

# Taxation and economic regulation: contributions to a Regulatory Impact Analysis model of inductive tax rules\*

## *Tributação e regulação econômica: contribuições para um modelo de Análise de Impacto Regulatório das normas tributárias indutoras*

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### ABSTRACT

Based on contemporary discussions related to the role of taxation as an instrument of economic regulation, as well as the current experiences of good regulatory practices in Brazil, this work proposes to examine whether it is possible to develop or adapt a Brazilian model of Regulatory Impact Analysis of inducing tax rules. Through an interdisciplinary study,

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with an emphasis on qualitative research (bibliographical, documentary and legislative), being presented the main concepts, fundamentals and discussions related to regulatory tax rules and Regulatory Impact Analysis, in order to support the debate and examining the feasibility of a specific Regulatory Impact Analysis model for regulatory taxation in Brazil.

## KEYWORDS

regulatory tax rules — Regulatory Impact Analysis — regulatory taxation — economic regulation — regulation by taxation

## RESUMO

Com base nas discussões contemporâneas relativas ao papel da tributação como instrumento de regulação econômica, bem como as atuais experiências de boas práticas regulatórias desenvolvidas no Brasil, este trabalho propõe-se a examinar se é possível desenvolver ou adaptar um modelo brasileiro de Análise de Impacto Regulatório das normas tributárias indutoras. Por meio do estudo interdisciplinar, com ênfase na pesquisa qualitativa, de caráter bibliográfico, documental e legislativo, foram apresentados os principais conceitos, fundamentos e discussões relacionados tanto com normas tributárias indutoras quanto com a Análise de Impacto Regulatório, com o intuito de subsidiar o debate e o exame da viabilidade de um modelo de Análise de Impacto Regulatório específico para a tributação indutora no Brasil.

## PALAVRAS-CHAVE

normas tributárias indutoras — Análise de Impacto Regulatório — tributação indutora — regulação econômica — regulação via tributação

## 1. Introduction

In recent years, discussion around taxation of beverages with high sugar content (such as soft drinks and industrialized products)<sup>1</sup> has gained ground.

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<sup>1</sup> CORREIA NETO, Celso de Barros. *Tributação das bebidas açucaradas no Brasil: caminhos para sua efetivação*. Brasília, DF: Câmara dos Deputados, 2019. Available at: [https://bd.camara.leg.br/bd/bitstream/handle/bdcamara/39520/Tributa%C3%A7%C3%A3o\\_bebidas\\_Neto.pdf?sequence=5](https://bd.camara.leg.br/bd/bitstream/handle/bdcamara/39520/Tributa%C3%A7%C3%A3o_bebidas_Neto.pdf?sequence=5). Accessed on: 16 Sept. 2021.

Following the trend in other countries, the justification for increasing taxation on such products would be to reduce their consumption, since commonly sugary foods and drinks are associated with health problems such as obesity and diabetes. This practice is already adopted for other goods, such as cigarettes and alcohol, which are significantly taxed in Brazil. According to the assumptions of microeconomics, the increase in the tax burden on a given item has the potential to reduce demand, which can act as an instrument of correction of market failures, in the cases mentioned, and of negative external consequences resulting from the consumption of products harmful to health.

From another perspective, Brazil has long adopted policies of concession of tax incentives aimed at promoting development and reduction of socio-regional inequalities, aimed at attracting investments and companies to less developed areas, such as the North and Northeast, through tax relief.<sup>2</sup> From the economic point of view, it is assumed that incentive to economic activity will correct distortions (from a second-best point of view) and result in increased levels of well-being (through generation of employment, circulation of income, increase in productive capacity, promotion of research & development etc.).

These two cases — sugar-sweetened beverage taxation and political tax incentives for development — are typical examples of the use of taxation as an instrument of economic regulation. In both examples, through the creation of tax rules, the State intervenes in the economy, either by discouraging behaviour (for example, consumption of certain goods, through the creation of regulatory taxes), or inducing another (as in attracting investments and companies to a given region, through tax incentives). In this sense, expressions such as “regulatory tax rules”<sup>3</sup> or “regulatory taxation”<sup>4</sup> have been adopted by the specialized literature to refer to the kinds of norms whose main objective is to regulate the economy, influencing/directing the economic behaviour of agents in service of government interest.

As can be seen, the regulatory purposes of the standards can be as diverse

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<sup>2</sup> An example of this are the tax incentives provided for in the National Development Policy Regional Tax, which provide a reduction in federal taxes, such as the Income Tax (IRPJ). BRASIL. Ministério do Desenvolvimento Regional. *Incentivos fiscais — apresentação*. Available at: [www.gov.br/mdr/pt-br/assuntos/fundos-regionais-e-incentivosfiscais/incentivos-fiscais](http://www.gov.br/mdr/pt-br/assuntos/fundos-regionais-e-incentivosfiscais/incentivos-fiscais). Accessed on: 16 Sept. 2021.

<sup>3</sup> SCHOUERI, Luís Eduardo. *Normas tributárias indutoras e intervenção econômica*. Rio de Janeiro: Forense, 2005.

<sup>4</sup> SEIXAS, Luiz Felipe Monteiro. *Tributação indutora e análise econômica do direito: uma investigação crítica*. Tese (doutorado em direito) — Universidade Federal de Pernambuco, Recife, 2017.

as possible, mainly directed at correcting market failures (such as reducing foreign shortfalls, stimulating the production of public goods or reducing competition/competition failures) and in achieving positive institutional objectives (such as promotion of development, reduction of social and regional inequalities, increase in the levels of formal employment, and creation of new companies, among others).

In general, Brazilian legislation provides some specific parameters for the creation of inductive tax rules, in particular for tax incentives. An example of this are the rules that provide criteria for the granting of tax incentives (such as the Federal Constitution of 1988 and the Fiscal Responsibility Law), which are, in essence, characteristic revenue waiver hypotheses.

On the other hand, national legal literature, despite its considerable focus on regulatory taxation, has commonly examined the legal-formal aspects of such norms. It is assumed (not always confirmed in practice) that when applied, regulatory tax rules will achieve the regulatory objectives intended. Here arises an elementary and essential question: Is a particular inductive tax rule, for a specific purpose, a sound instrument of economic regulation?

Currently, one of the main instruments adopted by public administration to assess the quality, feasibility and potential consequences of available regulatory alternatives is Regulatory Impact Analysis (RIA). In general, RIA has been discussed and applied mainly by regulatory agencies, due to the significant normative production of these bodies. On the other hand, there has not been, in Brazil, at least in a systematic way (not in specialized literature or legislation), a model or experience of Regulatory Impact Analysis focused on the tax area, despite tax rules being continuously adopted for regulations, as already exemplified.

In this light, we will investigate whether it is possible to develop or adapt a Regulatory Impact Analysis model to the regulatory tax norms in Brazil — and, if so, how. The research methodology employed is qualitative, bibliographic, documental and legislative, with an emphasis on interdisciplinary content involving the theory of economic regulation and Regulatory Impact Analysis, as well as the legal and economic aspects of taxation and tax rules (which includes law and economics literature on the topics).

The work was structured around two central axes. Section 2 examines the fundamentals, main concepts and theoretical and historical aspects related to inductive taxation (with emphasis on the Brazilian situation), in addition to presenting the historical evolution and the current context of Regulatory Impact Analysis in the international context and in Brazil. Section 3 has a

descriptive and propositional character, based on the theoretical framework developed to present the limits, possibilities and main components and elements for a potential Brazilian model of regulatory tax rules. Finally, the main conclusions and results of the research are presented.

## 2. Regulatory Taxation and Regulatory Impact Analysis: conceptual and theoretical aspects

Through review of specialized literature and bibliographic, documentary and legislative research, the following sections will present the fundamentals and main theoretical and conceptual reflections on induced tax rules and the Regulatory Impact Analysis, contributing to the discussions and propositions described.

### 2.1 *Regulation and taxation: on the concept and function of induced tax rules*

Economic science and, in particular, the theory of taxation (or economic theory of taxation) has long observed that there is no neutral tax system, i.e., taxation that does not result in distorting market effects. This is because, to a greater or lesser degree, all taxes affect economic behaviour.<sup>5</sup> This assumption, sometimes deliberately ignored in the legal field, is fundamental to understanding the role tax rules play in the social environment. Taxation affects decisions about what product to buy, what profession to choose, what investment to make, and what business model or venture develop.<sup>6</sup> Even personal decisions, such as family matters, marriage arrangements and place of residence, can be (and are) influenced by taxation.

From a financial point of view, the purpose of taxation is to raise funds. Since the advent of the so-called "Tax State" (which derives from the emergence of the Modern State) and to this day, Taxes represent the main source of financing for the State and its public policies.<sup>7</sup> Naturally, in terms of collection, taxation impacts behaviour, even if not purposely created for that purpose.

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<sup>5</sup> STIGLITZ, Joseph E. *Economics of public sector*. 3. ed. Nova York: W. W. Norton & Company, 2000. p. 518.

<sup>6</sup> On the topic, cf. CARVALHO, Cristiano. *Teoria da decisão tributária*. São Paulo: Saraiva, 2012.

<sup>7</sup> SEIXAS, Luiz Felipe Monteiro. *Tributação, finanças públicas e política fiscal: uma análise sob a óptica do direito e economia*. Rio de Janeiro: Lumen Juris, 2016. p. 25-31.

However, precisely by identifying the effects of taxation on economic behaviour, governments have created tax rules for purposes other than collection. For example, consider the creation of import taxes of certain goods, for the purpose of protecting/favouring the national industry; or the aforementioned selective taxes on cigarettes, alcohol or gambling (popularly known as “sin taxes”);<sup>8</sup> or the policy of granting tax incentives for the promotion of regional development, consolidated in Brazil from the 1960s.<sup>9</sup>

Under Brazilian tax law, this function became known as “extra-fiscal” (or “extra-fiscality”),<sup>10</sup> which contrasts with the “fiscal” (or “tax” collection) function.<sup>11</sup> In the context of extra-fiscality, we may identify an even more specific objective, namely, economic intervention. As already pointed out, the specialized literature began to adopt expressions such as “inducing tax rules” or “inducing taxation” (which can be translated in English by the expression regulatory taxation), to refer to those norms whose main objective is to regulate/intervene in the economy, influencing, in a mediate or immediate way, the behaviour of economic agents subject to governmental control.

Practical experience shows that regulation via taxation is commonly embodied in tax rules that create incentives/advantages or disincentives/aggravations. When granting a tax benefit for a company, in the event it adopts a certain measure (installation of an industrial hub in a given region, carrying out investments in research, development and technological innovation, etc.), the government encourages this behaviour through a regularity tax norm. On the other hand, the government can also discourage behaviour that it perceives as undesirable, by increasing the tax burden, as in the examples already mentioned, where there are negative consequences/health problems, such as with alcoholic beverages and cigarettes.

It may be concluded, therefore, that the main techniques of regulation via taxation derive from tax rules of incentive and disincentive. To distinguish taxation techniques — theoretically and practically — based on the nomenclature adopted in Brazil and foreign literature, the expressions

<sup>8</sup> On the topic, cf. VASQUES, Sérgio. *Os impostos do pecado: o tabaco, o álcool, o jogo e o fisco*. Coimbra: Almedina, 1999.

<sup>9</sup> For an overview of the history of inductive taxation in Brazil and in the world, cf.: LEE, R. Alton. *A history of regulatory taxation*. Kentucky: The University Press of Kentucky, 1973; Luís Eduardo Schoueri, *Normas tributárias indutoras e intervenção econômica*, op. cit., p. 109-126.

<sup>10</sup> On the topic, cf. BOMFIM, Diego. *Extrafiscalidade: identificação, fundamentação, limitação e controle*. São Paulo: Noeses, 2015; CORREIA NETO, Celso de Barros. *O avesso do tributo*. São Paulo: Almedina, 2014; LEÃO, Martha Toríbio. *Controle da extrafiscalidade*. São Paulo: Quartier Latin, 2015. (Série Doutrina Tributária v. 16).

<sup>11</sup> Luiz Felipe Monteiro Seixas, *Tributação, finanças públicas e política fiscal*, op. cit., p. 31-39.

“regulatory taxes” and “tax incentives” are used, the former intended to discourage certain conduct, the latter to encourage a certain behaviour.<sup>12</sup>

Notwithstanding the conceptual categories and theoretical analyses mentioned, there are no studies that seek to answer if a given regulatory tax rule, given the purpose for which it was created, corresponds to a sound instrument of economic regulation. From this preliminary questioning, other questions arise: are regulation techniques through taxation adopted in Brazil able to achieve the objectives they propose? Can the consequences (desired or otherwise) of a regulatory tax rule be estimated? It is possible to think of analysis and control mechanisms for the creation and assessment of regulatory taxation?

These questions have not received the attention of researchers (especially those in the legal field) in Brazil in recent years. In truth, there are few critical analyses of taxation as an instrument of economic intervention. In this regard, it is necessary to think of regulatory taxation as what, in fact, it is: a regulation technique. And as such, it must (or should) be examined based on its degree of effectiveness, efficiency and adequacy with regard to the regulatory problems it seeks to solve. This is why such taxation should be continually evaluated through the current tools discussed in the scope of regulation theory, with special emphasis on Regulatory Impact Analysis, whose main characteristics and foundations are discussed below.

## *2.2 Evolution and trends of Regulatory Impact Analysis in the international context and in Brazil*

From the 1990s onwards, the Regulatory State model emerged in Brazil, after the privatization policy initiated in the Collor government and consolidated in the FHC administration, following international practices verified decades before. From this movement, new regulatory agencies were created for different economic sectors, such as oil and gas, electricity, telecommunications, etc., in addition to improving the regulatory performance of existing bodies, which regulated areas such as competition and market capital.<sup>13</sup> The period between the 1990s and 2010s was marked by

<sup>12</sup> On the conceptual distinction between “regulatory taxes” and “tax incentives”, cf. *ibid.*, p. 38-39.

<sup>13</sup> On the topic cf.: DELORME, Luiz Carlos. *Relações entre Estado e mercado: reformas e agências reguladoras no Brasil, 1991-2013*. In: EARP, Fabio Sá; BASTIAN, Eduardo F.; MODENESI, André de Melo (Org.). *Como vai o Brasil? A economia brasileira no terceiro milênio*. RJ: Ímã Editorial, 2014. Available at: <https://comovaiobrasil.pressbooks.com/chapter/relacoesentre-estado-e-mercado-reformas-e-agencias-reguladoras-no-brasil-1991-2013/>. Accessed on: 16 Sept. 2021; MOREIRA, Egon Bockman. *Passado, presente e futuro da regulação econômica no Brasil*. *Revista de Direito Público da Economia*, v. 44, p. 87-118, 2013.

the definition, modelling and consolidation of regulation experience in Brazil, with different mistakes and successes. From this perspective, regulation has gained (and continues to gain) a prominent role in Brazilian economic policy and public administration. Thus, a continuous effort is needed for its improvement as an instrument of intervention in the economy.

But this Brazilian experience is not isolated, influenced, as it is, by international practices adopted by other countries, especially in the context of the Organization for Economic Co-operation and Development (OECD). The OECD emerged in the 1990s as the main international body for the dissemination of discussions, studies, recommendations and new regulation practices.<sup>14</sup> Brazil incorporated such trends, including the main guidelines related to Regulatory Impact Analysis.

From the context of the OECD (and its influence on other countries), it is necessary to understand the movement of change and evolution that has taken place in recent decades with regard to regulation, which, in essence, represents the set of normative acts through which Governments establish requirements for economic agents (companies, consumers, individuals, etc.).<sup>15</sup> Regulation has gained a prominent role in economic theory, since the first half of the last century, based on discussions initiated within the scope of the neoclassical school and the advent of State welfare models, which were developed (and critiqued) throughout the 20th century.<sup>16</sup> From such a perspective, in its classical approach, the main function of economic regulation is to correct market failures, including externalities, information asymmetries, competition/competition failures, and provision of public goods, among others,<sup>17</sup> to stimulate the efficiency of the market, from a second-best point of view. This interpretation remains valid, pursued by different governments in the exercise of their regulatory function.<sup>18</sup>

<sup>14</sup> Available at: [www.oecd.org/gov/regulatory-policy/](http://www.oecd.org/gov/regulatory-policy/). Accessed on: 16 Sept. 2021.

<sup>15</sup> OECD. *The OECD report on regulatory reform: synthesis*. Paris: OECD, 1997. p. 6.

<sup>16</sup> For an analysis of the economic and political context of regulation and its evolution during the 20th century, see CHANG, Ha-Joon. The economics and politics of regulation. *Cambridge Journal of Economics*, v. 21, no. 6, p. 703-728, 1997.

<sup>17</sup> BALDWIN, Robert; CAVE, Martin; LODGE, Martin (Ed.). *Understanding regulation: theory, strategy, and practice*. 2. ed. Nova York: Oxford University Press, 2013. p. 12-22.

<sup>18</sup> Currently, there is a tendency to attribute other purposes to regulation, in addition to correction of market failures. In this sense, Cass R. Sunstein lists as justifications of regulation: correction of market failures, redistribution of resources, promotion of desires and collective aspirations, combating the social subordination of certain groups, the need for interference in the process of formation of endogenous preferences and protection of rights of future generations. SUNSTEIN, Cass R. *After the rights revolution: reconceiving the regulatory state*. Cambridge: Harvard University Press, 1991. p. 141.

However, partly due to criticism in the light of experiences in the 1970s and 1980s in different countries,<sup>19</sup> discussions gained a new character from the end of the 1980s, especially with regard to the necessity, risks and costs involved. In fact, it was found that regulation, when badly employed or exercised without technical, rational and empirical criteria, can become a real obstacle to achieving the goals of economic and social well-being for which it was designed, due to factors such as: excess; impeding innovation; creation of unnecessary barriers to the exercise of economic activities, competition, investment and the market in general.<sup>20</sup> On the other hand, still on the risks and costs of regulation, it is possible to point out problems such as: the speed with which technological innovations arise, causing the constant risk redundancy; the difficulties encountered in institutional coordination between the different bodies and levels of government; pressure from interest groups/lobbying; the inadequacy of the regulatory design when compared to the intended purpose; the costs of regulation for economic agents (businesses and consumers).

In this context, the OECD developed studies related to good governance practices and regulatory improvements. The aim is to improve past experiences, in order to avoid regulatory problems as described above. From such a perspective, “regulatory improvement” represents a set of measures aimed at increasing the quality, improving performance and effectiveness, reducing costs and bureaucratic formalities. Regulatory improvement is linked to regulatory reform programs, which may result in the review of a specific norm, the complete reformulation of the regulation or regulatory framework of a particular sector, or, broadly, in the improvement of the instruments and processes of regulation of the government. In this sense, sound regulatory practices converge (including in Brazil), with measures such as: professional training; inventory management; transparency and regulatory governance; Institution of Regulatory Impact Analysis and Regulatory Result Analysis; supervision and monitoring of implemented initiatives; and social participation mechanisms. The purpose, then, becomes better, necessary regulation.

RIA appears in this environment of regulatory improvement. In essence, it consists of a procedure aimed at evaluating the quality of a regulatory norm. For this, it starts from the definition of a problem that (in theory) would require government intervention. From there, the RIA is considered a process of

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<sup>19</sup> Ha-Joon Chang, *The economics and politics of regulation*, op. cit., p. 708-716.

<sup>20</sup> OECD, *The OECD report on regulatory reform*, op. cit., p. 9-10.

evaluation of the regulatory measure, especially with regard to available changes, intended objectives and possible consequences.<sup>21</sup> One of its main purposes is to guide the decision-making processes of regulatory activity. Often, such actions are decided in environments of uncertainty, and limited information.<sup>22</sup>

The contemporary Brazilian experience with regard to RIA demands a more detailed description, due to its incorporation in the national legislation, as of 2019. The first rule was Provisional Measure No. 881, of April 30, 2019, which “Establishes the Declaration of Economic Freedom Rights, free market guarantees, regulatory impact analysis, and other measures”. In art. 5, the MP n° 881/2019 expressly provides RIA for the creation or alteration of normative acts that may affect economic agents.<sup>23</sup> MP No. 881/2019 was later converted into Law No. 13,874/2019, which maintained the same rule regarding the obligation of RIA. In the same sense, Law No. 13,848/2019, art. 6, required RIA to create or alter normative acts which are in the interest of economic agents, consumers or service users, within the scope of regulatory agencies.<sup>24</sup>

<sup>21</sup> BRASIL. Subchefia de Análise e Acompanhamento de Políticas Governamentais et al. *Diretrizes gerais e guia orientativo para a elaboração de Análise de Impacto Regulatório* — AIR. Brasília, DF: Presidência da República, 2018. p. 23. Available at: [www.gov.br/casacivil/pt-br/centrais-deconteudo/downloads/diretrizes-gerais-e-guia-orientativo\\_final\\_27-09-2018.pdf/view](http://www.gov.br/casacivil/pt-br/centrais-deconteudo/downloads/diretrizes-gerais-e-guia-orientativo_final_27-09-2018.pdf/view). Accessed on: 16 Sept. 2021.

<sup>22</sup> OECD. *Regulatory Impact Analysis: a tool for policy coherence*. OECD, 2009. p. 17.

<sup>23</sup> MP no 881/2019. Art. 5. Proposals for editing and amending normative acts of interest to economic agents or users of the services provided, created by a body or entity of the federal public administration, including autonomous entities and public foundations, will be preceded by a regulatory impact analysis, which will contain information and data on the possible effects of the normative act to verify the reasonableness of its economic impact. Single paragraph. Regulation will provide for the start date of the requirement referred to in the main clause, and the content, the methodology of regulatory impact analysis, the minimum requirements to be examined, the cases in which their performance will be mandatory and the circumstances in which it may be waived.

<sup>24</sup> Law No. 13,848/2019. Art. 6. The adoption and proposals to amend normative acts of interest to general economic agents, consumers or users of the services provided will, in terms of regulation, be preceded by the carrying out a Regulatory Impact Analysis (RIA), which will contain information and data on the possible effects of the normative act.

§ 1 Regulation will provide for the content and methodology of the RIA, on the minimum requirements to be the object of examination, as well as on the cases in which it will be mandatory and those in which it can be dispensed with.

§ 2 The internal regulations of each agency shall provide for the operation of the RIA in its scope.

§ 3 The board of directors or the collegiate board will manifest itself, in relation to the RIA report, on the adequacy of the proposed normative act to the intended objectives, indicating whether the estimated impact recommend its adoption, and, when applicable, what supplementary measures are needed.

§ 4 The manifestation referred to in § 3 will integrate, together with the RIA report, the documentation to be made available to interested parties for consultation or public hearing, in case the board of directors or the collegiate board of directors decides for continuity of the administrative procedure.

§ 5 In cases where the RIA is not carried out, a technical document or equivalent document that supported the proposed decision must be supplied.

Subsequently, in 2020, Decree no. 10,411, 30 June 2020, aimed at regulating RIA at the federal level, according to the requirements of Laws no. 13,874/2019 and no. 13,848/2019, which is currently the main Brazilian RIA standard. Decree no. 10,411/2020 describes: basic concepts related to RIA; cases in which the RIA is mandatory, not applicable or expendable; components of the RIA report; methodologies that must be used in RIA; rules of social participation; guidelines applicable to Regulatory Result Analysis; deadlines for the adoption of the RIA at the federal level (mandatory for the Ministry of Economy, federal regulatory agencies and to *Inmetro* since April 15, 2021 and for all other bodies and entities of the direct, autonomous and foundational federal public administration as of October 14, 2021).

Among the conclusions that can be identified, at home and abroad, firstly, is the importance of institutionalizing the procedure in regulatory practice (something Brazil has performed gradually). This goes beyond the need to understand the instrumental character of RIA, since it represents a tool for systematization of reflection that brings elements to the decision-making processes, not the decision itself. On the other hand (also observed in Brazil), the institutionalization of RIA must occur gradually and progressively, taking into account the characteristics of the environment in which it will be implemented. However, although requiring time, the procedures must have a degree of technicality and efficiency that allows monitoring (and response to) regulatory problems for which it is required.<sup>25</sup> Naturally, the challenges are many, but Brazil is able to meet contemporary demands with regard to sound regulatory practices at an international level.

### 3. Contributions to an Impact Analysis Model for regulatory tax rules

Having examined the main concepts and context of regulatory taxation and RIA, we now discuss whether (and how) it is possible to adapt the

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<sup>25</sup> Antônio Porto, Nuno Garoupa and Sérgio Guerra, in the work “Análise de Impacto Regulatório: dimensões econômicas de sua aplicação”, emphasize that, despite the sophistication of the methodology, there is room for the occurrence of deviations, especially with regard to the application of economic theories in RIA, which is why it is important that the regulator be prepared to identify these potential deviations and act to reduce their effects, improving the use of the RIA methodology. PORTO, Antônio José Maristrello; GAROUPA, Nuno; GUERRA, Sérgio. *Análise de Impacto Regulatório: dimensões econômicas de sua aplicação. Economic Analysis of Law Review*, v. 10, n. 2, p. 173-190, maio/ago. 2019. Available at: <https://portalrevistas.ucb.br/index.php/EALR/article/view/10524>. Accessed on: 16 Sept. 2021.

RIA methodology for tax regulation. The investigation is divided into two central topics: i.) an assessment of the limits and possibilities of building and applying an RIA model for Brazil through analysis and interpretation of current legislation on the subject; ii.) a proposed basic structure and the main elements and criteria for a Brazilian RIA model of regulatory tax rules.

### 3.1 *Limits and possibilities of Impact Analysis of Regulatory taxation in Brazil*

Prior to proposing criteria for a Brazilian model for regulatory taxation, it is essential to identify, first, current limitations and obstacles in such cases; and, secondly, the needs and possibilities, from the perspective of positive Brazilian law, and as an instrument of regulatory governance.

As discussed, from the legislative point of view, *Provisional Measure no. 881/2019* (which became Law No. 13,874/2019) institutionalized RIA for the federal public administration. Similar content was provided for in Law no. 13,848/2019, which prescribes the requirement of RIA within the scope of regulatory agencies. Subsequently, Decree no. 10,411/2020, regulated the RIA at the federal level.

Specifically, regarding Law no. 13,874/2019, can it be applied to different areas of law? Although the aforementioned is, in essence, a rule of economic law, due to its breadth and interdisciplinarity it also applies to other legal branches, such as civil, business, labour and urban law.<sup>26</sup> In this sense, Chapters I, II and III of the Economic Freedom Act (re. arts. 1 to 4) provide for general rules on economic law, instituting the principles and rights of economic freedom, as well as guarantees of free enterprise, especially with regard to the exercise of economic activity by private agents. However, Law no. 13,874/2019 includes an important caveat regarding the aforementioned Chapters/articles — namely, that they do not apply to matters related to tax and financial law.<sup>27</sup> A hasty interpretation may lead us to conclude that taxation-oriented RIA would be included in such a restriction. In fact, the rule

<sup>26</sup> It is the law itself, in art. 1, § 1, which outlines its scope: “The provisions of this Law will be observed in the application and interpretation of civil, business, economic and urban planning and work in legal relationships that fall within its scope of application and in public management, including the exercise of professions, commerce, commercial boards, public records, transit, transportation and environmental protection”.

<sup>27</sup> Law no. 13,873/2019. Art. 1 [...].

§ 3 The provisions of this Chapter and Chapters II and III of this Law do not apply to tax and financial law, except for the provisions of item X of the main clause of art. 3 of this Law.

that requires AIR for the federal public administration is set out in Chapter IV/art. 5, sole paragraph, not included in the restrictions the law prescribes with respect to the financial and tax law (applicable to Chapters I, II and II/ arts. 1, 2, 3 and 4). In summary: from the legal-formal point of view, there is no obstacle to carrying out a specific RIA for regulatory taxation.

With respect to Decree no. 10,411/2020, as discussed in section 2.2, the standard in question presents different criteria or RIA, including its content, the minimum requirements to be subject to examination, the cases in which it will be mandatory and the cases in which it may be dismissed. Although it obliges the bodies of direct and indirect federal public administration to implement RIA, with regard to tax matters it required that: there is only the obligation to carry out the RIA for normative acts that establish or modify an accessory obligation.<sup>28</sup> In tax law, ancillary obligations are instrumental, in effect, i.e., not directly related to tax payment,<sup>29</sup> such as filling in declarations, accounting-tax bookkeeping, issuing invoices, and sending information to the information systems of the Treasury, among others.<sup>30</sup>

A second restriction also provided for in Decree no. 10,411/2020 — which could, in theory, limit the scope of the RIA — stems from the provision that it does not apply to normative acts that provide for budget and financial execution.<sup>31</sup> As discussed in section 2.1, the main regulation techniques via taxation correspond exactly with the granting of tax incentives, a tax policy measure that has repercussions for the public budget and, depending on the concessive modality, derives from a normative act of the Executive Branch (see the case of incentives granted by the regional development superintendencies, such as *Sudene*). Regarding the restriction imposed on normative acts that provide for budget and financial execution, there is little or no chance federal

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<sup>28</sup> Decree No. 10,411/2020. Art. 3 [...].

§ 1 In the scope of the tax and customs administration of the Union, the provisions of this Decree apply only to normative acts that establish or modify an accessory obligation.

<sup>29</sup> CTN. Art. 113. The tax obligation may be primary or ancillary.

§ 1 The main obligation arises with the occurrence of the taxable event, its object the payment of a tax or pecuniary penalty and it is extinguished together with the credit arising therefrom.

§ 2 The accessory obligation arises from the tax legislation directed at the benefits, positive or negative, provided therein in the interest of collection or inspection of taxes.

<sup>30</sup> About the topic, cf. SCHOUERI, Luís Eduardo. *Direito tributário*. 2. ed. São Paulo: Saraiva, 2012. E-book.

<sup>31</sup> Art. 3. The creation, alteration or revocation of normative acts of general interest for agents economic agents or users of the services provided, by federal public, autonomous and foundational administrative entities will be preceded by RIA.

§ 2 The provisions of the main clause do not apply to normative acts: [...].

III — that provide for budgetary and financial execution; [...].

public administration bodies respond directly by granting tax incentives to carry out RIA, at least in the current scenario.

In this sense, in view of the restrictions provided for in Decree no. 10,411/2020 regarding the limits of RIA in tax and financial-budgetary matters, there is a tendency, at least on the part of the Executive federal government (responsible for issuing the decree) to restrict the potential for RIA in these cases.<sup>32</sup> The reasons are not clear and it was not possible to identify legal or regulatory justification for doing so. The hypothesis sustained is that such restrictions do not find legitimacy in the legal system and the Brazilian regulatory environment. It remains to be seen.

First of all, it should be noted that Law no. 13,874/2019 does not limit RIA within the scope of regulatory taxation. On the contrary. As examined, the Economic Freedom Act could restrict the RIA in matters related to tax and financial law (as it did in Chapters I, II and III/arts. 1, 2, 3 and 4), but it did not. Thus, we conclude that there is full legal authorization to adopt the RIA in tax-regulatory matters. The restriction provided for in Decree no. 10,411/2020 is of an infra-legal nature, arising from a normative act presented by the Executive Power, which does not have the force of law. It may be stated, also, that such limitation exceeds the exercise of regulatory power, which is why it may be considered illegal in this respect.

On the other hand, and in a second sense, the limitations in Decree no. 10,411/2020 on RIA in tax matters goes against the sound regulatory governance practices. As discussed in section 2.1, taxation has long (and widely) been used as an instrument of economic regulation, either through the creation of regulatory taxes or the granting of tax incentives. Regarding both tax/fiscal policy and economic intervention, it is (or should be) expected that any regulatory practices via taxation are supported by technical studies that allow the assessment its real need, usefulness, efficiency and effectiveness. In this sense, the RIA allows not only examination of taxation as an instrument of regulation, but also institutionalizes it at the federal level, creating an obligation for direct and indirect administration bodies dealing with regulatory matters (including tax rules).

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<sup>32</sup> It is worth mentioning that the Federal Revenue Service, when disciplining the RIA procedures internally (through the recent Ordinance RFB nº 20, of April 5, 2021), repeated the same restrictions provided for in Decree No. 10,411/2020, as provided for in arts. 6 to 8. BRASIL. Receita Federal do Brasil. *Portaria RFB nº 20, de 05 de abril de 2021*. Provides for administrative acts within the scope of the Secretaria Especial da Receita Federal do Brasil. Brasília: Receita Federal do Brasil, 2021. Available at: <http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?naoPublicado=&idAto=116700&visao=original>. Accessed on: 16 Sept. 2021.

Thirdly, and specifically with regard to tax incentives, the restrictions of Decree no. 10,411/2020 on RIA — mainly those related to financial and budget execution — meet the basic rules of fiscal responsibility in terms of foregone revenue/tax expense. Currently, whether due to constitutional provision<sup>33</sup> or as a result of the determinations provided for in Supplementary Law no. 101/2000,<sup>34</sup> the granting of any tax incentive should be accompanied by an estimate of its budgetary and financial impact. Such rules were created to confer a greater degree of predictability and control of policies for granting tax incentives. Although the RIA does not have the immediate scope to measure the impact financial and budgetary costs, the administrative costs of possible regulatory requirements should be evaluated, which would include, for example, the estimates of revenue waivers arising from tax incentives. Limiting the RIA in this respect, therefore, is not supported in terms of transparency, governance and fiscal responsibility.

In view of the above, as a preliminary reflection, three possible solutions were identified to make RIA viable in tax matters. The first is that the bodies that deal with regulatory taxation (either directly or indirectly) carry out RIA spontaneously in these cases. This solution is difficult in terms of practical application, although there is no legal prohibition to do so. The reason is simply lack of incentives for the federal public administration to adopt such procedures, mainly due to the limits imposed by Decree no. 10,411/2020 (which, it should be noted, does not find legal support).

A second solution is the modification of Decree no. 10,411/2020, to allow unrestricted RIA on tax (as well as financial and budget) matters. In other

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<sup>33</sup> FC/1988. Transitional Constitutional Provisions Act. Art. 113. The legislative proposal that creates or changes mandatory expenditure or revenue waiver must be accompanied by the estimate of its budgetary and financial impact.

<sup>34</sup> Art. 14. The granting or expansion of an incentive or tax benefit from which a waiver of revenue shall be accompanied by an estimate of the budgetary-financial impact in the year in which it shall commence and in the following two years, complying with that provided for in the budget guidelines law and at least one of the following conditions:

- I — demonstration by the bidder that the waiver was considered in the revenue estimate of the budget law, in the form of art. 12, and that it will not affect fiscal outcome targets provided for in the specific annex of the budget guidelines law;
- II — be accompanied by compensatory measures, in the period mentioned in the main clause, through the increase in revenue, resulting from the increase in tax rates, expansion of the calculation, increase or creation of tribute or contribution.

§ 1 The waiver comprises amnesty, remission, subsidy, presumed credit, granting exemptions on a non-general basis, change in the rate or change of the calculation basis that implies a detailed reduction of taxes or contributions, and other benefits that correspond to differentiated treatment.

words, any tax rule that has regulatory purposes or effects must be preceded by RIA, through the directly or indirectly responsible administration body. Naturally, this initiative will demand discussions and deliberations by the Executive Power. In line with the trend of public sector efficiency and the scenario of regulatory improvement internationally, it is a minimum expectation that regulatory initiatives will be endowed with technical and rational criteria in their creation and execution - no different in the tax area. Hence, the arguments for a change in the Decree, for legal, regulatory or tax reasons, in the previous paragraphs.

Finally, a third solution, more incisive and with potential to resolve the limitations described, would correspond to legislative change, whether that of Law No. 13,874/2019 itself, or a related law, with the express provision that RIA must also be carried out for regulations on tax and financial-budgetary content. Such a change would (at least in theory) prevent the Executive Branch restricting the scope of RIA in these cases, as per Decree No. 10,411/2020.

The political scenario revived the debate around tax reform, proving favourable for the creation of a standard such as the one described above. Among the tax reform proposals under discussion, besides creation of the Goods and Services Tax (the IBS, replacing five other taxes: PIS, Cofins, IPI, ICMS and ISS), there is a Selective Tax, of extra-fiscal nature, aimed at discouraging consumption of certain consumer goods (e.g., cigarettes and alcohol). As pointed out in the Report of the Temporary Joint Committee of the Tax Reform, the Selective Tax should be levied on goods and services that result in some kind of negative externality (with the purpose, therefore, of correcting market failures), of an evident regulatory character.<sup>35</sup>

Although the justifications for such a tax (as, indeed, for other regulatory taxes) are rational, one cannot fail to assess their real degree of adequacy, efficiency and effectiveness as a technique of economic regulation. Thus, discussions around tax reform could incorporate the RIA as an instrument for evaluating the hypotheses of regulation through taxation, determining the requirement for its realization by competent bodies.

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<sup>35</sup> BRASIL. Câmara dos Deputados/Senado Federal. *Relatório Final da Comissão Mista da Reforma Tributária — PEC nº 45/2019 e nº 110/2019*. Brasília: Câmara dos Deputados/Senado Federal, 2021. p. 106. Available at: <https://legis.senado.leg.br/sdleg-getter/documento/download/39670bbc-5cab-4e9a-adc5-ed34b80a7da0>. Accessed on: 16 Sept. 2021.

### 3.2 *A Brazilian Impact Analysis model for regulative tax norms*

As stated, this study concerns the feasibility of creating an RIA model of regulatory tax norms, as well as the decision-making process and implementation of good practices related to tax-regulatory policy within the government, its bodies and respective technical staff.

The research is intended to help public agents, presenting the foundations and the main elements and criteria for a Brazilian RIA model of regulative taxation, to be consolidate in a final report or guide, adopted by regulatory bodies responsible for a particular program or regulatory policy. Such a proposal is in line with the current profile of the federal public administration, focused on the improvement of tools for evaluating regulatory practices and public policy.

Firstly, it is worth noting that a final RIA report in tax matters must meet the criteria required by Brazilian law, in particular those described in art. 6 and other items of Decree no. 10,411/2020.<sup>36</sup> As provided for in the sole paragraph of art., depending on the degree of complexity, scope and repercussion of the subject matter of the RIA, the content of the report can be detailed and supplemented with additional information related to the specific case under

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<sup>36</sup> Decree No. 10,411/2020. Art. 6. The RIA will be completed by means of a report containing:

- I — objective and concise executive summary, which must use simple language accessible to the general public;
- II — identification of the regulatory problem to be solved, with the presentation of its causes and its extent;
- III — identification of economic agents, users of services provided and others affected by the identified regulatory issue;
- IV — identification of the legal basis that supports the action of the body or entity regarding the identified regulatory problem;
- V — definition of the objectives to be achieved;
- VI — description of possible alternatives to face the regulatory problem identified, considering the options of non-action, normative solutions and, whenever possible, non-normative solutions;
- VII — exposure of the possible impact of the identified alternatives, including its regulatory costs;
- VIII — considerations regarding the information and manifestations received for the RIA in potential procedures of social participation or other procedures of receiving subsidies of those interested in the matter;
- IX — mapping of international experience regarding the measures adopted for the resolution of the identified regulatory problem;
- X — identification and definition of the effects and risks arising from the creation, alteration or revocation of the normative act;
- XI — comparison of alternatives considered to resolve the regulatory problem identified, accompanied by a reasoned analysis containing the specific methodology chosen for the specific case and the alternative or combination of alternatives suggested, considered more appropriate for solving the regulatory problem and achieving the objectives intended; and
- XII — description of the strategy for implementing the suggested alternative, accompanied by the forms of monitoring and evaluation to be adopted and, when applicable, evaluation regarding the need to change or revoke current rules.

examination.<sup>37</sup> Such criteria must be adapted to the characteristics of the regularity tax norm analysed. To this end, knowledge of the legal foundations and economic effects of the tax norm (be it a regulatory tax or a tax incentive) is fundamental on the part of the analyst/regulatory body involved, in particular for interventionist purposes. This is because the dynamics of taxation not only have repercussions on the economic sphere of regulated agents, but require an understanding of the legal-tax system (in particular, the constitutional laws of tax jurisdiction combined with the rules of regulatory competence), of the different taxes that can serve as regulatory instruments, and the reflexes of regulatory taxation from a financial-budgetary perspective (which gains greater relevance in the case of tax incentives), among other aspects.

Still more, concerning an RIA model of regulatory taxation, a central component is the choice of methodology that will be used in the analysis, especially with regard to the impact of regulatory alternatives. Decree no. 10,411/2020 itself lists the methodologies recommended in a non-exclusive list (article 7 and items): i) multicriteria analysis; ii) cost-benefit analysis; iii) cost-effectiveness analysis; iv) cost analysis; v) risk analysis; and vi) risk-risk analysis. Accordingly, re. Decree No. 10,411/2021 (art. 7, § 1), the choice of methodology must be justified and present a comparison between the suggested alternatives. On the other hand, more than one methodology may be adopted in a same RIA, depending on the nature of the regulatory problem and the variables involved.

In terms of tax regulation, respecting its nature and characteristics, with regard to RIA potential for regulatory taxation, two methodologies need highlighting — cost-benefit analysis and multi-criteria analysis.<sup>38</sup>

The cost-benefit analysis, widely adopted in the scope of evaluation of public policies and regulatory alternatives, is commonly aimed at examining the social utility/return in terms of well-being of each option.<sup>39</sup> Specifically in the case of regulation via tax incentives (where there is granting of tax

<sup>37</sup> For a breakdown of the elements that must be included in the RIA report, cf. BRASIL. Ministério da Economia. *Guia para elaboração de Análise de Impacto Regulatório (AIR)*. Brasília, DF: Presidência da República, 2021. p. 31-49. Available at: [www.gov.br/economia/pt-br/acesso-a-informacao/reg/guias-e-manuais/referencias-e-bibliografia-guia-air/guia-de-air\\_vfinal\\_150421.pdf](http://www.gov.br/economia/pt-br/acesso-a-informacao/reg/guias-e-manuais/referencias-e-bibliografia-guia-air/guia-de-air_vfinal_150421.pdf). Accessed on: 16 Sept. 2021.

<sup>38</sup> It will be the responsible manager/analyst or regulatory body to assess the relevance and feasibility of adopting other methodologies (including jointly) in an RIA of eventual regulatory tax policy.

<sup>39</sup> Brasil, Ministério da Economia, *Guia para elaboração de Análise de Impacto Regulatório (AIR)*, op. cit., p. 37-39.

advantages to modify the economic behaviour of agents involved, stimulating desirable conduct), cost-benefit analysis is highlighted, owing to the nature of the regulation technique. Such incentives represent, in essence, a cost to the government, which is why it is also called “tax expense”<sup>40</sup> or “foregone revenue”.<sup>41</sup> It is minimally expected (or should be) that tax incentives result in benefits in terms of social welfare, which should be related to the regulatory problem/objective for which the incentive was created (e.g., employment generation, investment attraction, economic/industrial development etc.). In this sense, the evaluation of a tax incentive policy should be performed by comparing costs (derived from the waiver of revenue) and potential benefits — using a typical cost-benefit analysis (and similar methodologies). Through this methodology, possible net gains (in terms of well-being) resulting from the granting of incentives can be measured, and compared with the counterfactual scenario where incentives were not granted. Still, it should be highlighted that, as already noted in section 3.1, the granting of any tax incentive must be accompanied by an estimate of its budgetary and financial impact, due to the provision contained in art. 113 of the ADCT and in art. 14 of the Fiscal Responsibility Law. In terms of cost-benefit analysis of tax incentives, and given the environment of uncertainty and informational limitations, it is essential that restrictions/budget limits are obeyed — to efficiently measure the effects of incentives on the budget over time, and therefore consequences with regard to compliance with other public policies and institutional obligations.

From another perspective, and still in relation to the RIA methodologies of regulatory taxation, multi-criteria analysis is highlighted, especially with regard to intervention via regulatory taxes, which characteristically discourage certain economic behaviour, by increasing the tax burden. The multi-criteria analysis allows the comparison of available alternatives, based on their performance, adopting specific criteria for that.<sup>42</sup> Each of the listed criteria receives a score/index and a rating based on the expected contribution to achieving the defined objectives. One of the advantages of analysing multicriteria is the possibility of incorporating not only technical and economic

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<sup>40</sup> An adaption of the expression in English tax expenditure, which is adopted from the 1960s. Luiz Felipe Monteiro Seixas, *Tributação indutora e análise econômica do direito*, op. cit., p. 172-173.

<sup>41</sup> The expression “renunciation of revenue” is adopted mainly in Supplementary Law no. 101/2000 (Fiscal Responsibility Law).

<sup>42</sup> Brasil, Subchefia de Análise e Acompanhamento de Políticas Governamentais et al., *Diretrizes gerais e guia orientativo para a elaboração de Análise de Impacto Regulatório* — AIR, op. cit., p. 52.

aspects, but also social, behavioural, environmental variables, etc., whose effects may be difficult to measure, but relevant to the objectives intended by the regulator. In addition, the multi-criteria analysis makes it possible to define and explain in an objective and transparent way the criteria that will be applied to compare the possible alternatives, notwithstanding these criteria are qualitative, in addition to adding distribution questions to the analysis. Specifically in the case of regulatory taxes, it should be noted that, as its main purpose is to discourage certain conduct (commonly related to the existence of external negatives, e.g.: pollution; harmful effects of cigarettes or alcoholic beverages, etc.), social, behavioural and environmental issues, among others, must be weighed in an eventual RIA report. Thus, a multi-criteria analysis is instructive in such cases.

In addition to the basic components and choice of the appropriate methodology for the elaboration of a RIA tax report, and based on the specific related elements and concepts, below is a checklist of questions for the evaluation and monitoring of a hypothetical regulatory tax rule, to assist the manager/regulatory body responsible for preparing the RIA. The checklist first presents considerations related to the RIA of broadly regulatory taxation and, subsequently, specific criteria and questions related to tax incentives and/or regulatory taxes:

### Broad considerations and questions for RIA of regulatory taxation<sup>43</sup>

- What is the regulatory problem that the regulatory tax rule aims to solve?
- What is the context of the problem?
- What causes the problem?
- What is the extent or magnitude of the problem (local, regional or national)?
- What is the expected evolution of the problem in the future if nothing is done?
- Present, if possible, an international comparison of the problem.

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<sup>43</sup> Based on the following references: *ibid.*, p. 101-104; NEW ZEALAND. New Zealand Treasury. *Guidance note: best practice impact analysis*. Nova Zelândia, 2017. p. 4-24. Available at: [www.treasury.govt.nz/sites/default/files/2018-03/ia-bestprac-guidance-note.pdf](http://www.treasury.govt.nz/sites/default/files/2018-03/ia-bestprac-guidance-note.pdf). Accessed on: 16 Sept. 2021.

- Which groups are being affected by the regulatory issue?
- How does the problem directly or indirectly affect each of the groups?
- Do affected groups contribute to the maintenance or aggravation of the problem?
- Is there any change in behaviour or measure that these groups could take to avoid or minimize the effect of the change.
- How are the effects of the problem evolving for each group? What are the prospects if nothing is done?
- What is the legal basis that authorizes the creation of the regulatory tax norm?
- What are the intended objectives of the regulatory tax rule?
- Are the objectives directly related and proportional to the regulatory problem?
- What are the intended results and expected impact of the regulatory tax rule?
- Present the relationship between the cause(s) of the problem, the proposed tax rule and expected rule.
- Research whether there are other similar regulatory alternatives (tax or not) already implemented in Brazil or in other countries, recognized as success stories.
- What is the main impact (economic, social, environmental, etc.) expected (positive and negative, desirable and undesirable, direct and indirect)?
- What are the likely benefits of the regulatory tax rule? And which groups will benefit? How will these benefits be distributed among groups?
- What are the likely costs of the regulatory tax rule? Which groups will incur these costs? How will these be distributed?
- Does the regulatory tax rule result in benefits that are superior to the alternative of not intervening?
- Why the regulatory tax rule over other actions (including not intervening)?
- Present, if any, the estimated period of validity of the regulatory tax rule.
- Present, when applicable, the cost estimates of the standard regulatory tax, including financial-budgetary and administrative costs.
- How will the triggering tax rule be implemented?
- Is there a need for a period of transition or adaptation for the agents and/or impacted groups?

- Does the regulatory tax rule need some inspection/monitoring?
- How will monitoring be carried out and what will be the indicators of this monitoring throughout the implementation?
- Subsequently, how will the results be evaluated?
- How will transparency and the publication of information and data function?
- What will be the standard control mechanisms adopted for the regulatory tax?

### Specific questions regarding tax incentives and/or regulatory taxes<sup>44</sup>

- Would economic behaviour change regardless of the existence of the tax incentive or regulatory tax (for example, particular investment made with or without a financial incentive)?
- Would the tax incentive or regulatory tax disadvantage other agents or groups (for example, companies that were already established in a certain region before the granting of an incentive)?
- In the case of promotion of a certain economic activity, during and after the effects of the tax incentive, will there be a possibility to obtain tax revenue arising from the incentivized activity? If so, is it possible to estimate?
- In the case of the imposition of a regulatory tax, will it also be possible to increase revenue levels? If so, to what extent?
- Could the economic activity/agent which benefit from the tax incentive or whose behaviour is discouraged by the regulatory tax generate positive externalities (eg: direct jobs, new technologies, professionalization of human capital, replacement of imports, infrastructure improvements, industrialization or stimulus to industry, reduction of pollution, improvements in levels of well-being resulting from reduction of pollution, improvements in levels of well-being resulting from the reduction of pollution and consumption of harmful products, increase in tax revenue, among others)?

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<sup>44</sup> Based on the following references: JAMES, Sebastian. *Tax and non-tax incentives and investments: evidence and policy implications*. World Bank Group, 2013. p. 33. Available at: <https://ssrn.com/abstract=2401905>. Accessed on: 16 Sept. 2021; Luiz Felipe Monteiro Seixas, *Tributação indutora e análise econômica do direito*, op. cit., p. 148.

- Will the tax incentive or regulatory tax create opportunities for tax evasion?
- May the tax incentive or regulatory tax cause new market/regulatory failures?
- Will the tax incentive increase demand or pressure for more incentives from other economic agents/groups?
- Could the regulatory tax serve as a substitute, in terms of obtaining revenue, for other, more complicated taxes?

Naturally, the questions listed must take into account the dimension and degree of complexity of the RIA. They can (and should) be adapted to better reflect the regulatory framework, and answered in an order that makes sense to the agent/team/regulatory body responsible, supplemented by other information it seems relevant. It should be noted that the proposals and recommendations suggested here are indicative and preliminary, and must be adapted according to the characteristics of the regulatory body and the regulatory tax rule analyzed. As there is, to date, no Brazilian experience related to RIA or similar methodologies (such as *ex ante* policy assessment or *ex post* public information) applied to the examination of taxation, the purpose of this section is to identify the fundamentals minimally necessary for a tax-regulatory RIA, to assist the activities of managers and regulatory bodies involved in its realization.

#### 4. Final considerations

This research sought to highlight the role that taxation plays (or may play) in regulatory policy, especially in Brazil. Tax rules have been used on a large scale as instruments of regulation for a long time. The purposes are diverse, including correction of market failures (broadly, improving economic efficiency) and achievement of positive institutional objectives (such as reducing unemployment, promotion of development, and reduction of socio-regional inequality, among others). The guiding thread is, in essence, to regulate and modify the behaviour of economic agents through tax rules that grant advantages (tax incentives) or discourage certain behaviours (regulatory taxes).

One of the main problems identified (if not the main one) in terms of

respect for regulatory tax rules corresponds to the almost total absence of instruments for evaluation and control. This stems from a few factors. First, taxation is inherently complex, with its own and very particular regulatory system, especially in Brazil. Second, there is a perception that, to a large extent, those responsible for the creation and implementation of a regulatory tax rule, sometimes do not even understand it as an instrument of economic regulation. Like regulatory technique, regulatory taxation should meet the standards of good regulatory practice. Third, there is a lack of parameters or specific criteria to assess and measure the effects of a particular regulatory tax rule, with regard to the achievement of intended goals.

In this sense, as presented, among the regulatory assessment instruments that have gained relevance, RIA stands out. In the Brazilian scenario, it has been widely disseminated in the agencies and regulatory bodies of the federal public administration. From the experiences of some regulatory agencies, starting in 2019 and, mainly, with the enactment of Decree no. 10,411/2020, RIA was institutionalized in Brazilian legislation. Observance has been mandatory for all public administration bodies in the federal government as of October 14, 2021. We understand that this also applies to tax rules for regulatory purposes.

To understand if (and how) it would be possible to develop a Brazilian RIA model of regulatory taxation, initially the theoretical framework was presented, based on a broad bibliographic survey, with emphasis on varied reports, studies and scientific articles related to the main issues. Specifically, regarding the regulatory taxation standards, the theoretical review presented sought to describe, functionally, what they are and what they are used for, as well as demonstrate that regulation via taxation has been adopted by different governments for a long time and continues to be an important technique of economic intervention. In the case of RIA, its historical evolution was presented and consolidation as a technique derived from the context of regulatory improvement disseminated by the OECD to different national economies, including its institutionalization in Brazil, which went through different stages until reaching the current legal framework, with emphasis on Laws no. 13,874/2019 and no. 13,848/2019 and Decree No. 10,411/2020.

Regarding the discussions and conclusions of the research, one of the most significant results concerns the critical investigation of the real limits and possibilities of instituting the RIA for regulatory tax rules in Brazil, in particular the legal/legal restrictions. That concern is not gratuitous,

but derives from the viability of the proposals developed in the research. To this end, a survey was carried out in the Brazilian legislation on RIA, identifying the main limitations in the use of the procedure with regard to tax and financial law. Through an interpretative and reflective exercise, it was concluded that even identified constraints can be resolved, either through spontaneous action by the public administration, publication of an infra-legal act (amending Decree no. 10,411/2020) or specific legislative proposal. In addition to presenting possible solutions, we discussed the current scenario on tax policy and regulatory taxation, and mapped out which bodies of the Federal Executive Branch deal directly or indirectly with regulatory tax rules — to further legitimize the need to institute RIA in cases of regulation through taxation.

Regarding the feasibility of adopting RIA for the examination of regulatory taxation, another central aim of the research was to consider the main components, elements and criteria necessary for a potential RIA model in such cases. In this sense, the investigation converged, on the one hand, on the examination of the characteristics and basic requirements of an RIA report/study (taking into account the recommendations of the Brazilian legislation and technical studies on the subject) and, on the other hand, verifying how the particularities inherent to regulatory tax rules fit into that space. For example, specific analysis of regulatory taxation was recommended (with emphasis on cost-benefit and multi-criteria analysis), as well as a checklist of questions to help the analyst/regulatory body in the elaboration of the RIA of a particular regulatory tax rule.

Naturally, notwithstanding the conclusions, the research presented represents a starting point for a discussion agenda and assessment of regulatory taxation in Brazil, which may be adopted in the government and its different technical and advisory bodies. The aim is to open space to investigate and propose solutions for the different problems and limitations related to RIA and regulatory taxation, such as: examination of the objectives that justify the creation of inducing tax rules; adoption of regulatory governance practices and accountability in the management of regulatory tax rules; creation of assessment and control instruments, based on technical criteria, which allow adequate dimensioning and improvement of regulatory practices related to the tax policy of the Union, among other issues. This will make it possible to draw up plans and evaluation and control models which are functional and viable, to improve the standards of regulatory taxes in Brazil.

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