is restricted because regulatory policy should, as a rule, apply equally to all airports, regardless of their specific operating model or concession agreement. Secondly, asymmetries across different concession agreements between ANAC and concession operators are limited because they are all based on the same sector public policy and the same regulatory policy.

Based on these conclusions, what measures can then be taken for these cases of undue regulatory and contractual asymmetries (meaning those lacking any clearly expressed technical and legal rationale)?

If asymmetry arises from the general regulatory context, the regulation will have extrapolated the limits of the regulatory framework and without any grounds for doing so, made distinctions that are, therefore, *legally untenable*. Therefore, the rule may be administratively and judicially challenged on the grounds of its being illegal (contrary to sector regulatory framework) and breaching the principle of isonomy.

However, if *asymmetry originates from a certain contractual scope, the concession awarding authority must neutralize these asymmetries.* There are two possible ways of doing so.

Firstly, interpret distinction restrictively, approaching the contractual provisions for which there is no good reason. When asymmetries arise from unequal contractual provisions, but are present in each contract from its origin, one must approach regulatory application by removing unreasonable or unjustifiable obligations that burden one operator more than another. Therefore, if it does not make sense for a concessionaire to be able to sign contracts beyond its concession period (for example, by ensuring that the one subjected to softer regulation may have a competitive advantage to, say, attract an airline to build its own terminal on its site) and the other not being able (having no explicit reason sufficient to justify this asymmetry), good regulation is needed to neutralize this contractual asymmetry.

Secondly, when such an interpretation is not sufficient to effectively approach contractual provisions (and their consequences), the distinction-

making clause should then be revised, which may imply that the concessionaire unburdened by regulatory asymmetry compensates the awarding authority by rebalancing its concession agreement. In this case, the improper distinction will have been neutralized, but the concessionaire will be required to rebalance the economic equation by sharing some of the advantage that will be obtained from neutralization and which obviously was not reflected in the original price of the award arising from the auction.

References

BANDEIRA DE MELLO, Celso Antônio. Princípio da isonomia. *Revista Trimestral de Direito Público,* São Paulo, v. 1, pg. 79-83, 1993.

BILOTKACH, Volodymyr. Asymetric regulation and airport dominance in international aviation: evidence from the London-New York market. *Southern Economic Journal,* v. 74, n. 2, 2007.

FRIEDEN, Rob. Wither convergence: legal, regulatory, and trade opportunism in telecommunications. *Santa Clara Computer & High Tech. L. J.,* v. 18, pg. 171, 2002.

LYON, Thomas P.; HUANG, Haizou. Asymmetric regulation and incentives for innovation. *Industrial and Corporate Change,* v. 4, n. 4, 1995.

MARQUES NETO, Floriano de Azevedo. A nova regulação dos serviços públicos. *Revista de Direito Administrativo,* v. 228, pg. 13-29, 2002.

____. *Agências reguladoras independentes.* Belo Horizonte: Fórum, 2005.

____. Limites à abrangência e à intensidade da regulação estatal. *Revista de Direito Público da Economia,* n. 1, pg. 69-93, Jan. 2003.

____. Regulação econômica e suas modulações. *Revista de Direito Público da Economia — RDPE,* Belo Horizonte, yr. 7, n. 28, Oct./Dec. 2009. Avaiable at: <www.bidforum. com.br/bid/PDI0006.aspx?pdiCntd=64263>. Access on: Retrieved June 27, 2017.

____. ZAGO, Marina Fontão. Parte III Fomento. In: DI PIETRO, Maria Sylvia Zanella (Coord.). *Tratado de direito administrativo:* funções administrativas do Estado. São Paulo: Revista dos Tribunais, 2014. v. 4, pg. 405-510.

OECD Review of Telecommunication Policy and Regulation in Mexico, 2012.

SUNDFELD, Carlos Ari. Restrições regulatórias à participação no mercado são matéria regulamentar e não de edital de licitação. In: SUNDFELD, Carlos Ari. *Pareceres:* direito administrativo econômico. São Paulo: Revista dos Tribunais, 2013. v. I, pg. 149-160.

WEISMANN, Dennis L. Default capacity tariffs: smoothing the transitional regulatory asymmetries in the telecommunications market. *Yale Journal on Regulation,* 1988.