

# Reflections on the independence of federal government auditors



## Augusto Sherman Cavalcanti

has been a substitute minister of the Federal Court of Accounts – Brazil since 2001. He has a BA in law, a BA in Electronic Engineering, and a graduate degree in Process Control, from the Universidade de Brasília (UnB). He was a Federal Government Auditor at TCU where he held the positions of advisor and chief of staff of the Office of the Prosecutor General within TCU. He was a graduate professor at the Instituto Brasiliense de Direito Público (IDP) and the Centro Universitário de Brasília (UniCeub) in the fields of Financial Law, Constitutional Tax Law, and Administrative Law.

## ABSTRACT

This text aims to consider objectively the independence of federal government auditors when exercising their significant roles for the Federal Court of Accounts (TCU) and for the country.

**Keywords:** professional independence; Federal Government Auditor; TCU mandate.

## 1. INTRODUCTION

The independence of federal government auditors is mainly set forth in the Organic Law of the Court (LOTUCU), Article 86, item I, as the duty of a civil servant who exercises specific roles of external control.

Aiming at better scrutinizing such obligation of independence and how this relates to TCU's mandate, I sought help in the Federal Constitution and in the LOTUCU.

In Article 71 of the Federal Constitution, I identified the mandates of the Federal Court of Accounts, and therefore, of its ministers. They are to judge accounts (item II), to oversee (items IV, V, and VI), to examine personnel acts including admission, retirement, and pensions (item III), to sanction (item VII), to determine corrections (items IX and X), and finally, to issue a prior opinion on the President's annual accounts (item I).

Mandates are granted to the Federal Court of Accounts and to its collegiate bodies and ministers by the



Constitution. Therefore, neither the LOTCU nor any other law could establish different provisions, under penalty of serious constitutional violation.

As could be expected, Article 1 of TCU's Organic Law confirms that all those roles or mandates regarding judgement, oversight, evaluation of personnel acts, sanctions, determination of corrections, and issuance of prior opinions are mandates exclusive to the Federal Court of Accounts, and therefore, to its members.

As they are exclusive mandates of the Federal Court of Accounts, they cannot be transferred to the federal government auditors. These worthy civil servants perform important external control functions and are, therefore, aides in carrying out the Court mandates. It is within this legal and constitutional framework that the independence of TCU auditors is understood and outlined.

Upon a more in-depth analysis of the roles set forth for federal government auditors in the LOTCU, I identified Article 65, which establishes that the TCU Secretariat is in charge of all technical and administrative support required for the performance of TCU's mandates. In turn, Article 85 reiterates this command.

On one hand, these provisions make it clear that the TCU Secretariat does not and cannot perform any mandates of the Court and of its collective bodies and ministers. On the other hand, that the Secretariat exercises relevant external control functions rendering technical and administrative support to the Court. Thus, it is within these functions that we need to seek boundaries and limits for the independence of the federal government auditors.

As I continued my research, the LOTCU showed that it is the responsibility of the Court to organize its Secretariat according to its bylaws (Article 1, Paragraph XIV), as well as exclusively forward a draft bill to structure its staff (Article 1, Paragraph XV). Furthermore, it is the responsibility of the TCU President to issue personnel acts related to the Secretariat staff, including appointment and dismissal of employees.

The consequence of these provisions is that the independence of the auditors is not of a functional or administrative nature since in this regard, the organization of the Secretariat, as well as structuring and hiring of the staff are prerogatives of the Federal Court of Accounts and of its President. Nevertheless, some of these prerogatives related to the personnel can be transferred to the auditors through delegation. Since the federal government auditors perform technical and administrative functions, and as independence is not relevant for the latter, one may conclude that such independence is limited only to the technical functions.

Pursuing the analysis, I noticed that in Article 41, Paragraph 1, the LOTCU establishes that the TCU Secretariat staff, therefore the federal government auditors, will perform inspections and auditing activities. However, this does not transfer, nor has the capability to transfer, to the Secretariat or to its servants, ownership of the oversight mandate, which belongs exclusively to the Federal Court of Accounts and to its members, as enforced by the Constitution.



This is clearly stated in Article 87 of the LOTCU, when it sets forth that the civil servants of the Secretariat must be necessarily accredited by the TCU President or by the head of a technical unit, by delegation, to perform audits, inspections or requests for clarifications. This command makes it clear that it is through direct or indirect delegation by the TCU President that the TCU auditor performs the audits that are the responsibility of this Court. At this point, I see a relative technical independence of the auditors regarding the planning and preparation of works. I will make myself clearer.

In Article 11 of the LOTCU, we also see that it is the responsibility of a Court minister, acting as rapporteur, to preside over filing of the court cases, including audits, and submit them to the appraisal of the Collective Body, Chamber, or Full Court, either through a vote or deliberation proposal. This function is exclusive to the rapporteur during all phases of the case, and cannot be performed by the federal government auditors. It could not be otherwise because, in this hypothesis, the minister represents the Federal Court of Accounts, who holds the mandates.

It is the responsibility of the Secretariat and its employees to act in the cases filed, including audits, although not presiding them regardless of their procedural phase. Article 11 states that the rapporteur has the prerogative to preside over the whole case, from the beginning to the end. Therefore, the prerogative of the rapporteur to preside over the case is his alone. It is comprehensive and encompasses the whole case, from planning to sentencing.

However, the secretariat and its employees do have some relevant roles during the case development. The Secretariat, for instance, has autonomy to organize its work to provide technical support to all rapporteurs

and meet their needs, reconciling the needs of a certain rapporteur with the needs of others.

Nevertheless, this autonomy to organize the work is not absolute and this does not mean that, in specific situations, the rapporteur cannot adopt or request measures he/she deems necessary for a smooth workflow, through the head of the corresponding department or through the Court President.

In such hypothesis, the adoption of measures is a duty, not an option, of the rapporteur while acting as president of the case and aiming to avoid possible prejudice of celerity and quality of work. I understand that such measures do not characterize, in any way, an undue interference in the work of the Secretariat because they are adopted with the support of the head of the department himself/herself, or, should he/she refuse or should there be a conflict with other rapporteurs, by the TCU president who is the chief of the secretariat

In view of these circumstances, I conclude that the independence of the federal government auditors regarding the planning and organization of audits is relative and technical in nature.

Continuing my analysis, I see that Article 1, Paragraph 3, item I of the LOTCU, states that the rapporteur's report should include, as a required section, the conclusions of the case. Such conclusions are based on the report of the audit team or of the technical employee in charge of analyzing the case, as well as on the opinion of the immediate heads of the technical unit. In the exercise of this function, the total technical independence of the federal government auditors seems undisputable to me.

In my opinion, technical and total independence of the federal government auditors lies in the compre-

hensive freedom of analysis and conviction regarding the facts they investigate, which materializes in the report they produce and sign. This is, granted by article 86, item I, of the LOTCU as an obligation.

In summary, my conclusion is that to help the Federal Court of Accounts and its members fulfill their mandates, the federal government auditors have important external control roles of a technical and administrative nature.

With regard to the administrative functions, independence is not a relevant issue.

In technical functions related to planning, organization, and preparation of work, the auditors have a relative technical independence in view of the prerogatives of both the TCU President, the head of the Court Secretariat, and the rapporteur, who presides over the case, who legitimates both to intervene in such activities, if needed.

Nevertheless, the federal government auditors have full technical independence when analyzing a case and regarding their conviction about the facts under investigation, whose results should be disclosed in reports and opinions they produce and sign and for which therefore they are fully responsible.

Full technical independence more than a right is a duty of the federal government auditor and that is why it is treated as an obligation in Article 86, item I, of the LOTCU. This duty consists basically in expressing opinions about the case under analysis based exclusively on the evidences they gathered, on the law and on their own conscience, without any other influence.

This duty of independence is of the utmost relevance for the fulfillment of the constitutional mission of the Federal Court of Accounts. It is essential for the production of technical, fair, prudent, and balanced decisions by the Court, which has conferred great credibility to the Court among public bodies over the years. I will explain. This happens mainly because, as a rule, the collegiate decisions by the Court are made after confronting four or five independent opinions, three of which are from federal government auditors.

Finally, I would like to state that the federal government auditors have been performing their work with excellence, which is why they have been given due recognition by the Federal Court of Accounts, the public administration in general and Brazilian society.

## REFERENCES

BRAZIL Constitution of the Federative Republic of Brazil of October 5, 1988. Official Federal Gazette, Executive Power, Brasilia, DF, 1988. Available in Portuguese at: <[http://www.planalto.gov.br/ccivil\\_03/constituicao/constituicao.htm](http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm)> Accessed in August 1. 2017

BRAZIL Law 8443 of July 16 of 1992 – Organic Law of the Federal Court of Accounts – LOTCU. Official Gazette of the Union, Executive Power, Brasilia, DF, 1992. Available in Portuguese at: <[http://www.planalto.gov.br/ccivil\\_03/leis/L8443.htm](http://www.planalto.gov.br/ccivil_03/leis/L8443.htm)>. Accessed in August 1. 2017

