

## Forum: Practical Perspectives

# Reforming the regulatory reform: general law on independent agencies in Brazil

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This paper addresses the effects of the new general law on independent agencies in Brazil. This regulatory reform sought to increase transparency and accountability, strengthen ex-ante evaluation, and improve decision-making. The research objective was to evaluate the possible organizational and institutional consequences of these changes. The study compared data collected from key actors in the 11 agencies referring to the period before the law with the regulatory scenario one year after the law was enacted. The results allow an unprecedented panoramic view of the agencies' instruments under the inspiration of better regulation, and the new scenario can positively impact these structures' credibility and trust. The study indicates an advance in the Brazilian regulatory governance model and opens space for future research.

**Keywords:** regulatory policy; regulatory reform; independent agencies; regulatory governance; Brazil.

### Reformando a reforma regulatória: Lei Geral das Agências Independentes no Brasil

Este trabalho investiga os efeitos da nova Lei Geral das Agências Independentes no Brasil. Essa reforma da reforma regulatória buscou aumentar a transparência e a responsabilidade, fortalecer a avaliação ex ante e melhorar a tomada de decisões. O objetivo da pesquisa foi avaliar possíveis consequências organizacionais e institucionais dessas mudanças. A partir da coleta de dados com atores-chave nas 11 agências, foi feita uma comparação entre o período anterior à Lei e o cenário regulatório após um ano de sua vigência. Os resultados permitem uma visão panorâmica inédita dos instrumentos das agências, sob a inspiração da *better regulation*. Esse novo cenário pode impactar positivamente na credibilidade e confiança dessas estruturas. O estudo indica um avanço no modelo de governança regulatória brasileiro e abre espaço para futuras pesquisas.

**Palavras-chave:** política regulatória; reforma regulatória; agências independentes; governança regulatória; Brasil.

### Reformando la reforma regulatoria: Ley General de Organismos Independientes en Brasil

Este artículo investiga los efectos de la nueva Ley General de Organismos Independientes en Brasil. Esta reforma de la reforma regulatoria intentó aumentar la transparencia y la rendición de cuentas, fortalecer la evaluación ex ante y mejorar la toma de decisiones. El objetivo de la investigación fue evaluar las posibles consecuencias organizacionales e institucionales de estos cambios. A partir de la recolección de datos con actores clave de los 11 organismos, se realizó una comparación entre el período previo a la Ley y el escenario regulatorio a un año de su vigencia. Los resultados permiten una panorámica inédita de los instrumentos de los organismos, bajo la inspiración de la *better regulation*. Este nuevo escenario puede tener un impacto positivo en la credibilidad y confianza de estas estructuras. El estudio indica un avance en el modelo brasileño de gobernanza regulatoria y abre espacio para futuras investigaciones.

**Palabras clave:** política regulatoria; reforma regulatoria; organismos independientes; gobernanza regulatoria; Brasil.


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## 1. INTRODUCTION

In recent years there has been an increasing interest in the most precise definition of a regulatory policy. Reform processes involving the creation or adjustment of regulatory institutions and procedures have been adopted in countries with more advanced economies, as well as those in development (Francesco & Guaschino, 2019; Zhang & Thomas, 2009).

These institutional reforms, with different results in terms of achieving objectives, can be broader and involve issues related to the State intervention model, focusing on management and the regulatory process, and oriented towards organizations and their relationships with stakeholders (Park, Lee, & Son, 2021; Wiener, 2006).

In the Brazilian case, the most extensive regulatory reform took place in the 1990s with the creation of the first independent regulatory agencies. The main objective was to increase the credibility of the State and attract private investment, guaranteeing the stability and independence of the regulatory process (Mueller & Pereira, 2002; Prado, 2012). However, another Brazilian regulatory reform took place in 2019, when the so-called General Law on Agencies was published, which assigned various obligations and procedures to regulatory agencies. Although not new, such measures, brought the force of the law to the standardization of processes and regulatory structures which was unusual in the reality of these organizations before.

Although critical, the study of regulatory reforms based on organizational or institutional factors is still scarce in literature (Park et al., 2021). Brazilian regulatory agencies are relatively new, especially when compared to American or European experiences, representing a vast gap still to be covered by research on their functioning, which includes the effects of the most recent regulatory reform on the institutional configuration of these regulatory bodies.

This work aims to contribute to filling these gaps. The study results allow an unprecedented panoramic view of the instruments used by Brazilian regulatory agencies for institutional planning and management; support for the decision-making process; transparency and accountability.

The context and objectives of regulatory reforms that seek to improve governance first approached, focusing on the case of Brazil. A methodology session follows, in which the results found in the data collection are discussed. In conclusion, suggestions are made for new studies that may further enhance comprehension of regulatory reforms, particularly using institutional approaches to the matter.

## 2. POLICY AND REGULATORY REFORM: GOOD PRACTICES IN BRAZIL

Regulatory reforms have specific objectives and results, but, in general, their motivation is the need to design and implement more rational regulatory management systems. After the initial experiences of regulatory reform processes in the 1970s to 1990s, their goals have been to improve regulatory quality. The expected results are better quality regulatory systems and greater coordination and engagement of institutions and actors. Such strategies are part of the so-called regulatory governance agenda.

Called better regulation, high-quality regulation, or smart regulation (Baldwin, 2005; European Commission, 2015; Gunningham & Sinclair, 2004), the tools and policy guidelines developed by the regulatory governance agenda promote the idea of providing institutions with regulatory systems with greater capacity to respond to political and regulatory problems in an increasingly complex world.

According to Kjaer and Vetterlein (2018), the emergence and development of governance and regulation processes are intertwined with mutual influence, but not with a cause and effect relationship. Two aspects of the research agenda would be the most relevant: how institutional governance structures shape actions and how regulations are produced as well as their effects on the economy and society.

This regulatory governance agenda has been fed in recent decades with recommendations and data on countries mainly by two international institutions: Organization for Economic Cooperation and Development (OECD) and World Bank (Francesco & Guaschino, 2019). But it cannot be said that there are single recommendations for institutions, processes, and tools. While the OECD places more emphasis on the regulatory arrangement and implementation process, the World Bank prioritizes the government's role in regulation, transparency, and accountability. However, common concerns and efforts can be found: both institutions address the institutional context of regulation and its most relevant stakeholders of the regulatory process.

The wave of regulatory governance has also hit developing economies. However, in this context, this possible transfer of best practice models from developed countries has been seen with additional difficulties related to a gap between these practices and administrative, legal, political, and economic processes (Adelle et al., 2014; Dubash & Morgan, 2012; Kirkpatrick, Parker, & Zhang, 2004; Zhang & Thomas, 2009).

In Brazil, the regulatory system follows the trend of dissemination of regulatory reforms carried out by developing countries (Peci, Santos, & Araújo, 2022). An important process was carried out from the 1990s to the beginning of the 2000s to create a dozen independent national agencies, with a diversified structure and procedures. After the creation of the agencies, Brazil focused its efforts to promote regulatory governance on PRO-REG (Program for Strengthening Regulatory Capacity). Created in 2007, its focus was on independent agencies, most interested in this agenda. Over more than 20 years, there has been a growing trend in the structuring and consolidation of institutional mechanisms in Brazilian agencies, including the involvement of actors in the regulatory process and accountability to Congress and society in general (Pó & Abrucio, 2006; Ramalho, 2009).

The General Law on Agencies (Lei nº 13.848, de 25 de junho de 2019) institutionalized these processes to determine, among others, the holding of consultations and public hearings, the preparation of a regulatory agenda, the presentation of reports to Congress, as well as the participation of interested parties in the preparation of proposals. As a kind of reform of regulatory reform, the new Law addresses several aspects of independent agencies, from planning, management, and accountability to social participation, through the decision-making process and good regulatory practices.

### 3. METHODOLOGY

The methodology adopted in the research is characterized as quali-quantitative, in order to obtain the benefits of complementary approaches to data collection and analysis.

Qualitative data comes from specialized literature review and document analysis strategies. In the document analysis, the sources used were, basically, national legislation and internal regulations of independent agencies.

Quantitative data were obtained through interviews conducted by videoconference, between September and October 2020, with one representative from each of the 11 Brazilian Regulatory Agencies.

The profile of the 11 interviewees was defined prior to selection: civil servants in strategic positions in the areas of planning, good regulatory practices, or working in the structures of the presidency or executive secretariat, with in-depth experience and knowledge of the different strategic processes related to the topics covered in the General Law on the Agencies.

The interviews were carried out using a structured questionnaire to standardize the collection and subsequent processing of information (Bradburn, Sudman, & Wansink, 2004). Interview questions addressed issues related to fraud and corruption prevention; the agency's decision-making process; accountability and transparency; institutional interaction and articulation; and the agency's Board of Directors.

In addition to the questions with closed answers of the dichotomous or scale type, open questions were included to record the observations of the interviewees indicating the sources of information and the location of the documents (Czaja & Blair, 1996).

Some of the main advantages of using the structured interview were the speed in data collection, the relatively low costs, and the standardization of the answers (Babbie, 1990), which allows a descriptive statistical analysis of the data, presented in the following section.

## 4. RESULTS AND DISCUSSION

The new Brazilian legislation provisions bring a set of initiatives aimed at improving regulatory governance to the organization and standardization of the procedures adopted in each Agency, establishing clear mandatory procedures for the regulatory activity of the State. Many of these measures were already being implemented by different agencies, following their regulations and individual initiatives, as shown in the following subsections.

### 4.1 Institutional management and organization

The new legislation introduced the obligation for the Agencies to prepare the four-year Strategic Planning (PE), in line with the Federal Government's Pluriannual Plan (PPA), and as an annual monitoring instrument, the Annual Management Plan (PGA), which must contain the actions, results and goals related to the final and management processes, including the Regulatory Agenda. The PGA must be approved by the Board and forwarded to the Federal Senate, Chamber of Deputies, and the Federal Court of Auditors (TCU), in addition to being available on the Agency's website.

Most Agencies have already prepared a Strategic Plan (63.64%) and a document similar to the PGA (54.55%), before the new legislation. A part of these Agencies still do not have these instruments (27.27% for PE and 18.18% for PGA), and others started to use them only after the new Law (9.09% for PE and 27.27% for PGA). However, in some cases, all the components provided for in the Law only started to be included in the PGA after the publication of the new standard, as Table 1 shows.

**TABLE 1** PROCEDURES RELATED TO THE ANNUAL MANAGEMENT PLAN (PGA)

Procedures related to the Annual Management Plan (PGA)	Used BEFORE Law 13,848		Used only AFTER Law 13,848		Total of Agencies that use the PGA		Do not use	
	N	%	N	%	N	%	N	%
Elaboration	6	54.55%	3	27.27%	9	81,82%	2	18.18%
Inclusion of the Regulatory Agenda	5	45.45%	4	36.36%	9	81,82%	2	18.18%
Approval by the Collegiate Board ten working days before the effective date	5	45.45%	4	36.36%	9	81,82%	2	18.18%
Submission to the Senate, Chamber and TCU within 20 working days after approval	0	0.00%	9	81.82%	9	81,82%	2	18.18%
Publication on the internet within 20 working days	5	45.45%	4	36.36%	9	81,82%	2	18.18%
Administrative, operational and inspection performance goals	5	45.45%	4	36.36%	9	81,82%	2	18.18%
Budget resources and disbursement schedule for targets	4	36.36%	5	45.45%	9	81,82%	2	18.18%
Quality targets for the Agency's services, promotion of research and cooperation with consumer protection	2	18.18%	4	36.36%	6	54,55%	5	45.45%
Rules on the review, monitoring and evaluation provided for in the Regulation	1	9.09%	4	36.36%	5	45,45%	6	54.55%

**Source:** Elaborated by the authors.

Another initiative of the Law was to enforce risk management practices and internal controls and the preparation and disclosure of an integrity program to prevent, detect, punish and remedy fraud and acts of corruption. These procedures have also been adopted by most Agencies. In the integrity program, 72.73% of the Agencies had such a program before the Law, and 18.18% started to have it after the Law was enacted. Regarding risk management practices and internal controls, 81.82% had already implemented them before the Law.

#### 4.2 Decision-making process

The Law established several tools and procedures to improve the decision-making process of the Agencies, which can be organized around four central objectives: predictability of decisions (publication of the Regulatory Agenda); motivation and impact of decisions (Regulatory Impact Analysis - mandatory RIA); social participation and evidence for decision-making (holding public hearings and consultations); and transparency in the decision-making process (public meetings of the Boards of Agencies).

As for the predictability and impact of decisions, before the Law, 90.91% of the Agencies already prepared and published on their Internet pages a regulatory agenda with priority themes for regulation and carried out RIA processes for the publication of normative acts of general interest, although with great variation in its practice (Peci, 2011). However, the procedures for operationalizing the RIA are not yet foreseen in the regulations of most Agencies (72.73%). Nor was it customary, in most cases, for the boards to discuss RIA reports. Even after the enactment of the Law, only six Boards (54.55%) spoke about all the assessments RIA carried out.

To promote social participation in decision-making, 90.91% of the Agencies already held public hearings before the enactment of the Law. However, only four had this provision in their regulations and two included it after the Law was published. Most bodies (72.73%) provide in their regulations for other forms of stakeholder participation in their decisions. After the enactment of the Law, there was an increase in the availability of reports from public hearings and other means of participation. There was also an increase in the number of Agencies that previously made RIA reports available at all their public hearings (Table 2).

**TABLE 2** AVAILABILITY OF THE RIA REPORT ON THE PROPOSALS TAKEN TO PUBLIC HEARINGS

Availability of the RIA report	Total Agencies BEFORE Law 13,848		Total Agencies AFTER Law 13,848	
	N	%	N	%
No	1	9,09%	2	18,18%
Yes, in PART of the cases	4	36,36%	0	0,00%
Yes, in ALL cases	5	45,45%	8	72,73%
Does not hold public hearings	1	9,09%	1	9,09%

Source: Elaborated by the authors.

Public consultations were also carried out by the bodies before the legislative change, as shown in Table 3.<sup>1</sup> However, consultations and other requirements provided for in the Law are not procedures adopted in all regulatory changes, as shown in Table 4, Table 5, and Table 6.

<sup>1</sup> In the Law and in the practices adopted by Brazilian Agencies, public hearings and public consultations are different mechanisms of social participation, sometimes complementary, but with different rules and forms of participation.

**TABLE 3 CONDUCTING PUBLIC CONSULTATIONS**

Conducting public consultations for proposals for the creation or alteration of normative acts	Total Agencies in this situation BEFORE Law 13,848		Total Agencies in this situation AFTER Law 13,848	
	N	%	N	%
No	0	0,00%	0	0,00%
Yes, in PART of the cases	4	36,36%	2	18,18%
Yes, in ALL cases	7	63,64%	9	81,82%

Source: Elaborated by the authors.

**TABLE 4 AVAILABILITY OF THE RIA REPORT**

Availability of the RIA report (and studies, data, and technical material) as a basis for the proposals brought to public consultation	Total Agencies in this situation BEFORE Law 13,848		Total Agencies in this situation AFTER Law 13,848	
	N	%	N	%
No	1	9,09%	0	0,00%
Yes, in PART of the cases	3	27,27%	2	18,18%
Yes, in ALL cases	7	63,64%	9	81,82%

Source: Elaborated by the authors.

**TABLE 5 AVAILABILITY OF PROPOSALS SENT BY PARTICIPANTS IN PUBLIC CONSULTATIONS**

Availability on the Agency website (within ten working days) of proposals sent by participants in public consultations	Total Agencies in this situation BEFORE Law 13,848		Total Agencies in this situation AFTER Law 13,848	
	N	%	N	%
No	2	18,18%	1	9,09%
Yes, in PART of the cases	5	45,45%	0	0,00%
Yes, in ALL cases	4	36,36%	10	90,91%

Source: Elaborated by the authors.

**TABLE 6** PROVISION OF THE AGENCY'S POSITION ON THE PROPOSALS MADE IN PUBLIC CONSULTATIONS

Availability on the Agency's website (within 30 working days after the board meeting) of the Agency's position on the proposals presented in public consultations	Total Agencies in this situation BEFORE Law 13,848		Total Agencies in this situation AFTER Law 13,848	
	N	%	N	%
No	1	9,09%	0	0,00%
Yes, in PART of the cases	3	27,27%	1	9,09%
Yes, in ALL cases	7	63,64%	10	90,91%

**Source:** Elaborated by the authors.

With regard to the transparency of the decision-making process, most agencies hold deliberative meetings of their Board publicly, disclosing agendas, recordings and summary of deliberations. In all bodies, the decisions taken indicate the assumptions on which they were based. However, most agencies (54.55%) do not indicate in their regulations the deadlines for their decisions, in addition to those already provided for by law. Of those that indicate these deadlines, four (36.36%) already did so before the enactment of the new law and one (9.09%) started to do so after the new rule.

#### 4.3 Transparency and accountability

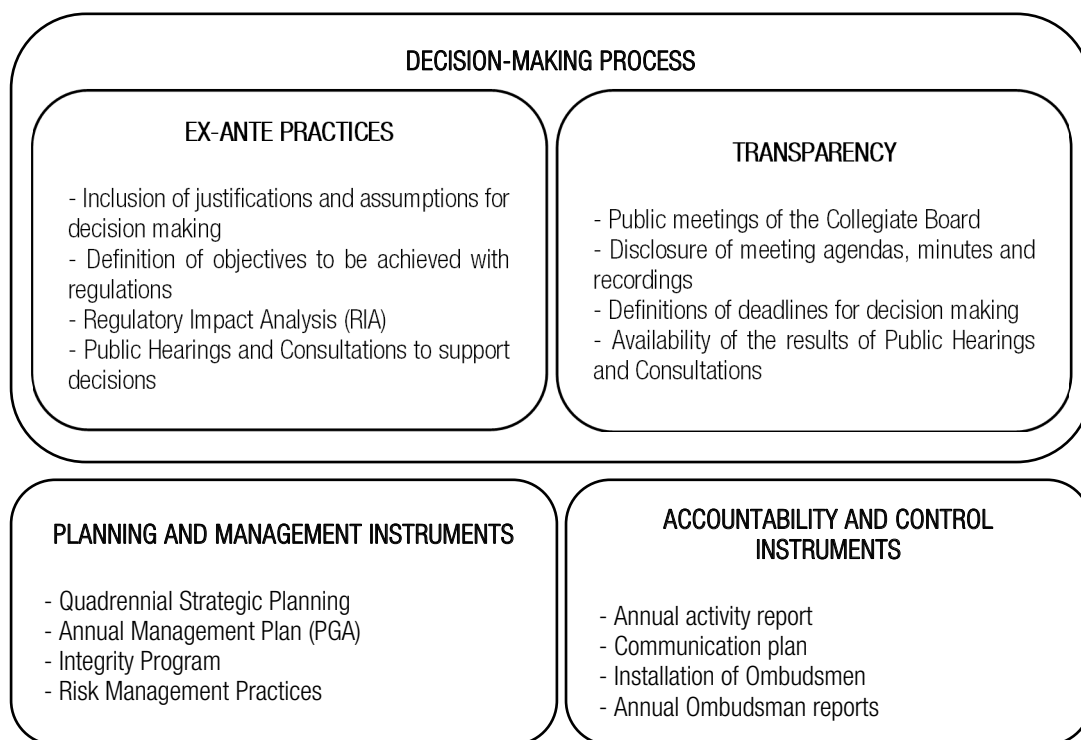
As a form of accountability, the Law defines that the Agencies must prepare an annual report of activities with the results of the Strategic Planning (PE) and the Annual Management Plan (PGA). In addition, agencies must prepare an Annual Communication Plan to disseminate information and, also, educational actions on the rights of the agency's users and companies that make up the regulated sector.

Most Agencies already prepared the activity report before the Law (72.73%) and 9.09% started to prepare the report after the new legislation. However, only 36.36% of said Agencies forwarded their report to the Minister of State, the Federal Senate, the Chamber of Deputies, and the Federal Court of Auditors. Another 36.36% started to adopt this procedure after the publication of the new legislation. For the communication plan, 45.45% of the agencies already prepared it before the normative change and 36.36% started to carry it out after the Law.

As shown in the data of this research, the measures foreseen in the General Law on Agencies were already being adopted by most Brazilian regulatory agencies, despite not in the same way as they were foreseen in the Law. The new legislation seems to have induced the agencies to improve their internal procedures and allowed a standardization of the different practices used by them. The results can be summarized according to Figure 1.



**FIGURE 1 REGULATORY GOVERNANCE INSTRUMENTS AND PRACTICES OF BRAZILIAN FEDERAL REGULATORY AGENCIES PROVIDED IN LAW 13,848**



Source: Elaborated by the authors.

## 6. CONCLUSION

Recent Brazilian regulatory reform has focused on the organizational and institutional aspects of independent regulatory Agencies. This research showed that the enactment of the new legislation may have reflected the consolidation of consultations and public hearings, RIA and the availability of decisions to the interested public, in line with the better regulation practices of European regulatory bodies (Radaelli & Meuwese, 2009).

These initiatives sought to reinforce transparency and can impact the credibility of regulatory Agencies and the trust that stakeholders have in their performance (Grimmelikhuisen et al., 2021), contributing to the achievement of some of the initial objectives of the creation of these bodies in Brazil (Mueller & Pereira, 2002).

Accountability mechanisms have also been standardized and extended to all Agencies, including reporting to Parliament. These requirements allow a greater range of control instances, including control and supervised by Congress, by ministries, and by the Court of Auditors.

The results of this study indicate a potential advance in the Brazilian regulatory governance model at the federal level. Further studies will be able to observe the impact of the changes resulting from the recent regulatory reform on the expansion of social and political control and on the trust

that stakeholders place in regulatory agencies. It is also important to carry out comparative studies between Brazilian independent agencies and those of other countries. The particularities of each region are relevant, but these studies could indicate whether Brazil's initiatives are in line with what has been happening in countries with more experience in the subject.

Further studies on the effectiveness of the instruments introduced by the new Brazilian legislation will allow a critical analysis regarding the implementation of each practice in the constant search for the reduction of administrative costs and unnecessary procedures in regulatory activities.

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