

PUBLIC UNDERTAKING IN THE NEW CONSTITUTION

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Summary

1. General considerations

1.1. Concept of public company

Brazilian doctrine, until recently, conceptualized the public company with the sole and exclusive concern of characterizing its legal regime of Private Law, which is conatural and salient to it. In the meantime, lately, the impact of rules of Administrative Law on them is already beginning to be stressed. Caio Tacitus refers to public companies in the broad sense, "...as legal entities under Private Law, governed at a time by Commercial Law, and by Administrative Law, created along the lines of the common commercial law, in the form of a company by shares, beginning their existence with the filing of constitutive acts in the register of commerce, depending on their institution of prior legislative authorization, because it involves the application of a certain task of the State" (cf. *Public companies in Brazil*, GDR 86/433). J. Cretella Jr. defined it as follows: "Public enterprise is the state legal institute of Private Law through which the Public Power performs either economic, industrial or commercial activities, competing with the private, (b) or administrative activities, decentralizing typical services, previously entrusted to public or private entities, of another nature (dealers, permission holders or municipal entities)" (cf. *Brazilian Indirect Administration*, p. 287-288). Therefore, in the concept of public enterprise it is necessary to distinguish its legal nature by the corporate object imposed on it by law. We even claim that there are two types of public enterprise, depending on whether it operates in the economic field or in that of public services (see: Mukai, *Administrative Law and State Enterprises*, Forensics, 1984). Cotrim Neto underlined this aspect well, in Zanobini's line: "For us – indeed, this is also Zanobini's thought – the end, the scope, of the legal entity must be the main (though not exclusive) element for the conceptualization of its legal nature: if it has the physiognomy of a state

entity, it uses processes of Public Law, and follows goals that are finalistically of interest, of the interest that was attributed to it at the act of its creation, but are equally public interest of state essence, then the personalized company enjoys prerogatives and has *the* nature of a public entity” (*Company Theory Public Strict Sense*, GDR 122/36). Thus, one cannot lose sight of the fact that, in Brazil, there are public companies that provide public services (although so-called commercial or industrial) and others that exploit economic activities.

1.2. Distinction between public service (*lato sensu*) and economic activity

The State has no other mission than to seek the satisfaction of the public interest. This he does precisely when performing public services, but even when exploring economic activity, he can only do so shielded also in a criterion of public interest. However, the notion of public interest can be understood as an expression of the public value that certain things have in themselves, or as well as an expression of what interests the public. In the first case it is an objective notion, which designates a quality of things, whose existence is independent of someone estimating it. In the second, it is a subjective notion, an expression of what, in fact, interests an indeterminate plurality of people (cf. Fernando Sains Moreno, *Conceptos legal, interpretación y discrecionalidad administrativa*, Civitas, Madrid, 1976. p. 323). Thus, we can say that “... industrial or commercial public service is one that the State, in electing it as such, exercises it directly or by interposed people, and that, by meeting the essential or almost essential need of the collectivity, presents an objective public interest in its management. And, economic activity of the State is that which it decides to assume, within its economic policy, observing the constitutional principles of the Economic Order, by judging that such activity consults the public interest of the same Order (subjective public interest)” (cf. Mukai, op. cit., p. 183). And, as a consequence, we may have, in Brazil, public companies that perform commercial or industrial public services, and public companies that exploit economic activities. Hence we have traced the legal regimes of both (different), the former with outstanding administrative legal substrate, and the latter with predominant legal substrate of Private Law (cf. Mukai, op. cit., p. 185; p. 237 et seq.). Celso Antônio Bandeira de Mello also showed this distinction with undeniable accuracy: “The important thing, however, as pointed out when examining the distinction between public services and government services, is to discern between mixed economy societies aimed at satisfying ‘public interests’, that is, companies providing public services, and mixed societies that are willing to satisfy ‘collective interests’ – relevant to society, but that are not qualified as public. The latter, because they are not public service providers, constitute State interventions in the economic

domain – an area in principle reserved for free enterprise, according to constitutional orientation (article 170 and §§)” (cf. *Provision of Public Services*, RT, p. 101).

2. The public company and the new Brazilian Constitution 2.1. The previous Constitutional Text

Examining the previous Constitution, it appears, in its article 170, that it was up to the private company, preferably, with the support and encouragement of the State, to organize and exploit economic activities, and only in a supplementary character of the private initiative, the State would directly organize and exploit economic activity (§ 1). Next, the constitutional provision said that, in the exploitation by the State of economic activity, public companies and mixed economy companies would be governed by the rules applicable to private companies, including labor law and obligations (§ 2). Commenting on this provision, we said: “From the outset, it can be inferred that the exploitation of economic activity by public companies or mixed economy companies, of which the last two paragraphs mentioned speak, does not cover the so-called commercial or industrial public services, since the ‘economic activity’ referred to there is none other than that already described in the caput of the article, as being of preferential exploitation of private enterprise.” It appears, therefore, that the so-called industrial or commercial public services are not expressly provided for in the Constitution. As for these, as well as any public service, they do not suffer the incidence, as to their creation, of the supplementary rule of § 1 of article 170 of the CF (LGL\1988\3) (cf. Mukai, op. cit., p. 214).

2.2. The current Constitutional Text

Article 173 of the current Constitution states: “Excusing the cases provided for in this Constitution, the exploitation of economic activity by the State will only be allowed when necessary to the imperatives of national security or the relevant collective interest, as defined by law. § 10 - The public company, the mixed economy company and other entities that exploit economic activity are subject to the legal regime of private companies, including labor and tax obligations. § 20 - Public companies and mixed economy companies may not enjoy privileges not extended to those of the private sector.” Article 175 provides that: “It is up to the Public Power, in the form of the law, directly or under concession or permission regime, always through bidding, to provide public service”. It turns out that the corresponding provisions of the current Constitution, those of the previous one, are even clearer and more precise with regard to the dichotomy of public companies. What we've been dealing with. Indeed, it is clear that, by the wording given to § 1 of article 173, the new Constitution does not exclude the possibility of the public company providing public services, this is clear

when the provision says “...to exploit economic activity ...”, implying that public companies (and mixed economy companies) may not be exploiting economic activity, but rather public service. In this respect, the current Text does not reflect the previous one. But where this dichotomy is clear is in article 175, when the constituent legislator expressly said, that “it is up to the Public Power, directly, or under a regime of concession or permission, through bidding, to provide public service”. There are the two forms of decentralization of public services that the doctrine has usually pointed out: the granting of public services to entities created by law, and which occurs in the indirect administration, consisting of municipalities, public companies, mixed societies and foundations (here framed in the constitutional expression directly), and the decentralization by private individuals in collaboration (granting and permission). Therefore, in view of these provisions, it is evident that §§ 1 and 2 of article 173 of the new Constitution are inapplicable to the public service provider, exactly because from § 1 and article 175 one can extract the unmistakable interpretation that it is subject to the predominant regime of Administrative Law.

3. Constitutional principles and rules to be observed by the public company

3.1. Principles

Article 37 of the Federal Constitution (LGL\1988\3) states that the direct, indirect and functional Public Administration of any of the Powers of the Union, the States, the Federal District and the Municipalities, will obey the principles of legality, impersonality, morality, publicity. When the provision covers the indirect administration, of course, it is encompassing the public enterprise: however, it should be noted, only the public company providing public service, not the one that exploits economic activity, because it subsumes itself to the principles of the Economic Order, capitulated in article 170 of the Constitution. What can be observed is that article 37, items and paragraphs, dictate superior commands of Public Law, only applicable, in principle, to state entities; however, it is also verified that entities that have as substrate of their existence activities typical of the Public Power, even if structured in the form of Private Law (the case of foundations, for example), are subject to those commands. Thus, it will be up to the interpreter to discern such subtleties when examining the mentioned Text. And, consequently, make necessary distinctions regarding the application of the principles and items and paragraphs of article 37, as the case may be. So, for example, from incs. I to XXI of article 37, only incs are applicable to public companies that exploit economic activities. XVI, XVII, XIX, XX and XXI. Of the paragraphs, none of them apply to those companies. On the other hand, and even by virtue of this consideration, all items and paragraphs, adaptedly, depending on the scope that the caput of the article

makes about indirect administration, apply to the public service provider. These include the provisions of incs. II, III, IV, VI, VII, XVI, XVII, XIX, XX, XXI, and §§ 20, 30, 40, 50 and 60, notably.

3.2. Civil liability of the public company

Paragraph 6 of the new Constitution states: “Legal entities under public law and those under private law that provide public services shall be liable for the damages that their agents, in this capacity, cause to third parties, ensuring the right of return against the person responsible in cases of intent or fault.” As if to confirm everything we have said about the difference in legal regimes of public companies, as they act in the economic field or in that of public services, the retrotranscribed provision brings, once again, closer to the administrative regime, since it focuses on them the theory of administrative risk on the civil liability of the State (unfault liability). Therefore, only public companies providing public services are subject to the disposition, which obliges them to submit to the objective theory of administrative risk, regarding their liability for damage caused to third parties; those that exploit economic activities continue, for this very reason, to be subject to the theory of subjective civil liability, more common in relations between individuals.

4. Bids and hiring in public companies

Article 22, inc. XXVII, which is up to the Union to legislate on: “General rules of bidding and contracting, in all modalities, for public administration, direct and indirect, including foundations established and maintained by the Public Power, in the various spheres of Government, and companies under its control” (emphasis added). Note that here the standard covers public companies providing public services (in the indirect expression) and those that exploit economic activities (in the expression company under their control). However, there is one difficulty here. The general rules on contracts are inserted in Dec.-Law 2.300/86 (LGL\1986\434), and are mostly rules specific to administrative contracts. Now, if public companies that exploit economic activity should, according to the provisions of § 1 of article 173, be subject to the legal regime proper to private companies, how can they claim their contracts to contain exorbitant clauses of common law, typical of administrative contracts? The answer is one. The general rules on contracts contained in Dec.-Law 2,300/86 (LGL\1986\434), applicable to public companies that exploit economic activities, are only those that do not transform the (private law) contracts of these companies into administrative contracts, that is, they cannot include the so-called exorbitant clauses, in view of the provisions of § 1 of article 173 of the Constitution. The inc. XXI of article 37 of the Constitution states: “Excurring the cases specified in the legislation, the works, services, purchases and disposals will be contracted

through a public bidding process that ensures equal conditions for all competitors, with clauses that establish payment obligations, maintaining the effective conditions of the proposal, in accordance with the law, which will only allow the technical and economic qualification requirements indispensable to guarantee the fulfillment of the obligations.” This provision also applies to public companies, whether public service providers or exploiting economic activity, since it is a natural complement to inc. XXVII of article 22, and because the cases specified in the legislation, of waiver and unenforceability of bids, are general rules. Paragraph 2 of article 171 says: “In the acquisition of goods and services, the Government will give preferential treatment, under the law, to the Brazilian company with national capital”. As it turns out, this provision is not self-applicable, depending on a law that amends § 2 of article 3 of Dec.-Law 2.300/86 (LGL\1986\434), to replace the expression “goods and services produced in the country” inserted therein by the expression “goods and services produced by a Brazilian company with national capital”. The rule is only applicable to the Government as such, not to companies and foundations under private law. § 3 of article 195 states: “The legal entity indebted to the social security system, as established by law, may not contract with the Government or receive tax and credit benefits or incentives from it”. The rule, in addition to not being self-applicable (according to article 59 of the Transitional Provisions, the aforementioned law should only be enacted in a year's time), does not apply to public companies and private law foundations.

5. Performances of the public company subject to the control or approvals of the Legislative Branch

Article 52 of the new Constitution: “It is up to the Federal Senate to provide for global limits and conditions for the external and internal credit operations of the Union, the States, the Federal District and the Municipalities, their municipalities and other entities controlled by the Federal Government.” The standard covers public companies in general, at the federal level. Article 71 of the Federal Constitution determines that: “External control, in charge of the National Congress, shall be exercised with the help of the Federal Court of Auditors, which is responsible for: [...] II - judge the accounts of administrators and others responsible for money, assets and public values of direct and indirect administration, including foundations and companies established and maintained by the Federal Government, and the accounts of those who cause the loss, loss or other irregularity resulting in damage to the public purse.” Article 75 provides: “The rules established in this section shall apply, where appropriate, to the organization, composition and supervision of the Courts of Auditors of the

States and the Federal District, as well as of the Courts and Audit Councils of the Municipalities”. Therefore, the aforementioned provision (art. 71, II) applies to public companies in general, federal, state and municipal. Article 165, § 5, of the Constitution states: “The annual budget law shall comprise: I - the fiscal budget referring to the Federal Powers, their funds, organs and entities of direct and indirect administration, including foundations established and maintained by the Government; II - the investment budget of companies in which the Union, directly or indirectly, holds the majority of the share capital with voting rights.” Thus, public companies providing public services will have their annual and investment budgets, approved by law along with the annual budget of the federal, state or municipal administration, as the case may be; public companies that explore economic activities will have only their investment budgets approved by law.

6. Personnel issues in the public company 6.1. Obligation to open competition on admission

Only those public companies providing public services are subject to the provisions of article 37, § 11, behold, only they are part of the indirect Administration of which the caput speaks.

6.2. Strike Right

Paragraph 1 of article 9 of the Constitution provides that: “The law shall define the essential services or activities and shall provide for the fulfillment of the urgent needs of the community”. The inc. VII of art. 37 states that: “the right to strike shall be exercised under the terms and within the limits defined in complementary law”. Naturally, the ordinary law referred to in the first provision should reach only those public service providers; and the supplementary law referred to in the second provision should not cover public undertakings, foundations and mixed economy companies.

6.3. Participation of employee representatives in collective bargaining

Article 11 ensures that, in companies with more than 200 employees, a representative of these employees will be elected with the sole purpose of promoting direct understanding with employers. The standard applies to all state-owned companies, of any level of government, as long as they have more than 200 employees on their staff.

6.4. Budget allocation forecast for personnel admission expense projections

Article 169 of the Federal Constitution (LGL\1988\3): “Expenditure on active and inactive personnel of the Union, the States, the Federal District and the Municipalities may not exceed the limits established in supplementary law. Sole Paragraph - The granting of any advantage or increase in remuneration, the creation of positions or change of career structure, as well as the admission of personnel, in any capacity, by the

organs and entities of direct or indirect administration, including foundations established and maintained by the Government, may only be made: I - if there is sufficient budget allocation to meet the projections of personnel expenditure and the resulting increases; II - if there is specific authorization in the law of budgetary guidelines, except for public companies and mixed economy companies. "The norm, as it turns out, is mandatory by public companies providing public services, behold, members of the indirect administration referred to in the sole paragraph of article 169 and because, as we have seen, only they will have their (global) budgets approved by law, and here we can speak of budget appropriations; however, inc. II does not apply to all public companies, since the constitutional norm makes no distinction.6.5. Control of legality of staff admissions by the Courts of Auditors

Provides art. 71, III, of the CF (LGL\1988\3), which is the responsibility of the Courts of Auditors "...to assess, for the purposes of registration, the legality of acts of admission of personnel, in any capacity, in the direct and indirect Administration, including the foundations established and maintained by the Public Power, except for appointments to a position of provision in commission, as well as that of the concessions of retirements, pensions and pensions, except for subsequent improvements that do not alter the legal basis of the concessionary act". It appears, as we have been stating, that the Courts of Auditors should examine whether there was a public tender in the admissions of public companies providing public services, since they belong to the indirect administration, referred to in the constitutional provision; on the other hand, as for public companies that exploit economic activities, the same will not occur, because they are not part of the indirect administration, and, as we said when interpreting article 37, they are not subject to its inc. II, which requires the public tender to admit staff.

7. Subjection of the public company to judicial control

7.1. Warrant

Article 5, LXIX, provides that an injunction shall be given when the person responsible for the illegality or abuse of power is a public authority or agent of a legal entity in the exercise of the powers of the Public Power. Therefore, there will only be a warrant against illegal acts that offend a net and certain right, committed by directors of public companies providing public services, thus not by public companies that exploit economic activities. In fact, the norm complies with what is already expressed in § 1 of article 1 of Law 1,533, of 31.12.1951 (LGL\1951\4) (Law of the Warrant of Security): "The representatives or organs of the Political Parties and the representatives or administrators of the municipal entities and of natural or legal persons with

delegated functions of the public power are considered authorities for the purposes of this law, only insofar as they understand these functions.”

7.2. Popular action Article 5, LXXIII, states that popular action will be appropriate to annul an act detrimental to the public property or entity in which the State participates [...]. Thus, the popular action may be brought against acts harmful to the assets of any public company, whether it is a provider of public service or economic activity.

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