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Mission Statement

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

José Múcio Monteiro
Minister of the Federal Court of Accounts and Supervisor
of the Editorial Council of the Federal Court of Accounts Journal.

DEAR READER,

Issue 141 of the Federal Court of Accounts Journal brings you innovation! With a layout that is more modern and more suitable to digital format, the new graphic concept, created by designer Marcello Augusto, servant of the Federal Court of Accounts, is based on elegance through simplicity and aims at a fast editorial process, which is going through an automation stage. The changes are included in a scope of scientific qualification of the publication.

The interviewee of this issue is Carlos Pio, holder of a master and doctoral degree in Political Sciences. He is a professor at UnB (University of Brasilia) and at the Rio Branco Institute in addition to being a researcher in the fields of international political economy, trade and economic development, political economy of structural adjustment in Latin America and sustainability of economic policy. Based on international experience, he talks about the improvement of public policies to overcome the average income trap, improvement of education and increase of efficiency and productivity in Brazil.

In the Opinion column, Marcelo Barros, Coordinator General for Outcomes of the Public Programs and Policies of the Federal Court of Accounts, approaches the external control of public policies and their results for the citizen and for a sustainable and inclusive development of the country.

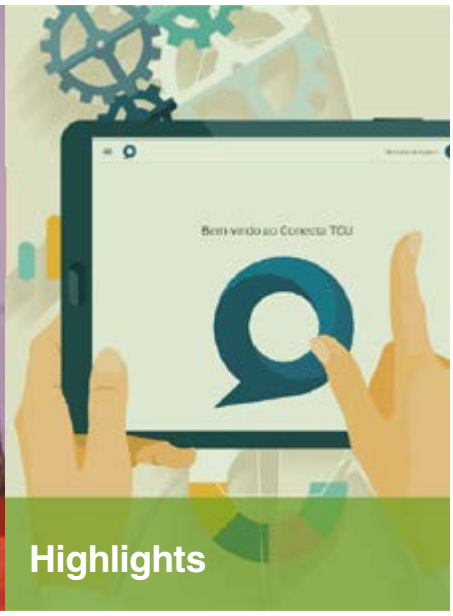
This issue also highlights the meetings of the Cecap groups for Fight against Fraud and Corruption and Assessment of Efficiency and Quality of Public Services; the launching of the Federal Court of Accounts Panel on Federal Tax Breaks; the implementation of a solution to improve communication with bodies under TCU's jurisdiction; and the publication of the diagnosis "National Development Highlighted at TCU", which points out directions for Brazil.

The articles cover a variety of topics, such as: the Federal Government's duty to compensate electric utilities for unmanageable costs and their disclosure on the balance sheet in accordance with international accounting standards; risks that weaken risk management; the restitution of proceeds of wrongdoing in the court-supervised reorganization and bankruptcy proceedings; actuarial liability and its impact on the Balance Sheet of the Federal Government; the Law of State-owned Companies and its contribution to simplify and enhance the legal certainty of bidding processes and contracts; and the executive analysis of results concerning the direction and accountability of government strategies.

Enjoy reading this issue!

Interview

Opinion



Highlights

Articles

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Improvement of public policies to increase efficiency and productivity in Brazil

Carlos Pio

Carlos Roberto Pio da Costa Filho is a professor and researcher in the fields of international political economy, trade and economic development, political economy of structural adjustment in Latin America and sustainability of economic policy. He is an International Political Economy professor at the International Relations Institute of the University of Brasília (UnB), a tenured professor at the Rio Branco Institute and holder of a master and doctorate degrees in Political Science from the *Instituto Universitário de Pesquisas do Rio de Janeiro* (Iuperj). In 2017, he took over the Strategic Planning Secretariat of the General Secretariat of the Presidency of Brazil. Based on international experience, Carlos Pio talks to the Federal Court of Accounts Journal about the improvement of public policies to overcome the average income trap, improvement of education and increase of efficiency and productivity in Brazil. Fernando Camargo, servant of the Federal Court of Accounts collaborated on the interview.

Regarding average income, some countries are managing to overcome this trap, such as Korea, Taiwan, Israel and Japan; and others are apparently in the right direction, including Colombia, Chile, Vietnam, Malaysia and China. What do the countries that managed to advance have in common? What public policies may have contributed to this?

Perhaps the best example for this transition is China. Peru and Chile are moving forward, but China was the fastest one. There are problems, there are risks, but China did it. I believe that when we talk about such an intensively growing economy, the intensity refers to knowledge, innovation, management and brands techniques, markets, new suppliers, new products, new inputs. We are talking about the extremely high quality of human capital, the capacity for exposure and the capacity for strenuous and creative work. To work harder and increasingly better. Therefore, in this sense, the public policies that can help are those that leverage this potential of human capital. They involve policies of education, capacity building, and qualification of workers. In many countries, it is the policy of attraction, of high qualification. When we talk about education, we mean education in the formal sense as well as the learning environment and cognitive expansion. Thus, there are educational public policies that demand several government interventions. We are increasingly aware of them, so we need, for example, to improve the quality of elementary school. This is an absolute consensus among all political forces. .

The public policies that can help are those that leverage this potential of human capital. They involve policies of education, capacity building, and qualification of workers. In many countries, it is the policy of attraction, of high qualification.

Given what you can already see from the experience of other countries, what would be the best strategy to promote better education?

International experience demonstrates that you have to constantly evaluate learning and motivate schools to train and qualify teachers to deliver results. Additionally, there are other problems. You have to deal with strong unions and resistance against serial evaluation and against syllabus changes and adjustments. We also need to expand high school education. The figures related to high school education are very problematic in Brazil, starting from the way they are disclosed. When you look at the simplest statistics, it seems that, in Brazil, 105%, more than 100%, of students are in high school, which is correct in a way, but wrong if you analyze it. In fact, adults in high school inflate these numbers, they should be in high school, but the disclosure should focus on students at the proper age of high school. You also need to reallocate public resources from the public budget of higher education. Brazil is the country that spends the most on higher education, compared to countries at the same level of development, it spends more than many rich countries. And you also have to create, expand the fairly recent network of pre-school education, nursery schools. And promote inclusion.

It is already known that the cognitive capacity of an adult strongly depends on what happens in the first three years of his life. When I was young, I resisted a lot, as a scholar, against looking at things through an economic point of view because it seems insensitive. It gives the impression

that 'I am not worried about well-being'. You often hear economists saying 'I am worried about the worker's qualification'. Then you say 'but looking from this point of view, and not underrating well-being, it is our life, our well-being'. But the worker's ability and also the ability for well-being depends on him/her being able to, cognitively, understand the complexity of the world. And this is impressive, since it occurs from age 0 to 3. At that point, the window closes and his/her cognitive capacity remains strongly conditioned to what happened in that period, it is the so-called brain plasticity. I am talking about interventions that are quiet simple and that demand little investment.

In some countries, Sweden for example, the political discussion on the topic goes as follows: should I keep the focus on nursery schools or should I - in the case of conservatives - give money to mothers to take care of their children? I do not want to get involved in the Swedish debate, not that it will have any importance, but it is very different from ours. We need to increase the well-being of families that depend on increasingly more women entering the labor market. And it depends on other things that conservatives appreciate, more and more men staying at home with their children, this is a Brazilian problem, but I am not going to approach this discussion.

From an economic point of view, you really need to emphasize this and we are emphasizing the end of the academic journey. We are a country that puts on the market more than ten thousand people with doctorates a year and keeps children in such conditions, which we all have the ability to know, we just need to talk. Perhaps we do not have so much contact with the poor in Brasília, in the Pilot Plan. But you know how the family of your doorman, living in the states of Piauí, Maranhão, Amazonas, take care of children there, without basic stimuli, right? Everyday stimuli, stimiuli, routine, physics, optics stimuli. I am talking about basic things, like a mobile over the crib, walls painted with different colors, or talking to the child. From age 0 to 3, how do you rock the child and how does the child become startled? All of those things stimulate brain plasticity. The child learns that movement. So, this is all part of the great leap. Everything else varies a lot. There is no variation from the perspective of government intervention.

The worker's ability and also the ability for well-being depends on him/her being able to, cognitively, understand the complexity of the world.

Regarding the economic issue, you usually make an interesting distinction between production, productivity and competitiveness. Could you clarify this differentiation as regards public policies?

It is as if we had two binomials: production x productivity, as an emphasis, as a target for government intervention in the economy; and competitiveness x competition, rivalry. So, we have public policies that promote productivity and efficiency gains from all individuals, companies and regions involved. It is the policies that maintain sustained growth, I will not say forever, but in the long run. Efficiency gains enable you to invest more, save more, better remunerate the workforce, reduce costs and prices, and sell more, so you have a complete mechanism. And this will allow the government to charge less taxes, without prejudice to the revenue, and so on. Policies that promote local production harm the overall productivity of the economy, it keeps companies that buy from a local producer from saving money by buying from those who produce more cheaply. And this would force each producer to specialize.

Thus, when the government promotes local production of anything, first, it does so with very flawed information, not knowing what are the things that are going to be highly demanded and very profitable in the future. It would be like choosing like this: we choose what shares we buy from which company. If you are not an expert, you had better hire one. And the government is not an expert on future, no government is. In addition to not having the perfect information, it is also under the pressure of interest groups all the time, they are all over the place, they are probably here in the Federal Court of Accounts as well: 'I want to represent the rights of my company, I am here to say that you do not have all the information'. And the information is necessarily biased in favor of the company, it does not acknowledge: 'we made mistakes here, we did not make such good use of the subsidy we received, we have had administrative problems'. Thus, policies that promote local production at all costs turn into obstacles that keep the economy from becoming more efficient as a whole, especially concerning those who buy from that producer, since they cannot buy from the competitor, to keep this local producer alive, they are subject to overpricing for much longer than desired. It inhibits the natural dynamics of economy. The producer stays there because he is subsidized and protected.

Another problem is the confusion between competition and competitiveness. Again, the private sector generally advocates policies that allow it to survive, with local production and so on, to be competitive abroad. So you subsidize. Suppose that the private sector can only sell a product abroad at a price of 100, they want a policy, a government aid that would allow lowering the price from 100 to 70, selling at 70 and profiting the 30 that was deducted. This is export subsidy. In theory, you have made the company more competitive, but this is not sustainable, that money is no longer being applied elsewhere. The company's selling price is 100, to sell at 70 they have to innovate, buy from suppliers that are more efficient, learn to produce at lower costs, train and qualify workers to make them more efficient, to lower the price from 100 to 95.90. When this occurs as an export subsidy, in a subsidiary credit, the producer sells more - this is a fact - but it is not sustainable. They will always depend on the continuity of that subsidy, and months before the subsidy expires, they will be here demanding it to be renewed and expanded. What I want to say is: this idea of spurious competitiveness where the private sector constantly asks the government to provide, and that we still do, it does not encourage people to innovate, it encourages them organize a stronger lobby in Brasilia.

Efficiency gains enable you to invest more, save more, better remunerate the workforce, reduce costs and prices, and sell more, so you have a complete mechanism. And this will allow the government to charge less taxes, without prejudice to the revenue, and so on.

So, is rent-seeking an obstacle to productivity?

What ensures the permanence of these mistaken interventions, which do not promote productivity growth, is the political pressure of interest groups, of companies directly, the strongest ones. They try to amass budget slices, speaking directly to the decision maker, in the executive and legislative branches, and I am sure it happens all over the State. And in the case of companies that are not strong enough to have that structure of interest representation, it is the sectoral

associations that do so. They can be associations of a sector or confederations of industry, of agriculture. They all have an agenda that aims at increasing the profitability of businesses through budget transfer or creating specific rules that ensure an income, which is higher than the adequate figure for that sector. This is what we call “rent-seeking”, the search for an income of privileges, the search for pay through legislation.

I am not saying that everything that the companies and representative entities defend goes against the increase in productivity, I do not mean that. I am saying that the public manager must know how to differentiate one thing from the other and the mechanism that enables it. It is necessary to increase the capacity of the public manager to identify when pressure or policy suggestions target the income of privileges, when it is compatible with the public interest in improving the general productivity of the economy. Emphasis on the qualification of public managers based on good technical training should be focused on knowing the complexity of the world along with the way economy and democracy work in their various aspects. Including internal and external control of administration, in order to know how to establish a priority scale for a governmental intervention that takes into account both the risk of meeting private interests that go against the general interest, and how to contemplate, upon budgetary or regulatory decisions, opportunity costs, risks, or anticipate possible impacts.

It is necessary to increase the capacity of the public manager to identify when pressure or policy suggestions target the income of privileges, when it is compatible with the public interest in improving the general productivity of the economy.

How could the Federal Court of Accounts assist in this decision-making process and help the State make decisions that will lead the country on a path of more effective productivity?

I think the Court is already doing this. I mean, it is already doing enough by bringing to the administration a concern about how this is justified. I think the Federal Court of Accounts has the important role of promoting governance, in addition to many other aspects. The Federal Court of Accounts is an institution that is not affected by the consequences of the political-electoral cycle. Its role is to signal to the new managers what are the aspects that need to be considered at each moment. I believe that the Federal Court of Accounts may also indicate how to improve interagency cooperation, both from an oversight perspective, which is its obvious task, and from the point of view of extenuating the problems caused by the electoral cycle and by the vulnerability caused by external pressure. I think this is a very important task, because there is a very large renovation of top-level managers in Brazil. It is smaller than what the data shows, apparently twenty-five thousand positions, but it is really high and a good part of these positions are occupied by people coming from the administration itself. There is a turnover, both from outside into the public sector, or within the public sector itself, the lateral movement of managers. It all implies knowing the problems, knowing the existing control mechanisms. In this regard, the concern with governance is very important, reaching beyond control, the quality of the capacity of governance agencies, programs, etc.

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And in relation to the State's role as a regulator aiming at boosting productivity, how could the Court help to leverage this improvement in regulation?

The Federal Court of Accounts has this technical capacity. It is infused with the notion of perennial public interest, regardless of the political-electoral cycle. In Australia, they built a commission, and then New Zealand and other European countries began to head towards the same direction, as a lean technical body that evaluates the main areas of activity. It is conditioned to conduct sectoral studies, evaluating how the big projects, the main areas of each body, affect the potential productivity of the country. In some cases, they even submit party programs and they hold tremendous legitimacy, as if they were the Federal Court of Accounts.

As I was getting ready to come to SAE [Secretariat for Strategic Affairs], I was thinking about what could be done in the Presidency of the Republic to improve this. In the United States, for example, there is an independent body, it is not composed of public servants, there is a group of three or four economists, and then, a group of technicians and civil servants coordinated by them. However, they are fully independent, they offer an annual assessment on the status of the nation and key policies. One thing I missed after joining SAE and having to deal a lot with the MDIC [Ministry of Industry, Foreign Trade and Services], Finance, Planning, but also with health and other things, because of foreign trade, is that not only is there a lack of a shared notion of where we want to go, but within the bodies themselves such vision does not exist.

In the bodies, sometimes, the secretaries shoot at opposite targets. It is very difficult. So, I thought: they should have a chief economist, as big entities do today. And why an economist? Because they know how to calculate, they are concerned about efficiency and rationality and understand the incentives. What is each of the ministry policies encouraging? How consistent is it? It is the idea that there should be some level, which is probably the executive secretary, but he/she is under a lot of pressure coming from the day-to-day management.

I conducted a research once. I visited some ministries, before joining the government. There is the expression 'public policies based on evidence', and then I found a group in the Ministry of Health, an extremely marginal group, in the sense that it is given no importance, which had, among its determinations, the idea of public policies based on evidence. Nowadays, there is the very idea of what evidence is. A tie? Only because it works elsewhere? I want to innovate here.

So that's the way it is. There is an important mentality shift, but if we wait for this shift to come spontaneously, it will not happen. We really need to be under pressure. It has happened all over the world. This is what the example of the productivity commission in Australia is. You look at the Australian economic policy from the 1970s to the mid-1980s and it is very similar to that of Brazil. The results are not so bad, because they have inherited the British institutional legal framework, for better or for worse. But it's recent, they started to make reforms, more or less like Brazil. In

1985, the liberal reforms started to take off. The prime minister said that this is a banana country, a banana republic, barely comparing, but it is. By whatever means, this is not how Australia became powerful. It is not a well-solved country, it has not been like that since the beginning, it had many conflicts, many worker strikes. The country was very closed in the past. Until the 90's it was closed, it had seven automakers. Nowadays they have none and they do not resent it.

Today, 30% of Australian export is education. The country managed to transform its mentality and, incredible as it seems, everything was done by the labor party. What happened in Australia is very similar to what happened years later in England, with Tony Blair. Although Tony Blair came after [Margaret] Thatcher. The labor leader came to power at the same time as Thatcher, so he learned in real time. Thatcher was already achieving results when he came to power. So, a few years, six or seven years before Tony Blair, he does what Tony Blair would do later, and without having a Thatcher before him. That is, this group was responsible for making the revolution. It starts with the financial sector, which was awful. And the Australian banks adjust themselves and manage on their own.

There is an important mentality shift, but if we wait for this shift to come spontaneously, it will not happen. We really need to be under pressure. It has happened all over the world

The external control of public policies: results for the citizen and sustainable and inclusive development for the country

Marcelo Barros Gomes

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Promoting transformations for the good functioning of Centers of Center of Government of their National States. Improving, thus, the supervision, coordination, prioritization and coherence of public policies and government programs. Developing, in order to reach these goals, national long-term strategies that are more cross-cutting, adaptive and integrated; implementing the digital modernization of governments; promoting systematic actions of public service innovation that reduce systemic risks of fragmentation, duplication, overlapping, gaps and poor performance of public interventions. Finally, seeking to implement state reforms to attain better services, better business opportunities and to promote the citizen's quality of life. In summary, these were the main commitments signed on November 8 and 9, 2018, in a meeting of leaders of Centers of Government of the countries that make up the Organization for Economic Co-operation and Development (OECD, 2018).

Centers of Government are structures and instruments to improve the entire government's performance by ensuring internal coherence of public actions, strategic direction and focus on results. In some countries, the Centers of Government are located directly in the Chief Executive's Office, as in the United States. In other cases, they are divided into some levels in the executive. In Brazil, the activities of the Center of Government are currently concentrated in the Chief Executive's Office (*Casa Civil*), the Government Secretariat, the Ministry of Finance and the Ministry of Planning. It must be noted that the Federal Court of Accounts (*Tribunal de Contas da União – TCU*) has signed an agreement with the OECD (2013-2016) to improve the external control of public governance. Within the framework of that project, a Center of Government was defined as the bodies that provide direct support to the Chief of the Executive Power in the integrated management of government, including the ones that perform corss-cutting central and governmental functions such as planning, budgeting, coordination, monitoring, articulation and communication of decisions and results regarding the government's priorities.

Considering the transformative strategic intention of Center of Government leaders in OECD countries, it would be fair to ask whether, in the public sector, we could in fact, change, soon and in a definitive way, the average citizen's opinion that governments are not reliable (OECD, 2016) and perform tasks that are repetitive, bureaucratic, without purpose and self-referential, thus incapable of generating due public value (IDB, 2016). This image of public service remits us to Greek mythology, where the most astute of men was condemned to carry a heavy marble stone to the peak of a mountain because he challenged Zeus. When performing his task, however, whenever he came near the peak, the stone would roll back down. He would then have to repeat the same harsh and useless task again and again, for all eternity, never reaching his goal of attaining the peak. Would the bureaucracies likewise be confined to self-reference, by the State's constitution; and their public servants, by the laws and regulations of public service, bound to perform their activities and routines with no innovation, value or creativity, and with no perspective of transforming policies, programs and services for the citizen? In this manner, this is what seems to be the great challenge of public national administrations in the 21st century: **proving to the citizen and to society that the government generates public value and is useful and necessary for the country's development; it is not simply a burden that charges them high fees and taxes without the proportional return on quality goods and services.**

The various administrative reforms, notably in OECD countries, indicate that citizen-centered transformation of the State requires the good functioning of the Center of Government, since its activities are fundamental for a more efficient and effective application of the resources envisaged

in the public plans and budgets. Differently from what is in fact happening in Brazil today, some countries have for some time now only made budget allocations linked to results, as is the case of the United States Office of Management Budget (OMB) which, since 1993, based on the applicable regulation, seeks to tie program performance to budget. Thus, with the advent of the Government Performance and Results Act (GPRAct, 1993), the OMB monitors the impact and efficiency of the various policies and programs implemented by departments and public agencies. In 2010, the GPRA Modernization Act evolved to a more cross-cutting and systemic vision of measuring government actions (Key National Indicators) supported by a complex and sophisticated system of monitoring priorities, goals, budgets and results. All these advances are monitored by the Government Accountability Office (GAO) which reports annually to the US Congress on the results and needs for improvement of this system and makes its own report on fragmentation, duplication and overlapping of public programs with a high impact on efficiency and saving billions of dollars, avoiding waste in public expenditure.

In 1992, the United Kingdom created an efficiency unit in the Prime Minister's office which seeks to evaluate the results of governmental action and more recently created a reform and results unit at the Center of Government (UKGOV, 2018). Since that date, 1992, the National Audit Office (NAO) prepared itself to produce Value for Money reports on policies and programs. It produces around sixty such reports every year, and it has more recently created an integrated report on reforms and results of cross-cutting nature, coherence and public modernization (NAO 2016).

The Australian Government's Efficiency and Results Unit assesses the impact of all government programs and systematically feeds planning, budgeting and sectoral plans. The Australian Government, along with the Australian National Audit Office (ANAO) and the Country's Parliament evaluate public governance every year using criteria contained in a joint regulation elaborated by these three entities.

Since 2009, French governments have undertaken significant reforms to leverage public efficiency and render the government more "citizen responsive" (*Court de Comptes*, 2016). The French Center of Government instituted the concept of agility for its operation as of 2012. The French *Court de Comptes*, in its turn, produces at least eighteen annual evaluations of public policies and programs and a consolidated report on the outcome indicators of State action.

Several other OECD countries have taken measures to better coordinate and orient their actions with a more integrated and long-term perspective, with result-oriented priorities and policies (OECD, 2013). In Latin America, Chile created in 2010 – and Colombia and Costa Rica in 2014 – robust structures of Centers of Government called public efficiency and results units. Their purpose is to evaluate and monitor in the various programs and policies the execution and effectiveness of the priorities of the Office of the President, from an integrated and long-term perspective (OECD, 2015).

Despite all these advancements, there is still a consensus, including within the scope of more advanced countries, that a great systemic advancement is still miles away, with the creation of a new robust and coherent "central nervous system for public services" (Australian Government, 2018). Thus, it is a fundamental mission for governments to build and publicize evidence about what works and what does not work in government (Idem, 2018). They argue that "if there is indeed an interest in change and innovation, national public administrations would need to

convert the functioning system of their Centers of Government with a focus on the citizen, with more information, absolute transparency and the breaking of silos" (OECD, 2018) .

Even more severe is the scenario that shows the low possibility for public administration to promote more coordinated and cross-cutting public policy interventions, considering that the government trust index has been declining steadily in most OECD countries for more than a decade. Public policy theoreticians argue that this distrust also generates a high degree of disaggregation and low intra-governmental collaboration within the various organizations and public entities, which should cooperate and integrate to attain better results for the citizen (IDB, 2017).

According to the World Bank (2018), the phenomenon of low trust in governments occurs in most countries. In Brazil this low trust context is even more dramatic. In our country, the federative environment is quite threatened and weakened, as demonstrated in the Systemic Report on the Northeast Region (TCU, 2016, having Minister José Múcio Monteiro as rapporteur) and the Systemic Report on Regional Financing (TCU, 2017, having Minister Aroldo Cedraz as rapporteur). Moreover, in Brazil, only about 20 percent of the population trust in the government, against an average of 43 percent in the OECD countries (OECD, 2016). Added to this distrust of the citizen in the public sector is the insufficient capacity to deliver quality public goods and services in Brazil (World Bank, OECD and Inter-American Development Bank, TCU's Reports on the Government of the Republic Accounts since 2004). Brazil has one of the worst ratios between the Tax Burden and the Human Development Index of the Municipalities (IDHM) in Latin America, and the worst ratio among all OECD countries (TCU's Report on Government Policies and Programs - RePP, 2017). This situation is aggravated and creates concern, notably due to the fiscal and economic crisis as of 2014. The great majority of sectoral indicators are declining when compared internationally, especially those of competitiveness and productivity in Brazil (World Bank, 2017; OECD, 2018; TCU's Reports on the Government of the Republic Accounts since 2004). Recent positive news refers to the significant improvement of our position in the business environment, contained in the *doing business report*: we have advanced from the 125th to the 109th position (World Bank, 2018). It is argued here that several actions undertaken, with a TCU partnership by the Center of Government in Brazil are already bringing results to resume the atmosphere of trust in the country.

In this scenario of international transformations, and in an adverse internal socioeconomic environment, with low trust in the public sector, emerged **in 2017 in TCU the guideline of Results of Public Policies and Programs and its related management unit, the General Coordination of External Control of Results of Public Policies and Programs - Coger, with the objective of structuring, guiding and coordinating TCU's activities in public policies and programs.** Considering the best international practices applicable to Brazil, our track record in evaluation of programs, coordinated audits, systemic reports, and performance audits, and considering moreover the premises of efficiency, results, specialization, coordination and integration established in the TCU in recent years, **we sought in the last biennium to promote systemic, consolidated and decisive referral to the main risks and problems, identified in TCU's audits, for efficient and effective provision of public services through public policies in the country.** With this intention, it was verified that three strategies for TCU's performance could be considered in a more coherent, systemic, cross-cutting, and synergic way, promoting better and more sustainable results:

- Improve the systemic performance of External Control regarding the functioning of the Center of Government and Sectoral Policies;

- Develop audits and monitoring with a more integrated and cross-cutting vision on high-risk issues and chronic problems that recurrently affect the achievement of long-term national challenges, quality of services and public policy outcomes;

- Align and integrate the strategies of the various control and evaluation actors for greater impact of multilevel coordinated audits, aiming at improving inter-federative articulation, decentralized public policies and public services with a focus on the citizen, taking into account regional and local peculiarities and inequalities.

SYSTEMIC PERFORMANCE OF EXTERNAL CONTROL REGARDING THE FUNCTIONING OF THE CENTER OF GOVERNMENT AND SECTORAL POLICIES

At the beginning of 2017, it was observed that, although data and information were available, there were persistent institutional gaps in the TCU's technical units, mainly related to the lack of clarity of the factors that affected the performance of public policies related to its area of operation; lack of medium and long-term control strategies in sectoral policies; absence of a systemic view that considered the cross-cutting nature of social and economic problems, since audits are almost always sparse and limited in specific issues related to government functions. Thus, in order to promote greater knowledge about the objects of control, the units were encouraged to think systemically about factors that affect the result of public policies and programs, as well as to draw medium-term systemic control strategies. As a result, 20 critical national challenges were highlighted as crucial for national development (Table 1), to be considered as guiding themes for the TCU's performance in the various existing public policies.

Table 1 – National challenges crucial for national development

Perspective / Area	Society	Institutional
Social	Improve the quality of education. Improve the quality of health. Improve public security. Reduce poverty and social and regional inequalities.	Improve the efficiency and quality of public service. Increase the transparency of public administration. Improve governance and public management. Increase integrity and combat fraud and corruption. Improve the quality of regulation.
Economic	Ensure fiscal sustainability. Ensure social security systems sustainability. Improve the tax system. Increase the country's productivity and competitiveness. Promote sustained economic growth.	
Infrastructure	Ensure water and sanitation for all. Ensure energy for all. Improve the country's logistics performance. Improve information technology and communication services. Improve the quality of life in cities.	
Environmental	Ensure environmental sustainability.	

It should be noted that for each national challenge a systemic causality diagnosis will be applied, which will contribute to the identification of critical factors and risks. In addition, the building of operational strategies for complex problems will be sought, considering its cross-cutting nature, such as control actions related to de-bureaucratization, transparency and oversight related to the fight against poverty and regional development. It is important to highlight that the national challenges should guide TCU's actions and promote the prioritization and convergence among the various control actions. In this sense, the challenges, critical factors and identified risks can be considered in TCU's strategic planning for the coming years, in such a way as to contribute to a greater sustainability and effectiveness of its oversight.

A key initiative by Coger was the construction of a consolidating product, called the Report on Government Policies and Programs (RePP), which could meet not only the provisions of the Budget Guidelines Law, but also achieve TCU's own vision of systemic monitoring of the results of public policies and programs. With this purpose, the RePP seeks to analyze and monitor the structural problems in the pillars of state performance that systemically impact the results of public policies and present, individually and in aggregate manner, the main

problems encountered in audits carried out by the TCU that affect the achievement of results of government policies, programs and actions.

DEVELOP AUDITS AND MONITORING WITH A MORE SYSTEMIC, INTEGRATED AND CROSS-CUTTING VIEW

RePP 2017, subject of Decision 2.127 / 2017-TCU-Plenary, having Substitute Minister Marcos Bemquerer as rapporteur, covered 7 public policies, consolidated more than 30 TCU decisions that addressed issues related to the functioning of the Center of Government and explained chronic problems in governance and management of public policies. In order to mitigate some of the problems identified, the TCU recommended several structuring actions to improve the functioning of the Center of Government. Among them, the most important are the drafting of a legislative proposal to define "guidelines and bases for national development planning" (article 174, § 1 of the Constitution); System of National Key Indicators, reflected in the strategic guidelines of the PPA; the improvement of budget governance; the definition of institutional arrangements for the purpose of improving coherence and coordination; and updating the standardization of the Internal Control System of the Federal Executive Branch, in such a way as to bring it closer, where possible, to international norms and standards related to the subject.

The RePP 2017 monitoring, object of Decision 2,608 / 2018-TCU-Plenary, of November 2018, observed that the Federal Government, in response to TCU recommendations, initiated structuring measures, which should be continued in the coming years for greater effectiveness, among which stand out:

- Publication of Decree 9,203 / 2017, which provides for the governance policy of the federal public administration;
- Definition of procedures necessary for the structuring, execution and monitoring of the integrity programs of the bodies and entities of the federal public administration (direct, autarchic and foundational) (action aligned with the public governance policy established through Decree No. 9203/2017);
- Institution of the Office of General Coordination of Public Policies Evaluation (CGAPP);
- Preparation of a proposal for a National Economic and Social Development Strategy (ENDES);
- Definition of key indexes of national development that allow international comparison in ENDES;
- Publication of the "Practical Guide for e*x ante* Analysis" for the formulation of programs and public policies, 2020-2023 for better alignment of Planning and Budget.

Despite these advances, RePP 2018, the object of Decision 2,608 / 2018 – Plenary - in addition to the aforementioned monitoring - consolidated the oversight of 18 public policies / programs and found that the level of governance maturity in public policies and programs in Brazil remains low. 12% of the policies evaluated in 2018 are not adequately institutionalized; in 31% there are serious deficiencies in the plans; and 50% showed significant gaps in the objectives and the monitoring

and evaluation system. The integrated analysis of the control actions carried out showed that the country must necessarily continue the measures adopted by the Center of Government but now reaching the ministries and sectoral policies to overcome the existing institutional deficits of governance and public management. Some examples are **institutionalization of an integrated national planning with a long-term vision, greater coherence and inter-federative coordination, risk management, evidence-based decisions, and the construction of a results oriented medium-term budget that has greater predictability.**

The work demonstrated, through the consolidation of evidence, that deficiencies in the management and governance of public policies do not occur in isolation, but in a systemic, recurrent form and at all stages of the policy cycle. It can be inferred from the studies that the Brazilian State's low delivery capacity is not only due to unforeseen events and external and uncontrollable factors, but to the absence of institutional factors and application of good practices essential for the creation of public value.

We observed that the legislative gap that defines and demands the fulfillment of minimum prerequisites for the creation, reformulation and improvement of public policies contributes to the accomplishment of a process that is highly subjective and, consequently, very likely to fail to reach the desired results, or to do so in a much more costly way than necessary. **With these findings, it is necessary to conclude that it is essential to reformulate the current model of creation, execution and expansion of public policies, as well as to reformulate the modus operandi of the allocation model of public resources in the country.**

In this context, the TCU has recommended that the Center of Government (a) define a schedule of actions to guide, train and encourage public administration bodies to disseminate the application of the *Ex ante* Analysis Guide of the Federal Government in the creation, improvement and expansion processes of public policies; and (b) define a schedule of actions aimed at institutionalizing and qualifying the mechanisms and practices of risk management, internal controls, coordination and articulation, monitoring and evaluation within the scope of public administration bodies.

Finally, we should highlight the relevance of the National Congress' role in the processes of reviewing public policies and budget allocation. According to articles 49 and 166 of the Federal Constitution, it is incumbent upon the National Congress: (a) to assess reports on the execution of government plans; (b) to examine and deliver an opinion on the national, regional and sectoral plans and programs provided for in the Constitution; (c) to exercise budgetary monitoring and oversight.

ALIGN AND INTEGRATE THE STRATEGIES OF THE VARIOUS CONTROL AND EVALUATION ACTORS

It is important to highlight that in order to maximize the results of the work, the Court signed in 2017 cooperation agreements with the Chamber of Deputies and the Federal Senate aiming to strengthen the technical integration and the collaborative capacity between the participants. The agreements also aimed to contribute to the improvement of the oversight and evaluation activities carried out by the participants, with a view to improving the processes of formulation, selection, implementation, control and monitoring of policies, plans and government programs for the benefit of society.

In a complementary way, in order to contribute to the improvement of public governance, the TCU instituted the project called "Improvement of the Governance of Decentralized Public Policies". The project stems from a partnership signed in early 2018 between the Brazilian Federal Court of Accounts (TCU), the Organization for Economic Co-operation and Development (OECD), the Association of Members of the Brazilian Courts of Accounts (Atricon) and the Rui Barbosa Institute (IRB) and the State Courts of Accounts (TCEs), whose main objective is to improve the coordinated performance of the Brazilian courts of accounts in the oversight of public policies and programs that are implemented in a decentralized manner, with a view to promoting better results and better delivery to citizens. **This phase of the project will focus on improving public policies in the area of education.**

CONCLUSION

The actions carried out by the TCU Presidency over the last two years, with the support of the General Coordination of Results of Public Policies and Programs, have demonstrated that TCU's activities, focused on more systemic and consolidating projects with a long-term vision and based on challenges of policies and programs on the performance of the Center of Government, of sectoral public policies, including decentralized public policies, will have the potential to improve the use of public resources and results delivered to citizens. Thus, the TCU will be contributing to the paradigm shift from a self-referred State to a State focused on results and on sustainable and inclusive national development.

The work begun in the TCU and in the Center of Government is still incipient for effective and lasting transformations. Sectoral ministries and all federal entities still need to be reached, but there are already perspectives that converge with the international standards adopted by the SAIs and the various audit standards (ISSAIS) and the strategic intentions of the Centers of Government in developed countries. The actions of continuity and sustainability will be essential if we are to achieve the ideal of 21st century public administration. An administration where the citizen is the focus and society is the greatest beneficiary of State actions that will make development permanent and full without the effort to pick up rocks simply to see them roll down the mountain again, as happens with unsustainable economic growth or public policies that are never implemented.

In this context, and lastly, we conclude that the public policies and programs results guideline, embodied in the 2018 Report on Government Policies and Programs (Decision 2,608 / 2018-TCU-Plenary), is the TCU's strategic guideline for fulfilling its role of assisting the National Congress and improving federal public administration. There are still challenges for the TCU itself. It needs to deepen and develop its partnerships strategies, institutional capacity and support for the modernization of systems, processes and technological methods, in addition to methods to monitor and oversee in a coherent and systemic manner the implementation and effectiveness of all these measures by the Executive Branch. Thus, we hope that this will contribute to the improvement of the instruments that guide the actions of public agents in the cycle of public policies; the enhancement of the agents' ability to assess, plan and monitor public policies; and, ultimately, contribute to enhancing the quality and effectiveness of public expenditure for the benefit of society.

Cecap Group for Fight against Fraud and Corruption holds its first meeting

On June 4, Cecap held the first meeting of the thematic group Fight against Fraud and Corruption in the Federal Public Administration. The Federal Court of Accounts (TCU) created Cecap in 2014 and its mission is to expand the connections between the Court and society. To facilitate the planning and implementation of the Center's activities, five thematic groups composed of Court servants, external experts, representatives of civil society and the academic community have been created.

11 representatives from civil society institutions and bodies from the Judiciary and Federal Government attended the first meeting of the Thematic Group of Fight against Fraud and Corruption in the Federal Public. At the opening, the president of the Federal Court of Accounts, Minister Raimundo Carreiro, emphasized the importance of Cecap as a fundamental instrument to ensure dialogue between the Court and the different external audiences.

The following participants attended the first thematic group meeting: the chief executive officer of Ethos Institute, Caio Magri; the president of Contas Abertas NGO, Gil Castello Branco; the executive director of Transparência Brasil, Manoel Galdino; Federal Prosecutor Samantha Dobrowolski; Federal Appellate Judge Fausto De Sanctis; Deputy Chief of Government Policy Analysis and Monitoring of the Office of the President's Chief of Staff, Erika Nassar; the Public Prosecutor of the Federal Prosecution Service and the Federal District and Territories (MPDFT), Luciana Asper; the general coordinator of corruption suppression of the Federal Police (PF), Marcio Anselmo; the professor and researcher of the School of Social Sciences of the Center for Research and Documentation of the Contemporary History of Brazil of the Getúlio Vargas Foundation - RJ, Sergio Praça; and the research and graduate director of the National School of Public Administration, Fernando Filgueiras; the Counsel for the Federal Government Pedro Vasques; and the representative of the Ministry of Transparency and Office of the Federal Controller General (CGU) Renato Capanema.

The Federal Court of Accounts was represented in the meeting by the Secretary-General of External Control, Cláudio Castello Branco; the Deputy Secretary-General of External Control, Marcelo Luiz Souza da Eira; the director general of Serzedello Corrêa Institute, Maurício Wanderley; the head of the Department of Institutional Relations for Control on Fight against Fraud and Corruption, Rafael Jardim.

Cecap's Efficiency thematic group discusses public principles for efficiency to leverage productivity

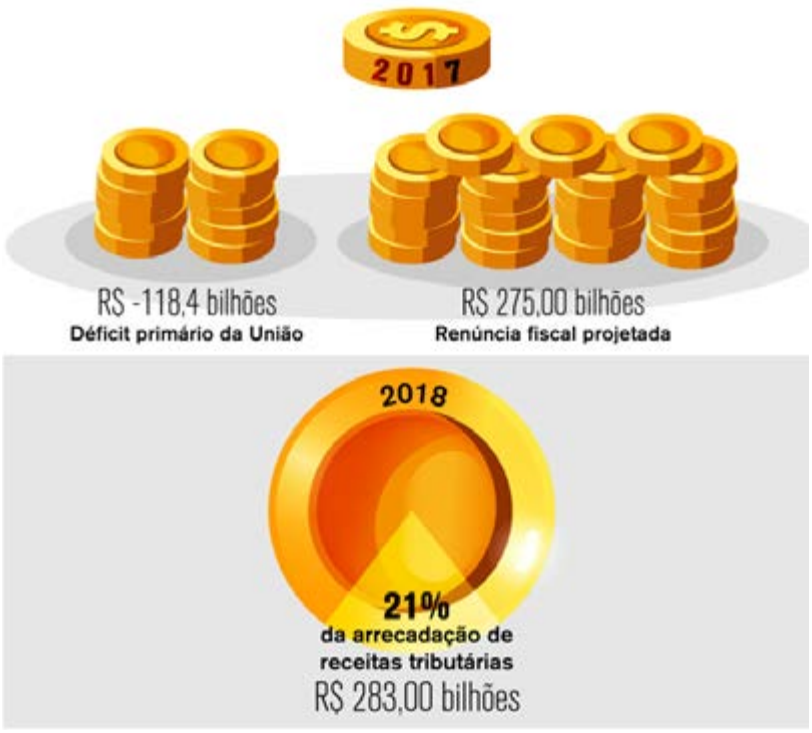
On October 19, Cecap held the second meeting of the Thematic Group on the Evaluation of Efficiency and Quality of Public Services. The thematic groups of Cecap bring together court servants, external experts, representatives of civil society and the academic community to discuss actions and articulate partnerships that can help improve external control tasks on specific issues.

The meeting of the Efficiency Thematic Group, implemented in 2017, aimed at discussing the development of public principles for efficiency to leverage productivity. People who from the national public administration who are references and associated to the subject in several sectors participated in the meeting as representatives of society, such as Valdir Simão, Paulo Bugarin, Carlos Pio, Giovanna Victer, Humberto Lucena, Emerson Gabardo, Sandro Cabral, Pablo Villarim, Rafael Barros Leite and Eloy Oliveira.

The debates of the meeting focused on the importance of efficiency when structuring a public administration that promotes productivity and the identification and prioritization of the fundamental characteristics of an efficient administration. Based on the prioritized characteristics and points agreed upon, a preliminary version of public principles for efficiency will be produced to leverage productivity, through a virtual environment. This version will be evaluated in a future meeting of the thematic group, which will be attended by representatives from productive sectors.

Upon validation of the principles, the Federal Court of Accounts shall promote their institutionalization and dissemination, in order to make public administration more agile and less costly to the productive sector and society.

The Federal Court of Accounts introduces the Panel on Federal Tax Breaks



The panel is a contribution of the Federal Court of Accounts to Brazilian society. The purpose is to make the information on tax breaks easily available in the federal scope.

The Federal Court of Accounts (TCU) introduces this week the Panel on Federal Tax Breaks. In these times of crisis in the public accounts, with recurring deficits and difficulties of all kinds to meet tax targets, shedding light on information regarding tax breaks can contribute to a better understanding of the decisions made by governments and the State as regards concession of tax benefits and their possible results.

The tax breaks arise from a decision made by the government of not collecting taxes from certain taxpayers, in general, aiming to achieve economic, social or regional development goals. They are, therefore, government resources applied indirectly, that is, without passing through the government budget. The use of tax breaks as a means of financing public policies has intensified over the years, as demonstrated annually in the Reports on the Accounts of the President of the Republic. The Panel on Federal Tax Breaks demonstrated, for example, that in the last six fiscal years alone, the amount of resources granted exceeded R$ 1.5 trillion. The tax break of the fiscal year of 2017 alone, projected at R$ 275 billion, corresponds to approximately 2.3 times the

primary deficit of Brazil registered in that year (R$ -118.4 billion). For 2018, the planned amount reached R$ 283 billion, corresponding to approximately 21% of the tax revenue.

It is known that Constitutional Amendment 95/2016 (Ceiling on Expenditure) sets limits on the Union's primary expenditures for twenty years, in an attempt to contain the continued growth of these expenditures based on the significant decrease of federal revenue, and thus seeking to reestablish fiscal balance. However, no equivalent mechanism has yet been established to curb the excessive growth of revenue concessions. Therefore, the normative framework related to public finances is still fragile, which makes it difficult to achieve an effective fiscal policy in order to balance the public accounts and, thus, seek a sustainable path for public debt.

It is important to clarify that the data is restricted to concessions classified by the Federal Revenue Service of Brazil in the concept of "tax expense", included in the series of publications of that entity i entitled "Statement of Tax Expenses". These statements are published annually in compliance with the provisions of Paragraph 6 of Article 165 of the Federal Constitution. To prepare the panel, the data included in document "Tax Expenditure Statement", Calendar Year 2015 - Series 2013 to 2018, available on the Federal Revenue Service website, was used.

For users not yet familiar with the subject, we suggest reading the report based on TCU Decision 1205/2014-TCU-Plenário, issued by Minister Raimundo Carreiro, which includes background information and pinpoints the chronic problems associated with tax breaks.

[2017 R$ -118.4 billion - Primary deficit of the Federal Government
R$ 275.00 billion – Projected tax break

2018 – 21% of tax revenue – R$ 283.00 billion]

Visit the Panel on Federal Tax Breaks

The Federal Court of Accounts introduces new solution to improve communication with units under its jurisdiction

The proposal of Conecta-TCU is to organize and centralize the contents addressed to managers of entities and bodies, who will be able to see, in a single place, all cases, decisions, determinations and recommendations received from the Court in a centralized way and with background information.

Units under TCU's jurisdiction will have a new form of relationship with the Federal Court of Accounts (TCU). This new solution, Conecta-TCU, is a communication channel between the Court and the public administration, to organize and centralize the contents from the Court addressed to managers of entities and bodies. The main goal is to help the manager comprehend and fulfill the determinations of the Federal Court of Accounts, contributing to the improvement of public administration.

Prior to the system, in order to follow up on what the Court had issued to each body or entity, managers of the units under jurisdiction (UJs) had to look for TCU decisions in the search for judicial decisions and register in the push system of each case of interest to them. Each of these actions is performed in different areas of the Federal Court of Accounts Portal, which is often unknown to new managers.

Now, with the first version of Conecta-TCU, the UJs can see, in a single place, all cases, decisions, determinations and recommendations received from the Court in a centralized way and with background information. It also enables the user to follow up on the deadline of determinations, know the status of cases and use filters to search decisions, for example. The system was launched on October 10, for three UJs: Petrobras, the National Fund for Education Development (FNDE) and the Ministry of Health. They were selected to participate in the first version of the system, due to the large number of determinations and recommendations that are addressed to them. Soon other UJs will be selected.

TCU introduces a diagnosis that indicates directions for Brazil

[The Federal Court of Accounts and the National Development - Contributions for the Public Administration]

The Federal Court of Accounts (TCU) has released the latest version of its publication "The Federal Court of Accounts and National Development - Contributions to Public Administration". Its purpose is to promote discussions that summarizes the Court's ideas and strategic proposals for various government sectors.

The analyzed topics include agriculture and rural development, public finances, public management, regulatory environment, infrastructure, economic development, environment, health, education, social security, social assistance, public security and national defense.

The Brazilian citizen, currently in a moment of budget constraints, calls for efficiency and good public services, as well as for a society free from the setbacks caused by corruption, which undermines the resources that should improve their quality of life.

In this context, it is crucial that the Federal Court of Accounts contribute more and more to the social transformation and development of the country. In fact, all of its constitutional mandates enable the Court to achieve a high level of knowledge about the biggest difficulties for the public administration, and for Brazil.

The publication "The Federal Court of Accounts and National Development - Contributions to Public Administration" summarizes the current understanding of the Court, considering its most recent decisionss, on the measures to be adopted in strategic sectors, so that it is possible to really leverage the development of the country.

At the same time, the Court is open to dialogue with the Executive and other branches of the Federal Government, the public administration as a whole, and with the organized civil society. It intends to formulate action plans to boost development and help the country rise above national bottlenecks.

Publication "The Federal Court of Accounts and National Development - Contributions to Public Administration" (https://portal.tcu.gov.br/deenvolvimento-nacional/)

The duty of the Federal Government to compensate electric utilities for unmanageable costs and their disclosure on the balance sheet according to international accounting standards

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ABSTRACT

Since the issuance of OCPC 08 (Technical Guideline of the Accounting Pronouncements Committee 08), electric utility companies have had the right to be compensated by the Government in the event of non-recovery of unmanageable costs upon termination of their contracts. Indeed, the potential recognition of this obligation by the Federal Government could have a very negative effect on public accounts. Effective oversight of the recovery of these costs over the term of the contracts along with the correct accounting treatment by the Government, namely the Tax Risks Attachment of the Federal Government Balance Sheet, are crucial to the sustainable management of public accounts. This management also aims to meet the principle of publicity, established by article 37 of the Federal Constitution. This study examines the effects of demonstrating, measuring, and reporting this complex category of assets in the electric power sector and indicates potential topics of study on their management, monitoring, and control, conducted either internally by agencies of the Federal Executive Branch or externally by the Federal Court of Accounts - Brazil.

Keywords: Sectoral Financial Asset. Contra Account of Value Variation for Component A Items. Unmanageable Costs. Contingent Liability. Provisions.

INTRODUCTION

The electric power sector is a very complex economic segment. In the case of distribution companies, one of their main features is that they represent natural monopolies. This means that the operating costs of this type of activity are so high that its development by more than one company would be virtually impossible in this market. Therefore, companies in this industry require

special management of their resources, which is the reason for dividing the costs into Components *A* and *B*. The former, also known as unmanageable costs, refers to the cost of electric energy sold to end consumers, transmission costs, and corresponding charges. Component *B*, on the other hand, refers to administrative costs, such as human resources and work materials. In the latter component, companies are able to exercise much more managerial control.

For Component *A*, the main regulation is Ordinance MF/MME No. 25/2002, which determines that the utilities cannot pass on any additional electricity costs acquired in the year to the tariff pertaining to that same accounting period (year *A*). The electric utility will only able to pass them on at the time of the next tariff adjustment (TANCINI, 2013). If they are not recovered in year *A* + 1, this difference will go on to be recovered in year *A* + 2, and so on. If this cost is not recovered by the tariff before the end of the concession agreement, the company has the right to receive this amount from the Government (Federal Government). This regulation is provided in OCPC 08, the rule approved by CVM Resolution No. 732/2014. The balance of these unmanageable costs on the balance sheet of the companies is recognized as assets by way of the Contra Account of Value Variation for Component *A* Items (CVA).

Therefore, unmanageable costs – in the form of CVA – represent a potential debt (suspensive condition) for the Federal Government, as there is no liability until the concession agreement ends. International rules for this type of situation provide specific treatments, which are recommended in NBC TSP 19 (Provisions, Contingent Liabilities, and Contingent Assets). Thus, the Provision figure arises, which are probable resource outflows from the entity to a creditor. Contingent Liabilities are on an immediately lower probability scale relative to Provisions. There is even a third level of probability of resource outflow, where there is neither acknowledgement of a provision nor mention of the potential loss in an explanatory note.

In light of these considerations, this study aims to **highlight the possible accounting treatments for the companies' right to compensation for unmanageable costs on the Federal Government Balance Sheet, pursuant to international accounting rules.** The positive and negative impacts of each situation are illustrated. This work also presents proposals for audit procedures that can contribute to more reliable measurements of these contingencies and control activities of the components, in order to mitigate the Federal Government's chances of bearing large financial expenses in the future, which could harm the sustainability of public accounts.

METHODOLOGY

With regard to its approach, this study is classified as a qualitative research. According to Deslauriers (1991 apud GERHARDT; SILVEIRA, 2009, p. 32), in this type of study, the purpose of the sample is to "produce in-depth and illustrative information; whether small or big, what matters is that it is able to produce new information." As for its nature, this work is identified as applied research since its purpose is to apply the findings in practice. This study's objectives categorize it as descriptive research since, according to Perovano (2014 apud SILVA, 2016, p. 2), it is concerned with how "a system, method, process, or operational reality is structured and functions," where first the variables and then the results are analyzed. As for its procedures, this work is classified as a case study.

BACKGROUND

The concern over the high acquisition costs of electricity by utility distributors, particularly in Component *A*, gained significant importance after the huge currency devaluation crisis in 1999 (TANCINI, 2013, p. 59). Since many energy contracts are quoted in United States dollars, distributors incurred large deficits due to the difference between the purchase price and the sale price in the accounting period, as this acquisition cost could not be automatically passed on to the consumer. From that moment on, the Government allowed these differences to be transferred to the consumer in the following adjustment, which would be recognized as assets in the electric utility distributors' accounts. Finally, Interministerial Ordinance MF/MME No. 25 of January 24, 2002, formalized this procedure and these assets also became recognized as Regulatory Assets.

Years later, after the process of allignemnt with international standards, which was completed in Brazil in 2010, utility distributors began facing new challenges. The regulatory assets that were previously recognized by Brazilian accounting standards did not fit in with the rules issued by the International Accounting Standards Board (IASB), the agency that regulates International Financial Accounting Standards – IFRS. This is because, according to IFRS rules, on an international scale, and to the Accounting Pronouncements Committee (CPC) in Brazil, an asset is "a resource controlled by the entity resulting from past events and from which future economic benefits for the entity are expected to flow" (Conceptual Framework for Preparing and Disclosing Financial Accounting Reports – CPC 00). Based on this definition, the referred Regulatory Assets would not be covered by this new concept, as they do not guarantee a probable flow of future economic benefits to the entity, but only a mere expectation of the companies.

Thus, by the end of 2014, the same year Brazil concluded its allignement with international public sector standards, a new solution was found to manage Unmanageable Costs. The Federal Government, through the National Agency of Electric Power (Aneel), signed a commitment to compensate the electric utility distribution companies at the end of their concession agreements if there is a balance of unmanageable costs to recover upon the contracts' termination. Accordingly, on November 28, 2014, the Accounting Pronouncements Committee issued Technical Guideline OCPC 08 (Recognition of Certain Assets and Liabilities in General Accounting and Financial Reports of Electric Utility Distributors issued in accordance with Brazilian and International Accounting Rules). CVM Resolution No. 732 regulated this rule on December 9, 2014.

Full adoption of the International Public Sector Accounting Standards (IPSAS) is consolidated in the Public Sector Accounting Manual (MCASP), 6th Edition, valid since the 2015 accounting period.

THEORETICAL FRAMEWORK

INTERNATIONAL STANDARDS IN BRAZIL

The Brazilian translation of the International Public Sector Accounting Standards (IPSAS), referred to as the Brazilian Public Sector Accounting Rules (NBCASP), was approved by Brazilian Accounting authorities through Ordinance No. 634 of November 19, 2013, of the Brazilian Treasury Office. As for the Liabilities, Provisions, and Contingent Liabilities, the Brazilian rule is NBC TSP 19 (IPSAS 19). The document has already been incorporated into chapter 9, part II of the 6th Edition of the MCASP.

In the Federal Government Balance Sheet, the provisions are recognized in the Equity Variation Statements. This statement is of paramount importance in describing the evolution of the entity's equity during the accounting period, in order to issue positive or negative evaluations about given management. According to Silva (2014 apud SANTOS and CASTRO, 2015, p. 5):

> An entity's equity income is its management indicator and an object for analysis of the tax objectives attachment in the Budget Guidelines Law, given its influence on the evolution of the net equity over a certain period.

Thus, it is possible to understand that accurately measuring the provision to be recognized is critical to faithfully expressing the Government's equity, as this situation is an essential condition for the public entity's sustainable, responsible management.

LIABILITIES. PROVISIONS, AND CONTINGENT LIABILITIES

NBC TSP 19 defines Provision as "a liability of an uncertain timing or amount." It differs from Liability in that it is a present obligation of the entity, arising from events that have already occurred and from which there is an expectation of resource outflow to a given creditor. Furthermore, there is a third element, Contingent Liability. NBC TSP 19 defines it as follows:

> 18. Contingent Liability: (a) a potential obligation arising from past events and whose existence shall be **confirmed only by the occurrence or non-occurrence of one or more uncertain future events not wholly within the control of the entity;** or (b) a present obligation resulting from past events, but it is not recognized, because: (i) it is improbable that a resource outflow incorporating economic benefits be required to liquidate the obligation; or (ii) the amount of the obligation cannot be measured with sufficient reliability. (Emphasis added.)

Subsequently, NBC TSP 19 defines the criteria that classify an obligation as a Liability, Provision, or Contingent Liability:

> 24. In most cases, it shall be clear whether a past event has given rise to a present obligation. In rare cases - in a lawsuit, for example - whether certain events occurred as well as whether those events resulted in a present obligation may be up for discussion. In this case, the entity must determine if the present obligation existed on the date of the **balance sheet, by taking into account all available evidence,** including, for example, expert opinion. The evidence considered includes any additional evidence provided by events after the balance sheet's date. Based on such evidence: (a) when it is **more likely than not that a present obligation exists on the balance sheet's date**, the entity must recognize the provision (if the recognition criteria are met); (b) **when it is more likely that no present obligation exists on the balance sheet's date,** the entity discloses a contingent liability, unless there is the remote possibility of a resource outflow incorporating economic benefits.

Based on these concepts, the chart in Figure 1 correlates the probabilities and accounting treatments of each situation:

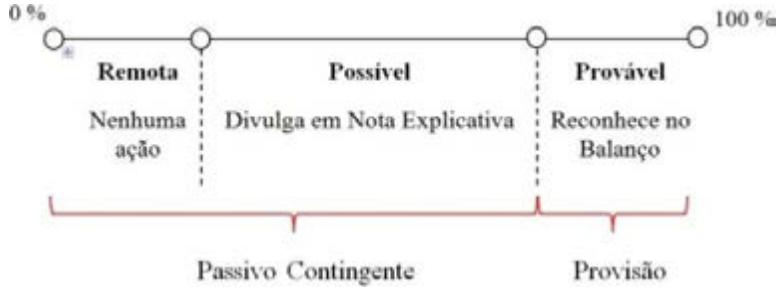

Figure 1 – Treatment of the Event as Probable, Possible, or Remote.
Source: The author.

Translation:

Remote	**Possible**	**Probable**
No action	Discloses in explanatory note	Recognizes in the balance sheet
Contingent Liability		Provision

As observed, NBC TSP does not numerically establish what might be considered "Probable," "Possible," and "Remote." In this sense, Cravo (1994 apud OLIVEIRA, 2007) asserts that the term "Probable" would be associated with a 50% to 95% chance of the obligation's occurrence. The term "Possible" would be associated with the 5% to 50% range, and, finally, a probability of less than 5% would be "Remote." According to Poeta (2012), there is no consensus on these classifications. The author argues that professional judgment may influence this process, especially when terminology is translated into numbers.

> As verified in prior research, there are studies that advocate the use of numerical terms, while others believe that verbal terms of probability are better. The findings from this research do not allow for a conclusion to be made one way or the other, considering each individual's complexity when making judgments and interpretations [...]. The differences found, specifically in point Y, imply that verbal-numerical and numerical-verbal translation may involve different judgment processes. Consequently, they may have a different impact on accounting statements.

Hence, it appears that there is no categorical definition for the use of numerical or verbal terms associated with the degree of probability for recognizing a present obligation. It is apparent that criteria for this kind of classification may be established in accordance with each type of market and the type of professional judgment inherent to it.

OCPC 08 AND THE RIGHT TO RECOVER UNMANAGEABLE COSTS

Initially, Technical Guideline CPC 08 refers to the regulatory framework that recognizes the right to recover CVA, which was approved by the Aneel Board of Directors in an extraordinary session on November 13, 2014. For the Government, electric utility distributors and licensees that amended their contracts would have the right to recover Component *A,* currently named Sectoral Financial Assets (AFS).

> IN12. The contract amendment would have, in summary, the following principle: In the event of the concession agreement's termination, aside from recovering damages arising from non-amortized or depreciated investments over the course of the concession agreement**, the remaining balances calculated from items in Component A and other financial components that have not been recovered through tariff cycles shall also be subject to compensation by the Government.** The situation above applies to any form of termination of concession agreements, such as the end of the contract term, bankruptcy, nationalization, lapse, termination, or annulment of the contract. In the case of termination with the remaining balance constituting an obligation of return, this amount shall be compensated with the cited reimbursements. (Emphasis added.)

In light of this situation, the committee issued an opinion (IN13) in order to cease the impediment that existed prior to recognizing temporary differences in distribution tariffs as assets or liabilities.

PRESENTATION AND DISCUSSION OF FINDINGS

ENFORCEABLE PROCEDURES

In the current scenario of public accounts management, procedures regarding the treatment of contingent liabilities that have been adopted by other agencies already exist, as verified in the Federal Government Balance Sheet of 2015. Explanatory note 3.8.2 (p. 117-123) expresses, in addition to other information, that the Office of the General Counsel for the Federal Government is the most representative group under the item "Other Provisions – Long Term" (p. 121).

Thus, to prepare the Tax Risks Statement, article 3 of Ordinance No. 40 of February 10, 2015, of the Office of the General Counsel for the Federal Government, establishes the criteria that give such classifications to contingent liabilities of the Federal Government's potential obligations. This classification occurs basically according to the degree of the decisions on the respective matter of each lawsuit or group of lawsuits. For example:

> I – Probable Risk: a) when there is a Binding Precedent against the National Treasury [...] II – Possible Risk: a) when there is special controversy appeal decided by the Superior Court of Justice or the Superior Labor Court against the National Treasury in cases where there is a legal possibility of the Federal Supreme Court's knowledge on the matter [...]. III- Remote risk: actions that do not fall within the classification provided in items I and II.

It is worth noting that the aforementioned Ordinance determines the lawsuit or group of similar lawsuits to have a sum equal to or greater than BRL 1 billion for the purposes of classification. In the specific case of the Office of the General Counsel for the Federal Government, classification regarding the likelihood of a particular obligation's occurrence is not linked to numerical indicators, which provides subsidies for other Agencies to adopt procedures using this same guideline.

ANALYSIS OF ALTERNATIVES

To analyze the results, we selected electricity distribution companies to compose a sample from the Aneel database, which has 102 companies. The criteria adopted was selection of the companies with the highest electricity supply revenues in the 2015 accounting period. In this study, "highest revenues" are the companies belonging to group A of the ABC classification of supply revenues. Thus, the sum of these companies' revenues covers 80% of the industry, as set forth in Table 1.

It is worth mentioning that when the cost of electricity purchased by the utility is less than the amount calculated for the respective tariff, the company must compensate this amount in the following adjustment. In this situation, the company has a Sectoral Financial Liability (PFS). The difference between what the utility is entitled to receive and what it has to compensate is called either a Net Sectoral Financial Asset (AFS) or a Net PFS, depending on the case.

Table 1 – Supply Revenue Percentage by Electric Utility Company in 2015

Electric Utility Distributor	State	Revenue in 2015	%
Eletropaulo – Eletropaulo Metropolitana Eletricidade De São Paulo S.A	SP	13,872,037,352.29	10.27%
Cemig-D – Cemig Distribuição S.A	MG	11,350,508,188.72	8.40%
Copel-Dis – Copel Distribuição S.A	PR	10,180,067,878.23	7.54%
Cpfl-Paulista – Companhia Paulista De Força E Luz	SP	8,986,272,261.73	6.65%
Light – Light Serviços De Eletricidade S.A.	RJ	8,771,897,067.32	6.50%
Celesc-Dis – Celesc Distribuição S.A.	SC	5,955,387,473.12	4.41%
Elektro – Elektro Eletricidade E Serviços S.A.	SP	5,376,264,466.84	3.98%
Coelba – Companhia De Eletricidade Do Estado Da Bahia	BA	5,184,376,847.21	3.84%
Celg-D – Celg Distribuição S.A.	GO	4,813,179,872.69	3.56%

Electric Utility Distributor	State	Revenue in 2015	%
Ampla – Ampla Energia E Serviços S.A	RJ	4,617,467,887.65	3.42%
Bandeirante – Bandeirante Energia S.A.	SP	3,971,314,776.03	2.94%
Cpfl- Piratininga – Companhia Piratininga De Força E Luz	SP	3,924,624,336.01	2.91%
Celpe – Companhia Energética De Pernambuco	PE	3,766,586,271.67	2.79%
Coelce – Companhia Energética Do Ceará	CE	3,748,900,420.23	2.78%
Celpa – Centrais Elétricas Do Pará S.A.	PA	3,472,664,074.77	2.57%
Ceee-D – Companhia Estadual De Distribuição De Energia Elétrica	RS	3,333,572,057.28	2.47%
Aes-Sul – Aes Sul Distribuidora Gaúcha De Energia S.A.	RS	3,128,359,238.73	2.32%
Rge – Rio Grande Energia S.A.	RS	2,861,397,204.57	2.12%
Total in Category A (18 Companies)		**107,314,877,675.09**	
Sum of revenues of the 102 distribution companies in 2015		**BRL 135,017,152,238.37**	

Source: Aneel Portal. Management Information.

Once group A was defined, the Net AFS account balance was extracted from the 2015 Accounting Statements of each electricity distributor, both in current (AC) and non-current assets (ANC). The sum of each of these equity components – the Government's potential obligation in the event of concession agreement termination – is the equity amount to be monitored by the Government. Table 2 presents the Net AFS extracted from each company, which will make up this amount.

Table 2 – Net Sectoral Financial Assets to Recover (by BRL Thousands)[1]

Electric Utility Distributor	2015		2014		Effective Term
	AC	ANC	AC	ANC	
Eletropaulo – Eletropaulo Metropolitana Eletricidade De São Paulo S.A	891,472	449,428	140,940	129,566	2028
Cemig-D – Cemig Distribuição S.A	860,466	489,190	843,793	262,882	2045
Copel-Dis – Copel Distribuição S.A	910,759	134,903	609,298	431,846	2045
Cpfl-Paulista – Companhia Paulista De Força E Luz	1,464,019	489,945	588,933	321,788	2027
Light – Light Serviços De Eletricidade S.A.	568,675	43,001	577,458	536,712	2026
Celesc-Dis – Celesc Distribuição S.A.	248,458	196,901	450,566	–	2045
Elektro – Elektro Eletricidade E Serviços S.A.	353,663	59,237	331,271	68,448	2028
Coelba – Companhia De Eletricidade Do Estado Da Bahia	139,122	142,971	608,280	218,748	2027
Celg-D – Celg Distribuição S.A.	141,398	- 56,264	114,325	110,497	2045
Ampla – Ampla Energia E Serviços S.A	459,074	78,706	335,853	79,936	2026
Bandeirante – Bandeirante Energia S.A.	664,410	70,437	383,378	218,164	2028
Cpfl- Piratininga – Companhia Piratininga De Força E Luz	–	–	–	–	2032
Celpe – Companhia Energética De Pernambuco	–	–	–	–	2030
Coelce – Companhia Energética Do Ceará	230,445	73,226	151,480	154,929	2028

1 The CPF Paulista company includes financial information relating to CPFL Piratininga and RGE Energia because it is part of the same economic group. Companhias Coelba includes information concerning the Celpe company as both are part of the Neoenergia Group.

Electric Utility Distributor	2015		2014		Effective Term
	AC	ANC	AC	ANC	
Celpa – Centrais Elétricas Do Pará S.A.	- 35,409	- 27,837	204,441	229,796	2028
Ceee-D – Companhia Estadual De Distribuição De Energia Elétrica	176,669	–	202,562	–	2045
Aes-Sul – Aes Sul Distribuidora Gaúcha De Energia S.A.	260,720	69,074	108,278	18,977	2027
Rge – Rio Grande Energia S.A.	–	–	–	–	2027
Group A CVA sum (18 companies)	**7,333,941**	**2,212,918**	**5,650,856**	**2,782,289**	

Source: AC and ANC - Financial statements of the respective companies in 2015.
Effective Term - Aneel Portal.

According to data from Table 2, the Federal Government has a contingent liability that exceeds BRL 7 billion. Observing explanatory note no. 38 (Constitution of Provisions), p. 150, of the 2015 Federal Government Balance Sheet, we find that in the disclosure of the "most relevant values", the amounts are those that exceed R$ 2 billion. In the table above, for example, if termination of the CPFL Paulista and Eletropaulo contracts was classified as Probable and there was a 100% provision of the current assets, the Net AFS, recognized to be around the BRL 2 billion mark, would need to be mentioned in the abovementioned explanatory note.

Consequently, if there are contracts that might be appropriately classified as "Probable," there will be an increase in provisions, which will, thereby, decrease the Federal Government's equity income or loss in the accounting period. This is a prudential measure so that, if the contract is not terminated, reversal is positive for the results of the accounting period in which they materialize.

On the other hand, while the "Possible" classification does not make an impact on the Equity Variation Statements and thereby the balance sheet, it alerts all the accounting information users that eventual concession agreement terminations may affect public accounts. Therefore, the constitutional mandate of publicity would be fulfilled, in addition to other basic accounting principles. However, in the event of a "Remote" classification resulting in an unexpected loss, not only would there be a sharp reduction in the Federal Government's equity, the cash flow of the accounting period when it occurred would also be affected. All of this would still be linked to the problem of disclosure to citizens.

OVERSIGHT PROCEDURES

Once the effects of the compensation of unmanageable costs to electric utilities on the Federal Government Balance Sheet are known, it is necessary to understand that the monitoring and control procedures for these accounting elements can be effective for internal and external control.

In order to ensure reliability, completeness, and other accounting information characteristics, the role of Internal and External Control Agencies is fundamental with respect to the Federal Government and, particularly, to the electricity sector. Baraldi (2012) demonstrates that those who practice "creative accounting" may either underestimate provisions, when they want to artificially improve the results for the accounting period, or overestimate them, when they understand that a dramatically positive result may not repeat itself in the future. Making use of concepts of professional judgment, responsible subjectivism, and other principles, it may even find loopholes in the rule itself so as not to make the due disclosures.

Indeed, External Control needs to verify which premises Aneel is taking into consideration to classify the potential concession agreement terminations as "Probable," "Possible," and "Remote," especially in periods close to the last year of the agreement. Therefore, NBC T 11.15 (Contingencies Audit) provides the premises for verification by assessing the measurement criteria. The second procedure is to ascertain how Aneel is overseeing the constitution of the electric utilities' CVA balances and whether the Agency is monitoring compliance with the efficiency requirements established in the respective contracts. It is worth noting, according to Tancini (2013, p. 17), that Component *A* is based on the cost-plus regime. In other words, it is recovered entirely through tariffs and, in this case, promotion of efficiency tends to be impaired within the companies.

CONCLUSIONS AND FUTURE WORKS

The Federal Government's decision to compensate electric utilities was crucial for these entities to recognize unmanageable costs on their balance sheets, according to international accounting standards. Nevertheless, the electricity sector is very complex and is subject to all kinds of economic setbacks. Given that there are currently more than 60 contracts with electricity distributors approved by Aneel, the accurate accounting of these components is crucial, under penalty of losing control of public accounts.

Therefore, the Federal Government needs to adopt monitoring and control mechanisms to manage sectoral financial assets and liabilities. In this regard, it should be noted that even a potential "Remote" classification does not prevent the Government from providing access every year to the oversight of the sum of sectoral financial assets (and liabilities) of each and every company jointly. After all, the Constitutional principle of publicity must prevail over the non-obligation of disclosure, as provided in certain accounting rules cases.

Thus, the Federal Court of Accounts in the external scope and the Ministry of Transparency, Supervision, and Control; the National Treasury Office; Office of the Attorney General of the Federal Government; the Ministry of Mines and Energy; and Aneel in the internal scope, must adopt methodologies and techniques that enable assessment of how the unmanageable costs are being managed and accounted for within the most rigorous legal and accounting parameters possible. The purpose is to improve monitoring and control of this component of Assets.

Accordingly, we suggest future studies that can create consistent parameters, within the scope of the Government, to demonstrate whether a concession agreement may be terminated or not. In this sense, the metrics for classification of an eventual obligation of the Federal Government as either "Probable" "Possible," or "Remote" must be established. As for the electric utilities, it is necessary

to monitor which mechanisms are being adopted for the effective recovery of unmanageable costs in the following accounting periods, especially toward the end of the concession agreements.

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The 4 risks that weaken risk management

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ABSTRACT

Decree n. 9.203, of November 22, 2017, established principles, guidelines and mechanisms of governance at the direct, autarchic, and foundational federal public administration, and the risk management is essential to integrity and transparency, aspects which are essential for the administration. Despite all the theoretical and methodological consolidated benchmark, it has been observed that the practice of the process of risk management can be weakened due to risks that impact the full accomplishment and accuracy of the reports submitted to the controlling agencies and to the Brazilian society. This article aims at presenting the risks that jeopardize risk management and suggests preventive actions.

Keywords: Governance. Integrity. Risk management.

INTRODUCTION

Decree no. 9,203, of November 22, 2017, provides in its Article 4, Item VI, the guideline of 'implementing internal controls based on risk management, which will privilege strategic prevention actions before administrative proceedings'. Also in its Article 17:

> The senior management of organizations of direct, autarchic, and foundational federal public administration shall establish, maintain, monitor and improve risk management and internal control systems aiming at the **identification, evaluation, treatment, monitoring, and critical analysis** of risks that may impact the implementation of the strategy and achievement of the organization's objectives when fulfilling their institutional mission […] (BRAZIL, 2017, our bold types)

There is a set of frameworks, standards, or implementation guides to assist in the functionality of risk management. Among them, we note the *Orange Book*: *Management of risk - Principles and Concepts,* of the United Kingdom; *Committee of Sponsoring Organizations* (COSO) and the *International Organization for Standardization* ISO 31000 translated in Brazil according to the norms of the Brazilian Association of Technical Standards (ABNT). Whereas COSO is traditionally

oriented towards financial institutions, International Standard ISO 31000:2018 suggests a structure that is applicable to the most diverse profiles and, therefore, is more suited to the plurality of public organizations. Therefore, this article explores the sources of risk that weaken management under the perspective of rule 31000.

This rule provides guidelines to manage risks that have already been used at government agencies, which implementation model is divided into well-defined stages, as shown in Figure 1.

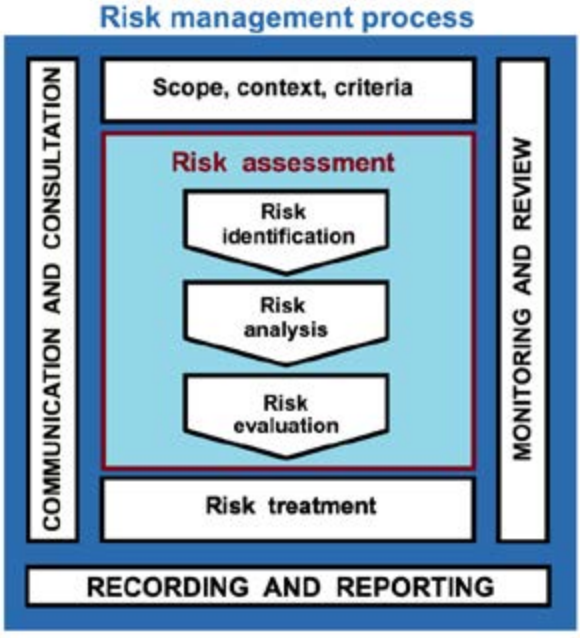

Figure 1: The risk management process.
Source Adapted from ABNT (2018)

Just as a construction, which, depends on a solid base obtained with quality materials, in order to be erected, the risk assessment process also depends on obtaining quality information at the initial stage of 'risk identification' to produce results that are truly useful to public managers. **The way in which several techniques concerning the recognition of risks is executed may lead to the production of incomplete or fraudulent reports.**

UNDERSTANDING RISK

The understanding of the concept of risk, though apparently trivial, often leads to erroneous strategies and rework when misinterpreted. The word 'risk' derives from the ancient Italian *risicare* and its meaning was to dare (BERSTEIN, 1997, pg. 8), in the sense of risk being an option and not a destiny whose events would depend on good or bad luck, without possibility of preventive actions.

The idea of risk has evolved with the statistics that allowed for the analysis of past events by calculating the probability of events recurring in the future under certain conditions. Thus, for example, if there is a background of a high quantity of robberies at a particular location and time in the city, it is possible to reduce the risk, or, in other words, reduce the probability of a

hazardous event occurring, by simply avoiding such area at those times. Therefore, it is not the case of predicting the future, but of scientifically analyzing the existing threats in relation to the vulnerabilities. Risk is not material or real, but a probability measure of something happening: when passing through an area with records of high rates of robbery at a certain time, for example, the 'risk of an incident is 90%'.

The two elements that constitute the **sources of risk** - threat and vulnerability (fragility) - can increase the chance of materialization of events - **consequence** - capable of jeopardizing the achievement of organizational strategic objectives.

> […] It is appropriate that risk should be described as the combination of the probability of an event (or danger **or source of risk**) and its **consequence.**
>
> The understanding that risk can have positive or negative consequences is a core and vital concept to be understood by the management. Risk may expose an organization to an opportunity as well as to a threat, or to both. (ABNT, 2015, pg. 8, our bold types)

The understanding that risk management strongly depends on the accuracy of risk identification, i.e., their vulnerabilities and threats, is essential for the successful outcome of the technique of collecting this information in the organizational environment. Normally, records of vulnerabilities receive greater detail than records of threats, since preventive or corrective actions can be more easily executed regarding the former. For example, the risk of skidding on rainy days can be reduced more easily by treating the vulnerability of bald tires rather than trying to reduce the threat of rain.

There are numerous techniques that can be used to identify risks. Many of these are described in the ISO/IEC ABNT Rule 31,010. Various organizations work with brainstorming, an activity where people are invited to report in groups, or fill out forms with the fragilities - normally internal - and threats - normally external - which they believe to be related to their work environments or processes into which they are inserted.

Many fragilities existing in the organizations are known only by the people who have worked there for years. They would hardly appear by using statistical techniques. This knowledge or wisdom, which is stored only in the minds of these people, is called **tacit knowledge** and needs to be transformed into **explicit knowledge** in order to be useful to management. Making explicit or documenting fragilities that lead to risks is the most valuable raw material, since it documents individual perceptions of the 'wrong things' existing in public organizations. The process of transforming this knowledge is outlined in Figure 2.

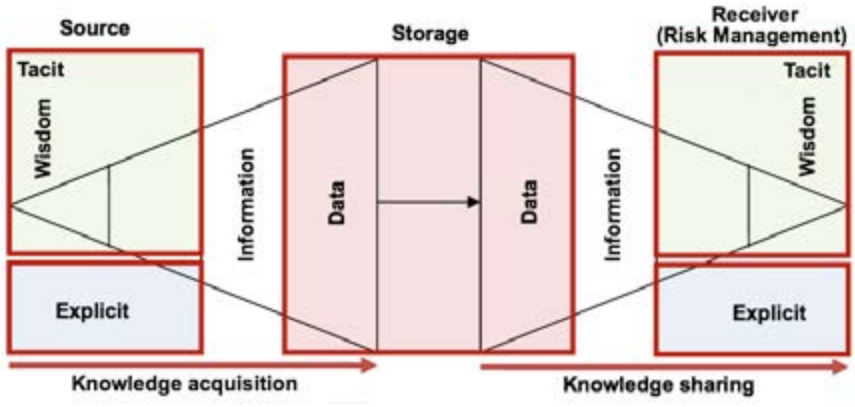

Figure 2: Transformation of tacit knowledge into explicit knowledge.
Source: Adapted from Kirsch, Hinem Maybury (2015, pg.66)

RISK AND INTEGRITY

Risk management should be used as a component of the integrity programs, since it has the power to reveal not only offenses previously categorized by legislation, but also other threats that are capable of jeopardizing the achievement of strategic objectives. Integrity is defined under Decree n. 9.203/2017 as one of the basic principles of public governance, and its relationship with risk assessment is shown in Figure 3.

Figure 3: Relationship between compliance, integrity and risk assessment.
Source Prepared by the author.

The term compliance is used to designate actions to mitigate risks and prevent corruption and fraud in organizations, regardless of the field of activity (SANTOS et al., 2012, pg. 1). In this sense, there is a continuous and worldwide effort of governments in the combat against corruption. The first anti-corruption compliance law emerged in the USA in 1977 and was called "Law on Corruption Practices Abroad (FCPA)". In 2011, the Bribery Act was approved in the

United Kingdom. In Brazil, several laws were created in this line:

- Law n. 7.492/1986 - Crimes against the National Financial System;
- Law n. 8.137/1990 - Crimes against the Taxation and Economic Order, and Consumption Relations;
- Law n. 8.429/1992 – Administrative Misconduct Law;
- Law n. 8.666/1993 - Procurement Law;
- Law n. 9.613/1998 - Crimes of Laundering or Concealment of Assets, Rights, and Values;
- Law n. 12.846/2013 - Anti-Corruption Law.

Integrity Program is defined under Administrative Rule n. 1,089, of April 25, 2018, of the Ministry of Transparency and Federal Office of the Comptroller-General (CGU), where guidelines for agencies and entities of the federal public administration are established:

> Article 2 For the purpose of this Administrative Rule, the following is considered:
>
> I - Integrity Program: a structured set of institutional measures concerning prevention, detection, penalty, and remediation of fraud and acts of corruption, in support of good governance; and
>
> II - Risks to integrity: risks that characterize actions or omissions that may encourage fraud or acts of corruption.
>
> […] (BRASIL, 2018).

In Figure 4 the **relationship between risk management and Integrity Program** is evident by the dependence of the latter in receiving from the former the list of risk events with a potential for materializing acts of corruption. Therefore, the possible actions that are damaging to the public treasury and that have not yet been detected in routine actions of control or audit - the integrity 'radar' - are unveiled by the ability that risk management has to bring to light sources of risk not yet made explicit in any organizational document.

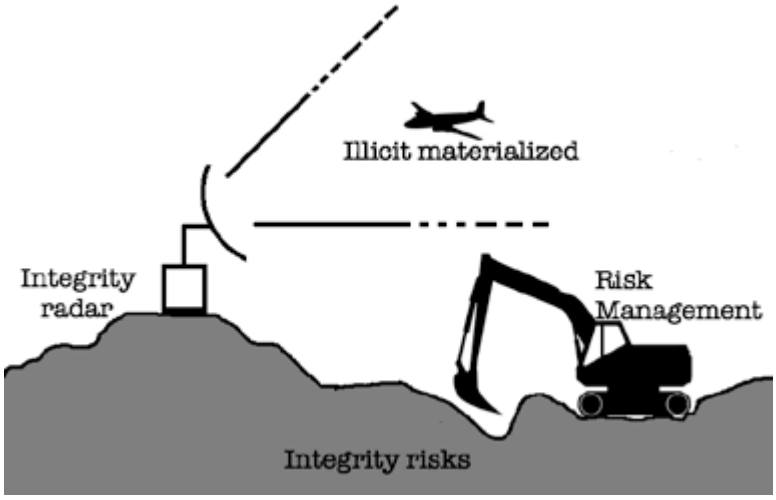

Figure 4: The integrity radar and risk management.
Source Prepared by the author.

RISKS TO RISK MANAGEMENT

As previously mentioned, the raw material for the risk assessment process is extracted at the identification stage, on which depend the subsequent stages of analysis, evaluation, and treatment. There is a set of sources of risks that renders their identification less efficient and contributes to **generating risks to their own management.** According to International Standard ISO 31000 (ABNT, 2018, pg. 2), 'source of risk is the element which, individually or combined, has the potential to originate the risk'.

The **first source of risk** arises when only bosses are heard in the identification process. Besides the natural tendency not to allow problems or fragilities existing under their responsibility to appear, the turnover in management posts leads them to not always know the details of their area of expertise as well as their subordinates do.

It suffices to open the Official Gazette any day in order to see the amount of commission posts that undergo dismissals and new appointments before, during, and after changes of government. The excessive managerial turnover not only destroys the value of the organization, but also goes against other ones. The efficient long-term relationships that were conquered are uprooted after the turnover, throughout the network of contacts, reducing loyalty, productivity, and destroying the value for the whole system. (REICHHELD; TEAL, 2001, p. 157).

In order to prevent this first factor from becoming a risk to management itself, it has been suggested that every 'factory floor' should be heard without any type of restriction, criticism or interference, since it is the great connoisseur of the vulnerabilities and threats existing in the labor activities.

The consequence of the use of of risk identification techniques that do not listen to all the subordinates, or which limit their participation, is the increase in the likelihood of risk management becoming incomplete and inefficient. Osborn (1963 apud Chapman, 2011, p. 175) is consistent with this thought when saying that during the exposure of ideas 'criticism should be discarded' and 'free thinking' encouraged.

The **second source of risk** stems from the use of a set of ready and closed-ended questions in forms or in interviews about the threats and vulnerabilities, which should be reported in the process of risk identification. Consequently, this reduces the organization's transparency for society, since it creates the possibility of incompleteness to the very process of risk assessment. Questions should not direct the thought of those who must pinpoint fragilities or failures. If, for example, when identifying the risks at a hangar, questions such as the following are put forward to the employees:

- Is the aircraft delivered revised and clean?
- Are the tires in good condition?

These questions direct the answers and do not allow freedom so that, for example, a mechanic is able to report the risk of a certain company often presenting their aircraft with fuel tanks almost empty after travel, indicating a probable nonconformity with the legislation that requires the maintenance of minimum levels of fuel to avoid incidents due to fuel exhaustion.

It is suggested that the **questions created for collecting tacit knowledge should be generic** (see Figure 2), not limiting the collaborators' responses, and should preferably follow a division of risks into categories (taxonomy) to stimulate thought in diverse areas where risks may arise: technology, people, budgeting and financial, operational, ethics, internal environmental, and external events. For Gupta (2016, pg. 5), it's essencial the understanding of the correctly identified sources of risk supported by a risk taxonomy that assists in measuring the impacts caused in case they materialize.

The **third source of risk** that jeopardizes the management itself arises where there is not enough support from the senior management, or when there are psychological sabotages in the form of open criticism to the work of risk identification. Resistance is expected during the implementation of any new procedure, since meetings, training sessions, completion of forms, or learning new systems require time previously destined for other activities. If bosses criticize the new procedures in front of their subordinates, thus discrediting the relevance of the work, those who hear these criticisms will not feel inclined to collaborate in identifying fragilities never exposed before.

For proactive reduction of this source of risk, it is suggested that senior management support the creation and maintenance of a culture of risk, where bosses and subordinates are made aware of the benefits that this management will bring for the improvement of the quality and safety of their own work environments. In this sense, Hillson (2016, p. 36) confirms that the real barriers to the implementation of risk management relate to people and not necessarily to the methodology or software. In relation to the senior management's frequent tone of support (top-down), **he also says 'more than empty words, it should be backed up by consistent and vigorous reinforcement actions'.**

The **fourth source of risk** may arise when the agency's risk management policy determines that the teams responsible for pinpointing the risks should also indicate solutions to mitigate them. In accordance with the Joint Normative Instruction n. 1 of May 10, 2016 (Brazil, 2016), the agencies and entities must institute risk management policies:

> […]
>
> Article 17. The risk management policy to be instituted by the agencies and entities of the Federal Executive, within twelve months from the publication of this Normative Instruction, shall specify at least:
>
> I - organizational principles and goals;
>
> II - guidelines on:
>
> how risk management will be integrated into the strategic planning, the
>
> processes and policies of the organization;
>
> (b) how and how often risks will be identified, evaluated, addressed, and monitored;
>
> (c) how risk management performance will be measured;
>
> (d) how the different levels of the agency or entity responsible for the risk management will be integrated;
>
> (e) the use of methodology and tools to support risk management; and
>
> (f) the continuous development of public agents in risk management;
>
> […]

The risk management policy is the first and foremost step towards the institutionalization of this management, since it offers support to the professionals that work in the area of risks to perform all the actions necessary to this management cycle.

Just as a *chef*, upon noticing the risk of a leakage from a tap, might not have the necessary skills to correctly assess the causes and the respective treatment of the risk, it is also likely that the servers of a public organization will not feel comfortable recording risks if they are jointly obliged to give guidance on the treatment of something beyond their expertise. This brings the damaging consequence to the process of identifying risks of omission in exposing the threats or vulnerabilities that generate them.

It is suggested that, during the creation or update of each public agency's or entity's risk policy, due **care should be taken to ensure that its wording does not discourage the process of risk identification,** i.e., that those responsible for identifying them are not automatically also made responsible for their correction, which, not rarely, requires multidisciplinary knowledge.

CONCLUSION

Risk management has become essential to public organizations due to its ability to identify threats and fragilities before they materialize into incidents capable of jeopardizing the achievement of strategic objectives, bringing damage to the public treasury and to Brazilian society. Despite all the recent legislation and every effort to put risk management and integrity programs into operation, there is margin for risks to management itself that bring a succession of damaging consequences: they reduce transparency, weaken integrity, and, forcibly, render governance less effective.

Management reports delivered to control agencies usually produce a generic vision of the risk management performance, without taking into consideration the details of the implementation of the identification process, a critical step to the management cycle, and from where the documented risks emerge. The four sources of risk that have been presented may be reduced by public management based on the suggestions outlined in this article.

Finally, future studies to create rules that guide to best practices of risk management operationalization can be a contribution to control agencies far beyond the analysis of content, but mainly to the way risk identification is performed as a major factor of reducing risks to their own management.

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Restitution of the proceeds of wrongdoing in the court-supervised reorganization and bankruptcy proceedings

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ABSTRACT

In a context where the court-supervised reorganization petitions of companies involved in corruption schemes are being granted, with considerable chances of conversion from reorganization to bankruptcy, this article analyzes how the restitution of the proceeds of wrongdoing should occur in the court-supervised reorganization and bankruptcy proceedings. Such analysis is carried out by clarifying the main aspects and effects of confiscation on bankruptcy law, adjusting the doctrines of Law n. 11.101 / 2005, without affecting the internal coherence of its system. Based on this analysis, we conclude that the forfeiture of the proceeds of wrongdoing, as an immediate result of a judgment or a settlement applying such sanction, because it constitutes a true transfer of ownership in favor of the State, produces the exclusion

of such values from the scope of the court with exclusive jurisdiction over the bankruptcy estate. Therefore, they must be promptly restituted, by means of the proceeding analogous to the one established in Articles 85 to 93 of Law n. 11.101 / 2005.

Keywords: Economic Criminal Law. Court-supervised reorganization. Bankruptcy. Proceeds of wrongdoing. Confiscation. Ownership interest.

INTRODUCTION

Originally aimed at the protection of credit and preservation of the company's activity (SALOMÃO FILHO, 2007, p. 43), Law n. 11.101 / 2005 did not anticipate that part of the assets and values initially held by companies in court-supervised reorganization or bankruptcy procedures could be the proceeds of wrongdoings by their agents in the performance of their business activities. The legal text has therefore not clearly stated how such values should be restituted in these procedures.

This legal gap is especially problematic in the context where the court-supervised reorganization petitions of companies involved in corruption schemes are being granted[1], with considerable chances of conversion from reorganization to bankruptcy[2]. The main issue is that the effectiveness of the restitution of the illegally obtained values, aimed at discouraging these corruptive practices, in a literal reading, would be counter to the rules and proceedings of the court with exclusive jurisdiction over the bankruptcy estate.

Thus, in these situations and in all other cases when the company has unequivocally committed wrongdoings, the question is if the values corresponding to the proceeds of wrongdoing must be subject to the general legally established patrimonial management rules for court-supervised reorganization and bankruptcy. Alternatively, does the legal system impose a diverse treatment for this amount in relation to the credits dealt with by Law n. 11.101 / 2005? Which legal construction, from the systemic point of view, provides a better solution to fill that gap?

In view of these issues, this paper aims to analyze in detail the effects of the confiscation or forfeiture of goods and values that constitute proceeds of wrongdoing in the court-supervised reorganization and bankruptcy procedures, trying to check and promote their consistency with the doctrines of Law n. 11.101 / 2005, without affecting the internal coherence of its system. In order to facilitate the understanding of the legal problem, we adopt the background the specific hypothesis of companies in which: (i) the confiscation of the undue advantages obtained by means of corruption schemes has been determined, and (ii) a court-supervised reorganization or bankruptcy procedure is underway.

Based on extensive study of the legal categories involved, the conclusion is that, because it represents actual transfer of ownership in favor of the State, the forfeiture of the proceeds of wrongdoing as a direct result of a judgment or a settlement applying such sanction, affects the exclusion of such values from the scope of the court with exclusive jurisdiction over the bankruptcy estate. Therefore, they must be restituted promptly, whether by means of the proceeding analogous to the one set forth in Articles 85 to 93 of Law n. 11.101 / 2005 or by way of a third-party motion, provided for in the Code of Civil Procedure.

In order to achieve the proposed goal, the paper examines in the following chapter the nature and legal contours of the confiscation or forfeiture doctrine, as well as its immediate legal consequences for the other spheres of law. Next, the repercussions of the confiscation in the scope of the bankruptcy law and of the court with exclusive jurisdiction over the bankruptcy estate are investigated.

ASPECTS OF CONFISCATION OR FORFEITURE OF THE PROCEEDS OF WRONGDOING

Although the confiscation or forfeiture of the proceeds of wrongdoing is a legal doctrine widely used to carry out the preventive and punitive functions of the State, little is said about the juridical contours of such doctrine in its interconnection with other spheres of law. For this reason, this chapter proposes to clarify these contours, further outlining specificities of the situations of confiscation set forth for fighting corruption.

LEGAL CONTOURS AND EFFECTS OF THE CONFISCATION OF THE PROCEEDS OF WRONGDOING

In a risk society (BECK, 1998), the vast damaging potential of the economic and property crimes[3] urges the design of an effective criminal policy to fight them. For this reason, the Criminal Law has been forced to reformulate its traditional model of imprisonment to attack the true motivation of these crimes: the unlawful profit. In this context, the confiscation or forfeiture[4] of the proceeds of wrongdoing[5] showed to be the most adequate and efficient instrument to deter these illicit practices in the sense that the economic theory of crime prescribes (BECKER, 1992), by precisely capturing the undue advantage obtained that way[6][7].

This is especially true in the case of criminal organizations that use legal entities to carry out and organize their activities[8], since the consolidation of unlawful patrimonial situations, in spite of the orders for detention of the individuals involved, maintains the stimulus to the continuity of these practices. It also sends signals to the other individuals of the society that it is advantageous to engage in these types of crime, if compared to the lawful conduct, further considering also the shielding of assets provided by the establishment of the company[9]. Moreover, this situation allows this unlawful profit to circulate, stimulating other crimes and practices discouraged by the State.

It is in this context that the cases of confiscation and forfeiture of the proceeds of wrongdoing have multiplied in the Brazilian legal system, both as an effect of a conviction and as a sanction, reaching far beyond the Criminal Law[10].

As for its definition, confiscation is a legal act through which the compulsory expropriation of assets and values unlawfully incorporated into the property of the wrongdoer is carried out, without the right to any indemnification (NUCCI, 2017, p.1027), according to the conceptions in the law and the opinion of jurists, as set out below:

> The punishment of confiscation therefore has the legal nature of a pecuniary punitive sanction in so far as reaches **the ownership interest of the convict, imposing a reduction of property by means of the partial or total loss of their assets, creating an obligation to surrender them to the State.** (CORRÊA JÚNIOR, 2006, p. 38)

> "Confiscation" shall mean the **permanent deprivation of property** by order of a court or other competent authority (Article 2 (b) of the United Nations Convention against Corruption)

Thus, the main conclusion drawn from the above is that the transfer of ownership of the specified assets and values to the Government takes place at the very moment of the conviction, act or agreement that anticipates its effects. So much so, that the civil-law doctrine understand confiscation as a special case of loss of ownership, subject to the legal regime of public law (PEREIRA, 2017, p. 223). In other words, the amounts related to the proceeds of wrongdoing,[11] which were subject to the confiscation, are no longer considered assets of the wrongdoer from the specified moments, becoming the property of the State.

It is therefore a State ownership right, which is not confused with the right to credit arising from business acts. Therefore, as a prerogative of its constitutionally protected ownership right, the State is responsible for proposing the applicable provisional remedies to guarantee the inalienability and proper restitution of these amounts[12], even if they have been converted into other licit assets and values[13] or affect successors[14].

All these specificities apply indiscriminately to the cases of confiscation of the proceeds of wrongdoing related to corruption, which will be analyzed in more detail below in this paper, as an illustration.

2.2. CONFISCATION OF THE PROCEEDS OF WRONGDOINGS RELATED TO CORRUPTION

In the context of corruption-related crimes, the confiscation of the proceeds of wrongdoing is provided for both in the international legal system and in national law.

For considering acts of corruption as practices widely discouraged by the international community, the United Nations Convention against Corruption[15] provided the confiscation of the proceeds of wrongdoing as an indispensable punishment to be adopted by the domestic legislation of the signatory countries. It also demanded the adoption of all necessary measures to make this confiscation feasible, such as the freezing, seizure of the respective assets, and any other means that ensure its free disposition by the lawful owners:

> Article 31 - Freezing, seizure and confiscation
>
> 1. Each State Party shall take, to the greatest extent possible within its domestic legal system, **such measures as may be necessary to enable confiscation of:**
>
> (a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;
>
> 2. Each State Party shall take such **measures as may be necessary to enable the identification, tracing, freezing or seizure** of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.
>
> 3. Each State Party shall adopt, in accordance with its domestic law,

> such **legislative and other measures** as may be necessary to **regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.** (...)
>
> Article 53 - Measures for direct recovery of property
>
> Each State Party shall, in accordance with its domestic law:
>
> (c) Take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to **recognize** another State Party's claim as a **legitimate owner of property** acquired through the commission of an offence established in accordance with this Convention.
>
> Article 57 - Return and disposal of assets
>
> 1. Property confiscated by a State Party pursuant to article 31 or 55 of this Convention shall be disposed of, **including by return to its prior legitimate owners,** pursuant to paragraph 3 of this article, by that State Party in accordance with the provisions of this Convention and its domestic law.
>
> 2. Each State Party shall adopt such legislative and other measures, in accordance with the fundamental principles of its domestic law, as may be necessary to **enable its competent authorities to return confiscated property,** when acting on the request made by another State Party, in accordance with this Convention, taking into account the rights of bona fide third parties.

Since the opinion of jurists concerning the control of conventionality of laws (MAZZUOLI, MARINONI, 2013; FERREIRA, 2015; CONCI, 2014) set the understanding adopted by the Federal Supreme Court from RE 466.343 that the domestic legislation of the State signatory to international treaties and conventions must be in conformity with the provisions and objectives of these treaties and conventions, the Brazilian legal system cannot forgo adopting their provisions. This conformity involves not only the already provided events of confiscation of the proceeds of corruption-related wrongdoings (in the Anti-Corruption Act of 2013[16] and the Misconduct in Public Office Act[17]) (DI PIETRO, 2017, p 248)[18], but also the harmonization with the international guidelines of the laws previous to the internalization, such as the Court-supervised Reorganization Act of 2005.

In fact, once an adverse judgment is rendered against companies involved in corruption schemes in which the loss of the proceeds of wrongdoing is recognized, or an act or agreement that anticipates its effects occurs, the amounts that they have received as a result of corruptive practices no longer belong to them. Examples of such amounts are the amounts referring to the surcharge and to the profit of an administrative contract that would not have been obtained without collusion, in the context of acts of corruption involving damage to the treasury.

In addition, the transfer of ownership as a result of confiscation produces immediate legal consequences for all other legal spheres and judicial instances, including for the court with exclusive jurisdiction over the bankruptcy estate in which the court-supervised reorganization or

bankruptcy procedure of the convicted company is pending[19], under penalty of disrespecting the systemic nature of the legal system, in addition to producing inconsistencies and even ineffectiveness of the measures aimed at disincentives of unlawful acts, such as corruption. In this sense, the following chapter discusses the consequences on the court of the court-supervised reorganization and bankruptcy.

CONSEQUENCES OF CONFISCATION OF THE PROCEEDS OF WRONGDOING IN THE COURT-SUPERVISED REORGANIZATION AND BANKRUPTCY PROCEDURES

To investigate the effects of confiscation on the provisions of Law n. 11.101 / 2005, first a brief consideration on (i) the interrelationship between the constitutional limits of the enjoyment of the ownership right, and the social function of the company, (ii) the distinction between ownership right and credit rights and (iii) the claim that "money has no smell". Then, we address the repercussions of confiscation in the court-supervised reorganization and bankruptcy procedures.

CONFISCATION OF THE PROCEEDS OF WRONGDOING, OWNERSHIP RIGHT AND SOCIAL FUNCTION OF THE COMPANY

The transfer of ownership of the proceeds of wrongdoing through confiscation in the situations presented herein is in line with the process of ensuring the public interest of the ownership right (PEREIRA, 2017, p.90). In other words, the free disposition of private property must yield to certain limits, beyond which considerable harm is inflicted on society, or it ceases to produce desirable social benefits, and the use of the private property must seek to converge to the social function[20] that is expected.

Thus, there are no constitutional grounds for safeguarding the ownership right when it is used as a subterfuge to commit crimes or wrongdoings[21], since these practices do not serve the social function to which the ownership is destined. For this reason, it is not possible to raise a defense against the state confiscation with respect to everything that is acquired by unlawful means[22].

When it comes to corporate ownership, the legal issue gains new and more complex contours[23]. because when criminal or civil liability is attributed to a company for commitment of wrongdoing, it is not the property of partners and shareholders that is subject to confiscation, but rather the property of the legal entity, who concentrates, by legal fiction, the ownership of the assets and rights registered in its accounting records. The ownership of these partners and shareholders is only indirectly affected[24].

Thus, confiscation of corporate assets aims to limit both the business ownership right and the exercise of economic activities that do not fulfill their social function related to the performance of unlawful activities. Therefore, the company has no right to use, enjoy, dispose of and claim the proceeds of the wrongdoing, as of a conviction that recognizes the unlawfulness of part or the whole of its activities, or as of the act that anticipates its effects.

These findings have direct repercussions on bankruptcy law, since they imply a clear restriction on the power of the company, the court with exclusive jurisdiction over the bankruptcy estate, the bankruptcy trustee, and the creditors' meeting to dispose of the assets and values related to the

proceeds of wrongdoing, even though Law n. 11.101 / 2005 has conferred on them the powers to do so with the property of the company. In fact, once the proceeds of wrongdoing cease to constitute property of the company in crisis, there is no point in considering their submission to the proceedings specific to the court-supervised reorganization and bankruptcy procedures.

That is the case inasmuch as the prerogative of the company to file a reorganization petition in order to overcome crises and the prerogative of creditors to request the adjudication of bankruptcy to receive credits is only possible in the context of the lawful activities of the company, in line with its social function. With regard to unlawful activities, the company is socially unviable, and for that reason the risk of the activity cannot be transferred to the public entity directly aggrieved by these activities under the pretext of overcoming crises, in the same way that the economic unviability does not allow the transfer of risk to creditors.

To analyze the social importance of the company means to verify the importance that their activity has in the local, regional, or national economy. The idea is that the more relevant the company, the more important it will be to seek to overcome the crisis and maintain the activity. The greater number of interests surrounding the company justifies greater efforts in the search for reorganization, since the closure of a socially important company generates significant social losses. If the company practices unlawful activities, its social importance is counterbalanced by the social damages that it generates, and that is the reason why this portion should not be subject to court-supervised reorganization. Only viable companies are able to justify the sacrifices that will have to be made by creditors in the court-supervised reorganization, since the creditors will only make such sacrifices to protect more relevant interests. Thus, the court-supervised reorganization should only be used for viable companies.

Thus, just as in a procedure of liquidation of assets due to nonbusiness bankruptcy a stolen car must be returned after its confiscation with full preference to the real owner in relation to all other creditors of the wrongdoer, the State must have preference over the other classes of creditors of the company that is being reorganized or bankrupt. In other words, it would not be legitimate to pay employees and suppliers with “assets” derived from unlawful activities that do not meet the social function of the company, preventing the prompt restitution of such amount. That would violate the prerogative of the aggrieved Public Entity to recoup such amount from whoever unlawfully holds values of its property or detains them without title.

DISTINCTION BETWEEN OWNERSHIP RIGHT AND CREDIT RIGHT

In another respect, the ownership right of the Union is in no way confused with the rights of the other creditors of the company being reorganized or the bankrupt estate. Unlike the proceeds of wrongdoing, such credits are generally the result of business activities and normally fall within the list of creditors. These business creditors had the opportunity not only to assess the risk of a financial crisis that would lead the company against which credit was created to undergo a court-supervised reorganization or bankruptcy procedure, but also to price that risk, for example, by means of negotiated interests and required collateral. Caio Mário when analyzing the confiscation has already clarified this understanding:

> [...] the cessation of the ownership legal relationship for the dominus, and the

> integration of res in the state wealth. **It is not, therefore, a legal transaction, nor is it a purchase and sale (since it is forced), but a public law act generating the effect of the transfer of ownership.** (PEREIRA, 2017, p. 223)

The fundamental distinction is that workers, banks, suppliers, and other creditors of the company have never ruled out the possibility of mismanagement or financial crises leading to the filing of a court-supervised reorganization or bankruptcy petition. In the case of the Government, it could not anticipate either the practice of wrongdoings, such as corruption, or the possibility of not obtaining restitution for the proceeds of these wrongdoings, because of the granting of a court-supervised reorganization petition or the adjudication of bankruptcy of a company whose directors were convicted of such crimes.

In face of these specificities, there is no disregard for the principle of universality of the bankruptcy court, which means that all the creditors of the bankrupt, whoever they were, should concur at the court with exclusive jurisdiction over the bankruptcy estate, for the restitution of the proceeds of wrongdoings would not properly be a credit. Nor is there any distortion of the legal order of preferences among creditors, by favoring the more agile, since the right of restitution of the Government derives from its ownership right and not from a credit right.

MONEY HAS NO SMELL

Any benefit directly or indirectly obtained from corruptive practices is subject to be measured and restituted to the Public Power. In Criminal Case n. 5083351-89.2014.4.04.7000, an excerpt from the judgement deconstructs the argument that there would be hindrances to the restitution in cash of the values referring to the proceeds of wrongdoing, as quoted below:

> 396. There is no point in affirming that laundering has not occurred because the resources were lawful. If the company got the contract with Petrobrás through crimes of cartel and bid rigging**, the amounts paid under the contract constitute proceeds of these very crimes. Crimes do not generate lawful results.** [...]
>
> 400. In this case, however, the bribe destined to corrupting the Supply Office was **paid with dirty money, coming from other previous crimes, herein identified as cartel crimes** (art. 4, I, of Law n. 8.137 / 1990**) and bid rigging** (art. 90 of Law 8.666 / 1993)[25].

Regarding assertions that it is impossible to recover the proceeds of wrongdoing because of its pecuniary nature, under the saying that “money has no smell”, it must be clarified that the very Law n. 11.101 / 2005 provides for hypotheses in which this restitution occurs in monetary form and not by returning a specific asset. Among these hypotheses, one can cite the right to restitution of assets that no longer exist at the time of the request (article 86, item I, of Law n. 11.101 / 2005) and of the amounts paid to managers of consortiums and of values resulting from the advance on foreign-exchange contracts for exports (article 86, item II, of Law n. 11.101 / 2005).

Lastly, we should mention the restitution claim in cases of money held by the bankrupt of which they

cannot dispose. In certain cases, by virtue of the law or even of a contract, the bankrupt has money in their hands but cannot dispose of it and, therefore, restitution will be admissible. Such an event very much resembles the general restitution claim, but involves the ownership of the deposited money.

EFFECTS ON COURT-SUPERVISED REORGANIZATION

In the context of the court-supervised reorganization procedure, the main effect of the transfer of title of the amounts related to the proceeds of wrongdoing is the recognition that they cannot be part of the reorganization plan, since they do not constitute property of the company being reorganized.

Accordingly, such amounts should not even be included in the reorganization petition as a credit, under the terms of article 51, item III, of Law n. 11.101 / 2005, since items I and II of that article require that the real wealth of the debtor be shown, through the financial statements, not including the assets and values owned by the Union:

> Art. 51. The reorganization petition shall be accompanied by:
> I - an explanation of the real causes of **debtor's wealth** and of the reasons for the economic and financial crisis;
> II - the financial statements related to the last 3 (three) fiscal years and those specially prepared to instruct the petition, made in strict compliance with the applicable corporate law and necessarily composed of:
>
> a) balance sheet;
> b) statement of retained earnings;
> c) income statement since the last fiscal year;
> d) management report of cash flow and of its projection;
>
> III - the complete nominal list of creditors, including those for obligation to do or to give, with the indication of the address of each one, the nature, the classification and the adjusted value of the credit, distinguishing its origin, the respective maturity regime and the indication of the accounting records of each pending transaction;
>
> Art. 53. The reorganization plan shall be submitted in court by the debtor within the non-extendable term of 60 (sixty) days from the publication of the order granting the processing of the court-supervised reorganization process, under penalty of conversion from reorganization to bankruptcy, and shall contain: [...]
>
> II - demonstration of its economic viability; and
> III –a report of economic-financial nature and of appraisal of the **goods and assets of the debtor,** signed by a duly licensed professional or by a specialized company.

In this circumstance, the court-supervised reorganization procedure should not be able to manage assets and values owned by the Union. It should not be able to distribute them with primacy to other creditors to make it possible to overcome the economic and financial crisis of the debtor, in order to allow the maintenance of its source of production, labor claims and the

interests of creditors, by means of the proceeds of wrongdoing.

This is because, as already outlined, the preservation of the company, its social function and the stimulus to economic activity must be promoted through financial sources and profit margins derived from lawful activities of the company and not through those values resulting from unlawful activities, largely discouraged and fought by the international community and the national legal system.

Under the same logic of respecting the ownership right of third parties, Superior Court of Justice precedents have also ruled that it is not up to the court of the court-supervised reorganization to decide on the search and seizure of third-party agricultural products deposited in the warehouse of a company being reorganized. The restitution of these products must therefore occur in the terms determined by the civil court with jurisdiction to preside over and judge the *actio depositi directa*:

> CIVIL PROCEDURE. POSITIVE CONFLICT. *ACTIO DEPOSITI DIRECTA.* ADMISSIBILITY. SEARCH AND SEIZURE ACTION. GENERAL WAREHOUSE. CLASSICAL DEPOSIT OF FUNGIBLE GOODS. TYPICAL CONTRACT. DIFFERENTIATION OF ATYPICAL DEPOSIT. SOYA GRAINS. RESTITUTION NO SUBMISSION TO THE COURT OF THE COURT-SUPERVISED REORGANIZATION. JURISDICTION OF THE COURT OF THE JURISDICTION CHOSEN IN THE CONTRACT. DECREE 1.102 / 1903. LAW 9.300 / 2000. DECREE 3.855 / 2001. CIVIL CODE, ARTS. 627 AND FOLLOWING. LAW 11.101 / 2005. PRECEDENT 480/STJ. [...] 7. **It being, accordingly, property of a third party whose title was not transferred to the company being reorganized is not subject to the regime established in Law 11.101 / 2005.** Incidence of Precedent 480 of the STJ. 8. Conflict of jurisdiction entertained to declare the jurisdiction of the Court of Law of the 5th Civil Court of São Paulo. The present case is similar, and it is necessary to establish the same legal solution regarding the determination of the court with jurisdiction over the judgment of this demand. In view of the foregoing, I entertain the present conflict of jurisdiction to declare the COURT OF LAW OF THE 8th CIVIL COURT OF UBERLÂNDIA - MG with jurisdiction to preside over and judge the action of depositi directa n. 0788488-56.2015.8.13.0702 filed by ABC INDÚSTRIA E COMÉRCIO S/A ABC INCO and, consequently, to determine any measures related to the assets discussed therein. The judicial authorities in conflict must be informed and the parties must be given notice of this decision. Brasília (DF), May 23, 2017. JUSTICE PAULO DE TARSO SANSEVERINO Judge-Rapporteur.

The precedents of the State Justice Courts have also been respecting the right of third parties in the sphere of court-supervised reorganization and bankruptcy as, for example, in the case where the 26th Civil Chamber of the State Justice Court of Rio de Janeiro upheld a judgement that ordered the company to refund an amount improperly debited from a client. It is worth analyzing the *ratio decidendi* for this judgement:

> It is clear that while the company is being reorganized, any payment due to the creditors must observe what is defined by the wills of the debtor and creditors in an environment of extensive debate. Otherwise, a differential treatment

> would be conferred to a certain creditor to the detriment of the others who are equated to the first. It is certain that the legal means for this is related to the proof of claim, whether timely or not, according to art. 7 of Law n. 11.101 / 05.
>
> Yet, **the present case reveals an exceptional situation which, as such, also deserves differential treatment.** The company being reorganized recognized and confessed that the amount of R$ 16,721.85 (sixteen thousand, seven hundred and twenty-one reais and eighty-five cents **was unduly subtracted from the legal sphere of the appellee.** The "systemic" error confessed by the company being reorganized**, justifies the upholding of the judgement, under penalty of a greater evil that could compromise the financial health of the creditor, who did not contribute to the situation revealed by the record**.

Likewise, the effects of the confiscation arise from the undue subtraction of amounts from the juridical sphere of the aggrieved Government, recognized by the judgment that determined the confiscation or by the negotiating act, which anticipates such effects.

Another situation in which the immediate restitution of the values is determined, without them being integrated into the bankrupt estate, is that of the appropriation of assets. According to art. 31-F of Law n. 4.591 / 1964, with the new wording of art. 53 of Law n. 10.931 / 2004, "the effects of the adjudication of business or nonbusiness bankruptcy of the real estate developer do not reach the assets appropriated for a certain purpose, and the land, accessions and other assets, credit rights, obligations, and charges subject to the development do not integrate the bankruptcy estate". This consequence is due to the provision that the assets and rights submitted to the appropriation regime "will remain separated from the property of the developer and will constitute appropriated assets, destined to the achievement of the corresponding real estate development and the delivery of the real estate units to the respective purchasers".

In a similar situation, the Superior Court of Justice sustained to promisor-buyers of a real estate unit whose person in charge of construction was declared bankrupt the right to restitution of the installments paid:

> SPECIAL APPEAL - ARTS. 1.062 OF THE CIVIL CODE OF 1916 AND 1 OF DECREE-LAW 86.649 / 81 - ABSENCE OF PREQUESTIONING, AND FILING OF A MOTION FOR CLARIFICATION FOR SUCH PURPOSE - APPLICATION TO THE CASE OF PRECEDENTS N. 282 AND 356 OF STF - ACTION FOR DAMAGES PECUNIARY AND NONPECUNIARY LOSSES - PROMISE OF PURCHASE AND SALE OF REAL ESTATE UNDER CONSTRUCTION SIGNED WITH THE BANKRUPT COMPANY ENCOL, WITH THE PARTICIPATION OF THE SUCESSOR CARVALHO HOSKEN - UNILATERAL TERMINATION OF THE CONTRACT BY CARVALHO HOSKEN AND TRANSFER OF THE REAL ESTATE TO A THIRD PARTY - **RETURN IN WHOLE OF THE INSTALLMENTS PAID BY THE PROMISOR-BUYER AND RESTITUTION OF THE STATUS QUO ANTE** - NEED - PRECEDENTS OF STJ - SPECIAL APPEAL DENIED. I - The matters related to arts. 1.062 of the Civil Code of 1916 and 1 of Decree-law n. 86.649 / 81 were not addressed by the appealed decision and no motion for

> clarification was filed demanding a decision by the State Appellate Court on such matters. So, the necessary prequestioning is absent, being applicable Precedents 282 and 356 of STF; II - The return in whole of the amounts paid due to the termination of the promise of purchase and sale of real estate under construction signed with the bankrupt company ENCOL, with the participation of the appellant CARVALHO HOSKEN, is not admitted only in the event forbearance or nonpayment by the purchaser of the real estate restituted to the constructor who, as a refund for the administrative expenses, is entitled to a percentage of the amount paid.; III - In the case, however, the plaintiff/appellant made the full payment of the real estate even before the term established for its delivery and the default was by the appellant CARVALHO HOSKEN, who unilaterally terminated the promise of purchase and sale of real estate and transferred the property to a third party, and the plaintiff/appellee received nothing; IV - **Thus, it is nonsense that the appellant, which expressly assumed the obligations of the developer ENCOL, becoming both a developer and a constructor, retains part of the installments paid, since it was such part that gave rise to the termination. Precedents.** V - Special appeal denied[26].

In light of the principles and objectives of the court-supervised reorganization, the precedents of the Superior Court of Justice have been acknowledging the jurisdiction of the court presiding over the court-supervised reorganization only for any measure that may affect the property of the companies being reorganized, given its universality and indivisibility. It should be noted, that such attractive force only occurs from the decision granting the processing of the reorganization[27] and lasts until the end of the procedure.

On the subject, Justice Castro Meira said:

> In this case, the fate of the defendant company's property in the procedure of court-supervised reorganization cannot be reached by decisions rendered by a court other than that of the Reorganization, otherwise the operation of the place of business would be prejudiced, jeopardizing the success of the reorganization plan. That is the case even if the legal term of suspension provided in Paragraph 4 of art. 6, of Law n. 11.101 / 05 is exceeded, otherwise it would violate the principle of business continuity[28].

In the same vein, Justice Luis Felipe Salomão said:

> [...] is consolidated within the Second Section of this Court, which recognizes that it is the court where the court-supervised reorganization is presided-over that has jurisdiction to judge the cases in which **interests and assets of the company being reorganized are involved,** including for the continuation of the execution actions, even if the credit is prior to the granting of the court-supervised reorganization, and must therefore submit to the plan, otherwise it will make the reorganization[29] unviable.

The very STF declared:

> Thus, in the bankruptcy procedure there is the court with exclusive jurisdiction over all claims and issues related to the estate, which attracts all actions that may affect the property of the company in the bankruptcy or court-supervised reorganization procedure. In short, it is the court with jurisdiction to preside over and judge all the demands that require a uniform decision and to be binding *erga omnes*[30].

This attractive force, however, is not the same as the bankruptcy one. It should be interpreted more narrowly, that is, the court for the reorganization will have jurisdiction to decide on the issues that may affect the property of the debtor being reorganized, that is, only the assets belonging to this very debtor. It is also for this reason that the Superior Court of Justice issued Precedent 480, which states that "*the court with jurisdiction over the court-supervised does not have jurisdiction to decide on the constriction of assets not covered by the company's reorganization plan*", in the sense that property other than that of the company being recovered should not be managed by the court with jurisdiction over the reorganization. Thus, proceeds of wrongdoing that do not belong to the debtor being reorganized will not be subject to the reorganization procedure, nor to the respective court.

In cases of eviction lawsuits (asset belonging to the lessor and not to the debtor being reorganized), STJ has been repeatedly recognizing the lack of jurisdiction of the reorganization court, stating that "*the eviction lawsuit filed by the lessor owner against a company being reorganized is not subject to the jurisdiction of the court where the reorganization is pending*"[31]. The same reasoning applies to the proceeds of wrongdoing committed by the debtor, since those proceeds do not belong to them. They are property of the Union, due to the confiscation arising from a judgement or a settlement that anticipated such effects.

The restitution of the amounts that constitute the proceeds of wrongdoing, that are not part of the court-supervised reorganization, could occur both according to the proceeding set forth in articles 85 to 93 of Law 11.101 / 2005 and through the procedural instrument of third-party motion to stay execution, provided for in Articles 674 or 681 of the Code of Civil Procedure:

> Art. 93. In cases in which a restitution claim is not applicable, the right of the creditors to file a third-party motion to stay execution is ensured, observing the civil procedural law.

As in court-supervised reorganization, the restitution of the proceeds of wrongdoing is applicable in bankruptcy procedure as will be explained in the following section.

EFFECTS ON BANKRUPTCY

The collective nature of bankruptcy means that it comprehends all the creditors of the bankrupt and should also comprehend all of the bankrupt's assets. In order to collectively satisfy the creditors, the assets of the debtor must be gathered and subject to the bankruptcy procedure. All existing assets of the bankrupt, or those eventually acquired during the bankruptcy process, are subject to the bankruptcy procedure.

Since the property of the debtor assures the fulfilment of their obligations (CPC / 2015 - art. 789) and in bankruptcy there shall be an attempt to pay all the obligations of the bankrupt, the natural consequence is that all of their property must be subject to the bankruptcy procedure. However, such a rule admits that the law provides for restrictions, that is, certain assets may be excluded from the reach of creditors. In this regard, article 832 of CPC / 2015 provides that "The assets considered immune from distrain or inalienable are not subject to execution."

Thus, the effect of subjecting all assets of the bankrupt to the bankruptcy procedure will also admit exceptions. That is, assets that are absolutely immune from distrain and assets appropriated for a certain purpose are not subject to the procedure. Therefore, the assets that do not belong to the bankrupt will not be subject to the effects of bankruptcy even if such assets are in the possession of the bankrupt.

In a similar situation, in the case of adjudication of bankruptcy, the legislator protected the right of the owner of assets and values collected in the bankruptcy procedure or held by the debtor on the date of the adjudication of the bankruptcy by providing for the restitution claim, regulated in articles 85 to 93 of Law n. 11.101 / 2005:

> Art. 85. The owner of the asset collected in the bankruptcy procedure or which is in the possession of the debtor on the date of the adjudication of bankruptcy may file a restitution claim.

It is clear from the wording of this article that the sole requirement is the existence of a right of ownership of amounts unduly collected or held by the bankrupt at the time of the adjudication of bankruptcy. It is a legal prerogative of the holder of the ownership right to exercise it in the context of the bankruptcy procedure, to which the public entity aggrieved by acts of corruption is entitled, in relation to the proceeds of wrongdoing, through adjustments of the bankrupt estate.

The main objective to be sought in the bankruptcy procedure is the satisfaction of as many creditors as possible within a legal order of preferences. In this search, the collection measures, liability actions and even declarations of ineffectiveness are included, with the adjustments imposed by the restitution claims and the third-party motions.

> The restitution claim should be analyzed not as an isolated fact, arising from a casual situation, but as **a fact that makes the property consistency of the debtor's assets anomalous, and may even lead to inconsistency.** It is worth noting that the legal truth about the title of the assets of the debtor's property cannot be derived solely from a mere presumption arising of the simple detention by the debtor at the moment of the adjudication of the bankruptcy. **For this reason, it is necessary to depurate or allow to be depurated the debtor's property from values that do not belong to them, that may appear as if they were in the act of collection or in the processing, and that could falsely add value to the bankruptcy estate if transferred.** (ALMEIDA, 2007, p.379) (Emphasis added)

> In both cases, the discussion is centered on the **exclusion of the bankruptcy estate of everything that is not of the debtor's property,** in order to avoid its realization made by someone who is not the owner - *a non domino* (ALMEIDA, 2007, p.380) (emphasis added)

In this sense, the Federal Supreme Court issued Precedent 417, which provides that *"in bankruptcy, money held by the bankrupt, received in the name of another, or of which, by law or contract, the bankrupt would not have the availability, can be subject to restitution".* If from the conviction, the sentenced party does not have these values available, as explained above, they are not subject to the bankruptcy procedure.

In addition, the right of restitution cannot be an opposition to the fact that the proceeds of wrongdoing consist of values and not of individually identified assets, according to the reasoning already presented above.

CONCLUSIONS

Accordingly, the effective fight against economic and property crimes, such as corruption, required that the legal system provide for hypotheses of confiscation of the proceeds of wrongdoing. In addition, the transfer of ownership to the Government aggrieved by the unlawful conduct shall occur as of the conviction or act that anticipates its effects. Thereafter, the powers of the offender to dispose of the confiscated assets and values cease, and the prerogative of recovering them from those who unduly hold them passes to the new owner.

We therefore concluded that companies who had a share of their property confiscated by the practice of wrongdoings cannot include such amounts in the court-supervised reorganization plan or in the bankrupt estate, since they are no longer their property. Should this occur by mistake, the Government has the prerogative of receiving restitution with total primacy over the other creditors of the wrongdoer, as such prerogative derives from its ownership right and not from a credit right.

The central assumption of Law n. 11.101 / 2005 is that business entities that are subject to these procedures fulfill their social function in performing licit economic activities, and that is the reason why it would be desirable for society to preserve them. In this sense, the doctrines of Law n. 11.101 / 2005 do not seem to be subterfuges to elide, postpone, or prevent the restitution of the proceeds of wrongdoings committed by the companies.

From a practical point of view, if court-supervised reorganization and bankruptcy become the means to contravene measures aimed at fighting corruption-related wrongdoings, there will be inconsistencies in the legal system as well as distorted incentives for the continuity of corruption practices. In this situation, one of the indirect benefits foreseen from the current position is the incentive for agents to interact or negotiate with companies that require the adoption of rules and mechanisms of compliance sufficient to mitigate the risk that companies are involved in corruption schemes.

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NOTES

1 This is the case of UTC, available at: <https://goo.gl/U3Muaq>; of OAS, available at: <https://goo.gl/EciRhb>; of Mendes Júnior, available at: <https://goo.gl/t48DWR>; of Galvão Engenharia, available at: <https://goo.gl/M42MbL>.

2 In this respect, refer to the news available at: <https://goo.gl/cfrkkn>.

3 Economic crimes are defined as those that aim at unlawful profit - whether profit in economic terms or commercial, and competitiveness advantages in a market. Thiago Bottino do Amaral sums up that "Economic crime causes non-individualizable, irreparable, uncontrollable damages and subject to a differentiated social perception. The goal is the economic profit, a commercial advantage, or the dominance of a market. The possibilities and facilities offered by the technological advance give rise to the appearance of conducts engaged on a large scale by complex organizations and of great damaging potentiality. The conducts engaged are difficult to identify. In some cases, the unlawful profit is disguised and regularized ("laundered") in the financial system and other formal instances, acquiring the appearance of legality, hindering the determination and punishment of the crimes"(AMARAL, 2015, p.8).

4 "The metaphor "loss or forfeiture of assets" that the legislator chose is nothing more than the old "confiscation" that dates back to Ancient Rome and was maintained in some Brazilian constitutions and prohibited in other ones". (Pereira, 2017, page 227).

5 "As regards the proceed of crime, it is what was directly achieved with the commission of the crime, such as the money subtracted from the bank or the collection of weapons taken from a collector. In addition to the proceed, it is possible for the offender to convert into other assets or values what he earned on account of the crime, giving rise to the confiscation. In this case, one speaks of the benefit of crime. E.g. the apartment purchased with the money stolen from the bank. In both situations, the forfeiture is automatic, resulting from a mere adverse judgement against who owned the proceed or benefit, regardless of whether the judge has pronounced themself in that respect (art. 91, II, b, CP)" (NUCCI, 2017, p.1028).

6 "The effective fight against this organized and globalized criminality requires the disablement of the unlawful profit, especially when this profit shows the appearance of legality, since this profit feeds and stimulates criminal organizations, allows the emergence of new delinquents attracted by the easy enrichment and can also generate corruption in the structure of the State. However, as pointed out above, classical criminal law has proved insufficient to respond effectively to this type of criminality, especially with regard to the traditionally used punishment system, that is to say, based exclusively on imprisonment or on the imposition of a fine. In this risk society, the punishment of confiscation shows to be an adequate and useful criminal measure, as well as very effective in fighting the unlawful profit derived from criminal activities"(CORRÊA JÚNIOR, 2006, p. 24).

7 This perception is clear in the excerpt from the opinion the judge-rapporteur of which was Justice Luiz Fux in the Extraordinary Appeal n. 638491, in which he ruled on confiscation in the context of crimes related to drug traffic: "In comparative law the confiscation is a doctrine of great applicability in the crimes of economic repercussion, under the bias that "crime should not pay", a perspective adopted not only by the Brazilian constitutional conventioneer but also by the Federative Republic of Brazil that internalized several international acts aimed at severely repressing drug traffic " (RE 638491, Judge-rapporteur: Judge LUIZ FUX, En banc court, judgement on 17/05/2017, ELECTRONIC APPELLATE DECISION GENERAL REPERCUSSION - MERITS DJe-186 DISC. 22-08-2017 PUB. 23-08-2017).

8 On the subject, specifically in the case of corruption, Fábio Ulhoa points out that "who provides the resources for corruption and who benefits the most from its results is the legal entity, generally a company" (COELHO, 2015, p.292).

9 "The punishment of loss of assets and values, provided for in the Federal Constitution (CF / 1988) and regulated by Law 9.714 / 1998, appears in this scenario as an appropriate penal alternative to some cases of economic and patrimonial crimes, in addition to those practiced by legal entities, among others, since it imposes a legal consequence that can be individualized, proportional, and similar in nature to the aggrieved legal interest. In addition, the enforcement of the above-mentioned punishment also encourages the compliance with the social rules in so far as annuls the benefit obtained from the unlawful conduct and further imposes an asset loss corresponding to the desired advantage" (CORRÊA JÚNIOR, 2006, p.33).

10 Article 91 of the Penal Code provided for the forfeiture of the proceeds of crime as generic extra-criminal effects of the conviction: "Art. 91 - The effects of the conviction are: II - the loss in favor of the Union, except for the right of the victim or a third party in good faith: (...) b) of the proceeds of the crime or any asset or value that constitutes a gain obtained by the agent with the practice of the criminal act". Based on this rule, the confiscation takes effect immediately and automatically after the entry of the adverse judgement that recognizes that any crime foreseen in the Brazilian legal system was committed and that the accused committed it, or from the performance of any settlement act by the State that legally anticipates the effects of the judgment, regardless of whether they are explicitly stated. These effects are maintained even with the termination of punishability by the revocation of the crime, and also reach the amounts equivalent to what initially constituted the proceeds of wrongdoing. It should be emphasized that the discussion about whether or not it is possible the execution of the sentence in the second degree of jurisdiction is limited to prison sentences and does not apply to the effects of the conviction.

11 The Penal Code provides for the possibility of confiscation not only of assets, but also of pecuniary values, even because the Code started to allow, after Law n. 12.694, of 2012, the decreeing of the loss of "values equivalent to the proceeds or benefit of crime when they are not found or when they are located abroad", in accordance with Article 91, Paragraph 1.

12 Penal Code: "Art. 91 (...)Paragraph 2 - In the events of Paragraph 1, the provisional remedies provided for in the procedural legislation may include equivalent assets or values of the suspect or accused for subsequent decree of loss" (Included by Law n. 12.694, of 2012).

13 The unlawful source of the resources to be confiscated matters. The United Nations Convention against Corruption provides: "Article 31 (...) 4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds. 5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds".

14 Federal Constitution: “Art. 5. (...) XLV - no punishment shall go beyond the person of the convict, and the obligation to compensate for the damage, as well as the decreeing of loss of assets may, under the terms of the law, be extended to the successors and executed against them, up to the limit of the value of the assets transferred”.

15 Also known as the Merida Convention, this Convention was internalized through Decree 5.687, dated January 31, 2006. In this regard, the preamble to the United Nations Convention against Corruption should be considered. Available in: https://goo.gl/HqdSkm.

16 Law n. 12.486 / 2013: Art. 19 Due to the practice of acts set forth in art. 5 of this Law, the Union, the States, the Federal District, and the Municipalities, through their respective General Counsels or judicial representation bodies, or the equivalent, and the Prosecution Office, may file an action to apply the following sanctions to the wrongdoer legal entities: I - forfeiture of assets, rights or values that represent the advantage or benefit directly or indirectly obtained from the offense, except for the right of the victim or a third party in good faith”.

17 Law 8.429, of June 2, 1992: “Art. 12. Irrespective of the criminal, civil and administrative sanctions provided for in the specific legislation, the person responsible for the misconduct is subject to the following punishments, which may be applied alone or cumulatively, according to the gravity of the fact: I - in the event of art. 9, loss of assets or values unlawfully added to the property, full compensation for damages, when applicable, loss of the civil service, suspension of political rights from eight to ten years, payment of a civil fine of up to three times the value of the increase in the property, and prohibition of contracting with the Government or receiving benefits or fiscal or credit incentives, directly or indirectly, even through an intermediary legal entity of which they are a majority partner, for ten years”.

18 In addition to these situations, it is worth mentioning the Decree-Law n. 3.240, dated May 8, 1941, which subjected to sequestration the assets of persons indicated for crimes that result in damage to the tax authority, with the possibility of also reaching assets held by third parties since they had acquired them unlawfully (DI PIETRO, MARRARA, 2017, 248).

19 It is also possible to foresee situations in which the partners have been convicted, as long as there is commingling of assets or interference of their unlawful activities in the activities of the company.

20 From the 1946 Constitution to the present constitutional order, there are provisions with respect to this relativization of the ownership interest (art. 5, XXIII, 170, 182, Paragraph 2 and art. 186).

21 “In addition, one cannot forget that freedom is a fundamental right of the human being, and yet it has always been subject to criminal intervention, and there is no reason to justify the inviolability of the ownership interest in the event of a criminal offense. It seems reasonable that although ownership should be the object of legal protection and guarantee, it cannot be broadly or more rigorously guaranteed than freedom or life. However, as already mentioned, freedom continues to be subject to criminal intervention by the State through imprisonment [...] “ (CORRÊA JÚNIOR, 2006. p.195).

22 “Obviously, the ownership interest, especially when it has a business nature, must be subject to specific restrictions with which it shall comply, in accordance with the requirements of the common good, and will be subject to obligations that restrict it in order to restrain its misuse (Civil Code, art. 1.228, Paragraph 1) “ (Pereira, 2017, p 108).

23 On the subject, Caio Mario describes the trend towards fragmentation of ownership interest: “Confronting the ownership interest in its Roman aspect with the conceptions that day to day take place, it is clear that a trend is concretely formulated in current opinion of jurists, distancing today’s notions from classical concepts and

emphasizing a notorious line of evolution for an ownership regime unequivocally different from what it was in the past. In the midst of such trends, modern law knows a new ownership type, that of business ownership. With the concentration of economic power, it became necessary to give the ownership greater flexibility, allowing it to adapt to conditions of easier capital mobilization, reduction of tax charges, etc. On the other hand, certain ventures require enormous availabilities. As a result of all this, the company has been instituted as an economic organization, within which the rights of each are fragmented, and instead of the investor presenting themself as owner of assets of immense value, the ius dominii moves to the company, dispersed into a number of partners, or more commonly shareholders, and the rights expressed in securities represent a kind of naked ownership. In this way, property remains a subjective right and, without losing its individual characteristics, it is fragmented in turn. The company, which is managed by a controlling group, owns the stock of assets, sometimes of immeasurable value, while the individuals who contributed for the formation of financial resources have their rights restricted to the enjoyment of advantages, or reduced to the perception of a certain profitability (kind of usufruct). The ownership multiplies in terms of value while concentrated in the company; and at the same time diffuses in the faculty of fruition"(PEREIRA, 2017, pp. 91-92).

24 The event of direct access to shareholders' property depends on the occurrence of disregard of the legal entity.

25 Regional Federal Appellate Court of the 4th Region - 13th Federal Court of the Judicial District of Curitiba. Criminal Action N. 5000553-66.2017.4.04.7000, judgement, p. 113.

26 STJ - REsp: 1087447 RJ 2008/0191494-0, Rapporteur: Justice MASSAMI UYEDA, Judgment Date: 18/03/2010, T3 - THIRD PANEL, Publication Date: DJe 14/04/2010

27 STJ-AgRg in CC 117.216 / DF, Rapporteur Justice NANCY ANDRIGHI, SECOND SECTION, judgement on 12-6-2013, DJe 17-6-2013.

28 STJ - CC 79.170 / SP, Rapporteur Justice CASTRO MEIRA, FIRST SECTION, judgement on 10-9-2008, DJe 19-9-2008.

29 STJ - CC 106.768 / RJ, Rapporteur Justice LUIS FELIPE SOLOMÃO, SECOND SECTION, judgement on 23/09/2009, DJe 2-10-2009. In the same sense, STJ - AgRg in the EDcl in CC 99.548 / SP, Rapporteur Justice SIDNEI BENETI, SECOND SECTION, judgement on 23-2-2011, DJe 10-3-2011.

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Actuarial Liabilities and their impact on the Balance Sheet of the Federal Government

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ABSTRACT

The continuous growth of the social security expenditure has been worrying the Federal Government, especially because of the spending cap established by the New Tax Regime. In this context, the definition of the social security liabilities of the special social security scheme (*Regime Próprio de Previdência Social* - RPPS), with respect to the federal public servants, becomes essential for taking necessary measures for the long-term solvency of this scheme. Bearing in mind that the result of the actuarial evaluations of this RPPS has given support to the registration of the mathematical social security provision (*Provisão Matemática Previdenciária* - PMP) in the Federal Government's General Balance Sheet, this study intends to analyze the elements that compose the social security liabilities, and the accounting aspects that have underpinned the registration of this provision. The results found allowed to verify the obstacles faced, specifically in relation to the database, to perform the actuarial evaluation of the RPPS. Thus, this paper proposes two alternatives for the improvement of accounting data: a reclassification of part of the PMP in the contingent liabilities or a change in the actuarial costing method to allow future benefits to be fairly accounted for.

Keywords: RPPS, BGU, PMP, actuarial, accounting.

INTRODUCTION

Brazil's economic and fiscal situation in recent years has led to a stricter control of the Federal Government expenditure, mainly due to the limit imposed on the primary expenditure by the New Tax Regime established by the Constitutional Amendment no. 95/2016. In this context, according to Santos (2014), the cost of the social security has caused a great concern to government authorities at all levels in Brazil.

Annually, in compliance with the Fiscal Responsibility Law (LRF), the Federal Government prepares the actuarial evaluation of the special social security scheme (RPPS) of the Union. The Social Security Secretariat, linked to the Ministry of Finance, prepares said evaluation and its result guides the registration of mathematical social security provision (PMP), which is reflected in the General Balance Sheet (*Balanço Geral da União* - BGU) of the Federal Government.

Thus, within the scope of the Union, the definition of the social security cost of public servants is essential for assessing the long-term sustainability of the scheme and taking actions to secure the feasibility of the benefits of current and future insureds. The role of the actuarial evaluation and of fair accounting disclosure are relevant and deserve attention, especially in light of the ongoing discussions about social security accounting and its impact on the public accounts. Therefore, this study intends to analyze the actuarial and accounting aspects that have supported the calculation of the social security cost of the RPPS, over a period of 10 years (2006 to 2015), and guided the disclosure of the PMP in the BGU as of 2014, arising from the result of the actuarial evaluation of the Union's RPPS.

FINANCIAL AND ACTUARIAL EVALUATION OF THE SOCIAL SECURITY REGIMES

The Federal Constitution of 1988 implemented a major change in Brazilian social security. According to Santos (2014), the reform resulting from the new constitutional text established, among other aspects, the observance of the financial and actuarial balance, aiming at the regularity of the social security regimes.

In this respect, Supplementary Law No. 101, of May 4, 2000 (LRF), in its article 4, paragraph 2, IV, (a), determines that the Budgetary Guidelines Bill (PLDO) must contain an annex referring to the evaluation of the financial and actuarial situation of the social security regimes.

Plamondon et al. (2011, p. 45) say that "the actuarial report presents the feasibility of the plan under different economic and demographic scenarios, providing the funders of the system with an evaluation of the risks they face in relation to the sufficiency of the contribution indices."

Nogueira (2011, p. 217), in turn, emphasizes that achieving the financial and actuarial balance in regimes organized before 1998, which already found themselves in a situation of chronic structural imbalance, is a very complex task that implies in the deconstruction of "models and structures erroneously consolidated for years or decades."

SOCIAL SECURITY COST

Nóbrega (2006, page 71), establishes that social security cost is directly related to the number of benefits offered, corresponding "to the present (actuarial) value of future benefits of the mass of insureds at a given point in time," noting that to this value it should be added the administrative expenses of the social security regime.

Nogueira (2011, p.191), in turn, defines social security cost as "the total amount of future commitments of the benefit scheme to honor the social security entitlements of its insureds." To ascertain this cost, the following items are considered:

a) regulatory basis of the benefits: it consists, as a rule, of the list of the benefits, the granting rules, the calculation methodology, etc.;
b) registration database: of utmost importance for one to quantify the future RPPS benefits, it encompasses the individual characteristics of the insureds; and
c) actuarial database, or actuarial assumptions: they determine significant effects on the calculation of the social security cost of RPPS (Nogueira, 2011).

Gushiken et al. (2002) say that the design of the RPPS is the major defining factor of the social security cost, while the trustworthiness of the calculation of this cost basically depends on the database accuracy. All in all, the actuarial assumptions are mere attempts to approach the reality, and need ongoing revaluation.

FUNDING REGIMES AND E METHODS

Once the social security cost is ascertained, it remains to be determined how it will be funded in the long term. Article 4 of MPS Ordinance no. 403, dated December 10, 2008, provides that the RPPS may use the capitalization, pay as you go, and terminal funding regimes.

According to Pinheiro (2005), the pay as you go regime does not establish any funds and is based on the budgetary balance for the period, in which the contributions are equivalent to the benefits, as shown in equations 1 and 2:

$$\int_{\alpha}^{\beta} N(x,t)\,contribuição(t)\,w(t)\,dx = \int_{\beta}^{\omega} N(x,t)\,benefício(t)\,w(t)\,dx \qquad (1)$$

$$\frac{contribuição(t)}{benefício(t)} = \frac{\int_{\beta}^{\omega} N(x,t)dx}{\int_{\alpha}^{\beta} N(x,t)x} \qquad (2)$$

Where:

- N(x,t) is the x years old population in the period t
- contribution (t) is the contribution in the period t
- benefit (t) is the benefit rate in the period t
- w(t) is the wage in the period t

- β is the age of retirement
- α is the age of entry into the labor market
- ω is the survival age limit

The capitalization regime, in turn, accumulates funds and is based on budgetary balances of cohorts, in which the amount of the benefits in the receipt period equals the total amount accumulated in the fund (Pinheiro, 2005), observing the equations 3 and 4:

$$contribuição(w)e^{j\beta}\int_{\alpha}^{\beta} p(x)e^{-jx} + js(x)dx = benefício(w)e^{j\beta}\int_{\beta}^{\omega} p(x)e^{-jx} + js(x)dx \quad (3)$$

$$contribuição\ (w) = \frac{\int_{\beta}^{\omega} p(x)e^{-jx}}{\int_{\alpha}^{\beta} p(x)e^{-jx}}\ benefício(w) \quad (4)$$

Where:

- p(x) is the probability of survival from birth to age x
- contribution(w) is the contribution
- benefit(w) is the benefit rate
- w is the wage
- j is the real interest rate
- β is the age of retirement
- α is the age of entry into the labor market
- ω is the survival age limit
- s(x) is the amount accumulated by a cohort up to the age x under a capitalization regime

Pugh (2006) notes that, among the possible actuarial funding methods, two categories stand out:

a) accumulated benefits funding methods - they relate to services or years of contribution already incurred, until the actuarial evaluation date, and are focused on keeping a certain funding level. Safety-oriented, such methods cope with establishing and keeping a solid relationship between the assets of the fund and its accrued liabilities. The most important methods are the current unit credit and the projected unit credit; and
b) prospective benefit funding methods - they relate to projected future services, and are focused on defining a certain level of contributions. Contribution-oriented, they have as their main goal the stability of such contributions. The most important methods are age of entry, age reached, and aggregate.

In Brazil, with respect to the RPPS, paragraph 4 of article 4, of MPS Ordinance no. 403/2008, provides that the funding method for actuarial evaluations will be the projected unit credit.

FUNDAMENTAL ACCOUNTING ASPECTS

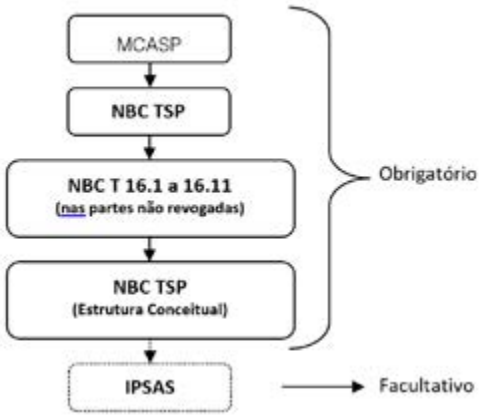
It is currently in force the 7th edition of the accounting manual applied to the public sector (MCASP), whose observance by federal entities is mandatory. The item 10.2.1 of MCASP provides that the provisions should be recognized if the following occurs concurrently:

> a) there is a present obligation resulting from past events that are independent of the entity's future actions;
>
> b) an outflow of funds that incorporate economic benefits or potential services for extinguishing the obligation is likely; and
>
> c) it is possible to reliably estimate the amount of the obligation.

Item 10.3 of MCASP provides that contingent liabilities should not be recognized on equity basis because they depend on the occurrence of events for the obligation to arise. They should be registered in control accounts and disclosed in explanatory notes.

Regarding the PMP, item 10.5.4 of MCASP stresses that the International Public Sector Accounting Standard (IPSAS) no. 39 (Employee Benefits) highlights the need to recognize the actuarial liabilities and to disclose them in the Balance Sheet.

However, it should be noted that the mentioned standard is still undergoing a convergence process. According to a joint work schedule of the National Treasury Secretariat (STN) and



Federal Accounting Board (CFC), this process is expected to be completed in 2018. Thus, the compliance with IPSAS 39 is optional and residual, as shown in Figure 1 .

Figure 1 - Regulatory Accounting Filter
Source: Prepared by the authors based on MCASP.

SOCIAL SECURITY ACCOUNTING

According to Lima and Guimarães (2009, p. 23), the social security accounting aims at

> evidencing the economic and financial ability of the public entity to ensure an individual no longer capable of working the funds needed for the survival of the individual and the individual's dependents, in the proportion of the benefits determined by the legislation, from a sustainability perspective.

Therefore, especially for defined-benefit pension plans, there is a complex accounting, and there are numerous non-consensual issues in the literature. Additionally, it involves the estimation of values, based on actuarial assumptions, for the recognition of the respective liabilities, of the total costs to be distributed in the periods they are actually incurred, and of any existing assets (Glaum, 2009).

In Brazil, MPS Ordinance no. 509, dated December 12, 2013, provides that the accounting procedures applied to RPPS must comply with the provisions in MCASP. Item 10.5.4 of MCASP provides that "the social security mathematical provision, also known as an actuarial obligation, represents the present value of the total funds necessary to pay the commitments under the benefit plans, calculated on actuarial basis, on a given date" (MCASP, 226).

ANALYSIS OF THE ACTUARIAL EVALUATION OF THE RPPS

REGISTRATION DATABASE

Preliminarily, it should be highlighted that

> the social security mathematical provisions present the sum of mathematical reserves of the RPPS, of the benefits granted and to be granted, meaning the net commitments under the benefit plan with a 150-year projection, which consider the servant replacement expectation. (General Balance Sheet of the Union, 2014, p. 598)

Chart 1 shows the Actuarial Present Value (APV) of the benefits granted, benefits to be granted, contributions and, consequently, the actuarial deficit for 2008-2017, according to data of the annex to PLDO for the respective year.

After reviewing it, it is possible to verify a substantial change in the behavior of the APV - from 2012 to 2013 - of the benefits to be granted and of the contributions, affecting the actuarial deficit trajectory, and a change of trend from 2014 to 2015. On the other hand, we verified a balanced behavior in the APV of the benefits granted. It is important to stress that the APV of the contributions is directly related to the mass of sponsors and to the rates charged, while the APV of the benefits to be granted is related to the total number of active servants.

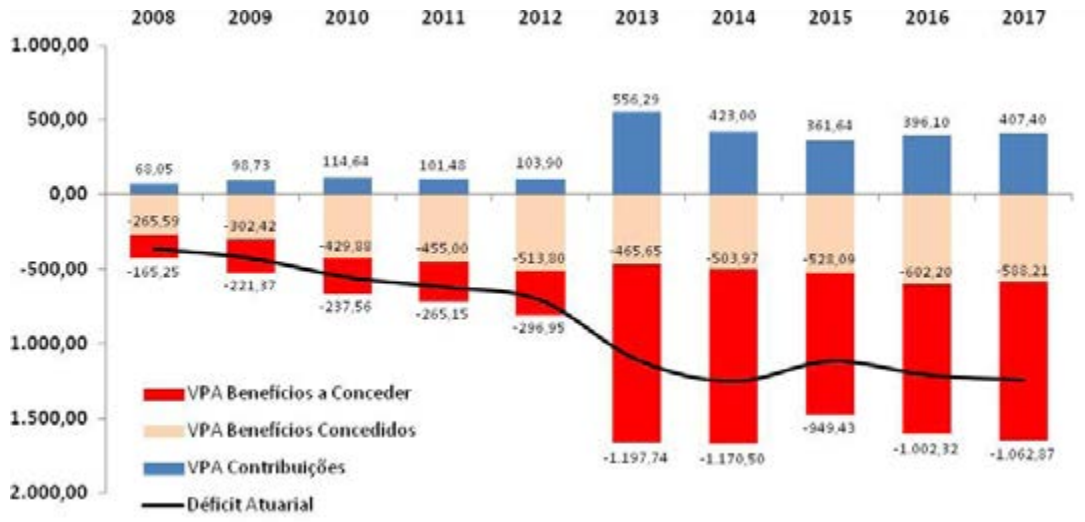


Chart 1 – Actuarial evaluation of the RPPS (Billions of BRL) – 2008 to 2017
Source: PLDO from 2008 to 2017.

Considering the stability of the APV of the benefits granted and the strong variation in the APV of benefits to be granted and of contributions, it is possible to verify the following hypothesis:

> "H0 - There was an increase in the database of the active public servants in the PLDO of 2013."

Table 1 - Number of federal servants (millions)

Source of data	Database year									
	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
	Year of the Budgetary Guidelines Bill									
	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
PLDO (1)	1.20	1.28	1.30	1.30	1.30	1.40	1.40	1.16	1.17	1.22
BEPS (2)	1.34	1.34	1.36	1.40	1.44	1.45	1.45	1.47	1.52	1.54
(1)/(2)%	89.40	95.39	96.28	93.21	90.87	96.61	96.19	78.44	77.17	79.65

Source: PLDO from 2008 to 2017 and BEPS 249.

Table 1 shows the number of servants disclosed in the PLDO from 2008 to 2017, compared to the figures disclosed in the Personnel and Organizational Information Statistical Bulletin (BEPS) no. 249, prepared by the Ministry of Planning, Development and Management. It is possible to verify that:

a) the PLDO database, from 2006 to 2012, corresponded, on average, to 94% of the BEPS data. However, it should be highlighted the decrease of this ratio in the period from 2013 to 2015;

b) to prepare the 2011 and 2012 PLDO, the MPS used the same database of 2008, alleging that this occurred due to the quality of the information received. This helps to explain the reduction of the relation between the data of the PLDO with the data of the BEPS, in the 2009 (93.21%) and 2010 (90.87%) databases, compared to 2008 (96.28%); and

c) comparing the database of 2011 to 2010, there is an increase, which may indicate the accuracy of the database used.

Thus, considering that the database of 2011 was used for the preparation of the PLDO of 2013, it is possible to conclude that the hypothesis is true (there was an increase in the database of the active public servants in the PLDO of 2013). Such a statement is also confirmed based on the data included in Table 2.

Table 2 - Comparative database (2010 - 2011)

Category	Database					
	2010			2011		
	PLDO (1)	BEPS (2)	(1)/(2)%	PLDO (1)	BEPS (2)	(1)/(2)%
Active	581,836	771,570	75.41	741,328	782,591	94.73
Retired	391,037	404,858	96.59	395,462	407,997	96.93
Pensioners	331,866	259,395	127.94	266,276	261,672	101.76
TOTAL	1,304,739	1,435,823	90.87	1,403,066	1,452,260	96.61

Source: PLDO of 2012 and 2013.

An increase of 159,492 active servants is verified in the database of 2011. Although untimely, this refinement helped to improve the estimate of the social security cost. However, two other facts stand out: the reduction of 65,590 pensioners in the database of 2011, and a relation of data of the PLDO exceeding 100% of the BEPS (127.94% in 2010 and 101.76 in 2011).

Table 3. Compared database (2006 to 2015)

Category	Active			Retired			Pensioners		
	PLDO (1)	BEPS (2)	(1)/ (2)%	PLDO (1)	BEPS (2)	(1)/ (2)%	PLDO (1)	BEPS (2)	(1)/ (2)%
2006	551,065	691,604	79.68	411,527	397,939	103.41	237,746	253,127	93.92
2007	573,413	691,589	82.91	397,036	394,475	100.65	311,191	257,579	120.81
2008	581,836	701,582	82.93	391,037	392,686	99.58	331,866	260,947	127.18
2009	581,836	742,178	78.40	391,037	400,721	97.58	331,866	256,812	129.23
2010	581,836	771,570	75.41	391,037	404,858	96.59	331,866	259,395	127.94
2011	741,328	782,591	94.73	395,462	407,997	96.93	266,276	261,672	101.76
2012	737,175	779,719	94.54	395,462	413,199	95.71	266,276	261,342	101.89
2013	490,197	797,319	61.48	322,455	414,785	77.74	343,869	262,231	131.13
2014	533,708	840,876	63.47	333,983	418,049	79.89	306,955	263,180	116.63

Source: PLDO from 2008 to 2017 and BEPS 249.

Table 3 was prepared to verify the occurrence or not of a relation of the data of the PLDO and of the BEPS exceeding 100%, throughout the period studied. We verified that, with the exception of 2006, the entire period presented such a discrepancy. Based on this fact, and considering that pensioners are beneficiaries and sponsors of the RPPS, it is possible to infer that there is an overvaluation in the APV of the benefits granted and of the contributions, as well as in the estimated actuarial deficit.

With respect to the decrease in the ratio between PLDO and BEPS data, from 2013 to 2015, it is inferred that it results from the poor quality of the data on active servants received used to prepare the respective evaluations. Therefore, considering such employees are not yet beneficiaries of the scheme, this fact contributes to an undervaluation of the APV of the benefits to be granted and of contributions, also impacting the estimated actuarial deficit.

REGULATORY BASE OF THE BENEFITS

With respect to the financial regime, only in 2017 PLDO was the capitalization regime provided in MPS Ordinance no. 403/2008 used. However, the types of benefits evaluated were not detailed. The remaining evaluations used the pay as you go scheme. It should be highlighted that the capitalization regime is used on notional basis, since the RPPS of federal public servants is not capitalized.

Although the adoption of the projected unit credit method defined by MPS no. 403/2008, the actuarial evaluations for the period under analysis, the aggregate method was used. The actuarial reports do not provide any justification for using this costing method.

ACTUARIAL BASIS

The premises and hypotheses used in the actuarial evaluations were biometric tables; salary increase by merit; replacement of servants; standard family; age of entry into the labor market; turnover rate; interest rate; financial regime; and costing method.

For the period considered, changes were observed in the following parameters:

a) as of the 2011 PLDO, IBGE's biometric boards were used; and

b) from the 2013 PLDO: i) the servant replacement ratio was changed to 1:1 (the reasoning was to minimize the undervaluations of the mathematical reserves calculated until then); ii) the standard family began to be considered as a couple with the same age (there was a difference of 5 years between the spouses) and 90% of pension payment obligation (a 22-year younger child was defined); and iii) the turnover rate was disregarded (until 2012 PLDO, the rate was 1% pa).

It was then verified that the changes made were reflected on the calculation of the social security cost, especially in the 2013 PLDO, which reported a BRL 400 billion rise in the actuarial deficit. Thus, the deficit assessed in 2013 was 56% higher than that estimated in the 2012 PLDO.

ANALYSIS OF SOCIAL SECURITY MATHEMATICAL PROVISION ASSETS RECORD

As already mentioned, "liability" is an obligation that does not depend on the occurrence of other events to materialize. Thus, the benefits to be granted, relating to active servants, should not be considered liabilities, but rather as contingent liabilities, as they still depend on the occurrence of other events for their realization, according to MCASP. This situation was aggravated in the actuarial evaluations carried out under 2013 PLDO and thereafter, as the replacement ratio of servants changed to 1:1, thus computing costs of servants that did not even contribute to the social security scheme. The APV of benefits to be granted would be evidenced in explanatory notes, observing an adequate classification and disclosure of the accounting information. Table 4 shows the PMP amount that would be recognized following this understanding.

Table 4 - Social Security Mathematical Provision (PMP) (Billions of BRL)

BGU	PMP recorded	PMP suggested
2014	1,208.43	206.11
2015	1,243.69	180.82

BGU	PMP recorded	PMP suggested
2016	1,364.50	347.01

Source: Prepared by the authors.

On the other hand, by keeping the APV of the benefits to be granted under the PMP, it would be necessary to correct the actuarial costing method under a projected unit credit method, aiming at improving the accounting estimate, complying with MPS Ordinance no. 403/2008, and with the existing doctrine (Hendriksen & Van Breda, 1999; Pugh, 2006). Accordingly, it should be noted that, after the convergence process of IPSAS 39, the resulting NBC TSP will probably indicate this method of actuarial costing for the measurement and recognition of the PMP of post-employment benefits.

CONCLUSION

The actuarial deficit determined in a managerial report must be analyzed, from the accounting perspective, so that it is appropriately included in the financial statements. Notwithstanding the work performed by the Social Security Secretariat, which corroborates the fact that actuarial science proves itself suitable to measure long-term obligations, it is a prerogative of accounting science the correct classification of assets, so as not to unduly affect the public accounts.

This study has tried to evidence that the uncertainties surrounding the actuarial calculations are not constraints unreasonably pointed out by the doctrine. The volatility of the premises and hypothesis, as well as the absence of a reliable database, affect the measurement of these obligations. In any case, the disclosure of accounting evidence should be promoted for an appropriate transparency of the information provided to the society.

Therefore, aiming to improve accounting information, it seems feasible to adopt one of the alternatives presented here: an exclusion of the APV from the benefits to be granted from the PMP and inclusion of the respective amount in the contingent liabilities; or a change from the actuarial funding method to the projected unit credit method so that future benefits can be accounted for more accurately, contributing to the transparency of the Union accounts.

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Does the State-owned Companies Law contribute to simplify and enhance the legal certainty of bidding and contracts?

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ABSTRACT

Law 13303/16 demands the execution of a prior bidding procedure for contracting made by state-owned companies, in compliance with Art. 37, XXI, of the Federal Constitution. The rule, however, is not applied in the contracting required for the business performance of these entities, such as those related to the direct sale, provision or performance of products, services or works specifically related to their respective purposes, so that the state-owned company is not at a disadvantage in relation to the agility of private business companies and competitors. Although these companies are exempt from bidding for the purchase of goods, works and services related to its respective purposes, their contracting must be honest and transparent, in accordance with the principles governing the performance of public administration, selecting their partners through an isonomic, impersonal and transparent process.

Keywords: State-owned companies. Bidding. Exemption. Business activities. Simplification

INTRODUCTION

Building a Rule of Law presupposes an agile, efficient, and effective administration in the production of results that meet the individual and social rights promised in the Brazilian

Constitution. If these results are not seen for decades and do not follow a rhythm and quantity that correspond to the expectations of citizens or to the profile that society expects from the State and its agents, or worse, if they mask misapplication of resources to serve illegitimate interests, it is necessary to investigate the causes of jam or misapplication, in search for solutions that prevent and overcome them at bearable costs.

Since the end of the last century, national legal orders, justifiably dissatisfied with state inefficiency - which is universal, despite varying in degrees and dimensions - are proposing the simplification of administrative structures and practices as a means of reaching the planned results of public interest, after agreeing on choices and priorities of exercised citizenship. This strategy - which is being identified as the "simplification principle" – with a gain in efficiency and efficacy, is what was expected from the contracting model to be adopted by state-owned companies, government-controlled companies and their subsidiaries, which are, in contemporary economies, responsible for a relevant part of development.

One of the most distinctive characteristics of the Rule of Law is that the law is not exhausted by the set of formal norms. Laws and their regulations, no matter how broad and detailed they may be, fail to predict and resolve the many nuances presented in or that modify interpersonal, collective, political, economic, and social relations in contemporary societies, which are distinguished by the incredibly accelerated rhythm of proposals and changes in cultural paradigms.

The law materializes, at every step, by its conformation to the legal order and this does not comprise only legal norms, but also principles that precede the laws, guiding the system by the prevalence of the ethical values that consecrate it, making the system consistent. This is what has become known as legal certainty, that is, it is not the rules that ensure relative stability of relations, but, mainly, the principles and values with which the rules are interpreted and applied. Legal certainty presupposes a legal order and this is not only a matter of rules, but rules subject to principles, values, and norms that give integrity and consistency to the system based on the Constitution and on laws.

Eighteen years after the publication of Constitutional Amendment (EC - acronym in Portuguese) 19/98, promised Law 13.303/16 was promulgated. It provided for the legal statute of state-owned companies, government-controlled companies and their subsidiaries within the scope of the federal, state, Federal District, and city governments. This was a new law motivated by corruption scandals involving bidding and contracting carried out by some of these entities.

Title II of Law 13.303/16 provides for bidding processes and contracting of state-owned companies, the most prominent legal instrument that guides the movement of goods and services. However, it does not originate an innovative system, which we could identify with simplicity and legal certainty. On the contrary. The so-called State-Owned Companies Law embodies procedures established by Law 12.462/11, which provides for the differentiated regime of public contracting (RDC - acronym in Portuguese), Law 10.520/02, which instituted the bidding modality called the auction, and Law 8.666/93, which establishes general norms on public bidding and administrative contracting. The new regulation of state-owned companies thus brings together normative orders whose practice shows positive and negative points, which is why it was expected that the State-Owned Companies Law would improve the positive points and eradicate the negative ones, besides referring numerous points for a future regulation. The

purpose of this text is to summarize them between the past and the foreseeable future, based on the observation made by Minister Vital do Rego[1], of the Federal Court of Accounts - Brazil:

> In the field of bidding and contracting, the State-Owned Companies Law sought to consolidate, in a single legal instrument, provisions of Law 8.666/1993, Law of Auction (Law 10.520/2002) and the RDC (Law 12.462/2011), extracting the essence of these three norms.

Among the innovations introduced by Law 13.303/2016 in the field of administrative activity of the State, we should highlighting the "updating" of the limits for the hypothesis of exemption from bidding due to the value. The severely outdated limits that, in Law 8.666/1993, are of approximately fifteen thousand reais for engineering works and services, and eight thousand for other services and purchases, they were increased to one hundred thousand and fifty thousand reais, respectively.

However, it frustrated those who expected to see in Law 13.303/2016 the implementation of even faster and more efficient contracting procedures that would allow state-owned companies to compete effectively in the same conditions with companies that operate exclusively in the private market.

SELF-APPLICABILITY OF THE BIDDING AND CONTRACTING REGIME OF LAW 13.303/16

Art. 71 of Decree 8.945/16, which regulates Law 13.303/16 within the Federal scope, establishes that the bidding and contracting regime created by this instrument is self-applicable, except regarding:

> (a) auxiliary procedures of bidding, established in articles 63 to 67 of Law 13.303/16;
>
> (b) procedure of manifestation of private interest in receiving enterprise proposals and projects, provided for in paragraph 4, of Art. 31, of Law 13.303/16;
>
> (c) exclusively electronic bid phase, provided for in paragraph 4, of Art. 32, of Law 13.303/16;
>
> (d) preparation of bids with risk matrix, which is addressed in item X, of the caput of Art. 42, of Law 13.303/16;
>
> (e) compliance with the policy of transactions with related parties, to be prepared, addressed in item V, of the caput of Art. 32, of Law 13.303/16; and
>
> (f) publication on the internet of the information requested in Articles 32, paragraph 3, 39, 40 and 48 of Law 13.303/16.

Except for the aforementioned hypotheses, the norms on bidding and contracting of Law 13.303/16, within the Federal scope, have full effectiveness and direct, immediate, and full applicability as of

1 Available at: <https://bit.ly/2w07IjA>. Visited on: August 10th, 2016.

entry into force of the law and are, therefore, able to produce effects regardless of regulatory norms.

As for the exceptions listed in Art. 71 of Decree 8.945/16, those are not self-applicable norms, i.e., they depend on regulation to complement their meaning. The preparation of such regulation is the responsibility of the competent state entity. The processing of the bidding for the formation of the price register also depends on regulation by the competent Executive Branch, according to Art. 66, caput, of Law 13.303/16.

REPEAL OF DECREE 2.745/98 (PETROBRAS BIDDING AND CONTRACTING REGULATION)

Art. 67 of Law 9.478/97, which was repealed, established that contracts executed by Petrobras to acquire goods and services, would be preceded by a simplified bidding procedure, defined by a Decree by the President of the Republic. In compliance with the legal provisions, Decree 2.745/98 was published, with EC 19/1998 already in force.

The legal regime for bidding and contracting created by Law 13.303/16 differs from that revoked Decree 2.745/98 by enshrining the principles of procedural speed - which was already framing the legislation that governs the auction modality, enacted as of 2002. The difference is that the presentation of bids and verification of their effectiveness take place before the qualification phase, that only qualification documents of bidders provisionally classified in first place are examined, and the existence of a single administrative appeal - of the wide competitiveness - by the preferential adoption of the electronic format - and of the economy - based on the dispute that takes place through a bidding phase.

The new statute privileges the bidding of state-owned companies, and, therefore, the auctioning ritual, as seen in its Art. 51, certainly taking into account the results hitherto measured - reducing the processing time, simplifying the procedure and obtaining proposals that are more advantageous. The gains in efficiency and effectiveness of the auction seem so favorable that the guideline of Art. 32, IV, of Law 13.303/16, establishes the preferential adoption of this modality in the acquisition of common goods and services. That is to say that not using it without a full justification shall be considered illegal, since the legal preference expressed in favor of the auction would be ruled out.

EXECUTION OF BIDDINGS BY STATE-OWNED COMPANIES, GOVERNMENT-CONTROLLED COMPANIES AND THEIR SUBSIDIARIES THAT EXPLOIT ECONOMIC ACTIVITY OF PRODUCTION OR SALE OF GOODS OR DELIVERY OF SERVICES.

State-owned companies and government-controlled companies are types of state companies and represent mechanisms of direct intervention by the State in the economic domain, in cases where there are national security imperatives or with relevant collective interests, as provided in Art. 173 of the Federal Constitution.

These companies may be providers of public service, such as the *Empresa Brasileira de Correios e Telégrafos*-ECT (Brazilian Postal Service), which exclusively provides postal services in a privileged regime (monopoly).

When state-owned companies exploit economic activity, they must comply with the constitutional command provided for in Art. 173, paragraph 1, III, of the Constitution. According to this command, the law defining the legal statute of state-owned companies, government-controlled companies and their subsidiaries that exploit economic activity of production or sale of goods or provision of services, shall provide for the bidding and contracting of works, services, purchases, and sales, in compliance with the principles of public administration.

Pursuant to Law 13303/16, the provisions related to bidding and contracting are applied to state-owned companies, government-controlled companies and their subsidiaries that exploit economic activity of production or sale of goods or services, even if the economic activity is subject to the monopoly regime of the Union or constitutes provision of public services. According to Art. 1, paragraph 2, of the mentioned instrument, the provisions on bidding and contracting provided for in Chapters I and II of Title II also apply to dependent state-owned company[2], defined in item III, of Art. 2, of the Supplementary Law 101/00 (Fiscal Responsibility Law), which exploits economic activity, even if the economic activity is subject to the regime of Federal Government's monopoly or constitute provision of public services. Furthermore, it does not distinguish the companies subject to the new statute according to the type of activity carried out or its characteristics.

Public bidding is the rule, even for state-owned companies subject to the legal regime of private companies (Art. 173, paragraph 1, item II, of the Federal Constitution). Bidding will only be subject to exclusion when there is evidence of business obstacles (Art. 28, paragraph 3, I and II, of Law 13.303/16) that cause duly demonstrated harm to the activities of the state-owned company, making it impossible to carry out a bid, either because it makes the competition materially unfeasible (Art. 30 of Law 13.303/16), or because it could result in prejudice to the public interest present in the institutional purposes of the state-owned company (dispensability of the bidding).

The function of bidding is to make feasible, by means of a most extensive dispute possible, the search for the most advantageous proposal for the entity involving the greatest possible number of qualified economic agents.

The adoption of a procedure to procure goods, public works, and services of interest to the state-owned companies, as well as for the sale of their goods, assets and property, has the objective of conferring predictability, safety, and equal access to the competition. It also enables internal and external control agencies to investigate the administrative acts practiced in the process, supported by the rules for execution of the process.

Predictability results from the existence of a previous regulation, materialized in the call notice, by means of which the rules for participation in the bidding and for the choice of the best proposal are disclosed. Such rule, governed by the regulative legislation, anticipates the necessary conditions for participation in the bidding, giving legal certainty to the entity and those interested in contracting.

2 Article 2: For the purposes of this Supplementary Law, "III - dependent state -owned company: a controlled company that receives from the controlling entity financial resources for the payment of personnel expenses or general or capital costs, excluded, in the latter case, those arising from an increase in shareholding".

DIRECT SALE, PROVISION OR PERFORMANCE OF PRODUCTS, SERVICES OR PUBLIC WORKS SPECIFICALLY RELATED TO THE PURPOSES OF THE STATE-OWNED COMPANIES.

Law 13.303/16, without distinction, imposed the general rule of bidding on state-owned companies that exploit economic activity of production or sale of goods or services, even if the economic activity is subject to a regime of Federal Government's monopoly or provides public services. However, the same instrument granted these entities (providers of public services or exploiters of economic activities) the prerogative of not submitting to a bidding regime when performing their end activities. This procedure, if adopted, would render their coexistence unviable in relation to private companies - their competitors in the market for the production or sale of goods or services - as a result of the disconnection of the formal procedure of biddings in relation to the swift measures performed by the private sector.

The state-owned companies that exploit economic activities, although belonging to the indirect public administration, perform peculiar operations of clear economic character linked to their own purposes. These operations are called end activities. Law 13.303/16 established the inapplicability of the bidding regime to contracting related to the end activity of state-owned companies, which, pursuant to item I, paragraph 3, Art. 28, are associated with activities specifically related to the purposes of these entities, that is, those registered in the law that authorized their establishment and in their respective Articles (CF/88, Art. 37, XIX).

One can see in Law 8.666/93, particularly in Art. 17, item II, sub item "e", a provision for the removal of the bidding regime in the sale of goods produced or sold by bodies or entities of the government, by virtue of their purposes, i.e., in view of their business purpose. The removal of the bidding regime is also provided for in Law 13.303/16, especially in its Art. 29, item XVIII, according to which the bidding by state-owned companies and government-controlled companies for the purchase and sale of shares, security bonds, debt securities, and "goods produced or commercialized" is unnecessary.

These entities, as a rule, cannot evade the bidding rule, except in the exercise of acts typically linked to the immediate performance of industrial or commercial activity that they are responsible to develop as an object of the purposes for which they were created, according to the law.

Thus, the purchase and sale of basic material and inputs necessary for the production of goods and services by a state-owned company that exploits an economic activity, as well as the sale of such goods and services, are not subject to the bidding rule. To impose on them the same contracting rules applicable to public agencies when performing their end activities would undermine the guarantee of flexibility in the conduct of their business activities. Considering they dispute parts of the market with private companies, free of the formalities of the bidding regime, thus suppressing the agile performance and harming the possibility of obtaining the most advantageous deal.

It is worth remembering that the state-owned companies, especially those organized as a corporation, are bound to a duty of efficiency, pursuant to Law 6.404/76, the Business Corporation Law. Therefore:

> Art. 153. In the exercise of his duties, the company administrator must use the care and diligence that every active and honest man usually uses in the administration of his own business.
>
> Art. 154. The administrator shall exercise the attributions that the law and the statute confer upon him to achieve the ends within the interest of the company, fulfilling the requirements of the public property and the social function of the company.
>
> […]
>
> Art. 238. The legal entity controlling the government-controlled company has the duties and responsibilities of the controlling shareholder (Articles 116 and 117), but may direct the company's activities in order to serve the public interest that justified its creation.

The end activities of the state-owned companies are governed by private law and are not subject to the duty of bidding. However, this obligation is required in the contracting required to carry out the ancillary activities. It is not uncommon for certain end activities to be confused with ancillary activities. The difference between them lies in the link between the contract and the object whose development constitutes the raison d'être of the state-owned company, as described in the law of its creation and in its Articles. The end activity is that towards which the entity is oriented. The others are ancillary activities and, therefore, are subject to the bidding rule.

> Within the scope of the Federal Court of Accounts, Decision 624/2003 – Full Court faced the issue:
>
> First, recalling the legislation applicable to the state-owned companies in relation to the bidding procedures, we had the Executive Order 2.300/1986, which, by establishing compliance with its precepts by the centralized and autonomous administration, expressed that the state-owned companies could edit their own regulations, provided the basic principles of bidding were met (Art. 86).
>
> Such flexibility was changed, however, with the 1988 Constitution, which, in its Art. 37 (original wording) and item XXI, generally imposed on entities of the indirect administration compliance with the legal rules on bidding. At the same time, it subjected the state-owned company, the government-controlled company and other entities that exploit economic activity to the legal regime of private companies (Art. 173, paragraph 1, in its original wording).
>
> With the enactment of Law 8.666/1993, it was determined that the provisions contained therein would be applied to the state-owned companies and, accordingly, their regulations should therefore be compatible with the legal text (Arts. 118 and 119).

Subsequently, through the Constitutional Amendment 19/1998, paragraph 1 of Art. 173 was changed to the following wording:

Art. 173

paragraph 1 The law shall establish the legal statute of the public company, the government-controlled company and their subsidiaries that exploit economic activity of production or sale of goods or provision of services, providing for:

[…]

III – bidding and contracting of works, services, purchases and sale, in compliance with the principles of public administration.

In the same year of 1998, after considering aspects related mainly to the need of granting greater managerial flexibility to the state-owned companies, given the competitive regime imposed on them, the Court decided to exclude the obligation of Petrobras Distribuidora-BR to carry out a bidding process to procure transport that are the end activity of the company, among them, transportation of products. The obligation remains for ancillary activities (Appellate Decision 121/1998-Full Court, Minutes 35).

In a more recent court ruling, the Full Court, by accepting the reasons set forth by Minister Ubiratan Aguiar regarding the unconstitutionality of Decree 2.745/1998 and Art. 67 of Law 9.478/1997, determined that Petrobras should comply with Law 8.666/1993 and its regulation until the amendment of the enactment of the Law referred to in paragraph 1 of Art. 173 of the Federal Constitution, in the wording given by the Constitutional Amendment 19/1998 (Decision 663/2002-Full Court, Minutes 21). In the vote of the reporting judge of the aforementioned resolution, the previous decision, mentioned above, came to light, and the understanding was confirmed that Petrobras should not use, in an unrestricted manner, all the commands included in Law 8.666/93 for any situation. Subsequently, it was repeated that the company could use the unenforceability of bidding for contracting services that constitute its end activity.

This being the Court's opinion on the subject, and returning to the file, it is necessary to ask whether the rural credit operations carried out by Banco do Brasil are included or not in its end activity.

By consulting the Statute of the Bank, we verified that the purpose of the institution comprises the practice of all active, passive and ancillary banking operations, the provision of banking services, intermediation and multiple forms of financial supply and the exercise of any activities of the responsibility of the National Financial System (Art. 2).

In this context, there is no doubt that the rural financing provided by Banco

do Brasil represents a typical banking operation and that the contracting of the related insurance is characterized as an ancillary banking operation, and such operations are directly linked to the end activity. In addition, it should be stressed that the responsibility for the payment of the insurance premium is exclusive to the borrower, thus not constituting an expense borne by the banking institution.

It should also be noted that Banco do Brasil, by dealing with such financing, is on equal terms with the other institutions that are part of the rural credit system, and, therefore, requires agility and flexibility to perform this activity and many others related to the performance of its business purpose.

Although Banco do Brasil is the main financial agent, responsible for 47% of the total balance of rural and agribusiness financing applied by the institutions, as mentioned in the Bank's 2002 Administration Report, this does not represent its supremacy in this range of the insurance market, even because, as seen, more than half of the operations are conducted by other banking entities.

On the other hand, it must be pointed out that state-owned companies, particularly the corporations, are subject to the duty of efficiency, according to the provisions contained in Law6.404/1976, including:

Art. 153. The company administrator shall use, in the exercise of his functions, the care and diligence that every active and honest man usually uses in the administration of his own business.

Art. 154. The administrator shall exercise the attributions that the law and the statute confer upon him to achieve the ends within the interest of the company, meeting the requirements of the public property and the social function of the company.

Art. 238 - The legal entity controlling the government-controlled company has the duties and responsibilities of the controlling shareholder (articles 116 and 117), but may direct the company's activities in order to serve the public interest that justified its creation.

It should be noted that the control, whether internal or external, to be exercised over the activities developed by Banco do Brasil will be based on the results obtained by it, and, in this particular, from the prism of efficiency, given the managerial model introduced in the public administration by the administrative reform (EC 19/1998).

Thus, I believe that demanding that Banco do Brasil - under the conditions of acting in a competitive market, under the principle of efficiency – carry out a bidding process to procure a rural pledge insurance in the rural finance operations would be against the provisions of this Court itself, in which

> those operations included in the companies' end activities were excepted from the incidence of Law 8.666/1993. Under the terms already decided, until the legal norm referred to in Art. 173, paragraph 1, of the Federal Constitution is amended, the state-owned companies must meet the dictates of Law 8.666/1993 and their own regulation, and may use the situation of unenforceability when contracting services that constitute its end activity (BRASIL, 2003).

In another Judgment, the Federal Court of Accounts established:

> 7. In fact, the basic issue addressed in the review request concerns the need for Petrobras Distribuidora S/A - BR, in the performance of the end activity, and on the basis of which it was constituted, open a bidding process for the transportation of liquid fuels, since all other effects sought by the applicants will arise therefrom.
>
> 8. Regarding the relevant legislation, it is worth mentioning that the then Executive Order 2.300, of November 21st, 1986, when addressing bidding, established that the enforceability of the norms contained therein was applied only to centralized and local administration, with an express provision that the state-owned companies should issue their own regulations, adapted to their peculiarities, with simplified selective procedures and fulfillment of the basic principles of bidding. At the time, the predominant guidance was that state-owned companies had a wide margin of freedom to open bidding processes, and could, in their own regulations, establish the cases of exemption and the ranges of values within which they would develop certain procedures, to a greater or lesser extent.
>
> 9. With the enactment of the Federal Constitution of 1988, this situation changed. The requirement for fulfillment of the norms on bidding by state-owned companies, in a generic way, can be inferred initially from the combination of the provisions in Article 37 (original wording), and the content of Item XXI, of this same constitutional provision: "Art. 37 - The direct, indirect, or foundational public administration of any of the Powers of the Government, of the States, of the Federal District and of the Municipalities shall obey the principles of legality, impersonality, morality, publicity and also the following:
>
> XXI - except for the cases specified in the legislation, the public works, services, purchases, and sales shall be contracted through a public bidding process that guarantees equal conditions to all competitors. It must have clauses that establish payment obligations, maintaining the actual conditions of the bid, according to the law, which shall only allow the requisites of technical and economic qualification indispensable to guarantee the fulfillment of the obligations".
>
> 10. However, it is worth noting another constitutional provision, which concerns state-owned companies, which, because of its implications, cannot be ignored

in the examination of the present question. This is Article 173, paragraph 1, of CF/88 (original wording), verbis:

"Art. 173 - With the exception of the cases set forth in this Constitution, the direct exploitation of an economic activity by the State shall only be allowed whenever needed to the imperative necessities of the national security or to a relevant collective interest, as defined by law.

Paragraph 1. The public company, the government-controlled company and other entities that exploit economic activity are subject to the legal regime of private companies, including labor and tax obligations".

11. Subsequently, with the enactment of Law 8.666/93, it was expressly established that the norms contained therein would also apply to public companies, government-controlled companies and other entities directly and indirectly controlled by the Federal Government. Consequently, the own regulations of these entities, before any consideration, had to be adjusted. These companies could prepare their own manuals, as long as they were compatible with legal norms, added only with details and particularities (according to Articles 118, 119 and Sole Paragraph).

12. This change of treatment, in the sense of establishing more rigid operating norms for these (parastate) entities, which operate under private law, as recognized by the Federal Constitution of 1988, can and should now, in my opinion, receive new assignment of purpose, in order to adopt a position of greater managerial flexibility for such entities.

13. As evidenced by the doctrine, no legal provision, much less of constitutional level, can be interpreted in isolation, unrelated to the context in which it is inserted. Although the legal text is often presented with evident clarity, it still implies a work of knowledge, assimilation and complementation of what the legislator intended to express, which may be more or less complex, but which cannot be neglected, so that the standards are applied without any doubt.

14. Addressing this theme, the eminent Carlos Maximiliano states (in Hermenêutica e Aplicação do Direito, Editora Forense, 1984, p. 128-129): "Natural Law is not a chaotic conglomeration of precepts; it is a vast unity, a regular organism, a system, a harmonious set of coordinated norms, in methodical interdependence, although each one is fixed in its proper place. From more or less general legal principles corollaries are deduced; some condition or restrict each other, although they develop in such a way that they constitute autonomous elements operating in different fields. Each precept, therefore, is a member of a great whole; so the examination of the whole corpus provides a fair amount of light to the present case. The positive prescription is confronted with another from which it came, or which came from the same prescription; it results in the nexus between the rule and the exception, between

the general and the particular, and thus one can obtain precious clarifications. The precept thus subjected to examination, far from losing its own individuality, acquires greater, perhaps unexpected, enhancement. With this work of synthesis, it becomes better understood. The hermeneut raises his gaze, from the special cases to the governing principles to which they are submitted; he asks if, by obeying one, he does not violate another; he asks about the possible consequences of each isolated exegesis. Thus, by looking at the legal phenomena from above, one can see better the meaning of each vocabulary, as well as whether a provision should be taken broadly or strictly as a common or special precept. In Rome, it was already unacceptable for a judge to make a decision based only on part of the law. The norm should be examined as a whole: *incivile est, nisi tota lege perspecta, una aliqua particula ejus proposita, judicare vel respondere* – "it is against the Law to judge or pronounce an opinion, considering, instead of the Law as a whole, only part of it".

15. Still on this subject, it is convenient to highlight part of the opinion of the 10th SECEX, which shows "... the antinomy between Articles 37, XXI and 173, paragraph 1 of the CF is only apparent, since each one of these provisions protects a particular legal interest. In this way, good hermeneutics is protected, as taught by the master Carlos Maximiliano *(in Hermenêutica e Aplicação do Direito. Editora Forense: 1998, p. 356)*:

3.20.1. Absolute contradictions are not presumed. It is the duty of the applicator to compare and try to reconcile the various provisions on the same subject, and from the whole, thus harmonized, deduce the meaning and scope of each one".

16. In this way, we can infer that one of the purposes or properties of systematic interpretation is, exactly, in overcoming apparent conflicts of norms, as stated by Juarez Freitas, one of the most brilliant publicists of the present time (*in A Interpretação Sistemática do Direito, Malheiros Editores, 1995, p. 54)*:

"Thus, assuming a view that is broader and more well equipped, systematic interpretation must be defined as an operation that consists of assigning the best meaning, among several possible, to the principles, norms and legal values, hierarchizing them in an open whole, fixing their reach and overcoming antinomies, from the theological conformation, in order to solve the concrete cases".

17. As stated above, the Federal Constitution of 1988 (original), in its Art. 37, item XXI, establishes a general rule, applicable initially to all state-owned companies. On the other hand, Art. 173 separates a kind of state-owned company, which exploits economic activity. This time to say that only this kind can and should be governed by the same rules applicable to private companies. It creates an exception to the general rule, so that exceptions must have strict interpretation, in the sense that only situations that fit perfectly in the exception rule, without extensions, can be considered as exceptional.

18. It should also be remembered that state-owned companies, especially those formed as a corporation, are subject to a duty of efficiency, according to the provisions of the Corporate Law 6.404/76:

"Art. 153 - In the exercise of his duties, the company administrator must use the care and diligence that every active and honest man usually uses in the administration of his own business.

[…]

"Art. 238 - The legal entity controlling the government-controlled company has the duties and responsibilities of the controlling shareholder (articles 116 and 117), but may direct the company's activities in order to serve the public interest that justified its creation".

19. In this regard, the competent Unit initially considers that BR, in the performance of its final activities, assumes a social role, since it is present in locations that do not attract the interest of other distribution companies, even accepting evident financial losses. For these reasons, it warns that the company must have mobility to quickly change its prices and offset such losses with the gains from other parts of the country, with the need to negotiate case by case with the carriers. It refers to the commercial and strategic nature of the transport contracts entered into by the entity, emphasizing that they take on peculiar and specific characteristics of the economic branch to which the distributor belongs. This makes it impossible to carry out the previous bidding process for its contracting, since these contracts are linked to the essence of the economic activity it exercises.

20. In addition, as already discussed by the 10th SECEX, "the activity of distributing in this case assumes a meaning that makes it synonymous with the activity of transport, which is its physical materialization, which can occur through trucks, boats or other means, as done by the state-owned company. Thus, it is concluded that the transportation of fuels is, in fact, one of the BR's end activities", which does not depend on whether or not it is outsourced.

21. Additionally, the Technical Unity follows, whose aspects are now applicable, especially: "It should be emphasized that the freight is part of BR's direct cost, thus being inseparable from the commercial activity of the company, as much as the raw material it transports, both of which must be the subject matter of commercial contracts. The inclusion of their impact on invoices as part of the price is only a blatant consequence of this finding".

22. This finding became clearer with the advent of Law9.478/97, which consolidated the intensification of competition in the sector in which BR operates, constituting a new fact to corroborate the need for the company to act with agility and competitiveness in the market, as a way to preserve the wealth that constitutes it.

23. In this sense, it is noteworthy that, in compliance with the caput and paragraphs of article 61 of the law that established the National Agency of Petroleum (ANP), Petrobras and its subsidiaries, including BR shall perform under free competition with other companies, according to market conditions, when developing economic activity related to research, mining, refining, processing, trading and transportation of oil and its byproducts, natural gas and other fluid hydrocarbons, as well as any other related activities,.

24. It should also be noted that the Representative of the Office of the Public Prosecutor before this Court, Dr. Walton Alencar Rodrigues, acknowledges that "in light of the new legal system established by Constitutional Amendment 19/98, the internal regulations do not need repairs, but the appealed decision should be repaired", since it partially follows the opinion of the 10th SECEX.

25. For this reason, it is feasible to directly procure goods, services and products related to BR's end activity, that is, those resulting from usual market procedures in which it operates and are indispensable to the development of its normal activity, among them, transportation of products distributed by it.

26. Also worthy of note are the new justifications presented by the members of the Executive Board on the economic activity of the Entity, accompanied by the study carried out by the eminent Prof. Adilson Abreu Dallari, from which I extract the excerpt transcribed below. "Things were at this stage of development when the Federal Court of Accounts pronounced Decision 414/94, commanding Petrobras Distribuidora S/A - BR to: a) adapt its General Contracting Manual to the norms of Law8.666/93; and, b) carry out a formal bidding procedure to procure transport services for its products. The latter provision proved to be infeasible, incompatible with the purposes for which this Petrobras subsidiary had been created. In fact, it was, and it still is, its responsibility to ensure the regular distribution of oil by-products throughout the national territory, especially in the most distant places, which are difficult to reach, where this activity does not arouse the interest of competitors, precisely because it is uneconomical. To offset the deficits thus generated, the company needed and need to be efficient, commercially aggressive, to win the market in the more densely populated urban areas, where competition is exacerbated. To have competitive prices (remembering that oil products are no longer tabulated) the company had and has to reduce costs, and transportation is a relevant item of cost composition. In other words, in order to compete, in equal conditions with other private companies distributing oil by-products (non-monopolized activity), Petrobras Distribuidora S/A - BR needs to be free to contract, in order to negotiate transportation contracts. Without it, it cannot maintain itself. The Federal Court of Accounts understood all of this when re-examining the matter, but, in Decision 240/97, it was considered only as an attenuation of the conduct of the company's officers, keeping the understanding that the direct contracting of oil by-product transportation services is an unlawful act. This is the essential point of the question under

examination. The factual necessity is not under discussion or dispute; only the illegality of that conduct is stated. However, the defendant's conduct considered as illicit had and has constitutional protection. This is what derives from the systematic interpretation of the Federal Constitution.

Art. 37 effectively establishes a general obligation of bidding process, for all entities of the indirect or decentralized administration, without exception. When read in isolation, out of context, this is its interpretation.

However, no normative provision has life outside the context in which it is necessarily inserted. The normative universe is not a chaotic heap of prescriptions, but rather an organized, articulated, and hierarchical system, in which contracting is only apparent.

Interpreted systematically, in conjunction with the provisions of Art. 173 (in its original wording), Art. 37 only establishes a general rule, which, however, is not absolute, since it finds an exception exactly in the juridical discipline constitutionally established for state-owned companies exploiting economic activity, which must act in competition with private entities, in relation to which it can neither have privileges nor disadvantages, except for those arising from the social purposes that determine its creation.

In the case under examination, Petrobras Distribuidora S/A - BR shall bear the burden of its obligation to distribute its products even where this is uneconomical, but it cannot be compelled to compete with the 85 private competitors at disadvantage, where this activity is profitable.

Therefore, the freedom to hire transport services as an essential part of the distribution activity, which is the ultimate end activity of this company, has never been illegal. In fact, the law has never been incompatible with mere common sense.

Currently, the lawfulness of this conduct has become even more pronounced. In fact, after the enactment of Constitutional Amendment 19 (Administrative Reform), which introduced in the Public Administration a management model, in which the control of administrative processes is replaced by control of results, the freedom of contracting by state-owned companies that exploit economic activity has been even more pronounced.

Paragraph 1 of Art. 173 states that those companies must be governed, in their commercial rights and obligations, by the same rules applicable to private companies and, in relation to bidding procedures, it allows the issuance of internal regulations, always in compliance with the principles of public administration.

This freedom has been offset by more adequate control mechanisms, such as the creation of regulatory agencies. In this specific case, the National

> Agency of Petroleum - ANP.
>
> In summary, currently, in view of the current wording of the constitutional text, PETROBRAS Distribuidora S/A - BR may have its own General Contracting Manual, provided that the specific provisions of this regulation are compatible with the principles of Public Administration.
>
> It may also directly contract, without bidding, the services of transportation of its products, provided that it can justify each choice and that, in so doing, it does not contradict or offend those same principles, either by privileging or prejudicing someone, either by paying exorbitant prices or remunerating unnecessary or unpaid services etc." (Judgment 121/1998 – Full Court, Reporting Minister Iram Saraiva, Case 010.124/1995-0).

The Federal Constitution, in its Art. 37, caput and item XXI, established the general rule of bidding when executing contracts for public works, services, purchases, and sale of goods, assets and property, of the direct and indirect public administration of any of the Powers of the Federal, state, Federal District and municipal Governments. That is, it extended the obligation of the bidding process also to public companies and government-controlled companies, entities that are part of the indirect public administration. In its Art. 173, paragraph 1, it assigned to the law the duty to establish the legal statute of the public company, the government-controlled company and its subsidiaries that exploit economic activity of production or sale of goods or provision of services, including concerning bidding and contracting of works, services, purchases and sales, in compliance with the principles of public administration.

Based on systematic interpretation of these constitutional provisions, it is concluded that (a) public companies, government-controlled companies and their subsidiaries are obliged to open bidding process for works, services, purchases and also the sales of their assets; (b) it is incumbent on the law, therefore excluding lower hierarchy norms, such as decrees, regulations or normative instructions, to establish the general guidelines applicable to such bidding processes.

However, when public companies, government-controlled companies and their subsidiaries operate in the market of production or sale of goods and services, they are subject to the legal regime of private companies, including civil, commercial, labor and tax rights and obligations (Art. 173, paragraph 1, II, of the Federal Constitution).

In compliance with the constitutional guidelines, Law 13.303/16 established the general rule of bidding for the contractual activities of government-owned companies that exploit economic activity of production or sale of goods or services, even if the economic activity is subject to a regime of monopoly of the Nation or is of provision of public services. However, it made an exception in Art. 28, paragraph 3, I, concerning direct sale, provision or performance of products, services or works specifically related to their respective business purposes set forth in their Articles.

This exception to the general rule of bidding aims to fulfill the legal discipline constitutionally established for state-owned companies that exploit economic activity, which must act effectively and efficiently in the pursuit of the best results, which is why they operate in a regime of

equalization with private companies, in relation to which they cannot have privileges or suffer disadvantages. By the way, paragraph 2 of Art. 8, of Law 13.303/16 establishes that any obligations and responsibilities that the public company and the government-controlled company that exploit economic activity assume in conditions different from those of any other company of the private sector in which they operate, must be clearly defined by law or regulation, as well as provided for in a contract, covenant or agreement entered with the public entity competent to establish them, in compliance with the total publicity of these instruments, and must also have their costs and revenues broken down and disclosed in a transparent manner, including in the accounting plan.

6. CONCLUSION

Law 13.303/16 requires a prior bidding procedure when hiring third parties to provide services to public companies and government-controlled companies. Such services include engineering and advertising, for the purchase and rental of goods, sale of goods and assets that are part of the respective wealth or the performance of works to be integrated to this wealth, as well as the implementation of the security interest on such assets.

However, the rule of prior bidding is set aside in the contracts required for the business performance of state-owned companies, such as those related to the direct sale, provision or performance of goods, services or works specifically related to their respective business purposes, as well as in cases where the choice of partner is associated with particular characteristics and linked to defined and specific business opportunities, provided that the unfeasibility of the competitive procedure is demonstrated.

Business opportunity means, according to the law, the formation and extinction of partnerships and other associative, corporate or contractual forms, the purchase and sale of interest in companies and other associative, corporate or contractual forms, and the operations carried out in the scope of the capital market, subject to regulation by the competent body.

Therefore, the general rule of bidding is imposed on contracts of state-owned companies, except in contracts where there is a specific demonstration of the existence of business obstacles to the performance of their end activity. This is illustrated with the accomplishment of previous bidding process by public financial institution to select individuals or legal entities applying for loans. The bidding, in this case, in addition to delaying the conduct of the business by the state-owned company, conflicts with the disciplinary rules of these operations by private financial institutions, placing the state-owned company in a position of disadvantage in relation to the agility available to the latter.

In addition, the state-owned companies that carry out economic activity do not enjoy tax privileges that are not extended to the private sector, being thus under the same legal regimes as those of private companies operating in the area, which confers on them competitiveness in the market for the provision of goods and services . If prior bidding was required for the performance of their end activity, these entities would be jeopardized in the efficient exploitation of their economic activity, damaging not only the free competition regime, but also the equality guaranteed by the Federal Constitution before private business entities.

Although the state-owned companies are exempt from bidding for the provision of services related

to their respective business purposes (Art. 28, paragraph 3, item I, of Law 13.303/16), they must confer honesty and transparency to these contracts, in accordance with the principles governing the performance of public administration. Their partners must be selected through a competitive, isonomic, impersonal, and transparent process, as established by the Federal Court of Accounts in Judgment 2.033/2017 – Full Court, Reporting Minister Benjamin Zymler, Case 016.197/2017-8.

The proposal to simplify structures, rules, administrative procedures, and work processes to "optimize" the cost-benefit (efficiency) ratio and contribute to the achievement of results (effectiveness), thus meeting the commitments of the State with the civil society, has been developed in the public management of several Rules of Law, of both Romano-Germanic legal culture and Anglo-Saxon tradition. So much so that, in the United Kingdom, there is a repeated recitation of the ten commandments of the simplification of public services, useful both to advise managers of the direct state administration and those who run state-owned companies with their own distinct identity, separated from the State, and provided with financial and patrimonial autonomy. Their services to the Brazilian State-Owned Law stand out because it has provided to make itself dependent on its application of regulations to be edited within each company. In a free translation of the British manual of public management:

> 1 - Start with the user.
>
> The simplification of the service begins with the identification of the user, his socio-family environment, his wishes, his routine, his complaints, his needs, whether explicit or implicit. If you do not know who your user is and what he needs, you will not build the right thing. Do surveys, analyze data, talk to users, get up from your chair and go out! Do not make assumptions, put yourself in the user's shoes, try the service yourself, be empathetic, and remember that what they ask for is not always what they need.
>
> 2 - Decide with data.
>
> In most cases, we can learn from real-world behavior by observing how existing services are used. Let the data collected in the provision of the service (time and costs of the provision for the user, level of satisfaction, among others) direct decision making rather than intuitions or conjectures. Keep doing this after your service is available and whenever you have new prototypes and tests with users.
>
> 3 - It can always be simpler.
>
> It is very simple to do something complex, but it is very complex to do something simple. Doing something simple to use is much more difficult, especially when the underlying systems are complex. The user needs focus, he needs to be driven by a simple, clear and intuitive service, and not get lost in complexity. Do not take "it has always been this way" as response. Less is more. Try to remove functionalities, forms, options, fields, colors, etc. Finally, always use the KISS (Keep it Simple, Servant) rule.

4 - Take small, steady steps, iterate.

The only way to solve a great challenge is to divide it into small actions. The best way to build good services is to start small and constantly iterate. Release the Minimum Viable Service (MVS) in advance, test it with real users, switch from Alpha to Beta to "Go Live" by adding features, excluding things that do not work, and doing refinements based on feedback. Iteration reduces risk. It makes major failures unlikely and turns small flaws into lessons. If a prototype is not working, do not be afraid of discarding it and starting over.

5 - Simplicity is accessibility.

Everything we build must be as inclusive as possible. We are building for the needs, not for the public. We are designing for everyone, not only for those who are the majority, like us. The people who need our services the most are often the people who find it harder to use. Let us think about these people from the beginning.

6 - Understand the present and project the future.

We are not designing for a computer screen or smartphone. We are designing for people who follow trends. We need to think hard about the context in which they are using our services. Ask yourself: are they in a library? Are they on a telephone? Are they just only familiar with Facebook? Have they used the web before? Where will they be in 3.5 or 10 years?

7 - Create digital services, not websites.

A service is something that helps people do something. Our job is to discover the users' needs and build the service that meets those needs, a 100% digital service that can be consumed in a walk in the park, in the time of a stop at the red traffic light. Of course, much of what the services will be on web pages, but we are not here to build unidirectional information channels. The digital world has to connect to the real world, so we have to think about every aspect of a service, and make sure they add something that meets the needs of the user.

8 - Be consistent, not uniform.

We should use the same language and the same design standards whenever possible. This helps people become familiar with our services, but, when that is not possible, we should make sure that our approach is consistent.

This is not a straightjacket or rulebook. Every circumstance is different. When we find standards that work, we should share them and talk about why we use them. However, that should not stop us from improving or changing them in the future, when we find better ways of doing things or when the users' needs

change.

9 - Create in partnership and share.

We should share what we are doing whenever we can. With colleagues, with users, with the world. Share codes, share projects, share ideas, share intentions, share flaws. The more eyes in a service, the better it gets.

If you know a way to do something that works and is efficient, you should make it reusable and shareable instead of reinventing the wheel all the time. This means building platforms and records that other bodies can use, providing resources that are easily usable and scalable to other contexts and jobs.

10 – Does it work?

Finally, and most importantly, if none of these commandments has helped, simply ask yourself the following question: "Does this solution improve the user's life?" If it does not clearly transform the user experience for the better, simply abandon it and start again from commandment number 1.

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The executive analysis of results in the direction and accountability of the government strategies

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ABSTRACT

Given the reality of the country regarding the scarcity of resources, especially financial ones, advances in public management have presented several options for governmental action, whether federal, state or municipal, with proposals for focusing public policies, but little put into practice.

By observing this scenario, with the adjustment of investments and efforts, to calibrate the delivery capacity of governments, more and more tools are needed to support the direction taken, which evidences the correctness of decision-making based on data and information closer to the effectiveness of actions.

Recently, there have been variations of public policy evaluations, but they do not permeate a timelines that is appropriate to the government cycle. The state of Goiás developed the Executive Analysis of Results, which, based on the program *Goiás Mais Competitivo e Inovador*, seeks to present the results achieved in a more objective and timely manner

The Executive Analysis of Results guides or promotes the correction of governmental actions based on the evolution of strategic indicators and their associates. The prerogative of the Executive Analysis of Results is to provide a scenario that is evaluated much less frequently than that of the publication of indicators by the official institutions. Thus, public managers can monitor the effectiveness of their actions and, if necessary, redesign and repackage projects to achieve their goals.

Keywords: Government. Results. Strategies. Accountability.

INTRODUCTION

After decades of implementation and evaluation of public policies, naturally we should already have a consistent and more employable model that could suppress all the difficulties faced in Public Management, mainly in what concerns the expectation of reaching results based on prior modeling and planning. However, when a new planning cycle begins, we seek increasingly better tools that will deliver a result beyond what has been achieved previously.

When we expect that each year we will have better results than the previous year, we are limited by factors that have an impact on different scopes of power and decision. We need to adapt ourselves to the crisis scenario, whether political or economic. There is an increasing need to curb waste based on a culture of quality spending as complex as meeting the needs and demands of the population. The shortage of resources does not allow us to know if we will have financial contributions at a given moment nor that we will be able to have and manage structural and human resources without this affecting the services of the Public Power.

Society is more demanding and finds within the limitations of the Public Power reasons to question even the existence of the State. There is the need to reevaluate the whole public policy cycle to have sustainable public policies and not just actions that may or may not be carried out, without expected results that are actually feasible.

In order to position the subject matter of this paper in a coherent and concise manner to our interlocutors, there is the need to align some definitions and/or concepts inherent to the context, and the main one is the Cycle of Public Policies.

THE CYCLE OF PUBLIC POLICIES

Public policy literature is quite comprehensive. Some phases and nomenclatures differ according to each author and/or ideologies structured according to the panorama implemented. To develop this paper, we will conceptualize the cycle of public policies in 7 phases:

Phase 1 – Diagnosis of the public problem: an allusion to the needs and demands of the population, political demands that must serve this population and opportunities for advancement or contingency for future problems.

Phase 2 – Update of the strategic agenda: the consolidation of the public problems prioritized for government performance, usually in the form of plans, laws, decrees, amendments, processes, and actions. It allows public managers to have a portfolio for allocating funds and directing efforts. Government plans prepared during a given election period are also included in this phase.

Phase 3 – Portfolio of initiatives: represents proposals or suggestions for solutions to public problems. Their implementation depends on the context where the public problem was diagnosed, i.e., the emphasis or criticality of the problem is representative in terms of the application or not of a given initiative.

Phase 4 – Definition of the initiative: among the portfolio of initiatives, the chosen one is the initiative that is more aligned to the context that will receive investments of funds and direction of efforts. The strategic alignment of the organization is the prioritization of a consonant public policy.

Phase 5 – Planning: based on the previous phases, the planning systematizes the performance of the Public Power for the implementation of public policy, allowing us to foresee the conclusion of the policy at the end of the process according to the expectation depleted during its preparation. The conclusion here does not concern the quality and effectiveness of the public policy, at this phase we only perceive tangible criteria in terms of efficiency and effectiveness.

Phase 6 – Implementation and monitoring: once planning is concluded, after all the planning is prepared, in this phase it is implemented and there is current monitoring to update the status of each point of interest or control listed by the public manager.

Phase 7 – Evaluation: after phase 6, measures are condensed to verify if the implementation of that public policy produced the expected effects, or if at least the scenario was affected so that/so/in order that based on new propositions we achieve continuous effectiveness of the actions.

Following these phases, there is no strangeness to what we normally propose during a cycle of public policies, but as we anticipated at the beginning of this paper, each day we are faced with a new scenario that requires a certain degree of adaptability and faster responses to the problems faced.

However, what we want to pinpoint in this paper is the time in which the actions of this cycle are carried out - we do not propose to change the order of these phases, but rather propose to bring them closer or overlap them. The monitoring carried out in phase 6 and the evaluation carried out in phase 7, in conjunction and distributed over the previous phases, anticipate situations that may not be foreseen in subsequent phases. However, as an objective of this study, we will focus only on evaluation.

WHY DO WE NEED TO EVALUATE PUBLIC POLICIES?

Usually, the evaluation of public policies has been defined as a tool that supports the feasibility of programs and actions. It provides to the public manager certainty that a given action may bring satisfying results or something close to it.

In the context of planning, the Multi-Year Plan (PPA) has several initiatives that reflect the aspirations of the population and will be carried out with deadlines, which are not so short and require future funds. But what if that given action does not achieve the expected effectiveness? What if such action is no longer consistent with what we identify as a need? We will need to find arguments to justify the result, and consequently we will be able to conduct or plan again for a new cycle the implementation of an adjusted public policy.

Without a public policy evaluation, we do not allow ourselves to make decisions without knowing for sure whether a change is needed. . Adjustments can only be made where problems of public policy application have been detected, unless we abandon the evolutionary characteristics of public management that lead to actions justified by evidence. However, going in the opposite direction would cause irreparable damage, problems with certain cases of accountability, conflicts of interest, and even misconduct in public office.

According to Cohen and Franco (2004), public policy evaluation is justified because it plays a central role in rationalization and is a basic planning element. When the application of a public policy does not have its results evaluated, there is a great risk it won't be effective. Without evaluation, we do not know if we are on the right track or if we are just performing something due to legal obligation.

The evaluation of public policies cannot be seen only as a mechanism to support the performance of the Public Power, but also as accountability to the population that expects that their needs and demands be met promptly and with at least minimum quality - that is, promotion of accountability and social control.

Day after day, society becomes more demanding. It is not satisfied and is moved by crises and austerity policies, demanding quality public service because it understands that it already pays a high price for it. And even if a certain public service is high quality, there will always be the need to seek better ways to perform so that part of the investments are redirected to low quality public services.

ACCOUNTABILITY: A MATTER OF GOVERNANCE, RESPONSIBILITY, AND SOCIAL CONTROL

When in the previous paragraph we ask ourselves why we evaluate public policies, we address the matter of fostering liability and social control. Recently, the term accountability has begun to be used in the sense of responsibility, without the need for outside interference to that authority scenario. Normally, it connotes the appropriation of a problem and its respective solution, in connection with the criteria that seek to guarantee better public performance (VAITSMAN, 2011).

Accountability is control and independence over a particular responsibility or action. It can be understood as the commitment of the public manager when assuming the delivery commitments to the population. Even campaign promises, when considered as public problem inputs prioritized by a governing authority, may imply accountability.

This search for responsibility is still imminent, since public managers may view the evaluation of public policies as a tool for political criticism when a particular result is not satisfying - even if the opposite is also possible, i.e., the recognition of results consistent with the political-social expectation. When the purposes of a public policy evaluation are unknown and distrusted, the tendency is to =not use it, since it gives the sense that evidence can be created against a questionable administrative act.

When a public policy is designed and implemented, not interfering in the process in order to ensure its results is no longer reasonable. Efficiency, effectiveness, and efficacy criteria may change from one moment to another and this requires us to have adaptability criteria or, in other words, good management and governance to change and decide what needs to be addressed immediately.

Another element to remember is that even if there is not much discussion regarding differences between control mechanisms and evaluation mechanisms, when focusing on the scope of an implemented public policy we note that the evaluation aims to develop full knowledge about programs, actions, and projects, as well as their impacts. General, control mechanisms seek to check conformities and establish limits for monitoring the program.

VOLATILITY IN THE IMPLEMENTATION OF PUBLIC POLICIES

It is common knowledge that once a public policy has been defined and its programs and actions have been designed, changes will occur during its implementation – and they may be small or big, to the point of making a program or action unfeasible. These changes are necessary to ensure that the objectives established are achieved or that we can positively interfere in the initially diagnosed scenario. They are also necessary when we overvalue or undervalue a goal, moving away from criteria of reasonableness due to funds, invested efforts, and the addressed scenario.

Changes are needed to improve the implementation of public policies, and not just to make corrections. Only a short-term program could take the risk of remaining solid and efficient. However, most programs last more than one year, which is inevitably a length of time prone to complications.

The preparation of a diagnosis, the level of available information, the definition of priorities, the financial and human resources, the interferences of the actors involved, among other factors, are subject to constant changes. All these factors have an impact on the results of a program.

Any change is accompanied by an impact that must be measured. In this context, and also in the universe of evaluation of public policies, we need measures that allow us to know if we are on the right path or if we have deviated from the objectives we proposed to pursue. The perceptions we bring to the technical solution method based on the use of indicators make it possible to visualize where we are and where we want to go.

And, in this case, we should bear in mind that there is a policy evolution that requires the evolution of all the processes and concepts applied in its implementation. In relation to the use of the indicators, we can say that they are no longer identified by the quantitative methodology and begin to observe more qualitative issues. It is no longer enough to implement a public policy; it must be effective. (CARNEIRO, 2013)

Later, we will address the indicators briefly, but it is clear that defining them is crucial for monitoring and evaluation of public policies. Socioeconomic indicators are no longer enough and we need to find more tangible alternatives to establish a basis for comparison.

TYPES OF EVALUATION OF PUBLIC POLICIES

Before we proceed to the objectives of this specific paper, we need to position further concepts for alignment with our readers. The vast literature on public policies leads to classifications to group them according to their proposed application. According to Cohen and Franco (2004) and Cotta (1998), we can classify public policies in relation to the agent that performs the evaluation, the nature of the evaluation and the time in which it is performed.

A – TYPE OF EVALUATION: BY AGENT

External evaluation: carried out by actors external to the institution in charge of implementation of the public policy. It has the advantage of not incurring everyday vices, and there is a possibility of innovations, but it also leads to longer terms since it does not have all the information. It is commonly understood as an audit or assistance operation. Even if the evaluator is in the same institution, but in a different area, the evaluation is considered external.

Internal evaluation: carried out by actors of the institution in charge of implementation of public policies. This is the opposite of external evaluation in terms of advantages and disadvantages.

Mixed evaluation: combines external and internal evaluations, seeking to include the advantages of each one and reduce their disadvantages.

Participative evaluation: motivated by the participation of the target public in the process of implementing public policies, including planning, execution, and evaluation. It is a more critical assessment and may occur over a longer period of time, as the target public's expectations may not be fully met by the proposed solution.

B – TYPE OF EVALUATION: BY NATURE

Formative evaluation: carried out during the formulation of the programs and actions, to support the managers in completing corrections or improvements in the structuring of the strategy. Prior monitoring may be performed to map the status of the scenario to be addressed.

Summative evaluation: carried out after the formulation, when the programs and actions have been implemented for some time or even when they end, to evaluate their effectiveness and have the perception of the gains/losses of the impact caused.

C – TYPE OF EVALUATION: BY TIME PERIOD

Ex-ante evaluation: connotes the diagnosis that is made at the beginning of the formulation of a program, to inform decision-making about whether or not to continue its implementation. It evaluates the coherence of the program. It is usually called pre-evaluation.

Ex-post evaluation: connotes monitoring or points of control during the execution of a program or at its end, in order to inform decision-making regarding the continuity of the program, whether we should keep the formulation initially designed or if we need to make adjustments. When the evaluation is performed at the end of the execution of the program, the goal is to target a new use of that experience or not, whether adjusted or not. It is usually called an impact assessment.

We note that an ex-post evaluation is sometimes discriminated as a method of abstraction or a non-concrete method because it evaluates a result by a baseline. However, in any case, it anticipates certain decisions that need to be made.

D – TYPE OF EVALUATION: BY PROBLEM

Evaluation of processes: an evaluation that seeks to identify the bottlenecks during the process of adjustments in the implementation of the program or action. It is directed towards improving the efficiency of public management, supporting the continuity of the vicious circle.

Evaluation of impacts or results: a more robust evaluation that gathers several elements and verifies if a given public policy was effective or not. As a program achieves its objectives, it evaluates if the scenario initially diagnosed has undergone changes that justify the actions taken. It informs decision-making on whether to give continuity to a program and formulate others.

Cotta (1998) suggests differentiating between the evaluation of impacts and the evaluation of results. The author understands that an evaluation of results is intended to measure interference in the target audience scenario, while an impact evaluation is aimed at capturing the effects of this interference.

OBJECTIVES

After a brief introduction of the public policy evaluation scenario, we are able to proceed with the fundamental presentation of this paper, which is The Executive Analysis of Results, which is an evaluation prepared with the participation of government actors (C*entral de Resultados*

da Secretaria de Estado de Gestão e Planejamento do estado de Goiás - Segplan[1]*)* - and specialized support from a consulting company (*Macroplan – Prospectiva, Estratégia & Gestão*).

The purpose of the Executive Analysis of Results is to give support to public managers based on a greater prediction of the results to be achieved. It provides a timely and shorter duration evaluation so that the formulation of strategies, the design of programs and actions, as well as their execution be observed through the effective achievement of the aligned objectives.

It is a tool which guides government performance and actions. In addition to identifying points of control to achieve goals, it represents a form of accountability, since it exposes all the commitments assumed and confronts them with perceived reality. It is not explicitly a mechanism of public spending quality, but rather it supports the need to direct the necessary interventions for the qualifications of the actions performed.

The Executive Analysis of Results merges the idea of Project Evaluation and Indicator Evaluation, which support the actors involved in the execution of the programs, but with guiding approaches. In other words, it abandons the separate view, understanding that when a particular program is outlined, its efficiency, efficacy, and above all effectiveness cannot be evaluated by only looking at the physical and financial performance of such program, let alone the value measured of an indicator that may not have been influenced yet by the public policy in question.

It is not a new concept or product, we cannot consider it a great innovation in public management, but we can understand it as a great point of transposition of periods of evaluation within the cycle of implementation of a public policy. It is not to be confused with an impact assessment as suggested by Cotta (1998), but instead it brings greater qualification to the public manager for decision-making, because at every favorable time it provides analyzes and positions of the possible results.

Its purpose is to support the evaluation of a certain program during its execution, avoiding that we exceed the limits of the term necessary to cause some change. Anticipation positively reduces the risk of losing all effort made.

In terms of temporal positioning, we estimate that every six months we have a broader evaluation; and, on a quarterly basis, a specific evaluation to support program managers.

METHODOLOGY

In the state of Goiás, after outlining the diagnosis of the situation of public problems, public policies were prioritized in challenges, which could be potentially faced and met criteria such as criticality, relevance, opportunity, timeliness, and governability. The *Goiás Mais Competitivo e Inovador* **(GMCI)**[2] program was structured based on this work, translating the strategies of government action measured according to an analysis of the competitive evolution of socioeconomic indicators (SANTOS, 2016).

1 Results Center of the Secretariat of Management and Planning of the State of Goiás - Segplan

2 Goiás More Competitive and Innovative Program (GMCI)

The GMCI is a program aimed at developing competitiveness and improving public management in the state of Goiás, aiming to place Goiás among the most competitive states of the country, considering the rankings of competitiveness and based on studies, scenarios, and surveys of the challenges emerging in that state for the coming years.

Figure 1 – Portfolio of Challenges/Programs of the GMCI

[Translation:
QUALITY OF LIFE:
HOUSING – DEATHS IN TRAFFIC ACCIDENTS – CHILD MORTALITY – HOMICIDES – BASIC HEALTH CARE SERVICE – CONNECTIVITY – BASIC SANITATION

ECONOMIC COMPETITIVENESS:
QUALITY OF LEARNING – CHILDHOOD EDUCATION – INNOVATE GOIÁS – QUALITY OF ROADWAYS

EFFICIENT PUBLIC MANAGEMENT:
FISCAL SOUNDNESS]

The GMCI has three axes: quality of life, economic competitiveness, and efficient public management. The challenges or “subprograms” are positioned within each axis.

As with any program, it has undergone some developments: actions, projects, milestones, and activities were identified to improve the diagnosed scenario.

Bold goals were negotiated for socioeconomic indicators to reflect improvement of the public services provided and attention to the needs of the population. Evidently, in a scenario of crisis and lack of resources, these goals can be timely overvalued or undervalued - always seeking a bold goal that is reasonable and possible to achieve.

Figure 2 – Scope of the Executive Analysis of Results

[Translation:
GOALS
CHALLENGE/PROGRAM – STRATEGIC INDICATOR
PROJECT/ACTION – ASSOCIATED INDICATOR
MILESTONE/ACTIVITIES
PRODUCTS /DELIVERIES
PROJECT EVALUATION
INDICATOR EVALUATION
EXECUTIVE ANALYSIS OF RESULTS]

The Executive Analysis of Results, based on the definition of any structure of the GMCI portfolio, makes it possible to evaluate whether the formulation initially defined will provide the results contained in the goals of the indicators and the expected deliveries for each challenge.

The formulation of the program defined strategic indicators with the possibility of comparison with the other federative units, following the aforementioned concept of competitiveness. These indicators, for the most part, do not allow for follow-up with reduced frequency, some have a delay of one year or more. Therefore, to promote quality information for the evaluation of the program, the Executive Analysis of Results jointly provides information on the strategic indicator and information on the associated indicators and/or specific information that measures the progress of the actions, both quantitatively and qualitatively. (SANTOS, 2016)

Products related to strategic performance were defined as a point of control of results, and sometimes they are the only alternative, since not all strategic indicators allow for guided reading based on an associated indicator. For example, the relative and absolute housing deficit calculated by the Fundação João Pinheiro (MG) does not provide associated indicators similar to the child mortality rates (prenatal visits, vaccination coverage etc.), it is usually accompanied by the deliveries of housing units.

By following the evolution of the associated indicators, the strategic indicators trend, and the performance of challenge deliveries, we began to have better control of the condition of the implementation of public policies and, finally, provide greater security to continue or promote change in the executed design. We do not have to wait for the execution of a plan or project to be completed. The greater the anticipation of results, the better the condition of adjusting a certain critical situation and reducing the risks and costs of subsequent changes.

Nevertheless, it is worth noting great care is needed when defining the period to be evaluated. Short deadlines may not reflect the program implementation - especially when the impact is sensitive regarding social problems.

Two cycles of elaboration of the Executive Analysis of Results were already carried out, which contemplated more and more information, analyzes, and notes, avoiding that any indication of change in the program be subjective. That is, evidence and trends are presented to support decision-making. This does not imply that it will become a restriction to the program – the continuity, change or termination of the program remains under the responsibility of its manager.

The Executive Analysis of Results is structured in three major stages or sections: updated retrospective analysis, performance analysis of the GMCI program and analysis of indicator trajectories.

The Updated Retrospective Analysis is a stage or section that provides the diagnosis prior to the formulation of the GMCI program, but where all the updates of indicators and information were made to position the scenario closer to the reality of the performance of the public manager. A "basis of comparison" is defined for the program evaluation disregarding the possible lag.

The Program Performance Analysis is a stage or section that presents the traditional evaluation of projects, that is, the physical execution of the programs, actions, frameworks, activities, and deliveries - with the exception of the financial part that, for the moment, we have opted to delay to better qualify the program's cost management.

During this stage, we may assume very conflicting conditions. We may observe a program with high execution percentage and no results achieved, just as we may observe a program with many deliveries and no improvement in the indicator. The analysis cannot be performed in isolation and does not follow a standard to be applied to all challenges.

The Analysis of Indicator Trajectories is a stage or section that provides analysis and evaluation of the measured path of the indicators from the base defined during the retrospective analysis. We observe increases and decreases in the indices and perceptions of whether there were advancements or not in view of the established goals. This is where most of the trends that demonstrate the effectiveness or inaccuracy of a particular action are present. Here we can perceive that we are carrying out a diagnosis after the formulation of a strategy, but our intention is to clarify the notes that tend to reach the results or not.

CONCLUSIONS

The estimated deadline for conclusion of GMCI planning the end of 2018. Until then, the public managers, the persons responsible for actions, ge and the actors who gain or lose depending on the results achieved by the indicators periodically have information in their hands to subsidize any decision-making.

The Executive Analysis of Results allows for the maintenance of a specific program, pointing out that every line of implementation is following the most appropriate path to reach the results and improvement of the initially diagnosed scenario.

It allows you to review a particular program, making the points of correction or improvements explicit according to the delivered results, suggesting that we should not persist with the implementation of something that, up to that moment, did not produce anything satisfying.

The creation of new programs and actions may be indicated when the expectations and limits of the current program are exceeded or when branches of activities that are quite different from the defined scope are identified.

Furthermore, in a drastic manner, the Executive Analysis of Results may recommend the cancellation or termination of a certain program. Either because the program is no longer coherent or because the treated scenario has been modified in such a way that a new formulation is needed.

It is a type of work more directed toward achieving what needs to be done rather than necessarily representing the insertion of public management innovation. It is a public policy evaluation condensed into a format that gathers results of projects/actions and results of indicators, aligning the expectations of the public agents with the possibility of performance.

We still need to evolve in the design of a methodology to prepare the Executive Analysis of Results. The information produced must be better communicated and, we need to strategically convince the public agents to make the necessary decisions - because, culturally, these agents ignore notes and disregard decision-making based on data.

The present trend analysis allows the program results to have a uniform direction but may lead to misinterpretation, since within a given historical series, specific or seasonal factors may have interfered in the timeline. We are diligent in presenting all these gradations to make good use of the information that we have at hand.

In addition, in the next cycles of preparation of the Executive Analysis of Results, in addition to the necessary adjustments, we intend to expand and further enter the scope of public spending quality.

In any case, we believe that preparation and use of the information produced bring great benefits to public managers, even to those who fear the political use of results. We provide another tool available to public agents and the population in relation to guide government strategies towards accountability.

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