

Management adjustment terms: perspectives for consensual external control



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ABSTRACT

The study demonstrates the new trend of adopting controversy-solving tools based on consensus in Brazilian public administration in order to increase the State's efficiency. We examine implementation of the management adjustment terms (TAG) in courts of accounts as a new mechanism of proximity between controller and controlled when setting goals to correct irregularities or increase a given public policy's effectiveness. We also present the evolution of the Federal Court of Accounts in adopting consensual solutions for conflicts, especially the precedent contained in a recent judgment that determined that agencies under the Court jurisdiction sign a TAG. Finally, we suggest applying these instruments to control implementation of intersectoral public policies.

Keywords: Consensual solution. Public administration. Court of Accounts. Management adjustment term. Intersectoral public policies. Fundamental rights.

1. INTRODUCTION

There is an increasing demand for the State to improve its performance, whether it is to provide public services or regulate economic activities. Inefficient public administration is no longer acceptable nor is ineffective external control of public bodies and entities acceptable before the essential nature of the policies to

fulfill the fundamental goals and duties set forth in our Federal Constitution.

Therefore, public administration must employ other means to achieve public purposes beyond the traditional unilateral actions predominantly characterized by an imperative nature. The new tools for solving conflicts consensually provide administrators with a new option for overcoming eventual bureaucratic obstacles that result in, among other problems, the lack of celerity in resolving cases and the ineffectiveness of applied measures. The controlling bodies shall proceed with the same approach, preferably in a non-adversarial manner.

Consensual public administration models with consensual external control gain more ground. A one-sided, authoritative approach gives way to administrative consultation where the participation of other agents influences the implementation of public policies to be adopted. Citizens (as well as the parties under the court's jurisdiction) can no longer be seen as adversaries but as allies in achieving public purposes¹.

Among the premises in the consensual administrative approach, we consider administrative efficiency as the most important for adopting consensual solutions, especially considering the lack of resources. After efficiency was incorporated as a constitutional premise to be followed by the public administration, according to article 37 of the Federal Constitution, by constitutional amendment no. 19, of June 4, 1998 (BRAZIL, 1988), the activity shall no longer be conducted only by written law and must be preoccupied with the efficacy

of the State's performance in fulfilling its duties so as to guarantee the fundamental right/duty to good public administration (CANOTILHO, 2006ⁱⁱ; FALZONE, 1953; FREITAS, 2014).

The possibility to adopt administrative consultation practices is compatible with this premise since it allows overcoming certain bureaucratic obstacles, such as delays in administrative procedures or minimal execution of measures applied by administrative authority. Furthermore, consensus has other potential beneficial effects related directly or indirectly to efficiency that oftentimes the imperative manner cannot achieve, such as the efficacy of administrative decisions, the possibility of decisions that are more proportional to the potential encumbrance, a decrease in the judicialization of administrative decisions, greater participation of the parties involved in the process – administrator and citizens and/or controlling body and party under jurisdiction, decisions more suitable to sectoral particularities and to the concrete case, and the time it saves (FACCHINI NETO, 2017).

We highlight that the alternative of signing agreements instead of one-sided measures is also directly related to one of the sustainable development goals established in the 2030 Agenda signed by 193 Member States of the United Nations (UN, 2015)ⁱⁱⁱ. On a national scale, faced with this new reality, Brazilian public administration has been broadening its participation in adopting consensual mechanisms^{iv}, no longer restricted to mere control/sanction procedures. Even though this movement has gained momentum only in the last two decades, consensus is not a recent phenomenon in Brazilian administrative law. Considering the legislative evolution towards consensual conflict resolutions, Juarez Freitas affirms that “the Brazilian normative system, interpreted systematically, prioritizes consensual conflict resolutions, including within the scope of administrative contracts” (FREITAS, 2017, p. 42).

In this study, aside from presenting brief considerations on the evolving application of conciliation mechanisms in Brazilian public administration, we will also detail the establishment of the management adjustment terms (TAGs) within the courts of accounts as a new control tool based on consensus. We will also reveal the evolution in the Federal Court of Accounts's (TCU) pointing the possibility of using consensual solutions to resolve conflicts within the context of its cases, drawing special attention to the pioneer decision which determined that entities under its jurisdiction employ

TAGs. Finally, we will briefly analyze how these instruments were adapted to control the elaboration of intersectoral public policies.

2. MANAGEMENT ADJUSTMENT TERMS IN COURTS OF ACCOUNTS AND EVOLUTION OF THE TCU UNDERSTANDING OF CONSENSUAL CONFLICT RESOLUTION

As the implementation of hypotheses on consensual conflict resolution has gained force, it's necessary the adaptation of the performance standards of public administration control to this new reality since they can no longer be limited to an approach based on control/sanction, as previously mentioned. In agreement with this point of view, the most current legal doctrine (BARROSO FILHO, 2014; CUNDA, 2010; 2013; 2016) proposes that the Courts of Accounts adopt “management adjustment terms” as a method of consensual control of the administration. With these tools, it's possible to establish an agreement of intention between the controller and controlled parties whereby the latter commits to take measures in order to comply with the law or to make a given public policy more effective. In exchange, the proceedings of a given case that could result in punishment for the controlled party are suspended.

Adopting consensual control mechanisms such as the TAGs allows us to stop viewing the performance of the Courts of Accounts as strictly mandatory so that the practice of negotiations relieved of controversies can be consolidated. Therefore, there is a convergence of control and consensus tied to a management model whose main purpose is collaboration among State, society, and individuals. At the same time, it allows for a departure from the control/sanction approach, which is based on a bureaucratic model tied to legal positivism (ARAÚJO; ALVES, 2012). As for these tools' characteristics, Araújo and Alves (2012) demonstrate that there are three aspects that conduct the establishment of these terms. The first is willingness, since the parties must participate freely, according to their own autonomy and without affecting the administrators' discretion. The second aspect is recognition of the administrators' good faith, since, if there is evidence of bad faith or of consummated losses to the treasury, signing the TAG will not be possible. Finally, consensus is highlighted as the guiding aspect behind establishing TAGs. This last characteristic resonates with the new paradigm of Ad-



ministrative Law, which diverges from authoritative inflexibility and moves toward democratic flexibility (ARAÚJO; ALVES, 2012).

In face of this new control tool's characteristics, a prior study affirmed that these agreements are capable of enabling both the reparation of losses caused to public funds and the correction of irregularities practiced within the public administration in a quick and efficient manner (CUNDA, 2016). This characteristic aligns with the constitutional principle of administrative efficiency and the fundamental rights to the reasonable duration of a case and to the good public administration. Freitas is another author who mentions the importance of establishing TAG as a tool capable of promoting the improvement of external control. In this jurist's opinion, such instrument has the capacity to make compliance with oversight goals more effective (FREITAS, 2013).

Aligned with this new trend of facilitating consensual tools for resolving controversies, several Brazilian Courts of Accounts have been incorporating TAGs. According to a recent study (SANTOS, 2017), Courts of Accounts of the states of Amazonas, Goiás, Mato Grosso, Minas Gerais, Paraná, Pernambuco, Rio Grande do Norte, and Sergipe had already projected the use of management adjustment terms. Moreover, we also emphasize that there is already a legal or regulatory provision for the Courts of Accounts of Amapá^v, Ceará^{vi}, Piauí^{vii}, Rio Grande do Sul^{xiii}, and Rondônia^{ix} to sign the TAGs. Even before the the organic laws of the Courts of Accounts took effect, it

is worth mentioning that the first city to adopt TAGs was Belo Horizonte (FERRAZ, 2014).

In relation to the necessity of the organic laws and internal regulation foresee the possibility of adopting TAGs, we reiterate that prior studies mentioned that such provision would not be strictly necessary. On this occasion, the understanding of Luciano Ferraz was ratified for providing enough legal basis for utilization of the aforementioned consensual tools, namely in the Preamble; Article 4, item VII; and Article 71, item IX of the Federal Constitution (BRAZIL, 1988); Article 59, paragraph 1 of the Fiscal Responsibility Law (BRAZIL, 2000); and Article 5, paragraph 6 of the Public-interest Civil Suit Law (BRAZIL, 1985)^x. To these legal provisions, the new Civil Procedure Code – Law no. 13.105, of March 16, 2015, can be included, which, in Article 3, paragraph 2, provides that “the State shall promote, whenever possible, the consensual resolution of conflicts” (BRAZIL, 2015a, par. 5). We stress that the provisions of Article 15 of the same Code apply alternatively to administrative procedures in the absence of regulatory norms. Furthermore, even in cases where the referred legal provisions are disregarded, the Theory of Implicit Powers corroborates the use of such tools (CUNDA, 2016). However, legal doctrine is not undisputed in this sense^{xi}. Faced with controversy among legal scholars regarding the need or not for a specific provision to adopt TAGs in our Courts of Accounts due to a legal security issue, it is understood that the concrete effects of such mechanisms in the organic

laws of these controlling bodies and their respective internal bylaws are appropriate. As mentioned previously, “the explicit provision in the internal regulations and organic laws of the Courts of Accounts seems to be, if not paramount, at least convenient” (CUNDA, 2016, p. 220).

In the search for the real possibility of signing the TAGs, it is also important to note that the provision to adopt this term was already in the draft of the National Law of the Oversight Procedure of the Courts of Accounts (BRAZIL, 2012). Currently, the provision is in the draft of the Organic Law of the Federal Public Administration and Collaborating Entities (BRAZIL 2007). In the context of the states, the provision is in effect in the states of São Paulo and Santa Catarina^{xii}.

As demonstrated, several Courts of Accounts have implemented the TAGs as conflict resolution alternatives in their jurisdictions. Additionally, there are drafts at the national level and in some states which aim to put these tools into effect. However, the referred terms have not yet been incorporated into either the TCU’s organic law or internal bylaws.

Following, we will examine the evolution of the understanding of the Federal Court of Accounts in the use of consensual conflict resolution mechanisms in the cases under its jurisdiction, highlighting the discussion around the TAGs. Generally, the TCU has been reticent to adopt consensual instruments for conflict resolution. However, one can observe that a relative downturn in the rhetoric resistant to negotiated

activities in the context of the Federal Court of Accounts has occurred. As an example of this paradigm, an evolution in the TCU understanding can be observed in the possibility of the public administration submission to the arbitration clause (PALMA, 2015). Another example of the TCU progress in incorporating consensual solutions was the introduction of the possibility of the audited body or entity to determine which action plan to elaborate in order to execute the issued recommendations and determinations. This solution is especially possible within the scope of operational audits that seek an efficiency evaluation of a given governmental program or activity, pursuant to the heading of Articles 37 and 70 of the Federal Constitution (BRAZIL, 1988)^{xiii}.

The incorporation of TAGs to the TCU internal regulations was a topic of discussion in the full court when reviewing this normative rule. The rapporteur, Minister Augusto Nardes, proposed to incorporate the possibility of signing TAGs because he understood this instrument could contribute to improving the Court participation since it would allow for an increase in efficiency (BRAZIL, 2011a). Throughout the process, there were objections to the inclusion of this device due to perceptions that there was no support in the legal framework for the TCU to sign the TAG and that the introduction of this mechanism would create an unnecessary procedural step. Furthermore, attention was drawn to the principles of legality and non-availability of public interest would not allow the TCU to compromise with those responsible when assessing losses in the public treasury nor to reduce punishments provided by law. Before this controversy, the proposal to include the following provision in the internal bylaws was set forth: “Article 298-C. Aiming to improve Public Administration, the court can sign a management adjustment terms with the bodies and entities, public or private, under the terms of the normative act” (BRAZIL, 2011b, par. 298). After the discussion, the suggestion to suppress the provision was accepted, considering that the Court already had the competence to adopt corrective measures without the need to negotiate solutions with the parties under its jurisdiction. However, the same decision that defined this exclusion provided that the matter would be reexamined in specific cases and resolutions, which has not occurred yet (BRAZIL, 2011b).

Notwithstanding the absence of regulation for the TAGs in the TCU, attention is drawn to a recent



legal precedent that determined the organization of a public hearing for the subsequent signing of an instrument of this kind. Decision no. 494, of March 22, 2017 (BRAZIL, 2017), having Minister Augusto Nardes as rapporteur and pronounced within TC 010.915/2015-0, which monitored the determinations and recommendations issued to the Ministry of Sports and the Civil House of the Presidency of the Republic due to the risk analysis related to the legacy of the Olympic Games and its respective implementation plan, especially regarding sports arenas constructed with federal public resources. The following briefly presents the circumstances of the concrete case.

In 2014, the TCU proceeded to track the activities related to the Olympic's legacy. Uncertain of what measures to take, it was determined that the Ministry of Sports would elaborate a document with a plan detailing the legacy of the sports equipment built with federal resources, pursuant to item 9.1 of Decision no. 2.758, of October 15, 2014 (BRAZIL, 2014). Subsequently, the TCU monitored compliance with these deliberations^{xiv}. Finally, before evidence of omission to execute the referred proposed measures, a fine was applied to those responsible for not complying with the determination in Decision 494/2017, pursuant to Article 58, item IV of Law no. 8.443, of July 16, 1992 (BRAZIL, 1992); c/c Article 268, item VII; and section 3, of the TCU's internal bylaws. On the occasion, this noncompliance was considered to be the result of omission in the elaboration of the legacy plan and the abandonment of sports arenas in less than six months after the Games ended. We also add that, due to the urgency of the situation and the multiplicity of entities involved in the search for an effective solution for sports centers' maintenance, it was determined that the General Secretariat of External Control would hold a public hearing with all bodies to discuss problems related to the issue. As a result of this hearing, a TAG clearly establishing the responsibilities of each of the entities involved, aiming to solve the problems, would be signed in order to solve the problems (BRASIL, 2017).

It is understood that this precedent means progress for the TCU in employing new mechanisms for resolving controversies under its jurisdiction and meets the latest trends in administrative law to adopt conciliation mechanisms. The argument that there is a lack of public interest can no longer be tolerated in order not to adopt this kind of instrument since Law 13.140, of June 26, 2015, which regulates the resolution of judicial and

extrajudicial conflicts in public administration, admits the transaction over inalienable rights, as provided in Article 3 (BRAZIL, 2015b).

Regarding the precedent of Decision 494/2017, a more detailed analysis regarding the *ratio decidendi* is required. Before the situation of the necessary joint participation of several bodies and entities in implementing measures aimed towards the public policy in question, it was understood that the solution must be achieved upon a negotiation process conducted by the Federal Court of Accounts itself. In order to increase transparency and stimulate democratic participation, a decision was made to hold a public hearing where the issues will be discussed and, finally, the measures taken by each entity involved will be reduced to an adjustment. This decision is worthy of applause because if the TCU had opted for each of the bodies or entities involved to elaborate an action plan, it is possible that each would adopt a strategy that would not be compatible with the measures taken by the others and, consequently, reduce its chances of effectiveness. It is understood that the same solution may be the most appropriate in several other oversight efforts where achieving public policies depends on intersectoral performance. Notably, we can mention the number of operational audits that the TCU has conducted in evaluating certain public policies where the decisions made determinations and recommendations to the bodies and entities involved without the measures being necessarily linked with each other. Promotion by controlled bodies of an agreement to implement measures in intersectoral policies resonates with the new consensual public administration model. In the case of the TAGs to be agreed upon to define the actions that each accountable entity will adopt, the TCU, in face of its constitutional prerogatives and renowned expertise, must act as the true conciliator by recommending cooperative alternatives to those involved^{xv}.

In any case, even if the precedent of Decision 494/2017 can be considered an evolution in bringing administrators closer in order to arrive at a peaceful solution, it is understood that the effective possibility of tools such as the TAGs, both in the Law and in the internal bylaws, would be an essential measure to implementing the control/consensus approach, just as several other Courts of Accounts have already done. This measure would bring more legal security and, consequently, avoid eventual legal questioning regarding the signed instruments.

3. CONCLUSION

Considering the above, various effective mechanisms of administrative conciliation for conflict resolution in Brazilian legislation exist. Administrative action based on authority and coercion continually loses ground to the new consensual conflict resolutions. Within the context of the Courts of Accounts, the TAG is an example of an instrument that brings the possibility of a participation based on control/consensus in that it allows for a joint effort between the auditing body and the audited entity to agree on goals for correcting irregularities or establishing governmental actions in order to make a certain public policy more effective.

Resonating with this new administrative law trend of introducing consensual solutions for conflict resolution, the TCU's jurisprudence has been changing its jurisprudential understanding with respect to some issues, such as: i) accepting the public administration's submission to the arbitration clause; ii) the possibility of regulating agencies substituting goals agreed upon in the TAG for sanctions; iii) adopting actions in its auditing practices, as determined through open dialogue with administrators through "action plans," to be executed so as to correct the problematic aspects detected.

Nevertheless, with the objective of consolidating non-adversarial administrative activity in the TCU's auditing practices, standardization of the TAG – or a similar instrument – is recommendable and already regulated in several state courts of accounts. This instrument has shown to be more advantageous than the current determination to bodies and entities requesting that they elaborate action plans since the TAG's goals are outlined collectively. Therefore, in addition to reducing the argumentative burden for the application of penalties in case of noncompliance, the interference of control bodies in the discretion of public administrators is also reduced^{xvi}. That way, standardization of the referred instrument is urgent in auditing cases that detect the need for the joint cooperation of several bodies and entities to conciliate a given public policy. In this case, the TAG would be a way to stipulate the collective actions of several accountable entities and the TCU would act as auditor of this negotiation, in addition to proposing alternatives to be established in the agreement, in a way that it also assumes a broader leadership role in the efficacy of the fundamental principles, rights, and duties contained in the constitutional charter.

NOTES

- i According to Palma (2015), there are three theoretical premises that support consensual administrative performance: efficiency, administrative participation, and public governance.
- ii Canotilho (2006) discusses the constitutionalism and geology of good governance (p. 325 and ss.).
- iii That is exactly what is discussed in "Peace, justice and strong institutions," which presents as some of its goals, the development of effective, accountable, and transparent institutions, as well as ensuring responsive, inclusive, and participatory decision making. As for sustainable development goals and the 2030 Agenda, access the site <<https://nacoesunidas.org/pos2015/>>.
- iv Some legal documents on this subject are available at: <<http://www4.planalto.gov.br/legislacao>> (Access on Nov. 2017): Decree-Law 3.365/1941, head provisions of Article 10; Decree 94.764/1987, which altered the text of Article 45 of Decree 88.351/1983; Law 9.099/1995; Law 9.469/1997; Consumer Defense Code (Law 8.079/1990), which modified Law 7.347/1985 by incorporating a generic permission to sign conduct adjustment commitments; Law 10.149/2000, which brought CADE the possibility to promote leniency agreements; in the same way, the Securities and Exchange Commission (CVM), pursuant to Law 9.457/1997, included adoption of the commitment term as a regulatory instrument. The movement towards implementing consensual instruments gained even more intensity since 2010, v.g. The Law of Solid Residues (Law 12.305/2010), Article 8, item XVIII; Decree 7.562/2011, Article 18, section 4, item III; and Normative Instruction nº 2/2017 of the Ministry of Transparency and Accountability and the Office of the General Federal Controller (CGU), which regulated the signing of conduct adjustment terms in cases of less offensive disciplinary infractions. Available at: <<https://goo.gl/L5FiEs>> Access on: Nov. 27, 2017.
- v Normative Resolution 171/2017-TCE/AP regulated the TAG in the Court of Accounts of the State of Amapá, according to provisions in Article 26, item XX of Complementary State Law 10/1995. Available at: <<https://goo.gl/sa6sk5>>. Access on: Nov. 24, 2017.
- vi The possibility of the Court of Accounts of the State of Ceará signing the TAG was inserted in Article 76, section 4 of the

- State Constitution by means of Constitutional Amendment 87/2016. Available at: <<https://goo.gl/ddGzvd>>. Access on: Nov. 15, 2017.
- vii Resolution TCE/PI 10/1996 regulated the TAG in the Court of Accounts of the State of Piauí, according to provisions in Article 2, items XI and XVIII of State Law 5.888/2009 (Organic Law of TCE-PI). Available at: <<https://goo.gl/YT2t6U>>. Access on: Nov. 24, 2017.
- viii The internal bylaws of the Court of Accounts of the State of Rio Grande do Sul provides the possibility of signing the TAG in Article 142. According to this normative order, specific resolution still needs to be edited in order to establish the terms and conditions for signing this instrument.
- ix According to the Article 1, item XVII of Complementary State Law 154/1996, included by Complementary State Law 679/2012. Available at: <<https://goo.gl/h6tXXC>>. Access on: Nov. 25, 2017.
- x Indicating that there is already enough legal basis to apply management adjustment terms, see Cunda, Daniela Zago Gonçalves da. A brief diagnosis of the use of management adjustment terms by state courts of accounts. **Interesse Público**, Belo Horizonte, n. 58, p. 243-251, 2010 and Reis, Fernando Simões dos. News Perspectives to the Control of the Administrative Discretion by the Brazilian Court of Audit in Performance Audits. **Interesse Público**, Belo Horizonte, year 17, n. 89, v. 1, Jan./Feb. 2015. p. 270.
- xi Regarding the absence of the provision for the possibility of peaceful conflict resolution in Law 9.784/1999, Juarez Freitas affirms that “[...] the Federal Law of Administrative Procedure must be adapted to contemplate the cooperative, non-adversarial procedure as soon as possible. For this purpose, legislation improvement is recommended” (FREITAS, 2017, p. 38).
- xii At the Parliament of the State of São Paulo, Complementary Law Project 60/2015 is currently in process, and it alters the organic law of the state’s Court of Accounts in order to establish the management adjustment terms. Available at: <<https://goo.gl/RcZ95x>>. In Santa Catarina, Resolution 137/2017 was voted unanimously by the full State Court of Accounts, which approved the submission of the law’s draft to incorporate the possibility of signing the TAG into the organic law of the aforementioned Court of Accounts. Available at: <<https://goo.gl/xaeiy4>>.
- xiii Regarding the determination of an action plan to implement the TCU’s recommendations and determinations in operational audits, see Reis, Fernando Simões dos. News Perspectives to the Control of the Administrative Discretion by the Brazilian Court of Audit in Performance Audits. **Interesse Público**, Belo Horizonte, year 17, n. 89, v. 1, Jan./Feb. 2015.
- xiv Cf. Decisions 706, of April 8, 2015 (BRAZIL, 2015b), no. 1.856, of July 29, 2015 (BRAZIL, 2015c), no. 3.315, of December 9, 2015 (BRAZIL, 2015c), and no. 1.527, of July 15, 2016 (BRAZIL, 2016), whose rapporteur was Minister Augusto Nardes, considered that the measures adopted by administrators were not enough to solve the matter.
- xv As for negotiation techniques, see “Manual de negociação baseado na Teoria de Harvard” (MARA-SCHIN et al., 2017), in order to provide orientation to employees regarding negotiation strategies. Available at: <<https://goo.gl/1ieu3d>>. Access on Dec. 20, 2017.
- xvi It is necessary to clarify that discretion will always be tied to the fundamental principles, rights/duties contained in the Federal Constitution. In this regard, see Maurer (1985) and Freitas (2013).

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