ReGeo ISSN: 2177-3246

EUROPEAN AND BRAZILIAN COURT OF AUDITORS: ONE COMPARATIVE OVERVIEW[1]

TRIBUNAIS DE CONTAS EUROPEUS E BRASILEIRO: UMA VISÃO COMPARATIVE

TRIBUNALES DE CUENTAS EUROPEO Y BRASILEÑO: UNA VISIÓN COMPARATIVA

https://doi.org/10.56238/revgeov17n10-136

Data de submissão: 21/09/2026 **Data de publicação:** 21/10/2026

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ABSTRACT

Study on the historical context of the advent of the Supreme Audit Institutions (SAI), in the case of the internal public law of the external administrative scope of the Federative Republic of Brazil, in its models brought by the Magna Carta of 1988 and in comparison with the *fac simile* instituted by the Treaty of Brussels 22 of July of 1975 with designation of competencies in October of 1977: : Auditing Court of Brazil and European Union. Bringing elsewhere the political scope and general hierarchical structure of internal organization, among a framework of comparability and importance for the Democratic State under the Rule of Law and institutional transparency, or better use of the public budget or public contribution.

Keywords: Public Law. Comparative Law. Court of Auditors. Auditing. Internal and External Control.

RESUMO

Estudo sobre o contexto histórico do surgimento das Instituições Superiores de Controle (IST), no caso de Direito Público interno de âmbito externo Administrativo da República Federativa do Brasil, nos seus moldes trazidos pela Carta Magna de 1988 e em comparação com a *fac simile* instituída pelo Tratado de Bruxelas 22 of July of 1975, com designação de competências in October of 1977, trazendo alhures o escopo político e estrutural hierárquica geral de organização interna, dentre um escopo de comparação e importância para o Estado Democrático de Direito e transparência institucional, ou melhor uso do erário público ou contributo público.

Palavras-chave: Direito Público. Direito Comparado. Tribunal de Contas. Auditoria. Controle Interno e Externo.

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[1] Paper Work produced for the Lecture *Tutorium zum Kolloquium II: Einführung zur Europäischen Rechtspraxis,* in Studies Areas of ***Europäischer Rechtspraxis,*** by *Juristische Fakultät* of *Gottfried Wilhelm Leibniz Universität Hannover,* with supervison of Professor/Magíster: Dr. Dr. Dimitrios Parashu. Summer/Sommer: 2021.
Daniel Schneider Guedes Alcoforado. **European and Brazilian Court of Auditors: one comparative overview**. Working Paper. In. **Tutorium zum Kolloquium II: Einführung zur Europäischen Rechtspraxis abe Europäischer Rechtspraxis Seminar.** Dr. Dr. Dimitrios Parashu**.** Hannover, Alemanha. Lisboa, Portugal. Juristische Fakultät, Gottfried Wilhelm Leibniz Universität Hannover e Faculdade de Direito de Lisboa, Universidade de Lisboa. Julho/2021. Disponível em < https://www.fd.ulisboa.pt/wp-content/uploads/2025/02/European-and-Brazilian-Court-of-Auditors_working_papers.pdf>.

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RESUMEN
Estudio sobre el contexto histórico del surgimiento de las Entidades Fiscalizadoras Superiores (EFS) —en el marco del derecho público interno y el ámbito administrativo externo de la República Federativa del Brasil—, analizando los modelos establecidos por la Constitución de 1988 y comparándolos con el sistema instituido por el Tratado de Bruselas del 22 de julio de 1975 (con la definición de competencias en octubre de 1977): el Tribunal de Cuentas de Brasil y el de la Unión Europea. Se aborda, asimismo, el alcance político y la estructura jerárquica de su organización interna, en un marco que permite la comparabilidad y destaca su importancia para el Estado democrático de derecho, la transparencia institucional y una gestión más eficiente del presupuesto público o de los recursos aportados por la ciudadanía.

Palabras clave: Derecho Público. Derecho Comparado. Tribunal de Cuentas. Fiscalización. Control Interno y Externo.

1 EUROPEAN COURT OF AUDITORS

1.1 FOUNDATION, HISTORY AND LEGAL FRAMEWORK OF EUROPEAN COURT OF AUDITORS

The legal framework for the creation of the Court of Auditors of the European Union was the Brussels Treaty of 22 of July of 1975, and it took up it's duties in October of 1977, with its headquarters in Luxembourg. However, only 16 (sixteen) years later it became a fully-fledged European institution through the Maastricht Treaty, enacted on 1st of November of 1993, which allowed it to have the legal *status* equivalent to that of the Commission, the Council and the European Parliament in terms of it's independence. The Court acquired a legal personality as a postulatory body, institutional independence, and the power to intervene in and audit all the agencies of the European Union-EU, through the Treaty of Amsterdam enacted in 1999, becoming in fact and in law an external control body of the EU.

It should be noted that since the founding of the European Community in 1958, the task of auditing the budget was performed by the Audit Committee, which didn't have the powers or the resources necessary to ensure the proper auditing of the budget executed by the European Parliament.We must ponder that the European Community has as the basis of its foundation the economic and financial restructuring and reconstruction resulting from the Marshall Plan[3] (started in 1948), which would lead to the formation of the Organization for Economic Cooperation and Development - OECD[4] was founded by signed at the Chateau de la Muette in Paris on 14th of December of 1960 and entered into force on 30th of September of 1961, whose objective of the United States and Member States was to rebuild regions devastated by II World War-IIWW, remove trade barriers and modernize industry, improve European prosperity and prevent the spread of communism.

It should be remembered that precisely in the beginning of the 1990s we had as a historical and social landmark the opening of the Union of Soviet Socialist Republics (USSR) to the West, which began with the opening and transparency initiated by Mikhail Gorbachev (1931-, president 1990-1991) through Perestroika, concluded by Boris Nicoláievitch Yeltsin (1931-2007, president 1993-1999), marking the definitive end of the USSR and the emergence of the Russian Federation[5]:

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3 HOGAN, Michael J. **The Marshall Plan: America, Britain, and the Reconstruction of Western Europe, 1947–1952**. Cambridge UP, 1987.

4 OCDE. **OCDE 60 years**. Available on : <https://www.oecd.org/about/ >. Accessed on 25/05/2021.

5 We are inclined to conclude that transparency of EU resources was only possible with the defragmentation of the USSR/CCCP, the real reason for the obscurity, as well as the lack of political will to do

> Gorbachev's reforms weakened this role [of guaranteeing the legitimacy of international communism], without building a credible and sustainable alternative. His universalist revival revealed the loss of meaning of communism as a subject in the modern world. The decline of international communism in the 1960s thus revealed itself as the premise and the announcement of a deep crisis, destined to accumulate problems of all kinds. It was fundamentally a crisis of legitimation of states, of the movement, and of the communist political culture.[6]

Having, therefore, its full institutional powers, the European Court of Auditors can verify the economy, effectiveness, efficiency, legality and regularity of the EU's acts and actions to improve the management of the treasury, promoting accountability, transparency and financial management, through independent and external audit work and discretionary impact, therefore, being the "financial conscience of the Community", as defined by Hans Kutscher, who was President of the Court of Justice at the time of its creation in 1975[7].

The Treaty of Lisbon (initially known as the Reform Treaty) provides for the European Court of Auditors in Section 7, in its Articles 285 to 287, with Art. 285, *ex vi*[8]:

> The auditing of the Union's accounts is carried out by the Court of Auditors.

This Court is entrusted with the primary task of auditing the Union's accounts with a view to improving financial management, and all EU resources like is disposed at the Articles 310 to 325, of the same Treaty, those articles regards to the financial provisions is set out in. In essence, the Court of Auditors is given the role of the EU's independent external auditor.

As an independent institution of the European Union, enshrined in the Treaty, the functioning of the European Court of Auditors must be governed by appropriate rules and procedures. Thus, its Rules of Procedure are provided for in Article 287 of the TFEU and are subsequently adopted by the Council.

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so, may denote two things: spending for specially elected political or institutional purposes and funding, or secret partnership with the USSR.

6 PONS, Silvio. Trad. Luís Sérgio Henriques. **A Revolução Global – história do comunismo internacional. (1917-1991)**. Rio de Janeiro: Contraponto; Fundação Astrogildo Pereira, 2014, p. 553.

7 EUROPEAN COURT OF AUDITORS. History. Available on: <https://www.eca.europa.eu/pt/Pages/History.aspx>. Accessed on 25/05/2021.

8 EUROPEAN UNION. EUR-LEX **Access to EU Laws**. Available on: <https://eur-lex.europa.eu/legal-content/PT/TXT/?uri=OJ:C:2007:306:TOC>. Accessed on 25/05/2021.

It is for the Court to define the rules for implementing its own Rules of Procedure, Summary we can classified the Titles and Sections of the Internal Rules on[9]:

- Organization and Structure: Articles 1st. until 24th.
- Decisions and Reports: Articcles 25th. until 31th.
- Info Access: Article 35.

1.2 STRUCTURE AND COMPOSITION

This organ is composed of one member from each EU Member-State and is currently composed of a total number of 27 members, as stated in Article 285, of the Lisbon's Treaty[10]. The fact that it is a Court composed of representatives from each Member-State has highlighted the importance of the cooperation of the European Court of Auditors with the respective national audit institutions.

By disposition of Article 286, of the Lisbon's Treaty-TFUE[11], in particular n1, in order to be able to be part of this Court the members must belong or have belonged in their country to external audit institutions, or have a specific qualification for this function, and offer guarantees of independence. The process of appointment as members is carried out by the Council, which acts by qualified majority based on a recommendation from each Member-State, after consulting the European Parliament. The term of office is 06 (six) years, with the possibility of renewal.

The organization of the Court has two major spheres and a necessity, which are: the College, which is composed of 27 initiated Members, headed by a President; the Chambers, which elect their Dean from among their peers, and; the Committees, respectively.

It is the responsibility of European Parliament to sanction the 27 (twenty-seven) Members nominated by each signatory State, who have a mandate of 06 (six) years, with the possibility of reconduction which will compose the Chambers and Committees of the Court. The Members elect the President from among themselves, for a renewable period of 03 (three) years[12].

[9] EUROPEAN UNION. EUR-LEX Access to EU Laws. Available on: <https://www.eca.europa.eu/Lists/ECADocuments/RULES_PROCEDURE_2010/RULES_PROCEDURE_2010_PT.PDF>. Accessed on 25/05/2021.
[10] Ibidem.
[11] Ibidem.
[12] EUROPEAN COURT OF AUDITORS. **Governance.** Available on: <**https://www.eca.europa.eu/pt/Pages/Structure.aspx**>. Accessed on 25/05/2021.

The Internal Rules of the Court stipulate that meetings of the nominated Members shall be a minimum of two (2) times per month, designated by the provisional calendar defined at the end of the previous year of its execution, in accordance with item, n 1, of Article 17[13], of the Rules of Procedure of the Court, to discuss and adopt documents such as the Court's main annual publications, which are the reports on the EU general budget and the European Development Funds. It should be noted that additional meetings may be organized on the initiative of the President or at the request of at least one quarter of the Members of the Court, in accordance with, item 2, of Article 17[14], of the Rules of Procedure of the Court.

The Court is organized into 05 (five) chambers, each with its own area of activity:

Chamber I: Sustainable use of natural resources;
Chamber II: Investment for cohesion, growth and inclusion;
Chamber III: External action, security and justice;
Chamber IV: Market regulation and competitive economy;
Chamber V: Union financing and administration.

All of the above mentioned Chambers are composed of Members and permanent staff, the Chambers adopt reports and recommendations, with the exception of the Annual Report on the general budget of the European Union and the Annual Report on the European Development Funds, which are submitted to the Collegiate, with the base of Art. 11, of Internal Rule[15].

The Committees are responsible for issues not covered by the Chambers, in accordance with Article 11 of the Internal Rules, dealing with specific or seasonal topics, according to Article. 12, of the Rule[16].

Although the Court has its own Presidency, its management and organization is carried out by the General Secretary, who can be elected from among its permanent staff. At the hierarchical level, he is the highest ranking member of the institution and is appointed by the Court for a renewable six-year term. He is responsible for staff management and administration in the areas of human resources, finance and general services; information, working environment and innovation; and translation, language services and publishing. The

[13] Ibidem.
[14] Ibidem.
[15] Ibidem.
[16] Ibidem.

Secretary General is also responsible for the Court's Secretariat, according to Article. 13, of the Rule[17].

The Court has nine hundred (900) permanent staff[18] in the audit and administration departments. The training and professional experience of the Court's auditors is very varied, in both the public and private sectors, including accounting, financial management, internal and external audit, law and economics.

The Court also has translators who master some 23 (twenty three) official EU languages and ensure that the institution's publications can be read by the citizens of each Member State in the language of their choice. Like all other EU institutions, the Court employs citizens from all Member-States.

1.3 WORK AND ACTIVITIES

The principal mission[19] of the European Union's external auditor is to verify that EU funds are spent in accordance with the relevant principles of economy, efficiency and effectiveness. The ECA isn't only responsible for auditing the accounts, but also for the management of the European Union's public finances. It is an independent external control body of the European Union, complementing the European Parliament and the Council in the exercise of their respective control functions over the implementation of the budget, which has three main objectives:

- to contribute to improving the management of EU public finances
- to promote accountability and transparency
- to act as an independent guardian of the financial interests of EU citizens.[20]

As part of its work, the court carries out various types of audits in different areas of the EU budget. These can take the form of performance audits, which relate to the economy of EU policies and programs, and are mostly value for money audits focusing on specific budgetary or management aspects. It also carries out financial audits, which relate to the reliability of the annual accounts, and compliance audits, which examine the legality and regularity of underlying transactions.

[17] Ibidem.
[18] EUROPEAN COURT OF AUDITORS. **Governance.** Op.cit.
[19] EUROPEAN COURT OF AUDITORS. **Values, Mission and Vision.** Available on: <**https://www.eca.europa.eu/pt/Pages/values-mission-and-vision.aspx**>. Accessed on 25/05/2021.
[20] EUROPEAN COURT OF AUDITORS. **Values, Mission and Vision.** Op.cit.

The audit performed by the Court of Auditors is permanent and carried out in collaboration with the National Supreme Audit Institutions. As a rule, and as provided for in Article 287.3 of the TFEU[21], this audit is performed on a document basis, and the entities are obliged to supply any document or information that is deemed necessary for the correct performance of the Court's duties. However, if necessary, the audit may be carried out at the EU institutions and agencies as well as at any body which manages revenue or expenditure on behalf of the Union and at any natural or legal person in receipt of payments from the EU budget.

Based on the information it gathers during its audit work, the court draws up reports presenting its clear findings on the management of the Union's public finances. These can be annual reports, specific annual reports and special reports, depending on the type of audit. Among these reports, the annual report is of great importance. According to Article 287 of the TFEU[22], this report is published after the end of each financial year in the Official Journal of the European Union[23], and it reflects the conclusions drawn from the various audits.

Among the audit activities carried out by the ECA we highlight the various programs and activities undertaken by the EU, many of which are implemented by non-governmental organizations (ONGs). In the period 2014-2017[24], the Commission committed an estimated 11,3 billion euro for implementation by NGOs in many direct and indirect programs intervention areas.

The Court's audit work examined the transparency of Union funds implemented by ONGs, with a particular focus on external action, which is, of all policy areas, the largest area where NGOs implement EU funds, developed in Third-States.

The Court found that the way in which the Commission identifies entities as ONGs in its systems is unreliable although generally transparent in the process of selection of entities by the Commission project officer.

However, the procedures for the selection of ONGs by some of the UN bodies audited were not transparent and the Commission does not always collect and verify complete information on all ONGs supported. Information on EU funds implemented by ONGs is

[21] Ibidem.
[22] Ibidem.
[23] The Official Journal of the European Union (OJ) is the main source of EU-related content. It is published daily (Monday to Friday and, in urgent cases, Saturdays, Sundays or national holidays) in all official EU languages.
[24] AUDIT CHAMBER V. Org. Lazaros S. Lazarou. Especial Report n35: Transparency of EU funds implemented by ONGs: more efforts are needed. Court of Auditors of the European Union, 2018, 50p.

published in various systems, but there is limited information for dissemination and publication. The Court concludes that more efforts are needed to improve the publicity of ONG selection procedures and implementation of funds. In addition, the Court makes a number of recommendations aimed at improving the transparency of EU funds implemented by ONGs.

In the context of the management and structural organization of the European Union itself, we perceive the implementation of the principle of adherence of the public entity, the need for the existence of a legal norm for its action. Faced with this phenomenon, the Court proceeded to analyze the legislative body of the Union, which resulted in statements whose points on the path to be followed by the bodies of the Union. Based on the results of its previous audits and the information analyzed, the Court has identified as major challenges for the Commission, the EU co-legislators and the member states, through its Audit Work the "better regulation" initiative o ensuring that EU policies and legislative initiatives are sufficiently subject to good quality consultation, ex post evaluations and impact assessments; o ensuring that legislative proposals provide for sufficient data collection to support effective monitoring and evaluation; o continuing to simplify EU legislation and monitor its incorporation and implementation in the Member States; and o improving the transparency of the legislative process for citizens and other stakeholders[25].

2 BRAZILIAN COURT OF AUDITORS: UNION COURT OF AUDITORS

2.1 FOUNDATION, HISTORY AND LEGAL FRAMEWORK OF UNION COURT OF AUDITORS

The Union Court of Auditors[26] or “Tribunal de Contas da União” (UCA/TCU), was created with the mission of "examining, reviewing and judging acts concerning the revenue and expenditure of the Republic", the Court of Auditors was established by Decree nº 966A of 7 November 1890[27], signed by the President of the Provisional Government, Marshall Manuel Deodoro da Fonseca[28]. The initiative was taken by Rui Barbosa, then Minister of Finance. In his explanatory statement, he saw the Court of Auditors as:

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[25] AUDIT CHAMBER V. Org. Tony Murphy. Analysis Report 2: The legislative process in the European Union after almost 20 years of "Better Lawmaking." Court of Auditors of the European Union, 2020.

[26] The translation of the Portuguese expression “União” in English could be “Union”, literal one, and also could be “Federal” one with mention of the government form, this work adopted the literal one.

[27] BRAZIL. **Decree nº 966-A, of 7 of November of 1890**. Available in: < https://www2.camara.leg.br/legin/fed/decret/1824-1899/decreto-966-a-7-novembro-1890-553450-publicacaooriginal-71409-pe.html/>. Access in 21/06/2021.

[28] Manuel Deodoro da Fonseca (1827-1892) was a Brazilian military and political figure, the first president of Brazil and one of the central figures in the Masonic Military coup/mutiny to overthrow the Brazilian Empire and

> "(…) body of intermediate magistracy to the administration and the legislature, which, placed in an autonomous position with attributions of revision and judgment, surrounded by guarantees against any threats, may exercise its vital functions in the constitutional organism (...).) An independent mediator should be raised between the branch that periodically authorizes expenditure and the branch that executes it on a daily basis, an auxiliary of both, who, communicating with the legislature and intervening in the administration, is not only the watchman but also the strong hand of the former over the latter, preventing the perpetration of budgetary violations by opportunely vetoing acts of the Executive that directly or indirectly, closely or remotely, deviate from the strict line of the finance laws". [29]

The Constitution of 1891, still under the influence of Rui Barbosa, definitively instituted the Court of Auditors, inscribing it in Article 89. Also by Rui Barbosa, in the Explanatory Memorandum of the Decree that originated it, he cites his comparative studies of the European models of Courts[30]. The first model adopted comprised France, Sweden, Spain, Greece, Serbia, Romania and Turkey. The second model included Italy, Holland, Belgium, Portugal, Chile and Japan. The difference between them was basically the possibility, in the Italian model, of anticipating possible abuses, preventing the Executive Power from performing acts that might generate illegal expenditure, called prior control, which was adopted by Brazilian legislation and maintained to this day.

Since then, the Court of Auditors was present in all constitutional texts, always in the position of autonomous body and with outstanding functions, although its powers in the course of the Republic[31], have undergone changes.

The Constitution of the Federative Republic of Brazil of 1988 (CRFB/88) [32], the competencies and prerogatives of the TCU were reinscribed, significantly expanded[33].. The TCU's competence to judge the accounts of administrators and others responsible for monies, assets, and values of the direct administration - ministries and related bodies - and of the indirect administration, the latter comprising autarchies, foundations, public companies,

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Proclaim the Republic in the country. DEODORO DA Fonseca. Wikipedia, 2020. Available in: < https://pt.wikipedia.org/wiki/Deodoro_da_Fonseca>. Access in 21/06/2021.

29 TRIBUNAL DE CONTAS DA UNIAO. In: DICIO, Dicionário Online Fundação Getúlio Vargas: Centro de Pesquisa e Documentação de História Contemporânea do Brasil. Available in: < http://www.fgv.br/cpdoc/acervo/dicionarios/verbete-tematico/tribunal-de-contas-da-uniao-tcu/>. Access in 21/06/2021.

30 BARBOSA, Rui. **Exposição de motivos de Rui Barbosa sobre a criação do TCU**. Revista do Tribunal de Contas da União. Brasília, v. 30, n. 82, p. 253-262, out./dez. 1999.

31 *Vide*: Brazilian Constitution of 1934's, 1946's, 1967's.

32 Also known as: Magna Carta, or Constituição Cidadã (Citizen's Constitution) - After the Military Regime (1964-1985). BRAZIL. **Constitution of the Federative Republic of Brazil, of 5º October of 1988**. Available in: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm>. Access in 21/06/2021.

33 Vide: Articles 33, §2, 70, 71, 72, §1, 74, §2 and 161, sole paragraph,CRFB/88. Ibidem.

mixed economy companies, and other entities controlled directly or indirectly by the Union, was consecrated (Article. 70, CRFB/88). Likewise, the Court is responsible for judging the accounts of those who cause the loss, misplacement or other irregularities that result in damage to the treasury. And in its judgment, the TCU appreciates, by constitutional imperative, not only the legality and legitimacy of the acts of those responsible, but also verifies if the principles of economy, efficiency and effectiveness were observed in the application of resources.

The Court, by its own initiative or by the National Congress, may conduct inspections or audits of an accounting, financial, budgetary, operational or patrimonial nature, in the units of the three branches of government, without any reservations. It is also in charge of supervising the application of official subsidies and the renunciation of government revenues and the application of any resources passed on by the Union, through agreements, arrangements or other similar instruments, to states, to the Federal District or to municipalities.

The TCU is also responsible for evaluating, for the purposes of registration, the legality of acts of personnel admission, for any reason, in the direct and indirect administration, including foundations created and maintained by the government, except for nominations for commissioned positions, as well as the legality of retirement, retirement and pension grants.

In the hypothesis of expenditure illegality or account irregularity[34],, the TCU is responsible for setting a deadline for the responsible party to adopt corrective measures; for suspending the execution of the impugned act, except regarding contracts, which is the competence of the National Congress; for representing the competent Power on the abuses or irregularities verified, and also, according to the case and the seriousness of the transgression, to impose sanctions foreseen by law. According to the Constitution, the Court's decisions that result in the imposition of a debt or the imposition of a fine are enforceable.

Finally, the 1988 Constitution maintains one of the Court's most important attributions: to offer a prior opinion on the annual accounts of the President of the Republic for later judgment by the National Congress[35]:

In resume, those are the competence of TCU[36]:

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[34] BRAZIL. **Complementary Law nº 101**, of 4 May 2000. Available in: < http://www.planalto.gov.br/ccivil_03/leis/lcp/lcp101.htm>. Access in 21/06/2021.

[35] TRIBUNAL DE CONTAS DA UNIÃO. Conhecendo o Tribunal: Tribunal de Contas da União.7. ed. Brasília : TCU, Secretaria-Geral da Presidência, 2019, p. 16.

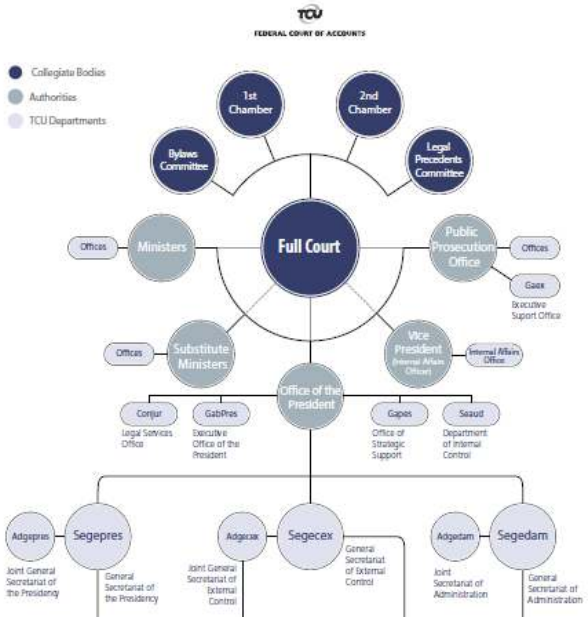
[36] Ibidem.

- To examine the annual accounts of the President of the Republic
- To judge the accounts of administrators and others responsible for public money, assets and values.
- To examine the legality of the acts of personnel admission and the concession of civil and military retirement pensions.
- Carry out inspections and audits by its own initiative or by request of the National Congress.
- To inspect the national accounts of supranational companies.
- To inspect the application of federal resources transferred to states, the Federal District and municipalities.
- Provide information to the National Congress on the inspections carried out.
- Apply sanctions and determine the correction of illegalities and irregularities in acts and contracts.
- Suspend, if not complied with, the execution of the impugned act, communicating the decision to the House of Representatives and to the Federal Senate.
- Issue conclusive opinions, at the request of the Joint Standing Committee of Senators and Deputies, on expenses incurred without authorization.
- Investigate denunciations presented by any citizen, political party, association or union regarding irregularities or illegalities in the application of federal resources.
- Establish the coefficients of the participation funds of the states, the Federal District and the municipalities and supervise the delivery of resources to the state governments and municipalities.

2.2 STRUCTURE AND COMPOSITION

Figure 1

Unique Image. Hight Structure of the Auditing Court of Brazil[37].



[37] UNION COURT OF AUDITORS. **Organization Structure**. Available in: < https://portal.tcu.gov.br/institucional/estrutura-organizacional/>. Access in 21/06/2021.

The TCU is a collegiate body and its decisions are taken by the Plenary of the Court or by one of its chambers[38] and has its own staff, its headquarters is in the Federal District, Brasilia (BSB-DF)[39].

The TCU Ministers are appointed from among Brazilians who meet the following conditions, requirements brought by paragraph 1, Article 73, of the CRFB/88[40], *ex vi*:

> a) over 35 years of age and less than 65 years of age;
> b) moral character and unblemished reputation;
> c) notorious knowledge of law, accounting, economics/finance, or public administration.

Regarding this requirement, the Federal Supreme Court (STF) has already pronounced that it is not necessary to have a university degree in the area, it is enough to have a subjective evaluation of notorious knowledge made by the appointing party, more than ten years in the position, and effective professional activity that requires this knowledge. Once these requirements are met, anyone can be appointed by the President of the Republic as a Minister of the Federal Audit Court, R.*Decisum* that we transcribe *in verbis*:

> EMENTA: ORIGINAL ACTION. CONSTITUTIONAL. STATE AUDIT COURT. COUNCILORS. APPOINTMENT. FORMAL PROFESSIONAL QUALIFICATION. NOTORIOUS KNOWLEDGE. Formal professional qualification is not a requisite for the appointment of Councilor of the State Audit Court. The notorious knowledge requirement is a subjective assumption to be analyzed by the State Governor, at his discretionary judgment[41].

The CFRB/88 says that the choice of TCU Ministers is made as follows (§2, Article. 73, CRFB)[42]: there are nine Ministers, so that 1/3 (3 Ministers) are appointed by the President of the Republic with the approval of the Federal Senate, two of them alternately among

[38] BRAZIL. **Resolution-TCU nº 324, of 30 of December of 2020**. Available in: <https://portal.tcu.gov.br/data/files/13/00/E8/9A/4BDC67106D09B867F18818A8/BTCU_01_de_04_01_2021_Especial%20%20%20Cargos,%20Fun%C3%A7%C3%B5es%20de%20Confian%C3%A7a,%20Estrutura%20e%20Compet%C3%AAncias%20das%20Unidades%20do%20TCU.pdf>. Access in 29/06/2021.
[39] UNION COURT OF AUDITORS**. Address and Contacts.** Available in: <https://portal.tcu.gov.br/institucional/enderecos-e-contatos/>. Access in 29/06/2021.
[40] Op.cit.
[41] BRAZIL**.Supremo Tribunal Federal**. AO 476, Relator: MARCO AURÉLIO, Relator p/ Acórdão: NELSON JOBIM, Tribunal Pleno, julgado em 16/10/1997, DJ 05-11-1999 PP-00003 EMENT VOL-01970-01 PP-00009 RTJ VOL-00171-01 PP-00010. Available in: <https://jurisprudencia.stf.jus.br/pages/search?classeNumeroIncidente=%22AO%20476%22&base=acordaos&sinonimo=true&plural=true&page=1&pageSize=10&sort=_score&sortBy=desc&isAdvanced=true>. Access in 29/06/2021.
[42] Op.cit.

auditors and members of the Public Prosecution Service (MP) at the TCU, appointed in a three-nominee list by the Court. The other six Justices (2/3) are appointed directly by Congress.

There is a career of members of the Public Ministry attached to the TCU (MPTCU) that acts with the objective of defending the legal order, protecting the law and supervising its execution. Its attributions are listed in the Internal Regulations of the TCU under the heading of Public Ministry. The MPTCU has a Prosecutor-General, three Deputy Prosecutors-General and four Prosecutors, all appointed by the President of the Republic, after being approved in a public examination of tests and titles. No session can be held without the presence of a representative of the Public Ministry-TCU.

There is also a career of auditors (§4º, Article. 73, CRFB)[43], who assist the TCU ministers, carry out some instruction acts and eventually substitute the ministers in case of absence, vacation, or impediments. This auditor of the TCU, when substituting for the Minister, will have the same guarantees and impediments, but when he is in the normal exercise of his functions as auditor of the TCU, he will be equated to a judge of a Federal Regional Court, who will make up the staff of the TCU.

The Plenary of the TCU meets weekly on Wednesday afternoons. It is composed of all the Justices and is headed by the President of this Court of Auditors. Its sessions are also attended by the Substitute Justices and by a representative of the Public Prosecution Service attached to the TCU (MPTCU). The Plenary is responsible for deliberating on matters of relevance, which are listed in the Internal Regulations of the TCU under the heading "Competencies of the Plenary[44].

The TCU is also divided into two chambers, each composed of four ministers, two deputy ministers, and one representative from the MPTCU. The chambers meet on Tuesday afternoons. The 1st Chamber is chaired by the longest-serving minister in office (minister-decan); the 2nd Chamber, in turn, is chaired by the TCU's vice-president. It is up to the Chambers to deliberate on the matters listed in the Internal Rules of the TCU under the title Competences of the Chambers[45].

[43] Op.cit.
[44] TCU. Conhecendo o Tribunal. p. 10-11. Op.cit.
[45] Ibidem.

For technical support and administrative services, the TCU has a Secretariat, divided into three General Secretariats: General Secretariat of the Presidency, General Secretariat for External Control, and General Secretariat for Administration[46].

The Secretariat of the Union Court of Auditors has its own staff, organized into a career plan whose principles, guidelines, titles, structure, forms of employment, and other functions are established by specific law[47].

2.3 WORK AND ACTIVITIES

The TCU has shown itself, throughout its history, to be aware of the need to get closer to the public manager to ensure greater efficiency in the application of the Treasury's resources. To this end, it increasingly seeks to increase preventive and pedagogical actions.

In this context, the dissemination of good management practices is an important line of action of this Court of Auditors. Several measures have been adopted with the purpose of providing subsidies for the correct interpretation of the legislation related to government spending, such as the launching of several publications like books, manuals, magazines, jurisprudence, guidelines.

Among the various courses given and guidance given to public managers, it has been requested that in the administrative processes formulated, the most complete forms of proof be attached to the acts taken by the public manager, even in discretionary acts. "The justification in the administrative processes has the same strength as the "mens legis" or the explanatory memorandum that affixes the legal norm"[48], however not exclusively in a formal, doctrinaire, legal way, but in a descriptive way of the motive/reason/motivation with respect to the adopted administrative acts and facts, such as photographs of procedures; before and after; mechanisms that make it possible to make compares (by force of comparative law it is now required to exemplify 03 modalities, Public Tenders Law no. 8.666[49]).

The current policy of structuring goals and objectives, not as a Court to dictate the conformity or nonconformity with the legal norms, but the preventive purpose of administrative acts, seeking the best practice for the fulfillment of the public function (public service to

[46] Ibidem.
[47] Ibidem.
[48] Speech by TCU Minister Augusto Sherman Cavalcanti, in the course of Specialization in Auditing, in Brasilia on 27/02/2013 - 01/03/2013, and the gift of his book "O Novo Modelo De Contratração De Soluções De TI Pela Administração Pública".
[49] *Vide:* Article. 43, inc. IV. BRAZIL. **Law nº 8.666, of 21 of June of 1993**. Available in: <http://www.planalto.gov.br/ccivil_03/leis/l8666cons.htm>. Access in 21/06/2021.

citizens), stands out among the most relevant points of the TCU. To this end, the TCU has sought to verify means for the public entity and its manager to be following their functions and obligations, for which it has constituted.

The Basic Governance Reference (BGR) refers to the management methods between the TCU and the more than five hundred organizations under the jurisdiction of the TCU, which generated the legal benchmark Decree 9.203/2017[50], which established the governance policy of the federal public administration, establishing principles, guidelines, and practices on the subject, characterized as an important step in the improvement of these organizations.

In addition to the BGR, the TCU has sought to elaborate in advance, as an administrative suggestion/recommendation by the jurisdiction, numerous other documents, with the purpose of avoiding audit and inspection procedures, such as Special Accounts, Reference[51] for the evaluation of governance in public policies (2014); Benchmark for evaluating governance in the Center of Government (2016); Benchmark to Combat Fraud and Corruption (2017 and 2018); Guide to Governance and Management in Health (2018) and Basic benchmark of risk management (2018) [52].

The Court of Auditors of the Union has direct partnerships with the Organization for Economic Cooperation and Development (OECD) and the United Nations (UN)[53], integrating directly International Organization of Supreme Audit Institutions (INTOSAI)[54]; Latin American and Caribbean Organization of Supreme Audit Institutions (OLACEFS)[55]; Organization of

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50 MONTEIRO FILHO, José Múcio**. in: Referencial básico de governança aplicável a organizações públicas e outros entes jurisdicionados ao TCU**. Tribunal de Contas da União. Edição 3 - Brasília: TCU, 2020, 11p.

51 Special Accounts Audit. It is about audit procedure determined by a subsequent management to another one that aims to identify all procedures of ordering expenses and responsibility of procedures of the previous management with the purpose of mitigating or demanding responsibility from the new administrator.

52 PUBLICAÇÕES Institucionais. **Tribunal de Contas da União**. Available in: <https://portal.tcu.gov.br/publicacoes-institucionais/>. Access in 21/06/2021.

53 RELAÇÕES INTERNACIONAIS. **Tribunal de Contas da União**. Available in: <https://portal.tcu.gov.br/relacoes-institucionais/relacoes-internacionais//>. Access in 21/06/2021.

54 International Organization of Supreme Audit Institutions (INTOSAI) is an autonomous organization, independent and non-political. Its non-governmental nature allows it to have special consultative *status* with the Economic and Social Council (ECOSOC) of the United Nations. Currently, the TCU is one of the 21 countries that are part of the institution's Managing Council. The fundamental principles that govern INTOSAI are consolidated in the Lima Declaration on Guidelines for Auditing Principles adopted in October 1977, at the IX INCOSAI held in Lima (Peru). Actually the president of INTOSAI is Dr. Alexei Kudrin, from Russia. *Ibidem.*

55 Latin American and Caribbean Organization of Supreme Audit Institutions (OLACEFS) is an international, autonomous, independent, non-political and permanent body. Its origins date back to 1963 and it took its current form in 1990 at the Extraordinary Assembly held in Buenos Aires, Argentina, with the objective of promoting the development and improvement of the Supreme Audit Institutions (SAIs). It currently has 22 member countries and is one of the regional groups of the International Organization of Supreme Audit Institutions (INTOSAI). *Ibidem*.

Supreme Audit Institutions of the MERCOSUR and Associated Countries (EFSUL)[56], Organization of Supreme Audit Institutions (SAI) of the Community of Portuguese Speaking Countries (OISC/CPLP)[57]58.

3 COMPARATIVE OVERVIEW OF THE SUPREME AUDIT INSTITUTIONS

Once the more specific aspects concerning the European and Member States Courts of Auditors and the Brazilian Court have been observed, it's necessary to bring some more general information related to the other countries that integrate the European Union, which influence the layout and constitution of the European Court of Auditors[59].

As a result of the civilizing and philosophical process that has taken place over the years, each country has improved its institutions in accordance with the local and historical contingencies of its society. Comparative law helps to understand the current stage of the Brazilian Court of Auditors and its potential and prominence within the international scenario. To this end, we will use the detailed study conducted by the UK's Supreme Audit Institution, the National Audit Office (NAO).

Firstly, it refers to the terminology Supreme Audit Institutions (SAIs) to cover the various institutions responsible for the inspection and control of the Public Administration. In democratic countries there are basically two kinds of SAIs. Those that are affiliated to the Roman-Germanic family adopt, as a rule, the collegiate model of the Court of Auditors, whose parameter is commonly indicated as the French Court of Comptes. In countries that follow the tradition of the common law family we have the Audit General or Comptroller General, a model often characterized by the concentration of the most relevant decisions in the person of its Auditor General or President.

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56 Organization of Supreme Audit Institutions of the MERCOSUR and Associated Countries (EFSUR), currently composed of the SAIs of Argentina, Bolivia, Brazil, Chile, Ecuador, Paraguay, Uruguay and Venezuela, derived from the 1991 Asunción Treaty, with the purpose of sharing information and experiences of the institutions. *Ibidem*.

57 Organization of Supreme Audit Institutions (SAI) of the Community of Portuguese Speaking Countries (CPLP) is an autonomous and independent association, created to foster institutional development. It was created in 1995 and has been an Associate Member of INTOSAI since 2010. *Ibidem.*

58 Organization of Supreme Audit Institutions (SAI) of the Community of Portuguese Speaking Countries (CPLP) is an autonomous and independent association, created to foster institutional development. It was created in 1995 and has been an Associate Member of INTOSAI since 2010. *Ibidem.*

59 UNITED KINGDOM NATIONAL AUDIT OFFICE. *State Audit in the European Union.* Heronsgate, dez. 2005. p. 1-15. Available in: < https://www.nao.org.uk/report/state-audit-in-the-european-union/>. Access in 21/06/2021.

Based on their analysis, four types of SAIs can be identified: (a) Court (Tribunal) with a jurisdictional function, in France, Belgium, Portugal, Spain, Italy and Greece; (b) collegiate structure without a jurisdictional function, in the Netherlands, Germany, Slovakia, Czech Republic, Luxembourg and the European Court of Auditors (ECA); (c) audit office, independent from the government and headed by an Auditor General or President, in Hungary, Malta, Poland, Cyprus, United Kingdom, Ireland, Latvia, Lithuania, Sweden, Finland, Dinamarca and Estonia, and; (d) a specific model, headed by a President and auditing at central, regional, and local levels, in Austria and Slovenia.

In sequence, the form of decision making in SAIs is not always collegiate, as we observe in Brazil. In several countries this is done in a unipersonal way by the Auditor General or President of the SAI, as in Latvia, Cyprus, Ireland, Sweden, Finland, United Kingdom, Austria, Denmark, Lithuania, Estonia, Hungary, Malta, Slovakia and Slovenia. The Czech Republic, France, Belgium, Spain, Portugal, Germany, Greece, Luxembourg, the Netherlands, Italy, Poland and the European Court of Auditors adopt the collegiate decision-making system.

The linking of SAIs within the organizational structure of the state is variable. To the Judiciary: Greece and Portugal. To the Legislative Branch: Germany, Austria, Belgium, Spain, Italy, Luxembourg, the Netherlands, Denmark, Ireland and the United Kingdom, and the European Court of Auditors (European Parliament). To the Executive: Finland and Sweden. The exception to all cases occurs in France, where there is no link to any branch, but is completely independent, the reasons for which are historical, since the Code and notion of Administrative Law originated in the Abbey of Suget. In several countries, the *status* of its members is equivalent to that of magistrates, as in Spain, Portugal, Italy, Germany, and in the European Court of Auditors.

As to the functions exercised, all examine and issue reports on the rendering of accounts for public resources, while some also perform performance audits. The NAO classifies audits between those conducted *a priori*, where the SAI authorizes or advises on public spending as part of the financial control process, verifying, for example, the accuracy, legality and regularity of transactions and whether there is sufficient budgetary provision, and expost audits, which are subdivided into three types: judicial, financial and performance.

The judicial audit takes place when the SAI examines and passes judgment on the individual records of those who are responsible for the use of public funds. The financial audit allows the SAIs to express an opinion on the state of the state accounts, providing elements

so that the Parliament can issue a statement attesting to their regularity or just giving an opinion. Performance audits, on the other hand, have a broader scope, related to aspects of economy, efficiency, and effectiveness in the application of funds.

The *a priori* audits are carried out by the SAIs of Belgium, Germany, Greece, Italy and Portugal. The ex post judicial audit is only carried out in Belgium, France, Greece, Italy, Portugal, and Spain. The financial ex-post audit is carried out by all the SAIs of the European Union and performance audits are carried out by all SAIs except Greece.

3.1 BRAZIL AND THE EUROPEAN UNION, PRACTICES SIMILARITIES

Therefore, the Brazilian model of external control from its counterparts members of the European Union, which results in a generic constitution of the European Court of Auditors, it is necessary to compare this information with the current model of the Court of Auditors in Brazil.

On another aspect, it should be considered that the European Union and the European Court of Auditors in relation to Brazil have a greater capacity for comparability than other countries, whether due to the origin and legislative inspiration or the constitution itself. For example, the territorial extension of the State of Bahia-BR alone is comparable to the whole of France, Mato Grosso do Sul to Germany, Santa Catarina to Portugal, with the advantage that the entire Brazilian territorial area is under the demands of a "Union" between 27 Federated States[60], constituting the fifth largest country in the world, In the same way as the "Union" of National States[61], with the difference that Brazil has the advantage of the language and the historical unity that promotes the practice and structural development, organizational and administrative, internationally recognized by the positions, and functions exercised by the SAIs.

Both institutions have the same challenges, however with a clearly reduced and mitigated structure by the European Court of Auditors, we highlight the structural, constitutive, financial aspects and institutional tools, since it is not enough to have powers, one must have mechanisms to exercise them, which does not occur in the European one. The latter has the

60 BRAZILIAN INSTITUTE OF GEOGRAPHY AND STATISTICS. Legislation. Available in: <https://www.ibge.gov.br/geociencias/organizacao-do-territorio/estrutura-territorial/15761-areas-dos-municipios.html?=&t=resolucoes-e-legislacao>. Access in 21/06/2021.

61 EUROPEAN. UNION. **About the EU**. Available in: < https://europa.eu/european-union/about-eu/countries_en/>. Access in 21/06/2021.

Herculean task of not only auditing the various funds that increase in resources around the globe, but also all the EU's NGO partners.

Among the best practices that stand out are the TCU's Governance Model, but mainly its IT elements, the e-TCU and GEO-OBRAS, which will be briefly presented.

The e-TCU[62] system deals with the procedures that deal with the constitution, organization, and processing of processes and documents related to external control and to those under jurisdiction, so that the entire auditing procedure and acts of the TCU are done online and through the system, with the proper forms, document management, and reports by the parties involved.

In continuity, e-Contas[63] is a system entirely developed by TCU teams and made available to agencies and entities of the Public Administration to render annual accounts to the Court. Currently, the universe of organs and entities covered by e-Contas is of 1,368 reporting units (UPC), 75 internal control organs, and 130 supervisory organs. The system is also permanently used by more than forty TCU sub-units to manage the accounts rendered by the organs and entities. The number of people currently able to access e-Contas exceeds 4,000 users. Among the external users are the managers of the accounting units, the auditors of the internal control organs, and the ministers or equivalent authorities who have the role of ministerial supervision. The number of internal TCU users who operate the system almost daily is more than 400 auditors.

GEO-OBRAS[64] is a software developed to manage the information on the works executed in all public agencies of the jurisdictional spheres, which send information and documents related to engineering works and services, involving all of their stages. It is a powerful tool for consulting the investments made by the Government. By combining the available filter options, the citizen can obtain general or specific information about the works.

The GEO-OBRAS System was implemented so that the filling out and sending of data in editable format constitutes a set of logical and chained processes, aligned with the legal and normative requirements regarding the execution of engineering works or services by

62 BRAZIL. Resolution**- TCU nº 259, of 7 of May of 2014.** Available in: < https://pesquisa.apps.tcu.gov.br/#/resultado/portal?ts=1625003951684&gsc.q=eTCU&gsc.sort=>. Access in 21/06/2021.

63 TRIBUNAL DE CONTAS DA UNIÃO. **E-Contas:** Sistema de Prestação de Contas Anuais ao TCU. Available in: < https://portal.tcu.gov.br/data/files/CE/E7/F0/1A/18E4151069F653151A2818A8/Texto%20da%20p_gina.pdf>. Access in 21/06/2021.

64 TRIBUNAL DE CONTAS DO ESTADO DO ESPÍRITO. Núcleo de Controle Externo de Edificações. **Apostila GEO-OBRAS**. p.4-10.

public entities. In this sense, the Geo-Works System can be used, even, as a support tool to jurisdictional entities, since it helps controlling the stages and documents affected.

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