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To improve public administration for the benefit of society through government audit

Vision Statement
To be a reference in promoting a more efficient, ethical, responsive and responsible public administration

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Letter to the Reader

Bruno Spada

José Múcio Monteiro
Minister of the Federal Court of Accounts of Brazil and Head of the Editorial Council of the TCU Journal

Dear reader,

This issue of the TCU Journal reflects on the efficiency of public management and the role of courts of accounts in ensuring the achievement of the results of public investments for society. To approach the topic, we interviewed the distinguished economist Bresser-Pereira, indisputably renowned figure in the political and economic scenarios of the country.

Bresser-Pereira took stock of the legacy of managerial reform to Brazilian public service and proposed essential actions for the country to grown consistently.

In the opinion column, Luiz Akutsu, TCU Coordinator General of External Control for Public Efficiency, discusses the central theme of the issue; the principle of public efficiency. In a scenario of fiscal crisis and imposition of limits to public investments, he presents best practices and initiatives by courts of accounts aiming at improving public management.

Highlights in the quarter are the 1st National Forum on Control, which took place at the Serzedello Corrêa Institute (ISC) in October 2017, the debate and lecture promoted by TCU to discuss Constitutional Amendment 95; the first meeting of the Working Group on evaluation of efficiency and quality of public services of the Center for TCU High Studies in Control and Public Administration (Cecap) and presentation of the Report on Government Policies and Programs (RePP 2017).

The articles discuss several topics. Independence of auditors is the theme of the essay by Minister Augusto Sherman. The issue also brings articles on the challenges of public procurement. Another subject is the analysis of the market as a basis for planning government contracts, in addition to the importance of preliminary technical studies and a document to formalize demand as essential elements for planning and success of public procurement. The issue also presents an important debate on the competencies of internal and external controls in the public sector, accompanied by an analysis of the case of the Office of the Comptroller General of the State of Pernambuco. Finally, the issue reports the case of optimization of the work processes in the Court of Accounts of the State of Santa Catarina as of the implementation of electronic case files.

Enjoy reading this issue!

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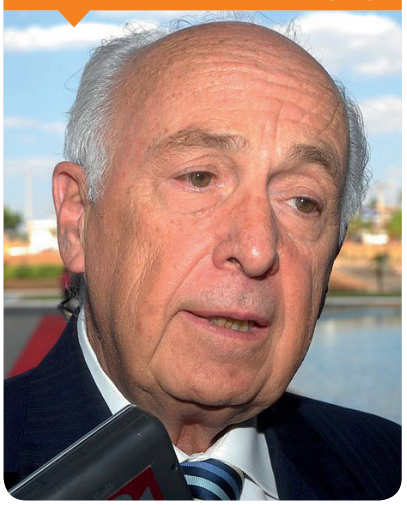

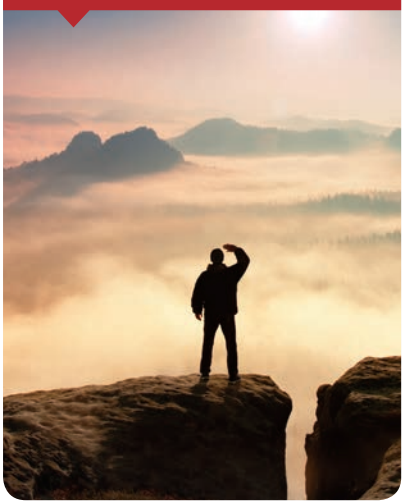

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Challenges faced by Brazil post Managerial Reform

Bresser-Pereira
Economist, political and social scientist

Economist, political and social scientist. Has a degree in Business Administration and Law. Luiz Carlos Bresser-Pereira was Minister of Finance in 1987, and Minister of Federal Administration and State Reform (MARE) from 1995-1998, period in which he was responsible for conducting the managerial reform in the Brazilian state. In an interview to the TCU Magazine, Bresser-Pereira takes stock of the managerial reform legacy to the efficiency in the Brazilian public service and suggests essential actions for the country to have consistent growth. He also addresses the role of the courts of accounts in pursuing greater efficiency in the public sector.

You were at the forefront of the State Apparatus Reform in the 90's, which came up as an answer to the successive political and economic crises that the country faced. Twenty years later, the country faces again economic and political crises. Do you consider that the Brazilian state will need a new reform in order to overcome the present scenario?

My understanding is that if you work at a relatively high level of management there are only two managerial reforms in a capitalist State. That is, the capitalist state is born patrimonialist, with absolute monarchs associating with the merchants that later turned into industrialists, and public employees. Its court consisted not only of the military but also of bureaucrats who managed public wealth as if it was also theirs. This is patrimonialism. Then the first reform comes up, which is the bureaucratic reform. In English, it is called civil service reform. In French, it is called *la réform de la fonction publique*. In Portuguese, it would be public administration reform, or bureaucratic reform, which was very important. This is the reform analyzed by Max Weber. Then, from the 1980s the

second reform begins, which was the managerial reform in England, Australia and New Zealand. Brazil was one of the first to begin the reforms. Nowadays it has spread all over the world. Now the reform focuses on increasing efficiency mainly in the public services of the state. Currently, when there is a universal health system, an educational system, a social security system, or a tax collection system, then I need efficiency. These big sectors of public services involve many people.

What are the key objectives of the managerial reform?

The key objective of the managerial reform of 1995 was to change a bit the logic of management by procedures to management by results and administrative competition, promoting administrative competition by excellence. That is, it is simply the Federal Court of Accounts who is controlling, for example, the Minister of Social Security, who in turn is controlling the National Social Security agencies, comparing the agencies and, under certain conditions, looking at the parameters and targets. Indicators are a product of comparison between them. Which is much better than simply imposing something. However, competition by excellence is something that bureaucrats do not like; it was the most difficult thing for me, because I proposed three things in the management overhaul. Rather than analyzing supervision of physical regulation, direct supervision and strict audits by processes, I stood for results-oriented management and everyone liked that. Social management, everybody also liked that. And it means administrative competition by excellence. Later, they started to understand, as competition is not really in the logic of public servants, but it is fundamental. It is something that companies widely use. Now the second issue is that, to become more efficient, I classified the agencies as state public bodies, non-state public bodies, state-exclusive and non-exclusive. Then I said that for activities that are non-exclusive of the state, there is no reason for them to be within the state, they can be executed by social organizations. They may be more efficient, more flexible, if transformed into social organizations.

How do you evaluate the fulfillment of these objectives over the years?

All this has been happening slower than I would have liked. Once I was out, I made a mistake. At the end, in January 2008, that is, in the last of the four years in which I was Minister, I said to myself what I said to the president later. I said I thought that the reform would be approved by the Congress in April, and the new ideas were already circulating, and people were aware of it all, so that, now, the basic principle was to implement the reform. The MARE (Ministry of Federal Administration and State Reform) had no power to implement the reform; it was a very small Ministry. In the United States, there is an office and I was very impressed because when I went to talk with people there they told me the following: do you know what the source of my power is? I said I did not. He answered that the power was next. It was the office of the head of budget planning. Then I said it was better to relocate it to the Ministry of Planning, as they have a budget. Today I think it was a mistake because the Minister of Planning never took interest in Public Administration and the issue lost its previous status and the focus was reduced. Anyway, I think it (the reform) is happening, because it has happened a lot in the state-level and the most impressing thing was the change in academia. The number of papers and theses, master dissertations and doctoral theses about the reform is amazing.

In your opinion, what are the proposals that would help to enhance efficiency in the Public Administration?

The Getúlio Vargas Foundation in São Paulo offers an undergraduate course in Public Administration since 1970 and, since the mid-1980s, a graduate course. I was the coordinator and reformed the whole course soon after I was Minister of Finance in 1988 and 89. I said to my colleagues that we have very few students. That is, everybody wants to be a Management student and nobody wants to be a Public Administration student. I already knew the reason; there were no civil service entrance exams. What I meant is that these people do not promote civil service exams, as there is no regular demand for students. Thus, when I arrived here in the Ministry of Finance, I said I wanted to issue an ordinance. I decided that all state careers are to have entrance exams every year and that these exams should be selective instead of approbatory. I took office and soon created the formula for the number of vacancies in the entrance exam and the formula for writing the exam notice. You take the number of vacancies that the career needs – let us say there are 1500 employees for a given career. Then you divide 1500 by the average amount of years the

employee stays in the career. The result would be the number of vacancies that should open every year. This provides for a number of employees that enables you to have a balanced age proportion and constant oxygenation in that career. Then I also supported high wages for the employees. At the time, it was very low. So, I propose these two measures: regular public entrance exams and wage increase.

In this new context, are the assumptions of the managerial reform still applicable or does the Public Administration need to search for new foundations to reshape itself?

It is still valid with concern to management. You always have to improve; there are new problems, new imagination, but the fundamental problem continues to be making Public Administration more efficient as a whole through changes in the management mechanisms. What was my main objective in relation to all this? To make the state apparatus more efficient, but why? In my opinion, the state is the major instrument of collective action of the Brazilian nation. Therefore, it is through the state that I look for the great political objectives of modern societies. Liberty, economic development, social justice, the protection of the environment and security. These are the five objectives. Well, what was I interested in then that I am still interested in now? I was interested mainly in increasing the size of the state in the social sector. Because, in my opinion, a fair society is necessarily a society that has a large tax burden and has large expenditure on health services, on the great social services of the state. The Constitution of 1988 had pointed in that direction. And I needed, then, to legitimate this, but why exactly? Because liberals are obviously terrified by all of this. They want a very small state, financed by regressive taxes. This is what they want, because in Brazil taxes are regressive, but the state is huge, mainly in the social area. In 1985, it represented between 11 and 12% of GDP, today it has swelled to 23, 24%, therefore, it doubled, but I needed to legitimate this, in other words, I had to stand for the welfare state against those gentlemen that shout "I don't want to put good money over bad Money. It is unnecessary. All public employees are corrupt and inefficient". To show and tell that they are not right, I had to show that the state is efficient in providing these great social services. Therefore, the money that I am putting into this is good money, and it is the underlying logic. Then I will say that it looks like I failed. And why did I fail? I think I noticed many improvements. This reform was inevitable and will continue because there is no alternative to it. Countries that delayed these reforms, such as Germany and France, are already doing it too, each in their own way, but always in this direction. Now, the problem is that Brazil had a downturn in the last 3 years. Brazil was dominated by liberals determined to show that the welfare state did not work and willing to reduce the size of the state. To that end, they approved the budget ceiling, which freezes public expenditure. The Brazilian population will keep growing, the GDP will continue to grow very modestly, because it grows very little, but will keep growing, and the services for education, health, social security, and social assistance will keep shrinking. This is what is happening. Thus, in this sense, I failed. However, I am very happy with the reform I created, which I helped to create, and, after all is said and done; I say I conquered the heart and the minds of the upper echelons of Brazilian Public Administration.

"You always have to improve; there are new problems, new imagination, but the fundamental problem continues to be making Public Administration more efficient as a whole through changes in the management mechanisms."

What are the main advances achieved by Brazil in terms of efficiency since the managerial reform?

I think these are the advances. Today management is much more defined by results than before, social control is better than before and this social control was already in its beginning stages back then. I mean, it all has improved a lot. Social organizations, especially in São Paulo, are very successful both in the hospital and in cultural areas. In other places, it did not go so well, because they are not any magical solution. Is simply a mechanism that if managed and audited well works better than before.

What about the obstacles?

The obstacles are difficulties of human nature. We are prone to failure. I have a very simple perception on what the administrative process is. There is no flight in cruise altitude: an airplane that is cruising, when it gets up there, it flies straight, but still could encounter some violent turbulence. In other words, the last thing that there is in management is cruise flight. You have to make corrections all the way, as things are always going out of control. Making these adjustments are an everyday challenge. These are some of the major obstacles which derive from people`s interests, and you have to motivate them in a correct way. In other words, the difficulties derive from permanent attempts to loot public property.

How can the Federal Court of Accounts and the other courts of accounts act in order to promote reduction in bureaucracy and pursuit greater efficiency and quality of the public services?

I think the Courts of Accounts can certainly help with all these things. You are not just interested in fraud, but also in efficiency and effectiveness. Effectiveness is about public policy achieving the objective; efficiency is doing so at the lowest cost. That is, both things are not easy. You said a third thing is you would do evaluation of public policies. There is a group of trained economists, the social micro economists. After all, I found out that they are, essentially, public policy evaluators. They have a whole methodology, with many econometric methods to do this. Therefore, the Court of Accounts performing its process of evaluation, contacting these people and using their technology would be a very nice thing.

"I think the Courts of Accounts can certainly help with all these things. You are not just interested in fraud, but also in efficiency and effectiveness."

You have been supporting a new development project for the country, the Project *Brasil Nação*, which lists essential actions for consistent growth. What would be the key points of this new project?

I have been saying for over ten years that Brazil is an almost stagnated economy. That is, it grows at very low rates. Brazil grew, between 1930 and 1980, about 4% per year *per capita*, between 1950 and 1980 at 4.5% per capita. Since 1980, it grows at 1% *per capita*. Thus, the reduction was huge Now, since 2014, all this is clear. From 2015 on, we entered in a deep recession, so that if you were to add the negative growth rates of these last years, then it gets even worse.

Since 2001, I have been involved in developmental macroeconomics, or, more broadly, this was the name that stood and it already is the new development concept. It is an attempt to understand why Brazil is growing so little. What is the macroeconomic cause of this? In my understanding, the cause is essentially that Brazil now has a very high interest rates and a grossly valued exchange rate. In the long-term, the consequence is a serious discouragement to investment. Without investment, there are no savings, without investment and savings there is no growth. Investment comes before savings, according to Keynes. Brazil does not seem to be able to get out of this situation.

Brazil has transitioned into a liberal economic regime, where before it has adopted a developmental ideology between 1930 and 1990, going through a crisis in the 1960s that was overcome and through the last crisis of the 1990s that has not been overcome. Then came neoliberalism, which had taken over the world outside, financial capitalism, rent-seekers, took over Brazil, also during ten years of growth. Since then, our interest rates have skyrocketed and our exchange rates have appreciated. In the northern hemisphere, the rent-seeking financial neoliberalism has entered in a crisis since 2008. Since then, things have become quite complicated for them. Since 2016, they entered in a political crisis due to Brexit and Trump. And we are here, with great determination and enthusiasm, willing to end the Brazilian state and reduce all Brazilians to mere employees of foreign multinationals.

We live in a globalized world where states are in fierce competition, where the most powerful countries, the rich nations led by the United States, have great interest in obtaining our market. In this scenario, I say that in order to develop, you need a strong nation, and therefore, you need to be a nationalist in the economic sense. Economic nationalism is almost the same as developmental ideology. This ideology adds to economic nationalism a sense of moderation in state intervention of the economy. Therefore, if this is

"I say that in order to develop, you need a strong nation, and therefore, you need to be a nationalist in the economic sense. Economic nationalism is almost the same as developmental ideology. This ideology adds to economic nationalism a sense of moderation in state intervention of the economy."

true, we start to elaborate the plan according to two premises, one of near stagnation of the economy and the other political. We convened a group in the beginning of the year and we finally launched the Project *Brasil Nação*.

In the Project *Brasil Nação* we advocate some general ideas that are also values, we stand for the idea of nation and we proposed five topics for the economy. Of course, there are other fields to develop, but we chose one that I happened to know better and to which I could give some contribution, and also that is more important nowadays. And what are these five topics? They are related closely with this developmental macroeconomics.

The first topic is fiscal responsibility. This is a dispute between myself and my Keynesian friends of this conference. Among them, there are a lot of vulgar Keynesians, or populist Keynesians, or developmental populists who think that they can solve all the problems of the Brazilian and world economy by increasing state expenditure and causing the state to enter into a fiscal crisis. The same thing happens on the other side, the orthodox liberal economists, who think that they can solve all the problems by cutting state expenditure and plunging into account deficit to create external reserves, and then liquidate Brazil on the other side. It is a perfect alliance between two extremes. Therefore, the first [topic] is that I need a capable state. That is able to intervene effectively to promote economic development in Brazil, to ensure that the five macroeconomic topics are correct, and for that I need a state that is not bankrupt. I need a financially healthy state. This is number one.

The second is the interest rate, which needs to be much lower. There is no reason for the interest rate to be like this. In my opinion, two real percentage points is more than enough.

Third: we should have a small account surplus, as only a small surplus is compatible with an exchange rate that is competitive for technology intensive companies in Brazil, industrial companies. For commodity producing companies this is not a problem, as they have natural advantages. Natural resources grant them (commodities) Ricardian advantages, such as Ricardian income. However, the secondary sector in Brazil needs to compete with foreign companies, but by foreign I do not mean foreign multinationals installed here. Foreign means industries in China, in the United States or in Argentina. Brazilian industry needs to compete with them on an equal footing. I defend that Brazil does not need protection for its industry, that was needed when the process of industrialization began in the 1930s and 40s. There is no more need for protectionism for some time now, but there is need for equal conditions of competition. When I got notice of this, I finally understood an expression widely used by Americans – I do not know if the English use it as well – "leveling the playing field". It means establishing equal conditions of competition. For them this concept is key and we do not know this. I discovered that this is fundamental and our industries do not have these conditions.

The fourth topic is recovering the investment capacity of the state. Besides fiscal adjustments in expenditure, I want the State to be able to invest a little. Say, twenty per cent of the total expenditure.

Finally, the fifth point is the one about distribution. We want a progressive tax system. There are three ways to distribute income. One is increasing the minimum wage whenever possible. This was

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done recently done by the Labor Party (PT) government. Getúlio had done this long ago. The other way, which was not done by the PT, but by democratic transition, was the increase in social spending, an increase from 11.12 to 24. The third way, which was not implemented in Brazil, is establishing a progressive tax system. I knew this for a long time, but the fact is that Brazilians have forgotten about this and it has been left out of the agenda years ago. Of course, the issue was left out from the right wing agenda, but it also has been off the left-wing agenda. Four years ago, by chance, I saw a comparison between Sweden and the United States on the distribution of income before and after taxes. In other words, we know that Sweden is one of the most egalitarian countries in the world. And that the United States, amongst the rich nations, is by far the worse, as research shows. The Gini index of both countries before taxes are almost equal, with Sweden having an index that is a little lower, with better distribution, but nothing significant. But the difference widens after taxes. Therefore, the effect is really powerful. Taxes in Sweden are progressive; the rich pay more than the poor proportionally. And in the United States and Brazil taxes are regressive. Thus, we have to put this topic on the national agenda.

In relation to the progressive tax, one of the topics of this project, what are the measures that the Federal Government could adopt to implement it in the present panorama of fiscal crisis?

There is no secret about instilling a progressive tax system. You start with income tax and then you raise the proportion of the income tax in total revenue, and, at the same time, lower direct taxes such as taxes on goods and services, amongst others. The difficulty is political. No one wants to pay taxes and especially the rich who definitely do not want to pay taxes, and now, they are all powerful as with the failure of the Dilma Rousseff government they felt reinvigorated, they were defeated in the elections, but they found an extremely undemocratic way of toppling the state. Toppling the government that was elected, and now they are having their own soirée against Brazil.

"The difficulty is political. No one wants to pay taxes and especially the rich who definitely do not want to pay taxes, and now, they are all powerful as with the failure of the Dilma Rousseff government they felt reinvigorated, they were defeated in the elections, but they found an extremely undemocratic way of toppling the state."

We would like to hear you particularly about the performance of the Federal Court of Accounts (TCU), a body whose mission is to improve Public Administration through external control. In your opinion, what can be the main contribution of the TCU for the development of a more efficient Public Administration?

I have never thought enough about this subject in order to give an answer that makes sense. The main thing is that you have so many objectives and my understanding is that modern societies defined for themselves certain key political objectives. They already had the objective of security and in the XVIII Century they defined the objective of liberty and of liberalism, and then the objective of economic development and nationalism, or developmental ideology. Then the objective of social justice and socialism and finally, the objective of environmental protection and environmentalism. Therefore, we have four great ideologies and five objectives. I have not given an ideology for security. But I could have. With this, the State exists to help the Brazilian nation to reach its objectives. For this reason, it needs to have intermediary goals, because these objectives are very general. What is the intermediary goal for which I am so fiercely fighting? It is a small account surplus, because I want a competitive exchange rate. If I had to choose only one objective, it would be this. And curiously, the second objective that we haven't even discussed, my intermediary goal, would be to end with all indexation, it is an economist's thing. Forbid the Brazilian state from having any indexation, as it would lower the costs of inflation control. You are obliged to induce brutal recessions. Thus, the interesting thing is to know what would be the strategic intermediary objective, one or two that the Court of Accounts should have.

Opinion

Public Efficiency

Luiz Akutsu
Office of the Coordinator-General for the Public Efficiency

Inefficiency in the public sector is one of the main causes of poor provision of services and waste of resources. The challenge of meeting the increasing demands of society with a limited volume of financial resources involves, necessarily, improving on the quality of public spending.

Despite its importance, the constitutional principle of efficiency was only incorporated in an explicit way to the Federal Constitution of 1988 (CF/1988) with the enactment of Constitutional Amendment n° 19, of June 4, 1998 (EC 19/1998). The original wording of article 37 of CF/1988 listed the following principles for the Public Administration: legality, impersonality, morality and publicity.

According to the Interministerial Explanatory Memorandum n° 49, of August 18, 1995, the EC 19/1998 aimed to search for answers to the economic stagnation, fiscal crisis, crisis of the state's mode of intervention in the economy, crisis of the state apparatus itself and deterioration of the capacity for administrative action of the state.

In accordance with the said Explanatory Memorandum, the EC 19/1998 sought "the reinvigoration of the capacity for management, formulation and implementation of policies in the state apparatus […] for the resumption of economic development and meeting of the citizenship demands for a better quality public service".

With regard to the principle of efficiency, the Explanatory Memorandum supported that:

> The increase of efficiency in the state apparatus is essential to overcome definitively the fiscal crisis […].
> As outcomes expected from the administrative reform, it is worth mentioning the following:
> – Incorporate the efficiency dimension into Public Administration: the state apparatus should prove able to generate more benefit, in the form of providing services to society, with the available resources, respecting the taxpayer.

The subject becomes even more relevant with the advent of the recent Constitutional Amendment nº 95, of December 15, 2016 (EC 95/1016), which instituted the New Fiscal System, establishing limits to State expenditure for the next twenty years.

Considering this background, contributing to the improvement of efficiency and quality of public services is one of the main strategic guidelines of TCU in the current biennium (2017/2018). By means of the Order dated January 13, 2017, which relates to the "execution of control actions focusing on evaluation of efficiency and the improvement of government performance outcomes", the distinguished Minister-President Raimundo Carreiro determined to the General Secretariat of External Control of the TCU, among other measures:

> I) prioritize the performance of control actions:
>
> a) that foster the increase of efficiency and the improvement of results from policies and public organizations, especially in actions of greater impact on the public welfare;
>
> b) intended to curb waste in public investments, with special focus on rebuking and reducing the incidence of diversion of the State expenditures and ensure TCU's timely and effective performance.

In accordance with this strategic guideline, two administrative innovations were implemented in 2017. They were the creation of the Office of the Coordinator General of External Control of Public Efficiency and Transparency (Cogef), part of the Strategic Center of External Control of TCU's General Secretariat of External Control; and the creation of the Thematic Group of Efficiency and Quality of Public Services, within the scope of TCU's Center of Advanced Studies in Control and Management (GT Eficiência/Cecap).

With the creation of Cogef, TCU aims to identify and systematize proceedings, good practices and methodologies, as well as gather control actions that contribute to the improvement of efficiency and quality of the public services, in order to enable the development of a systemic view of the Court's performance on this subject.

The GT Eficiência/Cecap, in turn, aims at strengthening cooperation between TCU and civil society, through representatives of the scientific community, the productive sector and the third sector, searching for enhancement of control mechanisms that contribute to the improvement of the Public Administration efficiency.

To improve the control actions related to the subject, it is necessary to narrow down the concept of efficiency. We adopt as a general concept the one of technical efficiency. TCU's Vocabulary of External Control defines efficiency as:

> Relation between products (goods and services) generated by an activity and the costs of the inputs used to produce them, in a certain period, maintaining the quality standards. (TCU's Vocabulary of External Control, 2016).

From this definition, we can conclude that, considering a range of inputs and respective products, technical efficiency relies on the following factors not mutually exclusive: (a) Minimization of costs to produce goods and services (economy); (b) maximization of goods and services produced with appropriate quality and in a timely fashion (time), for a given quantity of inputs; (c) improvement of organizational capacity for optimization of allocation of risks, inputs and production assets.

Besides this concept, it is relevant to highlight that of allocative efficiency, related to the degree to which a certain action leads to the production of more positive than negative outcomes from the point

of view of society. As examples of allocative inefficiency we can list (a) the construction of a wind power plant without building the respective transmission lines, causing idleness and, consequently, waste of resources; (b) building hospital facilities without procuring the corresponding equipment, thus delaying its inauguration and assistance to the population; and (c) the construction of soccer arenas for a given event in regions that aren't able of use it after this event, causing idleness and burden for the Administration with maintenance costs.

In order to evaluate efficiency, countless audit methods and techniques can be applied, such as evaluation of cost and time it takes to provide a service or to deliver a good to society; analysis of fragmentation, overlap and duplication; use of DEA – statistic tool of data envelopment analysis; cost-benefit and cost-effectiveness analysis. Some of these methods and techniques are better known and used on a daily basis by the courts of accounts, for example, in costs evaluation in bids, contracts and public works.

The sustained improvement of efficiency relies on improving organizational capacity of the Public Administration bodies. The inclusion of efficiency as a constitutional principle (EC 19/1998) is a strong evidence of the importance of the topic; however, improvements resulting from this principle are difficult to obtain.

Contrary to what common sense might indicate, the pursuit of public efficiency improvement is a challenge even for the most developed countries, such as the United States. In 1993, the North-American government issued a law named *Government Performance and Results Act* (GPRA), aiming to enhance the performance of government agencies in the country. The GPRA underwent significant changes in 2010, with the publication of the GPRA *Modernization Act of 2010* (GPRMA).

The main contributions of GPRA and GPRMA to the improvement of organizational capacity of North-American government agencies derive from the emphasis in these laws on results related to goals and strategic objectives, and from identification of means and key-factors external to the agency that are necessary to achieve these results. Among its main requirements, we list the following:

a) Federal agencies must prepare a strategic plan, covering a period of no less than five years, focusing on the delivery of results, comprising the agency's mission, goals and objectives for its main actions and the annual performance plans for the respective subsequent fiscal years;

b) The Executive Power must prepare a Federal Government performance plan for the government as a whole for submission to the Legislative Power along with the budget proposal;

c) The government agencies must prepare an annual report about the achievement of performance goals for the accrued fiscal year;

d) Possibility of legislative flexibility for performance improvement;

e) The Executive Power, through the Office of Management and Budget, shall oversee fulfillment of obligations by the agencies;

f) Oversight of agencies by the North-American Congress, with the Government Accountability Office's support, and the possibility of integration of the respective strategic plans with the budget;

g) Training for the implementation of the measures resulting from GPRA and the GPRMA;

h) Implementation through negotiation; and

i) Implementation in a gradual and flexible way, preceded by pilots.

One of the characteristics of GPRA and of GPRMA that stands out is the possibility of legislative flexibilization, which enables dealing with controls in a more adequate way, by discharging managers of part of the controls formally instituted by law and enabling the adoption of more dynamics controls, linked to risk management.

The good practices and results related to GPRA can serve as inspiration for the Brazilian reality, as long as they present procedures and techniques to induce sustained improvement of public efficiency. In our country, there is an additional space for this improvement, particularly concerning debureaucratization and administrative continuity.

Decree nº 9.094, of July 17, 2017, which provides for simplification of delivery of public service to users, is an evidence of the importance of the subject to the federal government. The said decree aims to reduce bureaucracy and complexity of the relationship of the government with citizens, as well as to provide new tools for citizens to propose measures to improve and increase state efficiency.

By evaluating debureaucratization possibilities, the courts of accounts can contribute to the efficiency of the state in at least two relevant fronts: (a) improving public services available to citizens and (b) increasing the country's economic competitiveness. The contributions could take place within the scope of the audits in order to: (1) simplify controls of Public Administration entities by analyzing cost-benefit of controls; (2) reduce overlaps and duplicities through sharing of database between Public Administration entities; (3) share solutions and systems for similar needs – for example, electronic judicial procedures in federal and state bodies of the Judiciary Power; and (4) reduce time and cost that bodies and entities take to answer demands by simplifying procedures.

Management continuity is another factor that can contribute to the consistent increase of organizational capacity and efficiency. By ensuring maintenance of the plans, strategic objectives and goals in several successive managements, the bodies, agencies and entities of the Federation can strengthen their capacity to produce more results with the increasingly efficient expenditure of resources.

The practices and initiatives addressed here are some of the possible ways for the courts of accounts to work towards the improvement of Public Administration to meet the difficult mission of achieving the constitutional principle of public efficiency, improving the capacity of Public Administration entities. This mission is especially important in the current scenario of fiscal crisis and of spending limits imposed by the EC 95/2016.

TCU conducts 1st National Forum of Control

Working with prevention, going beyond control, acting in an integrated manner, adopting a systemic vision, empowering the team and valuing transparency were recurrent points that marked the panels in the 1st National Forum of Control, held in the Serzedello Corrêa Institute (ISC) on 25 and 26 of October 2017. Some of the issues presented were internal and external control, management accountability, governance and management indicators, social control and combating corruption.

Envisaged and coordinated by the minister of the Federal Court of Accounts (TCU), Augusto Nardes, the event had the objective of integrating various institutions of internal and external control with focus on joint action; proposing new legislation, undertake capacity-building activities, in addition to spreading best practices in governance.

The institutions promoting the forum singed, at the end of the event, a letter of commitment containing measures providing greater integration between external and internal control, aiming to strengthen governance, management and control mechanisms of the Public Federal Administration. These actions seek to maximize results of policies and programs in benefit of society as a whole.

TCU sponsors debate and seminar on Constitutional Amendment nº 95

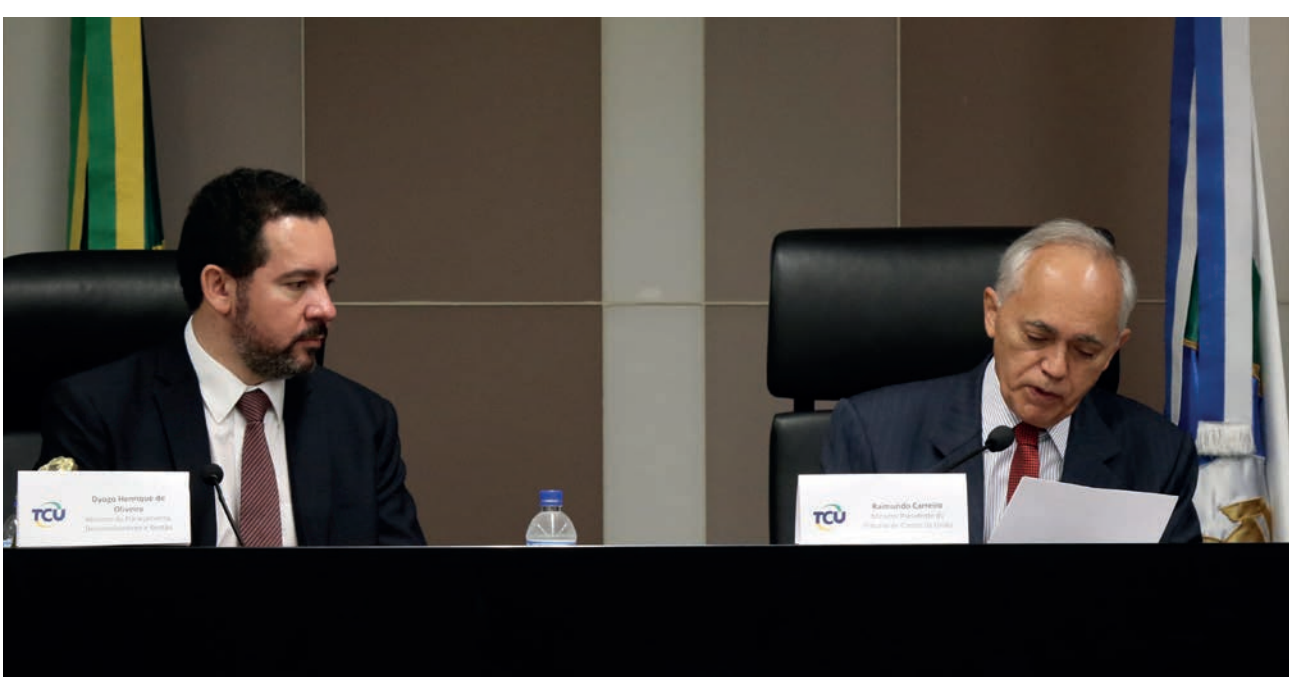
A public hearing held on 10/18/2017 in the Federal Court of Accounts (TCU) highlighted the state of Social Security in the country. During the debate, Minister Dyogo Oliveira, of the Ministry of Planning, Development, and Management (MP), stressed that Social Security is the most pressing issue within the current scenario of fiscal difficulties that Brazil is facing.

The objective of the hearing, proposed by the vice-president of the Court, Minister José Múcio Monteiro, was to support the analysis of the case TC 014.133/2017-2. The audit has the aim to evaluate measures adopted by agencies and branches of the government to uphold the spending limit as stated in the New Fiscal Regime, adopted by Constitutional Amendment nº 95.

During the hearing, a study on social security spending, commissioned by the president of the TCU, Minister Raimundo Carreiro, and led by the Department of External Control – Social Security, Labor and Welfare (SecexPrevi), was presented. According to the survey, cyclical, structural, and management issues affect Social Security. At the start of the hearing, president Carreiro highlighted the measures adopted by the Court to uphold the spending limit.

To stimulate debate, on 11/20/2017 the Serzedello Correa Institute promoted an edition of the Episteme program with the theme "Public Finance and Constitutional Amendment 95: interpretations and challenges". The idea was to present to the staff a critical analysis on the subject, aiming to prepare them for changes that will occur in this context.

Mauricio Wanderley, Director General of the Serzedello Corrêa Institute (ISC) and the Director of Education of the Financial Management School (ESAF), Fabiana Baptistucci, opened the event. Speaking at the event were Pedro Jucá Maciel, Undersecretary of Strategic Planning on Fiscal Policy of the National Treasury; Ricardo Gomes, Phd in Public Administration and University of Brasilia Professor; Márcia Lovane Sott, General Secretary of the Higher Council of Labor Courts; and Ricardo Volpe, Director of the Budget and Financial Control Advisory of the Chamber of Deputies. The Secretary of the Department of Governmental Macro Evaluation (Semag) of the TCU, Leonardo Rodrigues Albernaz moderated the debate.



Cecap Working Group discusses efficiency and quality of public services

The Center for High Studies of Control and Public Administration (Cecap) of the Federal Court of Accounts (TCU) held, on 10/22/2017, the first meeting of the Thematic Working Group (GT) on evaluating quality and efficiency of public services.

Created by Resolution TCU 263/2014 and implemented in 2017, Cecap is a permanent collegiate body of a consultative nature aimed at helping the Court to produce and disseminate relevant knowledge for external control; suggest institutional action for enhancement of the control system and public administration; and promote cooperation, research and studies, among others. The Serzedello Corrêa Institute (ISC) functions as the executive secretariat of the Center.

Cecap counts on four thematic groups, which gather TCU staff, external specialists, civil society and academic community representatives in support of the Center for planning and executing actions under implementation. Currently, the thematic groups include the evaluation of the efficiency and quality of public services; evaluation of results of policies and public programs; fostering transparency and combating fraud and corruption in the Public Federal Administration (APF); and the performance of the Courts of Accounts.

The GT for evaluation of efficiency and quality of public services was the first one to meet. The meeting sought to identify joint work opportunities and the interest of the participants in tasks and specific events.

Among the problem situations and their corresponding control actions presented to the group were the fragility of the internal control system of the Judiciary; risk of corruption in federal bank governance; low credibility of information on credit and tax installments; low recoverability of tax credit and active debt; deficiencies in governance of foregone revenues; high risks to Brazilian energy security; and the low effectiveness, efficacy and efficiency of the public administration when executing public policies.

One of the main issues discussed during the group meeting was the challenge regarding enhancing public services under primary spending limitation, ensued from Constitutional Amendment 95, which established the New Fiscal Regime. Apart from priority topics for TCU action in respect to the efficiency of public administration, the group meeting also discussed practical means of operating partnerships between Cecap and the academic community.

TCU presents the 2017 Policies and Programs Report to the National Congress

The Federal Court of Accounts (TCU) participated in the public hearing in the Joint Committee on Planning, Public Budget and Oversight (CMO), aiming to present the 2017 Policies and Programs Report (RePP 2017). The meeting was held on 9/28/2017.

The General Secretary of External Control of the TCU, Cláudio Castello Branco, set forth the structure and results of the report and stressed the importance of the National Congress in decisions concerning the allocation of budgetary resources by explaining the instructions determined by the court decision. The document, produced in compliance with the Budgetary Guidelines Act, offers subsidies for the legislative process of budgetary allocation and its developments.

The TCU aims to construct a long-term action plan in order for the country to find synergy in government programs. To this end, the annual delivery of the RePP, systemic monitoring of the court decisions mentioned in the report (integrated control actions), and partnerships with the National Congress, Center of Government and sectorial bodies for the integration of initiatives are foreseen.

After discussing the deficiencies of the plans, the TCU recommended the preparation of an action plan covering budget-enhancing measures. In addition, TCU will continue participating in public hearings in order to help the National Congress in its decisions and, in the future, enhance public governance.

Senator Dário Berger, president of the CMO, conducted the hearing. Other participants included Deputy Cacá Leão, rapporteur of the Annual Budget Act (LOA 2018), the Coordinator General of External Control of Policy Results and Public Programs of the TCU, Marcelo Barros Gomes, and the Secretary of Governmental Macro evaluation of the TCU, Leonardo Rodrigues Albernaz. Representatives from technical units responsible for audits consolidated in the report also accompanied the public hearing.

During the debates, the secretary general answered questions from committee members on the report and on other issues, such as the judicialization of health services, social security, public security, unfinished kindergartens and public debt. With regard to all these issues, TCU mentioned recently finished works or those in progress, which means that the Court is tuned with the needs of the National Congress, who is the representative of Brazilian society.

Reflections on the independence of federal government auditors

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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 (LOTCU), 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 LOTCU.

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.

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The activity of market analysis for planning of government procurement

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ABSTRACT

Since Act n. 8,666/1993 became effective, there have been discussions about the stage of the procurement process that concerns price survey. By reason of complete lack of regulation, for many years, determining the methodology to be followed for the performance of this important stage of the internal phase of the procurement process has been left at the discretion of public agents (managers, purchasing agents, and even legal assistants). It is important to acknowledge that this activity has a major strategic relevance in the procurement process and the budget administration of the agency, since a poor price survey will give space to entering into overpriced contracts; price surveys that do not find the actual market price may render the execution of contracts impracticable, and consequently restrict the mechanism. It must be acknowledged that this is an extremely complex activity that requires skill on the part of the public agents. Even now, under the provisions of Normative Instruction n. 5/2014, the agent performing the regulation still lacks guidelines as to the methods that can be adopted in order to reach an appropriate financial planning of the contract. It is precisely this aspect that will be addressed herein, so as to offer the public agents in charge of such activity the minimum data to perform their duties well.

Keywords: procurement, internal phase, price survey.

1. INTRODUCTION

In exception of engineering works and services contracts, which answer by their own techniques, pricing for the purpose of planning contracts has been addressed, in most of the public agencies and entities, under a simplistic and unreal formula: the survey should be carried out with at least three quotations, thereby understood as proposals forwarded by any parties that may be interested. Having said that, it is easy to realize the degree to which such method is fallible (which until nowadays continues in many regions of this vast country).

In the first place, the company of the related sector, once consulted, is not obliged to provide a 'quotation'. And, not rarely, resists in doing so, whether since this work will require its precious time just to provide a preliminary pricing, or whether since the businessperson has no intention of anticipating his/her price to the administration or to his/her competitors. Secondly, because those who respond to the request are aware that the aim is to contribute towards a future procurement procedure, and therefore have no interest in providing any information which can be relied upon. Thus, the information as a rule is fictitious: prices with a broad margin of fat to be burned at the time of the competition as such.

Given the complexity and importance of such activity, we prefer not to address it with the simplicity of the expression 'price quotation or survey', since this suggests an elementary activity. That which agents have developed (or should develop) is an actual 'market analysis'; that is, a real investigation of the market conditions regarding the object that is to be placed for competition.

The expression 'quotation' is also improper, since it should be understood as information provided by the entrepreneur of the sector related to the object. Therefore, the expression would not include information obtained from other sources of consultation. In this regard, we also prefer the expression 'parameters or pricing data'. Of course, since each piece of information obtained from a variety of sources represents data that must be duly treated as to compose the market price spreadsheet. That which the public agent in charge of this activity carries out is therefore a 'market analysis' that allows for collecting 'pricing parameters or data'.

With the advent of Normative Instruction (IN) n.5 MPOG/SLTI, of June 27, 2014, new parameters were finally fixed to mark the investigation of the market, aiming at planning public bidding. Its Article 2 lists sources of consultation that can serve as a basis to collect information, to wit: recent contracts of the agency that is promoting the bidding; biddings and contracts of other public agencies; official charts

or specialized publications; and the internet. TCU Ordinance n. 128, of May 24, 2014, further states that pricing information can be obtained by consultation carried out over the counter or phone.

However, in that which concerns advances in relation to the matter, neither of these regulations addresses in detail how each of these sources should be treated. In a recently concluded bidding, should I use only the lowest price, the average of all the prices classified, or each of the prices classified as an isolated piece of information? Should prices obtained in consultation on the web include freight? And where freight is announced free of charge, can it be used? This will be addressed below.

2. FROM SEVERAL SOURCES OF SURVEY

2.1 RECENTLY ENDED BIDDING

As mentioned above, among other information to be used as sources for pricing, results of recent biddings of the agency itself and of other agencies and public entities can be used, as per IN 5/2014-MPOG/SLTI:

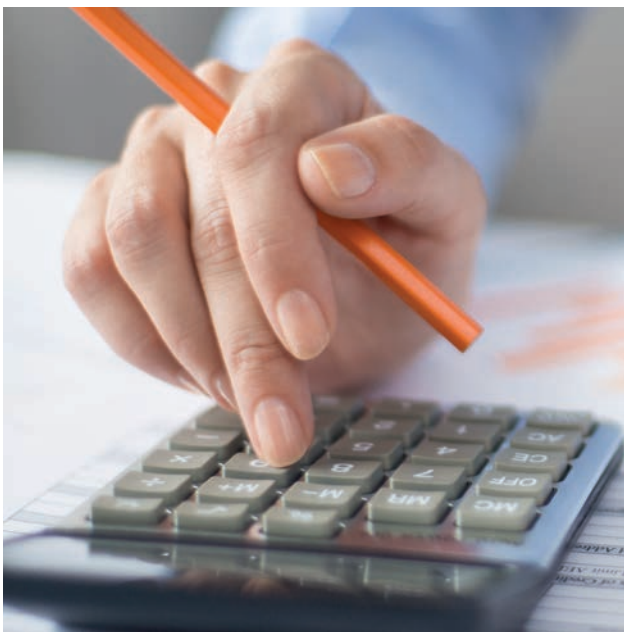
> Article 2 Pricing survey will be carried out by using one of the following parameters: (Wording given by Normative Instruction n.7, of August 29, 2014).
>
> [...]
>
> III – similar contracts of other public entities, which are underway or have been concluded within one hundred and eighty (180) days previous to the date of the price survey;

And TCU Ordinance n. 128/2014:

> Article 9 The estimation of price of materials, equipment, inputs, and services hired for supply of goods or utilities must be calculated based on the simple arithmetic mean of at least three (3) price references obtained, separately or jointly, by means of market price survey, at the Public Administration's agencies or entities.
>
> Paragraph 1 In the calculation of the simple arithmetic mean referred to in the main paragraph should be excluded extreme and unreasonable amounts which may significantly alter the core trend of the result of the example.
>
> [...]
>
> Paragraph 4 For the purpose of this Ordinance, the prices practiced in the Public Administration's agencies or entities are evidenced, among other forms, by means of results of recent bidding procedures, of acquisitions and contracts recently undertaken, of prices recorded in effective price records minutes, or of prices practiced in contracts that are underway.

As can be noticed, despite both the normative texts referring to the results of biddings (in the case of IN 5/2014-MPOG/SLTI, indirectly) there is no indication whatsoever of the methodology that should be applied for the use of the latter, which is, in my view, one of the richest consultation sources. Should solely the winner price, the average of all the classified prices, or each of the prices classified as autonomous data be used?

However, before looking further into the merits of the methodology to be used in the appraisal of the price estimated with the 'biddings' source, the following is worth mentioning: whichever the data that has been collected, notwithstanding the source that was consulted (biddings, suppliers, Min-



utes of Price Records System [SRP], contracts of other agencies, internet), it is of primary importance that a critical analysis should be performed, in such manner as to avoid that prices which are discrepant, unpracticable, or overpriced in relation to the object to be hired, should be included in the calculation memory, attracting an unreal result in relation to the market average. The following refers to the TCU guidelines:

> The price survey which precedes the drafting of the bidding budget requires a critical appraisal of the amounts found, in order to dismiss those showing a significant variation in relation to the others, which for this reason compromises the price estimation in reference. According to the plaintiff, the price estimation comprised in the basic project of the bidding proved to be inconsistent, since the surveyed amounts showed high variations of price, 'sufficient to affirm that the average of these prices is not adequate to represent the prices practiced in the market'. The Court, upon accepting the offer of the reporting judge, decided to inflict on the responsible parties the penalty fine of Article 58 of Act n. 8,443/1992. Precedent that was mentioned: ***Court Decision 1,108/2007 – Plenary Appellate Decision 403/2013 – First Chamber 013.319/2011-6, rapporteur minister Walton Alencar Rodrigues, 02.05.2013.***

Having said that, we will proceed to address the methodology to be adopted in the examination of the results found based on previous biddings, for market outlining in the purchase process.

The first recommendation is to preferably use results of biddings of other agencies located in the same region of the entity that is carrying out the survey. In fact, the cost of transport, especially in Brazil, has a strong influence on the final price. One must also pay attention to the institutional aim of the surveyed agency. As far as possible, it should resemble the aim of the entity that carries out the survey, namely if the object of the purchase is specific for its performance area. If a public sanitation company intends to acquire chemical products to use at water treatment plants, other companies of the same sector will probably adopt the same routine and approximate quantities. In another situation, it would not be reasonable that an agency, e.g, a court that intends to acquire medicines for its health department stock, should compare prices against a purchase made by a municipal health department, or that of a major hospital, for the reason of the purchase profile of these two agencies being quite distinctive.

The analyst must also take care as to verify whether the object of the paradigm bidding resembles the one its organization will hire in technical characteristics and quantities.

For the purpose of market analysis, objects may be considered similar ones when difference in terms of technical characteristics will not cause a significant impact on their final price. For example, if an agency intends to acquire a notebook, the processor's difference in performance causes a decisive impact on the price, which does not occur with the hard disk capacity. With regard to the quantities, compatibility relates to a difference between the item to be acquired and the surveyed one which would not impact the price, in view of economies of scale. The unit price of a ballpoint pen is not significantly altered (or altered at all) by an acquisition from one hundred to one thousand units; though if the object is an air conditioner, type Split 21.000BTUs, the unit price would definitely suffer a strong impact.

Once the compatibility of the object of the paradigm bidding has been verified, it is the moment to collect the obtained data.

None of the norms referenced herein address this detail. Therefore, considering the duty to criticize

the collected data (see aforesaid TCU precedent), common sense should prevail. It is noteworthy that the analyst will not be bound to collect data on the winner's final price only. In fact, as demonstrated below, it is even possible that the winner's price may not be used. Take as a hypothetical example a bidding carried out in the modality of an electronic bidding, whose final result classified ten offers.

Figure 1:
Data collected based on the result of a bidding

Classification		Final Offer
1ª	Company A	R$ 1.000,00
2ª	Company B	R$ 1.050,00
3ª	Company C	R$ 1.080,00
4ª	Company D	R$ 1.084,00
5ª	Company E	R$ 1.085,00
6ª	Company F	R$ 1.110,00
7ª	Company G	R$ 1.200,00
8ª	Company H	R$ 1.250,00
9ª	Company I	R$ 1.300,00
10ª	Company J	R$ 1.350,00

From the result it can be noted that the final prices between the winner and the sixth in rank are quite close, which indicates the competition was a tough one. From the seventh in rank onwards, the final prices become further apart. In this case, it would not be unreasonable to use the first six prices, each as isolated data. The others, having become distant from the first in rank, can indicate that they did not compete at the bidding and that their prices still contain the "excess fat" of the initial prices. The best instrument to perform this appraisal in the electronic biddings is the Minutes, since it shows the historic records of the evolution of the bids throughout the competitive stage, indicating which prices remain static and those that effectively competed for the object.

Let us assume that, besides these, the analyst would have received two proposals from suppliers. The final result of the survey would be:

Figure 2:
Data collected based on the result of a bid and quotations from suppliers

Source		Data Collected
1ª	Electronic Bidding n. _- Company A	R$ 1.000,00
2ª	Electronic Bidding n. _- Company B	R$ 1.050,00
3ª	Electronic Bidding n. _- Company C	R$ 1.080,00
4ª	Electronic Bidding n. _- Company D	R$ 1.084,00
5ª	Electronic Bidding n. _- Company E	R$ 1.085,00
6ª	Electronic Bidding n. _- Company F	R$ 1.110,00
7ª	Supplier 1	R$ 1.100,00
8ª	Supplier 2	R$ 1.150,00
Market average		**R$ 1.082,37**
Explanatory note		The final prices, from the 7th to the 10th ranked in the electronic Bidding n. ____, were not considered, as they were considered discrepant in relation to the whole.

Apart from this method, only the winning price as isolated data, the average from the second to the sixth in rank, and the suppliers' quotations could be used:

Figure 3:
Map of alternative prices

Source		Data Collected
1ª	Electronic Bidding n. ___ - Winner Price A	R$ 1.000,00
2ª	Electronic Bidding n. ___ - Average of 2nd to 6th	R$ 1.081,80
3ª	Supplier 1	R$ 1.100,00
4ª	Supplier 2	R$ 1.150,00
Market average		**R$ 1.082,95**
Explanatory note		The final prices, from the 7th to the 10th ranked in the electronic bidding n. ___, were not considered, as they were considered discrepant in relation to the whole.

However, if the result of the paradigm bidding has selected a winner price at a level well below the others, this may indicate that the winner would have quoted an impracticable price. In this specific case, it would be extremely recommendable not to use the winner price since this refers to data that is far too distant from the data as a whole found in the bidding, and to make use only of the other prices.

2.2 PRICES RECORDED IN THE MINUTES

The use of the price records minutes of other agencies and entities as a source of pricing data collection is regulated under Normative Instruction (IN) 5/2014-MPOG/SLTI:

> Article 2 The survey of prices will be carried out through one of the following parameters: (Wording amended by Normative Instruction n. 7, 29 August 2014)
>
> [...]
>
> II – Similar procurements of other public entities that are either underway, or completed within one hundred and eighty (180) days prior to the date of the survey of prices; (**amended by Normative Instruction n. 3, April 20, 2017**)

And, in TCU Ordinance n. 128/2014:

> Article 9, Paragraph 4 For the purposes of this ordinance, the prices practiced in agencies or entities of the Public Administration are evidenced, among other, through the results of recent bidding procedures, acquisitions and recently assumed contracts, **of prices recorded in effective price records minutes**, or of prices practised in contracts that are underway. (emphasis added)

It can be noted that Normative Instruction (IN) n. 5/2014 does not explicitly indicate the use of the price records minutes as a useful source, which the Ordinance n. 128/2014 of the TCU indicates in the transcribed provision. This does not mean that IN n. 5/2014 does not recognize this source as reputable, since it uses the general term 'similar procurements of other public entities […]'. Since no reservation exists, the construction will necessarily be comprehensive, to understand that the provision comprises all forms of contracts in the Public Administration.

The use of the price recorded in the minutes deserves, however, special care, in addition to those already explained in the case of use of bids' results. The reason is that the use of the recorded prices system has recorded a series of distortions, attracting considerable attention, including on the part of the Federal Court of Accounts. The distortions relate primarily to the degree of uncertainty that this procurement system is causing in the market of government procurement.

Many bids are undertaken without prior planning that show that this is the most appropriate way to fully satisfy the interests of the Administration, and are projected with a quantitative criterion devoid of minimum accuracy level. Many agencies and entities invite tenders aiming at recording prices on assumptions that have not been set forth in the respective legislation, setting quantitative limits to be recorded without much commitment towards the genuine demand of the contracting agency. In addition, unfortunately, invitations to bid that stipulate minimum supply lots and a delivery schedule are rare. In this manner, the business becomes uncertain for the entrepreneur, and the generally accepted commercial rule is that *the greater the uncertainty of the business, the higher its cost.*

Imagine the case of an invitation to bid that aims at recording prices for future purchases of a particular product in minimum quantities of a thousand and maximum of 5 thousand units, without fixing minimum supply lots and a delivery schedule. If the entrepreneur formulates the proposal, counting on a sale which is approximate to the quantitative registered limit, but the managing agency remains closer to the minimum quantity, the unit price will become unprofitable. Knowing this, the entrepreneur adds to the price an increase which provides him/her with greater security, reducing the risk of loss in the commercial relationship, since it will not be possible, during the effective term of the minutes, to readjust its prices.

This condition has turned the Recorded Prices System into a more costly form of procurement. For no other reason, the TCU has insisted that agencies and entities should adopt measures which would make it possible to identify acts of planning this type of procurement:

> Record the prices obtained by means of the electronic bidding [...] only if evidenced that this is the most economical option for Administration. (**Appellate Decision N. 984/2009, Plenary**)

> I therefore believe that it should also be determined, as condition for the continuity of electronic bidding, that the agency or entity should attach to the administrative proceeding thereof the actual motive for such tender to be performed by the Recorded Prices System, concurrently remitting a copy of such document to this Court. Further, the unit must be determined where in future bidding procedures the adoption of the Price Records is always preceded by the explanation of the reasons for its employment. (**Court Decision N. 2,401/2006, Plenary**)

> Therefore, the provision in Item IV of Article 2 of Decree 3,931/2001, which provides for the possibility of adopting the recorded prices system where it is not possible to previously define the quantities to be demanded by the Administration, cannot be understood as an authorization for the Administration not to define, albeit as an estimate, the quantities which may be purchased during the effective term of the price records minute. It is unreasonable to believe that by such provision the Decree has aimed to authorize the Administration to not select the best offer for the acquisition of goods and/or services, and to breach the constitutional principles. (**Court Decision No 1,100/2007 Plenary**)

In view of these observations, it is recommendable that the agent, who is in charge of collecting market prices, when faced with an effective price records minutes, whose object has characteristics similar to the one that is intended to be hired, should take care to check with the manager if the minutes have engendered business, especially in the case of minutes which term is about to expire. It is possible, and not rare that the minutes remain effective, appearing as valid in the system, while in practice not being used by the manager, participant, nor even generating external adhesions.

If the minutes, albeit in force, are not generating business, the recommendation is to not use them, since the recorded price can probably no longer be borne by the beneficiary, indicating that this price is outside the market rate.

SOURCE: Prices obtained on the Web

Regarding the use of the web, the regulations currently in force, IN 5/2014-MPOG/SLTI and TCU Ordinance 128/2014, provide, respectively, as follows:

> Article 2 The survey of prices will be carried out by using one of the following parameters: (Wording amended by Normative Instruction n. 7, 29 August 2014)
>
> [...]
>
> III – survey published in specialized media, specialized electronic sites or of extensive domain, provided that it contains the date and time of access; or (as amended by Normative Instruction n. 3, April 20, 2017)
>
> [...]

> Article 4 Price estimates obtained in auction or sales intermediation websites shall not be admitted.
>
> Article 10 The surveys of prices on the market can be carried out on the web, over the phone, via e-mail or correspondence, in specialized publications, and personally to the suppliers by means of a representative of the Administration of the TCU, in compliance with the following guidelines:
>
> I – in the case of price survey carried out in online shops, a copy of the searched page where the price, the description of the goods, and the date of the survey is stated should be coupled with the records;

As seen, the only methodological recommendation regarding the use of the web is the one provided under Article 4 of IN/MP N. 5, June 27, 2014. In the case of TCU Ordinance n. 128/2014, the recommendation falls upon the formal aspect of the record of the survey that was carried out. As for the methodology to be employed, no provision exists. However, it is obvious that the use of the web as a source of price consultation requires many other cares. Starting with the orientation provided under IN n.5/2014/MP mentioned herein, we shall proceed to the guidelines for use of this excellent source of consultation.

The above-transcribed rule seems to indicate that which is obvious. It provides that data search on the web may not be made on auction or sales intermediation sites. This could not be more reasonable.

Thus, should the search aim to investigate the actual 'behaviour' of the market, it is clear that the sources of consultation must be suitable. Suitable must not be mistaken for dishonest. By suitable, it must be understood as the source that represents the usual commercial sales segment. The auction websites, and those of exchange or sales intermediation – for example, OLX, Mercado Livre – are honest sources, but not suitable for the purpose of collecting data. The reason for this is that private individuals work with exchange and sale of used products (although they may also have formal stores in their advertising registrations).

For performing the consultation, prices announced on widely known e-commerce websites must be searched, such as, among others, *Shoptime.com* and *Americanas.com*. Websites of formal shops that advertise their products in the worldwide computer network are also suitable.

There is no obstacle in the use of search sites, such as *Buscapé* or *Bondfaro*, because such tools work as a large filter of sales information about a particular product, performing a search on all sale sites. Of course, the use of this tool will accelerate the process, but, on finding the results, the person responsible for the search should go to the seller's

site to print its page, because that is where the advertisement is to be found, which is ultimately the proposal.

As in the use of biddings, price records minutes and contracts with other public agencies, the comparison must be made based on the similarity of characteristics and quantities of the object to be acquired, which must be the most approximate as possible, thus considered the announced object which technical characteristics do not diverge to such an extent as to cause significant price differences.

In relation to the quantities however, the prices on the Web tend not be appropriate when the acquisition by the public agency will have a considerable volume. This is so since the price on the web is not calculated based on economies of scale, i.e., it does not promote the reduction of the unit value in view of the quantity to be acquired. Therefore, the web is more recommendable for purchases of small quantitative volumes. The agent who is in charge is responsible for determining in each case that which is to be considered as 'compatible quantity'.

Another concern that the analyst should have is with respect to price formation. In the open field of the web there is space for a number of offers and subsidised prices, either by the manufacturer, or by the website as such. For this reason, discount prices must be found, precisely because they do not represent the 'normal behaviour' of the market, but an exact and specific situation. Ads such as: "From... By" Should be avoided.

Further care to be taken concerns the inclusion of the cost of freight in the advertised price of the product. It is known that the cost of transport or distribution of goods significantly impacts the final price of the product. Therefore, the analyst cannot be conformed with the advertised price, should the latter still have to suffer the impact of freight. The procedures must be performed on the site as if the purchase were being performed until the freight is calculated to obtain the final price.

2.3 COST SPREADSHEETS OF OTHER CONTRACTS

As it is widely known, the costs of service agreements must be estimated by means of a spreadsheet of composition of costs, as provided under Act n. 8,666, of June 21, 1993:

> Article 7 Tenders for the performance of works and for services shall abide by the provisions of this Article and, in particular, the following sequence:
>
> Paragraph 2The works and services may only be tendered where:
>
> (...)

> II – there is a detailed budget in spreadsheets that express the composition of all its unit costs.

And in IN 2-SLTI/Mpog, April 30, 2008:

> Article 14 Procurements of service rendering will always be preceded by the presentation of the Basic Project or Term of Reference, which should preferably be prepared by a technician with professional qualification relevant to the specifics of the service to be hired, and the Project or the Term must be justified and approved by the competent authority.
>
> Article 15 of the Basic Project or Term of Reference should contain:
>
> [...]
>
> XII – the estimated cost of the procurement, the global and monthly maximum value established as a result of the identification of the elements that compose the price of services, defined as follows:
>
> a) by means of filling in the spreadsheet of costs and price formation, in accordance with the cost of the items referent to the service, and may be dismissed with motive in procurements where the nature of the object renders impracticable or unnecessary the details of costs for evaluating the possibility of performing the practiced prices.
>
> b) by means of a justified survey of the prices practiced in the market in similar procurements; or, also, by means of adopting regular amounts of sector indicators, tables of manufacturers, official reference amounts, public fees and others equivalent to these, as the case may be.

The costs spreadsheet identifies, basically, two major groups of expenses: direct costs and overheads. Direct costs refer to any expenditure that must be borne by the company, and which derives directly from the contract. In other words, it is the set of expenses that the company shall only bear if included in the performance of the contract. In a contract for cleaning, hygiene and conservation, the material employed is a direct cost, since it is only borne by the company if the latter assumes the contract. Once the term of the contract has ended (or upon not having won the bidding) the amounts related to this cost will no longer be disbursed. The following costs are included in the list of direct costs: those related to labour employed in a dedicated form, expenses incurred thereon; materials, inputs, uniforms, individual protection equipment (EPIs); equipment (in this case, the depreciation cost); tax charged on the service and/or materials employed, among other.

Indirect costs are those which refer to expenditures arising out of the company's operational structure itself, and which are borne regardless of the execution of a contract, receiving, however, the impact thereof. These constitute expenses on rent of the company's head office and branches, as well as its physical structure (furniture, equipment); owned or rented vehicles; costs of water, electricity, internet, telephone; administrative labour, members' pro-labore, taxes on sales etc. On spreadsheets of costs, indirect costs are identified under Bonus and Overhead ('BDI').

It is important to highlight that, besides the purpose of financial planning of the project – to check the likely cost of the contract that will be placed for tender – the decomposition of the final price in cost spreadsheets also fulfils the objective of allowing the administration to be able to control the cost of the contract, enabling the identification of signs of impracticability in the offers, and avoiding the overprice of unit costs, or the practice of the so-called 'spreadsheet game'. A simple example will illustrate the concept well.

Imagine that a company belonging to the cleaning, hygiene and conservation sector submits an offer where the unit cost of one item of the uniform is priced at 60 reais. It will be possible for the contracting authority to check with the market (professional uniform segment) whether that price is in accordance with the actual current practice. If the result of this investigation reveals that the average price of that item does not exceed the range of thirty reais, it would be possible to negotiate the contract price, reducing the value of the unit item.

However, this control is only possible in relation to the direct costs of the contract, because for controlling the overhead costs it would be necessary

that the manager should collect a range of information on which he had no power to interfere, such as: value of all the company's contracts that are underway, with identification of the respective rates of BDI, and value of each operating expense that the company owns (leasing of real estate, insurance, salaries of administrative employees).

It is therefore by direct costs that the contracting administration can promote the financial control of the contract. It is lawful to conclude that the cost spreadsheet will be used concurrently for the planning of the procurement and contract management. After all, at the time of the renewal or extension of the contract, it will be perfectly possible to verify the actual rise of direct costs.

It happens however that most public agencies and entities, when carrying out a price survey activity for service agreements, especially those outsourced, adopt the wrong method to appraise the estimated value of the procurement, focusing their survey based solely on the forwarding, to companies of the relevant sector, of the spreadsheet of costs in blank, so that they be returned duly filled in.

This is clearly not the most appropriate way to appraise the estimated value of the procurement.

If the administration allows the companies themselves to define their direct cost, they enable the latter to intentionally raise such costs, fixing profit on what should be direct cost, as demonstrated in the previous example.

Therefore, the administration itself should, by means of its technical experts, investigate the market in relation to each unit (direct) cost surveying the average price of labour that will be used, materials, inputs, EPIs, calculating the depreciation of equipment, all from the same sources of survey that would be used if the administration were to acquire such items directly.

A data source that is very important for the outlining of prices in these procurements are contracts, executed by both the agency promoting the procurement, as by other agencies and entities. This source of consultation falls under the same rules previously mentioned, IN 5/2014 and TCU Ordinance 128/2014, respectively:

> Article 2 The survey of prices will be carried out by using one of the following parameters: (Wording amended by Normative Instruction n. 7, 29 August 2014)
>
> […]
>
> III – Procurement similar to that of other public entities that are either underway or concluded within one hundred and eighty (180) days prior to the date of the survey of prices;

Article 8 The price estimates regarding labour for outsourced services shall be drawn up based on an analytical spreadsheet of labour and input costs composition, and shall abide by the following criteria:

I – the wages of contractor employees shall be established based on a collective employment agreement or convention of the relevant professional category;

II – if there is more than one category in a same procurement, wages will be fixed based on the collective agreement or convention of each professional category;

III – if there is no employment collective agreement or convention, wages will be fixed based on average prices obtained in market survey, in specialized sources, in private companies of the sector relevant to the tendered object, or in public agencies;

IV – the social charges and taxes shall be fixed in accordance with the specific laws; and

V – The input amounts will be established based on price survey, in terms of Articles 9 to 11 of this Ordinance, or at prices fixed in the relevant legal instruments.

Paragraph 1 If there is no employment collective agreement or convention, the value of the meal voucher can be set based on the simple arithmetic mean of the amounts paid by at least three (3) the contracts of the Federal Court of Accounts (TCU) or other agencies and entities of the Public Administration.

Paragraph 2 The input amounts can be fixed as a percentage of the service provider's wage amounts, using as reference the same percentage of a previous contract having same object.

Paragraph 3 The invitations for tender shall provide that the offered price shall expressly state the costs of meal and transport vouchers.

Paragraph 4 The invitations for tender and the contracts shall provide that the payment of the meal and transport voucher will be mandatory, regardless whether not provided for under a collective employment agreement or convention.

Paragraph 5 The invitations to tender shall provide that the remuneration amount of contractor employees shall not be less than that provided under a collective employment agreement or convention, or, if appropriate, than the amount fixed by the Administration.

Paragraph 6 For technical reasons, duly justified, wages may be fixed at amounts higher than those of collective employment agreements or conventions.

Considering that the main outsourced services are common to the vast majority of public agencies (cleaning, surveillance, telephone services, reception, elevator management, building maintenance, administrative support), it will not be a difficult task to find good pricing parameters from this source.

Thus, the average cost of each unit of the spreadsheet can be calculated based on cost spreadsheets of contracts of other agencies that are in force.

The only item which, as previously explained, cannot be controlled is the BDI. But even this cost can be predicted based on the average rate verified among several contracts that were surveyed.

With this methodology, the administration will have an approximate forecast that is much closer to the reality of the market, in addition to preventing companies from practicing overprice or spreadsheet game.

3. CONCLUSION

Thus, on using pricing data obtained through recent procurements, performed by the agency itself or by other agencies and entities:

a. preferably the tenders searched should be those that were conducted by agencies and entities located within the same region and with a similar institutional mission to that of the agency conducting the survey;

b. data can be used related to the classified prices, whether in an isolated manner, or by an average taken among those classified; and,

c. the use of collected data depends on previous critical evaluation, in order to avoid overpriced data or impracticable prices;

When pricing data is obtained from price record minutes, the agent who is in charge, after verifying that this refers to an object with similar characteristics to that which is intended to be hired, must inquire at the managing agency whether the minutes continue to generate business, in order to obtain greater security from their data.

As to the prices collected in a survey on the web:

a. surveys on the web are especially useful for the purchase of products in small quantities, since one is not being able to calculate the final price on the basis of economies of scale;

b. widely known e-commerce websites must be accessed, or websites of the suppliers themselves;

c. websites of sales intermediation or auction must not be used;

d. the characteristics of the object should be similar to those of the object to be acquired by the administration;

e. promotional prices must not be collected, since they do not represent the 'normal behaviour' of the market;

f. seek to include the freight in the final price, so that the pricing includes the cost of distribution of the product. For this purpose, it is sufficient that the analyst should perform the purchasing procedures (as if he/she were the consumer), until the product freight is calculated.

Finally, when the price survey relates to a service agreement, the agent who is in charge should prevent the forwarding of the spreadsheet of costs in blank to be filled in by companies of the relevant sector, and proceed to survey each component in order to find the total estimated value.

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Preliminary technical studies: the Achilles heel of public procurement

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ABSTRACT

The purpose of this study is to present the preliminary technical studies (ETP) and the Demand Officialization Document (DOD), as essential elements for the planning and success of public procurement. In this regard, it presents public procurement as a work process consisting of interconnected stages, each one with defined steps, inputs and products. Next, we will address the DOD as a first effort for the success of procurement, to further ahead examine the Preliminary Technical Studies (ETP), demonstrating the legal requirement for their formulation in public procurement, their content and adequate level of detail, and the difficulties for their sound formulation.

Keywords: governance; efficiency; public procurement; preliminary technical studies; demand officialization document.

1. INTRODUCTION

According to the article published in *Folha de S. Paulo*, the public sector in Brazil spends badly. "The combination of high and inefficient public spending has slowed the growth of Brazil." According to this same article, based on data from the *Credit Suisse*, between 1999 and 2014, even though the public sector spent 38.3% of the Gross Domestic Product (GDP), Brazil had an average growth rate of 3.1% of its economy. In in other emerging market countries, despite the public-sector spending much less, around 25% of the GDP, economic growth was much more expressive, in the range of 5% (Fraga, 2016).

The survey of *Credit Suisse* also shows that Brazil is the 28th among 39 countries in public spending efficiency. If health and education areas were to be analysed in isolation, the situation of the country would prove to be even more unfavourable, with Brazil occupying respectively the 34th and 33rd positions (Fraga, 2016).

The inefficiency of the Brazilian public sector should not be attributed only to deviations arising from fraud and corruption. Much is due to inefficiency in the management of the procurements, as for example, the absence of annual planning for the organizations' purchases, and, more specifically, the lack of adequate planning of each acquisition.

TCU's systemic ongoing inspections have found that the deficiency in planning is a frequent cause of weak points in public procurement (appellate decisions 2,328/2015 and 2,339/2016, both by the TCU Full Bench).

Thus, the purpose of this study is to present the preliminary technical studies (ETP) and the Demand Officialization Document (DOD), as essential elements for the planning and success of public procurement. In this regard, it presents public procurement as a work process consisting of interconnected stages, each of which with defined steps, inputs and products. Next, we will address the DOD as a first effort for the successful outcome of the procurement, so as to further ahead examine the Preliminary Technical

Studies (ETP), demonstrating the legal requirement for their formulation in public procurement, their content and adequate level of detail, and the difficulties for their acceptable formulation.

We hope these brief lines contribute to the debate about the relevance of the ETPs for the improvement in public procurement and, consequently, in the efficiency of public services.

2. PUBLIC PROCUREMENT AS A WORK PROCESS

The acquisition of an asset or the hiring of a construction work or service does not summarize the bidding procedure or the direct procurement procedure. Public procurement must be regarded as a process starting from the time when the request of the goods, construction works or services to be acquired is made, until the time when the hired solution is delivered, producing results which meet the need that originated the former.

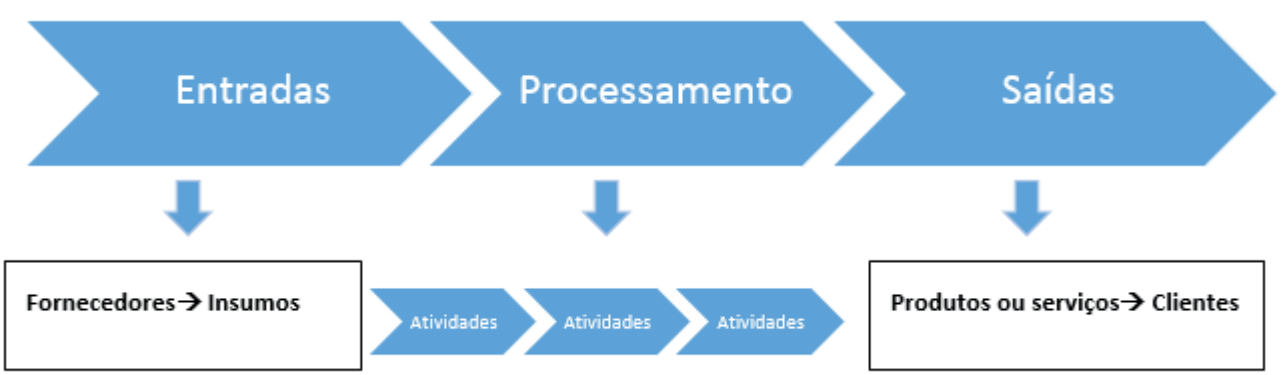
To regard public procurement as a process means to understand that a series of activities exist, with well defined inputs and outputs, and that each activity depends on the one that precedes it. A process 'is a set of interrelated or interactive activities than transform inputs (inputs) into products (outputs).' (BRAZILIAN ASSOCIATION OF TECHNICAL NORMS, 2015a). A process therefore comprises 'an ordered set of work activities, in time and space, with a beginning and an end, in addition to well defined inputs and outputs. It aims at generating results for the organization and may exist at different levels of detail, being commonly related to managerial areas, with ultimate and support functions" (BRASIL, 2013c, p. 13).

As elements of a process we can identify: input, processing, output, suppliers and customers (Figure 1). The inputs are products or information needed to start a process. The processing is the set of activities carried out to transform inputs into outputs. The outputs are the results (products or information) that will be delivered to customers, who can be internal or external. The suppliers, which can also be internal or external, are the origin of inputs, which provide something so that the process begins.

According to NBR ISO 9001 (Brazilian Association of Technical Norms, 2015b), in the search for quality it is important that organizations, private or public, should be able to properly view their work processes, seeking to identify steps, inputs and products that they generate. Occasions on which organizations with the same social objectives produce a different outcome are not rare, for the simple fact that one manages their work processes better than the other.

The so-called management by process or *Business Process Management* (BPM) 'is a systematic approach to management that deals with business processes as assets, which directly activate the performance potential of the organization, promoting organizational excellence and business agility" (BRAZIL, 2013, p. 13). As the approach to the process deals with quality management principles (ABNT NBR ISO 9000), understanding that a process of work is an asset consists in understanding that – as well as machinery, vehicles, furniture, real estate and securities – it is a valuable asset for the success of the organization. After all, how many organizations

Figure 1:
Elements of a process

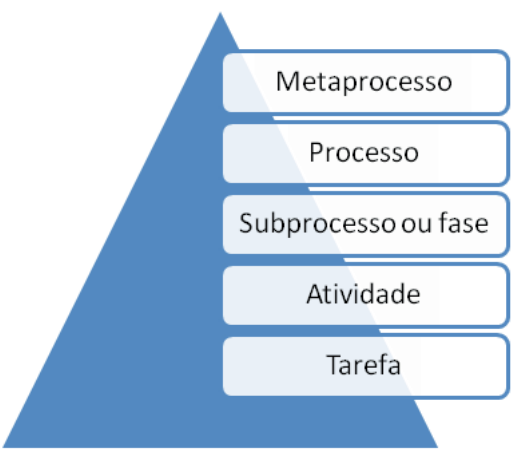


Source FEDERAL DISTRICT, 2014, pg. 8, (adapted).

have their work processes kept under lock and key, which represents the major differential when compared to their competitors?

Processes can be regarded hierarchically, starting with the macroprocesses, followed by the processes, sub-processes or phases, of the activities and tasks (Figure 2). This hierarchical view does not refer to importance, but to the level of detail that one wishes to deal with. Macroprocess is a more general view of the process and usually comprises several processes. Tasks are a set of instructions that can be directly implemented.

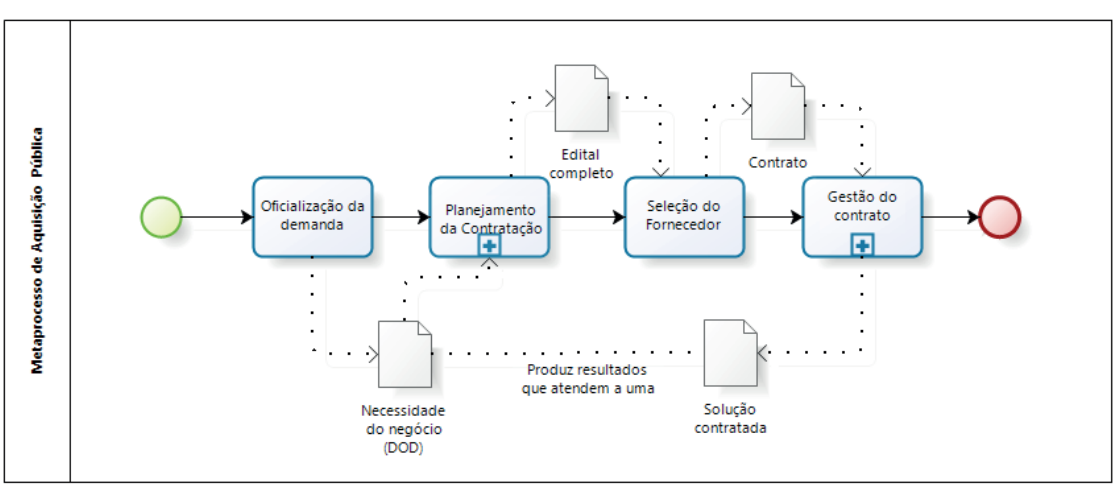
Figure 2:
Hierarchical view of the processes



A process is a set of activities (herein as per *latusense*) which receives inputs and transforms these into a product destined to meet the need of a customer (internal or external). Sub-process or phase 'refers to a specific part of the process, composed of a set of activities that require their own inputs and result in sub-products that contribute to the final product of the process'. Activity is a set of tasks, which, in its turn, is the smallest division of labour, a partition of the activity with specific routine or procedure (PALUDO, 2013, p. 343).

Public procurement can be understood as a sequential process composed of three phases: the planning of the procurement, the selection of the supplier and contract management (Figure 3). These phases are inter-related, and the result of the subsequent phase depends on the outcome of the previous one. The planning of the procurement receives as input a demand (business need) and generates as output a full competitive bid notice, including the term of reference (TR) or basic project (BP) for the procurement. The selection of the supplier receives as input the full competitive bid notice (output of the planning phase) and generates as output the signed contract (rules of the hiring, but the winning bidder is the one who will perform according to the rules). In its turn the contract management receives as input the signed contract and generates as output a solution which produces results which meet the need that generated the procurement. One of the procurement planning stages is the formulation of the ETPs.

Figure 3:
Metaprocess for public procurement



Source: Federal Court of Auditors – Report of Appellate Decision 2,622/2015 – Full Bench.

3. OFFICIALIZATION OF THE DEMAND: INITIATING THE PROCUREMENT PROCESS

The requisition of that which you intended to acquire starts the procurement process. More precisely, the requisition will initiate the procurement planning phase. The requisition, properly formulated, is the first effort to ensure that the organization performs a good procurement. Imagine that, after the procurement planning stages and selection of the supplier, one reaches the conclusion that the hired solution is not suitable for the needs of the purchaser.

The purchasing sector is usually not the one that performs the selection of the supplier, therefore this gap – the purchasing sector understands it is demanding the acquisition of a particular solution and receives another – is a probability that cannot be disregarded.

The officialization of the demand's objective is to prevent this imbalance and still ensure that the solution required by particular sector is perfectly understood by the sectors that are going to plan the acquisition, make the selection of the supplier and manage the contract. This officialization should always take place by means of an 'Demand Officialization Document – DOD', which, according to Article 9 of Normative Instruction 4/2014 of the Secretariat of Logistics and Information Technology, of the Ministry of Planning (IN-SLTI 4/2014), is the 'document containing the details of the need of the Area Requesting the Solution to be met by assuming the contract".

It is certain that this norm aims at regulating the procurement information technology solutions in the context of the Executive Federal Powers, but these guidelines can also be carried out in other procurements. The Federal Court of Accounts (TCU), in a document entitled 'Risks and Control in Procurements' (RCP), has recommended the use of the DOD regardless of the type of purchase intended, providing that the lack of formalization of the demand entails a high risk of carrying out a procurement that does not meet a need of the organization. To reduce this risk, the TCU instructs that the senior management of the organization should publish norms, creating the requirement that all procurements should be initiated with the DOD, and that the legal advisors should, when the bidding procedures or direct procurement are submitted, deny their progression if such document is missing (BRASIL, 2014b). In this sense, at a recent judgment of the TCU, Appellate Decision 1,840/2016- full bench, the 'absence of formalization of the demand for the procurement duly supported by the demanding area, with information guidelines for the formulation of the technical studies, in breach of its Manual of Procedures of Events' has not been left unnoticed.

The aforementioned IN-SLTI 4/2014, in its Article 11, requires as minimum content of the DOD to be filled in by the area requesting solution: the need of

procurement, considering the strategic objectives of the organization; the motivation and the statements of the results to be achieved by the procurement; the indication of source of funds for the procurement; and the indication of the party of the requesting area for composing the planning team. It must be noted that these elements, besides clearly formalizing and identifying who the author of the demand is, already allow for first analysis of that which is intended to be hired in terms of strategic alignment.

The need for the procurement should be aligned with the strategic objectives of the organization, demonstrating to which strategic planning goals the acquisition contributes. This alignment exercise helps in the dissemination of the strategic planning itself within organizations. Binding the intended procurement to an organizational purpose forces the requesting party, who must be the author of the DOD, to reflect on what importance such procurement has for achieving the institutional mission.

The motivation of what will be acquired is the legal duty of the person who manages the public affairs, since the reason, the factual and legal circumstances that lead to the practice of the act, is one of the elements of validity of the administrative act. The duty to substantiate, as a principle that obliges the public administration, is expressed in Article 2 and in Article 50 of Law 9,784/1999, which determines that the administrative acts must be substantiated, with the indication of the facts and the legal grounds.

The indication of source of funds is also legally required, since, in accordance with the Law 8,666/1993, Article 7, III and Article 14, the construction works, services and purchases can only be hired upon a plan of budgetary funds to ensure the payment of obligations.

The DOD will initiate the procurement planning process, which usually needs to be performed by a team, since procurement planning requires multiple skills that normally cannot be mastered by a single person. For example, to hire an advertising service for a campaign of vaccination, skills are required in at least three areas: advertising, vaccination, and competitive bidding and contracts. A representative, indicated by the requesting sector in the demand officialization document, should also participate in the procurement planning.

Thus, the first effort that organizations should perform to hire well is to require that the procurement process should be initiated with the DOD, as a formal and standardized document, containing at least the elements mentioned above. The second effort towards improvement is to formulate a preliminary technical study, the procurement planning phase.

4. PRELIMINARY TECHNICAL STUDIES

According to the *guide of good practice in information technology solutions procurement*, by TCU, 'the formulation of the preliminary technical studies constitutes the first step in procurement planning (preliminary planning)'. Also according to the Guide, the preliminary technical studies serve to 'a) ensure the technical feasibility of the procurement, as well as the treatment of its environmental impact; b) substantiate the term of reference or the basic project, which is only formulated if the hiring is considered feasible, as well as the workplan, in the case of services" (BRAZIL, 2012, pg. 39).

The formulation of ETPs is a duty imposed upon Public Administration. In accordance with Articles 7 and 6, IX, of Law 8,666/1993, the hiring of works and services shall be preceded by formulating a basic project (BP), thus understood as:

> A set of necessary and sufficient elements, with appropriate level of precision, to characterize the work or service, or set of works or services that are the object of the procurement, *formulated on the basis of* in the indications of *preliminary technical studies*, that ensure the technical feasibility and the proper treatment of the environmental impact of the undertaking, and enables the cost appraisal of the work, and the definition of the methods and the implementation period, which should comprise the following elements. [*We highlight*]

By the above definition, it can be inferred that the ETP is a control, which seeks to reduce at least two risks: of the Administration trying to hire something that is technically impracticable or that threatens the environment.

By reading the above provision, the logic that presents itself is that all procurements should be preceded by a basic project and that all basic projects are formulated based on the ETPs. Thus, the sequence in time provided for in the legislation consists in first formulating the ETP then preparing the basic project (based on the ETP), and next, hiring (based on basic project).

Law 10,520/2002, which addresses modality of electronic procurement of goods and common services, while the term 'preliminary technical studies' does not appear in its provisions, makes clear the need of this

instrument when it provides, in its Article 3, III, that in the preparatory phase of the electronic procurement, the records of the procedure should state 'the indispensable technical elements on which they are based."

Law 12,462/2011, which instituted the Public Procurement Differentiated Regime (DRC), in its Article 2, IV.a, also brought the ETP requirement that precedes the formulation of the basic project. In the same sense, Law 13,303/2016, which instituted the legal bye-laws of state companies, also provided, in its Article 42, VIII, the requirement that the procurements should be preceded by ETPs, additionally explaining that this will, in the same way as provided for in Law 8,666/1993, substantiate the formulation of the basic project. Moreover, the preliminary technical studies will substantiate not only the basic project, but also of the term of reference and the workplan (in this case, when hiring services, in accordance with the Decree 2,271/1997).

In the context of the Federal Court of Accounts, it is possible to envisage consolidated precedents regarding the requirement of preliminary technical studies, whether for the procurement of construction works, services or purchases (Appellate Decision 3,215/2016 – Full Bench; Appellate Decision 212/2017 – Full Bench; Appellate Decision 681/2017 – First Chamber ; Appellate Decision 1,134/2017 – Second Chamber).

The ETP requirement also applies in cases of direct procurement, waiver or nonrequirement for competitive bidding. The elements of a direct procurement process are not restricted to those provided for in Article 26 of Law 8,666/1993 (characterization of emergency or hazardous situation, reason for choice of supplier or performer, justification of prices, document for approval of research projects, justification and ratification of the act of waiver and due publication in the Official Journal). Article 38 of Law 8,666/1993 specifies that 'the procurement process will be started with the opening of an administrative proceeding, duly filed, registered and numbered, containing the respective authorization, a brief indication of its object and of its own funds for the expense", and posteriorly shall be attached to this proceeding several elements, among which, as provided in Item VI, 'technical or legal opinions issued on the procurement, waiver or nonrequirement for competitive bidding', which demonstrates that the processes of waiver and nonrequirement are not autonomous processes (FERNANDES, 2009, p. 641).

This is the understanding, that has been adopted by the TCU for long, as seen in the vote of the reporting judge of Decision 233/1996 – 1st Chamber:

> Therefore, the procurement procedure, in its broadest sense, as stated in the Law, covers both direct procurement and those carried out upon prior competitive bidding procedures (...) However, if the manager's duty and objective is to ensure the best offer for the agency, the preceding acts should be only part of a process, to which is added, also, as the case may be, the elements set out in paragraph one, Items I to III, Article 26 of Law n. 8.666/93. In this context, it must be concluded that there are no autonomous processes of waiver and nonrequirement of competitive bidding, and therefore, the provisions contained in the main paragraph of Article 38 apply.

Thus, we conclude that, both in the process of competitive bidding and direct procurement, elements such as basic project or term of reference are indispensable. Moreover, considering that in accordance with the provisions analysed in this section, these elements should be formulated based on the ETP, the logical consequence is that formulating the ETP is necessary in any procurement process, regardless whether the choice of supplier is through competitive bidding or direct procurement.

The mandatory requirement and the order of production of ETP basic projects (or terms of reference) and contracts are more clearly and explicitly comprised in the non-statutory norms that govern procurement of information technology (SLTI IN 4/2014, Resolution of the National Council of Justice and Resolution 182/2013 of the National Council of the Public Ministry 102/2013). This fact derived from the need to outline the procurement processes in the form of a work process and not the specificity of the its TI object, as you could be understood at first. This assertion is supported, for example, in the fact that the draft of the Normative Instruction that will replace the current Normative Instruction of the Secretariat of Logistics and Technology Information of the Ministry of Planning 2/2008 (for contracting services in general), which was submitted to public consultation in August 2016, contained analogous provisions.

4.1 WHAT SHOULD AN ETP CONTAIN?

While the demand for ETP is a legal duty to substantiate public procurement, the law does not expressly provide what its content should be. In addition to the reference in the definition of a basic project (Article 6,

Item IX), Law 8,666/1993 makes another reference to the ETPs in Article 46, when it addresses the use of the procurement types 'best technique' or 'technique and price,' for hiring work that is predominantly intellectual, such as the formulation of ETPs. And, unfortunately, it is only in these two points that Law 8,666/1993 *expressly* mentions the ETPs, since, as can be seen in the RCA (BRASIL, 2014b) and in the guide to IT procurement (BRAZIL, 2012), all the proposed contents for ETPs are based on such Law, there being therefore several indirect references made to ETPs.

It is known that ETPs aim at ensuring the technical feasibility of the procurement and the treatment of environmental impact, substantiating the term of reference, the basic project, and the workplan. Thus, the ETP content must be sufficient to ensure that it fulfils its objectives set forth in the Law.

In the context of the TCU, the suggestion to reduce the risk of irresolution as to the content of the ETPs has been the instruction so that the Superior Governing Agencies (OGS) (those who have competence to regulate certain subjects) should define the content of the preliminary technical studies, which would serve as a starting point for the procurement planning team.

The RCA (BRASIL, 2014b) and the guide to IT Procurement (BRAZIL, 2012) suggest some elements that should be part of the ETP. Other documents have also been published with the aim of defining the content of the ETPs, as for example, the quick guide for quick consultation to the Supreme Court of Justice (STJ) on the theme (Brazil, [2016?]).

While the majority of these documents have been created to direct TI procurements, one can observe that, from the content required of ETPs, they also apply to other procurements. This is since the RCA, that was conceived for procurements of every type of object, proposes analogous contents.

The public manager must make clear what is *the need of the solution* that will be hired; affirming to have sought the optimization of the work processes, and that, even so, the procurement proves to be necessary.

The public manager must demonstrate which is the *alignment of certain procurements to the plans of the agency*, as for example, with the targets of the organization's

Table 1:
Contents of the preliminary technical study

RCA and TCU Guide for IT procurement	IN-SLTI 4/2014	STJ Preliminary Technical Studies: Quick Consultation Guide
» Need for procurement » Alignment of the plans of the agency » Procurement requisites » Relationship between the planned demand and the quantity of each item » Market survey » Justifications for the choice of the type of solution to be hired » Preliminary price estimations » Description of the solution as a whole » Justifications for or against the payment of the solution in instalments » Intended results » Measures for adjusting the environment of the agency » Risk Analysis » Declaration on whether the procurement is feasible or not	» Definition and specification of the needs of the business and technologies » Evaluation of the different solutions » Analysis and comparison between the total costs of the identified solutions » Choice and justification for the choice » Evaluation of the needs for adjustment of the environment of the agency » Evaluation and definition of human and material resources for the implementation and maintenance of the solution » Definition of the mechanisms for the continuity of the supply of the solution, in the event of contractual interruption » Declaration of feasibility of the procurement	**Demand Officialization Document – DOD** » Need for procurement » Alignment between the procurement of the solution and the institutional strategic plans » Intended results **Analysis of Feasibility of the Procurement** » Procurement requisites » Survey of the demand » Market survey » Choice and justification of the most adequate solution » Justifications for or against the payment of the solution in instalments » Measures for adjusting the environment of the agency » Indication of the estimated budget » Declaration on whether or not the procurement is feasible **Sustentation Plan** » Strategy of the Court's independence in relation to the contracted party » Strategy for contractual transition and termination » Strategy for the continuity in the case of a possible interruption of the contract » Material and human resources necessary for the continuity of the business **Procurement Strategy** » Model of performance and management of the contract **Risk Analysis** » Risk analysis

strategic plan. This effort leads the manager to think about the extent to which the solution intended to be purchased will contribute for the achievement of the agency's mission. (BRASIL, 2014b).

Whether for the procurement of IT solutions, or for other solutions, the *procurement requisites*, including the minimum quality requisites, must be defined in order to be able to know which offer would be most advantageous for the Administration. An analysis between the *planned demand and the quantity of each item* must also be performed, in order to avoid unnecessary contractual amendments, or even the need to conduct new competitive biddings, with the consequent loss of economies of scale (BRASIL,2014b).

Knowledge of the market, in order to know what solutions would meet the need of the Administration, together with the *justification of the choice of the type of solution to hire*, are essential elements of any acquisition, since it is not possible to purchase something without knowing 'what is being offered by the market' and without making a choice between the options available.

Preliminary price estimates in their turn are indispensable, insofar as it will be necessary to know whether there are sufficient resources to move forward with the procurement.

The solution as a whole must be described in the ETP, not only for guiding the formulation of offers by the bidders, but also as to reduce the risk of the Administration not having their needs met due to some essential part of the solution not having been considered (BRASIL, 2014b).

The *analysis of the instalment payment of the object*, to decide whether the object must be paid in instalments, and, if so, in what way, is a measure that seeks to fulfil the principle of isonomy in the procurements. In this regard, reference is made to the forms of the instalment payment mentioned in the RCA: formal instalment (more than one bidding or adjudication per item) or material (authorization for participation of consortium or the performance of sub-procurement).

What are the *desired results with the acquisition* should also be highlighted in the ETP, including so that the regularity of the results of the executed contract is not restricted to the verification of its formal aspects. In this procurement planning phase, it should already be clear in the ETP that the Administration 'aims, by the procurement of the solution, in terms of economy, effectiveness, efficiency, better use of human, material and financial resources available, including with respect to positive environmental impacts (…) as well as, if appropriate, improvement of the quality of products or services, at meeting the need for the procurement' (BRASIL,2014b).

The ETPs content must also include *verification of the arrangements for adequacy of the environment* of the agency, for receiving the solution that will be hired. Will it be necessary to change or make electrical installations? Is the physical space appropriate? (BRASIL,2014b) Not rarely, for example, equipment is purchased without

adequate infrastructure for these to operate, generating a huge amount of waste of funds.

Finally, besides elements of the ETP, a *risk analysis* must be performed before the procurement, identifying risks and assessing the probability of their event and impacts, as well as indicating which actions would be required to reduce the identified risks (BRASIL,2014b).

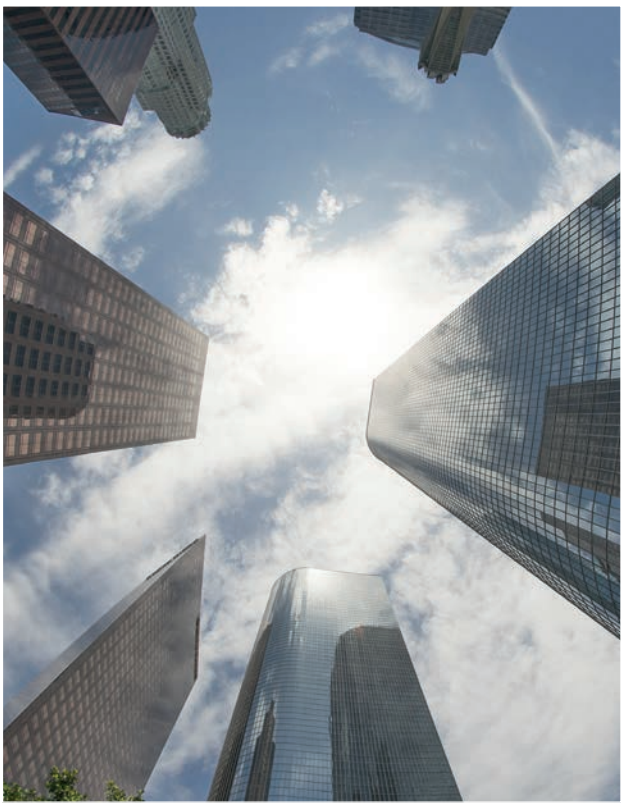
These elements of ETPs are necessary so that, at the end, but still in the stage of formulating the ETPs, the procurement planning team should declare whether or not the procurement is feasible. If it is feasible, the formulation of the basic project, the term of reference or the work plan begin.

4.2 THE ADEQUATE LEVEL OF DETAIL

Perhaps herein lies the difficulty of fixing a minimum content for the ETP, since the level of detail of the ETPs should vary in accordance with the risk of the procurement to be performed. As presented at the beginning of section 4, the ETPs is a a control mechanism and, therefore, its level of detail should be proportionate to the risk, in accordance with the Article 14 of Decree Law 200/1967.

So, for example, whereas the discontinuity of IT services can lead to a paralysis in the provision of public services, such procurements usually require greater efforts, including normative ones, for the definition of content the ETPs, as can be seen in the IN-SLTI 4/2014 (Table 1)2014. Similarly, complex engineering construction works would deserve greater detailing in the ETPs, which also occurs with purchases of materials in significant volumes and complexity.

One can observe that it is not recommendable to delete items from the content of the preliminary technical studies when the procurements have a lower risk, because, as mentioned above, the RCA (BRASIL,2014b) and the guide to IT procurement (BRAZIL, 2012) demonstrate the legal obligation to produce this information. Thus, the way to simplify the ETPs in lower risk procurements is to perform their activities in a more simplified manner. Take for an example, the market analysis by seeking solutions. If the engagement presents a major risk, more time should be invested consulting the market and analysing the available options (in the case of extreme risk, for example, perhaps all the known solutions should be consulted). However, if the procurement is assessed as having low risk, this analysis can be done in a more simplified manner (perhaps by using only the solution currently hired and one more alternative, for example). It must be noted though, that in both cases a market analysis must be performed.



4.3 THE DIFFICULTIES FOR FORMULATING A GOOD ETP

Notwithstanding the formulation of ETPs constituting a legal duty, there are still many obstacles to be overcome by the organizations in order that they should contribute to more effective public procurement.

The lack of standardization of that which should be comprised in the ETPs is one of them. The TCU has sought to remedy this gap by means of guidelines, as for example, the RCA. Specific initiatives of some public organizations that have published regulations internally instructing the formulation of ETPs and establishing their minimum content, as in the case of the Superior Court of Justice (Table 1), also aim at filling in this gap.

Another issue that must be taken into account in the formulation of the ETPs is that it must be done by a multidisciplinary team.

> The quality of the procurement planning depends on the team designated to conduct it. Therefore, the team should be chosen with care, so that,

> as a whole, they possess knowledge of the legal framework legislation, precedents, the solution to be hired, the internal regulations of the agency that affect the procurement (e.g. PSI), and the practices of the agency that might influence the procurement (e.g. model of the term of reference adopted in the agency) (Brazil, 2012, p. 52).

The IN-SLTI 4/2014, in its Article 2, IV., lists, as required members of a procurement planning team, the technical expert, the servant that understands technically about what will be purchased, the administrator, namely, the servant of the administrative area with knowledge of the laws of competitive bidding and contracts, and the requesting party, who is the servant that represents the area requesting the solution and who knows the problem that must be solved with the procurement.

Lack of procurement planning and the reactive culture of public administration, whether as a result of their own lack of planning, or due to the unexpected inflow of funds, are also elements that hinder the formulation of ETPs. According to a survey of the TCU, Appellate Decision 2,622/2015 – Full Bench, performed with the 376 organizations of the federal public administration, only 46% of organizations perform the of procurements planning process, approving a procurement plan (or similar document) for a minimum period of one year, and only 27% of the formulated plans are published on the Internet."

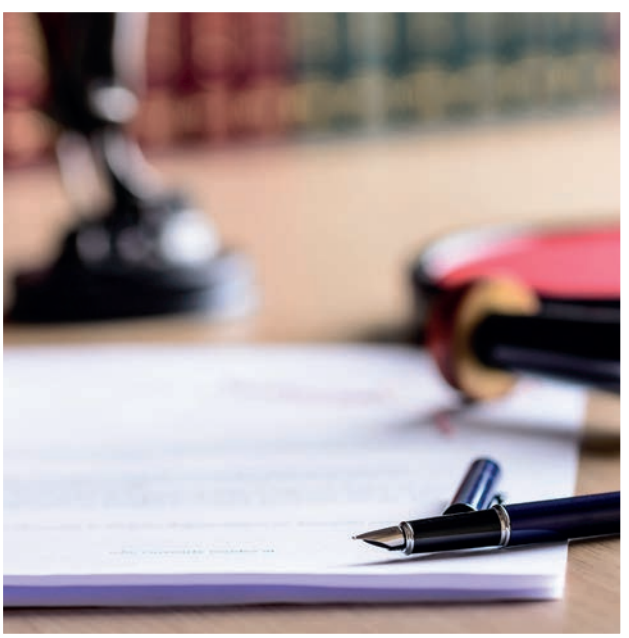
It is necessary that organizations should have an annual plan of their purchases. In Appellate Decision 2,348/2016 – Full Bench, the TCU has expressed the need for procurement planning to address, at least:

the formulation, with the participation of representatives of various sectors of the organization, of a document that materializes the procurement plan, containing, for each intended procurement, information such as: description of the object, estimated quantity for the procurement, estimated value, identification of the purchaser, justification of the need, estimated period for the procurement (e.g., month), program/action borne (a) by the procurement, and strategic goal(s) supported(s) by the procurement;

One of the requirements of the ETPs is that therein must be demonstrated that the procurements are aligned with the plans of the organizations – strategic plan, procurement and logistics and other specific plans. However, if the lack of planning tends to be the keynote of organizations, the lack of dissemination of plans that are formulated becomes another obstacle for formulating ETPs. In order for there to be an alignment of the procurement with the plans of the organization, it is necessary that at least the planning team that will draw up the ETPs should be aware of these plans in order to give their opinion about the feasibility of the procurement, especially demonstrating how such procurement will contribute to the achievement of the set targets.

The scenario of difficulty in the formulation the ETPs may improve by encouragement of standard procurements by the superior governing agencies (OGS), so that the Public Administration, in its majority, should purchase goods, services and works with standard specifications. In this case, the part that requires greater effort for formulating the ETPs should be performed once only, for the definition of the standard specification (for example, a market analysis, specification of requirements, benchmarks of unit prices, among others), and those who will use the specification standards shall prepare the missing part, which tends to require less effort (justification of need, estimated quantities, among others). The study of standardization, its relationship with ETPs and its implication in efficiency gains is a topic to be discussed in more detail at the appropriate time.

Finally, it is noteworthy that it is expected that the effort for formulating ETPS for procurements performed for the first time should be greater compared to that required for procurements that have already become a routine of the agency, for which the previous ETP is already relied upon as a starting point. For



organizations that do not yet practice the formulation of ETPs, perhaps the best way would be to draw them up primarily for procurements that offer a greater risk for the continuity of their business.

5. CONCLUSION

This article addressed the preliminary technical studies (ETP). Starting from the demand officialization document (DOD), the goal was to present the relevance of the DOD and the ETPs for the successful outcome of public procurements.

It started proposing to observe public procurement as a process of work with interconnected stages, each of which with well-defined inputs and products. It highlighted the importance of the pubic manager regarding the procurement process as a valuable asset for the organization, who shall see to its continuous improvement.

For the successful outcome of the procurements, it was observed that the first effort should be the officialization of the demand by means of an official document, signed by the requesting area, and comprising: the requesting area; the need for the procurement, considering the strategic objectives of the organization; statements of the results to be achieved by the procurement; the indication of source of funds for the procurement; and the indication of the requesting party for composing the planning team. It was reinforced that this document, which will initiate the process of procurements, is relevant in such manner that the solution that is being requested should be perfectly understood by the team that will perform the procurement. It was also affirmed that it is recommendable that the public organizations should officially establish the obligation of formulating the demand officialization document, planning their minimum content.

It was argued that ETPs, which are the product of the step following the procurement planning process, should be the element based on which the planning team, through risk analysis, should decide in favour or against the performance of the procurement. It was noted that, despite its legal requirement for all purchases, including those conducted through direct procurement, the law does not expressly provide for its content, though however the effort of some organizations, such as the Federal Court of Accounts, has been verified in the sense of specifying what the minimum content of a preliminary technical study should be.

In line with the principle of efficiency, it was affirmed that the level of detail of ETPs depends on the risk of the procurement, since we cannot lose sight of the fact that this is a mechanism of control, and that therefore its level of detail should be proportional to the risk. One can observe that it is not recommendable to delete items from the contents of ETPs in procurements with less risk, but rather to perform their activities in a more simplified manner.

In addition to the need to define a minimum content for ETPs, it was mentioned that the success in their formulation still depends on overcoming certain obstacles in public organizations, such as the need for multidisciplinary teams for their formulation, the lack of public procurement planning, and the absence of disclosure of institutional plans (required for checking the alignment between the procurement and the organization's mission).

Finally, it has been speculated that the scenario of difficulty in the formulation the ETPs can improve by encouragement of standardization of procurements by OGS, and further, that the effort to perform the ETPs for the first time is usually higher in comparison to those procurements that have already become a routine of the agency. It was further suggested that for organizations that do not yet practice the formulation of ETPs, perhaps the best way would be to draw them up primarily for procurements that offer a greater risk for the continuity of their business.

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External control versus internal and administrative control: analysis of the supposed conflict of competency between the Nacional Council of Justice (CNJ) and the Federal Accounts Office (TCU)

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ABSTRACT

The purpose of this article is to discuss the conflict between the decisions of the CNJ and the TCU based on the main arguments used by each agency to defend the supremacy of the former over the later. The conflict has been characterized based on the premise that these decisions are of distinct natures, one derived from internal and administrative control, and the other, from external control. The debate has gained relevance, since the Council, when attributing to itself the title of a specific agency of control of the Judiciary, has ventured in the competency of breaching and ordering breach of the decisions of the Court of Accounts, which privilege – not prerogative – is not, in principle, supported by the Federal Constitution of 1988.

Keywords: CNJ; TCU; conflict of decisions.

1. INTRODUCTION

According to Luiz Armando Badin (2009, p. 1) Constitutional Amendment n. 45, of December 30, 2004, announced one of the most important aspects of Constitutional Reform of the Brazilian Judiciary: the creation of the National Council of Justice (CNJ). The measure has intended, among other, to overcome the hermetic nature that has undermined the public reputation of the institutions of Justice. The Council represented the idea of a more transparent, expedite, and

responsible Judiciary, notes Badin (2009). Created with the mission of 'control of the administrative and financial performance of the Judiciary' (Paragraph 4, Article 103-B of the Federal Constitution), the duties of the CNJ are to certify that Article 37 is complied with and to assess the legality of administrative acts practiced by members or agencies of the Judiciary, without prejudice to the competency of the Federal Court of Accounts – TCU (Item II of the aforementioned Paragraph 4).

The Legislative Branch shall exercise, with the aid of the TCU, pursuant to Article 70 and 71 of the Federal Constitution, the external control of Public Administration, and is further entitled to stay defective acts and contracts. There are situations in this context where decisions of the CNJ may conflict with those of the TCU, and vice versa, when their purpose is the invalidation or suspension of acts and administrative contracts, since both are entitled to the competency of controlling the financial and administrative performance of the agencies of the Judiciary. According to the constitutional wording, the performance of the CNJ should take place without prejudice to the competencies of the TCU. In this sense, how is the conflict between the decisions of both agencies to be solved? What is the position that should prevail in the case of divergent statements?

The aim of this article is confined to the analysis of the competencies of the agencies with regard to that which may cause the conflict of decisions. That is, the CNJ has, besides the control of administrative performance, among other duties of correction and discipline, competencies that do not concur with those developed by TCU, and which are therefore not comprised within the focus hereof.

2. THE ADMINISTRATIVE CONTROLS, EXTERNAL AND INTERNAL, AND THE RESPECTIVE COMPETENCIES IN THE 1988 FEDERAL CONSITUTION (CF/1988)

This topic commences with certain concepts presented objectively, and which are relevant for the development of the work: one is the control, which, according to Hely Lopes Meirelles (2009, pg. 671), 'is the faculty of supervision, guidance and correction that a Branch, agency or authority exercises over the functional conduct of another". Maria Sylvia Zanella Di Pietro (2014, pg. 809) defines 'the control of Public Administration as the power of supervision and correction exercised upon it by the agencies of the Judiciary, Legislative and Executive Branches', seeking the adherence of their practice to the legal system.

It is clear that both of the concepts developed by the authors focus on the aspects of surveillance and correction, as well as, to some extent, on hierarchical action of some agencies over others, and of one Branch over the other. Di Pietro mentions the existence of several criteria for the classification of control; one of them highlights the agency that exercises it, thus reference to administrative, legislative, and judicial is made. Meirelles (2009, pg. 676) discusses the administrative control, which is the control

of legality and merit – that the Public Administration exercises over its own activities, aiming at compliance with laws, in addition to criteria of the need for service and technical and economic requirements. It derives from the duty-power of self-control (*autotutela*), notes the author.

Di Pietro (2014, pg. 811) makes a similar description of administrative control, characterizing it as being of the internal type; and that is derived from the power of self-control (*autotutela*) that authorizes Public Administration to revise their own acts, as per the Supreme Federal Court (STF) Precedents 346 and 473, in line with Article 53 of Law no. 9,784, of January 29, 1999, which sets forth provisions in the scope of the Federal Administration.

Legislative control is exercised by the Legislative Branch within the limits defined in the 1988 Federal Constitution (CF/1988), addressing aspects of legality and public convenience, according to Meirelles (2009, pg. 708-709). Di Pietro (2014, pg. 823-825) characterizes it in two types: political, where decisions of the Public Administration are assessed including in relation to convenience and opportunity; and financial, where it is noticeable that the main elements to be controlled are the aspects of legality, legitimacy, cost-effectiveness, functional fidelity and fidelity to results of work programs.

Judicial control, in its turn, is the one exercised by agencies of the Judiciary over administrative acts practiced by Public Administration of all the branches, in accordance with Meirelles (2009, pg. 715). It is derived from the Rule of Law and is grounded, in Brazilian law, on the monopoly of the jurisdictional function (one jurisdiction) by the Judiciary, supplements Di Pietro (2014, p. 827).

The external control, according to Meirelles (2009, pg. 673-674), is characterized by actions of a Branch or independent constitutional agency over the administrative actions of other branches that are agents of the controlled act. In its turn, internal control is materialized in surveillance action directed to the practices of the Branch or Administration to which it belongs. It is contextualized within the structure of the monitored agency itself, and is the specialization of the administrative control, notes Evandro Martins Guerra (2005, pg. 93 and 262).

The foregoing concepts, which focus on the aim of the work, are thus illustrated: 1) administrative control occurs, for example, when the Federal Supreme Court (STF) and the Office of the General Counsel to the Federal Government (AGU) decide to annul administrative acts where benefits were granted to their respective servants, because they are defective; 2) The external control, or legislative control is exercised by the National Congress (CN), with the aid of the TCU, on the acts of the Executive Branch, and it is also the supervision carried out by the Court of Accounts on agencies of the Judiciary; 3) The internal control, in its turn, takes place by means of the audit carried out by the Federal Department of Internal Control on the Ministry of Finance; or when the CNJ performs inspections in another agency of the Judiciary. On scrutinizing CF/1988, there are several references made to the terms 'internal control' and 'external control', but not directly to the whole of the expression 'administrative control'.

The term 'external control' is used to address two distinct themes, one with the content of account-

ing, financial, administrative supervision, under the responsibility of the legislative branch with the aid of specialized agencies of accounts; another in the sense of control over the police activity, under the responsibility of the Prosecutor's Office. The former is the meaning that is of interest to this work.

In Article 31, Paragraph 1, the wording sets forth that the supervision in the Municipality shall be exercised by the Legislative Branch, through external control, and by the internal control system of the Municipal Executive Branch[1]. In the aforesaid paragraph, it has been established that this external control becomes effective with the aid of the Courts of Accounts of the States or the Councils of the Courts of Accounts of the Municipalities. Further, Articles 70 and 71 of CF/1988 mention, for the purpose of supervision within the Federal Government, the system of external control and internal control of each Branch[2]. In the terms of the CF/1988, the National Congress conducts the external control in the strict sense, which is materialized with the aid of specialized agencies, such as the Courts and Councils of Accounts. In the broadest sense, the Judiciary also exerts external control, according to Guerra (2005, pg. 93).

According to Article 71, main paragraph, of CF/1988, the direct and indirect supervision of the Federal Government and of the entities of the administration, as to the legality, legitimacy, cost-effectiveness, implementation of subsidies and waiver of revenue shall be carried out by the National Congress, through external control, and by the system of internal control of each Branch.

Among the various duties of the Courts of Accounts in exercising external control, as provided for in Article 71 of CF/1988 (note: as ancillary agency of the CN), we can highlight Items IX and X, which legitimize respectively the Courts of Accounts to 'sign the deadline for the agency or entity to adopt the measures necessary for the exact fulfilment of the law, should illegality be found' and to 'stay, if not met within the deadline, the execution of the challenged act, giving notice of the decision to the Chamber of Deputies and to the Senate'. These duties are further provided under Law n. 8,443, of July 16, 1992 (TCU Organic Law).

In Article 74, Item 4 and Paragraph 1 of CF/1988, the purpose of the internal control system to be maintained by each Branch has been outlined, among which, to support the external control in the exercise of its institutional mission, as well as to give notice to the TCU about any irregularity or illegality. For the system of internal control, CF/1988 has reserved in Item II, Article 74, among others, the competency to 'evidence the legality and assess the results, as to the efficacy and efficiency of budget, financial and assets management in agencies and entities of the Federal Administration, as well as investment of public funds by entities governed by private law'.

In the scope of the Executive Branch, according to Article 22 of Law n. 10,180, of February 6, 2001, the Federal Department of Internal Control and the National Audit Department of the Public Health System (Denasus) are comprised as central agencies within above-mentioned system; and besides these, the sectoral agencies. By operation of Article 75, of CF/1988 shall apply, as the case may be, the constitutional rules of the Federal Government referent to organization, composition and supervision of the Courts of Accounts

of the States and the Federal District, and of the Courts and Councils of Accounts of the Municipalities.

On the act of the transitional provisions of CF/1988[3], in Paragraph 2, Article 16, the terms 'external control' are mentioned to address the accounting, financial, budgetary and assets supervision of the Federal District, which would be carried out by the Federal Senate, assisted by the Federal Court of Accounts of the Federal District, until the Legislative Chamber were installed. When referring to the duties of the CNJ, the CF/1988, in its Paragraph 4 and Item II of Article 103-B, qualifies it as of control of the administrative and financial performance of the Judiciary, which means to say that it is within the scope of the internal and administrative control. In this sense, the STF, on judging the Direct Action of Unconstitutionality (ADI) n. 3,367, defines it as typical internal control. In addition, it has been granted competency to comply with Article 37 and to assess the legality of the administrative acts practiced within the context of the aforesaid Branch.

The same article also qualifies it as of control of the financial and administrative performance of the Judiciary. In addition, competency is granted for it to comply with Article 37 and to assess the legality of the administrative acts practiced within the context of the aforesaid branch. In this sense, the STF, where judging the Direct Action of Unconstitutionality (ADI) n. 3,367, defines it as typical internal control. It can therefore be affirmed that it is comprised within the internal and administrative control. It should be noted, moreover, that, by means of Article 1 of Resolution n. 86, of September 8, 2009, the CNJ determined that the Courts within the Judiciary should create units or nuclei of internal control, regulating Article 74 of the Federal Constitution (CF).

3. CONFLICTS BETWEEN THE CNJ AND THE TCU DECISIONS

3.1 THE SUPPOSED CONFLICT OF COMPETENCY AS PER THE UNDERSTANDING OF THE TCU: PREVALENCE OF ITS DECISIONS

The event of conflict between decisions of the TCU and the CNJ has been verified with certain frequency in recent years, which issue has been debated at the Court of Accounts. In this sense, the vote that entailed Appellate Decision n. 8,890/2011-TCU- 1st Chamber[4], reported by Justice Augusto Nardes, is the most referenced when dealing with this issue, where there is a clear defence of the prevalence of the Court's decisions.

The main arguments used by the aforesaid justice to defend the prevalence of the TCU decisions to the detriment of those of the CNJ involve the following considerations:

> 1) the decisions of the TCU, in the exercise of external control, are binding upon all the administrative agencies and all the spheres of the Branches, while those of the CNJ are only binding upon the agencies under the jurisdiction at internal level of the Judiciary, save the STF;
>
> 2) to deny compliance with the determinations of the TCU, in order to follow those of the CNJ, renders meaningless the competencies derived from the National Congress, to whom the TCU is assistant in the exercise of external control;
>
> 3) The Nacional Council of Justice (CNJ) was created as a top agency of the Judiciary, along with other agencies of the internal control system of the three branches – whose mission is also to provide support to the external control -, for the exercise of control of the administrative and financial performance, though without prejudice to the TCU's competencies;
>
> 4) 'only by means of jurisdiction could the Administration […] seek protection for their possible claim to deny compliance with the decisions of this Court of Accounts', because, among other aspects, the TCU has, as stipulated in the CF/1988, similarities to the Brazilian Courts;
>
> 5) there are no divergencies (of the TCU) with the National Council of the Prosecutor's Office (CNMP), also created by Constitutional Amendment (EC) n. 45, of December 30, 2004, together with the Nacional Council of Justice (CNJ), in the sense of the former Council being entitled to disregard decisions of the accounts agency;
>
> 6) The CF/1988 assigned to the TCU competency to perform audits in administrative units of the three branches of the Federal Government (Item IV of Article 71);
>
> 7) the TCU can further sign a deadline for the correction of illegalities or to stay the execution of an act in the event of breach against a determination;

> h) the TCU Organic Law reflects the constitutional competencies that have been conferred to the agency, highlighting the possibility of applying sanctions, which comprise from award in debt to designation of temporary freezing of assets;
>
> 8) the provisions of Item XVII and Paragraph 2 of Article 1 of Law n. 8,443, of July 16, 1992, confer to the TCU 'powers to assess and decide on inquiries regarding the application of the law on matters within its competency, which has a normative character and is binding upon all the administrative agencies of all the Branches of the Federal Government, included therein, obviously, the CNJ'.

The premise that summarizes the arguments is that the control of Public Administration is a typical activity under the responsibility of the National Congress (CN), exercised with the assistance of the TCU, as a consequence of the principle of separation of the branches and of the reciprocal control that must exist among them; which attribution cannot be ruled out in favour of the performance of internal and administrative control (or specific control). Moreover, the Court of Accounts has all the constitutional and legal mechanisms that would enable the exercise of its competencies.

3.2 THE SUPPOSED CONFLICT OF COMPETENCY IN THE UNDERSTANDING OF THE CNJ: PREVALENCE OF ITS DECISIONS

It can be noted, in several judgments, that the CNJ has established that its determinations shall prevail over those of the TCU[5] in the event of contradiction between them. This position has its starting point in the appreciation of the Request for Measures (PP) n. 445[6], a decision that guides the Council in the supposed conflict of competencies with the Court of Accounts.

The above-mentioned decision of the CNJ full bench, of July 7, 2006, reported by councillor Douglas Rodrigues, is articulated on two essential grounds: 1) On the inexistence of any hierarchy between the CNJ and the TCU – hence the impossibility of reciprocal imposition of decisions that are a priori contradictory -; 2) The fact that the Council is the top agency of the internal and administrative control of the Brazilian judicial apparatus, including in the exercise of administrative self-control (*autotutela*). Rapporteur Douglas Monteiro raises in his vote a fundamental question for the outcome of the supposed conflict of competencies between the agencies: What would be the meaning of the exception expressed in Item II, Paragraph 4, of Article 103-B of the CF/1988, where it is provided that no loss to the competencies of the TCU may be entailed by the performance of the CNJ?

The answer to the query is structured, according to the councillor, on the understanding that the CNJ's position must prevail to the detriment of the TCU, with grounds on the following premise:

> 1) The CNJ features as an agency of internal control of the Judiciary, and the TCU, of external control, i.e., they have distinct political domains and institutional purposes; 'there is no way of considering them as competitors or self-excluding, nor hierarchically linked, in the scope of their constitutional functions";
>
> 2) they have a similar hierarchical position in the spheres of the branches within which they are comprised; among other aspects, it is noteworthy that the STF is the natural court for judicial queries against the decisions adopted by them; the members of the TCU and the CNJ are equalled to Justices of the STJ;
>
> 3) the existence of conflicts between decisions of the CNJ and TCU does not reveal that they are insoluble; if this were so, it would denote 'severe and offensive systemic contradiction of the fundamental concept of legal security', which would contribute to the dissemination of legal uncertainty in the administration of the Judiciary;
>
> 4) according to the STF, the TCU[7] would not have competency to impose the rectification of administrative acts upon the supervised agencies, which only can be done by the Administration according to STF Precedent 473, three precedents[8] cited;
>
> 5) from the refusal of the agency to comply with the resolution of the TCU two consequences would emerge, namely: (i) the possibility, on the part of the interested party, of seeking support in the Judiciary to reverse an unfavourable decision of the TCU against it; (ii) the Court of Accounts could, in its turn, sanction the administrator on grounds of violation of the decision;
>
> 6) The STF granted effectiveness to independence and harmony between the Branches in view

of the supervision competencies of the National Congress (CN). The possibility of administrative control of decisions of the CNJ the TCU, which was not set forth in the constitutional text, 'would represent clear and unacceptable fracture of the essential premises of harmony and independence among the branches';

7) upon complying with the decisions issued by the CNJ, the administrative authorities of the Judiciary do not submit to the sphere of control of the TCU;

8) the CNJ, as hierarchically superior internal control agency, should entail the legal-logical effect of displacement of the jurisdiction competency for examining the matter;

Other decisions have been adopted with regard to the position established on PP n 445. The vote of councillor Antonio Umberto de Souza Junior, on assessing PP n. 200810000020521, must be noted. In his analysis, the councillor believes that the Federal Constitution brought unique performance spaces for the TCU, as for example, judging the accounts of the Judiciary's administrators and assessing acts of personnel, and, for the CNJ, removing and reviewing administrative acts and applying disciplinary sanctions, neither of which being entitled to intervene in each other's realm.

He notes that 'the control of administrative actions exercised by the TCU is umbilically linked to the control of public spending', which conclusion has been reached based on the legal instruments it has available for asserting its competencies, such as signing a deadline for those responsible to adopt measures that are needed – but cannot remove or review an administrative act -, declaring a bidder's lack of good standing, applying fines and imputing debts. He makes clear, however, that there is a limited space of concurrence of competencies that relate to the fields of staying acts and contracts, and examining the legality of staff admission acts. In these two realms, he believes that 'conflicts of duties should be harmonized by the criterion of prevention, that is, by the validity of the statement on merits'.

Further noteworthy are the considerations councillor Marcelo Neves' vote, in Inquiry n. 007136-29.2010.2.00.0000: acknowledges the existence of competition between the competencies of the CNJ and the TCU for supervising the financial and administrative performance of the Judiciary; though neither in the Constitution nor the infra-constitutional legal system does there exist, 'clear limitation regarding this joint action that will objectively solve any deadlock that may arise, in the case of discrepant decisions derived from both agencies'. In this sense, the councillor believes that the criterion of specialization is the most appropriate to define who should have the last word when it comes to supervising the agencies of the Judiciary, with exception of the STF.

The central elements, used by the councillors to defend the primacy of the CNJ are grounded on the absence

of hierarchy between the Council and the TCU, and on the specialization of the agency (highest control agency of the Judiciary) in relation to the constitutional duties of the National Congress (CN) and the Court of Accounts. At the summit of this supremacy would be the administration's exercise of the power of self-control (*autotutela*).

3.3 THE UNDERSTANDING OF THE STF ON THE ROLE OF THE CNJ

On the trial of the Direct Action of Unconstitutionality (ADI) n. 3,367, proposed by the Brazilian Justices Association (*Associação dos Magistrados Brasileiros* – [AMB]) against the provisions of Constitutional Amendment (EC) n. 45, of December 30, 2004, the STF established constitutional frameworks for the CNJ's performance, which is the control of financial and administrative performance of the Judiciary and the fulfilment of the functional duties of the justices.

The AMB, when dealing with ADI n. 3,367, sought a declaration of unconstitutionality of the provisions of the EC n. 45, of December 30, 2004, which instituted the CNJ, based on the argument that the creation of the agency would breach the principle of separation of the branches – insofar as they would put the administrative, financial and budgetary autonomy of the courts at stake -, and likewise the federative covenant, upon submitting the Judiciary of the States to the supervision of the council within the scope of the Federal Government.

At various moments of the vote, Justice Cezar Peluso, rapporteur of the ADI n. 3367, puts forward considerations about the constitutional role of the CNJ, arguing that the creation of the agency does not offend the separation of the powers of the branches. In this aspect, he insinuates that the control exercised by CNJ is of intermediate level when compared to the authentic external control of budgetary, financial and accounting nature exercised by the CN, through the Federal Court of Accounts[9]. Further, when referring to the attribution of control of administrative and financial performance, the Justice emphasizes that this competency of the CNJ does not hinder the Judiciary's self-government. The agency is responsible for 'a top political role in relation to the refinement of the Judiciary's self-government, whose scattered bureaucratic structures preclude the outlining of a nationwide institutional and political strategy'.

In another excerpt of his vote, Justice Cezar Peluso affirms that the competency of the CNJ for reviewing the administrative acts of the lower courts, which

he considers as a power of internal control of constitutionality and legitimacy, does not conflict with the competency of external and posterior control attributed to the CN and to the Courts of Accounts, since the exercise of this power will be submitted to the process of refinement upon review of upper courts. His vote, which was forwarded for decision, was approved by majority. The difference, however, was restricted to the composition of the CNJ, when EC 45, of December 30, 2004, provided for members of other branches, entities or agencies that do not belong to the Judiciary. Otherwise, the other justices agreed upon the nature of internal administrative control of the CNJ.

3.4 CHARACTERIZATION OF CONFLICT OF DECISIONS BETWEEN THE CNJ AND THE TCU

It is no complex task to characterize the clash between the CNJ and the TCU decisions. In order to render the task objective the decisions of the former agency taken by the courts of the Judiciary in inquiry processes were elected, regarding compliance with decisions of the TCU that clashed with those of the Council.

In an inquiry[10] formulated by the courts of the Judiciary, the full bench of the CNJ responds, in theory, to the questions on the application of legal and statutory provisions within the competency of the Council; this answer will have a general rulemaking character if approved by an absolute majority of the full bench of the CNJ. In a quick search at the website of the agency with the terms 'inquiry', 'TCU' and 'conflict', it was possible to identify four Requests for Measures (PP) conveying CNJ queries:

Table 1:
Inquiries formulated the CNJ by agencies of the Judiciary

PP n.	Subject
2008100000277951[11]	Divergence between the determination of the Federal Court of Accounts (TCU Appellate Decision n. 2981/2008 – 2nd Chamber) and the understanding signed by the National Council of Justice (PP n. 22694) regarding the work hours of the servants occupying the post of Judicial Analyst – Speciality: Medicine.
0004490-12.2011.2.00.0000[12]	Divergence between decisions of the CNJ and the TCU, on the correct application of the constitutional remuneration cap, in the event of amounts received from different branches and federated states. Decision: The conflict was not characterized.
0006065-55.2011.2.00.0000[13]	Divergence on payment to the justices of the bonus named VPNI GEL, authorised by the CNJ; and considered illegal, by the TCU, through Appellate Decision n. 8890/2011 of the 1st Chamber.
0007136-29.2010.2.00.0000[14]	Possibility of redistribution of servants in the scope of Regional Appellate Labour Courts. Decision of the TCU (Appellate Decision n. 2366/2010 – Full Bench) bans the removal of servants with the corresponding redistribution of vacant positions. The CNJ confirms this understanding.

Out of the four mentioned PPs, the CNJ ruled out the existence of divergent position with the TCU in two of them (in the second and fourth inquiries above). In the other two (first and third), it was recorded that the position of Council must prevail, in view of the constitutional authority to exercise specifically the control of the financial and administrative performance of the Judiciary, which determinations should be accepted to the detriment of those of the TCU.

It can be noted that the CNJ uses the speciality – it is special, internal, in relation to the external – as main argument to defend a higher position in the conflict of resolutions with the TCU. A fact that calls attention is that in both the decisions where the CNJ released the agencies from complying with the resolutions of the TCU, the Council issued an understanding, in the sense of granting or extending rights, in the opposite direction of the position of the Court of Accounts, whose tendency was to restrict or repeal.

3.5 THE DUTIES OF THE CNJ AND THE RESPECT IN RELATION TO THE DECISIONS OF THE TCU: CHARACTERIZATION OF THE PREJUDICE AND THE PROPOSAL OF ANALYSIS

It has been demonstrated in previous paragraphs that the CNJ has been ruling out the competency of the TCU to assess the legality and legitimacy of acts of agencies of the Judiciary, as well as to determine the correction of illegalities. The conclusion cannot be otherwise once the CNJ, when summoned to manifest, by the courts of the Judiciary, responds in the sense that its decisions must be met to the detriment of those issued by the TCU, if they have distinct or even opposite courses of action. Moreover, in the vote which entailed the decision in the above-mentioned PP n. 445, councillor Douglas Ribeiro records that the Judiciary's administrators, who follow the guidelines established by the CNJ, are not subject to the sphere of control of the TCU.

In order to promote a proper analysis on the matter, the path to be followed starts with the confrontation between the main arguments used by each of the agencies to defend their supremacy in the conflict of decisions. There is no intention of analysing all of them, but only those that are substantial in order to sustain one position or the other. In this sense, the discussion will be directed based on two queries below.

First, in view of the CNJ considering itself as an agency of internal control, which affirmation, supported by the understanding of the STF in ADI n. 3,367; what kind of internal control is this, in the constitutional context, that can rule out decisions of external control to which it should, a priori, provide support? Secondly, are the speciality and the absence of hierarchy to which the CNJ refers legal arguments that are sufficient to rule out the powers of external control, which are grounded on the principle of separation of the powers of the branches, the state functions acting as a system of brakes and counterweights?

The probable consequence of endowing the CNJ with powers to rule out the decisions of the National Congress (CN) and of the TCU follow below.

3.5.1 The nature of internal control exercised by the CNJ and the power of self-control (*autotutela*)

As previously reported, EC n 45, of December 30, 2004 has attributed to the CNJ the control of the financial and administrative performance of the Judiciary,

which the STF named as internal control (ADI n. 3,367-DF). In this sense, by express constitutional provision, it has powers to assess the legality of administrative acts and even invalidate them, without prejudice to the competencies of the TCU.

Albeit top agency of the administrative control of the Judiciary, it is important to note that the CNJ is substantially an agency of internal control, as established by the STF. In this sense, for comparative purpose, which treatment is given by the internal control system of the Executive Branch to the decisions of the TCU?

Before objectively dealing with these issues, it is important to highlight that despite the constitutional competency to evidence the legality and assess the results, as to the efficacy and efficiency of budget, financial and assets management of agencies and entities of the Federal Administration, in that which refers to the Executive and Legislative Branches, authority to give orders has not been granted to the internal control system, nor can such system breach TCU decisions, moreover as a result of the express provision that they should give support to the external control on exercising the institutional mission.

Guerra clarifies the issue. He asserts that for the fact of composing the Public Administration, the internal control itself shall be subject to the external control's supervision, for analysis of the 'system, general survey, verification of compliance with the governing principles of control' (2005, pg. 263).

It must be noted that, in the scope of Executive and Legislative Branches, and in the relationship with the Public Administrator, the internal control can only suggest the adoption of measures, recommending the correction of directions, the practice or nonpractice of acts, without having powers to annul administrative acts or contracts practiced/signed by the manager. It is certain that, in the event of breach of the formulated recommendation, and, subsequently, once loss caused to the national treasury has been characterized, on grounds of illegal conduct, this may result in the filing for special accounts rendering, as well as administrative proceedings for assessment of discipline.

Again, the CNJ, is an agency of internal control, as characterized by Clémerson Merlin Cléve and Bruno Meneses Lorenzetto[11], and, as such, to it should apply the constitutional rules on the internal control system. It is also noteworthy that to both – the Council and the Federal Secretariat of Internal Control, within, for example, the Executive Branch, – the legality of the acts practiced in the context of their respective competency areas must be verified.

However, there is a fundamental difference, the CNJ can invalidate, in terms of the CF/1988, the defective acts that have been practiced, while the systems of internal control of the Executive and Legislative Branches can only make recommendation to managers. A crucial aspect, would this distinction be enough for the Council to issue orders for the other agencies of the Judiciary to breach the decisions of the TCU?

Note that the CNJ authorizes the violation of decisions of the TCU, using the supplementary argument that it has the power to directly invalidate the decisions of the agencies of the Judiciary, in the exercise of

self-control (*autotutela*), while the latter would not have this competency. It is the exercise of the so-called administrative control, to which Di Pietro and Meirelles refer, by means of which the Public Administration may revise their own acts, invalidating them, as the case may be.

There is, no doubt, misunderstanding in the interpretation of the Council, since the exercise of the power of self-control (*autotutela*), has always been the prerogative of the entire Public Administration to review their own acts. This, however, is no justification in order that, within the context of the Executive and Legislative Branches, the determinations of the TCU should not be fulfilled. Moreover, it must be made clear that the possibility of the CNJ invalidating acts, placing itself in the condition of a manager or co-manager, on publishing acts of management, reinforces, in fact, the need for submission of its decisions to external control.

It must be noted, in another sense, that the TCU is authorized by both CF/1988 and Law n. 8,443, of July 16, 1992, to sign a deadline for the agency or entity to adopt the necessary measures for the exact fulfilment of the law, if illegality be found, as well as to stay, if not complied with, the execution of a contested act. Thus, the power of self-control (*autotutela*), applicable the entire Public Administration, cannot be used as a joker in order to rule out the decision of the TCU when it conveys a determination to the Judiciary.

Finally, if the CNJ, as agency of internal control, has jurisdiction to rule out the decisions of the TCU, it is necessary to redefine the roles outlined in the CF/1988 for the system of control of Public Administration, which, until the creation of the above-mentioned Council, was composed by the structures of the internal control system and by external control, and compliance is due, in the administrative scope, with the provisions established by the latter. This means that the power of the management of the Council, allied to the character of internal control, rather than rendering it immune, makes it more susceptible to the requirements of external control.

In summary, the CNJ is therefore a typical internal control agency, with an essential distinction; that is the possibility of invalidating the acts performed by other agencies of the Judiciary, which attributes to it a character of management or co-management agency. This distinction, however, does not attribute exceptional powers to have the TCU's decisions breached, on the contrary (again: the effect is diverse), because, if it were valid in general (should self-control [*autotutela*], suffice for such), it would authorize the entire Administration to breach the decisions of the Courts of Auditors, which, in practice, does not take place. Therefore, the disconnection of CNJ's understanding with the effective legal system is clear.

3.5.2 Speciality associated to the idea of the inexistence of hierarchy between CNJ and the TCU as opposed to the principle of separation of the powers of the branches

The criterion of speciality[12] is another central argument in the decisions of the CNJ to rule out the TCU's competency. In some votes it is affirmed that by reason of exercising the control, specifically, of the administrative and financial performance of the Judiciary,

the decisions of the Council shall have precedence over the Court of Accounts.

Used emphatically, the criterion of the CNJ's speciality is the backbone on confronting the decisions of the TCU. It assumes indisputable importance – the jewel of the favourable hermeneutics – the arguments used in the various votes formulated by councillors. Hence the opportunity of the following question: does the criterion effectively have enough force to counteract the picture of the duties of the CN – the TCU as ancillary agency -, as outlined in the CF/1988?

The criterion of speciality, along with the chronological and hierarchical order, is the rule used to solve contradictions on applying the rule, notes Rogerio Delatorre (2008, pg. 8). Such criterion, according to the author, enables the solution of the conflict in favour of the special rule, which rules out the general one. Since we are referring specifically to Item II, Paragraph 4, of Article 103-B of CF/1988 – which provides on the duties and powers of the Council, is it correct to affirm that such constitutional provisions, which establish the competencies of the CNJ are special in relation to the duties of the National Congress (CN) and of the TCU?

The expressions used in the vote of Deputy Ms Zulaiê Cobra, which entailed the approval of EC n. 45, of December 30, 2004, help to clarify the role idealised for the CNJ by the Legislative Branch. To such is attributed the superior directional function of the bench, besides ensuring compliance with the principles relating to the Public Administration, with correctional and disciplinary functions. No reference whatsoever has been made, in the entire vote, to the impact of the institution of the Council on the duties of the TCU, moreover since express protection has been established for the competencies of the Court of Accounts[13].

Highlighting this issue even further: it can be noted, from the opinion of the aforesaid deputy, that the legislator did not at any time suggest the possibility of conflict between the duties of the CNJ and of the Legislative Branch by means of the TCU. The reason for this is that the role that each one should perform was clear, one as a directional, administrative, internal control agency; the other, exercising external control. The constitutional role of internal and external controls is unmistakable and has long since been outlined.

It must be noted that on the assumption that the CN is the holder of external control, the legislator has opted to limit the competencies of the CNJ in that which would cause prejudice to the exercise of the duties of the TCU, ancillary agency of the CN. This was

not by chance: it would make no sense to protect or limit the competencies of the CN in favour of an agency, albeit constitutional, from another Branch. This action would represent an attribution of exceptional force to the Judiciary, and not in accordance with the principle of separation of the powers of the branches, which is based on mutual subjection among themselves. In fact, if the legislator intended that the competencies of the National Congress (CN) and of the TCU should be minimized with the creation of the CNJ – which is actually taking place in practice – instead of being preserved they would have been restricted with express provisions.

Paulo Roberto Gouvêa Medina (2011, pg. 4-6) mentions the importance of the principle of separation of the powers of the branches, with the aim of ensuring the interdependence among them, which means the observation of boundaries between the territories reserved for each one's predominant performance of the functions they specialize in, hence the relevance of observing the criterion of functional-organic adequacy.[14] For the author (2011, pg. 11), the principle of separation of the powers changed and became more flexible, with each branch – executive, legislative and judicial – extending its competencies, on performing roles that are not typically theirs. However, he recognizes that the essence of aforesaid principle remains unchanged, since it constitutes 'the cornerstone of a Constitution of the Rule of Law'.[15]The statement is important to make clear that 'the excessive expansion of any of the Branches or constitutional institutions' goes against the effectiveness of the above-mentioned principle and does not harmonize with the Rule of Law.

José Joaquim Gomes Canotilho (2000, pg. 250) characterizes two dimensions of the principle of separation of the powers of the branches, which are complementary: the negative one, as a division, control and limit of power, which serves to protect the legal-subjective sphere of individuals, and to avoid concentration of power; the positive one, as 'constitutionalization, order, and organization of power of the State, inclined towards decisions that are functionally efficient, and materially just', constituting itself as a 'relational scheme of competencies, tasks, functions, and responsibility of the constitutional agencies of sovereignty'.

Romeo Felipe Barcellar Filho and Daniel Wunder Hachen (2011, pg. 5-6) affirm that the separation of the branches in the contemporary constitutional State takes place along with interdependence and mutual subjection. Note that the exercise of statutory power by the CNJ should not the overtake the law in the formal sense, hence the consideration that some of the published rules are unconstitutional, by advancing on the role of the legislator.

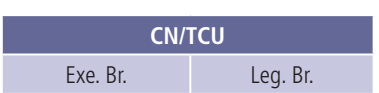
In the vote which entailed the decision in ADI n. 3,367, Justice Cezar Peluso ensures the elevated position of the principle of separation of the branches in the CF/1988. The state structure formulated by the members of the constitutional convention guaranteed independence in the exercise of typical functions, providing, in addition, 'assignments, many of which of reciprocal control, and forming together [...] a true system of integration and cooperation, preordained as to ensure a dynamic balance between the agencies, in the benefit of the ultimate goal, which is the guarantee of freedom'. This political architecture constitutes, in accordance with said Justice, the natural expression of the principle of separation of the Branches.

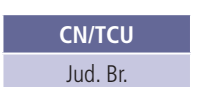
Gilmar Ferreira Mendes and Paulo Gustavo Gonet Branco (2014, pg. 817) note that the tripartition of powers is one of the most invoked nuances in direct action of unconstitutionality when defending constitutional and infra-constitutional rules. They mention, among other cases, the judgment of the STF for the unconstitutionality of the creation of an agency in the Executive Branch, which purpose was 'the function of dictating parameters and assessments of the functioning of justice', reiterating that the mechanisms of reciprocal control, of brakes and counterweights are only legitimate if they correspond to the Constitutional provision.

The external control of the Public Administration, as a typical activity of the CN, exercised with the support of the TCU, should not succumb in view of the alleged absence of hierarchy among the agencies, or by reason of the implementation of the CNJ criterion of specialty: the principle of separation of the powers is a pillar of the rule of law and, in this sense, any interpretation on the competencies of the above-mentioned Council must take place respecting the role, functions, the functional organizational system established in the Constitution itself[16]. In the figures below, one can note the scope of the competencies of the National Congress (CN) and of the TCU, before and after the creation of the CNJ, with the publication of EC n. 45, of December 30, 2004, on applying the interpretative perspective of the Council:

Figure 1:
Surveillance competence of the CN and the TCU before the creation of the CNJ[17]

Figures 2 e 3:
Surveillance competence of the CN and of the TCU, and of the CNJ Brazilian State after the creation of the latter[18]





It must be noted that the competencies of the CN and the TCU have been negatively affected with the suppression of the surveillance powers over the Judiciary. This suppression has been constructed based – solely – on the interpretation of constitutional provisions performed by the Council.

The absence of a rule that places the decision of the CNJ in a position higher than that of the Court of Accounts; despite constituted as an agency of internal and administrative control, and the objective criterion that preserves the competencies of the TCU, set forth under the constitution itself, besides the normative and jurisprudential arsenal that is the foundation for the performance of the court of accounts; it does not inhibit the Council, on the contrary, it is used as a force to invoke power, restructuring the constitutional picture of the Brazilian State.

It is worth mentioning the excerpt of the vote of Councillor Antonio Umberto de Souza Junior, quoted

above, in which he proposes the prevention for the definition of which agency would be competent to decide on the matter (the CNJ or the TCU). The conflicts, according to councillor, should be resolved in favour of the first one that made the statement on the merits; however, it must be made clear that this rule does not rely on normative support. It is a mistake to consider that the agencies have the same role, and that their decisions have the same force; they are obviously located in distinct branches with equally distinct competences; one of internal and administrative control; the other, of external control. This is exactly what makes them effectively different, although they may act, in one fraction of their competencies, on the same target.

Otherwise, it must be noted that the principle of separation of the branches, as well as the resulting reciprocal control, would be clearly minimized, in the event of the position of the CNJ prevailing. The Judiciary would be strengthened before the other branches, on relying on its own controlling agency, ruling out the scrutiny of the CN, in the exercise of external control. As a hypothesis, it must be noted that an illegal act committed by the Office of the General Counsel to the Federal Government (AGU) would be subject to administrative control (manager) and to the internal control of the Executive Branch (Federal Secretariat of Internal Control); such an act would be subject to the scrutiny of the external control of the CN and the TCU, and, furthermore, to the jurisdiction of the Judiciary.

In its turn, the same act, if practiced by an agency of the Judiciary – following the position defended by the Council – it would only be submitted to the Council itself and to the Judiciary in the exercise of jurisdiction. It is known that the CNJ is mostly composed of members of the branch itself, which makes it sensitive to corporative appeals. Therefore, such situation is weird, where the principle of separation of branches may serve as a mechanism of opacity, of protection against the exercise of supervision which, as typical function, is under the responsibility of the CN. Moreover, the driving force which led to the approval of EC No 45, of December 30, 2004 was seeking totally different results and, among other, to provide greater transparency to the Judiciary.

In fact, it is never too much to repeat that the STF, on the judgment of ADI n. 3,367, ruled out the argument of the AMB (*Associação dos Magistrados Brasileiros*) – of offense to the principle of separation of the branches, both in relation to the creation of the CNJ, as in relation to the composition of the Council defined in EC N 45, of December 30, 2004. There would be offense to the aforesaid principle, according to the Association, due to the presence, at the CNJ, of councillors of other agencies or branches, which was rebutted by the Constitutional Court. The same principle used by the AMB to try to bar the creation of the CNJ, or erect barriers to foreign advisers to the Judiciary, is now used as the foundation for opacity before of external control of the CN and TCU.

In view of the foregoing, if the position of the CNJ prevails, the Judicial Branch leaps from a position of independence and autonomy, to, within the limit, immunity against control other than by members of the branch itself, which places it in a distinctive and privileged position, clearly contradictory to the principle of separation of the branches. It is inconceivable that the CN, on such opportunity (approval of the PEC no. 45, December 30, 2004), would raise such hypothesis, waiving their typical duties.

3.5.3 The consequences of ruling out external control of the Judiciary by reason of the performance of the CNJ

As a consequence of the performance of external control, reaching all those responsible for public funds, the decisions of the TCU, in formal inquiries, or by reason of surveillance, serves as a guide for the administrative management, where the Agency, on assessment of concrete cases, does not specifically impose to its jurisdiction specific adjustments to the law.

The TCU, acting ex officio, or upon provocation, conducts audits, judges accounts, assesses the legality and legitimacy of acts, agreements, etc., which are opportunities

it has to mould the administrative practices, seeking an ideal of uniformity in the context of the controlled environment, intentionally or as a result of the work carried out.

It has been characterized to date that the CNJ understands that there is competition[19] of competencies with the TCU, and that the decisions of the Council must prevail over those of the Court of Accounts. This is the central aspect and entails consequences: in the event of the position of the CNJ prevailing, the possibility opens for breaking the standardizing and ideal potential that external control exercises where the supervision of administrative management in all the branches is under its competence.

In practice, it enables specific interpretations of law that can only be demanded in the courts of the Judiciary, which means, for example, in personnel management, that rights may or not be granted/confirmed to servants or justices differently from those granted in the other branches. It must be noted that the decisions of the CNJ do not reach the Supreme Court. Can the National Council of the Public Prosecutor's Office (CNMP), in view of the competence similar to the CNJ set forth in EC No 45, of December 30, 2004, demand for itself the non-interference of the TCU in matters on which the Council has already manifested?

Thus, as a hypothesis, any right granted within the framework of the Judicial Branch, and of the Public Prosecutor's Office, with the supervenience of decisions of acquiescence of the CNJ and the CNMP, and questioned by the TCU, would remain untouchable in administrative agencies under the control of such Councils, but could be suspended at the STF, and at the Legislative and Executive Branches.

Also hypothetically, within the scope of the Federal Justice, is granted a benefit that the CNJ understood as legal; however, this right was deemed illegal by the TCU. In the context of the Public Prosecutor's Office, this right was not granted, nor within the Federal Executive Branch. The hypotheses are several, and the impeachment of the standardizing potential of law in the administrative sphere, carried out by external control, causes extremely negative impacts, usually with a high financial cost for society. It is obvious that it will always be possible to seek a final judgment, but external control duties that are typical of the CN and TCU are being extracted.

But the lack of administrative uniformity, as a result of ruling out the competencies of external control, can occur not only between branches, or between the branches and the and the Public Prosecutor's Office, and vice versa, it may become effective even within the Judiciary itself, when the TCU has decided on the issue, and conflicting decision by the CNJ follows.

In the vote which entailed the decision on PP n. 0000431-44.2012.2.00.0000, the rapporteur councillor, Jefferson Kravchychyn affirms that it is not the CNJ who shall manifest, nor even intervene in view of the decision of the TCU, which determined, through Appellate Decision n. 3159/2010 – 1st Chamber[20], to the Regional Appellate Labour Court (TRT) of the 23rd Region, to extinguish the wage portion (VPNI-Locality) of the remuneration of justices who met certain requirements. Differently, the

CNJ accepts payment in certain situations, having published Administrative Statement (EA) n. 4/2006[21].

The example makes clear the clash of decisions between the agencies, though, the focal point, the possibility of different understandings coexisting within the Judicial Branch. It must be noted that the determination of the TCU was directed to the TRT of the 23rd Region, in relation to which the councillor Jefferson Kravchychyn abstained from interfering; while other courts, in theory, could carry on fulfilling the aforementioned Administrative Statement.

3.6 THE SOLUTION OF THE SUPPOSED CONFLICT OF COMPETENCIES TO BE DECIDED BY THE STF

The solution of the supposed conflict of competence takes place, as defended by the councillors of the CNJ, in votes where they appreciate the issue, with the proposition of their own actions within the scope of the Judiciary[22]. In its turn, the TCU believes that the Council cannot breach, nor order breach against determinations of the Court of Accounts. In this sense, the Council and other judicial agencies submitted to it in the administrative aspect should have as a premise to observe the decisions of external control and, as a result, in the event of disagreement, seek judicial relief.

Therefore, it is urgent that the STF should consider the issue and define the extension of the powers of the CNJ and the limit of its performance in comparison with the role of the CN and the TCU, in the exercise of external control. In this judgment the possibility of the Council having the decision of the TCU breached implies a decrease in the force of the CN, triggering damages to the balance among the Branches, insofar as the Judiciary renders itself immune to surveillance external to the management.

The opportunity for the STF to settle the divergence is conveyed in the Writ of Mandamus (MS) n. 31,556-DF[23], in which the TCU questions the decision of the CNJ that determined to the Federal Regional Court of the 2nd Region the adoption of four daily work hours for servants occupying the post of Judicial Analyst – Specialized Medicine Support, contrary to the position of the Court of Accounts. The Writ of Mandamus reported by Luiz Fux has been concluded for the rapporteur since February 26,2015.

4. CONCLUSION

This article has aimed at raising discussion on the conflict between the decisions of the CNJ and the TCU, since the Council, based on interpretations that are exclusively native, have advocated for themselves the power to breach and have the decisions adopted within the scope of external control breached, especially in the cases where the former deliberated on the matter.

CF/1988 is clear in the sense that the competencies of the CNJ should be exercised without prejudice to those of the TCU. The member of the constitutional convention, upon approving EC n. 45, of December 30, 2004, did not consider the possibility of conflict of competencies between the Council and the Court of Accounts, for the reason that each one acts within a functional-organic space that is demarcated by CF/1988; one is an agency of internal and administrative control; the other, of external control.

Note: there is not, on the contrary to that which the CNJ defends, conflict of competency between the agencies. Each one acts within the space that the constitutional powers entrusted them. That which exists are areas of common performance, though, as internal and administrative control, the decisions of the Council must abide by those adopted by the TCU. Can the Public Administrator, at its own discretion, breach decisions of the Court of Accounts? Can an agency of the internal control system not abide by the determinations of the TCU? Why would the CNJ, on exercising the role of internal and administrative control, be authorised?

Nor does the argument that the CNJ is an agency of specific control of the Judiciary help in ruling out the competencies of the CN and the TCU, since this would put an end to the principle of separation of the branches, based on which each branch prevails within the exercise of its typical function, and reciprocal control.

To think differently would mean to attribute to the CNJ, a constitutional agency, though, even as such, internal and administrative, such musculature and force that would suffice to render immune the Judiciary, to which the control exercised by the CN and by the TCU is linked, a privilege, rather than prerogative, incompatible with the idea of a republic and Rule of Law[24].

NOTES

1 Article 31. The supervision of the municipality shall be exercised by the Municipal Legislative Branch, through external control, and by the internal control systems of the Municipal Executive Branch, in the terms of the law.
Paragraph 1. The external control of the Municipal Chamber shall be exercised with the aid of the Courts of Accounts

of the States or the Councils or Courts of Accounts of the Municipalities, where these exist.

2 Article 70. The accounting, financial, budgetary, operational and asset supervision of the Federal Government and of the entities of the direct and indirect administration, as to the legality, legitimacy, cost-effectiveness, implementation of subsidies, and waiver of revenue, shall be exercised by the National Congress, through external control, and by the system of internal control of each Branch. [...] Article 71. The external control, under the responsibility of the National Congress, shall be exercised with the aid of the Federal Court of Accounts, which shall: [...]

3 Acts of the transitional constitutional provisions: Article 16 [...] Paragraph 2 The accounting, financial, budgetary, operational and assets supervision of the Federal District, for as long as the Legislative Chamber is not installed, shall be exercised by the Federal Senate, through external control, assisted by the Federal Court of Accounts of the Federal District, as provided under Article 72 of the Constitution.

4 Resolution adopted within the context of the TC-021.286/2011-TCU-1st Chamber, where the possibility of subsidies payment maintenance along with the bonus called VPNI-Locality or VPNI GEL was judged.

5 Examples: PP n.0004490-12.200810000027795, 2011.2.00.0000, 0006065-55.2011.2.00.0000 and 0007136-29.2010.2.00.0000.

6 Synopsis of the decision where PP n. 445 was judged: SYNOPSIS: 1. NATIONAL COUNCIL OF JUSTICE (CNJ) AND FEDERAL COURT OF ACCOUNTS (TCU). PUBLICATION OF DISSONANT AND CONTRADICTORY NORMATIVE GUIDELINES. FORM OF OVERCOMING CONFLICT. The publication, by the CNJ and the TCU, of contradictory normative guidelines regarding same legal-administrative issues, each of these agencies within the legitimate exercise of their constitutional competencies, does not point to severe systemic contradiction, but evidences the result of the natural and complex process of supervision of the Public Administration acknowledged in the constitutional text. Once no hierarchy exists among the agencies involved, since they are linked to distinct fractions of political power, there is no possibility of reciprocal imposition of any of the guidelines delivered, and for any parties that may be interested, direct access to the Judiciary is ensured in any event for the protection of their interests (CF/1988, Article 5, XXXV). Since, however, the CNJ features as the top agency in administrative control of the Brazilian judicial apparatus, of internal nature, its decisions must be complied with by the courts, moreover since they derive from the exercise of administrative self-control (autotutela) (Precedent 473/STF).

7 The TCU judged illegal the acts of retirement of servants and supposedly ordered the courts of the Judiciary to rectify them, which, according to councillor Douglas Ribeiro, the STF signalled negatively to the intention of the Court of Accounts.

8 The above-mentioned precedents are: MS 23665, Rapporteur Maurício Corrêa; CC 6987, Rapporteur Justice Sepúlveda Pertence; CJ 6975, Rapporteur Justice Néri da Silveira.

9 Excerpt of Justice Cezar Peluso's vote: 'Here, the doubt is less weighty. Assisted by the courts of accounts, the Legislative Branch has always held higher powers for supervising the courts as to budgetary, financial and accounting activities (Articles 70 and 71 of the Constitution of the Republic), without this authentic external control of the Judiciary being regarded, at any time and seriously, as incompatible with the system of separation and independence of the Branches, but as a mechanical part of the brakes and counterweights. And this framework also suggests a dilemma: either the power of intermediate control over the financial and administrative performance of the Judiciary, attributed to the National Council of Justice, does not affront the independence of the Branch, or it will be forcible to admit that the Judiciary has never been an independent Branch among us!'

10 Provision of Internal Regulations of the CNJ: Article 89. The Full Bench will decide on inquiries, in theory, of general interest and repercussion as to the doubt raised in the application of legal and statutory provisions concerning matters within its competency. Paragraph 1 The inquiry should contain the precise indication of its object, be formulated articulately, and be accompanied by the relevant documentation, as the case may be. Paragraph 2 The response to the inquiry, when rendered by an absolute majority of the Full Bench, has a general rulemaking character. Article 90. The inquiry can be assessed by the Rapporteur monocratically, when the matter has already been expressly regulated in Administrative Resolution or Enunciation, or has been the object of definitive pronouncement of the Full Bench or of the Supreme Federal Court.

11 Cléve and lorenzetto characterize the CNJ as an agency of internal control, as follows: 'For this reason, the CNJ can be observed from the normative perspective in the description of its competencies, or even, in the materialization of their correctional role. The CNJ must jointly exercise the internal control of the Judiciary and ensure the preservation of its autonomy in the confrontation with the other Branches, which also means the consideration of autonomic sphere of the courts'.

12 See below excerpts of synopses: 1) 2. The CNJ exercises the control, specifically, of the financial and administrative performance of the Judiciary. Excepting the Supreme Federal Court, all the Courts must abide by the determinations issued by the CNJ. Therefore, the Federal Council of Justice (CJF), shall, in the case of conflict of attributions, follow the guidelines of the CNJ, and not of the TCU' (Inquiry n. 0006065-55.2011.2.00.0000, rapporteur Tourinho Neto, June 5, 2012); 2) 'The conflict of competencies between the TCU and the CNJ for administrative-financial control of the government is settled by the criterion of speciality, and the competence of the CNJ prevails when referring specifically to the administrative and financial control of the Judiciary'. (Inquiry n.0007136-29.2010.2.00.0000 – Rapporteur. Councillor Marcelo da Costa Pinto Neves – 119th Session – j. 01/25/2011 – DJ – and n. 17/2011 on January 27, 2011, pg. 23).

13 Excerpt of the vote of Ms Zulaiê Cobra, whereby is entailed the approval of EC n. 45, December 30, 2004: 'In this regard the creation of the National Council of Justice (Conselho Nacional da Magistratura), whose composition seeks to reflect the various agencies of the Judiciary of the Federal Government and the States. Further proposed is the presence of members of the Public Prosecutor's Office, of lawyers and citizens, the latter of which chosen by joint committee of the National Congress, the Nation's highest representative instance. Popular participation is thus ensured, welcoming, albeit with modifications, several amendments accordingly tabled before the Commission. To the above-mentioned Council is attributed the role of the superior directional agency of the bench, who must ensure the autonomy of the Judiciary, besides ensuring compliance with the principles relating to the Public Administration, with disciplinary and correctional powers'.

14 Medina, in this passage, discusses the interference of the Judiciary in the establishment, by the Executive Branch, of public policies. He argues that such Branch does not intrude on the Public Administration daily routine.

15 The expression 'cornerstone of a constitution of the State of Law" is attributed, by the author, to Paulo Bonavides.

16 This refers to the principle of fairness or functional conformity described by Francisco Gilney Bezerra de Carvalho Ferreira. By this principle, 'it is established that the constitutional interpretation cannot reach an outcome that subverts or disturbs the organizational scheme established by the Constitution. That is, the implementation of constitutional norms may not imply a change in the structure of distribution of powers and exercise of the competencies constitutionally established'.

17 As a measure of simplification, we chose not to represent the Prosecutor's Office in the figure.

18 As a measure of simplification, we chose not to represent the Prosecutor's Office and the Public Defender's Office in the figure.

19 Term used by councillor Douglas Monteiro in the trial of PP n 445.

20 Two of the provisions of Appellate Decision n 3159/2010-TCU-1st Chamber: 9.2.2. To promote, within 15 days, the extinguishment of the VPNI-Locality remuneration portion of justices who had no right to earn the compensatory portion at the time Law n 11.143/2005was published.; 9.2.3 To promote, within 15 days, the extinguishment of the VPNI-Locality remuneration portion of justices who had no right to earn the compensatory portion at the time Law n 11.143/2005 was published, substituting the aforementioned VPNI by compensatory portion due, after considering the gradual absorption on account of the increases granted for subsidizing the justices after the year 2005;

21 Administrative Statement (EA) n. 4/2006 of the CNJ: "The justices of the Federal Government, who joined before the issue of Provisional Measure n. 1.573/96 and who meet the requirements of Article 17 of Law n. 8.270/1991, combined with Article 65, X, of Supplementary Law n. 35/79 (LOMAN), and Decree n. 493/92, besides the subsidy amount, are entitled to receiving the transitory advantage of Special Locality Bonus (GEL) as personal nominally identified advantage (VPNI), while they remain in office at the courts located in border areas or locations which living conditions so justify, and the total revenue amount is limited to the amount of the remuneration cap, according to Item I of Article 5 of Resolution n. 13 of the CNJ".

22 See below the excerpt of the vote of the rapporteur councillor, Jefferson Kravchychyn, on PP n. 0000431-44.2012.2.00.0000: "Possible questioning on the divergence of the established guidelines must be settled in court', addressing the divergence between decisions of the CNJ and of the TCU.

23 MS 31.556-DF, reported by Justice Luiz Fux, has been concluded for the rapporteur since February 26, 2015.

24 Paulo Roberto Gouvêa Medina (2011) quotes Paulo Bonavides, for whom the principle of separation of the branches is one of the 'unbreakable stones of the constitutional building' or "the cornerstone of a constitution of the Rule of Law'.

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Evaluation of internal controls in the public sector: the case of the General Comptroller's Office of the State of Pernambuco

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ABSTRACT

The supposition that weaknesses in internal control systems have facilitated emblematic cases of fraud and corruption around the world, especially in the Brazilian public sector, has raised questions about the functioning of these systems, and the evaluation of internal controls is an important item on this discussion. The ability of this evaluative procedure to identify weaknesses, vulnerabilities and the level of effectiveness of the internal control system, as well as to facilitate its improvement, in support of the organization's objectives and the legitimacy of public management in society, may deviate according to the configuration assumed by the evaluators. In order to investigate the procedure for the evaluation of internal controls in the public sector, this research was instrumented by a case study within the scope of the General Comptroller's Office of the State of Pernambuco (SCGE). The results demonstrated that the evaluation of internal controls is related not only to the procedural apparatus, but also to the cognitive aspect that involves the process, since everyone needs to understand the meaning of the evaluation and its repercussions at all stages so that the desired ends can be achieved.

Keywords: evaluation; internal control; public sector.

1. INTRODUCTION

The supposition that weaknesses in internal control systems have facilitated the emergence of emblematic cases of fraud and corruption around the world, both in private sector organizations and in the public sector, especially in the Brazilian public sector, raises questions about the functioning of these systems, and how those systems are evaluated.

These same observations led to the search of corporate governance systems for the improvement of their control mechanisms. In this context, conceptual and methodological models have enriched literature and practice regarding control in organizations, and some of these models have become references, such as the Committee of Sponsoring Organizations of the Treadway Commission (COSO – 1992) and the International Organization of Supreme Audit Institutions (Intosai – 2004), which provide the basis for an internal control system to be evaluated within the public sector.

An important item for this discussion is based on the configuration of the procedure for the evaluation of internal controls, since this procedure can identify weaknesses, vulnerabilities and the level of effectiveness of the internal control system and favor the improvement thereof to further the organization's goals and the legitimacy of public administration vis à vis society.

From the perception of those who evaluate the system of internal controls, the form of configuration of this procedure may unveil challenges, limitations, facilitations or even potentials due to the combination of aspects that are characteristic thereof, such as the purpose of the evaluation; the sequential ordering of phases; the choice of the techniques used and the definition of the scope and dimensions of the evaluated subject. However, studies on systematically articulated initiatives of this evaluative procedure within public management that explore this perception, are very rare, if not unknown.

Thus, an inquiry that arises amid the current day-to-day observation regarding Brazilian public management, which this research proposes to investigate, is expressed by the following problem question: *how is the procedure for evaluating internal controls in the public sector configured from the perception of evaluation agents?*

To answer this question, the objective of the research was to investigate the internal controls procedure in the public sector. The object of the study was the practice developed at the Comptroller General's Office of the State of Pernambuco (SCGE/PE), which is the body responsible for coordinating the internal control system of the Executive Branch of the state of Pernambuco. Thus, the result should contribute to the literature in the area by articulating other works related to control issues in organizations to integrate them into the context of the evaluation of internal controls in the public sector.

Therefore, the study is vested with importance because of its scientific novelty and the relevance the bodies responsible for coordination of internal control systems have in connection with the social reach of their actions within society.

This article introduces the reader to internal control in organizations to the evaluation of internal controls and relevant aspects of their configuration. Next, the methodological procedures used in the research are presented followed by the discussion on the outcome and some final considerations.

2. CONTROL IN ORGANIZATIONS: FROM LITERATURE TO PRACTICE IN BRAZILIAN PUBLIC ORGANIZATIONS

A major challenge in the integration of structures and paradigms regarding control in organizations results from the fact that the literature has largely, developed in different branches of knowledge independently. Whether identical or very similar, concepts are referred to in different technical terms. In addition to the communication difficulties caused by using different terms, researchers working with a paradigm tend not to mention works from other areas of knowledge, which makes it even more difficult to have progress in the convergence of literature on control in organizations (MERCHANT; VAN DER STEDE, ZHENG, 2003).

Today, the literature on organizational control is rich and varied, made up of various structures and paradigms that, even if developed largely independently, are useful in establishing a general notion of the organization of their field of study. The different approaches suggest different levels of control enforcement, both for relations with the external environment and for the internal environment of the organizations.

A more practice-based focus is given by the literature on internal control. Internal control is a term that auditors have long applied to sets of controls that are designed to prevent or detect errors and irregularities, especially while recording transactions that could lead to financial statements with material misstatements. Over time, auditors' internal control conceptions have expanded to include other areas of management control and corporate governance (MERCHANT and OTLEY, 2006).

In 1992, perceiving that the term "internal control" had a different meaning for different people, among accountants, lawyers and administrators, for example, COSO presented a conceptual model of internal control system that was widely accepted worldwide and has become a true paradigm of control, *Internal control – integrated framework* (1992), duly updated in 2013. This conception brought a comprehensive definition of internal control, seeking to meet the needs of various parties related to the subject (COSO, 2013, p. 6):

> It is a process conducted by the top management, managers and other professionals of the organization, to provide reasonable assurance regarding the objectives related to the effectiveness

of operations; reliability of information; and compliance with the law and regulations.

It is a definition formulated under the urge of a predictive ethical and instrumental behavioral philosophy that establishes the control environment as the basis for the other components of the internal control system, and the risk assessment as an essential mechanism facing continuous changes brought about by changes in the industry, economy, regulatory and operating conditions (DANTAS et al., 2010; RATCLIFFE; LANDES, 2009).

In the context of public sector organizations, Intosai has also become a conceptual and methodological reference on internal control, incorporating the COSO model in its guidelines for internal control standards of the public sector (INTOSAI, 2004).

Conceptually, the literature on internal control has developed rapidly since the 1990s, with the contributions of COSO (1992) and Intosai (2004) influencing the practical application of relevant concepts in public organizations around the world (ABDOLMOHAMMADI; BURNABY; Hass, 2006). However, apparently the reflexes of this development are not yet visible to society when shifting the spotlight of this discussion to the internal control system practices in the Brazilian public sector.

Notwithstanding the conceptual development of internal control, in the practical context of Brazilian public organizations, the operation of the internal control system shows signs of weakness. Cases of public resource malfeasance reported by the media are recurring, corroborating the observations by Ribeiro Filho and (2008), and the statement that "without internal control, or with a poor internal control, an entity is prone to the misleading and misuse of resources, to fraudulent management" (ibid., p.50).

In order to monitor properly the enhancement and strengthening of the internal control system, an important item in this discussion is the evaluation of internal controls. In addition, how this procedure is configured by the evaluators, since this configuration can influence their judgments (ASHTON, 1974; EMBY; FINLEY, 1997), being, therefore, an essential item for the study of internal control in organizations.

3. EVALUATION OF INTERNAL CONTROLS

An essential aspect for the effectiveness of a system of internal controls is its monitoring, which is

one of the fundamental components pointed out in the COSO (1992) conceptual model for their operation, since it allows a timely verification of the correct application of all the components of the internal control system according to the objectives to be achieved by the organization.

This monitoring, in part, is fundamentally subsidized by the process of evaluating internal controls, which assesses whether the system being applied in practice is in accordance with the institutional objectives, i.e., if it is fulfilling the purposes for which they are considered adequately and sufficiently (CASTRO, 2010).

According to Pickett (2003), the evaluation should be applied based on the controls needed to ensure that the organizational objectives are achieved with no major loss or inefficiency, providing reasonable assurance for decisions about the course of action to be taken by the organization.

This makes the evaluation of internal controls take on a significant level of relevance in this area, drawing the interest of researchers on several aspects with which this evaluation process is involved. Thus, some aspects that characterize such an important organizational process and that can be found in pertinent literature recurrently are presented in sequence:

These different characteristic aspects of the process of evaluating internal controls reveal the possibility of diversity between configurations by their

combinations. Thus, in view of this diversity, the ability to identify weaknesses, vulnerabilities and the level of effectiveness of the internal control system, as well as to improve the organization's objectives and the legitimacy of public management in society can vary according to with the characterizing aspects assumed by the evaluators (ASHTON, 1974; EMBY; FINLEY, 1997).

From the perception of those who evaluate the system of internal controls, the way in which this procedure is set up can reveal challenges, limitations, possibilities or even potentialities due to the combination of aspects that are characteristic of it. Thus, understanding this perception in public management can be a means to explain the effectiveness potential of internal control systems in Brazilian public sector organizations.

4. METHODOLOGICAL PROCEDURES

The presupposition of this quantitative research is that individuals socially construct meaning in interaction with their world. Its exploratory purpose provides greater familiarity with the phenomenon investigated, with a view to making it more explicit, enabling the improvement of ideas and the discovery of intuitions. In it, case study, which is the methodological procedure adopted, is an appropriate instrument to make the viable the exploratory purpose of the research (GERRING, 2006; GIL, 2002; HANCOCK, ALGOZZINE, 2006; MERRIAN, 2002; YIN, 2015).

Thus, as a criterion to select the case to be studied, in addition to the convenience of geographic lo-

Table 1:
Categories of characteristics in the evaluation process of internal controls

Feature Categories	Feature properties
Purpose of the evaluation of internal controls	Discussions on the evaluation of internal controls can be distinguished in two approaches to the purpose of the evaluation, (1) from an external agent evaluation perspective traditionally discussed as part of an independent audit process, to support the determination and planning the nature, timing, and extent of substantive audit procedures to be applied; and (2) from the perspective of internal agents, focused on the development, implementation and improvement of systems of managerial controls (BIERSTAKER; THIBODEAU, 2006; DEUMES; KNECHEL, 2008; PICKETT, 2003; RATCLIFFE; LANDES, 2009; WINOGRAD, GERSON; BERLIN, 2000).
Phases of the internal control evaluation process	The configuration of the stages and phases of an evaluation process is not something uniform or rigid, on the contrary, it can reflect the diversity and even individualities among evaluators (Almeida, 1996;). However, Pereira (2001) observes the existence of elements intrinsic to this process, which are configured in a standard of comparison (ideal or desired situation) based on the identification of the objective and object of the evaluation; in defining the criteria for judgment; and value judgment, because of the evaluation process.
Techniques for evaluating internal controls	The effectiveness of an audit based on the control evaluation can be compromised, since the choice of documentation formats leads to different audit conclusions (BORITZ, 1985; ASHTON, 1974). Four formats are most commonly used by auditors to document their understanding of an entity's internal control system, such as: the questionnaire and the narrative; most frequently used, and flowcharts and matrices, which are used less frequently (BIERSTAKER; BEDARD; BIGGS, 1999).
Quantitative and qualitative dimensions assessed in internal controls	The meaning attributed to the term "evaluation" in a broad sense conveys the quantitative and qualitative dimensions of its object. The qualitative meaning of evaluation expresses the idea of judgment, the formation of judgment or attribution of concept to certain attributes of internal control. "Measure" expresses the quantitative meaning of the term "evaluation": it refers to the quantification of internal control, with the purpose of expressing them in quantity parameters (BIERSTAKER; THIBODEAU, 2006; COSO, 1992; FERREIRA; OTLEY, 2009; GAUTHIER, 2006; PEREIRA, 2001; PICKETT, 2003; RATCLIFFE; LANDES, 2009).
Extent of the internal control system evaluated	According to the organizational amplitude taken as the object of the evaluation, the generalization about the interpretations reached as a result may reflect or not the characteristics of the organizational control as a whole. However, even with a narrower range (over specific subsystems or controls), their results can positively influence the configuration of the other components of the organization's control structure. Thus, the interests of the evaluation should also consider its reflexes, which makes the definition of the breadth of the evaluation of internal controls a relevant aspect in its configuration (ASHTON, 1974; BORITZ, 1985; BIERSTAKER; THIBODEAU, 2006; COSO, 1992, 2013; DEUMES, KNECHEL, 2008; EISENBERG, 1997; FERREIRA; OTLEY, 2009; GAUTHIER, 2006; PICKETT, 2003; RATCLIFFE, LANDES, 2009).

Source: Prepared by the authors.

cation to develop the research, based on access, time, available resources and availability of the participants, we observed its context as a procedure for the evaluation of controls carried out within the scope of public administration, periodically and regularly.

The evaluation procedure carried out in the Government of the State of Pernambuco, more specifically, in the SCGE/PE, was the case selected for the study because it fit the pre-established criteria.

After defining the case, to obtain convergent lines of investigation, multiple sources were used to collect the research data. Thus, data were collected through the triangulation of focus group techniques, document analysis and direct observation, when using references such as Dawson (2002); Patton (2002) and Gibbs (2009), not only for collection, but also for data analysis, which began concurrently.

The focus group technique was applied with the participation of nine public employees of SCGE/PE, from the various levels of their organizational structure (strategic, managerial and operational), which deal, among other duties, with the process of evaluation of internal controls. The document analysis technique was applied in 18 documents made available by SCGE/PE, between reports and opinions, which included as essential content the evaluation of internal controls. Regarding the technique of direct observation, the authors monitored an inspection for internal control evaluation (control of the filing of rendering of accounts cases) performed by SCGE/PE employees in a government secretariat.

Thus, for the analysis initiated during the collection phase, the data were organized by concept-based coding.

Coding is the way in which the data being analyzed are defined. It involves the identification and registration of one or more text passages or other data items as parts of the general table which, in some sense, exemplify the same theoretical and descriptive idea. The categories or concepts that the codes represent may be based on research literature, previous studies, topics in the interview script, perceptions about what is happening and so on (GIBBS, 2009).

As a conceptual source to define the categories of codes, to organize and analyze the data collected, we considered the characterization aspects of the process of evaluation of internal controls expressed in Table 1 of this article, which are: (1) purpose of the evaluation of internal controls; (2) phases of the evaluation process of internal controls; (3) techniques for evaluating internal controls; (4) quantitative and qualitative dimensions assessed in internal controls; and (5) the assessed range of the internal control system.

5. DISCUSSION ON THE OUTCOME

The evaluation of internal controls carried out by SCGE/PE, is a recent organizational process, started in

the middle of 2013, under a continuous methodological development and restricted to a thematic operational unit, the Rendering of Accounts Auditing Unit. This process is applied in a systematic way within the organs of the direct administration of the Government of Pernambuco and is guided by an annual plan of activities.

Under the established categories, after the organization and analysis of the data collected, results were obtained that allowed the characterization of this internal control evaluation procedure within the SCGE/PE, and these results are presented and discussed in the following topics.

5.1 STRENGTHENING THE INTERNAL CONTROL SYSTEM AS THE FOCUS OF THE EVALUATION

Under the analysis related to the purpose of evaluations of internal controls, it was generally verified that all organizational levels (strategic, managerial and operational) involved in the evaluation of internal controls perceived that this evaluation process in the institutional scope is relevant to strengthen the system of internal controls in the scope of state public administration.

The evaluative purpose emerging in its documented reports, of identifying and reporting improvements on the evaluated controls, is in line with the theoretical perception of a prospective focus, aimed at offering reasonable assurance as for the fulfillment of the organizational objectives, in a preventive action that aims at strengthening internal control systems.

However, the practical perception of the difference in purposes by which internal controls are evaluated (external agent – planning or internal agent – system effectiveness) is not very clear for those involved in the execution of the evaluation process.

In fact, the research data show a variation in the perception of those involved at a strategic, managerial and operational level regarding the conceptual approach that the evaluation of internal controls is shaped by the improvement of governance through the efficiency, effectiveness and effectiveness of the control system interns. This is only clearly recognized at the strategic level.

Those who participate in the operational scope understand the evaluation of internal controls as a procedure, but not in a holistic sense of the evaluation activity and its repercussions inside and outside the institution.

On the other hand, all levels recognize that the attitude of the parties responsible for the operation of the internal control system evaluated is collaborative and receptive to the idea of improving internal controls as a whole. That when they understand that SCGE/PE's performance is focused on improving management and not punishing, they become receptive to the activity.

5.2 CHALLENGES AND LIMITATIONS IN THE EVALUATION OF INTERNAL CONTROL DIMENSIONS

With respect to the dimensions that involve internal control, the reports and opinions arising from the SCGE/PE internal control evaluation activities clearly express these dimensions, but process participants at all levels (strategic, managerial and operational – execution), they find it difficult to perceive in practice the qualitative and quantitative dimensions, especially in the area of measurement (sufficiency) of internal controls.

The qualitative dimension of the internal controls is evaluated according to the comparative standards made up of elements of the structural composition of the internal control system (control environment, risk assessment, control activity, information and communication, and monitoring), showing a harmonic idealization with the conceptual model conceived by COSO (1992). The application of the evaluation criterion determines, in turn, the adequacy or inadequacy of the controls practiced within the scope of the evaluated organs.

In the evaluation of the quantitative dimension, the range of the control applied over the range of the controlled object is observed. The application of the evaluation criterion thus determines whether the amount of control applied is "sufficient" or "insufficient" in relation to what is being controlled.

This quantitative evaluation, however, is limited with respect to the excesses of internal controls, that is, the excess is not evaluated, since, besides being sufficient, a certain applied control can be excessive; which is also as bad as its inadequacy, as highlighted by Pickett (2003).

It is worth mentioning that SCGE/PE employees were asked about the terms used in the literature on internal control, if they were easy to understand. It study noticed that, to some extent, all had difficulties in understanding these terms.

This fact may compromise the results of the evaluation of internal controls, as well as the view of those assessed regarding the relevance of the activity. Lack of understanding of the terms makes the recommendations in the technical parts produced in the process innocuous, as they have no meaning to the evaluated party.

5.3 DIVERSITY OF COMPREHENSION IN THE ORGANIZATIONAL LOGIC OF INTERNAL CONTROL EVALUATION

Based on the analysis performed, we observed an evaluation process composed of logically ordered and time sequenced phases.

In an initial phase, the idealization of the comparative parameters is contemplated, which will be confronted with the controls practiced; and the identification of the evaluation criteria, which will inform the judgment on the controls that are in practice.

A second phase characterizes the actual evaluation, fieldwork, when the controls practiced are

compared to the ideal standards, and, subsequently, the judgment is based on the previously defined evaluative criteria.

In some cases, a transaction testing application phase is also observed, as a confirmation of the results obtained in the evaluation, through the analysis of the effectiveness of the application of the controls practiced.

Finally, as the last phase of this process, recommendations are presented for improvements in internal control systems.

Although the constitution of the evaluation process corresponds with the theoretical meanings, this more detailed perception about the constitution of each phase is not understood uniformly among those involved, and still needs a more in-depth reflection as a way of strengthening the practical domain of this process and for the methodological development of the practice itself.

5.4 THE POTENTIALITIES OF THE TECHNIQUES USED TO EVALUATE INTERNAL CONTROLS

Likewise, the research revealed interesting positions regarding the documentation techniques used in the evaluation of internal controls within SCGE/PE. The techniques are used to support the internal control evaluation process, which may influence the judgment and the results achieved. Thus, those involved in the evaluation process understand that the use of the techniques is important because they reduce the subjectivity factor in the evaluation results.

The questionnaire is adopted as a technique for documenting the internal controls practiced in the evaluated organizations, in the evaluations of internal controls performed by SCGE/PE. It is emphasized that this technique was pointed out as the most comprehensible for those audited in the opinion of the participants of the research. The questionnaires are formulated based on the idealization of the comparative parameters and are answered based on data collected through triangulation of sources that provide them with information support, namely: (1) interviews with those responsible for the control; (2) documents proving the existence and functioning of the control; and (3) direct observation of the operation of the control.

The standardization of the questionnaire in this evaluative model was pointed out as a management need based on the attribute of comparability between evaluations. However, achieving a more in-depth concept o this attribute is still a challenge for the practical enjoyment of its benefits. The perception of the concept of comparability among those involved does not reveal what can be explored about it in all its perspectives, in convergence with Pickett's (2003) notes, as well as in an individual evolutionary perspective, in which one can evaluate the evolution of the control system of a specific organ, for example, in different evaluations carried out over time; and also in a peer-to-peer perspective, in which one can assess the level at which control systems are established concomitantly in several evaluated organs; and also as a means of verifying qualitative aspects

of the execution of internal control evaluations; among other potentialities.

In addition, in the SCGE/PE assessments, one notes the use of norm compliance and transaction tests at different times. The first compliance test is used as part of the qualitative evaluation of internal control, which verifies not only if the norms are being fulfilled, but also the very existence of norms, in comparison with an ideal standard of the evaluated control.

This way of evaluating highlights the control environment, highlighted by COSO (2013) as the control consciousness in the organization, a fundamental basis for the system of internal controls. The rules governing the operation of controls are of fundamental importance to this component.

The test of transactions, in turn, is placed as a confirmatory phase of the evaluation process practiced by SCGE/PE, in which the effectiveness of the internal controls applied in a certain period is verified, by observing the recurrence of failures in the transactions (operations) within that period. The results of this test have a significant informative potential for the management of the control, which verifies the behavior and performance of the internal control evaluated.

Pickett (2003) addresses this perspective, which highlights the potential of strategic tests performed on internal controls, supporting the conceptual appropriateness of the use of these tests in the internal control evaluation process modeled by SCGE/PE.

5.5 THE RESTRICTION OF RANGE AS A FACILITATOR OF METHODOLOGICAL DEVELOPMENT

The organizational scope of the internal control evaluation process performed by SCGE/PE is characterized by subsystem level performance and specific internal controls, in the light of the technical parts analyzed and the collection of information from those involved in the process.

The SCGE/PE internal control evaluation model presents a thematic limitation, that is, it is applied only to controls related to the accountability process of the application of public resources. This limitation was pointed out by those involved as a deliberate choice, to allow a more specific follow-up on the evolutionary process of the practice.

Within this theme, it is possible to verify the application of the evaluation process at different levels of the system of internal organizational controls; At the same time, more complex evaluations are carried out

on subsystems related to different types of public expenditure processing (normal application regime, down payment arrangements, etc.), but simpler evaluations are performed only with specific internal controls of these subsystems.

Even though evaluations are performed in a partial extent of the internal control system, those involved in the evaluation process affirm that the results are positively impacted by the entire organizational structure to which the evaluated controls belong, fomenting and strengthening the control consciousness in the organization.

6. FINAL CONSIDERATIONS

In general, the results indicate that the evaluation of internal controls within the SCGE/PE has been worked at institutional level with the necessary relevance in the organization to achieve the intended goals throughout the state.

As a recent practice within SCGE/PE, we noted that it is still at an early stage of the process of institutionalization, with obvious characteristics of the habitualization of activities carried out jointly by different individuals, who need to negotiate rules and procedures flexibly and reflexively. Categories and classifications generate interpretive schemes – drawn from the construction of meaning among the members of the organization that relate to the procedure of evaluation of internal controls.

When specific schemes become routine, through application and repeated use, they develop a habitual

character, taken for granted. Since joint activities are habitualized and reciprocally interpreted, patterns are both strengthened and deepened as they are transmitted to others, especially to newcomers. When these schemes are perceived as goals, they become externalized facts, and their contingent origins are obscured, promoting sedimentation, which occurs when institutionalization survives for several generations in the organization, that is, it becomes part of the organization's history (POWELL; BROMLEY, 2013; TOLBERT; ZUCKER, 1999).

The methodology used by SCGE/PE to evaluate internal controls is supported by sophisticated concepts defined by the pertinent literature that supported the categorization of the data of this research. However, the need for the development of individual competences, which brings together knowledge, skills and attitudes (DURAND, 2000), is perceptibly related to those involved in this evaluation process, but naturally justified by the initial phases of the institutionalization process of this initiative. These skills are developed in the practical context, through the experiences of the employees with the evaluation process, requiring a prolonged time to reach a more significant level of maturity, as can be seen from Fleury and Fleury's (2004) notes.

It should be emphasized that this research demonstrates that the evaluation of internal controls is related not only to the procedural apparatus, but also to the cognitive aspect involved in the process, since everyone needs to understand the meaning of the evaluation and its repercussions at all stages so that the desired goals are achieved.

A discussion of results raises, under investigative skepticism, the possibility of generalization of the findings regarding the level of institutionalization of the evaluation practice of internal controls in the organizations of the Brazilian public sector. In view of the limitation of the qualitative methodological procedures, the purpose of this research requires the accomplishment of complementary researches. This reveals the contributory potential of the present work, articulating several researches of the study of organizations, under the theme of internal control, aiming at integrating them into the Brazilian public administration context and launching a scientific basis as a perspective for new research.

As an additional contribution, we point out that new research can also be carried out from the perspective of those evaluated in relation to the process of evaluation of internal controls in the public sector, since they are the ones who implement and undergo the evaluations of the control bodies.

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Business processes modeling in view of the procedural rites in the Court of Accounts of the State of Santa Catarina[1]

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ABSTRACT

With the implementation of electronic filing in the Court of Accounts of SC, it is necessary to check if it is possible to optimize its conformity and speed. The general purpose of this article is to show that business process modeling (BPM) stands out as the tool fit for the purpose, securing proactivity in tasks demanding further efforts, keeping the appropriate procedure based on the automation of the procedures without denigrating the speed and legitimacy of their acts. The study will also present a discussion on the Principle of Instrumentality of Forms and their implications in electronic filing. The results obtained in the action research carried out with several Courts of Accounts regarding their realities will also be analyzed, seeking to understand, based on the data collected, what can be improved to increase the knowledge of the respective subject, ratifying that the adoption of the BPM methodology will efficiently help in achieving the purpose of this article.

Keywords: BPM; electronic filing; instrumentality of forms.

1. INTRODUCTION

The mission of the Court of Accounts of the State of Santa Catarina (TCE/SC) is to oversee and verify where and how the public resources are being used, and if they meet the needs of the people of Santa Catarina.

Pereira (2014, p.52) paraphrases Cury Neto, when he mentions the mandate of the TCE/SC:

> The Federal Constitution of 1988, in addition to consolidating the achievements of the 1946 Constitution, expanded the jurisdiction of the Court of Accounts, adding the mandate to carry out performance audits, alongside financial, budgetary, accounting and property audits. In addition to examining the aspect of legality, it introduced the mandate to evaluate the aspects of the legitimacy and economy of the acts of the direct and indirect Public Administration. (CURY NETO, 2013 apud PEREIRA, 2014, page 52).

According to Freitas (2013, pp. 23-24), depending on the sphere of the unit audited along with the resources being evaluated, the external control processes can be divided as follows:

I – Prior Opinion on the Executive Chief 's Accounts;

II – Auditing the accounts of the managers and other officers responsible for goods, money and public assets;

III – Process of auditing the management or year accounts;

IV – Special Account Auditing;

V – Assessment of the legality of acts of admission, retirement, pension, revision of wages, retirement and transfer to military retirement;

VI – Inspections, Audits, Supervision and Monitoring;

VII – Consultations regarding questions raised regarding the application of legal and regulatory provisions concerning matters within its competence;

VIII – Complaints, provided for in Paragraph 2 of art. (1988, 168), which allows citizens, trade unions or political parties to bring to the attention of the Accounting Courts any irregularities in the appropriation of public funds, thus materializing the so-called social control;

IX – Representations, ordinary instruments of action of the Public Accounting Prosecution

> Service, and other qualified parties, such as congressmen, members of the Public Prosecution Service of the States and of the Federal Government, and, finally, anyone interested in regularity of bidding processes.

The process within the state institution is not only a tool of control, but a channel for resolving any dispute between the concerned parties. It is understood that the deadline for handling the case should be as short as necessary. The interested party – whether the citizen "waiting for the end of the work on his street" or the city hall "awaiting the release of a loan" – must believe that the TCE/SC is doing its best to have the case judged in a timely manner.

Santos (2013, p.2) highlights the Constitution regarding this time:

> The Constitution enshrines the fundamental right of access to justice, imposing upon the organs of the Judiciary the obligation to provide judicial protection in a reasonable time. On the other hand, what is seen in reality is a judiciary with a precarious structure and attached to rites, bureaucratic practices and excessive formalism, which consequently obstruct the timely delivery of the judicial service. The modernization of judicial rigging and the administration of justice is therefore required in order to optimize routines and forensic practices for an effective delivery of the judicial service.

Considering the best procedural practices, so that the backlog of legal cases is eliminated in the country, and considering the technological advances, in December 2006 the Electronic Filing Law of, no. 11.419/2006, was instated in Brazil.

About this Law, Almeida Filho (2011, p 56) says:

> The need for the creation of electronic means for the practice of procedural acts is indisputable. Due to this need, the idealization of a fully digitized process is presented as a form of acceleration of the Judiciary, making the procedure less time consuming.

After a few years, only in 2011 did the TCE/SC publish Resolution TC 60/2011, which regulates internally electronic filing. The goal of the TCE/SC is to render processes faster, in addition to ecological awareness, drastically reducing the use of paper. According to Resolution TC 60/2011:

Considering the convenience and timeliness of the use of the available means of information technol-

ogy, in order to give greater agility, efficiency, economy and transparency to the actions and services provided by the Court of Accounts and to improve the exercise of the external control under its mandate;

> Considering the need to adapt the standards to the procedures inherent to the electronic filing procedure, in view of the ongoing initiatives for its implementation within the framework of the Accounting Court;
>
> [...]
>
> Art. 1 The Court of Accounts may constitute a case exclusively in an electronic medium for the performance of external control duties related to the audits, evaluation and judgment of matters within its competence, without physically sending files. (SANTA CATARINA, 2011, n. p.)

After five years, it is possible that there has been a substantial improvement in the speed of cases, as well as in the economy of inputs compared to the same period when documented.

However, there is a constant need for the Court of Accounts to seek the Principle of Instrumentality of Forms. Batistella ([20-ؚ]) says that the aim of every legal professional is to seek simplification, but that he comes up against procedural bureaucracy. The various existing institutes that work in various areas have to commune with the same formality in order to achieve their goals and their pacification with Justice. Excessive worship of formality must be fought, but it cannot be ignored.

Batistella ([20-ؚ], p. 2) summarizes:

> Forms emerged to make procedures run smoothly, giving stakeholders a sense of security and predictability, so that the procedures reach their social, legal and political scopes. Thus, the Instrumentality of Forms is the principle that will permeate modern civil procedure, since it is a viable instrument of the legal order and a strong ally in the search for access to justice.

In short, is the TCE/SC ensuring both speed and procedural compliance؟ Will the use of business processes management methodology be a facilitator for achieving this goal؟

In the search for answers to these questions, this article will present how electronic filing in TCE/SC appeared, and then what the authors say about the Principle of Instrumentality of Forms, as well as the reason why after five years it is necessary to update the standards and technologies that are currently used. We will also see the result of the questionnaire applied, a descriptive action research in which a comparison analysis between the research variables was carried out. This was done attempting to prove, through the collected data, that the application of the discipline of business processes management would result in a greater conformity and procedural celerity in the TCE/SC, guaranteeing proactivity in the tasks that demand more efforts, leading to a decrease in the time of response of the TCE with the public in its jurisdiction. Maintaining the correct procedural order as of the automation of procedures without denigrating the celerity and legitimacy of their acts. By means of a temporal flow diagram, using lane notation, it is sought to identify the cascading effect, to the detriment of the process speed, of an unrealized task, inside or outside an area of the TCE.

2. INSTRUMENTALITY OF FORMS

In Resolution TC-009/2002 (SANTA CATARINA, 2002), the TCE/SC established its procedural rules. This Resolution determines how a document will be filed and forwarded,. According to article 6 of the Resolution:

> Article 6. Filing will take place by attaching a cover sheet and numbering the documentation received, identifying the Management Unit to which it refers, the name of the interested party and, if applicable, the person in charge, indicating the matter and, if possible, the concerned tax year, the name of the Rapporteur chosen in the regimental form and in accordance with the rules provided in this Resolution.

This Resolution provides all the information necessary for a document brought before the TCE/SC to follow a procedural rite: to which location it should be forwarded, under what circumstances it may be prosecuted as a case, how it should be brought in a proceeding, who can authorize its inclusion in the case record, its validity, and so on. When a document

sent to the TCE/SC becomes a case, new rules apply to it, regarding deadlines and legal obligations to be followed. As described in Article 43 of resolution TC-009/2002:

> Article 43. In the examination and processing of proceedings subject to the oversight of the Accounting Court, except for the proceedings rendering the accounts of Governors and Mayors, and proceedings considered urgent, the following deadlines shall be observed:
>
> I – five days for DIPRO to carry out the screening, filing and forwarding of the files to the competent unit;
>
> II – one hundred twenty days for the control body to document the processes with the conclusive report;
>
> III – ninety days for the Public Prosecutor to issue an opinion;
>
> IV – sixty days for the rapporteur to submit the cases to the Full Plenary or any of the Chambers; and
>
> V – thirty days for the General Secretary to submit to the General Prosecutor's Office of the Public Prosecutor's Service the submissions necessary for documenting the executive collection process.

These intention of the rules are to not only to have a standard of procedure within the Court of Accounts, but also to provide security, equality and transparency to the parties in the case. All parties must have the same treatment of importance in all processes, regardless of their subject matter. All proceedings must follow the same procedure regardless of the party interested in them. This way the rules bring equalization of processes, unless, of course, there are risks of loss to society, leading to acts that break the normal flow of the process.

The same resolution already includes, in its final provisions, the use of an electronic filing system to control procedural acts, so that procedural celerity is observed. Although documented, the case has its dates and data stored in an electronic medium, so that, after its closure, its information is stored in a more economical way. That is, instead of storing paper and taking up space, it can be filed in magnetic medium, according to specific legislation.

This formality established by the TCE/SC is based on the Principle of Instrumentality of Forms set forth in the current Brazilian Civil Procedure Code (CPC), Articles 188, 278 and 282, Paragraph 2 (BRAZIL, 1990):

> Art. 188. The acts and the procedural terms do not depend on a determined manner, except as expressly required by law; those done in another manner are considered valid if they fulfill the essential purpose.
>
> Art. 278. The nullity of the acts shall be asserted at the first opportunity the the party has to speak in the records, under penalty of estoppel.
>
> Art. 282. When pronouncing the nullity, the judge shall declare that acts are reached and shall order the necessary measures so that they may be repeated or rectified.
>
> Paragraph 2. When it can decide the merits for the party who avails of the decree of nullity, the judge shall not pronounce it or have the act repeated, nor shall the judge add to the absence thereof.

The Principle of Instrumentality of Forms is open to discussion among legal practitioners. In his article, Batistella ([20-؟]) brings the discussion of several authors into the question of formality. He cites Paixão Júnior (BATISTELLA, p.4), who states that even when the formality is not obeyed, but if the end for which it is intended is attained, this deviation from formality is forgiven, for the formality itself is not the ultimate goal of the process, but the guarantee of freedom to all parties. In the same line, he cites Marques (2000 apud BATISTELLA, [20-؟], P.4), explaining that:

> The observance of forms is therefore a factor of procedural regularity, guaranteeing to the parties a perfect knowledge of the course of the process and of the acts that are practiced in it. [...]. But to sacrifice the process in its march or efficacy, by virtue of only disregard of form, without prejudice to the parties, is now abandoned, since procedural laws, rather than being bound by the rule of absolute relevance of form, follow

> the principle of the Instrumentality of Forms, in which the formal aspect of the act gives way to a teleological meaning, and the *modus faciendi to the final cause*.

In addition, Batistella ([20-؟]) reminds that formalities exist to guarantee security to the parties and the predictability of procedural acts. That the interested party is granted a fair legal order and, in this way, the deformity of the process is contrary to this idea. Dinamarco (2005 apud BATISTELLA, [20-؟], P.5) says that formalism is the same as "decreeing the infeasibility of the process" in electronic media, because it is the exaggeration in the use of formalities. Batistella (Idem, p.6) points out that it is necessary to differentiate formality from formalism.

> It is necessary to differentiate formality from formalism. The first comes from the law and is healthy for the good progress of the process. The latter comes from the mentality of the enforcer of the law, due to the exacerbated cult of formality, whose conservatism is frequently mistaken and expressively present in the decisions of the judiciary, as if they were to resolve the process and meet the society.

> In fact, modern civil procedure has in the instrumentality of forms, a great ally for formalism to be gradually deprecated in the procedural field, and it is up to the magistrates to apply this principle, which helps to safeguard individual and trans individual rights, which makes the. Process as an effective tool for the realization of substantive law.

Almeida Filho (2011) presents the same theory of Professor Dinamarco, which finds resistance from Professor Moreira, because his thinking shows that abdicating formalism to the detriment of a faster judgment does not bring results, and it will not be the bias that will open the judicial channels. Almeida Filho (2011, p. 199) points out that both thoughts must be considered.

> Although we express our position in favor of the principle of the Instrumentality of Forms and the deviation from formality of the procedure, we accept that, with regard to judicial computerization, we must be extremely technical and not compromise with forms. On the other hand, we can admit that the electronic filing is already a form of deviation from formality, if we compare it with the physical process, or conventional. It is precisely for this reason that we do not admit the insertion of the principle of instrumentality in the same.

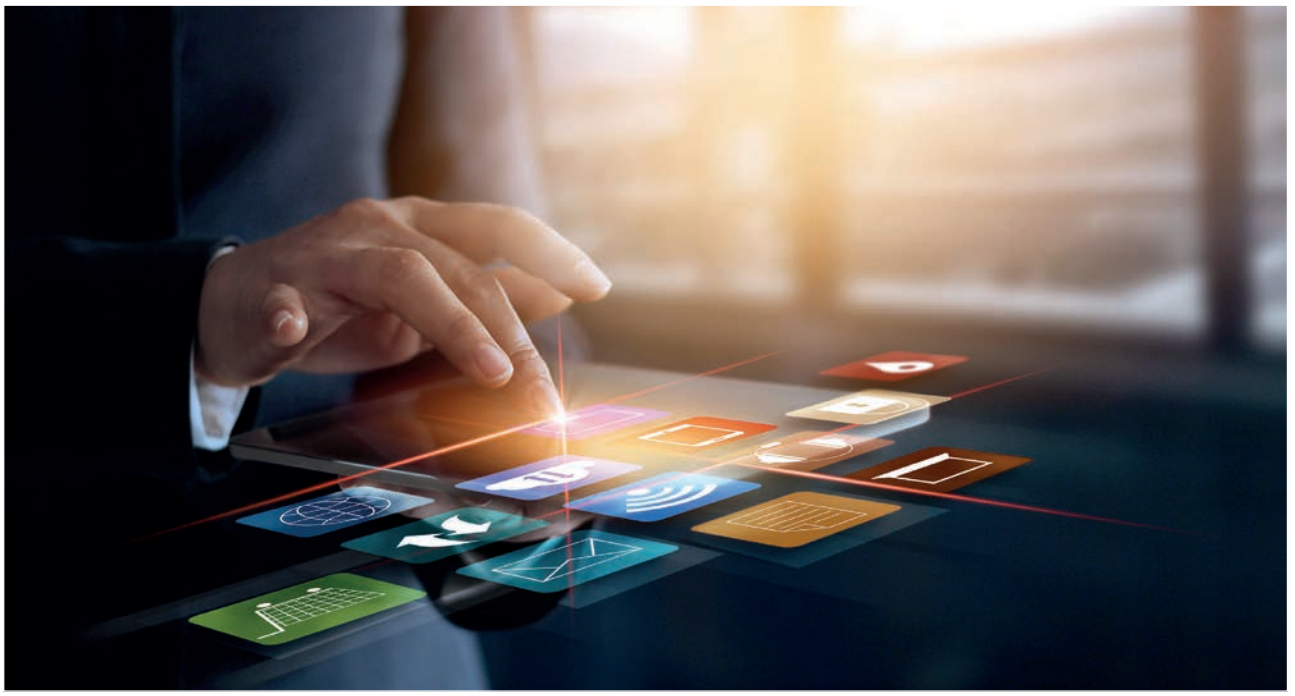
Almeida Filho (2011) also says that one cannot follow the modern trend by taking advantage of the agility of procedural acts in an electronic way, under risk of loss of basic guarantees of an electronic procedure, namely: integrity, authenticity and security. Thus, failing to follow basic and necessary formalities, in pursuit of a supposed speed, runs the risk of making the whole procedure void. The author cites as an example the decision of Minister Fatima Nancy (Ibid., P. 199):

> Civil Procedure. Rectification of defendant in the procedural relation after the answer. Instrumentality of Forms. Application. Possibility. Existence of injury. – The prevalence of the instrumental character of the procedure must be adopted in a judicious way, with the existence of possible damages being verified with accuracy, for the party in disfavor for which the principle applies. – In the light of the existence of obvious damage to one of the parties, it is not possible to apply the principle of instrumentality of forms. Appeal granted to dismiss the case without prejudice. (Resp. 763.004/RJ, Justice writing for the court NANCY ANDRIGHI, THIRD COURT, decided on September 25, 2006, published in the DJ on October 9, 2006, p.292)

In the TCE/SC, resolution TC-60/2011 (BRAZIL, 2011) was not concerned with the formality of the electronic procedure, leaving several gaps to be resolved by Resolution TC-09/2002. The first is a norm based on documentary acts, and the latter, on electronic acts. After the five years elapsed, we observe that the electronic filing in the TCE/SC faces several unnecessary formalities applied to the electronic procedure. On the other hand, acts that should be carried out do not find the necessary basis, since they are not regulated nor have not had their instrumentalization defined.

The TCE/SC needs a new resolution for electronic filing, with all the formalities that the process needs, based on the Principle of Instrumentality of Forms, as well as the current technological advances, together with the knowledge acquired in its implementation, over the last few years.

The Information Technology (IT) area of the TCE/SC should provide the necessary support for the



construction of this new norm, giving the necessary sustainability so that the dynamism that electronic filing perceives does not go against the procedural conformity established in the norm.

To do so, the use of the discipline of business processes management, along with its artifacts, will provide a practical exercise of the binomial celerity and procedural compliance.

3. BUSINESS PROCESSES MANAGEMENT

According to Brocke (2013, p.5), business process management (BPM) corresponds to "an integrated business performance management system for end-to-end business process management." Brocke reports that clients of a system care about only one thing: results. These results are direct products of business processes. Business processes correspond to the sequencing of activities that occur together. When one of these activities does not occur as expected, or does not work out very well, the business process as a whole ends up failing. Each activity can be treated and analyzed individually, without detriment to the others. By analyzing results, adapting situations and correcting small activities, improvements in the process as a whole can be improved and enhanced.

Brocke (2013, p.7) states that institutions that have business process management can "create high-performance processes that operate at lower costs, faster speed, better accuracy, better asset utilization, and greater flexibility." For the modeling of business processes, it is necessary to know some basic BPM artifacts.

According to Campos (2014, p.2), we can conceptualize a process as "a sequence of activities with a specific objective". This sequencing of activities has the characteristic of being end-to-end, that is, the process begins at a certain end and finishes at a certain end. The author (Ibidem, p.6) further emphasizes that these processes can be divided into primary or finalistic processes, when dealing directly with the final customer; support processes, when they support the primary processes; and managerial processes, which are those that monitor the other processes, recording data to suggest improvements and innovations, for a more strategic management.

In general, users easily define processes as "tracing a process". However, in order to design it, it is necessary to map correctly all the activities and tasks that make up the process. Pavani Júnior and Scucuglia (2011, p.69) differentiate activity and task:

> Activity – title given to a set of tasks oriented towards a defined objective. Its focus is "what to do" as an indispensable prerequisite to achieving the goal.

> Task – title given to a sequence of predetermined steps/steps to perform an activity. Each of these steps may require the need for detailed "how-to" explanations, justifying the construction of relevant documented procedures.

According to Campos (2014), the sequencing of activities generates a flow, a path to follow. This flow may have deviations, constraints, because, depending on what one activity delivers to the next activity, the process flow may be modified. This delivery may contain information, documents, etc. Within the connections between activities are also the business rules of the institution, which may or may not be done.

Finishing the basic notation, the author (Ibidem) brings the concepts of pool and lanes, respectively, pool and their streaks. The concept of pool represents the process itself, through the notation of a rectangle, and within it several streaks, representing the actors that interact with the process. These actors can be people or the personification of an area of the institution. With these artifacts, it is possible to model an entire process, contemplating its activities and the actors involved, forming several types of diagrams.

With process mapping, BPM allows you to create control points for maintenance. According to Pavani Júnior and Scucuglia (2011, page 210):

> Managing processes means promoting their functioning, that is, making the work happen in the right way or as expected and projected. With all the delay associated with the shift of responsibility between departments, potential productivity gains are lost in the inefficiency of the organizational hierarchical structure. It is the role of Process Management to make this chain of interrelationships between activities, information, materials and equipment occur without the traditional barriers of different organizational units. Therefore, the creation of a process-by-process process needs to be modeled because a number of practices need to be conducted to keep the process structure up to date and bring the expected productivity benefits.

One of the best ways of management is to create indicators. Pavani Júnior and Scucuglia (2011: 217) affirm that the indicators "are objective metrics, with clear understanding and understanding, capable of transmitting relevant information about the performance of the processes".

4. ANALYSIS OF DATA COLLECTION

The objective of the questionnaire applied was to prove that the automation of the business processes would result in a greater conformity and procedural celerity in the TCE/SC. The absolute majority of respondents belong to organs whose purpose is external control, similar to the organ object of the problem of this article.

Respondents were asked whether the business processes managements was performed by the institution itself or by another contracted organization. Expertise in the subject was observed, since more than 60% of the interviewees used their own human and technical resources to apply the methodology.

Table 1:
Business processes management in the institution

Was the business processes management in the institution carried out by the institution itself or by another contracted organization?	
Answer	**Count (%)**
It did not occur (A1)	16,13
In-house (A2)	61,29
Contractor (A3)	22,58
No answer	0

Source: Prepared by the author.

This stimulus to the use of business processes management occurs according to the guideline formed in the strategic planning of each institution interviewed in almost 50% of the cases. The TCE/SC, in line with the interviewees, makes sure that, by using the methodology of business processes, it will be on the right path to the search for better compliance and procedural speed.

When questioned about the involvement of the units of their institution in the mapping of business processes, it is observed that the majority of the interviewees had a holistic application, that is, all the units, whether of a finalistic or administrative nature, were involved.

Table 2:
Drivers

What were the drivers for introducing business process management in your institution?	
Answer	**Count (%)**
There was none (A1)	16,13
Strategic planning (A2)	45,16
Process documentation (A3)	9,68
Process automation – BPMS (A4)	19,35
ERP implementation (A5)	3,23
Other (A6)	3,23
No answer	3,22

Source: Prepared by the author.

Table 3:
Involvement in the mapping of business processes

Were all units of your institution, whether of a finalistic or administrative nature, involved in the mapping of business processes?	
Answer	**Count (%)**
None (A1)	12,90
All (A6)	29,03
Not all of them finalistic (A5)	22,58
Not all administrative (A4)	16,13
All of them finalistic (A3)	16,13
All of them administrative (A2)	0
No answer	3,23

Source: Prepared by the author.

In addition, 38% reported that the profile of employees involved was operational, and 42% reported that the profile was managerial. We conclude that the central idea is that everyone should work together, that it is not enough for management to decide something that the operational staff cannot make feasible. In turn, the operational staff will not be able to meet the current norms, which define the flow of a certain area. Business processes management comes as an important ally to align existing processes in each work cell, grouping them into commonly used trails.

Table 4:
Employee profile

What is the profile of employees that helped in mapping the business processes of your institution?	
Answer	**Count (%)**
Operational employees (A1)	38,71
Management employees (A3)	41,94
Dispatch employees (A2)	3,23
No answer	16,13

Source: Prepared by the author.

The management of business processes, in 36% of the institutions interviewed, is seen as a tool for end-to-end process improvement, presenting gains for the institution itself, as well as for the society that depends on the provision of its services.

Table 5:
Understanding the business process management

How does your institution today understand business process management?	
Answer	**Count (%)**
BPM is used for local improvement actions in some units	9,68
BPM is used for end-to-end process improvement, with gains for the institution and for society (A4)	35,48
BPM is used for end-to-end process improvement, with gains for the entire institution (A3)	9,68
Nobody talks about BPM in the institution. (A5)	29,03
No answer	16,13

Source: Prepared by the author.

We observe that, by using collaborative diagrams, it is possible to create a greater discernment and disclosure of the existing business processes in the institution. We found that 23% of the respondents, after measuring the mapped processes, externalized too much time in the execution of certain activities in their legacy systems. Thus, it is important to note the

importance of the application cycles that the methodology offers to seek always excellence in the execution of the activities mapped.

Table 6:
Measurement of mapped processes

Based on the measurement of mapped processes, how has excessive time in the execution of certain activities been externalized to your institution?	
Answer	**Count (%)**
Not externalized (A1)	45,16
No activity found with too much execution time (A4)	3,23
Strategic legacy software was used to outsource (A3)	22,58
It was used intranet/internet of the own institution (A2)	9,68
Third-party software was used to outsource (A5)	3,23
No answer	16,13

Source: Prepared by the author.

Unfortunately, most of the institutions interviewed did not constitute a permanent commission for the maintenance of business process management. The dynamism of business processes management is linked directly to the advance led by standards in concomitance with the available technologies. Thus, the importance of the constitution of a permanent commission that offers the institution the guarantee of efficiency and effectiveness of the processes mapped out from the continuous study of the simulations performed as well as of the indicators generated.

The search for speed and procedural compliance was perceived in more than 60% of the interviewees, since there was an impact on procedural management and the change of norms. A good part of the interviewees did not use the process modeling only to explain them, but applied the process control, allowing the creation of rules for the execution of the activities inherent to that workflow. Considering the execution dimension of processes, using the workflow machine, practically half of the institutions identified several bottlenecks in their process flow.

Table 7:
Standing Committee

Have you established a standing committee to maintain business process management in your institution?	
Answer	**Count (%)**
It was not established (A1)	45,16
It was established (A3)	35,48
It is still being processed by the top management (A2)	6,45
No answer	12,90

Source: Prepared by the author.

Table 8:
Change of rules in the institution

Has business process management had an impact on changes in your institution's standards?	
Answer	**Count (%)**
No change (A1)	12,90
It altered all standards related to legacy strategic software (A4)	22,58
Partially changed the standards related to legacy strategic software (A3)	38,71
Changed specific standards, not influencing any legacy strategic software (A2)	9,68
No answer	16,13

Source: Prepared by the author.

5. CONCLUSIONS

The adoption of BPM methodology by the TCE/SC is undoubtedly the most effective and efficient way to permeate the procedural compliance of the institution's final and administrative areas, aiming at speedy delivery to society of the demands generated by it.

There is an immediate need for the TCE/SC to review all legal provisions, which guide both procedures and the rules that make up the life of a case.

In the direction where some authors reveal the need to permeate the Principle of Instrumentality of Forms, with the real celerity that electronic filing provides, there is an alert to avoid total lack of formaliza-

tion of the process, realizing the existence of rules that have vital importance to the interested party to achieve the desired legal security.

The dynamism imposed by the dimensions resulting from the application of the methodology of business process management requires that the institutions constitute a standing committee, which will generate the necessary subsidies for a constant search of the binomial: conformity and speed of process.

The positive return of the use of BPM within institutions is notorious. It is noticed that the citizen, interested in sending the demands, can have a better return and a better interaction with these institutions. Thus, in the same time frame, other disciplines not covered in this article, such as the BPM Social, will allow the flows developed for institutions to extrapolate their physical limits, enabling them to be monitored before the demands of their control systems arrive. that have a better provisioning, thus facilitating a more profitable service to the citizen.

NOTES

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