



MECHANISM FOR FOLLOW-UP ON THE
IMPLEMENTATION OF THE INTER-AMERICAN
CONVENTION AGAINST CORRUPTION
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BRAZIL

FINAL REPORT

(Adopted at the March 15, 2018 Plenary Session)

SUMMARY

This Report contains a comprehensive review of the implementation of the Recommendations that were formulated to Brazil in the report of the Second Round with respect to paragraphs 5 and 8 of Article III of the Inter-American Convention against Corruption, which refer, respectively, to systems of government hiring and procurement of goods and services and for the protection of public servants and private citizens who, in good faith, report acts of corruption. Reference is also made, when appropriate, to new developments with respect to the implementation of these provisions.

In addition, the Report includes a comprehensive review of the implementation in Brazil of paragraphs 3 and 12 of Article III of the Convention, which refer, respectively, to measures intended to create, maintain and strengthen instructions to government personnel to ensure proper understanding of their responsibilities and the ethical rules governing their activities; and a study of further preventive measures that take into account the relationship between equitable compensation and probity in public service. In addition, the Report refers to the best practices presented by the country under review with regard to the implementation of the measures selected for the Second and Fifth Rounds.

The review was conducted in accordance with the Convention, the Report of Buenos Aires, the Committee's Rules of Procedure, and the methodologies it has adopted for conducting on-site visits and for the Fifth Round, including the criteria set out therein for guiding the review based on equal treatment for all states parties, functional equivalence, and the common purpose of both the Convention and the MESICIC of promoting, facilitating, and strengthening cooperation among the states parties in the prevention, detection, punishment, and eradication of corruption.

The review was carried out mainly taking into account Brazil's Response to the Questionnaire and information gathered during the on-site visit conducted October 3 – 5, 2017. During that visit, the information furnished by Brazil was clarified and supplemented with the opinions of civil society organizations. The review subgroup for Brazil consists of representatives from El Salvador and Venezuela and is supported by the MESICIC Technical Secretariat.

With regard to the follow-up on the recommendations formulated to Brazil in the Second Round and with respect to which the Committee, in the Third Round report, found required additional attention, based on the methodology for the Fifth Round and bearing in mind the information provided by Brazil in its Response to the Questionnaire and during the on-site visit, a determination was made as to which of those recommendations had been satisfactorily implemented, which required additional attention, which required reformulation and which were no longer valid.

Notable advances related to implementation of these recommendations include Law No. 12.846/2013, known as the the Anti-corruption Law or the Clean Company Law, which governs the administrative and civil liability of legal entities for actions taken against the public administration; Law No. 12.850/2013, known as the Organized Crime Law, which governs criminal investigation, methods for obtaining evidence, related criminal offenses and criminal procedure; Law No. 13.303/2016, also known as the "States Law," which governs the legal status of the public company, quasi-governmental company and their subsidiaries, at the federal level, in the States, the Federal District and the Municipalities and establishes the rules for procurement and specific contracts for public companies and quasi-governmental companies; Law No. 13.316/2016, which governs the minimum percentages for filling commissioned positions with career public servants in the Federal Prosecution Service; Law No.

13.346/2016, which governs the elimination of commissioned positions and the creation of positions of trust in the Federal Executive Branch; as well as draft laws on reform of the procurement and contracting system and protection for those who report acts of corruption.

Some of the recommendations formulated in the Second Round that remain valid refer to purposes such as the need to regulate, by law, the provisions of Article 37 (V) of the Federal Constitution with respect to the minimum percentages of career public servants who should fill commissioned positions within the Chamber of Deputies and the Federal Senate; expand, training sessions for public servants and employees responsible for bidding and contracting for works, goods and services; to unify, at a single web portal, all information regarding public procurement and contracts, including, on a mandatory basis, data from all agencies and entities in the three federal branches, the States, the Federal District and the Municipalities; implement additional systems for citizen oversight of bidding and contracting for large-scale public works, requiring that public consultations be held regarding the conditions that will be imposed in bidding notices; adopt comprehensive regulations on protecting public servants and private citizens who, in good faith, report acts of corruption, including protecting the identity thereof, the physical integrity of the informant and his family, as well as protecting his employment situation.

In addition, regarding the new developments in Brazil with respect to the implementation of the provisions of the Convention selected for the Second Round, the Committee formulated recommendations, such as: adopt the measures necessary to ensure that the relevant agencies conduct periodic audits to correct and punish irregularities related to the temporary hiring of staff and outsourcing; ensure that, in practice, bidding is the general rule for contracting for goods and services by the direct and indirect public administration and foundations; enable the creation and operation of the Federal General Registry of Works, pursuant to the definitions in rulings by the Federal Court of Accounts (TCU); regulate the requirement to consult, in practice, the supplier's status in the National Registry of Ineligible and Suspended Companies (CEIS) and the National Registry of Penalized Companies (CNEP), before entering into administrative contracts; regulate the sharing of confidential information and databases with control agencies by other agencies of the Public Administration to facilitate said agencies' performance of their control functions; strengthen cooperation among federal, district, state and municipal institutions and bodies in the search for evidence and information of interest in investigations or criminal procedures, so as to facilitate increased efficacy in arrests and punishment for cases of corruption; prepare detailed statistical reports compiled annually on ongoing cases in the Judicial Branch related to acts of corruption; expand the number of specialized anti-corruption courts and adopting relevant measures so that the Judicial Branch will be able to have the number of courts required to handle cases of corruption.

For the review of Article III (3) of the Convention, selected for the Fifth Round, which refers to instructions to government personnel to ensure a proper understanding of their responsibilities and the ethical rules governing their activities, the country under review selected the staff of the Ministry of Transparency and the Office of the Comptroller General (CGU), as well as senior officials in the Federal Public Administration and members of the ethics commission of the bodies and entities that make up the Ethics Management System of the Federal Executive Branch, the central authority of which is the Public Ethics Commission (CEP).

This review was focused on determining, with respect to the selected personnel, if the country under review has adopted provisions and/or measures which ensure the proper understanding of their responsibilities and the ethical rules governing their activities; the manner or occasions in which personnel are provided instructions; the programs in place for them; the bodies responsible for them; as well as the objective results obtained on the implementation of said provisions and/ or measures, taking

into account any difficulties and/or weaknesses to achieve the purpose of this provision of the Convention. At the same time, it took note of any difficulties and/or shortcomings in accomplishing the object of that provision of the Convention.

Some of the recommendations formulated to Brazil, for its consideration, with respect to this topic, are noted as follows:

With regard to the bodies mentioned above, target objectives like the following to be pursued: complete the development of the 2017-2020 Integrity Plan of the Federal Comptroller General's Office, including revision of the Public Servant Code of Conduct; strengthen the Public Ethics Commission (CEP), increasing its staffing schedule and ensure it has the financial resources it needs to fully carry out its functions; ensure the proper understanding of the rules of the Code of Conduct of the Senior Federal Administration by senior public officials; and send instructions on public ethics to senior authorities of the Federal Public Administration, through training events for which participation is mandatory.

In accordance with the provisions of the aforementioned methodology, the review of the second provision selected for the Fifth Round, as set out under Article III, paragraph 12 of the Convention, is intended to determine whether the State had conducted studies on preventive measures that take into account the relationship between compensation and probity in public service and establish objective and transparent criteria for determining the compensation of public servants. The recommendations formulated for Brasil target the following objectives: adopt and implement an equitable compensation system for federal public servants that creates adequate incentives based on merit, permits mobility, based on objective and transparent criteria, including the constitutional parameters; and regulate, by means of a general law applicable to all public employees, Article 117 of the Transitory Provisions Acts of the Federal Constitution, in order to prevent the existence of salaries that exceed the value established as the maximum ceiling by the Constitution.

Finally, Brazil submitted information on two best practices, to wit, the "Public Spending Observatory," which helps to monitor public spending through the use of data science and the "Ombudsman's Office System of the Federal Executive Branch (e-Ouv)," a mechanism to integrate the system of communications that allows any citizen to submit a report, complaint, praise, suggestion, or request to bodies of the public administration.



**COMMITTEE OF EXPERTS OF THE FOLLOW-UP MECHANISM ON THE
IMPLEMENTATION OF THE INTER-AMERICAN CONVENTION AGAINST
CORRUPTION**

**DRAFT REPORT ON FOLLOW-UP ON IMPLEMENTATION IN THE FEDERATIVE
REPUBLIC OF BRAZIL OF THE RECOMMENDATIONS FORMULATED AND
PROVISIONS REVIEWED IN THE SECOND ROUND, AND ON THE PROVISIONS OF
THE CONVENTION SELECTED FOR REVIEW IN THE FIFTH ROUND^{1/}**

INTRODUCTION

1. Content of the Report

[1] As agreed upon by the Committee of Experts (hereinafter “the Committee”) of the Follow-Up Mechanism for the Implementation of the Inter-American Convention against Corruption (MESICIC) at its Twenty-Fourth Meeting,² this Report will first refer to follow up on implementation of the recommendations formulated to the Federative Republic of Brazil in the Report from the Second Round,³ and which were deemed by the Committee to require additional attention in the Report from the Third Round.

[2] Second, where applicable, it will refer to new developments in the Federative Republic of Brazil with regard to the provisions of the Inter-American Convention against Corruption (hereinafter “the Convention”) selected for the Second Round, and regarding such matters as the legal framework, technological developments and results, and, if applicable, appropriate observations and recommendations will be formulated.

[3] Third, it will address implementation of the provisions of the Convention selected by the Committee for the Fifth Round. Those provisions are contained in paragraphs 3 and 12 of Article III regarding, respectively, measures to establish, maintain, and strengthen “*instructions to government personnel to ensure proper understanding of their responsibilities and the ethical rules governing their activities*”, and “*the study of preventive measures that take into account the relationship between equitable compensation and probity in public service.*”

[4] Fourth, it will refer to the best practices that the country under review wished voluntarily to share regarding implementation of the provisions of the Convention selected for the Second and Fifth Rounds.

1. Ratification of the Convention and adherence to the Mechanism

¹This draft preliminary Report was prepared in accordance with Articles 23(a) and 28 of the Committee’s Rules of Procedure (SG/MESICIC/doc.9/02 rev. 5), and the [Methodology](#) for follow-up of implementation of the recommendations formulated and provisions reviewed in the Second Round and for the review of the provisions of the Convention selected for the Fifth Round (SG/MESICIC/doc.438/15 rev. 1) and the format for country reports (SG/MESICIC/doc.439/15 rev.1). These last two documents were adopted by the Committee at its Twenty-Fifth Meeting, held at OAS Headquarters in Washington D.C., United States of America, from March 16-20, 2015.

² See the Minutes of the 24th Meeting of the Committee, available at: http://www.oas.org/juridico/docs/XXIV_min.doc

³ Available at: http://www.oas.org/juridico/english/mesicic_II_inf_bra_en.pdf

[5] According to official records of the OAS General Secretariat, the Federative Republic of Brazil ratified the Inter-American Convention against Corruption on July 10, 2002 and deposited the instrument of ratification on July 24, 2002.

[6] In addition, the Federative Republic of Brazil signed the Declaration on the Mechanism for Follow-up on the Implementation of the Inter-American Convention against Corruption on August 9, 2002.

I. SUMMARY OF INFORMATION RECEIVED

1. Response of the Federative Republic of Brazil

[7] The Committee wishes to acknowledge the cooperation that it received throughout the review process from the Federative Republic of Brazil, in particular, from the Ministry of Transparency and the Office of the Comptroller General of the Union (CGU); which was evidenced, *inter alia*, in its Response to the Questionnaire, in the constant willingness to clarify or complete its contents, and in the support for the execution of the on-site visit referred to below. Together with its Response, Brazil sent the provisions and documents it considered pertinent.⁴

[8] The Committee also notes that Brazil gave its consent for the on-site visit, in accordance with provision 5 of the Methodology for Conducting On-site Visits.⁵ That visit was conducted from October 3 – 5, 2017, by the representative of the Republic of El Salvador, in his capacity as member of the review subgroup, with the support of the MESICIC Technical Secretariat. The information obtained during that visit is included in the appropriate sections of this Report, and the agenda of meetings is attached hereto, in keeping with provision 34 of the above-mentioned Methodology.

[9] For its review, the Committee took into account the information provided by Brazil up to October 5, 2017, as well as that furnished and requested by the Technical Secretariat and the members of the review subgroup, to carry out their functions in keeping with the *Rules of Procedure and Other Provisions*; the *Methodology for follow-up of implementation of the recommendations formulated and provisions reviewed in the Second Round and for the review of the provisions of the Convention selected for the Fifth Round*; and the *Methodology for Conducting On-site visits*.

2. Documents and information received from civil society organizations and/or, *inter alia*, private sector organizations, professional associations, academics, and researchers

[10] The Committee did not receive documents from civil society organizations within the time frame established in the schedule for the Fifth Round, as envisaged by Article 34(b) of the Committee's Rules of Procedure.

[11] Nonetheless, during the course of the on-site visit from October 3 – 5, 2017, information was gathered from civil society and private sector organizations; professional associations; and academics invited to participate in meetings to that end, pursuant to Article 27 of the *Methodology for Conducting On-site Visits*. A list of those persons is included in the agenda for the visit, which is appended hereto. Pertinent parts of this information are reflected in the appropriate sections of this Report.

⁴ The Response to the Questionnaire, as well as the referenced provisions and documents can be consulted at: <http://www.oas.org/juridico/english/bra.htm>

⁵ Document SG/MESICIC/doc.276/11 rev. 2, available at: http://www.oas.org/juridico/english/met_onsite.pdf

II. FOLLOW UP ON IMPLEMENTATION OF THE RECOMMENDATIONS FORMULATED IN THE SECOND ROUND AND NEW DEVELOPMENTS WITH REGARD TO THE CONVENTION PROVISIONS SELECTED FOR REVIEW IN THAT ROUND

[12] First, the Committee will refer to progress made and new information and developments in Brazil with respect to the recommendations formulated and measures for their implementation suggested by the Committee in its Report from the Second Round, which the Committee deemed required additional attention in the Third Round Report, and it will proceed to take note of those that have been satisfactorily considered and of those that need further attention, in which case it will refer to the ongoing relevance of those recommendations and measures and to their restatement or reformulation, pursuant to Section V of the Methodology adopted by the Committee for the Fifth Round.

[13] In this section, the Committee will, where applicable, take note of any difficulties indicated by the country under review with implementing the recommendations and measures alluded to in the foregoing paragraph and of any technical cooperation requested by the State in that connection.

[14] Second, where applicable, it will refer to new developments in Brazil in respect of the provisions of the Convention selected for the Second Round regarding such matters as the legal framework, technological developments and results, and will formulate any observations and recommendations that may be applicable.

1. SYSTEMS OF GOVERNMENT HIRING AND PROCUREMENT OF GOODS AND SERVICES (ARTICLE III (5) OF THE CONVENTION)

1.1. SYSTEMS OF GOVERNMENT HIRING

1.1.1. Follow-Up to the Implementation of the Recommendations Formulated in the Second Round

Recommendation 1.1.1:

Strengthen government hiring systems

Single measure suggested by the Committee that requires additional attention within the Framework of the Third Round:

Regulate the cases, conditions and minimum percentages of career public servants who must fill commissioned offices within the three branches of the federal government.

[15] With respect to the aforementioned measure, in its Response to the Questionnaire, the country under review presents information and new developments, which the Committee notes as a step that contributes to progress in the implementation of the measure:⁶

[16] “...Senate Bill No. 257/2014, regulating Article 37(V) of the Federal Constitution, so as to comply with the recommendation from the Second Round of evaluation of Brazil. The bill seeks to

⁶ See Brazil’s Response to the Fifth Round questionnaire, p. 27, available at: <http://www.oas.org/juridico/english/bra.htm>

regulate the cases and conditions for filling commissioned positions with career public servants in the Federal Public Administration and establish that at least 50% of the commissioned positions in each Branch or independent body will be filled by career public servants in the respective staffing plan. Should they become law, the provisions of the bill will be applicable to commissioned positions in the federal direct administration, autonomous agencies, and foundations of the Legislative, Executive, and Judicial Branches, the Federal Prosecution Service, and the Federal Court of Auditors. The bill is with the rapporteurship of the Senate Constitution, Justice and Citizenship Committee, and its handling can be followed at: <http://www25.senado.leg.br/web/atividade/materias/-/materia/118493>".

[17] *"In addition, also being deliberated in the Federal Senate is Proposed Constitutional Amendment (Proposta de Emenda à Constituição - PEC) No. 110/2015, amending Article 37 of the Federal Constitution to restrict the number of commissioned positions in public administration and establishing a public selection process. According to the text of the PEC, commissioned positions may not exceed 1/10 of the actual positions in each entity, in that at least half of the commissioned positions will go to those currently holding positions, except in cases of direct advisory services to those holding elective office, Ministers of State, Secretaries of State, and Municipal Secretaries. The filling of commissioned positions and positions of trust will be preceded by a public selection process. The PEC will soon be debated by the full Senate and its handling can be followed at: <https://www25.senado.leg.br/web/atividade/materias/-/materia/122690>".*

[18] The Committee takes note of the steps taken by the country under review to advance in its implementation of the sole measure, as well as the need for it to continue to give attention thereto, considering that the aforementioned bill and proposed Constitutional amendment are still being deliberated and do not have the necessary legitimacy to be considered as the legal standard.

[19] When referring to difficulties in implementing measure a), the country under review stated in its Response to the Questionnaire that the process *"requires discussion and coordination efforts to ensure the viability of the legislative proposal covering the three branches, noting the specifics of each branch in terms of aspects such as the structure of commissioned positions and positions of trust, among other organizational aspects."*⁷

[20] Taking into account the difficulties presented by the country under review with respect to approval by the Brazilian Congress of the standard applicable to the three federal branches, the Committee will refer to progress made in each branch and will reformulate the sole measure of recommendation 1.1.1 so that the recommendations suggested by the Committee in this Fifth Round represent the specific situation of each branch.

▪ With respect to the hiring of public employees in the Executive Branch:

[21] In the context of the Federal Executive Branch, in its Response to the Questionnaire, the country under review presents information and new developments, which the Committee notes as a step that contributes to progress in its implementation.⁸

[22] *"The first relates to the release of Law No. 13.346, of October 10, 2016, on the elimination of commissioned positions in the Senior Executive and Advisory Group (DAS) and the creation of*

⁷ *Ibid.*, p. 30.

⁸ See Brazil's Response to the Fifth Round questionnaire, pp. 27 and 28, available at: http://www.oas.org/juridico/portuguese/mesicic5_bra.htm

positions of trust called Commissioned Functions of the Executive Branch (FCPE), as well as Decree No. 8785/16, regulating the law. Both instruments provide for changing 10,462 DAS positions, which have more flexible appointment rules and allow for more staff not tied to the Federal Public Administration, to FCPE – functions intended for public servants holding actual positions in a body or entity in any of the Federal Branches, the States, the Federal Districts, and the Municipalities. This change represents close to 50% of the level 1 to 4 positions. Thus, the changes brought about by the new rules confer greater transparency on the selection of those holding executive, management, and advisory positions, in addition to improving the appointment process, making it more stringent, leaving it to the bodies and entities to define the minimum requirements of the professional profiles of those holding such positions.”

[23] *“The second measure taken in the context of the Executive Branch that should be noted is the approval of Decree No. 9021/2017, which amends Decree No. 5497/05, the subject of analysis in the Second Round. The earlier decree, which defined the minimum percentages for exclusive appointment of career public servants to commissioned offices at the DAS 1, 2, 3, and 4 levels, was amended so as to include commissioned positions at the DAS 5 and 6 levels as well, changing the percentages formerly provided for levels 1, 2, and 3.”*

[24] During the on-site visit, the representatives of the Planning Ministry explained that, due to the enactment of Law No. 13.346, of October 10, 2016, 10,462 freely appointed commissioned positions in the Management and Advisory Services Group (DAS) are now being gradually replaced by the same number of positions of trust called Executive Branch Commissioned Positions (FCPE), which are exclusively positions of *“public servants holding effective positions in a body or entity of any of the Federal Branches, the States, the Federal District, and the Municipalities.”*⁹

[25] It was also reported during the on-site visit that the FCPE have the same roles and responsibilities as positions in the DAS Group. In addition, in accordance with Article 3 of Law No. 13.346, of October 10, 2016, the FCPE are for all legal and regulatory purposes equivalent to the commissioned positions in the DAS Group.

[26] In this context, the representatives of the Ministry of Planning, during the course of the on-site visit, also mentioned that Article 5 (1) established the inclusion in training plans of *“actions intended to qualify public servants to hold FCPE positions and commissioned positions in the DAS Group, based on the professional profile and desired skills consistent with the responsibility and complexity intrinsic to the function or position.”*

[27] The representatives of the Ministry of Planning, again on the occasion of the on-site visit, explained that the limits for commissioned positions at DAS levels 1, 2 and 3 to be held by career public servants were reduced from 75% to 50%, in comparison with the percentages formerly established by Decree No. 5497, of July 21, 2005, analyzed within the context of the Second Round of Review. It was reported that this change with respect to the commissioned positions at DAS levels 1, 2 and 3 was made in an effort to minimize the effects of including 60% of commissioned positions at DAS levels 5 and 6 to be held by career public servants, thus making it possible to main the internal operations of the agencies after restructuring.¹⁰

⁹ Article 2 (1) of the Law No. 13.346, of October 10, 2016 may be consulted at: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/lei/113346.htm

¹⁰ On March 8, 2018, Brazil clarified that “contrary to what had been reported, Decree No. 8785/16 does not regulate Law No. 13.346/16. In reality, the referenced decree establishes, *inter alia*, spending reduction targets with respect to 2,503 DAS

[28] Following the on-site visit, the country under review provided information on the number of public servants in the Federal Executive Branch up to the month of August 2017:

Total number of active public servants: 634,255

Total number of public servants with DAS and FCPE type commissioned positions: 22,379

Total number of public servants with DAS type commissioned positions: 11,323

Total number of public servants with FCPE type commissioned positions: 11,056

Total number of DAS type public servants without effective link: 4,547

[29] Considering the information presented above, the Committee notes that the number of public servants with DAS type commissioned positions (which are freely appointed and do not require prior public competition) represent approximately 1.7% of the total number of public servants active within the Federal Executive Branch. The Committee also notes that most of the commissioned positions (about 80%) are currently held by public servants with ties to the Public Administration (i.e., career public servants qualified through public competition). In this sense, the Committee considers it important to emphasize that only 0.7% of the total number of public servants active in the Federal Executive Branch are held by persons who have not gone through an external public competition to work for the Public Administration.

[30] In this context, , the Committee notes that the provisions contained in Decree No. 9.021/2017,¹¹ which establishes minimum percentages for filling DAS commissioned positions, levels 1 to 6, with career public servants, responds to the sole measure of the recommendation in section 1.1.1 of Chapter II of this Report, in that Article 84 (VI)(a) of the Federal Constitution establishes that “the President of the Republic has exclusive authority to: VI – rule, by decree, on the: a) organization and operation of the federal administration, when this does not involve increased expense or the creation or elimination of public bodies.”¹² Thus, the Committee takes note of the satisfactory consideration by the State under review of the sole measure of the recommendation in section 1.1.1 of Chapter II of this Report with respect to regulation of the minimum percentages for career public servants in the Federal Executive Branch who should fill commissioned positions.

[31] With respect to cases and conditions for filling commissioned positions with career public servants in the Federal Executive Branch, Law No. 13.346, of October 10, 2016¹³ established in Article 5 that “*an act of the Federal Executive Branch shall define the criteria, professional profile,*

commissioned positions with bodies and entities of the Federal Executive Branch, effectively implemented with the issuance of Decree No. 8947 of December 28, 2016. With regard to the 10,462 DAS positions to be gradually replaced by FCPE, in January 2018, 9,231 DAS had been replaced, close to 88% of the total planned, through revision of the organizational structure of the bodies and entities of the Federal Executive Branch. Thus, a total of 11,781 DAS positions ceased to exist, nearly 48% of the number existing in April 2016. The referenced Decree No. 9021/17 was issued in this context of a significant reduction of positions, so as to rebalance the percentages in levels 1 to 3 and allow the proper internal operation of the bodies and entities following their restructuring. Thus, while the percentages have increased with the issuance of the new standard, in absolute numbers there was a reduction of 571 DAS positions that can be filled at these levels by public servants without ties. It should also be emphasized that for the first time, minimum occupancy percentages were defined for the highest competitive positions – 60% of DAS levels 5 and 6.”

¹¹ Decree No. 9021/2017 is available at http://www.planalto.gov.br/ccivil_03/ato2015-2018/2017/decreto/D9021.htm

¹² See Article 84 (VI)(a) of the Federal Constitution at: http://www.planalto.gov.br/ccivil_05/constituicao/constituicao.htm

¹³ Law No. 13.346, of October 10, 2016 is available at: http://www.planalto.gov.br/ccivil_03/ato2015-2018/2016/lei/113346.htm

and general procedures to be met for holding FCPE positions and DAS Group commissioned positions.”¹⁴

[32] With respect to the criteria used for analysis of appointments to commissioned positions in the Federal Executive Branch, the Ministry of Transparency and Comptroller General’s Office (CGU), subsequent to the on-site visit, reported that the analysis is carried out at the request of the *Casa Civil* [Office of the Chief of Staff of the Office of the President] for DAS positions at levels 5 and above, members of Councils in state entities, and positions to be held in the Office of the President of the Republic: *“The Directorate of Research and Strategic Information receives the requests for analysis and proceeds to consult internal registries related to the existence of proceedings in the Federal Office of the Inspector General, complaints with the Federal Office of the General Ombudsman (including consultation of the databank of complaints regarding cases of nepotism), oversight actions with the Federal Oversight Secretariat, accounts deemed irregular and companies associated with the name of the potential holder of the position.”¹⁵*

[33] The Committee takes note of the steps taken by the country under review to implement the sole measure of the recommendation in section 1.1.1 of Chapter II of this Report, with respect to regulating the cases and conditions for filling commissioned positions with career public servants in the Federal Executive Branch. However, the Committee recommends that the referenced country continue to give attention to the indicated measure, taking into consideration that no standard has been found to exist that expressly regulates the cases and conditions for filling such positions with career public servants. In this respect, the Committee considers it relevant to reformulate the recommendation to clarify what has been presented above (see recommendation 1.1.3.1 of section 1.1.1 of Chapter II of this Report).

▪ With respect to the hiring of public employees in the Legislative Branch:

[34] With respect to the federal legislative branch, in its Response to the Questionnaire, the country under review provided the following information regarding commissioned functions or commissioned positions in the Federal Senate:¹⁶

[35] *“... the Commissioned Functions (FCs) include activities corresponding to executive, management, consulting, advisory, and other regularly created positions (Art. 61 of the Federal Senate’s Personnel Regulations). The FCs shall be filled by current public servants in the Federal Senate who have the qualifications necessary to perform, observing the compatibility of category,*

¹⁴ In this respect, on March 8, 2018, Brazil reported that “Article 5 does not set a deadline, although establishing criteria is desirable to promote the professionalization of holding DAS and FCPE positions. The Ministry of Planning and the Casa Civil of the Office of the President of the Republic are jointly analyzing and discussing the matter, considering its importance.”

¹⁵ In this regard, on March 8, 2018, Brazil reported that “Decree No. 8821 of July 26, 2016 makes provision for appointment to DAS levels 5 and 6 by the Casa Civil of the Office of the President of the Republic and also establishes the same procedure with regard to the Heads of Parliamentary Advisory Bodies and the heads of legal bodies of the Federal General Prosecutor’s Offices established in connection with the entities of the Indirect Administration of the Federal Executive Branch, responsible for the execution of public policies. The referenced decree is available at: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/decreto/D8821.htm”

¹⁶ See Brazil’s Response to the Fifth Round questionnaire, p. 30, available at: http://www.oas.org/juridico/portuguese/mesicic5_bra.htm

area, and specialty and the career position as well as the duties to be performed (Art. 61 (2) of the Personnel Regulations).”¹⁷

[36] “Commissioned positions are meant to handle technical advisory and secretariat activities, related to parliamentary offices and other specific needs of the Senate (Art. 32 (1) of the Personnel Regulations). These commissioned positions are filled according to confidential criteria, in accordance with legal and regulatory conditions. However, they are freely appointed by the legislator.”

[37] During the on-site visit, the representatives of the Federal Senate and Chamber of Deputies reported that no provision has yet been approved that regulates the minimum percentages for filling commissioned positions with career public servants, and that they do not currently see any movement in either house of Congress in this sense. They also clarified that the deliberations on Senate Bill No. 257/2014 and proposed Constitutional Amendment (PEC) No. 110/2015 (initiatives mentioned by the country under review in the Response to the Questionnaire) are currently stuck in the Congress.

[38] After the on-site visit, the Chamber of Deputies provided the following information, updated as of the month of August 2017, with respect to the number of public servants installed in offices and positions of trust:

Title	Held by effective public servant	Held by public servant without effective tie	Vacancies	Total
Commissioned function*	1,658	-	54	1,712
Parliamentary position (CNE) **	-	1,657	42	1,699
Parliamentary secretary***	-	10,810	-	10,810
Total	1,658	12,467	96	14,221
* Position in August /2017. According to the Federal Constitution, Art. 37 (V), the commissioned function is reserved for effective public servants. ¹⁸				
** Position in October /2017. CNE are positions that are freely filled and do not require prior public competition. Currently there are no effective public servants holding CNE positions.				
*** Position in August /2017. ¹⁹ Parliamentary Secretary positions are positions that are freely filled and do not require prior public competition.				

[39] Considering the information presented above, the Committee notes that 100% of the 12,467 commissioned positions (Parliamentary Positions and Parliamentary Secretary Positions) are

¹⁷ The current Administrative Regulations of the Federal Senate are available at:

<http://www2.senado.leg.br/bdsf/item/id/174851>

¹⁸ The number of commissioned positions in the Chamber of Deputies in August 2017 is available at:

<http://www2.camara.leg.br/transparencia/recursos-humanos/servidores/quantitativos/2016/fcs-31-12-2016>

¹⁹ The number of parliamentary secretaries in the Chamber of Deputies in August 2017 is available at:

http://www2.camara.leg.br/transparencia/recursos-humanos/servidores/quantitativos/2015/tabela_sp_31122015.pdf

currently held by public servants with no effective link to the public administration, i.e., public servants who did not undergo public competition.

[40] In this respect, it should be emphasized that the Federal Court of Accounts (TCU), in its survey report TC 011.954/2015-9, prepared in 2016, “*in order to identify and evaluate risks related to selection and appointment of positions of trust (FC) and commissioned positions (CC), within the Federal Public Administration (APF)*,” identified as a risk related to the hiring of public servants the possible failure to comply with minimum percentages of commissioned positions that should be filled by career public servants. In this context, the TCU found that the Federal Legislative Branch “*shows the highest proportion of public servants appointed to commissioned positions without ties to the administration, 97.27%*.”²⁰

[41] The Federal Supreme Court, during the Second Round of Review, had already expressed the need to guarantee proportionality between the number of public servants holding effective appointment positions and public servants holding commissioned positions, as can be seen in the Decision issued in Regimental Grievance in Special Appeal No. 365.368/SC: “*INTERIM GRIEVANCE. DIRECT ACTION ON UNCONSTITUTIONALITY. MUNICIPAL NORMATIVE ACT. PRINCIPLE OF PROPORTIONALITY. OFFENSE. INCOMPATIBILITY BETWEEN THE NUMBER OF EFFECTIVE PUBLIC SERVANTS AND PUBLIC SERVANTS IN COMMISSIONED POSITIONS. I – It falls to the Judicial Branch to verify the propriety of normative and administrative acts of the government with respect to causes, motives, and the purpose that gives rise to them. II – Based on the principle of proportionality, there must be a correlation between the number of effective positions and commissioned positions, to ensure the structure needed for the local Legislative Branch to act. III – Grievance not granted (First Panel, published in the DJ on 06/29/2007)*.”²¹

[42] In this regard, the Committee considers it important to emphasize that the high percentages (100% and 97%) of public servants without ties to the public administration who are installed in commissioned positions, compared to the percentage of public servants on the staff of the Legislative Chamber and the Federal Legislative Branch, respectively, is not consistent with the constitutional principles of proportionality and administrative morality. In addition, the Committee notes that some existing commissioned positions are not used “*exclusively for executive, leadership, and advisory positions*,” as provided in Article 37 (V) of the Constitution of Brazil: for example, drivers have been hired to hold commissioned positions by the Federal Senate.²² However, the Committee reiterates the need for the country under review to pay particular attention to the sole measure of the recommendation in section 1.1.1 of Chapter II of this Report and considers it relevant to reformulate the recommendation on the subject of hiring public employees in the Federal Legislative Branch. (see recommendations 1.1.3.2, 1.1.3.3, 1.1.3.4 and 1.1.3.5 of section 1.1.1 of Chapter II of this Report)

[43] In addition, with respect to the number of commissioned positions in the Legislative Branch, the representative of the Getúlio Vargas Foundation, during the on-site visit, emphasized that, based on the so-called “*presidentialist nature of the coalition*,” Brazil is on a path toward “*expanding these*

²⁰ Survey Report of the Federal Court of Accounts, TC 011.954/2015-9, p. 9, available at: http://portal.tcu.gov.br/data/files/E3/E4/31/0D/938055105DDA9F451A2818A8/011.954%20_.pdf

²¹ Regimental Grievance in Special Appeal No. 365.368/SC may be consulted at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=469872>

²² See staffing chart of the Federal Senate, available at: http://www.senado.gov.br/transparencia/rh/servidores/nova_consulta.asp

positions,” in that certain political parties remain allied with the government so as to ensure commissioned positions in the public administration or in state administrations. In addition, the representative stated that currently there are no measures directed to regulating the limit on these positions.

[44] With respect to cases and conditions for filling commissioned positions with effective public servants, it was noted, during the on-site visit, that the Administrative Regulations of the Federal Senate²³ (which have the force of law for the Senate in that they are approved by resolution of the full Senate) establish that criminal histories as well as possible cases of administrative impropriety and nepotism are analyzed with respect to candidates for filling commissioned positions. However, the Committee notes that no technical qualification criteria are established for filling these positions in the Federal Legislative Branch. Thus, the Committee feels that the submission of minimum technical professional qualifications for performing their duties must be a condition for entry into public service, both for public servants holding effective positions and for those holding positions that are freely appointed and dismissed. However, the Committee reiterates the need for the country under review to continue giving attention to the sole measure of the recommendation in section 1.1.1 of Chapter II of this Report. In this respect, the Committee considers it relevant to reformulate the recommendation to clarify what has been presented above. (see recommendations 1.1.3.6 and 1.1.3.7 in section 1.1.1 of Chapter II of this Report)

▪ With respect to the hiring of public employees in the Public Prosecutor’s Office:

[45] With respect to the Federal Prosecution Service, in its Response to the Questionnaire, the country under review presents information and new developments, which the Committee notes as a step that contributes to progress in its implementation.²⁴

[46] *“In the Federal Prosecution Service, Law No. 13.316/2016,²⁵ with provisions on the careers of the institution’s public servants, stipulates in Article 4 (1) that:*

Art. 4. The Federal Prosecution Service staffing plan includes positions of trust FC-1 to FC-3, commissioned positions CC-1 to CC-7, and special positions, for the exercise of executive, leadership, and advisory duties under the terms of Annexes IV, V and VI.

§ 1. Each branch of the Federal Prosecution Service will allocate at least 50% (fifty percent) of commissioned positions to career staff of the Federal Prosecution Service, in accordance with the qualifications and experience requirements provided in the regulations.

This provision already appeared in the previous law that governed the same careers (Art. 3 (1) of Law No. 11.415/06).”

[47] *“Also with respect to the Federal Prosecution Service, Ordinance PGR/MPU No. 287/2007, as amended by Ordinance PGR/MPU No. 542/2011, governs the exercise of positions of trust and commissioned positions. Art. 3 (1) establishes that “holding a commissioned position, at levels CC-4 to CC-7, shall have as a requirement, in addition to those contained in the caption for Art. 1, completion of an advanced graduate-level course consistent with the duties to be performed.”*

²³ The current Administrative Regulations of the Federal Senate are available at: <http://www2.senado.leg.br/bdsf/item/id/174851>

²⁴ See Brazil’s Response to the Fifth Round questionnaire, pp. 27 and 28, available at: http://www.oas.org/juridico/portuguese/mesicic5_bra.htm

²⁵ Law No. 13.316/2016 is available at: http://www.planalto.gov.br/ccivil_03/ato2015-2018/2016/lei/L13316.htm

[48] “The Transparency Portal of the Federal Prosecution Service includes the number of commissioned positions occupied and vacant in the institution. There is also information regarding the number of positions held by public servants who have gone through an external public competition and public servants who have not gone through an external public competition. The Portal has a list with the members and public servants that hold the positions, the specification for each of them, and the respective financial compensation.”

[49] After the on-site visit, the Federal Prosecution Service provided the following information, updated as of August 31, 2017, with respect to the number of public servants installed in functions and positions of trust:



Federal Prosecution Service
Consolidated – Commissioned Positions and Functions of Trust Occupied and Vacant

Description	Existing	Occupied			Vacancies
		With ties		Without ties	
		Staff	Employees		
CC-7	2	2	0	0	0
CC-6	65	8	42	15	0
CC-5	221	40	140	39	2
CC-4	436	1	292	138	5
CC-3	182	0	166	15	1
CC-2	1846	0	853	583	410
CC-1	114	0	107	7	0
FC-3	453	0	436	1	16
FC-2	1849	0	1,799	11	39
FC-1	820	0	703	4	113
Total	5988	51	4,538	813	586

[50] Considering the information presented above, the Committee notes that there are currently 2,867 commissioned positions in the Federal Prosecution Service; 1,653 are held by public servants and members who have gone through an external public competition, 815 are held by public servants without ties, and 399 positions are vacant. However, the number of public servants who have not gone through an external public competition represents a total of 33% of the occupied commissioned positions.

[51] The Committee feels that the provisions contained in Law No. 13.316/2016 governing the minimum percentages for filling commissioned positions with career public servants in the Federal Prosecution Service complies with the provision of Article 37 (V) of the Federal Constitution. Thus, the Committee takes note of the satisfactory consideration by the country under review of the sole measure of the recommendation in section 1.1.1 of Chapter II of this Report with respect to regulation of minimum percentages of career public servants in the Federal Prosecution Service who should fill commissioned positions.

[52] With respect to cases and conditions for filling commissioned positions with competitively qualified public servants, the Committee feels that the issuance of Ordinance PGR/MPU No. 287/2007, as amended by Ordinance PGR/MPU No. 542/2011 responds to the provision of Law No. 13.316/2016, Article 4(1) establishing that *“each branch of the Federal Prosecution Service shall allocate at least fifty percent (50%) of its commissioned positions to career public servants of the Federal Prosecution Service, according to the qualifications and experience provided in the regulations.”* Thus, the Commission takes note of the State’s satisfactory consideration of the sole measure of the recommendation in section 1.1.1 of Chapter II of this report with reference to the regulation of cases and conditions for filling commissioned positions with career public servants in the Federal Prosecution Service (emphasis added).

▪ With respect to the hiring of public employees in the Judicial Branch:

[53] In its Response to the Questionnaire²⁶, with respect to the Federal Judicial Branch, the country under review presents information and new developments. In this regard, the Committee notes the following as steps that lead it to conclude sole measure of recommendation 1.1.1 has been satisfactorily considered:

[54] *“Law No. 11.416/2006, which makes provision regarding the careers of public servants in the Federal Judicial Branch, includes a provision similar to the rule applied to the Federal Prosecution Service, establishing the minimum percentage of 50% of commissioned positions to be allocated to effective public servants (Article 5 (7) of the Law).”*

[55] *“The Federal Supreme Court’s website also includes information related to the number of commissioned positions and positions of trust, as well as the public servants of the institution who hold those positions, specifying as well whether or not they have effective ties with the Public Administration.”*

[56] During the on-site visit, there was no participation by representatives of the Judicial Branch who could provide information related to the hiring of public servants.

[57] However, the Committee managed to obtain the following information through survey report TC 011.954/2015-9 of the Federal Court of Accounts (TCU), mentioned earlier in paragraph 40 of this report:

[58] *“In the Judicial Branch, at least 50% of the CC (commissioned positions) in each agency should be set aside for effective public servants who are members of its staffing plan. In the case of FC (commissioned functions), each agency should set aside at least 80% of these positions to be exercised by career public servants of the Federal Judicial Branch. These percentages were defined by Law 11.416/2006, Article 5, paragraph 1 and 7, which are controlled by the agencies themselves. Based on analysis of the data, it was found that the courts are meeting these limits. The STJ reports that the Human Resources System (SARH) allows the preparation of reports with these minimum percentages, which are monitored monthly. These reports are available on the intranet. The court treats these*

²⁶ See Brazil’s Response to the Fifth Round Questionnaire, pp. 27 and 28, available at: http://www.oas.org/juridico/portuguese/mesicic5_bra.htm

*percentages as a strategic indicator of personnel management, with a view to evaluating the agency's employees.*²⁷

[59] With regard to cases and conditions for filling commissioned positions with effective public servants, the Committee finds that Law No. 11.416/2006, Art. 9 (1), stipulates that “*appointment to commissioned positions, except for established situations, shall require compatible advanced training and preferably, experience in the area, pursuant to the provisions of Article 4(1), Article 5 and its paragraphs with respect to those holding management-related commissioned positions and the provisions of Article 6 with respect to those holding non-management commissioned positions.*”

[60] The Committee considers it important to clarify that it was unaware of Law No. 11.416/2006 during the Second Round of Review. In this respect, the Committee notes that its provisions, now reviewed, by governing the minimum percentages, cases and conditions for filling commissioned positions with career public servants of the Federal Judicial Branch, comply with the provisions of Article 37 (V) of the Federal Constitution. Thus, the Committee takes note of the satisfactory consideration by the country under review of the sole measure in the recommendation in section 1.1.1 of Chapter II of this Report.

1.1.2. New Developments with Respect to the provisions of the Convention on Systems of Government Hiring

1.1.2.1. New Developments with Respect to the Legal Framework

a) Scope

- Statutory and other legal provisions applicable to the hiring of employees within the Federal Public Administration, among which the following should be noted:

[61] - Laws 11.784/2008, 12.314/2010 and 12.4425/2011 amended Law No. 8.475/1993, addressing fixed-term hiring to cover a temporary need of exceptional public interest, according to the Response to the Questionnaire by the country under review:

[62] “*Law No. 11.784/2008 includes in this role activities related to territorial identification and demarcation, programmatic activities of the Armed Forces Hospital, specialized technical activities necessary to set up bodies or institutions or new duties for existing organizations or activities arising from temporary increases in the volume of work, healthcare activities for indigenous communities, as well as other activities.*”

[63] “*Law No. 12.314/2010 includes in this role temporary needs subject to fixed-term hiring, attending to public health emergencies, with the Executive Branch being responsible for providing for the declaration of public health emergencies. According to the law, hiring to address needs arising from public disasters, environmental emergencies, and public health emergencies shall dispense with the selection process.*”

[64] “*Law No. 12.425/2011, finally, provides for the temporary admission of professors to fill demands arising from the expansion of federal educational institutions, in compliance with the limits and conditions set in the joint act of the Ministries of Planning and Education, as well as providing for cases in which a substitute professor is contracted to fill in for the absence of the actual*

²⁷Survey Report of the Federal Court of Accounts, TC011.954/2015-9, p. 51 available at http://portal.tcu.gov.br/data/files/E3/E4/31/0D/938055105DDA9F451A2818A8/011.954%20_.pdf

professor: position vacancy, removal or leave, appointment to occupy the executive position of rector, vice-rector, assistant dean, and campus director.”

[65] - Law No. 13.429 of March 31, 2017,²⁸ which amends certain provisions of Law No 6.019/1974, which deals with temporary employment and labor relations in companies providing services to third parties.

[66] With respect to temporary employment, Article 1 of the referenced law defines it as *“that provided by an individual hired by a temporary employment company that makes the individual available to a company receiving the service to meet the need to temporarily replace permanent staff or meet additional demand for services.”* Additional demand for services is defined in paragraph 2 of this same article as demand *“arising from unforeseeable factors or, when arising from foreseeable factors, demand that is intermittent, periodic, or seasonal in nature.”*

[67] The aforementioned law also provides, in Article 9 (3), that *“the temporary employment contract may cover the development of intermediate and programmatic activities to be performed in the company receiving services.”*

[68] With respect to the duration of the temporary employment contract, the new legal text stipulates in Article 10 (1) that, with respect to the same employer, the contract may be for up to 180 days, whether consecutive or not. Paragraph 2, in turn, provides that the contract may be extended for up to 90 days, whether consecutive or not, once continuation of the conditions that led to the contracting are verified. In addition, the employee may only be made available to the same company receiving services under a new temporary contract 90 days after the end of the previous contract.

[69] The new Law No. 13.429/2017, in addition to amending certain provisions of Law No. 6.019/1974 regarding temporary employment, also includes labor relations in companies providing services to third parties. Under the terms of Article. 4-A of the approved Law No. 6.019/1974, introduced by the new law approved, *“the company providing services to third parties is the legal entity under private law meant to provide certain specific services to the contracting party.”* The contracting party is defined in Article 5-A as the *“individual or legal entity that enters into a contract with the company providing certain specific services.”*

[70] In accordance with Article 19-B, the provisions of the law are not applicable to companies providing security and transportation for valuables, *“as the respective labor relations continue to be governed by special legislation and on a subsidiary basis by the Consolidation of Labor Laws (CLT).”*

- Provisions applicable to the hiring of employees within the Federal Executive Branch, which notably include:

[71] – Decree No. 6.944/2009²⁹ that, in accordance with its summary, *“establishes organizational measures for improving the direct federal public administration, autonomous agencies, and foundations, provides general standards related to public competitions, systematically organizes system the institutional organizational and innovation-related activities of the Federal Government, and other arrangements.”* The aforementioned decree, in Article 10, delegates

²⁸ Law 13.429 of March 31, 2017 is available at: http://www.planalto.gov.br/ccivil_03/ato2015-2018/2017/lei/L13429.htm

²⁹ Decree No. 6944 of August 21, 2009 is available at: http://www.planalto.gov.br/ccivil_03/ato2007-2010/2009/decreto/d6944.htm

jurisdiction to the Ministry of State for Planning, Development and Management for “*authorizing the conduct of public competitions in agencies and institutions of the direct federal public administration, autonomous agencies, and foundations and making decisions on the filling of public positions and jobs, as well as issuing additional acts necessary for this purpose.*”

[72] Article 11 of the referenced decree stipulates that “*during the validity period of the public competition, the Ministry of Planning, Development, and Management may authorize, with express justification, the appointment of approved and uncalled candidates, and may exceed by up to fifty percent the original number of vacancies.*” In addition, the caption of Article 16 of the referenced decree stipulates that the entity “*shall approve and publish in the Official Gazette of the Union the list of candidates who were approved in the examination.*”

[73] Article 16 of Decree No. 6.944/2009 stipulates that “*the agency or entity responsible for conducting the public competition shall approve and publish in the Official Gazette the list of candidates approved in the examination, ranked in accordance with Annex II of this decree by order of their classification. Paragraph 1: Candidates not ranked among the maximum number of approved candidates indicated in Annex II, while they may have achieved a minimum score, shall be automatically rejected in the public competition.*” Articles 18 and 19 specify the information that must appear in the notice opening registration for the public competition.

b) Observations

[74] First, the Committee would like to recognize the new regulatory measures adopted by Brazil to continue to push forward with the creation, maintenance, and strengthening of its systems of government systems for the procurement of goods and services as referred to in Article III (5) of the Convention.

[75] Having said that, it believes it useful to make a number of comments regarding the advisability of strengthening, developing, and/or adapting certain provisions that have to do with those new developments, notwithstanding the observations made by the Committee in Section 1.1.1 above in connection with the follow-up on implementation of the recommendations made to the country under review in the Report from the Second Round.

- With respect to the hiring of public employees in the Federal Public Administration, the Committee notes the following:

[76] With respect to the provisions of Law No. 13.429 of March 31, 2017 on temporary employment and labor relations in the company providing services to third parties, during the on-site visit, representatives from the Office of the Comptroller General (CGU) noted that the lack of regulations for the referenced law could lead to contracting of outsourced companies in the most varied areas of public service, including the programmatic areas of government.³⁰ According to the CGU representatives, this would be very problematic, in that it could open up

³⁰ On March 8, 2018, Brazil expressly made it clear that “Law No. 13.429 of March 31, 2017 is not directly applicable to the Federal Public Administration, in that contracting for a definite period to meet a temporary need of exceptional public interest, under the terms of Article 37 (IX) of the Federal Constitution, is provided for in Law No. 8.745 of December 9, 1993. Thus, there is a specific law for the direct Federal Administration, the autonomous agencies, and foundations. It is also important to note that Law No. 13.429 includes in Article 5 the term COMPANY that contracts services. Under no circumstances may the bodies of the Federal Administration be likened to a company, in that they are devoid of legal personality. Thus, the law itself excludes them from its application.”

precedents for third-party contracting³¹ for the performance of internal control, correction, ombudsman, and corruption prevention.³²

[77] On this same subject, the Committee notes that “provision is made for contracting for a specific period to meet a temporary need of exceptional public interest, under the terms of Article 37 (IX) of the Federal Constitution,” in Law No. 8.745 of December 9, 1993,³³ which was analyzed in the context of the Second Round of Analysis.³⁴

[78] Similarly, the Commission notes that the Federal Court of Accounts (TCU) already established that “*the outsourcing of programmatic activities and/or functions included in workload plans represents an illegitimate action and is not supported by Article 25 (I) of Law No. 8.987/1995, the interpretation of which should conform to the discipline of Article 37 (II) of the Federal Constitution.*”³⁵

[79] In this regard, Article 6 of Normative Ruling No. 2 of April 30, 2008 of the Ministry of Planning, Development and Management³⁶ establishes that “*ongoing services that can be outsourced by the Administration are those that support the conduct of activities essential to the essential mission of the body or entity, as provided in Decree No. 2271/97*”³⁷ (emphasis added).

³¹ In this context, the Commission adds that according to the CGU’s Management Report, published in 2016, there are currently no temporary employees in the staffing plans of either the intermediate or the programmatic areas of the CGU.

³² On March 8, 2018, Brazil made it clear that the “rule contained in Article 37 (II) of the Federal Constitution is that government positions must be filled through public competition, as outsourcing is merely an alternative for assisting in the activities of the State. In addition, the various careers that make up the Public Administration stipulate that specific activities and duties may only be exercised by public servants, with outsourcing being prohibited. Thus, although there is no express prohibition in the law referred to here, the Constitution itself and the express constitutional provisions that govern the Public Administration – particularly morality, legality, and impersonality – prevent the broad use of outsourcing as a resource to replace public competition, which continues to be the rule for the hiring of public servants and employees.”

³³ Law No. 8.745 of December 9, 1993 can be consulted at: http://www.planalto.gov.br/ccivil_03/Leis/L8745cons.htm

³⁴ See page 4 of Brazil’s report in the context of the Second Round of Analysis, available at:

http://www.oas.org/juridico/english/mesicic_II_inf_bra_en.pdf

³⁵ Monitoring Report of the Federal Court of Accounts, TC 006.373/2013-5 [Attached: TC 034.904/2015-8], p. 2, available at:

http://portal.tcu.gov.br/data/files/21/35/89/D1/64375510BBC6B5551A2818A8/006.373_.pdf

³⁶ Normative Ruling No. 2 of April 30, 2008 may be consulted at:

<https://www.comprasgovernamentais.gov.br/index.php/legislacao/instrucoes-normativas/417-instrucao-normativa-n-02-de-30-de-abril-de-2008>

³⁷ On this subject, Brazil made it clear on March 8, 2018 that “Normative Ruling No. 2 of 2008 was repealed by Normative Ruling No. 5 of May 26, 2017. Article 9 thereof indicates the activities that cannot be executed indirectly. In addition, any activity that is auxiliary to the programmatic mission provided in Article 9 may be executed indirectly provided that there is no transfer of responsibility for carrying out administrative acts or decision-making to the contractor. Thus, there are support and auxiliary contracts: ‘Article 9. The following shall not be subject to indirect performance in the direct Federal Public Administration, the autonomous agencies, and foundations: I – activities that involve decision-making or institutional positioning in the areas of planning, coordination, supervision and control; II – activities considered strategic for the body or entity, the outsourcing of which could put at risk the control of processes and knowledge and technologies; III – functions related to police power, regulation, delivery of public services, and imposition of penalties; and IV – activities inherent to the functional categories covered in the staffing plan of the body or entity unless there is an express legal provision to the contrary or when a totally or partially eliminated position is involved, within the general staffing plan. Single paragraph. Functions that are auxiliary, instrumental or accessory to the functions and activities defined in the caption subparagraphs may be executed indirectly, with a prohibition on transferring responsibility for carrying out administrative acts or decision-making to the contractor.’ Moreover, Normative Ruling No. 5 of 2017 is based on Decree No. 2.271 of 1997, which includes express prohibitions with regarding to the contracting of activities covered by the staffing schedule of the body or entity, as follows: “Article 1 (...), paragraph 2. Activities inherent to the functional categories covered by the career plan of

[80] The Committee also notes that the Federal Court of Accounts found that there are irregular hirings within the direct federal public administration, autonomous agencies, and foundations and notes the need to adopt procedures and oversight. In this respect, the Federal Court of Accounts, through Ruling (*Acórdão*) 1520/2006, established that outsourced workers identified at the time as being in an irregular situation in federal state-owned corporations were gradually replaced by competitively qualified public servants between the years 2006 and 2010. As a result of recent monitoring by the oversight body, according to ruling TC 006.373/2013-5, “27 public entities acknowledged that they still had outsourced employees in irregular situations. There were 47 companies that stated that they did not have illegal outsourced positions. The 31 companies belonging to the Petrobras System requested an extension of the deadline for sending information.” Thus, the Committee notes the need for the country under review to consider certifying that outsourced workers are contracted by the Public Administration in accordance with current legislation. In this respect, the Committee will formulate a recommendation to the country under review. (see recommendation 1.1.3.8 in section 1.1.2 of Chapter II of this Report)

- With respect to the hiring of public employees within the Federal Executive Branch, the Committee considers the following:

[81] With respect to Decree No. 6944 of August 21, 2009, the Committee notes that the decree consolidated general provisions related to public competitions. In this respect, although the decree does not establish a deadline for appointment of approved candidates following approval of the competition, the Federal Supreme Court recognized the importance of this subject in 2011, in a decision with general repercussions, and established that if a candidate approved in public competition is called to serve in an existing vacancy or position indicated in the notice, the approved candidate is entitled to be appointed and the Administration has the duty to appoint them:³⁸

[82] *“Within the validity period of the competition, the Administration may choose the moment when the appointment will be made, but may not rule on the appointment itself, which, in accordance with the notice, becomes a right of the approved competitor and thus a duty imposed on the government. Once the notice of competition is published with a specific number of vacancies, the Administration’s action declaring the candidates approved in the examination creates a duty to appoint for the Administration itself and, thus, a right to appointment secured by the candidate approved within that number of vacancies.”*

[83] Thus, according to the Federal Supreme Court, the right to an appointment would arise when the following *de facto* and *de jure* conditions are met: “a) indication in the notice of the specific number of vacancies to be filled by the candidates approved in the public competition; b) conduct of the examination in accordance with the rules of the notice; c) approval of the competition and proclamation of those approved among the indicated number of

the body or entity may not be subject to indirect execution, unless there is express legal provision to the contrary or when a totally or partially eliminated position is involved, within the general staffing schedule.”

³⁸ RE 598099, Report by Gilmar Mendes, Full Court, judgment on 8.10.2011, DJe of 10.3.2011, with general repercussions - topic 161 p.1

<http://www.stf.jus.br/repositorio/cms/portalStfInternacional/newsletterPortalInternacionalJurisprudencia/anexo/RE598099paginador2.pdf>

<http://www2.stf.jus.br/portalStfInternacional/cms/destaquesNewsletter.php?sigla=newsletterPortalInternacionalJurisprudencia&idConteudo=195930>

*vacancies, in the order of ranking, by means of an unequivocal and public act by the competent authority.*³⁹

[84] According to the jurisprudence of the Court, it is understood that the Public Administration would be bound by the rules of the notice of public competition and that it would thus be required to fill the vacancies indicated for the examination within the validity period of the competition, and this requirement can only be eliminated based on an exceptional justification. The Court asserts that there is a good faith duty on the part of the Administration to make a notice of the competition public, which produces an expectation on the part of the candidates with respect to its conduct, according to the rules provided in the notice.

[85] In addition, the Federal Supreme Court, in a decision with general repercussions, concluded that the candidate has a subjective right to appointment *“when new vacancies arise, or a new competition is opened during the validity of the previous examination, and candidates are omitted from the vacancies on an arbitrary and unjustified basis by the administration.”*⁴⁰

[86] Similarly, the Committee notes that, in accordance with Article 37 (IV) of the Constitution, during the validity period of the competition indicated in the notice, the individual approved in public competition will be called upon *“with priority over new competitors to assume the career position or post.”* Thus, considering the constitutional standard, interpreted by the jurisprudence of the Federal Supreme Court, the Committee will formulate a recommendation to the country under review to consider expressly establishing in a provision that public agencies have the duty to appoint candidates that are approved and qualified among the specific number of vacancies indicated in the notice. (see recommendation 1.1.3.9 in section 1.1.2 of Chapter II of this Report)

[87] On this subject, the Committee note that that Brazilian legal order permits authorization to fill positions from a public competition at any time during the validity period of the examination. The Ministry of Planning, Development and Management (MP), the agency responsible for authorizing the conduct of public competitions and deciding to fill public positions and posts, explains on its website how the filling of positions from a public competition is authorized:⁴¹

[88] *“Before authorization is granted to fill positions from a public competition, the notice approving the final result must be published, which is the responsibility of the agency or institution conducting the competition. Once the result is approved, the interested agency or institution must address a request to the MP, along with the documents established in Article 4 of Decree No. 6944/2009 and normative directives from the Secretariat of Personnel Management (SGP), the agency of this Ministry responsible for analyzing issues of this kind. The MP evaluates the request, considering the needs of the requesting agency compared to all requests made by all agencies of the direct federal public administration, autonomous agencies, and foundations, and*

³⁹ RE 598099, p. 8

⁴⁰ RE 837311, Report of Luiz Fux, Full Court, Judgment on 12.9.2015, DJe of 4.18.2016, with general repercussions - matter 784

<http://www.stf.jus.br/portal/jurisprudencia/menuSumarioSumulas.asp?sumula=1456>

⁴¹ See Internet page “Frequent Questions” on “Public Competitions” of the Ministry of Planning, Development and Management (published: 04/13/2015 23h21, last amended: 07/05/2017 18h14):

<http://www.planejamento.gov.br/servicos/faq/concursos#2--qual-legisla--o-disciplina-o-tema-concurso-p-blico->

authorizes the appointment within the validity period of the examination, according to budgetary-financial availability.”

[89] With respect to the deadline for analyzing processes involving authorization to conduct competitions and to make appointments, the Ministry of Planning, Development and Management explains that *“is it not possible to stipulate a deadline for completing the analyses necessary for procedures seeking authorization for competitions or appointments to positions in that variable aspects are considered, such as the needs of the requesting agency compared to all requests made by all agencies and institutions of the Federal Executive Branch, as well as budgetary-financial availability, and the validity period of the public competition. It is up to the MP to evaluate the priorities of the entire Federal Public Administration, gradually authorizing the conduct of public competitions and appointments, in accordance with identified needs and priorities.”*

[90] Taking into account the information reviewed above, the Committee notes that the process for authorizing the filling of positions based on a public competition occurs after the final results of the public competition are approved. Consequently, a candidate who undertook the competition and was ranked among the number of vacancies indicated may wait up to four years to be appointed, depending on the validity period of the competition.⁴² This happens because the time of appointment during the validity period of the public competition is a discretionary action by the public administration, that is, the Administration decides when the candidate’s appointment will be made.⁴³

[91] The Committee notes that since provision has been made for vacancies in the notice, this means that the Public Administration has an immediate need for human resources and budgetary-financial appropriations to make those appointments. Thus, the Committee notes that appointing candidates who were approved within the number of vacancies long after the final result of the examination was approved, as well as within the period of its validity, should not become the customary practice of the public administration.

[92] In this respect, the Committee feels it is important that the analyses needed for authorizing position appointments by various divisions of the Ministry of Planning, Development and Management occur at the same time as the analyses necessary for authorizing the opening of the respective competition. Thus, once the final results of the competition are approved, it would not be necessary to carry out the process for obtaining the signing and publication of the order authorizing the convening of approved candidates by order of ranking. Thus, the Committee will formulate a recommendation to the country under review that it consider adopting relevant measures to ensure that the process of appointing competitively qualified candidates is handled in a more efficient way. (see recommendation 1.1.3.10 in section 1.1.2 of Chapter II of this Report)

⁴² On March 8, 2018, the State under review provided the following clarification: *“according to Decree 6.944/09, the validity period will appear in the notice of competition, as the notice itself specifies the date on which that period will begin to run. In addition, it should be stated that the case law is settled to the effect that the initial term begins with the initial certification of the final result in the final phase of the classification of candidates.”* By way of example, it cited Rulings in Special Appeals Nos. 511857/DF and 162.068/DF. Rel.)

⁴³ On March 8, 2018, Brazil reported that *“the analysis done by the Ministry of Planning takes into consideration the requests made by various bodies of the Federal Executive after completion of all phases in a competition and once the final result is approved, with each body being responsible for organizing the examination. In addition, the appointment sought by the body may exceed the number of vacancies previously planned, which has an impact on the budget that must be evaluated.”*

[93] With regard to the method for notifying the candidate ranked in a public competition to take up the position, the Committee notes that the Decree No. 6.944/2009 establishes that the list of approved candidates is published in the Official Gazette of the Union. Thus, there is no express provision for personally summoning the approved candidate. In this regard, making the appointment effective solely through publication in the Official Gazette, according to precedents from the Superior Court of Justice,⁴⁴ would be a violation of the principles of publicity and reasonability enshrined in Article 37 of the Federal Constitution, particularly after such a long period of time. In addition, Brazilian reality should not be overlooked in the sense that most citizens do not have the habit of regularly reading the official gazette. Thus, the Committee will formulate a recommendation to the country under review that it consider requesting updated personal data on candidates when they register for public competitions and sending the candidate a personal notification of their appointment, as the mere publication in the Official Gazette should not relieve the Public Administration of its duty to personally notify, and in writing, those who are approved in public competition. (see recommendation 1.1.3.11 in section 1.1.2 of Chapter II of this Report)

[94] With regard to payment of the registration fee for public competitions, the Committee recognizes as a positive measure the signing of Decree No. 6593 of October 2, 2008,⁴⁵ which provides regulations for Article 11 of Law No. 8.112 of December 11, 1990, with regard to a tax exemption on registration for public competitions within the sphere of the Federal Executive Branch, because it allows the participation in public competitions of candidates from low-income families who would not be in a position to pay such taxes.⁴⁶ On this subject, the Committee will formulate a recommendation to the country under review to consider providing a tax exemption on registration for public competitions conducted within the other branches of government. (see recommendation 1.1.3.12 in section 1.1.2 of Chapter II of this Report)

1.1.2.2. New Developments with Respect to Technology

[95] The country under review, in its Response to the Questionnaire, provided the following information with respect to new technological developments:

[96] *“Now under development in the Ministry of Planning, Development and Management are upgrades in the Personnel Management System (SIGPE) that will involve various improvements and solutions to refine the workflow for selecting personnel within the*

⁴⁴ See REsp 1645213, Available at:

https://ww2.stj.jus.br/processo/revista/inteiroteor/?num_registro=201603153971&dt_publicacao=20/04/2017

“Summary: ADMINISTRATIVE. PROCEDURAL, CIVIL PUBLIC COMPETITION. SUMMONS TO ASSUME POSITION THROUGH PUBLICATION IN THE OFFICIAL GAZETTE, WITHOUT PERSONAL NOTIFICATION. IMPOSSIBILITY. CONTESTED DECISION CONSISTENT WITH JURISPRUDENCE OF THE STJ. SUMMARY STATEMENT 83/STJ. 1. In the instant case, the appointment in public competition after a considerable period of time has elapsed since approval of the final result, without personal notification to the interested party, violates the principles of publicity and reasonability, it not being sufficient to convene for a subsequent examination phase through the Official Gazette, in accordance with recent jurisprudence of the Superior Court of Justice, Summary statement 83/STJ. 2. Special appeal partially proven.”

⁴⁵ Decree No. 6593 of October 2, 2008 may be consulted at: http://www.planalto.gov.br/ccivil_03/ato2007-2010/2008/decreto/d6593.htm

⁴⁶ On March 8, 2018, the State under review provided the following information: “all federal public competitions follow the provisions of Decree No. 6.593/08 and apply the tax exemption rule to those registrants in the Single Registry who belong to low-income families, including competitions organized by the legislature, the judiciary and Public Prosecutor’s Office, as provided in the notices (e.g., latest competitions for the Federal Senate, Chamber of Deputies, Office of the Public Prosecutor, Federal Regional Court, and others).”

Federal Public Administration. The SIGEPE is intended for the personnel management areas of the agencies as well as public servants and their superiors, who interact with the system to obtain information or request services, and serves the agencies participating in the Civilian Personnel System of the Federal Administration (SIPEC). The project for its improvement is being developed in stages.”

[97] “Among the modules being developed, we can highlight the following:

1- Employment and Apprenticeship Posts

Purpose: Management of Employment and Apprenticeship Posts, including storing data and making it available for the other modules.

(An Employment and Apprenticeship Post consists of the following characteristics: duties of the post, agencies with capacity, workday, vacancies, structures, and compensation amounts.)

[98] “2- Personnel Selection

Purpose: Management of selection processes in the Federal Public Administration”

[99] “3- Link Management

Purpose: Management of links established between an individual and the agencies and institutions of the federal public administration and the government of the federal district (GDF).

(The link is established based on types of appointment, movement, dismissal, and resulting benefits, including compensatory pension, discretionary pension, and political amnesty benefits).”

[100] The Committee takes note of the new developments related to technological aspects of the systems for hiring public employees within the Federal Executive Branch. According to the country under review, the improvements mentioned above seek to “develop efficiency, efficacy and effectiveness in the process of selecting public employees, contributing to transparency in the federal government.” Thus, taking into consideration the importance of finalizing the development of relevant modules of the SIGEPE, the Committee will formulate a recommendation to this effect. (see recommendation 1.1.3.13 in section 1.1.2 of Chapter II of this Report)

[101] The Committee notes that the web page referring to the “Employment and Apprenticeship Post Module” of the SIGEPE, mentioned in the Response, states that “tutorials were issued to assist learning and the 2017 Workshop was held in September 2017 to present the module to the departments involved in introducing the system.”⁴⁷ However, the tutorials mentioned are not available for consultation on-line, as happens with the tutorials of the Judicial Action Module.⁴⁸ Taking into account that the tutorials should be easily accessed by the users of SIGEPE, the Committee will formulate a recommendation to the country under review to consider publishing all the tutorials developed so as to simplify the understanding and use of the systems and modules. (see recommendation 1.1.3.14 in section 1.1.2 of Chapter II of this Report)

⁴⁷ The Employment and Apprenticement Post Module of the SIGEPE may be consulted at: <https://www.servidor.gov.br/gestao-de-pessoas/sigepe/modulo-posto-de-trabalho-e-aprendizagem>

⁴⁸ The Judicial Action Module of the SIGEPE can be consulted at: <https://www.servidor.gov.br/gestao-de-pessoas/sigepe/modulo-acao-judicial>

1.1.2.3. Results

[102] The country under review, in its Response to the Questionnaire, provided the following information with respect to results on the hiring of public employees:

[103] “As explained above, investiture in a public office or position depends, as a rule, on previously passing a public competition, as established in the Federal Constitution, and related provisions. Within the Federal Executive Branch, the general rules for public competition provided in Decree no 6.994/09 establish that the conduct of competitions depends on prior authorization from the Ministry of Planning. Statistics on the number of authorizations and appointments within the Executive Branch are available at: <http://www.planejamento.gov.br/assuntos/concursos/autorizacoes-e-provimentos>”

[104] According to the statistics appearing on the web page cited in the Response to the Questionnaire related to the number of authorizations and appointments updated as of October 25, 2017, the Committee notes that the Ministry of Planning, Development and Management authorized the filling of a total of 4,089 positions in various ministries of the Federal Executive Branch in 2017, compared to 3,255 positions in 2016.

[105] According to the table available on the web page mentioned above, the Committee notes that, among the authorizations for position appointments in the Executive Branch in 2016, at least 595 positions (about 20% of the total) referred to outsourced employees replaced by staff approved in public competition:

Table of Authorizations and Appointments - 2016

BODY/ENTITY	LINK	POSITIONS	EDUCATION	VACANCIES	PUBLICATION Official Gazette of the Union - DOU	TYPE OF AUTHORIZATION
National Health Surveillance Agency (ANVISA)	Ministry of Health - MS	Administrative Technician	NI	78	Official Order No. 114, of April 19, 2016	Competition for replacement of outsourced employees
Oswaldo Cruz Foundation (Fiocruz)	Ministry of Health - MS	Technical Assistant in Health Management; Specialists in Science, Technology, Production and Innovation in Public Health; Researcher in Public Health and Public Health Technician	NS/NI	150	Official Order No. 140, of April 29, 2016	Competition for replacement of outsourced employees
National Cancer Institute (INCA)	Ministry of Health - MS	Researcher, Technologist, Analyst in Science and Technology and Technician	NS/NI	27	Official Order No. 115, of April 18, 2016	Competition for replacement of outsourced employees
Special Secretariat for Indigenous Health (SESAI)	Ministry of Health - MS	Administrator, Technical Analyst in Social Policies and Accountant	NS	102	Official Order No. 270, of September 21, 2016	Competition (Public Civil Action)
Federal Police Department (DPF)	Ministry of Justice and Citizenship - MJ	Administrative Agent	NI	204	Official Order No. 138, of April 29, 2016	Competition for replacement of outsourced employees
National Agency of Petroleum, Natural Gas and Biofuels - (ANP)	Ministry of Mines and Energy - MME	Technician in Regulation of Petroleum and Derivatives, Ethanol and Natural Gas and Administrative Technician	NI	34	Official Order No. 335, of November 8, 2016	Competition for replacement of outsourced employees

[106] On this subject, the Committee notes that the Court of Accounts (TCU) found there were irregular contracts within the Direct Federal Public Administration, the Autonomous Agencies, and Foundations, and the need to adopt procedures and supervision, as indicated earlier in item b) of section 1.1.2.1 of this report. Along these same lines, the Committee made a recommendation to the country under review (see recommendation 1.1.3.8 in section 1.1.3 of Chapter II of this Report).

[107] As mentioned earlier in section 1.1.1 of this Report, during the on-site visit there was no participation on the part of representatives from the Judicial Branch who could provide information regarding the hiring of public employees. The Technical Secretariat managed to obtain, through the report *Justiça em Números 2017*,⁴⁹ the following information on Federal Justice:

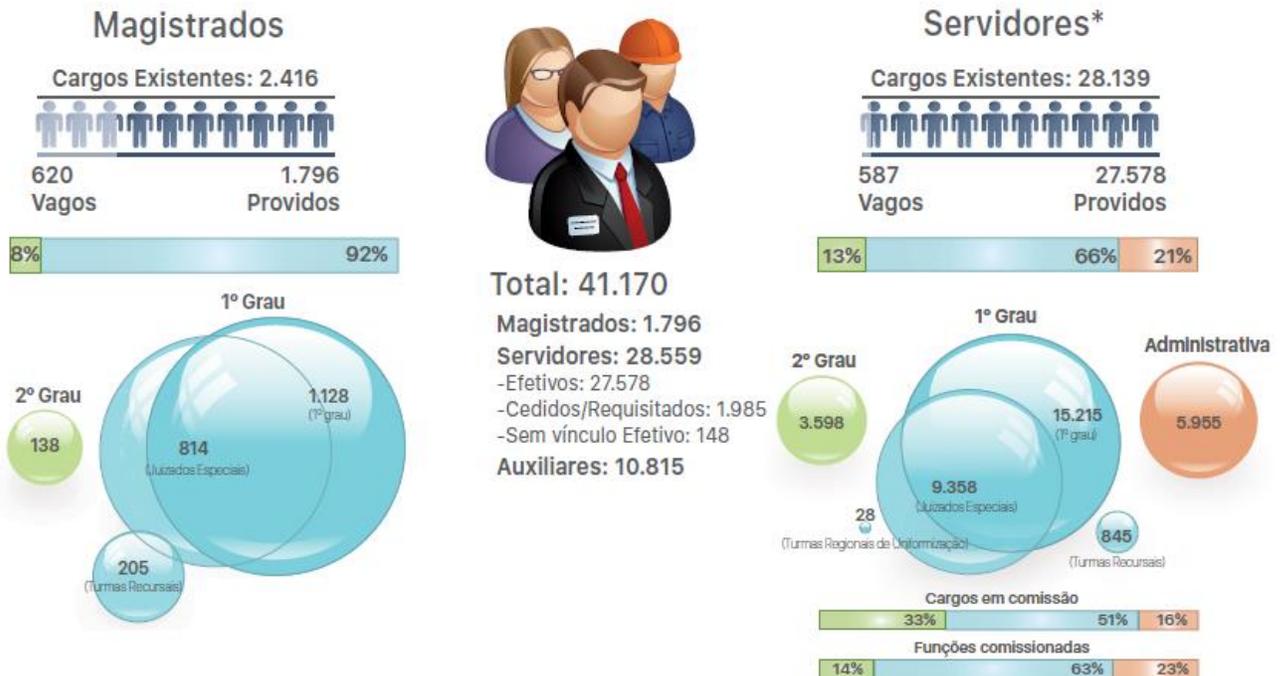
[Tr. Key to the table below: **Workforce**:

Magistrates – existing positions: 2.416; 620 vacancies 1,796 filled; 2nd level 138; 1st level: 814 (Special Courts), 205 (Appeals Chambers), 1,128 (1st level)

Staff – existing positions: 28,139; 587 vacancies, 27,578 filled; 2nd level: 3,598; 1st level: 15,215 (1st level), 9,358 (Special Courts), 28 (Regional Uniformity Chambers), 845 (Appeals Chambers); Administrative: 5.955; commissioned positions (33% - 51% - 16%); commissioned functions (14% - 63% - 23%).

Total: 41,170 – Magistrates: 1.796; staff: 28,559, employees: 25,578; Assigned/Required: 1,985, without effective tie: 148, Auxiliary: 10,815 - *The Federal Regional Court in Region One did not submit information on the number of existing positions]

Força de Trabalho



*O TRF1 não informou o número de cargos existentes.

[108] According to the report, at the end of 2016, there were 1,796 magistrate positions filled in the Judicial Branch, of a total of 2,416 positions created by law. Thus, there were, 620 vacant

⁴⁹ *Justiça em Números 2017: ano-base 2016/Conselho Nacional de Justiça - Brasília: CNJ, 2017, p. 42*
<http://www.cnj.jus.br/files/conteudo/arquivo/2017/09/904f097f215cf19a2838166729516b79.pdf>

magistrate positions, approximately 26% of the total number of existing positions.⁵⁰ According to the data in the publication, the largest number of magistrate positions not filled in the entire Judicial Branch is found in Federal Justice. Taking into consideration the importance of ensuring the proper performance of the functions of the Judicial Branch, the Committee will formulate a recommendation that the country under review guarantee that vacancies in the Federal Judicial Branch are filled. (see recommendation 1.1.3.15 in section 1.1.3 of Chapter II of this Report)

[109] The Committee recognizes the efforts undertaken by the Judicial Branch to publish specific data on-line, broken down and compiled concisely, clearly and objectively through annual editions of the *Relatório Justiça em Números* prepared by the National Council of Justice. Such publications facilitate understanding of the data related to each jurisdictional level and the comparison of data over the years.

[110] In addition, the Committee emphasizes that it did not have complete information regarding objective results on the subject of hiring public employees. Consequently, it was not possible to perform a comprehensive analysis due to the lack of information. Bearing in mind the difficulty of obtaining data, apparent since the Second Round of Review,⁵¹ including by consulting official agency websites, the Committee considers it useful, so as to be able to identify challenges and recommend corrective measures as needed, that the country under review consider preparing detailed and compiled statistical information each year on the hiring of public employees, so that it will be possible to clearly determine the number and percentage of staff linked through selection processes, public competitions, temporary and outsourced contracting, appointments freely made and dismissed, use of systems for the delivery of individual professional services (such as advisors or consultants), number and percentage of appeals filed against decisions made in hiring processes, selection and admission of staff, as well as the number and percentage of appeals filed against commissioned positions created and filled.⁵² (see recommendation 1.1.3.16 in section 1.1.3 of Chapter II of this Report)

1.1.3.Recommendations

[111] In light of the observations formulated in sections 1.1.1 and 1.1.2 of Chapter II of this Report, the Committee suggests that the country under review consider the following recommendations:

1.1.3.1.Regulate cases and conditions, including minimum professional qualification criteria, to be met for holding positions of trust and commissioned positions within

⁵⁰ According to the *Relatório Justiça em Números*, p. 31, “Magistrates include judges, *desembargadores* and *ministros*; employees include the actual staff, those requested, and those transferred from other agencies whether or not they belong to the structure of the Judicial Branch, in addition to commissioned agents without effective links. Excluded are effective staff members requested or transferred to other agencies; and auxiliary workers who include outsourced staff, interns, lay judges, mediators, and voluntary staff.”

⁵¹ See Brazil’s Report from the Second Round of Review, p. 23, available at: <http://www.oas.org/juridico/portuguese/bra.htm>

⁵² On March 8, 2018, the State under review reported that, with regard to the Executive, “the data requested are available both on the Planning Portal (<http://www.planejamento.gov.br/assuntos/gestao-publica/arquivos-e-publicacoes/BEP>) and in the form open on the Transparency Portal. In the case of the Legislative Branch, the data are made available on the pages of the Federal Senate and the Chamber of Deputies (Transparency section). With regard to the Public Prosecutor’s Office, the data are also available on the MPF transparency portal. It is emphasized that data are made available both on staff and employees with effective positions and commissioned positions without ties, positions of trust held by public servants and temporary employees. It should also be noted that the category of individual professional services requested is included in commissioned positions and positions of trust, and there is no separate category for the function of advisor.”

the Federal Executive Branch, in accordance with the provisions of Article 5 of Law No. 13.346 of October 10, 2016 and Article 37 (V) of the Federal Constitution (see paragraph 33 in section 1.1.1 of Chapter II of this Report).

- 1.1.3.2. Establish public competition as the general rule and condition for filling positions in the Federal Senate and direct appointment as the exception to the rule, amending the system for hiring public employees and the body's staffing chart, in compliance with the principles of legality, objectivity, morality, publicity, and efficiency, under the terms of Article 37 (V) of the Federal Constitution (see paragraph 42 in section 1.1.1 of Chapter II of this Report).
- 1.1.3.3. Establish public competition as the general rule and condition for filling positions in the Chamber of Deputies and open appointment as the exception to the rule, amending the system for hiring public employees and the body's staffing chart, in compliance with the principles of legality, objectivity, morality, publicity, and efficiency, under the terms of Article 37 of the Federal Constitution (see paragraph 42 in section 1.1.1 of Chapter II of this Report).
- 1.1.3.4. Consider regulating, by law, the provisions of Article 37 (V) of the Federal Constitution with respect to the minimum percentages of career public servants who should fill commissioned positions within the Federal Senate, in compliance with the constitutional principles of proportionality and administrative morality and the principles of publicity, equity, and efficiency provided in the Inter-American Convention against Corruption. (see paragraph 42 in section 1.1.1 of Chapter II of this Report).
- 1.1.3.5. Consider regulating, by law, the provisions of Article 37 (V) of the Federal Constitution with respect to the minimum percentages of career public servants who should fill commissioned positions in the Chamber of Deputies, in compliance with the constitutional principles of proportionality and administrative morality and the principles of publicity, equity, and efficiency provided in the Convention (see paragraph 42 in section 1.1.1 of Chapter II of this Report).
- 1.1.3.6. Consider regulating, by law, the provisions of [Article 37] (V) of the Federal Constitution with respect to the cases and conditions for filling commissioned positions within the Chamber of Deputies, establishing that such positions should perform executive, leadership, and advisory duties, and stipulating the minimum technical qualifications for the exercise of the commissioned position, in compliance with the principles of publicity, equity, and efficiency provided in the Convention (see paragraph 44 in section 1.1.1 of Chapter II of this Report).
- 1.1.3.7. Consider regulating, by law, the provisions of [Article 37] (V) of the Federal Constitution, with respect to the cases and conditions for filling commissioned positions within the Federal Senate, establishing that such positions should perform executive, leadership and advisory duties, and stipulating the minimum technical qualifications for the exercise of the commissioned position, in compliance with the principles of publicity, equity and efficiency provided in the Convention (see paragraph 44 in section 1.1.1 of Chapter II of this Report).

- 1.1.3.8. Adopt the measures necessary to ensure that the relevant agencies, such as the Federal Court of Accounts (TCU), the Ministry of Transparency and Comptroller General's Office (CGU) and the agencies of the internal control system of the Public Administration conduct periodic audits, according to the availability of resources, to correct and punish irregularities related to the temporary hiring of staff and outsourcing (see paragraph 80 in section 1.1.2 and paragraph 106 in section 1.1.3 of Chapter II of this Report)
- 1.1.3.9. Expressly establish, within the three branches of the federal government, the requirement to appoint approved and qualified candidates among the number of vacancies indicated in the notice of the public competition, in a timely manner, within the validity period of the competition (see paragraph 86 in section 1.1.2 of Chapter II of this Report)
- 1.1.3.10. Adopt the relevant measures to ensure that the appointment process is executed in a more efficient way-, thus enabling the timely appointment of approved candidates among the number of vacancies indicated in the competition's notice, within the three branches of the federal government (see paragraph 92 in section 1.1.2 of Chapter II of this Report)
- 1.1.3.11. Clearly and precisely regulate, within the sphere of the three branches of the federal government and the Federal Prosecution Service, the duty of the agency or institution to seek updated personal data on candidates registered in the public competition, so as to be able to send them personal notification in writing of their appointment, in the event they are approved (see paragraph 93 in section 1.1.2 of Chapter II of this Report)
- 1.1.3.12. Regulate, within the sphere of the Federal Legislative Branch, the Federal Judicial Branch, and the Federal Prosecution Service, the possibility of a tax exemption on the registration fee for public competitions (see paragraph 94 in section 1.1.2 of Chapter II of this Report)
- 1.1.3.13. Adopt, through the respective authority, the measures necessary to prepare, complete, and develop pending modules and upgrades in the Personnel Management System - SIGEPE (see paragraph 100 in section 1.1.2 of Chapter II of this Report)
- 1.1.3.14. Adopt, through the respective authority, the measures necessary to develop and publish tutorials on the use of the Personnel Management System (SIGPE) and particularly on the use of the new modules and tools, in order to assist system users (see paragraph 101 in section 1.1.2 of Chapter II of this Report)
- 1.1.3.15. Adopt, through the competent authority or authorities and according to the availability of government resources, the measures necessary to ensure that vacant positions in Federal Justice are filled through public competition (see paragraph 108 in section 1.1.2 of Chapter II of this Report).

- 1.1.3.16. Prepare detailed and compiled statistical information each year on the hiring of public employees in the Executive, Legislative, and Judicial branches and the Public Prosecutor's Office and publish it on the respective Transparency Portals, so that it will be possible to clearly determine the number and percentage of employees linked through selection processes, public competitions, temporary and outsourced contracting, appointments to positions of trust and freely appointed and dismissed appointments, use of systems for the delivery of individual professional services (such as advisors or consultants), the number and percentage of appeals filed against decisions made in hiring processes, selection and admission of personnel, as well as the number and percentage of appeals filed related to the creation of and appointment to commissioned positions, in order to be able to identify challenges and recommend corrective measures, as necessary (see paragraph 110 in section 1.1.2 of Chapter II of this Report).

1.2. GOVERNMENT SYSTEMS FOR THE PROCUREMENT OF GOODS AND SERVICES

1.2.1. Follow-Up to the Implementation of the Recommendations Formulated in the Second

Recommendation 1.2.1:

Strengthen government procurement systems

Measure a) suggested by the Committee that requires additional attention within the Framework of the Third Round:

Improve the web site at www.comprasnet.gov.br in order to facilitate access to the justifications for setting aside the tendering process that are published thereon

[112] With respect to the aforementioned measure, in its Response to the Questionnaire, the country under review presents information and new developments, which the Committee notes as a step that contributes to progress in its implementation.⁵³

[113] *“In May 2017, the Department of Standards and Logistics Systems – DELOG (Ministry of Planning, Development and Management) launched the new Purchasing Portal. This portal is a restructuring of the Federal Government Purchasing Portal, with a modern, dynamic and logical vision, in addition to providing a publication with content related to the process of governmental public procurement.”*

[114] *“The new portal establishes an improvement in the presentation of information and guidance for users, with a division by profile. On an iterative and dynamic basis, it standardizes the channel of communication between the Public Administration, suppliers, and society, in addition to managing knowledge and communication.”*

[115] *“In addition, the DELOG also made available the Government Purchasing Panel and the Pricing Panel, all integrated in the Purchasing Portal, in order to provide greater transparency and encourage social control.”*

[116] *“For purposes of addressing the recommendation, it is thus important to emphasize that the Purchasing Panel, included in the Purchasing Portal, is a tool that presents in one place the key figures in public contracting and its purpose is to offer a panorama of public expenditure and tendering activity within the Federal Public Administration. It was developed to include all agencies that make up the Integrated General Services System (SISG).”*

[117] *“More than being a display of statistical information to assist public managers in decision-making, the Panel, which presents data on tendering, contracts, price registration records and prices used, it is also meant to be an important tool in governmental transparency,*

⁵³ See Brazil's Response to the Fifth Round Questionnaire, p. 33, available at: http://www.oas.org/juridico/portuguese/mesicic5_bra.htm

allowing any citizen to create personalized indicators and queries, as well as to export data on various formats.”

[118] *“In this regard, in accordance with measure a) of the recommendation, it is emphasized that the Purchasing Panel allows both managers and citizens to easily access statements indicating that bidding is not required or waived, with the ability to use filters (year, entity, federal division, municipality) and separation based on both the number and value of procedures.”*

[119] *“The new Purchasing Portal can be accessed at: <http://www.comprasgovernamentais.gov.br/>”.*

[120] During the on-site visit, representatives of the Ministry of Planning, Development and Management explained that the technological restructuring of the Purchasing Portal focused on the system user and defined the following thematic axes: institutional area, public manager, suppliers, and transparency. In addition, they asserted that, through the new Purchasing Panel, it is possible to research purchases made directly by the country under review, without going through a bidding process. The data available on the Portal include the identification number and the value of the contract, as well as the contracting agency.

[121] In this context, the Committee considers it important to reiterate the basis of measure a) in recommendation 1.2.1, included in the Second Round of Review,⁵⁴ which states as follows: *“With respect to procurement systems without competitive bidding, the Committee notes that Article 24 of Law 8.666/93 allows 28 reasons for setting aside a tendering process. As well, Article 25 describes three situations where tendering is not required at all. In both cases, (with the exception of waiver for purchases of low value), the decision must be justified and reported to the superior authority for ratification and publication in the official press. These publications are also made available over the Internet (www.comprasnet.gov.br). Nevertheless, bearing in mind the difficulty of consulting and obtaining information in this website, the Committee believes that it would be useful if the electronic mechanisms for disclosure of this information were improved in order to facilitate access to the data published by these means.”* (emphasis added)

[122] In this regard, the Committee notes that, currently, through the Purchasing Portal, it is possible to view the contracts for which bidding was waived or not required. Additionally, the section of Art. 24 or Art. 25 of Law 8.666/93 (related to the justification of the manager's decision at the time of purchasing) is also published and accessible in the new system.

[123] The Committee takes note of the changes made in the Purchasing Portal and considers that the system currently facilitates access to the justifications for setting aside the tendering process that are published thereon. The Committee therefore notes the satisfactory consideration, by the State under review, of the measure a) of section 1.2.1 of chapter II of this report.

Measure b) suggested by the Committee that requires additional attention within the Framework of the Third Round:

⁵⁴ See section 1.2.2 of the Report from the Second Round of Review, p. 21, available at: http://www.oas.org/juridico/english/mesicic_II_inf_bra_en.pdf

Continue the training programs for public officials responsible for tendering and contracting works, goods and services

[124] With respect to the aforementioned measure, in its Response to the Questionnaire, the country under review presents information and new developments, which the Committee notes as a step that contributes to progress in its implementation:⁵⁵

[125] *“The Brazilian government continues to invest heavily in training and instruction. Partnerships were signed with government schools – particularly the National School of Public Administration (ENAP) and the School of Financial Administration (ESAF) – targeting the training of specific groups and content directed to the training of public employees responsible for tendering and contracting on works, goods and services. As a result of these partnerships, a specific thematic area was created at the ENAP for public logistics, and free distance education courses on public contracting have been made available, increasing the scope of instruction [...]”*

[126] *“The ESAF incorporated and consolidated as subjects in the curriculum for the Week on Financial, Budgetary and Public Contracting Administration a wide range of workshops directed to public employees responsible for bidding and contracting on works, goods, and services [...]”*⁵⁶

[127] *“In addition, it is important to note that the ENAP is launching, in 2017, the Leadership Program in Government Logistics. This training seeks to add knowledge and share best national and international practices in logistics, public management and management development. Developed based on the views of specialists, academics and professionals in this area, its target audience is those holding management positions in federal government agencies in one of the structural areas of Public Administration: government logistics.”*

[128] *“In addition, within the Ministry of Justice, government employees throughout the Public Administration are continuously trained on the subject of Bidding Fraud, which is a module in the National Training and Instruction Program to Combat Corruption and Money Laundering (PNLD). In 2016, 13 PNLD courses were conducted, with a total of 1,670 employees trained. The chart below shows the overall number of employees trained in the area of PNLD over the last two years.”*

[129] With respect to the difficulties encountered in the implementation of measure b) of recommendation 1.2.1, the country under review, in its Response to the Questionnaire, indicated that there has been a reduction in recent years of participants in live events due to restrictions on spending for per diems and travel, although this deficit was offset, in specific cases, by distance learning courses or by transmitting courses through video streaming.

[130] The representatives of the Ministry of Planning mentioned, during the on-site visit, that the Leadership Program in Public Logistics is an important tool for certification of professionals. Primarily after the increase in the percentage of effective public servants holding freely appointed positions in the Executive Branch (DAS positions), permanent professional staff will have to meet minimum technical requirements for the exercise of those positions of trust. In

⁵⁵ See Brazil’s Response to the Fifth Round Questionnaire, p. 35 to 48, available at: http://www.oas.org/juridico/portuguese/mesicic5_bra.htm

⁵⁶ The material is available on the following web page: <http://www.esaf.fazenda.gov.br/backup/presencial/orcamentaria/arquivo-2015/material-didatico-brasilia-ii-2015-2>

addition, the fact that part of the program is done remotely allows a larger number of area professionals to participate.

[131] The Committee takes note of the steps taken by the country under review to proceed with the implementation of measure b) of the recommendation in section 1.2.1 of Chapter II of this Report, as well as the need to continue giving attention to this measure, taking into account the reduction in the number of participants in classroom-based courses, as a result of restrictions on spending. In addition, the Committee notes that classroom-based courses are conducted at the facilities of the ENAP, in Brasília-DF, so that it is not feasible for public employees located elsewhere to participate.⁵⁷ In this regard, the Committee considers it relevant to reformulate the recommendation to reflect the above (see recommendation 1.2.3.1 of section 1.2.3 in Chapter II of this Report)

[132] With respect to the *National Training and Instruction Program to Combat Corruption and Money Laundering* (PNLD), the Committee notes that, according to the website of the *National Strategy to Combat Corruption and Money Laundering* (ENCCLA), the program arose in response to goal number 25 of the ENCCLA, of 2004, the objective of which was to present a training, instruction and specialization program for public employees engaged in combating money laundering. According to the ENCCLA, the program was expanded in 2013 with the development of programmatic content⁵⁸ to make a distance course available. The ENCCLA's expectation for 2017 is that, "*in addition to the PNLD's classroom and distance learning courses, it may be possible to implement the advanced program, as has been requested repeatedly by ENCCLA members and collaborators.*"⁵⁹

[133] In this context, the Committee emphasizes the importance of the National Training and Instruction Program to Combat Corruption and Money Laundering (PNLD) and will formulate a recommendation that the country under review consider adopting the measures necessary for its strengthening, implementing the advanced program method and considering expansion of its programmatic content to include subjects related to the prevention and detection of corruption by public employees responsible for the bidding and contracting of works, goods and services. (see recommendation 1.2.3.2 in section 1.2.3 of Chapter II of this Report)

Recommendation 1.2.2:

Strengthen the control mechanisms for the government procurement system

Measure a) suggested by the Committee that requires additional attention within the Framework of the Third Round:

Consider amending Law 8,666/93, extending the sanctions stipulated in articles 87 and 88 to include the owners and managers of the contractor entity.

⁵⁷ On March 8, 2018, the State under review clarified that "*in partnership with the National School of Public Administration (ENAP), in the year 2017, the milestone of 3,735 public servants trained in a classroom setting, distributed over 49 learning events was reached, out of a total of 6,425 public servants in the subject area of government logistics and procurement alone, representing close to 58% of this total, without any financial burden for the Public Administration*".

⁵⁸ See programmatic content of the PNLD, available at <http://enccla.camara.leg.br/pnld/pnld-2016>

⁵⁹ See ENCCLA site, available at: <http://enccla.camara.leg.br/pnld>

[134] With respect to the aforementioned measure, in its Response to the Questionnaire, the country under review presents information and new developments, which the Committee notes as a step that contributes to progress in its implementation.⁶⁰

[135] *“The Bidding Law provides for the imposition of penalties on companies and professionals – individuals – that contract with the Administration, but does not make provision for imposing the referenced penalties on the partners and administrators of the sanctioned legal entities, meaning that it is not possible to extend to them the effects of penalties imposed on the legal entity to which they belong.”*

[136] *“Law No. 12.846, known as the Anti-corruption Law (LAC) was enacted on August 1, 2013. This law assigned great importance to offenses committed by private entities with respect to the government in general, including with respect to bidding and contracts [...]”⁶¹*

[137] *“[...] Comparison of Article 88 of Law No. 8.666/93 and Article 5 (IV) of Law No. 12.846/2013 confirms that the unlawful acts indicated in Law No. 8.666/93 are contemplated in the Anti-corruption Law, so as to include within its sphere of accountability any irregularities committed by legal entities in their contractual relations with the Administration.”*

[138] *“As for extending the effects of the penalties imposed on a specific legal entity, through the Anti-corruption Law, specifically in Article 14 thereof, the Brazilian legislator instituted the concept of **disregarding the legal entity in cases of abuse of rights or commingling of assets**, extending it to **partners and administrators with administrative powers** within the private entity, which is in line with the recommendation set forth in the report on the implementation in Brazil of the provisions of the Convention selected for analysis in the second round and on the follow-up of the recommendations made to the country in the first round.”*

[139] *“In both cases, the effects of penalties imposed on the legal entity are extended to its administrators and partners with administrative powers, provided the right to cross examination and an ample defense is guaranteed in the specific administrative proceeding.”*

[140] *“According to Article 14: ‘Article 14. The legal entity may be disregarded whenever the abuse of rights is used to facilitate, conceal or disguise the commission of unlawful acts indicated in this law or to cause commingling of funds, with all the effects of penalties imposed on the legal entity being extended to its administrators and partners with powers of administration, provided there is a right to cross examination and an ample defense [...]’”*

⁶⁰ See Brazil’s Response to the Fifth Round Questionnaire, p. 38 a 41, available at: http://www.oas.org/juridico/portuguese/mesicic5_bra.htm

⁶¹ According to Article 5 (IV) of the LAC, acts detrimental to the national or foreign public administration are all those committed by legal entities against the national or foreign government’s assets or against international commitments assumed by Brazil, including, with respect to bidding and contracts: a) thwarting or rigging, through adjustment, combination or other means, the competitive nature of the government bidding procedure; b) impeding, disturbing or rigging the performance of any government bidding procedure; c) eliminating or seeking to eliminate a bidder, through fraud or offering any kind of advantage; d) rigging a government bidding procedure or the contract resulting therefrom; e) creating, in a fraudulent or irregular way, a legal entity to participate in public bidding or enter into an administrative contract; f) obtaining an improper advantage or benefit, in a fraudulent manner, from amendments or extensions to contracts entered into with the public administration, without legal authorization, in the act calling for government bidding or in the respective contractual instruments; or g) manipulating or distorting the economic-financial equilibrium of contracts entered into with the public administration.”

[141] Thus, according to the country under review, “[...] *the legal institution that allows extending administrative penalties to the individual person of partners or administrators is precisely disregard of the legal entity, an institution that was established in Law No. 12.846/2013.*”

[142] During the on-site visit, representatives of the Office of the Comptroller General (CGU) explained, firstly, that Law No. 8666/93 contains no provision for disregarding the legal entity and, for this reason, this institution has been used by the courts in the area of bidding and contracts based on Article 50 of the Civil Code, Law No. 10.406 of 2012, in cases of “*abuse of the legal entity, characterized by misuse of purpose, or the commingling of assets.*”⁶² It was made clear, as well, that Law 12.846/2013, known as the Anti-corruption Law or the Clean Company Law, explicitly establishes the Public Administration’s ability to disregard the legal entity, without the intervention of the judicial authority.

[143] In addition, CGU staff reported that the referenced law identifies a series of situations that represent actions harmful to the public administration in the area of bidding and contracts. On the other hand, they emphasized that the agency does not make use of the ability to disregard the legal entity and that so far they are unaware of the use of this institution by the Federal Executive Branch.

[144] During the on-site visit, public employees of the CGU and the Federal Court of Accounts (TCU) added that it has become a frequent practice to attempt to evade the penalties of temporary suspension and blacklisting: owners of penalized companies establish different corporate entities, although with a similar corporate purpose and similar assets, so as to be able to participate in bidding once again.⁶³ In this context, public servants mentioned that there is a Senate Bill No. 559 of 2013 that establishes provisions for bidding and contracts in Public Administration and repeals Law No. 8.666, of June 21, 1993; the bill is currently being deliberated by the Chamber of Deputies as Bill 6814/2017. Article 112 (15) of the referenced law⁶⁴ expressly provides for disregarding the legal entity whenever there is abuse of rights and extends the penalties to new legal entities created with the intent of evading the penalties imposed.

[145] In addition, during the on-site visit, the representative from the Federal Court of Accounts clarified that the TCU has used the institution of disregarding the legal entity, when rights are abused and unlawful acts are committed. However, he emphasized that there is still a legislative gap, in that the possibilities for using this institution in the administrative sphere are not clearly established, which produces legal uncertainty. On this subject, the country under

⁶² The Civil Code, Law No. 10.406 de 2012, is available at: http://www.planalto.gov.br/ccivil_03/leis/2002/L10406.htm

⁶³ On March 8, 2018, the State under review reported that “*in order to give public managers greater security and increase the transparency of bidding processes, the Management Secretariat of the MP implemented a new functionality in the Single Registry of Suppliers (SICAF) system that makes it possible to verify the CPF [taxpayer ID] of all partners in a company. This functionality alerts managers regarding the existence of common partners in the corporate structure of companies that have been disqualified, suspended or declared ineligible, under the terms of Law No. 8.666, of 1993, and Law No. 10.520, of 2002, called Indirect Disqualifying Incident. The issuance of this alert is based on cross-checking of registration data in the SICAF. The notice reports whether the partners of the CNPJ consulted correspond to a registered CPF as the manager or spouse from another registry (company) that has a current Declaration of Ineligibility in the system. Thus, until the penalized company is rehabilitated, in cases of unsuitability, or the penalty period has elapsed in the case of suspension and prohibition on bidding, the alert continues to be issued as certified in the SICAF.*”

⁶⁴ Bill 6814/2017 is available at: <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=2122766>

review provided Ruling (*Acórdão*) 5.764 of 2015, in which the Committee emphasizes the following points:

[146] “10. *The officers of the entity argue that they cannot be held jointly and severally liable for the damage to the treasury. They assert that such a possibility will mean disregarding the legal entity [...] and that such a possibility would be exclusive to the judicial branch.*

11. The argument does not have merit. It should be clarified that disregarding the legal entity is not an action exclusively reserved to the judicial branch. In the exercise of its constitutional powers, it is up to the TCU to judge the accounts of those who caused the loss, diversion or other irregularity that produced harm to the public treasury. Thus, the Court may disregard the legal entity so as to reach those truly responsible for the actions held to be irregular. Citing, in this regard, Rulings 4712/2015-1st Chamber, 4636/2015-1st Chamber, 4481/2015-1st Chamber and 4648/2015-2nd Chamber.”

[147] In this context, the Committee notes that the scope of Law No. 12.846/2013 covers the objective, administrative and civil liability of legal entities for the commission of actions against the public administration and provides for the liability of the individual involved in the commission of the harmful act. The Committee also recognizes that Article 5 (IV) of that law covers specific unlawful acts established in Law No. 8.666/1993.

[148] On the other hand, with respect to the penalties provided under Law No. 12.846/2013, the Committee notes that Article 30 (II) establishes the autonomy of the respective administrative penalties with respect to those prescribed in Law No. 8.666/93: “*the imposition of the penalties provided in this law does not affect liability for and the imposition of penalties resulting from: II – unlawful acts covered by Law No. 8.666/1993, or other provisions of biddings and contracts of the public administration.*” Moreover, the Committee notes that the penalties provided in Law No. 8.666/1993 in comparison with Law No. 12.846/2013, while similar, are not equal and fines are calculated differently.⁶⁵

[149] The Committee considers it important to recall the basis of measure a) of recommendation 1.2.2, included in the Report from the Second Round of Review,⁶⁶ which stated that “*the Committee observes that Law 8.666/93 does not, specifically provide that the sanctions of temporary suspension or blacklisting for bidding or contracting with the Public Administration should be applied also to the owners and managers of the contracted entity, which could compromise the effectiveness of such sanctions.*”

[150] Thus, the Committee takes note of the steps taken by the country under review to advance in its implementation of measure a) of the recommendation in section 1.2.2 of Chapter II of this Report, as well as the need for it to continue to give attention thereto, taking into consideration that the Law on Bidding and Contracts still does not specifically provide that the penalties of temporary suspension and blacklisting from bidding or contracting with the Public Administration can also be imposed on the partners and administrators of the penalized legal entity.

[151] According to the information analyzed, the Committee considers it relevant to reformulate the recommendation in section 1.2.2 of Chapter II of this Report so that the country

⁶⁵ See Art. 99 of Law No. 8.666/1993 compared to Art. 6 of Law No. 12.846/2013.

⁶⁶ See section 1.2.2 of the Report from the Second Round of Review, p. 23, available at: http://www.oas.org/juridico/portuguese/mesicic_II_inf_bra_por.pdf

under review will consider amending Law No. 8666/93 to extend the effects of penalties imposed on the legal entity not only to its administrators or partners, but also to the new legal entity in the same sector that is related to the penalized entity, in the case of abuse of rights to facilitate, conceal or disguise the commission of unlawful acts or to cause the commingling of assets (see recommendation 1.2.3.3 in section 1.2.3 of Chapter II of this Report)

Measure b) suggested by the Committee that requires additional attention within the Framework of the Third Round:

Continue to strengthen the control bodies of the public procurement system, especially the TCU and the CGU, as well as the Logistics and Information Technology Secretariat of the Ministry of Planning, Development and Management, as the system's administrative organ, and guarantee them the human and financial resources necessary to perform their functions adequately

[152] First, the Committee considers it important to clarify that the Logistics and Information Technology Secretariat (SLTI) of the Ministry of Planning, Development and Management has powers distributed according to the new organizational structure of the Ministry of Planning.⁶⁷ According to the information provided by the country under review, the power related to the administration of goods and services procurement systems is the responsibility of the new Management Secretariat (SEGES)⁶⁸ and specifically the Department of Standards and Logistics Systems (DELOG). Thus, so as to be able to verify compliance with measure b) of the preceding recommendation, the Commission will refer to the DELOG, which was represented during the on-site visit and had the opportunity to provide information.

[153] In addition, the Committee considers it relevant, based on the information analyzed, to refer separately to the CGU, the TCU and the DELOG, reformulating measure b) of recommendation 1.2.2 so that the new recommendations proposed by the Committee in this Fifth Round represent the specific situation in each institution.

[154] With respect to the Ministry of Transparency and the Office of the Comptroller General (CGU), in its Response to the Questionnaire,⁶⁹ the country under review provided the following information regarding measure b) of recommendation 1.2.2 of this Report:

[155] *“The 2016-2019 Strategic Map was approved in December 2015; it resulted from contributions made by public employees during the four phases of preparation of the agency’s Strategic Planning (published through Official Order (Portaria) No.50.223, attached to this questionnaire). One of the objectives appearing in the Strategic Plan includes ‘making the CGU an increasingly better working environment.’ Based on this objective, the CGU structured and developed the “Feel Good about Life” Program, coordinated by the General Personnel Management Coordinating Office (COGEP/DGI), the objective of which is to plan, develop and incorporate actions in the areas of health promotion; sociocultural integration and development; professional assessment and development of CGU employees and partners.”*

⁶⁷ The new organizational structure is available at: <http://www.planejamento.gov.br/aceso-a-informacao/institucional/estrutura-organizacional>

⁶⁸ According to the country under review, the new Secretariat is the central body of the SISG and was established by Decree No. 9035/17.

⁶⁹ See Brazil’s Response to the Fifth Round Questionnaire, p. 42, available at: http://www.oas.org/juridico/portuguese/mesicic5_bra.htm

[156] “Between November 2015 and December 2016, 16 events were held to promote the quality of life and sociocultural integration; these events reached at least 950 CGU employees and partners, according to the annual program management report.”

[157] The country under review, in its Response to the Questionnaire, reported that a survey of the agency’s employees and partners was made available in March 2017 “seeking to assess the degree of employee satisfaction with the institutional climate and environment.” It was reported that 45.4% of CGU employees participated in the research, which represented “an improvement of approximately 17% compared to the previous year.”

[158] During the on-site visit, the CGU provided the following information regarding the total number of active employees:

YEAR	AFFC	TFFC	TOTAL STAFF	EMPLOYEES FROM OTHER AGENCIES	GENERAL TOTAL
2017	1150	298	1448	319	2147
2016	1569	330	1899	315	2214
2015	1631	381	2012	305	2317
2014	1610	391	2001	273	2274
2013	1663	439	2102	264	2366

[159] Thus, with respect to the total number of employees from 2013 to 2017, the CGU representative clarified that, as provided in Decree No. 4.321 of August 5, 2002, there are a total of 3,000 Federal Auditor of Finances and Control (AFFC) vacancies and 2,000 Finances and Control Expert (TFFC) vacancies. Thus, “there are currently 1,450 vacant AFFC positions and 1,702 vacant TFFC positions.”

[160] In this regard, the CGU expressed great concern over the failure to hire employees, in that the most recent public competition was held more than five years ago, in 2012. It was also reported that requests to hold public competitions to fill 620 positions to rebuild the workforce were not authorized for the years 2016 and 2017.

[161] With regard to the process for requesting authorization to conduct public competition,⁷⁰ the Committee notes that, in May 2016, the Federal Attorney-General’s Office suggested that it proceed, in that it meets all the formalities required. In addition, the interim Minister of State of the CGU at the time reported in writing that the diagnosis of agency’s workforce situation was lacking and that “the problem tends to worsen over the short term, due to the demands made by society on the activities of the agency (particularly in administrative processes related to the liability of companies involved in Operation Car Wash), and over the medium term (due to retirements and other vacancies), if the decision is not made to replenish career staffing in Finances and Control.” Thus, a request was made for emergency authorization to hold that competition, in view of the “urgent need to restore the labor force.”

⁷⁰ The documents on the request for authorization for public competition from the CGU are part of the information provided by Brazil as part of the on-site visit and are available at: http://www.oas.org/juridico/portuguese/mesicic5_bra.htm

[162] The Committee notes that, even though all the formal requirements were met and the request to authorize public competition was properly justified, the request was not authorized “as a result of government directives suspending authorizations for public competitions for 2016 and 2017.” According to the Ministry of Planning, “the 2016 budget does not include authorization for new competitions and the 2017 Budgetary Guidelines Bill (PLDO) sent to the National Congress also makes no provision for such contracting.” Thus, requests from agencies relating to new competitions will be returned. The definition on the analysis of vacancy claims for 2018 will only occur ‘when the government sends the 2018 PLDO to the National Congress.’⁷¹

[163] As a result of the on-site visit, the following information was providing on the strengthening of the CGU: Law No. 12.527/2011, known as the Access to Information Law, defined the Ministry as the appeals agency on passive transparency; Law No. 12.813/2013, on conflicts of interest, established the CGU as the agency in the Federal Executive Branch to be consulted on the subject; and Law No. 12.846/2013, on the liability of legal entities, established in Article 8 the concurrent jurisdiction of the CGU to institute administrative proceedings on the liability of legal entities or to call back instituted proceedings, in addition to establishing exclusive jurisdiction to institute administrative accountability processes involving transnational bribery and to negotiate leniency agreements within the Federal Executive Branch.

[164] Also as a result of the on-site visit, the following information was provided on the budgetary development of the Ministry from 2012 to 2017:

[165] “Analyzing budgetary development and considering the amounts allocated for discretionary spending (using fiscal year 2012 as the base) there is a **systematic reduction in the real value of the Ministry’s budget in fiscal years 2015, 2016 and 2017**. The year 2017 has the worst budget in the period under review, **with a real reduction, compared to 2012, of 15.4%**, despite all the new powers and responsibilities assumed by the Ministry and the increase in all categories of administrative expenses.”

BUDGETARY DEVELOPMENT						
Year	ABL Total Allocation	ABL Final Allocation	Commitment limit (contingency)	Ref. Month	Amount Authorized	Budgetary Change %
2012	713,881,109.00	78,594,297.00	77,778,518.70	Dec/12	104,190,687.53	-
2013	815,962,727.00	84,823,014.00	79,424,743.70	Dec/13	106,172,440.55	1.90
2014	848,787,129.00	89,148,267.00	88,623,000.00	Dec/14	104,867,009.99	0.65
2015	904,162,987.00	91,578,454.00	91,468,289.00	Dec/15	97,336,896.39	-6.58
2016	934,831,353.00	89,013,633.00	89,013,633.00	Dec/16	89,013,633.00	-14.57
2017	1,016,034,963.00	88,094,852.00	87,095,743.00	Jan/17	88,094,852.00	-15.45

[166] “[...] The Ministry of Transparency feels it is necessary and reasonable to adjust its budget for fiscal year 2017 and future years by at least R\$30,000,000.00 (thirty million reales) in Action 2D58, assigning R\$20,000,000.00 for costs and R\$10,000,000.00 for investment, in order to effectively cover all the tasks assigned to it. In due course, this requirement will be recorded in the SIOP (Integrated Planning and Budget System).”

⁷¹ See website of the Ministry of Planning, Development and Management, available at: <http://www.planejamento.gov.br/assuntos/gestao-publica/noticias/concursos-publicos-permanecem-suspensos-ate-2017>

[167] In this context, the Committee notes that there was a substantial increase in the tasks and responsibilities of the CGU, caused by the recent enactment of the laws mentioned above, including the Clean Company Law, which had *“a great impact on its tasks starting in 2014, involving many employees in verifying unlawful administrative actions taken by companies.”*⁷² In this regard, the Committee feels that the need to adjust the Ministry’s budget to its new mandates is key to the comprehensive performance of its functions.

[168] In view of all the information presented above, the Committee feels that budgetary restrictions, the insufficient number of qualified employees in the CGU’s staffing chart, as well as the significant number of effective positions not filled (75% of technical positions and approximately 50% of auditors’ positions) are factors that weaken its internal control, government auditing, correction, prevention and combating corruption and ombudsman activities. In this regard, the Committee repeats recommendation 1.4.3 in section 1.2 of Chapter II of the Report prepared in the context of the Fourth Round of Review, according to which the Committee recommends that the country under review *“strengthen the CGU, ensuring that it has the financial and human resources needed for the proper performance of its functions, including seeking to implement an employee retention plan.”*

[169] In this regard, the Committee takes note of the need for the country under review to give additional attention to the recommendations made earlier on strengthening the CGU, taking into account the importance of its work in implementing the aims of the Inter-American Convention against Corruption.

[170] The Committee also considers it relevant to recommend that the country under review, within the framework of the Fifth Round of Review, consider including the filling of vacancies at the CGU in the Budgetary Guidelines Bills, through an external public competition, so as to restore its workforce, and adopting the other measures necessary to guarantee the full operation of this control body, according to the availability of resources. (see recommendation 1.2.3.4 in section 1.2.3 of Chapter II of this Report).

[171] In addition, during the on-site visit, CGU representatives emphasized some difficulties encountered in imposing penalties on companies, in that the process of imposing penalties is still done manually. Although the registry, with all the information on the company for participating in bidding, is available electronically, there are problems finding the companies and delivering the required documents, in that many of them refuse to accept them. According to CGU staff, one of the instruments that would make it possible to streamline the imposition of penalties would be the development of a module within the government procurement system itself that would allow penalties to be imposed electronically.

[172] In this regard, the Committee notes the need to have efficient instruments in the process of imposing penalties with regard to bidding and contracts. Thus, according to the information provided during the on-site visit, the Committee recommends that the country under review guaranteeing the efficiency of the process of imposing penalties related to bidding and contracts, including temporary suspension or blacklisting from bidding with the public administration. (see recommendation 1.2.3.5 in section 1.2.3 of Chapter II of this Report).

⁷² See document no. 4.11 prepared by the CGU, available at: http://www.oas.org/juridico/portuguese/mesicic5_bra.htm

[173] With respect to measure b) of the aforementioned recommendation, in its Response to the Questionnaire, the country under review presents information and new developments, which the Committee notes as a step that contributes to progress in its implementation:⁷³

[174] *“Since 2005, there have been initiatives to strengthen the agency. During that period, the staffing schedule was maintained – with increases in some years – and the work infrastructure was strengthened as well. In addition, the employee training strategy was given priority.”*

[175] *“In this regard, the budgetary allocation made available each year, despite not having been substantially increased, was streamlined, without compromising the control actions carried out during the period. According to the activities reports, published on the TCU website (<http://portal.tcu.gov.br/transparencia/relatorios/relatorios-de-atividades/>), allocations available between 2005 and 2016 were as follows:”*

YEAR	ALLOCATION
2005	R\$ 782,640,654.00
2006	R\$ 1,027,697,883.00
2007	R\$ 1,069,737,575.00
2008	R\$ 1,148,766,893.00
2009	R\$ 1,283,683,899.72
2010	R\$ 1,334,097,924.00
2011	R\$ 1,354,248,218.00
2012	R\$ 1,400,608,002.00
2013	R\$ 1,521,508,898.00
2014	R\$ 1,637,111,662.00
2015	R\$ 1,783,528,705.00
2016	R\$ 1,877,137,878.11

[176] *“With respect to personnel management, the following table shows effective positions in the period from 2005 to 2016”:*

YEAR	Effective positions	Positions occupied
2005	2,320	2,237
2006	2,420	2,381
2007	2,514	2,354
2008	2,611	2,581
2009	2,710	2,653
2010	2,710	2,648
2011	2,695	2,572
2012	2,695	2,657

⁷³ See Brazil’s Response to the Fifth Round Questionnaire, p. 43, available at: http://www.oas.org/juridico/portuguese/mesicic5_bra.htm

2013	2,695	2,572
2014	2,689	2,574
2015	2,687	2,644
2016	2,687	2,582

[177] *“With respect to employee training, in recent years the TCU has invested heavily in activities to train and upgrade its technical staff. Continued and professional education for public servants is essential for promoting the changes necessary in the Public Administration and for improving performance standards. Training and professional development activities are the responsibility of the Serzedello Corrêa Institute (ISC), created in 1992 by the Organic Law of the TCU (Law No. 8.443/92)73.”*

[178] *“Still within the strategy of continued strengthening of external control activities, every year the TCU has improved personnel management, the primary objective being “to encourage the development of competent, motivated professionals committed to effective external control and improved public management, in addition to creating and maintaining a working environment conducive to excellence in performance, to full participation, professional growth and quality of life. It also provides for improving practices related to the work system, as well as the guarantee of legality of actions related to personnel” (Macroprocess 8 – Personnel Management –TCU 2015-2021 Strategic Plan).”*

[179] During the on-site visit, the TCU representative confirmed that the agency has budgetary autonomy, in accordance with best international practices defined for Supreme Audit Institutions. Although the budget has not been reduced in recent years, the TCU has to streamline its spending, due to constitutional reform of the ceiling on spending in Public Administration in general. Thus, the TCU reduced its costs related to intermediate activities of the agency, i.e., administrative activities, so that streamlining would not compromise the performance of the agency’s programmatic activities.

[180] With respect to the penalties imposed by the TCU, it was reported, during the on-site visit, that once the commission of bidding fraud is confirmed, the Court declares the fraudulent bidder ineligible for a period of up to five years, barring its participation in bidding in the Federal Public Administration.⁷⁴ However, the punitive power of the TCU does not encompass contractual fraud, but only fraudulent bidding. Thus, the Committee considers it important to expand the punitive power of the TCU so that an individual or legal entity that demonstrably commits contractual fraud within the sphere of the Public Administration as a whole is also declared ineligible. In this case, the offender no longer meets the conditions for bidding or contracting by virtue of their illegal conduct and, thus, the TCU must have jurisdiction to declare it ineligible for as long as the reasons for the penalty persist.

[181] In order to ensure that the constitutional powers of the Federal Court of Accounts are fully effective, the Committee considers it relevant to reiterate recommendation 2.4.4 in section 2.2 in Chapter II of the Report prepared within the context of the Fourth Round of Review, according to which the Committee recommends that the country under review *“consider the possibility of expanding the punitive power of the TCU in cases of disqualification so that the*

⁷⁴ See Art. 46 of the Organic Law of the Federal Court of Accounts, available at: http://www.planalto.gov.br/ccivil_03/leis/L8443.htm

penalty provided in Article 46 of the Organic Law of the TCU is not restricted to bidding in the Federal Public Administration, but is extended to any type of contracting within the sphere of the entire Public Administration, its three branches and levels of government.” (emphasis added)

[182] In addition, during the on-site visit, the TCU staff member emphasized that the agency has sought to improve the detection of unlawful acts through the use of intelligence and information technology. However, information that is important and essential to combating fraud and corruption is widely dispersed throughout the Public Administration, in that each agency has some of that data. It was also reported that the control agencies do not have access to tax data, as the states hold on to them and they are protected by secrecy. According to the TCU representative, the ability to access tax databases is universally claimed by control agencies, in that it is very difficult to obtain indications of fraud without knowledge of financial intelligence data.

[183] Finally, the Committee also received information during the on-site visit on bill PLS 559 of 2013, which, according to the representative from the Court of Accounts, significantly restricts the precautionary powers of the TCU, which currently has jurisdiction to issue decisions on a precautionary basis, without a final judgment on the merits, such as the interruption of payments or temporary removals of public managers.

[184] In this context, the Committee considers it important that the precautionary powers of the controls agencies be strengthened, in order to avoid imminent and irreparable damage to the Public Administration. In addition, the Committee feels that the control agencies need to have knowledge of financial intelligence data considered confidential, based on the public interest and the principle of morality, the intent being to make oversight effective and to strengthen the fight against corruption. Thus, in view of the international commitments made by Brazil to detect and punish unlawful acts, the confidential nature of financial intelligence data should not be an obstacle to the oversight of the Federal Court of Accounts and the Federal Comptroller General's Office.

[185] In this regard, the Committee recalls that Article 85 of Law No. 13.303 of 2016,⁷⁵ known as the Law of the States, establishes that “1. *In order to carry out oversight activities as indicated in the heading, the control agencies shall have unrestricted access to the documents and information necessary to perform their tasks, including those classified as confidential by the public company or quasi-governmental company, under the terms of Law No. 12.527, of November 18, 2011.* 2. *The degree of confidentiality shall be assigned by public companies and quasi-governmental companies when they deliver the documents and information requested, making the control agency with which the confidential information was shared jointly responsible for maintaining its confidentiality.*” (emphasis added)

[186] Thus, the Committee takes note of the steps taken by the country under review to implement measure b) of the recommendation in section 1.2.2 of Chapter II of this Report, as well as the need to continue giving attention thereto, taking into consideration the need to strengthen the precautionary powers of the control agencies and to improve inter-agency technical cooperation between the TCU and other agencies of the Public Administration. In this regard, the Committee will formulate recommendations to the country under review so that it also considers

⁷⁵ See Art. 85 of Law No. 13.303 of 2016, available at: http://www.planalto.gov.br/ccivil_03/ato2015-2018/2016/lei/113303.htm

expressly authorizing the sharing of confidential information with control agencies by other agencies of Public Administration in any of the federal branches, the states, the federal district and the municipalities (see recommendation 1.2.3.6 and 1.2.3.7 in section 1.2.3 of Chapter II of this Report).

[187] During the on-site visit, it was reported that a new proposal, PEC 22/2017,⁷⁶ was submitted to amend the Constitution, providing for the creation of the National Council of the Court of Accounts. The Council would be established to standardize the operations of the State Courts of Accounts, which are currently independent and not linked to the Federal Court of Accounts. In this regard, the Committee reiterates recommendation 2.4.1 in section 2.2 in Chapter II of the Report prepared in the context of the Fourth Round of Review, according to which the Committee indicates that the country under review should “*consider the possibility of creating the National Council of Courts of Accounts as the agency for administrative, financial and disciplinary control of those courts, ensuring it has the human and financial resources necessary for the proper performance of its functions.*”

[188] With respect to the Department of Standards and Logistics Systems (DELOG), the Committee notes that the country under review did not provide information related to its strengthening.⁷⁷ In this regard, the Committee takes note of the need for the country under review to continue giving attention to implementation of measure b) of the recommendation in section 1.2.2 of Chapter II of this Report, taking into consideration that it did not provide information on its implementation. Thus, the Committee will reformulate the recommendation to refer to the DELOG. (see recommendation 1.2.3.8 in section 1.2.3 of Chapter II of this Report).

Recommendation 1.2.3:

Continue to strengthen the electronic channels and information systems for public procurement

Measure a) suggested by the Committee that requires additional attention within the Framework of the Third Round:

Consider amending Law 8,666/93 to include, as an official communication channel for tendering processes and their outcomes, publication in a centralized and permanent manner, preferably through the www.comprasnet.gov.br website, or through other official Internet pages, which must have the required digital signatures

⁷⁶ See PEC No. 6 of 2013, available at: <http://www25.senado.leg.br/web/atividade/materias/-/materia/111250>

⁷⁷ On March 8, 2018, the State under review reported that “*the new Regulatory Structure of the Ministry of Planning, Development and Management, approved by Decree No. 9035, of April 20, 2017, the Logistics and Information Technology Secretariat (SLTI) was broken down, so that the area of logistics is currently covered by the Management Secretariat (SEGES). From this new perspective, the intent is to establish a new paradigm in logistics management, with the creation of mechanisms directed to continuous improvement in the delivery of services, in the streamlining and optimization of public resources, efficiency in government actions and effective coordination of governmental actions. The aim, therefore, is to integrate governmental logistics actions, promote the exchange of knowledge, facilitate communication among bodies and entities of the system and improve their operation*”.

[189] With respect to the aforementioned measure, in its Response, the country under review presents information and new developments. In this regard, the Committee notes the following as steps that lead it to conclude said measure has been satisfactorily considered:⁷⁸

[190] *“It is important to cite, as a new mechanism for implementing this measure, the approval in November 2011 of the Access to Information Law (Law No. 12.527/11), Article 7 (VI) of which provides that ‘the access to information addressed in this law includes, inter alia, the right to obtain information relevant to the administration of public assets, use of public resources, bidding, administrative contracts.’”*

[191] *“Thus, by force of law, each agency and entity in the legislative, executive and judicial branches, including the Courts of Accounts and the Public Prosecutor’s Office, in all spheres (federal, state, municipal, and federal district) must submit, in the form of Active Transparency, information related to tendering procedures and their outcomes.”*

[192] *“Within the Executive Branch, it is important to cite that Decree No. 7.724/201287, which regulates the Access to Information Law, conceptualizes Active Transparency, assigning to agencies and entities the duty to promote the disclosure of such information on their Internet sites.”*

[193] *“Compliance with such mechanisms in the decree is monitored by the CGU, with an annual report to be submitted to the National Congress [...].”⁷⁹*

[194] *“[...] The Purchasing Panel, available on the Purchasing Portal, discloses in a centralized and sustainable way, the outcomes of all bidding sessions opened, allowing the use of filters by year, month, agency, and division of the Federation. Outcomes can be displayed according to the number of procurement procedures as well as by the amounts involved, by method and by year. It is also possible to display records and contracts signed, as well as the types of services and materials contracted.”*

[195] The Committee notes that, although Law No. 8.666/93 has not been expressly amended, the Access to Information Law, Law No. 12.527 of 2011,⁸⁰ was enacted, Article 8 of which establishes that *“public agencies and entities have the duty to promote, regardless of requirements, the disclosure on an easily accessed site, within their areas of responsibility, information of collective or general interest produced or held by them.”* The data that must be published, *“shall include, at a minimum: IV- information related to bidding procedures, including the respective notices and outcomes, as well as all contracts signed.”* To comply with the provisions of the article, public agencies and entities *“shall use all legitimate means and instruments available to them, with mandatory disclosure on official sites of the worldwide net (Internet).”*

[196] In this regard, the Committee notes that measure a) of recommendation 1.2.3 indicates the possibility of official publication *“through the website www.comprasnet.gov.br,*

⁷⁸ See Brazil’s Response to the Fifth Round Questionnaire, pp. 50 to 52, available at: http://www.oas.org/juridico/portuguese/mesicic5_bra.htm

⁷⁹ See Annual Report to the National Congress, available at: <http://www.acessoainformacao.gov.br/central-de-conteudo/publicacoes/publicacoes-1>

⁸⁰ See Access to Information Law, available at: http://www.planalto.gov.br/ccivil_03/ato2011-2014/2011/lei/112527.htm

preferably, or through other official Internet sites.” In view of this, the Committee notes that measure a) of recommendation 1.2.3 of Chapter II of this Report is no longer in effect, due to the enactment of the Access to Information Law, Law No. 12.527 of 2011.

Measure b) suggested by the Committee that requires additional attention within the Framework of the Third Round:

Consider the possibility of instituting a single prices registry for the federal government and of using the web site, www.comprasnet.gov.br as a mechanism for official publication of the prices contained in that registry

[197] With respect to the aforementioned measure, in its Response to the Questionnaire, the country under review presents information and new developments, which the Committee notes as a step that contributes to progress in its implementation:⁸¹

[198] *“Launched in April 2017 and an integral part of the Purchasing Portal, the objective of the Pricing Panel is to make available in a user-friendly way data and information on government purchases approved in the Integrated General Services Administration System (SIASG)/Comprasnet, in order to assist government managers in making decisions regarding purchasing procedures, lend transparency to prices paid by the Administration and encourage social control.”*

[199] *“The principal advantages of the Pricing Panel are: Simplicity – a tool that is intuitive and easy to use; Promptness – increases the speed of price searches; Economy – can compare prices paid by government agencies, minimizing risks of purchases at impracticable or exorbitant prices or with overcharging; Reduced operational costs – reduces wasted administrative and human resources; Transparency – guarantees transparency of prices approved by agencies using the SIASG/Comprasnet; Less red tape – relieves the government agency of the need to wait for responses from suppliers; Support for decision-making – complements the negotiation of prices and strategic decisions on contracts/acquisitions.”*

[200] *“In addition, the Purchasing Portal also makes available other methods for publishing and disseminating data and information on purchases/prices recorded. In the area intended for Transparency, the following tools are made available: API of Open Government Purchases Data; Purchasing Panel; Pricing Panel.”*

[201] *“In April 2017, the Ministry of Planning issued Regulatory Directive No. 3/2017,⁸² which changes Regulatory Directive No. 5/2014 and provides the basic administrative procedures for searching prices for the procurement of goods and contracting of services in general. The Directive makes the Pricing Panel the priority tool for market searches, except in cases in which the good or service is very specific and does not appear in the system’s database.*

⁸¹ See Brazil’s Response to the Fifth Round Questionnaire, pp. 53 and 54, available at: http://www.oas.org/juridico/portuguese/mesicic5_bra.htm

⁸² Regulatory Directive No. 3/2017 is available at: <http://www.comprasgovernamentais.gov.br/index.php/legislacao/instrucoes-normativas/713-instrucao-normativa-n-3-de-20-de-abril-de-2017>

In addition, Regulatory Directive No. 3/2017 provides that agencies use the tool⁸³ as a way to obtain benchmark prices for contracting.” (emphasis added)

[202] During the on-site visit, the representatives of the Ministry of Planning, Development and Management (MP) explained that the new Pricing Panel makes it possible to survey prices from contracts entered into throughout the entire country and significantly reduces the time it takes for public servants to research prices. According to Ministry of Planning staff, some studies indicate that market searches take up to 45% of the time spent in government contracting, and that the average time to search prices in the new system would be only nine minutes. It was also reported that staff from all units of the federation are using the new system, which is accessed an average of 8,000 times per day.

[203] The Committee notes that the Pricing Panel is a computerized system developed by the Federal Executive Branch that makes data and information available regarding government purchases approved in the *Federal Government Procurement System* (Comprasnet), allowing searches for the prices paid for materials or services purchased.

[204] However, the Committee notes that Regulatory Directive No. 3/2017 of the Ministry of Planning, mentioned in the Response to the Questionnaire, makes the Pricing Panel the priority tool for market searches only for agencies and entities belonging to the General Services System (SISG), i.e., agencies of the Direct Federal Public Administration, autonomous agencies and foundations, and does not include the remaining federal branches. In addition, the Committee notes that there is no general rule defining the criteria for price searches or for defining the benchmark price (highest acceptable amount for procurement or contracting) in the other federal branches.

[205] Finally, the Committee emphasizes that the Pricing Panel was launched recently, in April 2017, and the Committee did not receive information on the frequency of updates to the system or the statistical data on queries. In addition, the Committee notes that consulting the Pricing Panel should be prioritized, and is currently considered one of various parameters for researching prices, according to Regulatory Directive No. 3/2017.⁸⁴

[206] Thus, in order to guide and facilitate price search procedures and the execution of purchasing by the federal government manager, the Committee recommends that the country under review consider establishing the Pricing Panel as the required tool for price searches, stipulating objective criteria on how price searches should be conducted, as well as parameters for determining the benchmark price (highest acceptable amount for procurement or contracting) in the three federal branches. In this regard, the Committee considers it relevant to reformulate the recommendation to clarify what has been presented above (see recommendation 1.2.3.9 in section 1.2.3 of Chapter II of this Report).

Measure c) suggested by the Committee that requires additional attention within the Framework of the Third Round:

⁸³ According to the Ministry of Planning, the average is obtained by adding the amounts of all the figures and dividing the total by the number of figures. The mean is the figure occupying the central position after the amounts are arranged by increasing or decreasing order, if the number of these amounts is uneven; it is the average of the two central amounts, if the number of these amounts is even.

⁸⁴ On March 8, 2018, the State under review reported that “*this rule is consistent with Article 15 of Law No. 8.666 of 1993 (V – to be guided by the prices used within the sphere of the bodies and entities of the Public Administration).*”

Continue using the electronic reverse-auction (pregão) method as an important tool for ensuring the principles of openness, equity and efficiency enshrined in the Convention

[207] With respect to the aforementioned measure, in its Response⁸⁵, the country under review presents information and new developments. In this regard, the Committee notes the following as steps that lead it to conclude said measure has been satisfactorily considered:

[208] *“Since approval of the report from the MESICIC’s Second Round of Review, a significant increase has been noted in the use of the electronic reverse-auction as the principal method used for the procurement of goods and services by the Federal Government. The table below shows total procurement processes between the years 2012 and 2017 (June), by method:”*

PROCUREMENT METHOD	TOTAL PURCHASES
REVERSE AUCTION	135,121
SUBMISSION OF PRICES	3,823
COMPETITION	3,743
INVITATION TO TENDER	959
INTERNATIONAL COMPETITION	181

[209] The country under review also emphasizes that during the period from 2012 to June 2017, *“of the total number of purchases made through reverse auction, 99.43% were made through electronic reverse auction.”*

[210] As a result of the on-site visit, the Ministry of Planning, Development and Management made the following information available with respect to the use of the reverse auction:

Reverse Auction		
Year of Purchases	Total Purchases	% of Purchases
2012	28,504	16.82%
2013	29,879	18.73%
2014	27,616	19.03%
2015	21,740	20.58%
2016	22,006	20.85%
2017 (October)	12,387	21.30%

[211] The Committee notes that the data presented above show that the use of the reverse auction, in its electronic form, for the procurement of goods and services by the Direct Public Administration has increased since 2012. In addition, the statistical data in the context of the Second Round of Review demonstrate that 87% of total procurement handled through reverse

⁸⁵ See Brazil’s Response to the Fifth Round Questionnaire, pp. 53 and 54, available at: http://www.oas.org/juridico/portuguese/mesicic5_bra.htm

auction was done electronically in the first quarter of 2008.⁸⁶ In comparison, the Committee emphasizes that during the first half of 2017 that percentage increased to 99.63%, according to consultation of the Federal Government Purchasing Panel.⁸⁷ Thus, the Committee takes note of the satisfactory consideration by the country under review of measure c) of recommendation 1.2.3 of Chapter II of this Report.

Measure d) suggested by the Committee that requires additional attention within the Framework of the Third Round:

Continue to strengthen the Single Registry of Suppliers (SICAF) system, expanding it and making it available to other organs and entities that are still not part of the General Services System (SISG)

[212] With respect to the aforementioned measure, in its Response, the country under review presents information and new developments. In this regard, the Committee notes the following as steps that lead it to conclude said measure has been satisfactorily considered.⁸⁸

[213] “A specific official order was issued that regulates and allows expanded use of the SICAF system, including by agencies not belonging to the General Services System (SISG), as well as for states and municipalities that express interest, as indicated in Official Order No.16, of May 27, 2012.”

[214] “The referenced official order establishes procedures for access to and use of the Integrated General Services Administration System (SIASG) by agencies and entities of the Public Administration not belonging to the General Services System (SISG), within the federal government, the States, the Federal District, and Municipalities, autonomous social services and private non-profit entities that comply with the provisions therein.”

[215] “The Management Secretariat of the Ministry of Planning, Development and Management is in an advanced phase of a project to computerize access by the agencies indicated in Official Order SLTI No. 16 of 2012. The model application and terms for gaining access can be found at: http://comprasnet.gov.br/publicacoes/termo_adesao_siasg.htm”

[216] During the on-site visit, representatives from the Ministry of Planning, Development and Management explained that the SICAF compiles the information regarding a supplier’s qualifications, enabling it to contract with the State. This is currently a manual process and thus cumbersome. However, the reformulation of the SICAF, to make the system 100% digital, is currently under development. The staff also reported that the initiative is one of the strategic actions of that Ministry and includes the *Digital Citizenship Platform* program, the objective of which is to modernize and eliminate red tape in processes and services. In this regard, they mentioned the publication of Decree 9094 of July 17, 2017, which provides for simplifying the service provided to the users of public services.

⁸⁶ See section 1.2.2 of the Report from the Second Round of Review, p. 25, available at: http://www.oas.org/juridico/portuguese/mesicic_II_inf_bra_por.pdf

⁸⁷ See Purchasing Panel, available at: <https://paineldecopras.planejamento.gov.br/QvAJAXZfc/opedoc.htm?document=PaineldeCompras.qvw&host=QVS@17-0112-b-ias04&anonymous=true>

⁸⁸ See Brazil’s Response to the Fifth Round Questionnaire, pp. 53 and 54, available at: http://www.oas.org/juridico/portuguese/mesicic5_bra.htm

[217] With respect to the deadline for modernization of the SICAF, during the on-site visit, it was clarified that the project has priority among the initiatives of the Ministry of Planning, Development and Management and the system is expected to be 100% digital by February 2018.⁸⁹

[218] The Committee takes note of the satisfactory consideration by the country under review of the implementation of measure d) of the recommendation in section 1.2.2 of Chapter II of this Report, in that it was informed that the SICAF is currently being reformulated and that, through Official Order No. 16, of May 27, 2012,⁹⁰ it was made available to the other agencies and entities that are not yet part of the General Services System (SISG).

[219] In addition, during the on-site visit, staff from the CGU, TCU and the Ministry of Planning agreed that a centralized system of public procurement and contracting in federal entities would be very useful.⁹¹ As the use of the SICAF is mandatory only for the Direct Federal Public Administration, autonomous agencies and foundations, the Committee will formulate a recommendation that the country under review consider the possibility of establishing the mandatory use of the SICAF by the Direct and Indirect Public Administration within the three branches of the union, the states, the Federal District and municipalities (see recommendation 1.2.3.10 in section 1.2.3 of Chapter II of this Report).

[220] In addition, the Committee notes that it did not manage to gain access to the SICAF, in that access is restricted to suppliers or public managers, requiring a login and password to enter the system.⁹² Taking into consideration the principle of publicity provided in the Inter-American Convention against Corruption and in the Brazilian Constitution, the Committee will formulate a recommendation that the country under review consider including an access profile that is easily operated by citizens, allowing consultation of public and non-confidential information in the SICAF, in accordance with the Access to Information Law. (see recommendation 1.2.3.11 in section 1.2.3 of Chapter II of this Report). Finally, the Committee will also formulate a recommendation that the country under review consider completing the digitization of the SICAF, so as to make it more efficient. (see recommendation 1.2.3.12 in section 1.2.3 of Chapter II of this Report).

Measure e) suggested by the Committee that requires additional attention within the Framework of the Third Round:

Continue to strengthen the Electronic Procurement System (ComprasNet), making it available to other organs and entities of the Federal Administration that are not yet part of the SISG; centralize all government procurement information at a single web portal; as well as consider broadening its scope to cover logistical aspects such as contract management systems

⁸⁹ **On March 13, 2018, the State under review clarified that “a Regulatory Directive from the Ministry of Planning, Development and Management should be published in April 2018 governing the 100% digital SICAF. After this directive is issued, the system will be available for mandatory use by the bodies and entities starting in June 2018”**

⁹⁰ Official Order No. 16, of May 27, 2012 is available at: <https://www.comprasgovernamentais.gov.br/index.php/legislacao/portarias/639-portaria-n-16-de-27-de-marco-de-2012-compilada-com-alteracoes-da-portaria-n-31-de-18-de-junho-de-2012>

⁹¹ More details on the information provided on this subject during the on-site visit are found in the analysis portion of measure e) of section in section 1.2.2 of this Report.

⁹² See SICAF site, available at: <https://www3.comprasnet.gov.br/SICAFWeb/public/pages/security/loginFornecedor.jsf>

[221] With respect to the aforementioned measure, in its Response to the Questionnaire, the country under review presents information and new developments, which the Committee notes as a step that contributes to progress in its implementation:⁹³

[222] *“As reported earlier, Official Order No. 16/2012 allows use of the SIASG by bodies not belonging to the SISG, including subsystems, such as the Federal Government Purchasing Portal – Comprasnet and the modules: Face-to-Face Reverse Auction, Electronic Reverse Auction, and Electronic Quotes (Art. 2o, § 2o, X).”*

[223] *“In addition, as shown earlier, the Federal Government Purchasing Portal underwent significant changes, including in the sense of unifying the information on public contracting by the Federal Executive Branch, based on creation of the Purchasing Panel.”*

[224] *“With respect to expanding its scope on logistics aspects, after November 2007, the Ministry of Planning developed the following modules in the SIASG/Comprasnet: [...] Modules being designed: Contracts Management”*

[225] First, the Committee considers it relevant, based on the information analyzed, to refer separately to the three components of measure e) of recommendation 1.2.2 so that the new recommendations proposed by the Committee in this Fifth Round can reflect progress in each component of that measure.

[226] With respect to strengthening the *“Electronic Procurement System (ComprasNet), making it available to the other organs and entities of the Federal Administration that are not yet part of the SISG,”* the Committee notes that Official Order No. 16, of May 27, 2012, mentioned earlier in this Report and several times in Brazil’s Response to the Questionnaire, established procedures *“for gaining access to and utilizing the Integrated General Services Administration System (SIASG) by organs and entities of the Public Administration that are not part of the General Services System (SISG), within the Union, the States, the Federal District, and municipalities, autonomous social services and private non-profit entities that comply with the provisions of this Official Order.”*

[227] In this context, the Committee emphasizes that the document for applying to access and use the systems has a standard model appearing in Annexes I and III of the referenced Official Order, with a simplified format that requires providing the applicant’s basic data and his signature. During the on-site visit, Ministry of Planning, Development and Management staff responsible for the General Services System (SISG) confirmed that the Purchasing Portal and its subsystems are currently being used by entities that are not part of the SISG that applied for access.

[228] Thus, since use of the current Federal Government Purchasing Portal is available to other federal, state, district and municipal entities and organs, the Committee takes note of the satisfactory consideration by the country under review of measure e) of the recommendation in section 1.2.2 of Chapter II of this Report, with respect to *“continuing to strengthen the Electronic Procurement System (ComprasNet), making it available to the other organs and entities of the Federal Administration that are not yet part of the SISG.”*

⁹³ See Brazil’s Response to the Fifth Round Questionnaire, p.59, available at: http://www.oas.org/juridico/portuguese/mesicic5_bra.htm

[229] With respect to “*unifying, in a single web portal all the information on public contracting by the State,*” during the on-site visit, the TCU representative explained that spending by the Indirect Federal Administration, particularly with respect to public companies, lacks transparency, as do the legal and voluntary transfers of resources from the federal government to the states and municipalities, which makes external control difficult.

[230] Also during the on-site visit, Ministry of Planning, Development and Management staff agreed that a national-level centralized public procurement system would be ideal. However, due to the autonomy of the states and municipalities, it would be necessary to promote inter-Federation coordination so that everyone would join the system. They also confirmed that there are very different levels of transparency among the federative entities and municipal tendering procedures are handled face-to-face.

[231] According to information provided as a result of the on-site visit, in CGU technical note 1080/2017, “*analysis of the SICONV data allows for the conclusion that only 822 municipalities used the electronic reverse auction method in the history of voluntary transfers, compared to 3,843 that used the face-to-face reverse auction method*” – or approximately 21% of municipalities. In addition, “*for the bidding waiver and in-face reverse auction methods, which account for 49% of competitions conducted in voluntary transfers, the Comprasnet already offers tools for handling them electronically, via electronic reverse auctions and electronic quotes.*” Thus, the “*use of electronic tendering methods by the municipalities participating in voluntary transfers from the federal government is still limited, despite the availability of tools that can be used free-of-charge such as the Comprasnet system and e-Bidding.*”⁹⁴

[232] As use of the Purchasing Portal is not mandatory for all federative entities, the Committee reiterates the need for the country to continue giving attention to the implementation of measure e) of the recommendation in section 1.2.2 of Chapter II of this Report, so as to unify in a single web portal the information on the country’s government contracting. In this regard, the Committee deems relevant to reformulate the recommendation to reiterate the importance of consider establishing the mandatory use of the unified electronic system in tenders conducted at the national level, since that the use of electronic methods makes tendering more transparent, in addition to efficiency gains and economy in the control of public resources. (see recommendation 1.2.3.13 in section 1.2.3 of Chapter II of this Report).

[233] With respect to considering the possibility of broadening the scope of the “*system to cover logistical aspects, such as contract management systems,*” during the on-site visit, representatives from the Ministry of Planning reported that this module is currently in the design phase. However, the Committee did not receive information on when development of the platform would begin or when it would be operational.

[234] Taking into consideration that, since the Second Round of Review, the Committee has formulated a recommendation in this regard and that the contract management system is still in the design phase, the Committee reiterates the need for the country to continue giving attention to the implementation of measure e) of the recommendation in section 1.2.2 of Chapter II of this Report, so that the *Contracts Management* module of the SIASG is completed according to the

⁹⁴ See p. 5 of Technical Note No. 1080/2017/CGPLAG/DG/SFC – on the use of electronic tendering methods by states and municipalities – voluntary transfers, available at: http://www.oas.org/juridico/portuguese/mesicic5_bra.htm

schedule prepared for the purpose. (see recommendation 1.2.3.14 in section 1.2.3 of Chapter II of this Report).

Recommendation 1.2.4:

Strengthen the public works contracting systems

Measure a) suggested by the Committee that requires additional attention within the Framework of the Third Round:

Consider implementing additional citizen oversight for large-scale public works tendering and contracts, with the requirement to hold public consultations on the conditions that will be contained in the calls for tender and with facilities and encouragement for citizen oversight over contract execution.

[235] With respect to the aforementioned measure, in its Response to the Questionnaire, the country under review presents information and new developments, which the Committee notes as a step that contributes to progress in its implementation:

[236] *“In 2013, a bill was submitted to the Federal Senate to modernize the Bidding and Contracts Law [...] The text approved in the Federal Senate makes provision for face-to-face or remote hearings conducted electronically on proposed specifications for goods and services to be opened for bidding.”⁹⁵*

[237] The country under review also reports that “[...] it is important to note that the Ministry of Planning’s site discloses, in the Access to Information section, the Notices of Public Hearings and Public Consolations regarding tenders and contracts.”

[238] *“In order to encourage social oversight activities by citizens and to raise awareness regarding the importance of citizen participation in monitoring the management of public resources in the execution of public policies, the CGU developed, in partnership with the ENAP, the EaD course on ‘Social Control,’ offering an initial approach to society, presenting concepts and suggesting practical exercises. The use of the Access to Information Law and organization into interest groups (organized civil society) was encouraged. With 20 course hours, more than 6,000 students have already been trained.”*

[239] Taking into consideration that the bill, mentioned in Brazil’s Response to the Questionnaire, has not yet been approved in the National Congress and that the Committee did not receive information on the implementation of additional systems for citizen oversight of bidding and contracts on large-scale public works, the Committee reiterates the need for the country to continue giving attention to the implementation of measure a) of the recommendation in section 1.2.4 of Chapter II of this Report.(see recommendation 1.2.3.15 in section 1.2.3 of Chapter II of this Report).

[240] With respect to the importance of implementing additional systems for citizen oversight of bidding and contracts on large-scale public works, during the on-site visit, the representative of the Federal Court of Accounts (TCU) made reference to the need to create a

⁹⁵ Bill 6814/2017 can be consulted at:

<http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=2122766>

national registry of works performed using federal resources. In addition, the TCU staff member explained that it is currently not possible to obtain data on all federal public works, as there is no single code identifying such works, making it impossible to compile such data in the country.

[241] In this regard, the Ministry of Planning added that the various problems related to suspended works in Brazil show the misuse of public resources, it being important to review how such contracting is done.

[242] The TCU, in its ruling 1.188,⁹⁶ had already signaled in 2007 the importance of implementing an information system that would make it possible to display the process of contracting and executing works: *“All the difficulties encountered in seeking to minimize unfinished works in the Federal Government are due to the lack of an information system and inadequate physical and financial planning to execute the works. The following measures are proposed for implementing an information system to provide transparency in spending on federal public works:[...] creation and operation of the General Registry of Federal Works, the use of which is mandatory, subject to the penalty of a block on funds for unregistered works.”*

[243] In its recent ruling No. 2.451 published in 2017,⁹⁷ the TCU emphasizes that the current Government Works System, available at: <http://obras.planejamento.gov.br>, is inadequate: *“in the referenced system, there is no project value, the work’s status (suspended, delayed, or in progress) cannot be identified and there is no percentage indicating physical or financial execution,”* so that, *“it cannot be considered the Works Registry as defined by the TCU rulings issued since 2007.”*

[244] In addition, the TCU, in the above-mentioned ruling, explains that there are real effects and risks associated with continuing the current situation: *“impossibility of social oversight of public works performed using federal resources; impossibility of quantifying public works in progress in the country; impossibility of quantifying public works suspended in the country.”*

[245] Thus, the Committee deems relevant that the State under review consider creating a General Registry of Public Works executed using federal resources that could be extensively consulted by society, with the definition of a unique works’ identifier allowing control of physical-financial execution, within available resources. In this regard, the Committee will formulate a recommendation (see recommendation 1.2.3.16 in section 1.2.3 of Chapter II of this Report).

[246] Still with regard to the possibility of tracking and monitoring public works executed using federal resources, the Committee emphasizes that, through Official Order No. 862 of October 3, 2017, the country under review recognizes that *“the Federal Government needs summary and higher-level aggregated information regarding the physical and financial execution of public works.”* In this regard, a Working Group was created to *“I – develop a proposal for the definition of concepts and content for the works control model; II – define the content and methodology for creating, managing and implementing a unique works identifier*

⁹⁶ TCU Ruling 1.188/2007 is available at:

<https://extranet.camara.gov.br/internet/comissao/index/mista/orca/tcu/..%5Ctcu%5CPDFs%5CAcordao11882007-TCU-Plen%C3%A1rio.pdf>

⁹⁷ TCU Ruling 2.451/2017 is available at: <https://contas.tcu.gov.br/sagas/SvIVisualizarRelVotoAcRtf?codFiltro=SAGAS-SESSAO-ENCERRADA&seOcultoPagina=S&item0=606311>

number; III – submit a proposed standard model that would enable the implementation of control; and IV – propose options for possible technological solutions for tracking and monitoring works, with aggregate and summary information, utilizing information already available in various systems and databanks already in existence.”

[247] According to Article 5 of the Official Order, *“the members of the technical staff of the Federal Court of Accounts and the Ministry of Transparency and Federal Comptroller General’s Office will be able to participate in meetings, as outside observers, and may express opinions and take notes.”* Article 6 states that *“conclusions resulting from works may periodically be submitted to the team of the General Coordinating Office for External Control of the Federal Court of Account’s infrastructure for discussion and evaluation by that Court’s technical team.”* With respect to the deadline for completing works, the Official Order establishes the deadline as 180 days from the date of publication (i.e., October 4, 2017), and when justified this deadline can be extended for an equal amount of time.

[248] In order to ensure the creation of effective systems for control and tracking of bidding and contracts on public works, the Committee recommends that Brazil consider including representatives from the technical staff of the Federal Court of Accounts and the Ministry of Transparency and the Federal Comptroller General’s Office not just as outside observers but as fully active standing members of the Working Group, bearing in mind that, as control bodies, they have the knowledge and experience necessary to improve the efforts undertaken by the Ministry of Planning, Development and Management to develop a solution capable of summarizing progress made in public works. (see recommendation 1.2.3.17 in section 1.2.3 of Chapter II of this Report).

1.2.2. New Developments with Respect to the provisions of the Convention on Government Systems for the Procurement of Goods and Services

1.2.2.1. New Developments with Respect to the Legal Framework

a) Scope

- Various kinds of legal provisions applicable to the Federal Public Administration, notably including:

[249] - Laws 11.784/2008, 12.314/2010 and 12.4425/2011 amending Law No. 8666/93, which establishes rules for administrative bidding and contracts within the Federal Branches, the States, the Federal District and the Municipalities, according to the Response of the country under review.⁹⁸

[250] – Laws 12.188/10, 12.715/12, 12.873/13, 13.204/15 and 13.243/16, creating five new situations justifying bidding waiver under Article 24 of Law 8666/93.

⁹⁸ See Brazil’s Response to the Fifth Round Questionnaire, p. 79, available at: http://www.oas.org/juridico/portuguese/mesicic5_bra.htm

[251] – Law No. 12.462/2011⁹⁹ establishing the Differentiated Procurement Regime (RDC) applicable to bidding and contracts necessary to conduct:

I – the 2016 Olympic and Paralympic Games, in the Olympic Projects Portfolio to be defined by the Public Olympics Authority (APO);

II – the Confederations Cup of the International Federation of Football Associations – FIFA 2013 and the FIFA 2014 World Cup, defined by the Executive Group - Gecopa 2014 of the Management Committee established to define, approve and supervise the actions provided in the Strategic Plan of Actions of the Brazilian Government for the conduct of the 2014 FIFA World Cup - CGCOPA 2014, being limited to, in the case of public works, those included in the matrix of responsibilities entered into between the Federal Government, the States, the Federal District and the Municipalities;

III – infrastructure works and contracting of services for airports in the capitals of the States of the Federation up to 350 km (three hundred fifty kilometers) away from the headquarters cities of the world cups referred to in paragraphs I and II.

IV – actions included in the Growth Acceleration Program (PAC)

V – engineering works and services within the Single Health System (SUS).

VI - engineering works and services for construction, expansion and reform and administration of penal establishments and socio-educational service units;

VII – actions in the area of public safety;

VIII – engineering works and services related to improvements in urban mobility or expansion of logistical infrastructure; and

IX – the contracts referred to in Article 47-A.

X – actions in bodies and entities dedicated to science, technology and innovation. [...]

*§ 3^o In addition to the cases provided in the **caption**, the RDC is also applicable to bidding and contracts necessary to carry out engineering works and services in the area of public education, science and technology systems.”*

[252] In accordance with Article 1(1), *“the objectives of the RDC are: I – to increase efficiency in public contracting and competition among bidders; II – to promote the exchange of experiences and technologies in the search for improved cost-benefit ratios for the public sector; III – to encourage technological innovation; and IV – to ensure equal treatment among bidders and selection of the bid most advantageous to the public administration.”* The RDC option eliminates the traditional rules for bidding and contracts, contained in Law No. 8.666/93, except in matters not contrary to the new regime (Art. 39 of Law 12.462/11).

[253] Article 3 of the RDC establishes the principles applicable to this procurement method: *“legality, impersonality, morality, equality, publicity, efficiency, administrative probity, economy, sustainable national development, linkage to the bid notice, and objective judgment.”*

[254] The RDC includes the possibility of integrated contracting (Art. 9), which is one of the execution systems, according to which, in the procurement of engineering works and services, the contracted company is responsible for *“preparation and development of the basic and executive projects, assembly, testing, pre-operation and all other operations necessary and sufficient to the final delivery of the work.”* Thus, in integrated contracting, there is no requirement for a basic project approved by the competent authority, attached to the call notice

⁹⁹ Law No. 12.462/2011 is available at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/L12462compilado.htm

(Art. 8, para. 5), which must contain a preliminary engineering plan with the technical documents intended to make characterization of the work or service possible (Art. 9, para. 2 , I).

[255] As established in Article 6 of the RDC, the budget calculated previously for the contracting, if included in the bid notice, “*will become public only and immediately after the close of bidding, without prejudice to the disclosure of the quantitative breakdown and other information necessary to prepare the bids.*” Thus, information regarding the budget shall be “*confidential and shall be made available strictly and permanently to external and internal control bodies.*”

[256] Article 12 of Law No. 12.462/11 establishes that the bidding procedure must adhere to the following phases, in this order: “*(I) preparatory phase; (II) publication of the bid call; (III) submission of proposals or bids; (IV) judgment; (V) qualification; (VI) appeal; and (VII) close.*” Thus, proposals will be analyzed and judged first so that the qualifications documents of those participating in the competition are only examined later. As a rule, what occurs is the inverse of the phases in the bidding procedure governed by the RDC.

[257] - Law 13.303/2016, which makes provision regarding “*the legal status of the public company, quasi-governmental company and their subsidiaries, within the sphere of the Federal Government, the States, the Federal District and the Municipalities,*” also known as the “*States Law,*”¹⁰⁰ includes specific rules on bidding and contracting for public companies and quasi-governmental companies in Title II, seeking “*to consolidate, in a single text, the provisions of Law 8.666/1993, the Reverse Auction Law (Law 10.520/2002) and the RDC Law (Law No. 12.462/2011), extracting the essence of these three laws.*”¹⁰¹

[258] In addition, Law 13.303/2016 updates the limits for the case of bidding waiver based on value, which in Law 8.666/1993, the general bidding and contracting law, is fifteen thousand reales, for engineering works and services, and eight thousand reales for other services and purchases. These limits, in the States Law, were increased by one hundred thousand and fifty thousand reales, respectively.

[259] Article 2 (1) of the law establishes that “*the establishment of a public company or a quasi-governmental company shall depend on prior legal authorization clearly indicating important collective interest or national security imperative, under the terms of the caption of Article 173 of the Federal Constitution.*”

[260] - Law No. 12.846, known as the Anti-corruption Law or the Clean Company law, was enacted on August 1, 2013 and makes provision for the administrative and civil liability of legal entities for the commission of actions against the public administration, whether domestic or foreign. The law establishes the objective liability of legal entities (Art. 1), compliance, lenience agreement (Art. 16), the National Registry of Penalized Companies – CNEP (Art. 22), as well as the severity of the penalties (Art. 6). The penalties applicable for the administrative liability of legal entities in the area of administrative bidding and contracting are a fine and special publication of the sentence.

¹⁰⁰ On March 8, 2018, the State under review reported that oversight regarding compliance with Law 13.303/2016 is performed as part of control routines.

¹⁰¹ See communication from Minister Vital do Rêgo on the States Law, available at:

<http://portal.tcu.gov.br/lumis/portal/file/fileDownload.jsp?fileId=8A8182A255C278EE0155CC342CF70C5B&inline=1>

[261] The Clean Company Law created the *National Registry of Penalized Companies* (CNEP) that compiles and publicizes the penalties imposed by the agencies or entities of the Executive, Legislative and Judicial Branches in all areas of government. Article 22 (1) establishes that “*the bodies and entities referred to in the caption shall report and keep updated, in the CNEP, data related to the penalties they impose.*”

[262] The Ministry of Transparency, Oversight and the Federal Comptroller-General’s Office (CGU) is responsible for a large part of the procedures such as verification, processing and judgment of administrative liability proceedings and leniency agreements within the Federal Executive Branch, according to Article 9 of the law.

b) Observations

[263] Regarding the recent changes made to Law No. 8666/93 on bidding and contracting, the Committee notes that, over the years, various bidding waiver situations were included in the Bidding Law. There is, thus, a significant expansion in situations involving contracting with bidding waivers, so that there are currently 35 bidding waiver situations.

[264] In this context, the Committee recalls that the Brazilian Federal Constitution makes express mention of the bidding requirement, included in Article 37 (XXI): “*The direct public administration, autonomous agencies and foundations, in any of the Federal Branches, the States, the Federal District and the Municipalities shall adhere to the principles of legality, impersonality, morality, publicity and also the following: XXI – except for those cases specified in legislation, all works, services, purchases and disposals shall be contracted by public bidding proceedings that ensure equal conditions for all bidders [...].*”

[265] In this regard, the Committee will formulate a recommendation that the country under review consider doing an analysis of bidding waiver situations added following the enactment of the law in 1993, in order to establish whether the general rule on bidding, established in the Constitution, is being distorted legislatively and, if necessary, adopt relevant corrective measures (see recommendation 1.2.3.18 in section 1.2.3 of Chapter II of this Report).

[266] In addition, in low-value bidding waivers, in accordance with TCU jurisprudence and based on Article 24 (II), preference should be given to purchasing through electronic quotes.¹⁰² In this regard, the Committee notes that the *Electronic Price Quote System* is in operation; this module is part of the Integrated General Services Administration System (SIASG) and was created “*to expand competition and streamline the procedures for procurement of low-value goods, through bidding waiver, based on Article 24 (II) of Law No. 8.666, of 1993.*”¹⁰³

[267] In this context, the Committee feels that adoption of the electronic system allows for greater transparency in the management of public spending, impersonality and increased competition in contracting, procedural flexibility and economy of public resources, in view of the reduction in operational costs associated with face-to-face methods. The Office of the

¹⁰² See TCU Official order no. 215/2005, available at <http://www.tcu.gov.br/Consultas/Juris/Docs/judoc%5CPORTN%5C20090206%5CPRT2005-215.doc>

¹⁰³ See Official Order No. 306, of December 13, 2001, of the Ministry of Planning, Development and Management, available at: http://www.comprasnet.gov.br/legislacao/portarias/p306_01.htm

Comptroller General (CGU), in the recent technical note No. 1081/2017¹⁰⁴ established that ***“it is necessary to introduce a mechanism in the General Contract Bidding Law with the requirement that waivers and all other methods be conducted electronically, extending to all entities and branches. Such a measure seeks to afford society broad access to information on bidding processes and waivers, including suppliers consulted and prices submitted.”*** Thus, the Committee will formulate a recommendation that the country under review consider adopting the relevant measures to stipulate the requirement that waivers and all other methods be carried out electronically, which extends to all entities and branches (see recommendation 1.2.3.19 in section 1.2.3 of Chapter II of this Report).

[268] With respect to the existence of aspects that could be improved in the Bidding Law, according to the information obtained during the on-site visit, the Committee notes that there is agreement regarding the need to reform this law, but there is not agreement regarding the changes to be adopted. During the on-site visit, both representatives from civil society and public servants confirmed in their comments that Law 8.666/93 has survived over the years not on the basis of agreement regarding its content but rather due to the lack of a consensus-based proposal for replacing it. Thus, the Committee will formulate a recommendation that the country under review consider creating opportunities for discussion with the participation of the three federal branches, the private sector, academia, civil society and citizens in general, to facilitate and promote consensus regarding reform of the Bidding and Contracts Law, based on the principles of publicity, equity and efficiency provided in the Convention, and define the aspects that should be amended. (see recommendation 1.2.3.20 in section 1.2.3 of Chapter II of this Report).

[269] With respect to the Differentiated Procurement Regime (RDC), established by Law No. 12.462, of August 5, 2011,¹⁰⁵ the Committee considers it important to emphasize that Article 1 clearly stipulates that the law is *“exclusively applicable to bidding and contracts necessary to conduct”*: *I – the 2016 Olympic and Paralympic Games; II- the 2013 FIFA Confederations Cup¹⁰⁶ and the 2014 FIFA World Cup; III – infrastructure works and contracting of services for airports in capitals up to 350 kilometers away from the headquarters cities of the aforementioned events* (emphasis added)

[270] However, the Committee notes that the original text of the law approved in 2011 was later amended with various provisions that included several additional situations under the RDC, situations unrelated to the sports events cited in paragraphs I and II of Article 1: *“IV – actions included in the Growth Acceleration Program (PAC) (included under Law No. 12.688, of 2012); V – engineering works and services within the Single Health System - SUS. (included under Law No. 12.745, of 2012); VI – engineering works and services for construction, expansion and reform and administration of penal establishments and socio-educational service units; (included under Law No. 13.190, of 2015); VII – actions in the area of public safety; (included under Law No. 13.190, of 2015); VIII – engineering works and services related to improvements in urban mobility or expansion of logistical infrastructure; (included under Law No. 13.190, of 2015) and; IX – the contracts referred to in Article 47-A. (included under Law No. 13.190, de 2015).”*

¹⁰⁴ See p. 9 of Technical Note No. /2017/CGPLAG/DG/SFC – Use of electronic bidding methods by the States and Municipalities – voluntary transfers, available at: http://www.oas.org/juridico/portuguese/mesicic5_bra.htm

¹⁰⁵ See Law No. 12.462, of August 5, 2011, available at: http://www.planalto.gov.br/ccivil_03/ato2011-2014/2011/lei/112462.htm

¹⁰⁶ International Federation of Football Associations (FIFA)

[271] The Committee notes that, in accordance with Law No. 12.462, of August 5, 2011, if an agency opts to use the RDC, the rules contained in Law No. 8.666 of 1993, known as the general bidding and contracting law of the Public Administration, shall not apply.¹⁰⁷

[272] In this context, the Committee also emphasizes that RDC emerged from the conversion into law of Provisional Measure No. 527, of 2011,¹⁰⁸ which was issued by the President of the Republic in an effort to modify the structure of the bodies of the Office of the President of the Republic and the Ministries, in addition to promoting changes in the legislation of the National Civil Aviation Agency (ANAC) and the Brazilian Airport Infrastructure Company (INFRAERO). Thus, the provisional measure (an initiative reserved to the President of the Republic, in important and urgent cases, in accordance with Article 62 of the Federal Constitution) addressed different issues.

[273] After a provisional measure is issued by the President of the Republic, it is sent to the National Congress, which may approve it or reject it. If it is approved, it becomes law. However, during the course of deliberations in the Chamber of Deputies, the bill converting the provisional measure into a law was submitted, adding the procurement rules of the RDC. Thus, the Committee notes that that RDC was approved by means of parliamentary amendment to a provisional measure that addressed issues unrelated to procurement. In addition, through other measures, Brazil continued to expand the use of the Differentiated Regime for situations different from those initially anticipated.

[274] According to the Federal Prosecution Service,¹⁰⁹ the law in question has a formal defect, as the inclusion of matters other than those addressed in the provisional measure is an affront to due legislative process and the principle of the separation of branches.

[275] In this context, the Federal Supreme Court (STF), in the judgment on Direct Unconstitutionality Action (ADI) 5127, recently recognized the *“impossibility of including amendments in the bill converting a provisional measure to a law with a subject different from the original purpose of the provisional measure,”* which is known as “legislative smuggling.”¹¹⁰ In summary, *“such a practice diminishes the power of the President of the Republic to evaluate important and urgent matters to be addressed in a provisional measure; it violates ordinary due legislative process; and compromises the democratic principle by suppressing an important part of the debate that should occur in the Congress.”*¹¹¹ However, sensitive to legal certainty, the Court assigned *ex nunc* effect to the decision, preserving, up to the date of the judgment (October 15, 2015), *“laws resulting from amendments in bills converting provisional measures into laws.”*

[276] On this subject, the Committee considers it important to emphasize that Law 13.190/2015 was published on November 20, 2015, resulting from the conversion to law of provisional measure no. 678/2015, altering the Differentiated Procurement Regime, including new situations for using the regime (paragraphs VI, VII, VIII, IX, as well as other changes).

¹⁰⁷ See Article 1 (2) of Law No. 12.462, of 2011, available at:

http://www.planalto.gov.br/ccivil_03/ato2011-2014/2011/lei/12462.htm

¹⁰⁸ See Provisional Measure No. 527 of 2011, available at:

http://www.planalto.gov.br/ccivil_03/ato2011-2014/2011/Mpv/527.htm

¹⁰⁹ Direct Unconstitutionality Action (ADI) No. 4655, available at:

<http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=188758>

¹¹⁰ See STF notice, available at: <http://stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=304536>

¹¹¹ See STF Security Mandate 33.889, available at:

<http://stf.jus.br/portal/processo/verProcessoAndamento.asp?numero=33889&classe=MS&origem=AP&recurso=0&tipoJulgamento=M>

However, the Federal Supreme Court (STF), ruling on security mandate MS 33.889, on November 19, 2015, determined that, if the draft law was sanctioned, all the provisions should have suspended effect, with the exception of paragraphs VI and VII of Article 1 of the RDC (which already appeared in the original provisional measure), due to “legislative smuggling.” Thus, Law No. 13.190/2015 is already in force, but paragraphs VIII and IX of the RDC, for example, have suspended effect based on the decision of the STF, until later deliberation by the Full Court.

[277] Thus, the Committee notes that the RDC has not been used solely for bidding and contracting related to global sporting events, the initial purpose of the provisional measure, but also in the most varied sectors, such as engineering works and services for construction, expansion, and reform of penal establishments; actions in the area of public safety; engineering works and services related to urban mobility; actions in bodies and entities dedicated to science, technology and innovation, among others.¹¹²

[278] In addition, the Committee notes that there is a series of scattered rules on bidding and contracting in the Brazilian legal order, and some are mutually contradictory, as is the case, for example, with the RDC, when dispensing with the requirement of the basic project in the integrated contracting regime,¹¹³ compared to the Bidding and Contracting Law, which considers null any tender made without the basic project approved in advance by the Administration.¹¹⁴

[279] According to a technical note from the Advisory Office of the Federal Senate regarding the RDC,¹¹⁵ *“the new law has some positive innovations that could well be included in the General Law itself. While amendment of Law No. 8666 of 1993 was already pending deliberation in the Federal Senate, the government decided to opt for the rapid legislative process route of provisional measures, convincing its congressional base to insert in the text of MPV No. 527, of 2011, the new regulations on bidding and contracts for the indicated sporting events.”*

[280] In this context, the Committee feels that the consolidation of rules in the area of bidding and contracts would facilitate their application and understanding.¹¹⁶ Thus, the Committee will formulate a recommendation that the country under review consider, as one of the purposes of the reform of Law No. 8.666 of 1993 on Bidding and Contracts, consolidating the existing legal provisions on the subject in a single instrument, seeking to make it more understandable, without prejudice to strengthening it, in the light of the principles of publicity, equity and efficiency provided in the Convention (see recommendation 1.2.3.21 in section 1.2.3 of Chapter II of this Report).

[281] In this regard, the Ethos Institute, as a result of the on-site visit, submitted a position note on the RDC from the organizations included in the project “Clean Games Inside and Outside

¹¹² On March 8, 2018, the State under review clearly reported that *“the subject is already being addressed by the Federal Supreme Court (STF), which will decide on the constitutionality of the measures introduced, by law, in the Differentiated Procurement Regime”*.

¹¹³ See para. 5 of Art. 8 of Law 12.462, of 2011, available at:

http://www.planalto.gov.br/ccivil_03/ato2011-2014/2011/lei/112462.htm

¹¹⁴ See para. 5 of Art. 7 of Law No. 8.666, of 1993, available at: http://www.planalto.gov.br/ccivil_03/leis/L8666cons.htm

¹¹⁵ Technical note from the Advisory Office of the Federal Senate, available at:

<https://www12.senado.leg.br/publicacoes/estudos-legislativos/tipos-de-estudos/textos-para-discussao/td-100-o-regime-diferenciado-de-contratacoes-publicas-comentarios-a-lei-no-12.462-de-2011>

¹¹⁶ In this regard, on March 8, 2018, the State under review reported that *“that draft law PL 6814/2017, addressing the new bidding law, is already slanted toward consolidating the subject of contracting in a single instrument”*.

Stadiums,” in which they assert that “*regulation of the RDC should be achieved through a proper legislative instrument, and not included in a provisional measure issued for a completely different matter. This practice, now common in our country, is extremely harmful to democracy. Matters regarding bidding and contracting by the direct and indirect public administration are inserted in the role of constitutional powers reserved to the federal government and should be governed in the form of general national rules, which should be applied equally by the three spheres of government. This practice hampers the clarity of proposals and what is being discussed in the National Congress.*”

[282] Additionally, during the on-site visit, members of the Federal Prosecution Service, emphasized that the agency encounters difficulties in the regulatory sphere in holding criminally liable individuals and legal entities that violate the system for the procurement of goods by the State. In this regard, the representatives of the Public Prosecutor’s Office reported that there is no specific criminal definition criminalizing the practices of overpricing or overbilling in public procurement, which impedes criminal actions for this type of conduct.

[283] In this regard, the Committee notes that the States Law establishes, in Article 31, that “tenders made and contracts entered into by public companies and quasi-governmental companies are intended to ensure the selection of the most advantageous bid, including with respect to the life cycle of the item, and to avoid transactions characterized as overpricing or overbilling, with a duty to adhere to the principles of impersonality, morality, equality, publicity, efficiency, administrative probity, economy, sustainable national development, linkage to the call for bids, competitiveness, and objective judgment (emphasis added).

[284] In addition, the Committee notes that Article 31 (1) of the referenced law includes the following concepts: “I - overpricing when the prices quoted for procurement or the contracted prices are significantly higher than benchmark market prices, which may refer to an item’s unit value if the procurement was based on unit service prices, or the overall value of the item if the bidding or contracting was for a total price or price per undertaking; II - overbilling when damage was done to the assets of the public company or quasi-governmental company characterized, for example: a) by the measurement of quantities higher than those actually executed or supplied; b) by deficiency in the execution of engineering works and services resulting in reduced quality, useful life or safety; c) by changes in the budget for engineering works and services that cause economic-financial imbalance of the contract in favor of the contractor; d) by other changes in financial clauses that produce early contractual receipts, distortion of the physical-financial schedule, unjustified extension of the contract term with additional costs for the public company or quasi-governmental company or an irregular readjustment of prices.” (emphasis added)

[285] In this context, the Committee also notes that statistical data presented by the country under review, as a result of the on-site visit, show that less than 0.2% of the total number of people incarcerated in 2014 found themselves in that conditions based on having committed crimes related to corruption. In this regard, the Committee takes notes of the difficulties faced when seeking to assign criminal liability for acts of corruption related to public works and bidding, particularly the practice of overpricing and overbilling, fraudulent methods used in administrative contracts, to the detriment of the Public Administration. Thus, the Committee will formulate a recommendation that the country under review consider defining the crime of overpricing and overbilling in contractual activity, assigning it a penalty (see recommendation 1.2.3.22 in section 1.2.3 of Chapter II of this Report).

[286] With respect to Law No. 12.846/2013, known as the Anti-corruption Law or Clean Company Law, the Committee emphasizes that the CGU developed a specific methodology for evaluating integrity in state-owned companies in terms of the existence, quality and effectiveness of compliance policies and programs, using as a reference the parameters listed in Article 42 of Decree No. 8.420/2015 regulating the Clean Company Law. Thus, through audits and reports on the *Evaluation of Integrity in State-Owned Companies*,¹¹⁷ the Ministry presents a diagnosis regarding the evolutionary stage of policies and procedures related to ethics and integrity in state-owned companies, issuing conclusions and recommendations to the companies evaluated.

[287] In this context, the Committee recognizes the efforts made by the CGU in this area, including the *Pro-Ethics Company* program,¹¹⁸ an initiative that seeks to promote “*the voluntary adoption of integrity measures by companies, through public recognition of those that, regardless of their size and area of activity, demonstrate their commitment to implementing measures intended to prevent, detect and remedy acts of corruption and fraud.*”

1.2.2.2. New Developments with Respect to Technology

[288] In its Response to the Questionnaire, the country under review reported that the Purchasing and Contracting Center (*Center*)¹¹⁹ was created to “*develop, propose and implement, in the federal sphere, models and procedures for centralized procurement and contracting of goods and services commonly used by the agencies and entities of the Federal Public Administration. The Center operates as a “qualified filter” of market demand throughout the Administration. Through the Center, it is possible to generate economies of scale in government purchasing activities, in addition to optimizing the planning thereof. Similarly, standardization of the items sought makes feasible strategic action in government purchasing and brings quality and financial gains.*” (emphasis added).

[289] In this context, the Committee notes that it did not have information regarding the objective results, such as the quality and financial gains mentioned, nor was it possible to access them on-line. Thus, the Committee will formulate a recommendation that the country under review consider preparing and publishing the results achieved with completed and ongoing projects in the Center, including the quality and financial gains obtained with the centralization of support functions related to activities that are usually contracted by various agencies and entities. (see recommendation 1.2.3.23 in section 1.2.3 of Chapter II of this Report).

[290] During the on-site visit, the representatives of the Ministry of Planning, Development and Management briefly presented part of the technological restructuring of the Purchasing Portal and explained that the restructuring focused on the system user, defining the following thematic axes: institutional area, public manager, suppliers and transparency. They also clarified that the *Comprasnet* refers to the electronic reverse auction module within the Integrated General Services Administration Service (SIASG), which is the governmental purchasing system.

¹¹⁷ On March 8, 2018, the State under review informed that the reports and resulting recommendations are published in a specific portal within the CGU site: <https://auditoria.cgu.gov.br>

¹¹⁸ More information on *Pró-Ética* is available at: <http://www.cgu.gov.br/assuntos/etica-e-integridade/empresa-pro-etica>

¹¹⁹ Completed and ongoing projects in the Center can be tracked at: <http://www.planejamento.gov.br/aceso-a-informacao/licitacoes-e-contratos/central-de-compras>

[291] The representative from the Federal Court of Accounts, during the on-site visit, added that the *Comprasnet* is a very useful tool for external control and makes it possible to search for various types of very detailed information, including notices, budgets, prices, auctioneers, bids, etc.

[292] The Committee considers the restructuring of the Federal Government Purchasing Portal an advance, in that it presents information on a consolidated basis regarding the public agencies that make up the Integrated General Services System (SISG), the system for the procurement of goods by the Direct Federal Public Administration.

[293] In addition, the Committee notes it did not manage to gain access to the *Comprasnet* SIASG (<https://www.comprasgovernamentais.gov.br/index.php/comprasnet-siasg>) system, since access is restricted to suppliers or public managers, requiring a login and password to enter the system.

[294] According to the Federal Court of Accounts (TCU), in compliance with the principles of transparency and publicity, interested parties should be afforded knowledge of the bidding conditions, “*at any point in the bidding process, as it is public, so as to avoid irregularities in the respective procedures and secret contracting, which are harmful to the Treasury.*”¹²⁰

[295] Taking into consideration that the *Comprasnet* was mentioned as an important tool promoting governmental transparency, the Committee will formulate a recommendation that the country under review consider including an access profile for citizens, allowing consultation of data that is not sensitive for the general public, in accordance with the Access to Information Law (see recommendation 1.2.3.24 in section 1.2.3 of Chapter II of this Report).

1.2.2.3. Results

[296] In its Response to the Questionnaire,¹²¹ the country under review reported a decline in the number of purchasing processes over the last five years, “*primarily as a result of increased use of the Price Registry System (Decree No. 7.892/2013), in which just one agency conducts the bidding and the other agencies join as participants in the process (participating agencies) or even join after the process (non-participating agencies).*”

[297] As a result of the on-site visit, the country under review provided the following information on the number of goods and services procurement processes carried out by the State and the purchasing methods, between 2012 and 2017¹²²:

Purchasing Information			
Year of Purchase	Purchasing Method	Total Purchases	% of Purchases
2012	Competition	1,265	0.75%
	International Competition	40	0.02%
	Tender	16	0.01%

¹²⁰ See TCU publication on Tenders and Contracts, p. 20, available at:

<http://portal.tcu.gov.br/lumis/portal/file/fileDownload.jsp?inline=1&fileId=8A8182A24D6E86A4014D72AC81CA540A>

¹²¹ See Brazil’s Response to the Questionnaire, p. 82, available at:

http://www.oas.org/juridico/portuguese/mesicic5_bra.htm

¹²³ Data for the month of September 2017

	Invitation	333	0.20%
	Bidding waiver	117,773	69.51%
	Bidding exemption	20,339	12.00%
	Reverse auction	28,504	16.82%
	Submission of prices	1,154	0.68%
Total		169,424	100.00%
2013	Competition	999	0.63%
	International Competition	40	0.03%
	Tender	9	0.01%
	Invitation	250	0.16%
	Bidding waiver	106,269	66.63%
	Bidding exemption	21,142	13.26%
	Reverse auction	29,879	18.73%
	Submission of prices	911	0.57%
Total		159,499	100.00%
2014	Competition	696	0.48%
	International competition	47	0.03%
	Tender	31	0.02%
	Invitation	177	0.12%
	Bidding waiver	92,635	63.85%
	Bidding exemption	23,061	15.89%
	Reverse auction	27,616	19.03%
	Submission of prices	823	0.57%
Total		145,086	100.00%
2015	Competition	376	0.36%
	International competition	33	0.03%
	Tender	20	0.02%
	Invitation	76	0.07%
	Bidding waiver	65,518	62.03%
	Bidding exemption	17,412	16.48%
	Reverse auction	21,740	20.58%
	Submission of prices	449	0.43%
Total		105,624	100.00%
2016	Competition	347	0.33%
	International competition	21	0.02%
	Tender	15	0.01%
	Invitation	107	0.10%
	Bidding waiver	65,723	62.27%

	Bidding exemption	16,887	16.00%
	Reverse auction	22,006	20.85%
	Submission of prices	432	0.41%
	Total	105,538	100.00%
2017 ¹²³	Competition	125	0.21%
	International competition	2	0.00%
	Tender	14	0.02%
	Invitation	33	0.06%
	Bidding waiver	35,167	60.48%
	Bidding exemption	10,287	17.69%
	Reverse auction	12,387	21.30%
	Submission of prices	128	0.22%
	Total	58,143	100.00%
	General Total	743,314	

[298] When analyzing the statistical data presented above, the Committee notes that bidding waiver and bidding exemption cases represented 81.5% of the total number of purchases in the year 2012; 79.8 % in 2013; 79.7% in 2014; 78.5% in 2015; 78.2% in 2016 and 78.1% in 2017. The data show that most government purchases were carried out directly by the Direct Federal Public Administration, the autonomous agencies and foundations, without conducting a bidding process.

[299] In this context, the Committee notes, first, that Article 37 (XXI) and 175 of the Federal Constitution establish the mandatory nature of the bidding process for the procurement of goods and services by the State, except for cases specified in the legislation. It should be noted that TCU jurisprudence is firm in indicating that mandatory bidding is the rule and that contracting without bidding should be an exception to the rule:

[300] *“Bearing in mind that this Court of Accounts in judging processes under its jurisdiction repeatedly encounters analogous situations, its understanding regarding the matter is already a matter of precedent. At this point, despite the degree of subjectivity inherent in the matter, there is no doubt that only in special situations may the administrator dispense with use of the bidding procedure. Specific legal precepts associated with the teachings of reputable jurists are unanimous in asserting that bidding is the rule for contracting in the Public Administration.”*¹²⁴ (emphasis added)

[301] The Committee notes that, despite this, the numbers reported by the country under review, indicated above, reveal that, in practice, direct contracting has become the general rule for the procurement of goods and services. In this regard, the Committee will formulate a recommendation that the country under review consider adopting the measures necessary to ensure that the bidding procedure is used, in practice, as the general rule for the procurement of

¹²³ Data for the month of September 2017

¹²⁴ See TCU ruling 3860/2007, available at

<https://contas.tcu.gov.br/juris/SvlHighLightConteudo?key=41434f5244414f2d434f4d504c45544f2d3336363833&texto=nul&termoFq=null&bases=ACORDAO-COMPLETO:&sort=RELEVANCIA&ordem=DESC&highlight=&posicaoDocumento=0>

goods and services within Brazilian national territory, in accordance with the Constitution (see recommendation 1.2.3.25 in section 1.2.3 of Chapter II of this Report).

[302] With respect to the results related to Law No. 12.846/2013, known as the Clean Company or Anti-corruption Law, the Committee notes that there are currently 16 records published in the National Registry of Penalized Companies (CNEP), according to data from the CGU Transparency Portal.¹²⁵ As mentioned earlier in this Report, in section 1.2.2.1 on new developments related to the regulatory framework for the procurement of goods and services, Article 22 (1) of the Anti-corruption Law notes the requirement that public entities in all branches and spheres of government keep the Registry updated, which should be provided with updated information directly by the agencies and entities of Brazil's Federal District, the States, and the Municipalities.

[303] Still on the subject of results related to Law No. 12.846/2013, during the on-site visit, representatives from the CGU explained that the *National Registry of Ineligible and Suspended Companies (CEIS)* was created in 2010, when it was still a registry to be joined voluntarily by the states and municipalities, but was mandatory in the federal sphere. According to the public servants, joining the system became compulsory for all entities in the federation as of 2014 due to the enforcement of the Clean Company Law. Since then, the states and municipalities must include in the system the penalties imposed by them. However, there is no updated base that is "*centralized, public and transparent.*" The Committee notes that, according to data from the CGU Transparency Portal, there are currently 11,485 records published on the National Registry of Ineligible and Suspended Companies (CEIS).¹²⁶

[304] In this regard, the Committee notes that the CNEP and CEIS registries are very important, in that their objective is to compile data on the accountability of companies from various sources and can be used as a reference for all public managers in government procurement at the national level. Since joining the system is compulsory for all entities in the federation, the Committee recommends that the country under review establish training programs with the specific goal of instructing public employees, at the national level, regarding the possible imposition of the penalties provided in the Anti-corruption law and on the requirement to update the CNEP and CEIS systems. (see recommendations 1.2.3.26 and 1.2.3.27 in section 1.2.3 of Chapter II of this Report).

[305] In this regard, during the *on-site* visit, the representative from Transparency International confirmed that both the National Registry of Ineligible and Suspended Companies (CEIS) and the National Registry of Penalized Companies (CNEP) represent very significant advances. However, some states and municipalities do not send information on penalized, ineligible or suspended companies.

[306] Also during the on-site visit, CGU staff reported that there is no general rule defining the requirement to consult the *National Registry of Ineligible and Suspended Companies (CEIS)*, before engaging in public procurement or contracting.

¹²⁵ Data from the Transparency Portal on Penalized Companies (CNEP) are available at: <http://www.transparencia.gov.br/cnep/>. The Portal was accessed by the Committee on November 26, 2017.

¹²⁶ Data from the Transparency Portal on Ineligible and Suspended Companies (CEIS) are available at: <http://www.transparencia.gov.br/ceis/>. The Portal was accessed by the Committee on November 26, 2017.

[307] In this regard, the Committee notes that Inter-Ministerial Official Order No. 424 of December 30, 2016 lists in Article 22 the conditions for entering into instruments, to be performed by the parties, among which is found “*good standing with the federal government, based on consultation of the Informative Registry of Unsettled Claims in the Federal Public Sector (CADIN).*” Thus, the Committee will formulate a recommendation that the country under review consider regulating as well the requirement to consult the supplier’s situation in the CNEP and CEIS prior to contracting. (see recommendation 1.2.3.28 in section 1.2.3 of Chapter II of this Report).

[308] In addition, during the on-site visit, the TCU representative mentioned that there are some limitations related to training public servants to provide input for the *Transfer Agreements and Contracts Management System (SICONV)*. In this regard, the TCU, during the audit of SICONV, found, for example, that various agencies did not have the data required by law but, despite this, did record entities that sought to enter into agreements or contracts with the Federal Public Administration, “*which indicates possible ignorance of this requirement on the part of those responsible for recording data in the SICONV.*”¹²⁷

[309] In addition, the Ministry of Planning representatives added that the level of training of public servants, essential for making gains in strengthening governance, transparency and risk management, is very uneven; thus, while the number of training sessions has increased, investments are still needed to develop state capacity. In this regard, the Committee will formulate a recommendation that the country under review consider conducting training for public servants responsible for administering the *Transfer Agreements and Contracts Management System (SICONV)* and consider updating the manuals on use of the system in order to reduce the occurrence of errors and irregularities (see recommendations 1.2.3.29 and 1.2.3.30 in section 1.2.3 of Chapter II of this Report).

[310] During the on-site visit, the TCU representative emphasized that voluntary transfers from the federal government,¹²⁸ which include funds transferred under agreements, transfer contracts and partnership terms signed with the States, the Federal District and the Municipalities are difficult to track. Despite the existence of the SICONV, there is a lack of relevant information such as documents, notices, and other information. In addition, the public employee noted that the lack of information is even more serious in fund-to-fund transfers (based on a legal determination and characterized by direct transfer of resources from funds in the federal sphere to funds in the state, municipal, and federal district sphere, dispensing with agreements), in that the data needed to exercise control of government actions or assess risks do not exist.

[311] In this context, the Committee emphasizes that, in the report on the compliance audit conducted based on data from the SICONV, the TCU found a series of improvements needed in the system and called for an action plan to implement the measures required in Ruling

¹²⁷ See Executive Summary of the Audit of the Transfer Agreements and Contracts Management System (SICONV) of the Federal Government published in 2014, p. 19, available at: <http://portal.tcu.gov.br/biblioteca-digital/auditoria-no-sistema-de-gestao-de-convenios-e-contratos-de-repasse-siconv-do-governo-federal-sumario.htm>

¹²⁸ Transfers of resources from the federal budget to the municipalities are effected through three types of transfer: constitutional; legal; and voluntary. Voluntary transfers are transfers of resources from the federal government to the states, the federal district, the municipalities and private non-profit entities, that do not result from constitutional or legal definition. The instruments used to make voluntary transfers viable are agreements; transfer contracts; or partnership terms.

2.550/2013.¹²⁹ Thus, the Committee considers it important for the country under review to consider adopting the measures necessary to implement improvements in and internal controls over the SICONV, in accordance with the TCU ruling, so that voluntary transfers from the federal government can be properly monitored by the control bodies. (see recommendation 1.2.3.31 in section 1.2.3 of Chapter II of this Report).

[312] The country under review, as a result of the on-site visit, also provided information¹³⁰ on the *Registry of Ineligible Private Non-Profit Entities (CEPIM)*, which is an “information bank maintained by the Federal Comptroller General’s Office, based on data provided by the agencies and entities of the federal public administration, the objective of which is to consolidate and disseminate a list of private, non-profit entities that are precluded from entering into agreements, transfer contracts or partnership terms with the federal public administration, under the terms of Decree No. 7.592, of October 28, 2011.”¹³¹

[313] The Committee notes that the Transparency Portal data do not include the total number of ineligible private, non-profit entities, and various agencies fail to specify the reason why the penalty was imposed.¹³² In this regard, based on the principles of transparency and publicity, the Committee considers it useful for the country under review to consider including in the CEPIM the number of ineligible entities and establishing the obligation to include the reason for the prohibition on entering into agreements, transfer contracts or partnership terms with the federal public administration (see recommendation 1.2.3.32 in section 1.2.3 of Chapter II of this Report).

1.2.3. Recommendations

[314] In light of the observations formulated in sections 1.2.1 and 1.2.2 of Chapter II of this Report, the Committee suggests that the country under review consider the following recommendations:

- 1.2.3.1. Adopt the measures necessary to expand, regular and free training sessions for public servants and employees responsible for bidding and contracting for works, goods and services, using classroom-based and, in particular, distance learning

¹²⁹See Executive Summary of the Audit of the Transfer Agreements and Contracts Management System (SICONV) of the Federal Government published in 2014, pp. 33 to 43, available at: <http://portal.tcu.gov.br/biblioteca-digital/auditoria-no-sistema-de-gestao-de-convenios-e-contratos-de-repasse-siconv-do-governo-federal-sumario.htm>

¹³⁰ The country under review sent the link for the *Registry of Ineligible Private Non-Profit Entities (CEPIM)*, which is available at: <http://www.transparencia.gov.br/cepim/EntidadesImpedidas.asp?paramEmpresa=0>. The Portal was accessed by the Committee on November 26, 2017.

¹³¹ Decree No. 7.592, of October 28, 2011 may be consulted at: http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2011/Decreto/D7592.htm

¹³² On March 8, 2018, the State under review reported that “Although the Transparency Portal does not show consolidated information on the number of ineligible entities, the tool shows the list of penalties imposed, so that the citizen can learn about all ineligible entities <http://www.transparencia.gov.br/cepim/EntidadesImpedidas.asp?paramEmpresa=0&Pagina=1>. As of 01/26/2018, there were 2,500 ineligible entities. In addition, the Portal makes data on penalties available for downloading, allowing anyone to do the desired cross-checks and analyses: <http://www.transparencia.gov.br/downloads/snapshot.asp?c=CEPIM>. In this regard, we ask that the paragraph be adjusted. As for the existence of penalties without specification of the reason, we report that the CGU is developing the New Transparency Portal, to be published by the end of the first half of 2018, which will show the reasons reported by all agencies.”

methods, depending on the availability of resources. (see paragraph 131 in section 1.2.1 of Chapter II of this Report)

- 1.2.3.2. Adopt the measures necessary to strengthen the National Training and Instruction Program for Combating Corruption and Money Laundering (PNLD), expanding the supply of classroom-based or distance learning courses, implementing the advanced program method and including in the program's content topics related to the prevention and detection of corruption by public employees responsible for bidding and contracting for works, goods and services, depending on the availability of resources (see paragraph 133 in section 1.2.1 of Chapter II of this Report)
- 1.2.3.3. Consider amending the Bidding and Contracts Law, extending the penalties provided in its applicable provisions imposed on the legal entity to administrators or partners, as well as the new legal entity in the same sector that is related to the penalized entity, in cases where rights are abused in order to commit unlawful acts or to cause the commingling of assets. (see paragraph 151 in section 1.2.1 of Chapter II of this Report)
- 1.2.3.4. Consider including in the Budgetary Guidelines Bills the request to fill CGU vacancies, through public competition, so as to rebuild the CGU workforce and guarantee its full operation, in accordance with its powers and responsibilities (see paragraph 170 in section 1.2.1 of Chapter II of this Report).
- 1.2.3.5. Adopt the measures necessary to ensure that the imposition of penalties related to bidding and contracts, including temporary suspension or ineligibility to bid with the public administration, is efficient and expeditious, in accordance with the principle of efficiency, as provided in the Convention (see paragraph 172 in section 1.2.1 of Chapter II of this Report)
- 1.2.3.6. Adopt the measures necessary to strengthen the current capabilities of the Federal Court of Accounts, including its precautionary powers, enhancing inter-institutional technical cooperation among the agencies of the federal, state and municipal public administration, depending on the availability of resources. (see paragraph 186 in section 1.2.1 of Chapter II of this Report)
- 1.2.3.7. Regulate the sharing of confidential information and databases with control agencies by other agencies of the Public Administration in any of the three federal branches, the States, the Federal District and the Municipalities to facilitate said agencies' performance of their control functions (see paragraph 186 in section 1.2.1 of Chapter II of this Report).
- 1.2.3.8. Adopt the measures necessary to strengthen the Department of Standards and Logistics Systems (DELOG) of the Ministry of Planning, Development and Management as the administrator of systems related to the procurement of goods and services by the Brazilian State, ensuring it has the human and financial resources necessary for the proper performance of its functions. (see paragraph 188 in section 1.2.1 of Chapter II of this Report)

- 1.2.3.9. Establish a tool similar to the Pricing Panel of the Executive branch within the sphere of the other federal branches, stipulating objective criteria for searching prices and parameters for determining the benchmark price. (see paragraph 206 in section 1.2.1 of Chapter II of this Report)
- 1.2.3.10. Establish the Single Registry of Suppliers System (SICAF) as the sole national system for registration of suppliers, which must be used by the Direct and Indirect Public Administration within the three federal branches, the States, the Federal District and the Municipalities (see paragraph 219 in section 1.2.1 of Chapter II of this Report)
- 1.2.3.11. Adopt the measures necessary to allow the Single Registry of Suppliers System (SICAF) to be easily operated by users and accessible to the general public, allowing consultation of public data in this system (see paragraph 220 in section 1.2.1 of Chapter II of this Report).
- 1.2.3.12. Adopt the measures necessary to make the Single Registry of Suppliers System (SICAF) 100% digital in the scheduled timeframe, depending on the availability of resources. (see paragraph 220 in section 1.2.1 of Chapter II of this Report).
- 1.2.3.13. Adopt the relevant measures to unify, at a single web portal, all information regarding public procurement and contracts, including, on a mandatory basis, data from all agencies and entities in the three federal branches, the States, the Federal District and the Municipalities (see paragraph 232 in section 1.2.1 of Chapter II of this Report).
- 1.2.3.14. Adopt the measures necessary to ensure that the Contracts Management Module of the Integrated General Services Administration System (SIASG) is completed and becomes fully operational, according to the schedule prepared for the purpose, depending on the availability of resources.” (see paragraph 234 in section 1.2.1 of Chapter II of this Report).
- 1.2.3.15. Consider implementing additional systems for citizen oversight of bidding and contracting for large-scale public works, requiring that public consultations be held regarding the conditions that will be imposed in bidding notices, to facilitate and encourage citizen activities to control contract execution. (see paragraph 239 in section 1.2.1 of Chapter II of this Report).
- 1.2.3.16. Consider adopting the relevant measures to enable the creation and operation of the Federal General Registry of Works, to include a unique identifier of works, the use of which is required, subject to the penalty of a block on resources for unregistered works, pursuant to the definitions in rulings by the Federal Court of Accounts (TCU), depending on the availability of resources. (see paragraph 245 in section 1.2.1 of Chapter II of this Report).
- 1.2.3.17. Amend Official Order No. 862 of October 3, 2017, so as to include representatives from the technical staff of the Federal Court of Accounts (TCU) and the Ministry of Transparency and Office of the Comptroller General (CGU)

as regular members of the Working Group on federal public works (see paragraph 248 in section 1.2.1 of Chapter II of this Report).

- 1.2.3.18. Analyze the bidding waiver situations adopted after the enactment of Law No. 8666/93, in order to establish whether these changes are distorting the general rule of bidding for public contracting, as provided in the Constitution, and, if necessary, adopt relevant corrective measures. (see paragraph 265 in section 1.2.2 of Chapter II of this Report).
- 1.2.3.19. Consider, as one of the purposes for amending Law No. 8.666 of 1993 on Bidding and Contracts, adopting the relevant measures to establish the requirement that waivers and all other bidding methods be conducted electronically, for all federal branches, the States, the Federal District and the Municipalities (see paragraph 267 in section 1.2.2 of Chapter II of this Report).
- 1.2.3.20. Adopt the measures necessary to create opportunities for dialogue with the participation of public officials and civil society regarding reform of the Bidding and Contracts Law, using as a guide the principles of publicity, equity, and efficiency to determine the aspects that need to be amended (see paragraph 268 in section 1.2.2 of Chapter II of this Report).
- 1.2.3.21. Consider, as one of the purposes for amending Law No. 8.666 of 1993 on Bidding and Contracts, adopting relevant measures to consolidate existing legal provisions in a single legal instrument, which would be general and comprehensive, in order to facilitate its application by public servants, seeking to make it clearer and more comprehensible by those who participate in government contracting, as well as for the citizens in general, being guided by the principles of publicity, equity and efficiency provided in the Convention (see paragraph 280 in section 1.2.2 of Chapter II of this Report).
- 1.2.3.22. Consider defining, specifically, the crime of overpricing and overbilling in contractual activity, assigning it a penalty commensurate with the seriousness of such conduct (see paragraph 285 in section 1.2.2 of Chapter II of this Report).
- 1.2.3.23. Prepare and publish the specific results achieved with projects completed and in progress from the *Purchasing and Contracting Center* (see paragraph 289 in section 1.2.2 of Chapter II of this Report).
- 1.2.3.24. Adopt the measures necessary to allow access to the *Comprasnet* by citizens, so that they are able to consult this system's public data, according to the availability of resources. (see paragraph 295 in section 1.2.2 of Chapter II of this Report).
- 1.2.3.25. Adopt relevant measures, on the part of the respective authorities, to ensure that, in practice, bidding is the general rule for contracting for goods and services by the direct and indirect public administration and foundations, in any of the federal branches, the States, the Federal District and the Municipalities, in accordance with the provisions of Article 37 (XXI) of the Federal Constitution. (see paragraph 301 in section 1.2.2 of Chapter II of this Report).

- 1.2.3.26. Adopt the relevant measures to train public servants responsible for the procurement of goods and services regarding Law No. 12.846 de 2013, at the national level, depending on the availability of resources (see paragraph 304 in section 1.2.2 of Chapter II of this Report).
- 1.2.3.27. Adopt the relevant measures to guarantee, in practice, the inputting of data to and updating of the National Registry of Penalized Companies (CNEP) and the National Registry of Ineligible and Suspended Companies (CEIS) by the agencies and entities of the executive, legislative and judicial branches in all spheres of government, with the data related to penalties imposed by them, based on Laws Nos. 12.846/13 and 8.666/93. (see paragraph 304 in section 1.2.2 of Chapter II of this Report).
- 1.2.3.28. Adopt the measures necessary to regulate the requirement to consult, in practice, the supplier's status in the National Registry of Ineligible and Suspended Companies (CEIS) and the National Registry of Penalized Companies (CNEP), before entering into administrative contracts. (see paragraph 307 in section 1.2.2 of Chapter II of this Report).
- 1.2.3.29. Adopt the measures necessary to train public servants responsible for the administration of the Transfer Agreements and Contracts Management System (SICONV), on knowledge of and compliance with the rules, so as to avoid the occurrence of irregularities in the execution of transfer agreements and contracts by the Federal Public Administration. (see paragraph 309 in section 1.2.2 of Chapter II of this Report).
- 1.2.3.30. Update the manuals on the use of the Transfer Agreements and Contracts Management System (SICONV) with respect to the procedures adopted by registrars, granting parties, contractual parties and participants in the area of registration, formalization of execution and provision of accounts on voluntary transfers, with due diligence regarding system users (see paragraph 309 in section 1.2.2 of Chapter II of this Report).
- 1.2.3.31. Adopt the measures necessary to implement improvements and internal controls in the Transfer Agreements and Contracts Management System (SICONV), pursuant to TCU Ruling 2.550/2013, so that voluntary transfers from the federal government can be properly monitored by the control agencies, according to the availability of resources".(see paragraph 311 in section 1.2.2 of Chapter II of this Report).
- 1.2.3.32. Publish in the *Registry of Ineligible Private, Non-profit Entities (CEPIM)* the total number of ineligible entities and the reason for declaring their disqualification for entering into agreements, transfer contracts or partnership terms with the federal public administration (see paragraph 313 in section 1.2.2 of Chapter II of this Report).

2. SYSTEMS FOR PROTECTING PUBLIC SERVANTS AND PRIVATE CITIZENS WHO, IN GOOD FAITH, REPORT ACTS OF CORRUPTION (ARTICLE III (8) OF THE CONVENTION)

2.1. Follow-Up to the Implementation of the Recommendations Formulated in the Second Round

Recommendation 2.1

Strengthen systems to protect public officials and private citizens who in good faith report acts of corruption.

Measure suggested by the Committee that requires additional attention within the Framework of the Third Round:

Adopt, through the corresponding authority, a comprehensive regulation on the protection of public servants and private citizens who in good faith report acts of corruption, including protection of their identity, consistent with the Constitution and with the fundamental principles of Brazilian law. That regulation could include the following aspects, among others:

Measure a) suggested by the Committee that requires additional attention within the Framework of the Third Round:

Additional measures of protection for persons who in good faith report acts of corruption that may or may not be classified as crimes, but which may be the subject of a judicial or administrative investigation.

[315] With respect to measure a), in its Response to the Questionnaire, the country under review presents information and new developments, which the Committee notes as a step that contributes to progress in its implementation:

[316] *“The National Strategy to Combat Corruption and Money Laundering (ENCCLA), which consists of coordinating the efforts of various agencies in the three branches of government, Public Ministries and civil society that act, directly or indirectly, to prevent and combat corruption and money laundering, in order to identify and propose improvements and currently includes nearly 60 public and private agencies and entities, approved Action 4 for 2016: Prepare a diagnosis of and propose improvements in the Brazilian system for protecting and encouraging informants and whistleblowers. Coordinated by AJUFE (Association of Federal Judges of Brazil), the Action includes the participation of various other agencies and its objective is to submit a draft law based on discussion of the following topics: 1. The status of the subject in the National Congress; 2. Existing measures in terms of comparative law; 3. International standards on the subject; 4. The model developed by the AJUFE Study Group members, for discussion by the various agencies participating in the ENCCLA. Thus, the Action seeks to help the National Congress accelerate the process of introducing within the Brazilian legal system programs to protect informants, the importance of which is recognized by the entire international community.”*

[317] *“The final result of the Action included:*

1) Conduct of a seminar involving civil society and academia:

- The International Seminar on Whistleblower Protection and Incentives Programs was held in Florianópolis, September 19-20.*

2) Study of comparative law and good international practices;

- *An initial study on North American practices was already submitted at the first meeting, providing information on the regulation of the subject in various countries.*
 - *An in-depth study done by the Action's coordinator was submitted to the group and delivered to the Chamber of Deputies on the occasion of the submission of the draft law."*
- 3) *Studies on common ground and differences in Brazilian regulations and survey of draft laws on the subject;*
- *Various existing draft laws on the subject now before the National Congress, with their characteristics, processing status, authors and rapporteurs, were already submitted at the first meeting.*
 - *The domestic regulatory framework was presented on the same occasion, indicating already existing legislation with some affinity with the matter under study, to identify possible points of incompatibility with the draft law to be developed.*
- 4) *Preparation of the draft law on the subject*
- *Developed, completed and presented to the Special Chamber of Deputies Committee for anticorruption measures."*

[318] *"In addition, there are some proposals before the Congress to provide incentives for public servants and citizens to report corruption in good faith or reveal information of public interest:*

Draft Law No. 3.165/2015: Establishes the Incentives Program for Disclosure of Information of Public Interest and provides other measures. Pending appointment of rapporteur in the Labor, Administration and Public Service Committee of the Chamber of Deputies.

(<http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=1806152>)

Draft Law No. 1.701/2011: Establishes the Federal Program on Compensation and Combatting Corruption, whereby the informant who helps to elucidate a crime against the Administration and Public Assets, as well as recover diverted public funds and goods, receives monetary compensation. After being attached to Draft Law No. 3527/2015, which governs the Citizen Collaborator, the matter is ready for deliberation by the full Chamber of Deputies.

(<http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=510440>)

[319] *"Finally, to be noted as an important measure on this subject is the launch by the Ministry of Justice of the **Guide to the use of the Inter-American Human Rights System in Protecting those Reporting Acts of Corruption**, in September 2014. The document guides and brings together information on the guarantees and structures available within the inter-American human rights protection system for persons reporting acts of corruption, establishing the role of rights, such as the right to report, freedom of expression, the right to physical and mental integrity, the right to work, the right to effective use of due legal process, and rights to reparations. It also outlines international obligations and duties of States in acting with measures that prevent reprisals and protect informants with general recommendations for establishing protection for informants."*

[320] In addition, during the on-site visit, the staff member from the Federal General Ombudsman's Office (OGU) explained that a Regulatory Directive¹³³ was issued in June 2014, establishing provisions for receiving and processing anonymous reports and guidelines for protecting the identity of the informant within the control bodies of the Federal Executive Branch. According to Articles 2 and 3 of the document, *"when an anonymous report is submitted to the ombudsman's office of the Federal Executive Branch, that office will receive and process it, and should forward it to the responsible agencies for verification provided there is sufficient evidence for verification of the facts described."* In

¹³³ Joint Regulatory Directive No. 01 CRG/OGU, June 24, 2014, available at: <http://www.cgu.gov.br/sobre/legislacao/arquivos/instrucoes-normativas/in-crg-ogu-01-2014.pdf>

addition, *“whenever asked, the ombudsman must ensure restricted access to the identity of the complainant and other personal information appearing in the statements received.”*

[321] The OGU representative also reported that protection of the identity of the informant is anchored, in the Brazilian legal order, by Article 31 of the Access to Information Law, Law No. 12.527 of November 18, 2011,¹³⁴ according to which *“personal information must be treated transparently and with respect for the privacy, private life, honor and image of individuals, as well as individual freedoms and guarantees.”* The enactment of Law No. 13.460 of June 26, 2017,¹³⁵ which governs the participation, protection and defense of the rights of the user of public services from the public administration within the national sphere was also reported. Article 111 of this law establishes that *“under no circumstances shall acceptance of statements be refused,”* under penalty of liability on the part of the government employee, i.e., all reports must be accepted. In addition, Article 6 of the law includes as basic rights of the user the protection of his personal information, under the terms of the Access to Information Law.

[322] During the on-site visit, the representative from the Chamber of Deputies reported that a draft law was submitted on *“a detailed system for protection of the informant, based on works prepared by the ENCCLA, which was approved by the Special Committee and rejected by the full Chamber.”* According to the representative, this bill, as well as the others that were rejected in what was called *“10 Measures for Combating Corruption,”* was resubmitted in 2017. This is Draft Law 8727/2017,¹³⁶ which *“establishes measures for combating corruption and impunity.”*

[323] In this context, the Committee takes note of the steps taken by the country under review to proceed with implementation of the recommendation in section 2.1 of Chapter II of this Report, as well as measure a) thereof. However, the Committee reiterates the need for the country under review to continue giving attention to the recommendation, bearing in mind that no comprehensive standard has been adopted as yet for the protection of public employees and individual citizens who report in good faith acts of corruption that may or may not be classified as crimes and that may be subject to judicial or administrative investigation. In addition, the Committee feels that it would be useful for the country under review to use as a guide the *“Model Law to Facilitate and Encourage Reporting of Acts of Corruption and to Protect Informants and Witnesses,”* adopted by the Committee. Thus, it considers it relevant to reformulate the recommendation to clarify what has been indicated above¹³⁷ (see recommendation 2.3.1 in section 2.3 of Chapter II of this Report).

[324] In this regard, the coordinator of Action 4 of the National Strategy to Combat Corruption and Money Laundering (ENCCLA) and member of AJUFE (Association of Federal Judges of Brazil), mentioned, during the on-site visit that, as there is no protection system established by law, most Brazilians choose to remain anonymous when making reports, when this possibility exists. According to the public employee, various government agencies require personal identification of the citizen in order to accept statements; the ombudsman’s offices of the National Council of Justice (CNJ) and the Public Prosecutor’s Office, for example, do not process anonymous reports. In addition, the judge explained that *“the lack of connection has made it difficult to understand that the broad protection of*

¹³⁴ Access to Information Law No. 12.527 of 2011, available at:

http://www.planalto.gov.br/ccivil_03/ato2011-2014/2011/lei/112527.htm

¹³⁵ Law No. 13.460 of June 26, 2017, available at:

<http://www2.camara.leg.br/legin/fed/lei/2017/lei-13460-26-junho-2017-785098-publicacaooriginal-153203-pl.html>

¹³⁶ Draft Law 8727/2017, available at:

http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=1602844&filename=PL+8727/2017

¹³⁷ Model Law to Facilitate and Encourage Reporting of Acts of Corruption and Protect Informants and Witnesses, available (in Spanish) at: http://www.oas.org/juridico/PDFs/ley_modelo_proteccion.pdf

good faith informants is both a tool that is recognized internationally as essential in combating corruption and unlawful actions in general as well as an international commitment by the Brazilian State to ensure the exercise of the right of free expression, ensured by the Inter-American Convention on Human Rights.”

[325] The AJUFE representative also stated that the subject of protection for informants began to receive significant support from civil society entities and representatives. In addition, the draft law that was developed by the ENCCLA with collaboration from various government agencies¹³⁸ considered international best practices on the subject. Nonetheless, the legislative proposal was not approved by the Chamber of Deputies and has still not been evaluated by the Federal Senate.¹³⁹ According to the Appellate Court Judge, currently, “the perception is that the Brazilian State is not bound to these citizen protection proposals, as provided in the Inter-American Convention against Corruption.”

Measure b) suggested by the Committee that requires additional attention within the Framework of the Third Round:

Additional measures of protection that include protection of the physical integrity of the whistleblower and his family, as well as protection of his employment situation, especially in the case of a public official who does not have tenure, and when the acts of corruption may involve his hierarchical superior or his work colleagues.

[326] With respect to measure b), in its Response to the Questionnaire, the country under review presents information and new developments, which the Committee notes as a step that contributes to progress in its implementation:

[327] “*With regard to protection for the public servant who in good faith reports acts of corruption, it is important to highlight, as new provisions adopted, the approval on November 18, 2011, of Law No. 12.527/11 – the Access to Information Law,¹⁴⁰ Article 43 of which amends Article 116 (VI) of Law No. 8.112/90 (Public Servant Statute), so that it becomes the public servant’s duty to “bring irregularities he learns about by virtue of his position to the attention of his hierarchical superior, or when there is suspicion of that superior’s involvement, to the attention of another competent authority for verification.”*

[328] “*In addition, Article 44 of the Access to Information Law adds to Article 126-A of Law No. 8.112/90, ensuring that “no public servant may be held civilly, criminally or administratively liable for informing their hierarchical superior or, when there is suspicion of that superior’s involvement, another competent authority for verification of information regarding the commission of crimes or misconduct that he may learn about, a result of the performance of his position, job or public office. In this sense, the Access to Information Law reaffirms the duty of the public servant to*

¹³⁸ Brazilian Intelligence Agency (ABIN), National Association of Federal Police Delegates (ADPF), Federal Attorney General’s Office (AGU), Brazilian Magistrates Association (AMB), National Association of Federal Prosecutors (ANPR), Administrative Council for Economic Defense (CADE), Federal Comptroller General’s Office (CGU), Federal Justice Council (CJF), National Council of the Federal Prosecutor’s Office (CNMP), Securities and Exchange Commission (CVM), Federal Police Department (DPF), Federal Prosecution Service (MPF), São Paulo State Public Prosecutor’s Office (MPSP), Ministry of Foreign Affairs (MRE), Federal Revenue (RFB) and Federal Court of Accounts (TCU).

¹³⁹ Draft Law 80/2016 of the Federal Senate currently not being processed:

<https://www25.senado.leg.br/web/atividade/materias/-/materia/127692>

¹⁴⁰ Access to Information Law No. 12.527 of 2011, available at:

http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/12527.htm

report, even when the action involves his hierarchical superior, and protects him against any proceeding arising from the performance of this duty, regardless of tenure.”

[329] *“With regard to employees in the public sector, it should be noted that the Article 7 (VIII) of the Anti-corruption Law (Law No. 12.846/13) establishes that the imposition of the penalties provided in the law for legal entities shall consider ‘the existence of internal mechanisms and procedures on integrity, audit and incentives for reporting irregularities and the effective application of codes of ethics and codes of conduct within the legal entity.’ Decree No. 8.420/15, which regulates the Anti-corruption Law, also provides that ‘the adoption, application or improvement of the integrity program shall be recommended when leniency agreements are being negotiated (Art. 37, IV).”*

[330] *“Decree No. 8.420/15 thus establishes the parameters to be observed in analyzing integrity programs, which shall be applied in the calculation of fines and the negotiation of leniency agreements. In this respect, it is important to emphasize that according to Article 42 of the Decree: ‘Art. 42. For purposes of the provisions of Article 5(4), the integrity program will be evaluated with respect to its existence and application, in accordance with the following parameters: (...) X – channels for reporting irregularities, open and broadly disseminated to employees and third parties, and mechanisms intended to protect those reporting in good faith.”*

[331] *“The CGU also developed a booklet intended for the private sector – ‘Integrity Program: Guidelines for Private Companies’ – that includes guidelines for companies to establish the reporting channels indicated above, so that employees will regularly report irregularities. The booklet is available at: <http://www.cgu.gov.br/Publicacoes/etica-e-integridade/arquivos/programa-de-integridade-diretrizes-para-empresas-privadas.pdf>”*

[332] The Committee takes note of the steps taken by the country under review to proceed with the implementation of measure b) of the recommendation in section 2.1 of Chapter II of this Report, with respect to protection of the public employee’s employment situation through enactment of the Access to Information Law. However, taking into consideration that the Committee did not receive information on additional protective measures that include protecting the physical integrity of the informant and his family, as well as protecting his employment situation, if the informant is not a public employee, the Committee reiterates the need for the country under review to continue giving attention to measure b) of the recommendation in section 2.1 of Chapter II of this Report. In this regard, the Committee considers it relevant to reformulate the recommendation, recognizing the aforementioned regulatory advances related to the Access to Information Law (see recommendation 2.3.1 in section 2.3 of Chapter II of this Report).

[333] In this regard, the member of AJUFE (Association of Federal Judges of Brazil) reported that, in addition to guaranteeing protection for the employment situation of the public employee, it is also important to take into consideration the possibility of restricting indirect retaliation in the working environment, which is not currently regulated by Brazilian legislation.

Measure c) suggested by the Committee that requires additional attention within the Framework of the Third Round:

Mechanisms that facilitate international cooperation in this area, where appropriate.

[334] With respect to measure c), in its Response to the Questionnaire, the country under review presents information and new developments, which the Committee notes as a step that contributes to progress in its implementation:

[335] *“With regard to concrete actions for implementation of the recommendation, in terms of strengthening systems for protecting public employees and individual citizens who in good faith report acts of corruption, specifically with respect to strengthening mechanisms facilitating international cooperation, we emphasize that Brazil is a signatory to international conventions on combating corruption, notably: the Inter-American Convention against Corruption (CICC), enacted by Decree 4.410, of October 7, 2002; the United Nations Convention against Corruption (UNCAC), enacted by Decree 5687, of January 31, 2006; and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organization for Economic Co-operation and Development (OECD), enacted by Decree 3678, of November 30, 2000.”*

[336] *“In addition, Brazil is currently a signatory to 20 bilateral agreements on international legal assistance in criminal matters, which also serve as a legal basis for combating and repressing corruption at the international level.”*

[337] *“It is also important to note that the ENCCLA, the strategy mentioned in measure a) of this recommendation, approved Action 9 for 2017. This Action seeks “to create instruments that advance international legal cooperation, allowing the formation of joint transnational investigative teams in the areas of combating corruption and money laundering.” Anticipated outputs from that action include: a comparative study of existing legal and infralegal instruments on joint investigative teams, as well as their diagnosis; development of the proposed protocol for joint action; and the preparation of a study on the need for specific legislation in this area. The implementation of Action 9/2017 may serve as an additional option for international legal cooperation.”*

[338] With regard to the mechanisms of international cooperation in the area of protection, such as the accommodation of informants and witnesses of acts of corruption in another country, the country under review reported, as a result of the on-site visit, that *“there is a record of a passive request involving witness protection, which is being processed in secrecy.”*

[339] The Committee takes note of the steps taken by the country under review with respect to establishing mechanisms facilitating international cooperation to protect those who witness acts of corruption in another country. However, considering that the Committee did not receive information on other mechanisms that facilitate international cooperation, such as sheltering whistleblowers or collaborating to collect statements and carry out the necessary procedural steps, the Committee reiterates the need for the country under review to continue giving attention to measure c) of the recommendation in section 2.1 of Chapter II of this Report. In this regard, the Committee considers it relevant to reformulate the recommendation so as to clarify what has been stated above (see recommendation 2.3.1 of section 2.3 in Chapter II of this Report).

2.2. New Developments with Respect to the Provision of the Convention on Systems for Protecting Public Servants and Private Citizens Who, in Good Faith, Report Acts of Corruption

2.2.1. New Developments with respect to the Legal Framework

[340] In its Response to the Questionnaire, the country under review provided information regarding new developments related to the regulatory framework of systems for protecting public

servants and private citizens who, in good faith, report acts of corruption. The country under review mentioned Articles 43 and 44 of the Access to Information Law, Article 7 (VIII) of the Anti-corruption Law (Law No. 12.846/13) and Article 42 of Decree No. 8420/15, which regulates the Anti-corruption Law, provisions already considered in section 2.1 of this chapter, with respect to measure b) of recommendation 2.1.1.

[341] During the on-site visit, the country under review mentioned that there is a draft law¹⁴¹ pending evaluation by the National Congress, as already noted by the Committee in section 2.1 of Chapter II of this Report.

[342] In this context, Law No. 13.608/18 was enacted on January 11, 2018 and governs the telephone service for receiving reports and compensation for information that is helpful in police investigations. Article 2 of the Law establishes that the States are authorized to establish a service to receive reports by telephone, preferably free of charge, and Article 3 also ensures the secrecy of data on an informant who decides to identify himself.

2.2.2. New Developments with Respect to Technology

[343] During the on-site visit, the representative from the Federal General Ombudsman's Office (OGU) mentioned the existence of the *E-Ouv* electronic system, the ombudsman offices' system of the Federal Executive Branch, whereby citizens can access any federal agency and submit a report. That database is managed by the Ministry of Transparency and the Office of the Comptroller General (CGU) and can be accessed through the following website: <https://sistema.ouvidorias.gov.br/>.

2.2.3. Results

[344] As a result of the on-site visit, the country under review provided the following information:

[345] “Number of witnesses protected for having reported acts of corruption of public servants in the last five (5) years (2011 to 2015)¹⁴²”, according to the Program to Protect Threatened Victims and Witnesses – PROVITA:

Year	Total witnesses under protection	Number of witnesses protected for reporting acts of corruption (active and passive) by public servants
2011	316 cases	06
2012	858 cases	09
2013	847 cases	03
2014	606 cases	02
2015	413 cases	03

¹⁴¹ The draft law 8727/2017 is available at: http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=1602844&filename=PL+8727/2017

¹⁴² DATUM: PERSONS UNDER PROTECTION, SOURCE: Ministry of Human Rights, Federal Government (data provided by the General Coordinator of Protection for Threatened Victims and Witnesses – PROVITA)

[346] According to the country under review, the types of crimes usually witnessed by protected persons over the last five years are: murder, attempted murder, and aggravated murder and drug trafficking, in addition to criminal association and organization (formation of mob or gang).

[347] The Committee takes note that the country under review provided information on witnesses protected over the last five years; however, it did not report on results related to systems to protect public servants and citizens who, in good faith, report acts of corruption, in that there are no systems in the Brazilian legal order to protect whistleblowers who are not victims or witnesses of crimes.

2.3. Recommendation

[348] In view of the observations made in sections 2.1 and 2.2 of Chapter II of this Report, the Committee suggests that the country under review consider the following recommendation:

2.3.1. Adopt, through the corresponding authority, and taking into consideration the criteria established in the “Model Law to Facilitate and Encourage Reporting of Acts of Corruption and to Protect Informants and Witnesses,”¹⁴³ comprehensive regulations on protecting public servants and private citizens who, in good faith, report acts of corruption, including protecting the identity thereof, in accordance with the Constitution and the fundamental principles of the Brazilian legal order, including, *inter alia*, the following aspects:

- i) Protection for those who, in good faith, report acts of corruption that may or may not be classified as crimes and may be the subject of judicial or administrative investigation (see paragraph 323 of section 2.1 in Chapter II of this Report)
- ii) Protective measures that include protecting the physical integrity of the informant and his family, as well as protecting his employment situation, including support against reprisals in the work environment(see paragraph 332 of section 2.1 in Chapter II of this Report)
- iii)Mechanisms that facilitate international cooperation in the area of protecting those who report acts of corruption, when relevant and as stipulated in Article XIV of the Convention, including technical cooperation, as well as the exchange of experiences, training and reciprocal assistance (see paragraph 339 in section 2.1 of Chapter II of this Report)

¹⁴³ Model Law to Facilitate and Encourage the Reporting of Acts of Corruption and to Protect Informants and Witnesses, available (in Spanish) at: http://www.oas.org/juridico/PDFs/ley_modelo_proteccion.pdf

3. ACTS OF CORRUPTION (ARTICLE VI OF THE CONVENTION)

3.1. Follow-up on implementation of the recommendations made at the Second Round

Recommendation 3.1 suggested by the Committee that requires additional attention within the Framework of the Third Round:

Evaluate the need to modify Article 288 of the Criminal Code in order to establish that it only requires two persons to constitute the crime of criminal association

[349] In its Response to the Questionnaire, the country under review provided information regarding recommendation 3.1, in which the Committee highlights the following:

[350] *“Law No.12.850/13 (Organized Crime Law) was approved on August 2, 2013. This law defines criminal organizations and makes provision regarding criminal investigation, the means for obtaining evidence, related criminal offenses, and criminal procedure. The law, which took effect on September 16, 2013, amends, in Article 24, the definition in Article 288 of the Penal Code, so as to constitute “criminal association,” replacing the crime of “formation of mob or gang.” The Penal Code thus reads as follows: Art. 288. Three (3) or more persons associate, for the specific purpose of committing crimes: Penalty – imprisonment for one (1) to three (3) years. Single paragraph. The penalty is increased by up to half if the association is armed or if the participation of children or adolescents is involved.”*

[351] *“Thus, while it does not alter the minimum of two persons, the new wording puts the minimum at three individuals and redefines the crime, in addition to providing for an increased penalty in the case of armed association or the involvement of children or adolescents in the criminal association.”*

[352] *“In addition, it should be emphasized that the law also defined “criminal organization” establishing the applicable penalties: Art. 1. This Law defines criminal organization and makes provision on criminal investigation, the means for obtaining evidence, related criminal offenses and the criminal procedure to be applied. §1. A criminal organization is considered to mean the association of four (4) or more persons structurally ordered and characterized by the division of tasks, even if informally, with the objective of obtaining, directly or indirectly, an advantage of any kind, through the commission of criminal offenses whose maximum penalties exceed four (4) years, or that are transnational in nature (...)”*

[353] *“Art. 2. Promoting, establishing, financing or putting together, personally or through an intermediary, a criminal organization: Penalty – imprisonment, from three (3) to eight (8) years, and a fine, without prejudice to penalties corresponding to other criminal offenses committed. §1. The same penalties are incurred by anyone who impedes or, in any way, hinders the investigation of a criminal offense involving a criminal organization. §2. Penalties are increased by up to one half if firearms are employed in the criminal organization’s activities. §3. The penalty is increased for anyone who, individually or collectively, commands the criminal organization, even if he does not personally execute actions. §4. The penalty is increased by one-sixth (1/6) to two-thirds (2/3): I – if there is participation by children or adolescents; II – if a public servant is involved, with the criminal organization taking advantage of that position to commit the criminal offense; III – if the proceeds or gains from the criminal offense are, in whole or in part, sent abroad; IV – if the criminal organization maintains a connection with other*

independent criminal organizations; V – if the de facto circumstances provide evidence of the transnational nature of the organization.”

[354] During the *on-site* visit, the representative of the Federal Prosecution Service explained that the new law redefined the type of criminal association, which went from a minimum of four people to three people, and established the crime of criminal organization, which requires a minimum of four persons. In addition, members of the Public Prosecutor’s Office, as well as the representative of the Judicial Branch, all acting in various areas of Criminal Law, reasoned, during the on-site visit, that it would be neither necessary nor beneficial to the current Brazilian criminal system to reduce the crime defined in Article 288 of the Penal Code to two people.

[355] Taking into consideration the information submitted by the members of the Public Prosecutor’s Office and the Judicial Branch who were present during the on-site visit and that the State under review expressly reported that evaluated the need to amend Art. 288 of the Brazilian Penal Code during the process of reformulating the definition of the crime with enactment of the Organized Crime Law approved on August 2, 2013, the Committee takes note of the satisfactory consideration by the State under review of recommendation 3.1 in Chapter II of this report.

[356] It should also be emphasized that, during the on-site visit, the representative of the Order of Attorneys of Brazil (OAB) stated that the possibility of reducing the number of persons for constituting the crime of criminal association represents quite a complicated analysis for the country under review currently, in that the structure of the Brazilian criminal justice system has had problems applying the legislation that already exists. Thus, the chairman of the *Anti-corruption and Compliance Legislation Committee of the OAB* explained that this measure is not a priority, nor is it strategic for Brazil, in that there are other more effective actions for combating corruption to be perfected in the country, taking its current situation into account.

3.2. New developments in respect of the Convention provision on acts of corruption

3.2.1. New developments in the legal framework

a) Scope

[357] – Law No. 12.846/13,¹⁴⁴ known as the Anti-corruption Law or Clean Company Law, governs the administrative and civil liability of legal entities for the commission of actions against the public administration, whether domestic or foreign. The law applies *“to business companies and simple companies, whether incorporated or not, regardless of the form or organization or model adopted, as well as any foundations, associations of entities or persons, or foreign companies, with headquarters, branch or representative office in Brazilian territory, established on a de facto or de jure basis, even if temporarily.”*

[358] Article 5 (I) of the Clean Company Law refers to the acts of corruption indicated in Article VI (1) of the Convention: *“Art. 5. For purposes of this law, actions injurious to public administration, whether domestic or foreign, are all those committed by legal entities [...], that work against domestic or foreign public assets, against principles of public administration or against the international commitments assumed by Brazil, defined as follows: I – promising, offering or giving, directly or indirectly, an undue advantage to the public employee, or a third*

¹⁴⁴ Law No. 12.846/13 is available at:
http://www.planalto.gov.br/ccivil_03/ato2011-2014/2013/lei/112846.htm

party related to him; II – demonstrably financing, funding, sponsoring or in any way subsidizing the commission of the unlawful acts established under this law.”

[359] In the administrative sphere, the penalties imposed are a fine and publication of the enforceable judgment in *“communication media widely circulated in the area of the commission of the offense and the actions of the legal entity or, in the absence thereof, in a nationally circulated publication, as well as through posting of a public notice, for a minimum period of thirty (30) days, in the establishment itself or the site of the activity, in a manner visible to the public, and on the electronic site on the worldwide web.”* Article 18 of the law clarifies that *“in the administrative sphere, the liability of the legal entity does not exclude the possibility of their being held liable in the judicial sphere.”*

[360] In the judicial sphere, the following penalties can be imposed on offending legal entities, in accordance with Law No. 12.846/13: *I – loss of assets, rights or funds in favor of the public treasury, “that represent an advantage or profit obtained directly or indirectly from the offense, with the exception of the rights of the injured party or good faith third party; II – suspension or partial restriction of their activities; III – mandatory dissolution of the legal entity; IV – prohibition on receiving incentives, subsidies, allowances, donations or loans from public agencies and public financial institutions or those controlled by the government, for a minimum period of one (1) year and a maximum of five (5) years.”*

[361] – Decree No. 8420/15,¹⁴⁵ which regulates Law No. 12.846/2013 and establishes parameters for the imposition of penalties and judicial referrals, in addition to governing the conclusion of leniency agreements to be signed by the Office of the Comptroller General (CGU). According to Article 28, *“the leniency agreement will be entered into with legal entities responsible for the commission of the harmful actions provided in Law No. 12.846, of 2013 [...], to waive or reduce the respective penalties, provided they effectively collaborate with the investigations and the administrative process, which should result in: I – the identification of others involved in the administrative offense, when appropriate; and II – quickly obtained information and documents proving the offense being investigated.”* The decree establishes that the leniency agreement will contain, *inter alia*, *“the adoption, application and improvement of the integrity program,”* consistent with the parameters established in Chapter IV thereof.

[362] – Supplementary Law No. 135, of June 4, 2010 (Clean Record Law),¹⁴⁶ establishing ineligibility for any position of *“those who have been convicted, in a final decision or decision rendered by a collegiate judicial body, from the moment of conviction until eight (8) years have elapsed since completion of the penalty for crimes: 1. against the popular economy, the public faith, the public administration and public assets; [...]10. carried out by a criminal organization, mob or gang.”*

[363] –Law No. 12.850, of August 2, 2013, known as the Organized Crime Law, defines a criminal organization and governs criminal investigation, the means for obtaining evidence, the respective criminal penalties and criminal procedure. According to Article 1(1) of the law, *“a criminal organization means the association of four (4) or more persons that is structurally ordered and characterized by the division of tasks, even if informally, with the objective of obtaining, directly or indirectly, an advantage of any kind, through the commission of criminal offenses the maximum penalties for which are greater than four (4) years, or that are transnational in nature.”* The law also applies *“to criminal offenses provided in a treaty or*

¹⁴⁵ Decree No. 8.420/15 is available at:

http://www.planalto.gov.br/ccivil_03/ Ato2015-2018/2015/Decreto/D8420.htm

¹⁴⁶ Supplemental Law No. 135 is available at: <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=358095>

international convention when, execution having begun in the country, the result has or should have occurred abroad, or reciprocally.”

[364] According to the above-mentioned law, *“the following means for obtaining evidence, shall be permitted, in any phase of criminal prosecution, without prejudice to others already provided in the law: I – rewarded collaboration; II – capture in the environment of electromagnetic, optical or acoustical signals; III – controlled action; IV – access to records of telephonic and telematic links, recorded data appearing in public or private databanks and electoral or commercial information; V – intercepts of telephonic and telematic communications, under the terms of specific legislation; VI – removal of financial, banking, and tax secrecy, under the terms of specific legislation; VII – infiltration, by the police, in investigative activity, as provided in Article 11; VIII – cooperation among federal, district, state and municipal bodies in the search for evidence and information of interest to the investigation or criminal inquiry.”*

[365] With regard to the practice of rewarded collaboration, Article 4 of the law establishes that *“the judge may, at the request of the parties, grant judicial pardon, reduce a prison term by two-thirds (2/3) or replace it by restricting the rights of the person who has collaborated effectively and voluntarily with the investigation and with the criminal proceeding, provided that collaboration produces one or more of the following results: I – identification of the other co-perpetrators and participants in the criminal organization and the criminal offenses committed by them; II – disclosure of the hierarchical structure and the division of tasks of the criminal organization; III – the prevention of criminal offenses deriving from the activities of the criminal organization; IV – total or partial recovery of the proceeds or profit from the criminal offenses committed by the criminal organization; V – the location of the potential victim with their physical integrity preserved. § 1- In any case, the granting of the benefit shall take into account the personality of the collaborator, the nature, circumstances, seriousness and social repercussion of the criminal act and the effectiveness of the collaboration.”*

[366] According to the law, controlled action consists of *“delaying police or administrative intervention in actions carried out by a criminal organization or entity linked to it, provided they are kept under observation and surveillance so that the legal measure occurs at the most effective moment for producing evidence and obtaining information. § 1. The delay in police or administrative intervention shall be reported in advance to the competent judge who, if applicable, shall establish the limits thereof and inform the Public Prosecutor’s Office. § 2. Communication shall be secretly disseminated so as not to contain information that could indicate the operation to be carried out. § 3. Until conclusion of the operation, access to the record shall be restricted to the judge, the Public Prosecutor’s Office and the chief of police, as a way to guarantee the success of the investigations.”* If the controlled action involves crossing borders, *“the delay of police or administrative intervention may only occur with the cooperation of the authorities of countries included in the probable itinerary or destination of the subject of investigation, so as to reduce risks of flight and loss of the proceeds, subject, instrument or profits of the crime.”*

[367] In its Response to the Questionnaire, the country under review also reported on the issuance of Official Order No. 6.335-DG/PF, which creates Precincts for the Repression of Corruption and Financial Crimes (DELECOR) *“set up in all States of the Federation and dedicated exclusively to the investigation of crimes related to the diversion of public funds and financial crimes.”* In addition, the country under review provided information on the creation, within the Federal Prosecution Service, of a *“specific unit to address issues related to combating corruption, based on the reformulation of the Fifth Coordination and Review Chamber, by means of Resolution No. 148, of April 2014. The unit operates in cases related*

to acts of administrative improbity, crimes committed by public employees or individuals against the administration in general, including against a foreign public administration, as well as crimes involving the liability of mayors and council members, as provided in the Procurement Law.”

3.2.2. New developments with respect to technology

[368] In its Response to the Questionnaire, the country under review did not submit information on new technological developments related to acts of corruption, nor did it do so during the on-site visit.

3.2.3. Results

[369] In Brazil’s Response to the Questionnaire,¹⁴⁷ the country under review included the number of public employees in the Federal Executive Branch who had been punished with expulsion due to acts related to corruption:

Penalties involving expulsion imposed on employees of the Federal Executive Branch due to acts related to corruption:¹⁴⁸

	2012	2013	2014	2015	2016	2017
Termination	252	315	285	272	269	73
Cancelation of pension	37	42	44	42	50	11
Removal	26	22	34	18	24	3
Total	315	379	363	332	343	87

[370] In addition, Brazil reported on the number of “operations launched by the Federal Police related to investigations involving acts of corruption and financial crimes,” in the period 2010 to 2016:



¹⁴⁷ See Brazil’s Response to the Questionnaire, p. 87, available at: http://www.oas.org/juridico/portuguese/mesicic5_bra.htm

¹⁴⁸ According to Brazil’s Response to the Questionnaire, penalties based on acts related to corruption means those carried out based on paragraphs LXI and IX of Article 43 of Law No. 4878/65, paragraphs IX, XII and XVI of Article 117 of Law No. 8112/90, and paragraphs IV, X and XI of Article 132, of Law No. 8112/90.

[371] The country under review also provided, in its Response to the Questionnaire, the total number of arrest warrants, coercive transport, and search and seizure operations, in the period 2011 to 2016:



[372] The Committee notes that the information presented above by the country under review shows that technical cooperation among bodies responsible for actions to combat corruption in Brazil have increased and contributed to a considerable increase in the number of investigations, arrests and search and seizure warrants carried out by the Federal Police in recent years related to the acts of corruption established in Article VI.1 of the Inter-American Convention against Corruption.

[373] In this regard, during the on-site visit, representatives from the Federal Prosecution Service reported that cooperation between the Federal Police and the Public Prosecutor's Office and the control bodies has been shown to be very important in combating corruption in recent years and could be improved even more. In this regard, due to the importance of joint work for investigations, the Committee will formulate a recommendation that the mechanisms for integration and coordination be improved even more. (see recommendation 3.3.1 of section 3.2 in Chapter II of this Report).

[374] Again with regard to the criminal investigation of acts of corruption, the Committee emphasizes that the country under review did not provide information regarding the statistical data¹⁴⁹ requested by the Technical Secretariat and the MESICIC Review Subgroup on the total number of inquiries underway, suspended, prescribed and archived or on reports made regarding the acts of corruption stipulated in Article VI (1) of the Convention and, for this reason, will formulate a recommendation to this effect to the country under review (see recommendation 3.3.2 of section 3.2 in Chapter II of this Report).

¹⁴⁹ With respect to statistical data related to criminal investigations of acts of corruption, it should be made clear that the Federal Prosecution Service has the Single System, a system of communication and administrative and finalistic information used by all 276 units of the MPF in the country. Any and all documents, investigative procedure (from the Federal Police or instituted by the MPF itself) or judicial process that reaches a unit of the Federal Prosecution Service must be recorded in the Single System, as are subsequent movements. The inputting of data to the System adheres, *inter alia*, to the criteria of matter (criminal, administrative, combating corruption, environmental, childhood and youth), making it possible to extract statistical data related to criminal investigations of acts of corruption, which can be found at the Transparency Portal of the MPF, in which data is input monthly and available for public consultation at the electronic address <http://www.transparencia.mpf.mp.br>

[375] In regards to the final convictions by the Judicial Branch for acts of administrative improbity, the country under review provided the following information, as a result of the on-site visit:¹⁵⁰

Year	Total <i>res judicata</i> decisions	Convictions imposed by Federal Justice	Convictions imposed by civilian authorities
2012	2251	544	1707
2013	1643	617	1026
2014	1245	395	850
2015	1388	571	817
2016	2077	645	1432
2017 (* up to October)	1436*	494*	942*

[376] The Committee notes that the information contained in the above statistical table reflects the work done by the Judicial Branch with respect to acts of administrative improbity and the punishment of acts of corruption in the country under review. However, the Committee emphasizes that the country under review did not provide information on the statistical data requested by the MESICIC Technical Secretariat and Review Subgroup regarding the adjudication and criminal punishment of the acts of corruption stipulated in Article VI (1) of the Convention and, in particular, on decisions rendered related to cases that resulted in conviction or acquittal or where the statute of limitations ran out due to failure to reach a decision under the conditions or by the deadlines established by law. For this reason, the Committee will formulate a recommendation in this regard for the country under review. (see recommendation 3.3.3 of section 3.2 in Chapter II of this Report).

[377] Nonetheless, the Committee also notes that, according to the National Council of Justice (CNJ),¹⁵¹ the Judicial Branch met only 55.42% of its national target for 2014, with respect to trials regarding crimes of administrative improbity and criminal actions related to crimes against the public administration: “the efforts made by Brazilian Justice to reduce the number of corruption proceedings without a judicial decision resulted in trials involving nearly 109,600 proceedings in 2014. These are old actions pending resolution for at least three years – 20,800 of them related to administrative improbity and another 88,800 related to crimes committed against the public administration. Identifying and judging these proceedings were the objectives of what was called Target 4, a commitment undertaken by the presidents of Brazilian courts in 2013. The number of judged proceedings corresponds to 55.42% of the target, which means providing a legal resolution for 197,800 proceedings related to cases of corruption distributed up to December 31, 2012.”

[378] With regard to the workload of the Brazilian justice system in general, the Committee notes that statistical data from the National Council of Justice “indicates that of the 99.7 million proceedings handled by the Brazilian judiciary in 2014, 91.9 million were at the first level, which

¹⁵⁰ More information can be found in the National Registry of Civil Convictions for acts of administrative improbity – CNIA, available at: <http://www.cnj.jus.br/sistemas/certidoes/20650-cadastro-nacional-de-condenacoes-civeis-por-ato-de-improbidade-administrativa-cnja>

¹⁵¹ See National Council of Justice documents, available at: <http://www.cnj.jus.br/noticias/cnj/79332-tribunais-cumprem-55-da-meta-de-combate-a-corrupcao-no-pais> and <http://www.cnj.jus.br/files/conteudo/destaques/arquivo/2015/04/aaa6d8037cf73ee473ad54e31aa06fa2.pdf>

corresponds to 92% of the total.”¹⁵² In addition, the numbers show that the annual productive capacity of the first level of jurisdiction in 2014 covered “only 27% of the demand (new cases + backlog) requiring its evaluation.” “[...] considering the entire judiciary, the workload per judicial employee is 506 first level proceedings and 232 second level proceedings, a difference of 118%.”

[379] In this regard, the Committee considers it important to mention the excessive burden of cases and an inadequate workforce available at the first level of jurisdiction in the Brazilian Judicial Branch; these factors hamper the achievement of the targets established for the adjudication of proceedings related to cases of corruption in Brazil.

[380] In addition, the Committee notes that, according to the Justice in Numbers Report, “[...] the percentage of cases entering the Judicial Branch electronically has increased linearly, on a sharp curve, since 2012.”¹⁵³ In addition, by the end of 2016, all branches of justice had “procedural demand exceeding the number of employees, positions and functions allocated to the first level of jurisdiction [...].”

[381] On this same subject, during the on-site visit, both public servants and civil society representatives reported that the issues of corruption needed to be handled on a higher priority basis in the justice system, in that there are no courts dedicated exclusively to the subject and judges and employees are overloaded with all the other proceedings underway.¹⁵⁴ In this regard, bearing in mind the information analyzed and considering that cases of corruption are becoming increasingly complicated to prosecute, involving transactions with international dimensions, the Committee will formulate a recommendation in this regard. (see recommendation 3.3.4 of section 3.2 in Chapter II of this Report).

[382] In this context, the Committee considers it important to emphasize the efforts undertaken by the country under review to ensure that the hiring and distribution of employees in the Judicial Branch are carried out in a manner commensurate with the average number of new cases in each level of jurisdiction, by means of CNJ Resolution No. 219/2016,¹⁵⁵ establishing that the Judicial Branch’s workforce should be redistributed by July 1, 2017. As the Committee did not have access to statistical data with which to evaluate the extent of compliance with this provision by the country under review, the Committee considers it important for the country under review to monitor the implementation of this provision each year and to establish penalties for non-compliance. The

¹⁵² See National Council of Justice data, available at: <http://www.cnj.jus.br/programas-e-acoas/politica-nacional-de-priorizacao-do-1-grau-de-juriscao/dados-estatisticos-priorizacao>

¹⁵³ Justice in Numbers Report, p. 100, available at:

<http://www.cnj.jus.br/files/conteudo/arquivo/2017/12/9d7f990a5ea5e55f6d32e64c96f0645d.pdf>

¹⁵⁴ On March 8, 2018, the State under review reported the following: “the information that there are no courts dedicated exclusively to corruption is incorrect. Specialized judicial units (courts) were created in combating money laundering, criminal organizations and corruption both in the State justice systems and in the federal system (such as the 10th court of the TRF of the 1st and 13th Federal Court of Curitiba). In the area of the police, positive initiatives were also recorded, such as the creation of specialized precincts for repression of corruption and diversion of public funds in the 27 regional superintendencies of the Federal Police (DELECORs), in addition to a General Coordinating Unit for Repression of Corruption (CGRC), tied to the Directorate for Investigating and Combating Organized Crime – DICOR/PF. In addition, it is important to emphasize the existence of Centers for Combating Corruption within the sphere of the MPF. “The idea is to bring together in the centers prosecutors of the Republic whose function is to propose criminal actions and address administrative improbity with reference to combating corruption. It is hoped that this centralization and organization of activities will optimize the result of actions involving diversion of public funds.” Information regarding these Centers, their make-up, the rules governing them and their coverage in Brazil is available on the link <http://www.mpf.mp.br/atuacao-tematica/ccr5/institucional/nucleos-de-combate-a-corrupcao> .”

¹⁵⁵ CNJ Resolution No. 210/2016 is available at: <http://www.cnj.jus.br/busca-atos-adm?documento=3110>

Committee will formulate a recommendation to this effect (see recommendation 3.3.5 of section 3.2 in Chapter II of this Report).

[383] With regard to impunity for the acts of corruption indicated in Article VI (1) of the Convention, the Committee notes that “the numbers compiled by the National Council of Justice (CNJ) on the courts show that from January 1, 2010 to December 31, 2011, 2,918 criminal actions and proceedings” related to acts of corruption and money laundering were declared to be time-barred.¹⁵⁶ The Committee notes that as of the end of 2011, 25,799 corruption, money laundering and acts of improbity proceedings were handled by the Judicial Branch. Comparatively, this means that time-barred proceedings represent more than 11% of total actions in 2010 and 2011.

[384] In this context, The Committee notes that the current statute of limitations under Brazilian Criminal Law is one of the factors of impunity in crimes in general and, primarily, in corruption cases, due to strategies to conceal the crime. For example, the system allows for retroactive prescription, based on the penalty imposed concretely on the convicted, i.e., the penalty resulting from the *res judicata* decision for the indictment, pushing back the date of accusation. Article 110, (1) reads as follows: *“The prescription, after the res judicata conviction for the indictment or after the appeal is denied, is governed by the penalty imposed, and may in no case begin on a date prior to the accusation or complaint .”*

[385] Thus, the Committee considers it useful for the country under review to consider amending Brazil’s criminal prescription system so as to combat impunity. In this regard, the Committee will formulate a recommendation. (see recommendation 3.3.6 of section 3.2 in Chapter II of this Report).

3.3. Recommendations

[386] In light of the observations formulated in sections 3.1 and 3.2 of Chapter II of this Report, the Committee suggests that the country under review consider the following recommendation:

- 3.3.1. Adopt the measures necessary to strengthen cooperation among federal, district, state and municipal institutions and bodies, including the Federal Police, the Public Prosecutor’s Office, the Courts of Accounts and the Federal Comptroller General’s Office, in the search for evidence and information of interest in investigations or criminal procedures, so as to facilitate increased efficacy in arrests and punishment for cases of corruption (see paragraph 373 of section 3.2 in Chapter II of this Report).
- 3.3.2. Prepare and publish, each year, detailed statistical information compiled regarding investigations initiated by the Federal Police and by the Public Prosecutor’s Office, making it possible to establish the number of suspended, lapsed, archived and ongoing inquiries, as well as the number of reports that were submitted, so as to be able to identify challenges and recommend corrective measures, if necessary. (see paragraph 374 of section 3.2 in Chapter II of this Report).

¹⁵⁶ See data from the National Council of Justice, available at: <http://www.cnj.jus.br/noticias/cnj/60017-justica-condena-205-por-corrupcao-lavagem-eimprobidadeem-2012> e http://www.cnj.jus.br/images/dti/Sistemas/lavagem_dinheiro/Consolidacao_corrupcao_lavagem_dinheiro_improbidade_adm.xlsx

- 3.3.3. Prepare detailed statistical reports compiled annually on ongoing cases in the Judicial Branch related to acts of corruption, making it possible to know how many are underway, suspended, lapsed, archived with no decision on the merits, how many are pending a decision on the merits, how many resulted in a conviction and how many resulted in acquittal, so as to be able to identify challenges and recommend corrective measures, if necessary (see paragraph 376 in section 3.2 in Chapter II of this Report).
- 3.3.4. Consider expanding the number of specialized anti-corruption courts and adopting relevant measures so that, depending on the availability of resources, the Judicial Branch will be able to have the number of courts required to handle cases of corruption (see paragraph 381 in section 3.2 in Chapter II of this Report).
- 3.3.5. Adopt relevant measures to ensure adequate performance of Judicial Branch functions, particularly with respect to the adjudication of cases related to the acts of corruption indicated in Article VI (1) of the Convention, establishing monitoring mechanisms to equalize the distribution of its workforce between the first and second levels of jurisdiction in proportion to the caseload, based on the criteria established in CNJ Resolution No. 219/2016. (see paragraph 382 in section 3.2 in Chapter II of this Report).
- 3.3.6. Consider amending the criminal statute of limitations through changes in the Penal Code so as to guarantee reduced impunity in cases of corruption (see paragraph 385 in section 3.2 in Chapter II of this Report).

4. GENERAL RECOMMENDATIONS

Recommendation 4.1 suggested by the Committee that requires additional attention within the Framework of the Third Round:

Design and implement, when appropriate, training programs for public servants responsible for implementing the systems, provisions, measures, and mechanisms considered in this report, for the purpose of ensuring that the said systems, provisions, measures and mechanisms are adequately known, managed, and implemented.

[387] Given that in sections 1, 2 and 3 of Chapter II of this Report provides an updated and detailed follow-up of the recommendations formulated to Brazil in the Second Round of Review, as well as the systems, standards, measures and mechanisms that the suggested recommendations concern, the Committee believes that this recommendation is redundant.

Recommendation 4.2 suggested by the Committee that requires additional attention within the Framework of the Third Round:

Select and develop procedures and indicators, when appropriate and where they do not yet exist, to analyze the results of the systems, provisions, measures, and mechanisms considered in this report, and to follow-up on the recommendations made herein.

[388] Given that in sections 1, 2 and 3 of Chapter II of this Report provides an updated and detailed follow-up of the recommendations formulated to Brazil in the Second Round of Review, as well as the systems, standards, measures and mechanisms that the suggested recommendations concern, the Committee believes that this recommendation is redundant.

III. REVIEW, CONCLUSIONS AND RECOMMENDATIONS ON IMPLEMENTATION BY BRAZIL OF THE CONVENTION PROVISIONS SELECTED FOR THE FIFTH ROUND

1. INSTRUCTIONS TO GOVERNMENT PERSONNEL TO ENSURE PROPER UNDERSTANDING OF THEIR RESPONSIBILITIES AND THE ETHICAL RULES GOVERNING THEIR ACTIVITIES (ARTICLE III, PARAGRAPH 3 OF THE CONVENTION)

[389] In accordance with the Methodology adopted by the Committee for the Fifth Round regarding the implementation of Article III, paragraph 3 of the Convention, which refer to measures that intended to establish, maintain and strengthen “*instruction[s] to government personnel to ensure proper understanding of their responsibilities and the ethical rules governing their activities,*” the country under review selected the personnel of the Ministry of Transparency and the Office of the Comptroller General (CGU), as well as the senior officials of the Federal Public Administration and members of the ethics committees of the bodies and entities belonging to the Ethics Management System of the Federal Executive Branch, the central authority of which is the Public Ethics Commission (CEP), taking into account its important responsibilities, as described in Brazil’s Response to the Questionnaire.

[390] The following is a brief description of the two bodies selected by Brazil that are to be examined in this section.

[391] – The Ministry of Transparency and the Office of the Comptroller General (CGU) was created on May 28, 2003, with the publication of Law No. 10.683. The CGU is the body of the Federal Government responsible for carrying out activities related to the defense of public assets and increased transparency in management, through internal control actions, public audits, correction, prevention and combating corruption and the ombudsman’s office. The CGU must also exercise, as the central agency, the technical supervision of entities that make up the Internal Control System and the Correction System and the ombudsman’s units of the Federal Executive Branch, providing the necessary regulatory guidance.

[392] – The Public Ethics Commission (CEP) was created on May 26, 1999 to promote ethics within the sphere of the Federal Executive Branch, targeting institutional strengthening and combating misconduct, through the establishment of an effective standard of ethical posture. The CEP reports to the President of the Republic and acts as the advisory body to the President and Ministers of State in the area of public ethics. In this context, the CEP administers the enforcement of the Code of Conduct of the Senior Federal Administration (CCAFAF) and resolves doubts regarding the interpretation of the standards of the Code of Professional Ethics of Civil Public Servants of the Federal Executive Branch. It coordinates, evaluates and supervises the Public Ethics Management System of the Federal Executive Branch, which includes the ethics committees of federal bodies and entities.

1.1 Existence of a legal framework and/or other measures

[393] Brazil has a set of provisions and/or measures that provide instructions to government personnel to ensure proper understanding of their responsibilities and the ethical rules governing their activities, among which the following are highlighted:

- Various legal provisions and other common measures applicable to the activity of the Public Ethics Commission (CEP) and the personnel of the Ministry of Transparency and the Office of the Comptroller General (CGU), in particular:

[394] - Law No. 8.112/1990,¹⁵⁷ which governs the legal regime of federal civil public servants, the autonomous agencies and federal public foundations and includes, in Title IV on the disciplinary regime, the responsibilities, the duties, the prohibitions and penalties applicable to civil servants.

[395] – The Code of Professional Ethics of the Public Servant of the Federal Executive Branch, approved by Decree No. 1.171/1994,¹⁵⁸ which establishes principles, lists duties and imposes restrictions on all federal public servants. The Code stipulates as one of the fundamental duties of public servants that of “resisting all pressures from hierarchical superiors, contractors, interested parties and others who seeks to obtain any favors, gifts or undue advantages deriving from immoral, illegal or unethical actions and reporting them.”

- Statutory and other legal provisions applicable, in particular, to personnel of the Ministry of Transparency and the Office of the Comptroller General (CGU), notably:

[396] – The Code of Professional Conduct of the Public Servant of the Federal Comptroller General’s Office,¹⁵⁹ which provides that the employee must “*value ethics as a way to improve behaviors, attitudes and actions, basing their relationships on the principles of justice, honesty, democracy, cooperation, discipline, governance, responsibility, commitment, transparency, trust, civility, respect and equality.*”

[397] The above-mentioned code includes the behaviors to be observed, including maintaining, in one’s personal and professional life, conduct appropriate to moral, ethical and social values and “*performing, with timeliness and professionalism, the duties entrusted to them, striving for the highest standard of prudence, honesty and quality, and not evading any responsibility resulting therefrom*” The code also provides restrictions, notably a prohibition on using information for any personal or other advantage contrary to the law or that results in harm to the legitimate and ethical objectives of the organization..

[398] In addition to the common rules applicable to CGU staff as described above, the following aspects related to the CGU were mentioned in the Response to the Questionnaire and during the on-site visit:

[399] With regard to how the CGU employee is informed regarding his or her responsibilities and functions, the agency explained that communication is both verbal and written. In addition, the CGU clarified that the laws and regulations governing the career¹⁶⁰ are public and on the Ministry’s website, as well as being included in the notice calling for public competition, which covers the activities to be carried out by auditors and technical staff.

¹⁵⁷ Law 8.112 of December 11, 1990 may be consulted at: http://www.planalto.gov.br/ccivil_03/leis/L8112cons.htm

¹⁵⁸ The Code of Professional Ethics of the Public Servant of the Federal Executive Branch can be consulted at: http://www.planalto.gov.br/ccivil_03/decreto/d1171.htm

¹⁵⁹ The Code of Professional Conduct for the Public Servant of the Federal Comptroller General’s Office may be consulted at: <http://www.cgu.gov.br/sobre/institucional/comissao-de-etica/arquivos/codigo-de-conduta-cgu.pdf>

¹⁶⁰ Decree-Law No. 2346/19878 creates the Finances and Control career and Decree No. 95076/19879 regulates it; Decree No. 434/199210 governs the filling of career positions; and Decree No. 84669/198011 governs the functional progression in careers with the Federal Executive, including the criteria to be applied in evaluating employees. CGU Internal Rules of Procedure is available at: <http://www.cgu.gov.br/sobre/legislacao/arquivos/portarias/regimento-interno-cgu-2017.pdf>

[400] As for when the employee is informed regarding his responsibilities and functions, the country under review, in its Response to the Questionnaire, explained that: “*the information is provided both at the start of activities and during the course of performing his duties in this position. Even before participating in the public examination, the employee is informed through the call notice, published in the Official Gazette of the Union [...]. There is also widespread dissemination of the internal rules and procedures of the CGU.*” In addition, it was also reported that the employee is informed of his responsibilities and functions in the case of a change in duties upon nomination/appointment to the Senior Management and Advisory Services Group (DAS), and Executive Branch Commissioned Positions (FCPE) or Contract Auditor.

[401] With regard to the existence of programs and induction (or training) courses, training or instruction for the employee to guide him on how to assume his responsibilities and properly carry out his functions and, in particular, to make him aware of the risks of corruption inherent in the position, Brazil explained that the public examination for filling careers in Finances and Control provides for conducting training courses, as provided in the single paragraph of Article 1 of Decree No. 434/1992.¹⁶¹ It was also reported that, on the occasion of promotion, the employee holding this position goes through a refresher course on topics related to the activities of the CGU.

[402] In addition, the CGU has an Annual Training Plan that provides courses on public management, control, detection and suppression of diversion of funds, and anti-corruption activities, among other subjects.

[403] In this context, the CGU also reported on its Integrity Program,¹⁶² the objective of which is “*the identification, processing and systematic management of the risks related to violation of the agency’s integrity, so as to improve governance and the organizational environment.*” According to the agency, the 2017-2020 Integrity Plan is being developed; it includes mapping of integrity risks in each area, identified with the participation of employees.

[404] In addition, the CGU clarified that it conducts training and instruction activities for other federal bodies and entities, emphasizing the following: courses for public servants, employees and authorities, seeking improvement in the activities of the bodies and entities in the exercise of their disciplinary functions; preparation of booklets to guide public managers on subjects related to the areas of personnel audit, special rendering of accounts and improvement of public spending; conduct of the international seminar on audit and internal control and the “Public Management Strengthening Program” for conducting on-site training of municipal managers on the proper use of federal resources.”

[405] With regard to the use of modern communications technology to inform employees regarding their responsibilities and functions and guide them on how to assume and exercise them honorably, the CGU explained that it makes wide use of the Intranet and internal communications through e-mail marketing.

[406] As for the existence of bodies to which employees may turn to obtain information or clear up doubts on how to assume their responsibilities and carry out their functions properly, the CGU clarified that its employees may turn to their immediate superiors, to information made available on the Intranet and step-by-step process flows made available to clear up doubts regarding their

¹⁶¹ Decree No. 434/1992 may be consulted at: https://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d0434.htm

¹⁶² The CGU Integrity Program was established by Official Order No. 750/2016, available at: http://www.oas.org/juridico/PDFs/mesicic5_br_resp_ane10_p10.pdf

responsibilities and functions. In addition, an internal ombudsman's channel for the agency's employees is available on the Intranet, through which queries can be made.

[407] As for the existence of entities responsible for defining, steering, advising or supporting the manner in which personnel are to be informed of their responsibilities and functions, the country under review explained that the CGU is responsible, as the central body of the Internal Control System and the Correction System and the ombudsman's units of the Federal Executive Branch, for providing the rules-related guidance necessary for its personnel, as well as providing the technical supervision of the other bodies and entities of the above-mentioned systems, with respect to the activities of internal control, audit, ombudsman's services, and correction.

[408] According to the CGU, personnel are informed of the ethical rules governing their activities both in writing and verbally. According to Article 5 of the Code of Professional Conduct of the Employees of the CGU, *"any employee who takes up a position in the Federal Comptroller General's Office will sign an agreement in which he declares his knowledge of the provisions of this Code of Conduct, signing a commitment to observe the code in the performance of his duties."* In addition, the agency reported that *"when signing the Assumption of Office Agreement, the employee also states that he is aware of and will faithfully perform the responsibilities and duties of the positions, agreeing to observe the Code of Professional Ethics of the Civil Public Servant of the Federal Executive Branch."*

[409] The Ministry also explained that personnel are informed regarding the ethical rules governing their activities, both when beginning to perform them and during the course of their performance of their duties in the position. In this regard, the notice calling for competitive examination includes as testing materials the Code of Professional Ethics of the Civil Public Servant of the Federal Executive Branch and the Ethics Management System of the Federal Executive Branch. In addition, according to the CGU, when there is a change in the applicable system of ethical standards, the employee is informed immediately, through institutional e-mail.

[410] With regard to the existence of introductory, training or instructional programs and courses for personnel on the ethical rules governing their activities and, particularly, on the consequences of failure to abide by them in public service and for wrongdoers, the CGU reported that the Finances and Control career training course includes a specific module on ethics. In addition, the "Improvement Program for Functional Promotion of Finances and Control Employees in the CGU" includes a mandatory distance-learning course on "Ethics and Public Service" coordinated by the National School of Public Administration. In addition, in 2016, a CGU Ethics Commission promoted the first seminar on "Ethics and Public Administration."

[411] With reference to the use of modern communication technologies to apprise personnel of the ethical rules governing their activities and to provide guidance as to their scope or interpretation, the CGU explained that it uses them, *"including through the CGU website and the Intranet, emphasizing the agency's informative weeks, sent by e-mail to all colleagues, by means of which the CGU Ethics Commission disseminates guidance on ethical rules on a bi-weekly basis."*¹⁶³

[412] In addition, during the on-site visit, CGU representatives reported that *"the ever-increasing use of technological resources has provided a means for promoting the*

¹⁶³ On March 8, 2018, the State under review clarified that the bi-weekly action is not continuous and it occurred in particular during the first half of 2017.

dissemination of ethics, promoting the subject so that personnel will have a proper understanding of their responsibilities and the ethical rules governing their activities.”

[413] As for the existence of bodies to which personnel can resort to obtain information or resolve doubts about the scope or interpretation of the ethical rules governing their activities, the CGU explained that the responsible body is the CGU’s Ethics Commission.¹⁶⁴ According to the country under review, there are various channels of communication with the CGU Ethics Commission on the body’s pages (Intranet and Internet); e-mail (comissaodeetica@cgu.gov.br); in-person help, a dedicated telephone line; and through the Electronic System for Preventing Conflict of Interest (SeCI) “*that allows all interested personnel to make queries regarding concrete situations of potential conflict of interest and to seek authorization to carry out a private activity.*”

[414] With regard to the existence of a governing organ, authority or body responsible for defining, steering, giving guidance on, or supporting the manner in which personnel are to be informed of the ethical rules governing their activities, the CGU again referred to the Ethics Commission, whose jurisdiction includes “*recommending, supporting, evaluating and carrying out, within the Ministry, the development of actions aimed at dissemination, training and instruction regarding the rules of ethics and discipline.*”

- Various types of legal provisions and other applicable measures related to the actions of the Public Ethics Commission (CEP), with respect to Senior Federal Administration officials and Ethics Commission personnel, notably including:

[415] – The Code of Conduct of the Senior Federal Administration (CCAAF), for those holding the highest positions in the Federal Executive Branch. The Code’s rules apply to the following public officials: “*I – Ministers and Secretaries of State; II – those holding special positions, executive-secretaries, secretaries or equivalent officials holding Senior Management and Advisory Services Group (DAS) positions, at level six; III – presidents and directors of national agencies, autonomous agencies, including special agencies, foundations maintained by the government, public companies and quasi-governmental companies.*”

[416] One of the purposes of the CCAAF is to “*make clear the ethical rules of conduct of officials in the senior-level of the Federal Public Administration, so that society can assess the integrity and honesty of the governmental decision-making process.*”¹⁶⁵

[417] In addition to the above-mentioned code of conduct applied to senior officials in the Federal Public Administration, in the Response to the Questionnaire and in the on-site visit, the following aspects related to the Public Ethics Commission were mentioned:

[418] First, during the on-site visit, the CEP reported that the Ethics Commission has seven members appointed by the President of the Republic for non-concurrent terms of three years, renewable only once. Activities within the CEP do not entail any compensation for its members and the work done by the Commission is considered important public service. The CEP ordinarily meets once a month, but it has an Executive Secretariat linked to the Staff of the Office of the President of the Republic, which is responsible for providing technical and administrative

¹⁶⁴ Internal rules of procedure of the Ethics Commission of the Ministry of Transparency, Supervision and the Federal Comptroller General’s Office, available at: http://www.oas.org/juridico/PDFs/mesicic5_br_resp_ane19_p15.pdf

¹⁶⁵ See Article 1 (III) of the Code of Conduct of the Senior Federal Administration, available at: http://www.planalto.gov.br/ccivil_03/codigos/codi_conduta/cod_conduta.htm

support for the Commission's work on a full-time basis. The Executive Secretariat has few employees as its staffing schedule includes a total of only 16 employees: an Executive Secretary, a Deputy Executive Secretary, seven employees on the team monitoring the Code of Conduct of the Senior Federal Administration; five administrative, events and communications staff (5); and two secretaries.

[419] In this context, the CEP explained that *"the limited size of the team does not require formulation of an internal training session control system. The professionals are already selected on the basis of specific qualifications and are trained in-house by team colleagues."* For this reason, both the country under review and the Committee considered it relevant to analyze the role of the CEP as the central agency coordinating Management of the Ethics of the Federal Executive Branch, responsible for guiding the Ethics Commissions of other bodies and entities that make up the Federal Executive Branch, and employees holding positions or functions covered by the Code of Conduct of the Senior Federal Administration.

[420] As a result of the on-site visit, the CEP reported that currently 283 senior officials of the Federal Public Administration fall under the responsibility of the CEP:¹⁶⁶ 28 Ministers of State; 52 special positions and 203 employees holding positions in the Senior Management and Advisory Services Group (DAS0, level six). In addition, the CEP is responsible for analyzing queries and reports of conflicts of interest, also from officials holding DAS level five positions, representing an additional 1,051 staff under the responsibility of the CEP in this area.¹⁶⁷

[421] With regard to informing senior officials in the Federal Public Administration of their responsibilities and functions, the CEP reported that it is up to each body or entity to inform them directly.

[422] With reference to the occasion when senior officials are informed of ethical rules governing their activities, the CEP explained as follows: *"soon after the appointment of an official to the highest positions in government, the Public Ethics Commission sends a copy of the Code of Conduct of the Senior Federal Administration to all officials covered by the code, along with information that those officials are required to provide, within 10 days of assuming office, a statement on their asset situation, nepotism and conflict of interest (as provided in Law No. 12.813 and the CCAAF)."*

[423] As regards the existence of introductory, training or instructional programs and courses for senior officials on the ethical rules governing their activities and, particularly, on the consequences of failure to abide by them for public institutions and for wrongdoers, the CEP clarified that there are various training and instruction initiatives both for senior officials and employees that make up the Ethics Commissions of the bodies that make up the Ethics Management System of the Federal Executive Branch. The CEP reported that since 2002 it has been conducting international seminars, lectures and various courses and events related to ethics in public service.

[424] In addition, the CEP offers, in partnership with the National School of Public Administration, a continuous on-line course on "Ethics and Public Service" for employees and public officials in the three branches of government and interested citizens. According to the

¹⁶⁶ See Transparency Portal, available at: <http://www.transparencia.gov.br/servidores/Funcao-ListaFuncoes.asp>

¹⁶⁷ On March 8, 2018, the State under review clarified the following: *"the data presented are correct with respect to the information available on the Transparency Portal. However, they do not cover all the positions "equivalent" to DAS 5 and 6, particularly those related to public companies and quasi-governmental companies. In the internal registry system of the Public Ethics Commission, the EticaWeb System, the senior officials covered by the activities of the CEP total 3,593 individuals"*.

CEP: *“the objective of the course is to recognize ethical implications in their professional practice, ensuring procedures and decisions consistent with the values and principles governing the performance of their positions; and to identify the main areas of progress and challenges in Brazilian public service, particularly in terms of the employee’s values and individual conduct, for the consolidation of the citizenry and the democratic state.”*

[425] With regard to the use of modern communications technologies to inform senior officials and staff belonging to the Ethics Commissions, queries can be sent to the CEP by e-mail, by sending forms previously completed, which are found on-line on the CEP’s website.¹⁶⁸ Information was also provided on the existence of distance learning courses.¹⁶⁹ During the on-site visit, CEP staff recognized that, while the development of technological tools is one of the CEP’s priority actions, the use of technology is still quite limited, due to restrictions on human and financial resources.

[426] In addition, the CEP reported that the ethics commissions existing in the bodies and entities of the Federal Public administration are developing various actions to disseminate the culture of ethics in their respective institutions, including by using the internal IT network (Intranet): *“as a rule, the Internet sites of the bodies and entities of the Federal Public Administration have a space for the respective ethics commissions and these spaces are often used to disseminate guidance regarding ethical behavior by public servants.”*

[427] With reference to the existence of bodies to which personnel can turn to obtain information or resolve doubts regarding the scope or interpretation of the ethical rules governing their activities, public servants belonging to the Ethics Commissions of the various bodies of the Federal Executive Branch may consult the Public Ethics Commission (CEP).

[428] In this context, the CEP explained that all the bodies and entities of the Federal Public Administration have Ethics Commissions, which are responsible for *“acting as an advisory body for leaders and public servants with their respective body or entity”* (Art. 7 (I) of Decree No. 6029/2007). In addition, the Public Ethics Commission is responsible for coordinating, evaluating and supervising the Ethics Commissions and other bodies of the Public Ethics Management System of the Federal Executive Branch, issuing resolutions intended to guide the ethical conduct of public servants.

1.2 Adequacy of the legal framework and/or other measures

[429] With respect to the statutory and other legal provisions reviewed by the Committee on the measures intended to provide instructions to government personnel of the two bodies selected by the country under review that ensure proper understanding of their responsibilities and the ethical rules governing their activities, the Committee notes that they are relevant for promoting the purposes of the Convention.

¹⁶⁸ See forms on CEP website, available at:

http://etica.planalto.gov.br/sistema-de-gestao-da-etica/copy_of_consultas-e-denuncias

¹⁶⁹ On March 8, 2018, the State under review reported that *“a distance learning course has been under development since 2017, through a partnership between the CEP and the ENAP, but with a different subject matter and target audience. Titled “Introduction to Management and Verification of Public Ethics,” the new course seeks to offer a practical guide to new members of the Ethics Commissions, the goal being to subsidize activities and responsibilities for ethics management and make available the basic knowledge needed to implement this management in bodies and entities of the Federal Executive Branch”*

[430] Nevertheless, the Committee considers it appropriate to set forth some observations with respect to these provisions and/or other measures:

[431] First, with reference to the existence of introductory, training or instructional programs and courses for personnel to guide them on how to assume their responsibilities and perform their functions properly and, particularly, for making them aware of the risks of corruption inherent in their positions, the Committee emphasizes the CGU Integrity Program, adopted by means of Official Order No. 750, of April 20, 2016, which should be made operational based on an Integrity Plan currently being developed.

[432] According to Article 3 of the indicated Official Order, the plan will include standards of ethics and conduct; communication and training; channels for reporting and control actions; disciplinary measures; and actions for remediation and improvement of work practices. In addition, the plan also includes revision of the Public Servant Code of Conduct. In this regard, during the on-site visit, representatives of the CGU Ethics Commission reported that “*revision of the Public Servant Code of Conduct will allow for a more updated and efficient approach to the subject for internal public servants.*” Thus, taking into account the importance of the actions provided in the CGU Integrity Program for achieving the purposes of the Convention, the Committee will formulate a recommendation that the operational plan be completed and implemented, including revision of the Public Servant Code of Conduct, according to a schedule prepared for the purpose (see recommendation 1.4.1 in Chapter III of this Report).

[433] With regard to the existence of a governing organ, authority or body responsible for defining, steering, giving guidance on, or supporting the manner in which senior officials are to be informed of the ethical rules governing their activities, the Committee takes note that the Public Ethics Commission has highly relevant powers with regard to achieving the purposes of the Inter-American Convention against Corruption, due to its actions as an advisory body to the President of the Republic and the Ministers of State on the subject of public ethics; as the entity responsible for enforcement of the Code of Conduct of the Senior Federal Administration and the Code of Professional Ethics of the Public Civil Servant of the Federal Executive Branch; and as the coordinator of the Public Ethics Management System of the Federal Executive Branch, guiding the other Ethics Commission. Despite this, both in Brazil’s Response to the Questionnaire and during the on-site visit, CEP staff explained that the entity has limited human and financial resources. Thus, the Committee will formulate a recommendation to this effect (see recommendation 1.4.2 in Chapter III of this Report).

[434] As for the manner in which senior officials are informed regarding the ethical rules governing their activities, the Committee notes that, while the CEP sends senior officials a copy of the Code of Conduct of the Senior Federal Administration soon after their appointment, the Committee notes that there are no measures or actions to ensure a proper understanding of the ethical rules governing their activities. In this respect, the Committee will formulate a recommendation that the country under review adopt the measures necessary to ensure that the rules of the Code of Conduct of the Senior Federal Administration are read and properly understood by these public servants. (see recommendation 1.4.3 in Chapter III of this Report).

[435] The Committee notes that the CEP makes limited use of modern communications technologies. While there is an electronic system to respond to queries from senior officials and the ethics commissions, the Committee did not have information regarding the existence of other electronic systems to, for example, send resolutions to personnel in government agencies to ensure proper understanding of the ethical rules governing their activities. Thus, the Committee will formulate a recommendation that the country under review adopt the measures necessary so

that the CEP uses additional modern technologies in performing its functions (see recommendation 1.4.4 in Chapter III of this Report).

1.3 Results of the legal framework and/or other measures

- Results related to training of personnel of the Ministry of Transparency and Office of the Comptroller General (CGU)

[436] In its Response to the Questionnaire,¹⁷⁰ the country under review provided the following information regarding results related to training offered by the Ministry of Transparency and Office of the Comptroller General (CGU) for the proper understanding of the responsibilities and functions of their personnel and employees belonging to the remaining bodies and entities of the Federal Executive Branch:

[437] First, the CGU submitted the “Annual Report on Performance of the 2016 Training Plan,”¹⁷¹ a training policy instrument for CGU personnel, regulated by Official Order CGU No. 527, of April 11, 2008, and the National Personnel Development Policy of the Federal Public Administration, established by Decree No. 5707, of February 23, 2006. The report contains information on the objectives and guidelines of the annual training plan; its targets and indicators; the definition of training events, divided into short-, medium-, and long-duration events; the leaders’ development program and training and upgrading actions such as courses in foreign institutions; as well as benchmark issues for conducting training events.

[438] In this context, the above-mentioned report includes the total CGU budget for training in 2016 amounting to R\$1,765,531.78, to which the Program to Strengthen Prevention of and Combat Corruption in Brazilian Public Management (Proprevine) provided R\$765,531.78 and the National Treasury provided R\$1,000,000.00 (one million reales).¹⁷²

[439] In addition, the CGU reported that it develops educational manuals and booklets on ethics and integrity, which are public and available in digital form for consultation by public servants and Brazilian citizens, on the following website: <http://www.cgu.gov.br/Publicacoes>

[440] As a result of the on-site visit, the CGU reported the total number of training events for its personnel, carried out between 2013 and 2017:

Year	Number of Personnel	Total Training Events
2017	1828	39
2016	1899	160
2015	2012	131
2014	1874	118
2013	1950	182

[441] Regarding the total number of staff members who took promotion courses, the CGU provided the following information with respect to the period from 2013 to 2017:

¹⁷⁰ See Brazil’s Response to the Questionnaire, p. 18, available at:

http://www.oas.org/juridico/PDFs/mesicic5_br_respuesta.pdf

¹⁷¹ The Annual Report on Performance of the 2016 Annual Training Plan may be consulted, in Portuguese, at:

http://www.oas.org/juridico/PDFs/mesicic5_br_resp_ane9_p9.pdf

¹⁷² According to Action 4572 on “Training of Federal Public Servants in the Qualification and Requalificationonn Process.”

YEAR	Federal Auditor of Finances and Control (AFFC)	Finance and Control Expert (TFFC)	TOTAL
2017	38	1	39
2016	156	4	160
2015	106	25	131
2014	117	1	118
2013	173	9	182

[442] As for the type of training, the Ministry reported that most courses between 2013 and 2017 were offered as distance learning courses, i.e., 3,307 courses, representing 55% of the total, compared to 2,694 classroom-based courses conducted.

[443] In addition, the following charts shows data by type of training in the period between 2013 and 2017:

Type	2017	2016	2015	2014	2013	Totals	%
Post	19	43	55	13	14	142	3%
Short and medium duration ¹⁷³	174	1556	395	266	863	3254	54%
Training license	585	756	721	450	93	2605	43%
						6001	100%

[444] According to the CGU, the frequency of the training offered depends on specific criteria for each course type or method. It also reported that it has a fully-dedicated specialized division to instruct and support all of the institution’s training processes and that there is a CGU Development and Training Policy Management Committee (CCAP).

[445] With regard to the methodology used to verify whether the purpose of training has been achieved, the CGU reported, during the on-site visit, that “*all application forms supporting approval of the course identify all the skills that will be improved, which should be in line with the CGU’s strategic planning and, thus, the principles and values disseminated by the institution. All courses are evaluated by the participants; dissemination proposals are requested for the most important courses, which can be conducted through lectures or courses prepared by internal multipliers.*”

[446] Taking into consideration the results presented in this section, the Committee recognizes the relevance of the training actions undertaken by the Ministry of Transparency and Office of the Comptroller General (CGU) in order to transmit instructions to the personnel of government agencies to ensure proper understanding of their responsibilities and the ethical rules governing their activities.

¹⁷³ According to the CGU, the short- and medium-duration courses include seminars, congresses and the like, professional certification and other advanced training courses conducted in up to 360 days.

[447] As for the dissemination of training activities, the CGU reported, during the on-site visit that, depending on their scope, courses are widely disseminated on the Internet, through e-mail marketing, posters in the elevators, as well as by area managers. The courses conducted are not publicized for participation by the general public, given that their aim is to meet the CGU's internal requirements. On the other hand, citizens will be able to access information on the courses conducted by the CGU through the Access to Information Law (LAI).

[448] The Ministry also reported the existence of the Skills-Based Management System, “*a management tool that makes it possible to plan, monitor and evaluate training actions based on identification of the knowledge, skills and attitudes necessary for the performance of employees' functions, by means of the Training Requirements Survey (LNC) based on the measurement of skills gaps.*”

[449] With reference to the training activities of the Ombudsman's Offices Strengthening Program (PROFORT), the CGU reported, during the on-site visit, that there are 313 federal ombudsman's offices in the various states, in addition to the 191 ombudsman's offices of state and municipal bodies that are part of the Program, of which 48 currently make up the National Network of Ombudsman's Offices. The PROFORT establishes the Ombudsman's Offices Continuous Training Policy (PROFOCO), which includes the conduct of on-line and in-person training, post-graduate courses, seminars and conferences in addition to the preparation of manuals and publications. Regarding the PROFOCO, the country under review presented the following data: 1,360 training events carried out in 2014; 3,120 training events in 2015 and 4,211 training events in 2016. It also reported that “*in 2017, more than 53,000 public servants have already been reached by PROFOCO products.*” Additionally, the CGU reported that the Ombudsman's Certification course was launched in March 2017¹⁷⁴ and should have a total of 21,269 registrants in the first six months.

[450] Finally, with respect to the statistics of the CGU Ethics Commission, the CGU explained the following: “*communication and guidance actions throughout 2016 and 2017 were issued to all colleagues (a total of 2,738 people). The Commission analyzed 37 processes in 2013; 66 processes in 2015; 79 processes in 2016 [...]. These processes include conflict of interests queries, requests for authorization to engage in private activity; queries regarding the application of the Code of Conduct; reports:*”

Year	Total Processes	Queries (total / %)	Reports (total / %)	Other (total / %)
2014	37	32 (86.48%)	1 (2.71%)	4 (10.81%)
2015	66	60 (90.91%)	4 (6.06%)	2 (3.03%)
2016	79	71 (89.87%)	3 (3.80%)	5 (6.33%)
2017 (September)	58	25 (43.10%)	11 (18.97%)	22 (37.93%)

¹⁷⁴ Additional information on the Ombudsman Certification course is available at: <http://www.ouvidorias.gov.br/ouvidorias/certificacao>

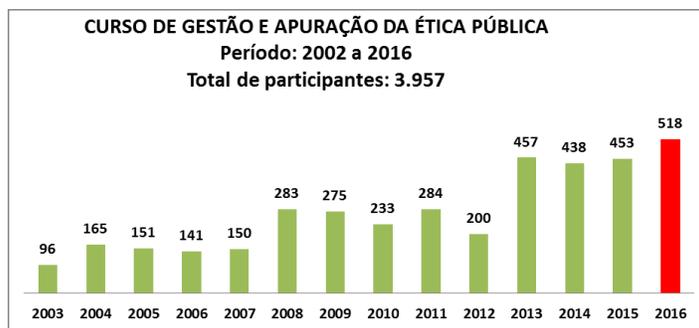
- Results related to the actions of the Public Ethics Commission (CEP)

[451] With regard to the actions of the Public Ethics Commission (CEP), the graphs below show the results obtained from the application of provisions and measures related to instructions regarding ethical standards, which were included in Brazil's Response to the Questionnaire.¹⁷⁵

[452] The first graph shows the number of participants, by year, in the International Seminar on "Ethics in Management" between the years 2002 and 2016, with a total of 4,146 participants. According to the CEP, the main objectives of the seminar are "to share experiences and instruments for disseminating ethics in the Federal Executive Branch, evaluate ethics management actions in public administration and promote discussion, involving public employees, specialists and civil society, regarding issues related to ethics. The seminar consists of a series of panels and conferences that, over a period of two days, address issues related to ethical conduct in public service. Since 2015, space is also reserved for Ethics Commissions that win the Ethics Management Good Practices Competition, who share their experiences with the public. [...] The seminar's target audience includes senior officials, Ethics Commission members, public employees with responsibility for ethics management in the entities and bodies of the Federal Executive Branch and the other branches, national and foreign specialists, in addition to representatives from civil society and the private sector."



[453] The second graph shows the number of participants, by year, in the course on "Management and Verification of Public Ethics"; a total de 3.957 public servants were trained between 2002 and 2016:



[454] In addition, in its Response to the Questionnaire, the CEP reported that it conducted 172 technical visits between 2009 and 2016. According to the CEP, "the number of annual technical visits is not considered a management indicator by the SECEP. The technical visits are

¹⁷⁵ See Brazil's Response to the Questionnaire, p. 22, available at: http://www.oas.org/juridico/PDFs/mesicic5_br_respuesta.pdf

an additional way to provide support to troubled ethics commissions. Merely counting the number of annual visits does not adequately assess the impact of the visits made, in that the bodies of the federal public administration are very different in terms of composition and size and the Ethics Commissions have different levels of organization.”



[455] As a result of the on-site visit, the CEP reported that, between the years 2012 and 2016, 655 consultations were recorded, resulting in an average of 131 consultations per year. The CEP also clarified that, since October 2016, it has adopted “a computerized system of procedural control that makes it possible to produce more precise statistics,. Data prior to that period were gathered manually and are thus not so precise. It is notable that there were 237 (two hundred thirty-seven) consultations in 2017, and there has already been a response to 210 (two hundred ten) of them. In addition to these consultations, the CEP responded in the current year to 115 (one hundred fifteen) consultations from earlier years, which were pending. Thus, to date 325 (three hundred twenty-five) consultations have received a response in the year 2017.”¹⁷⁶

[456] According to the CEP, “in accordance with Decree 6029/2007, any citizen, public servant, private legal entity, association or trade association can cause the CEP to act by seeking verification of an ethical violation on the part of a public servant, body or specific sector of the State with respect to any of the officials subject to the Code of Conduct of the Senior Federal Administration and members of the ethics commission [...] In 2017, 179 (one hundred seventy-nine) complaints procedures were opened, 115 of which were already concluded.”

[457] The Public Ethics Commission also reported that it gives lectures in institutions, based on demand, and provided information on the total number of lectures given during the period from 2014 to 2017: 18 lectures with a total of 1,813 people in 2017 (up to October); 12 lectures with a total of 982 people in 2016; 16 lectures with a total of 1,374 people in 2015; and 16 lectures with a total of 1658 people in 2014.

[458] With regard to the training of senior officials, the CEP explained that, each year, it sends an invitation to participate in the International Ethics in Management Seminar, although participation in the seminar is not mandatory. In this regard, the Committee notes that there is no requirement that senior officials participate in training, courses, or seminars offered by the CEP. In addition, the Committee notes that it did not have statistical data related to training activities intended for these public servants in particular. Thus, the Committee considers it relevant for the country under review to consider organizing events on public ethics in order to transmit instructions to senior officials, ensuring proper understanding of the ethical rules governing their activities (see recommendation 1.4.5 in Chapter III of this Report).

¹⁷⁶ On March 8, 2018, the State under review reported the following information in regards to the number of processes in the year 2017, from January to December, based on the SEI/PR: 327 processes related to consultations, 277 of which were concluded; 137 processes related to reports, 73 of which were concluded.

[459] Finally, taking into consideration the results presented in section 1.3.2 in Chapter III of this Report and the fact that the Committee did not have information on measures or actions to verify the effectiveness of training activities, seminars and courses conducted by the CEP were achieved, the Committee believes it would be useful for the country under review to consider implementing them in order to ensure a proper understanding of ethical standards on the part of senior officials and members of ethics commissions. The Committee will formulate a recommendation to this effect. (see recommendation 1.4.6 in Chapter III of this Report).

1.4 Conclusions and recommendations

[460] Based on the review conducted regarding the implementation of Brazil of Article III, paragraph 3 of the Convention, the Committee offers the following conclusions and recommendations:

[461] **Brazil has considered and adopted measures intended to establish, maintain and strengthen the instructions provided to government personnel by the bodies selected that ensure proper understanding of their responsibilities and the ethical rules governing their activities, as described in Chapter III, Section 1 of this Report.**

[462] In light of the comments made in section 1 of this Chapter, the Committee suggests that the country under review consider the following recommendations:

- 1.4.1 Adopt the relevant measures, on the part of the corresponding authority or authorities, to complete the development of the 2017-2020 Integrity Plan of the Federal Comptroller General's Office, including a review of the Public Servant Code of Conduct, and initiate its implementation according to a schedule developed for the purpose (see paragraph 432 in section 1.2 in Chapter III of this Report).
- 1.4.2 Adopt relevant measures to strengthen the Public Ethics Commission (CEP), increasing its staffing schedule and ensuring it has the financial resources needed to fully carry out its function, according to the availability of resources (see paragraph 433 in section 1.2 in Chapter III of this Report).
- 1.4.3 Adopt the relevant measures to ensure that senior public officials have read and have a proper understanding of the standards of the Code of Conduct of the Senior Federal Administration, in order to ensure that the purposes of the Convention governing this issue are achieved (see paragraph 434 in section 1.2 in Chapter III of this Report).
- 1.4.4 Adopt the relevant measures so that the Public Ethics Commission (CEP) uses modern technologies to issue resolutions and transmit instructions to the personnel of federal public entities and bodies regarding the ethical rules governing their activities, depending on the availability of resources (see paragraph 435 in section 1.2 in Chapter III of this Report).
- 1.4.5 Transmit instructions regarding public ethics to senior officials in the Federal Public Administration through events and training activities, in which participation is mandatory, ensuring the proper understanding of the ethical rules governing their activities, depending

on the availability of resources. (see paragraph 458 in section 1.3 in Chapter III of this Report).

- 1.4.6 Adopt relevant measures to verify the effectiveness of the courses conducted by the Public Ethics Commission (CEP) for senior officials and members of the ethics commissions (see paragraph 459 in section 1.3 in Chapter III of this Report).

2. THE STUDY OF PREVENTIVE MEASURES THAT TAKE INTO ACCOUNT THE RELATIONSHIP BETWEEN EQUITABLE COMPENSATION AND PROBITY IN PUBLIC SERVICE (ARTICLE III, PARAGRAPH 12 OF THE CONVENTION)

2.1. STUDY OF PREVENTIVE MEASURES THAT TAKE INTO ACCOUNT THE RELATIONSHIP BETWEEN EQUITABLE COMPENSATION AND PROBITY IN PUBLIC SERVICE

[463] The country under review did not submit studies on preventive measures that take into account the relationship between equitable compensation and probity in public service. On the other hand, during the on-site visit,¹⁷⁷ it presented a study on compensation in public entities and private companies and a study in progress on possible reform of the compensation system, which will be considered in this Report in 2.2.2 of this Chapter.

2.2. ESTABLISHMENT OF OBJECTIVE AND TRANSPARENT CRITERIA FOR DETERMINING THE COMPENSATION OF PUBLIC SERVANTS

2.2.1. Existence of a legal framework and/or other measures

[464] Brazil has a series of provisions designed to establish objective and transparent criteria for determining the compensation of public servants, which notably include the following:

[465] Article 37 of the Federal Constitution, under the heading of compensation for public servants, establishes as follows: “(...) *XI – the remuneration and the compensation of the holders of public offices, functions and positions in governmental entities, associate government agencies, and foundation; of the members of any of the Federal Branches, the States, the Federal District and the Municipalities, of the holders of elective office, and any other political agent as well as the pay, pension or other type of remuneration, earned on a cumulative basis or not, including advantages of a personal nature of any other nature, may not be higher than the monthly compensation, in legal tender, of the Justices of the Federal Supreme Court, and the following limits shall be applied: in Municipalities, the compensation of the Mayor, in the States and Federal District, the monthly compensation of the Governor within the Executive Branch, the allowance of State and District Delegates within the Legislative Branch and the compensation of the Judges of the Court of Justice, limited to 90.25 percent of the monthly compensation, in legal*

¹⁷⁷ In regards to the comparative study done in 2014 on compensation in government agencies and private companies, the country under review clarified that “it was found that management position salaries in the federal public service are lower than in the private sector, as are organizational support area functions, for example, in the Logistics, Human Resources and Information Technology sectors. In addition, although this was not the focus of the study, the representative asserted that it was also possible to perceive that certain government positions and careers rank higher in the salary scale than others, and also rank higher than private sector positions of similar complexity”

tender, of the Justices of the Federal Supreme Court, within the Judicial Branch, this limit being applicable to the members of the Public Prosecutor's Office, the Prosecutors and Public Defenders” (emphasis added)

[466] In this context, Article 37 (XII) of the Constitution adds that *“position salaries in the Legislative Branch and Judicial Branch shall not be higher than pay in the Executive Branch.”*

[467] Article 39 of the Federal Constitution establishes that *“the Union, the States, the Federal District and the Municipalities shall institute a board of administration policy and personnel remuneration policy, composed of public employees appointed by their respective branches. § 1. The stipulation of pay levels and of other components of the remuneration system shall comply with: I – the nature, the level of responsibility and the complexity of the posts in each career; II – the requirements for investiture; and III – the specific characteristics of each post.”*

[468] Article 48 of the Constitution also stipulates that the National Congress, with the approval of the President of the Republic is responsible for making provisions regarding “[...] XV – stipulation of the compensation for the Justices of the Federal Supreme Court [...]”.

[469] Law No. 13.091 of January 12, 2015¹⁷⁸ governs the compensation of the Justices of the Federal Supreme Court, as referred to in Article 48 (VI) of the Federal Constitution, as follows: *“Art. 1. Monthly allowance of the Justices of the Federal Supreme Court, as referred to in Article 48 (VI) of the Federal Constitution, in compliance with Article 4 of this law, shall be R\$33,763.00 (thirty-three thousand, seventy hundred sixty-three reales) starting on January 1, 2015.”* In addition, the law establishes that starting in 2016, the monthly allowance of the Justices of the Federal Supreme Court (STF) shall be set by the STF initiative law, with mandatory consideration of the following criteria, in accordance with the respective budgetary forecast: *“I – recovery of their purchasing power; II – status of the monthly allowance of the Justices of the Supreme Court as the compensation ceiling for the public administration; III – comparison with the allowances and total compensation of the members of the other government careers and the federal civil service.”*

[470] Finally, Article 17 of the Transitory Provisions Acts of the Federal Constitution stipulates that *“the salaries, compensation, benefits and additions, as well as retirement proceeds that may be received in violation of this Constitution shall be immediately reduced to the limits resulting therefrom, prohibiting, in this case, invocation of acquired rights or receipt of excess compensation for any reason.”*

[471] Legislative Decree No. 277, of 2014¹⁷⁹ establishes at R\$30,934.70 (thirty thousand, nine hundred thirty-four reales and seventy centavos) the monthly allowance for the President or Vice President of the Republic and for the Ministers of State, as referred to in Article 49 (VIII) of the Federal Constitution.

[472] Also in accordance with the Federal Constitution, the value of the allowance is the same for federal representatives and senators (Art. 49, para. VII). In this regard, Article 1 of Legislative Decree No. 276, of 2014¹⁸⁰ establishes the monthly compensation of the members of

¹⁷⁸ Law No. 13.091 of January 12, 2015 may be consulted at:

http://www.planalto.gov.br/ccivil_03/ato2015-2018/2015/lei/L13091.htm

¹⁷⁹ Legislative Decree No. 277, of 2014 is available at: <http://www2.camara.leg.br/legin/fed/decleg/2014/decretolegislativo-277-18-dezembro-2014-779807-publicacaooriginal-145683-pl.html>

¹⁸⁰ Legislative Decree No. 276, of 2014 is available at: <http://www2.camara.leg.br/legin/fed/decleg/2014/decretolegislativo-276-18-dezembro-2014-779806-norma-pl.html>

the National Congress at R\$33,763.00 (thirty-three thousand, seven hundred sixty-three reals). In addition, paragraph 1 of the referenced article establishes that “the amount due to the members of the National Congress, at the beginning and end of their term is an expense allowance equal to the value of their salary, intended to offset expenses for relocation and transportation.”

[473] With respect to the remaining public employees of the Legislative Branch, Law No. 12.777 of December 28, 2012 establishes the career path of public servants in the Chamber of Deputies¹⁸¹ and contains, in Annex I, the table of salaries according to the career level or position, the employee’s grade and pattern. The career path of public servants in the Federal Senate,¹⁸² as well as their salaries, are already established in accordance with Law 12.300 of July 28, 2010.

[474] Law No. 8.112 of December 11, 1990,¹⁸³ which governs the legal regime of federal-level civil servants, those in the autonomous agencies and the foundations, establishes that the salary is “the monetary reward for the performance of the public office, with a value set by law”¹⁸⁴ and that compensation is “the salary for the effective position, plus permanent monetary benefits established by law.”¹⁸⁵ Article 41 ensures “*equal salaries for positions with equal or similar duties in the same branch, or among public servants in the three branches, except for individual benefits and those related to the nature or location of the position*”¹⁸⁶ and prohibits any public servant from receiving compensation below the minimum salary.¹⁸⁷

[475] The referenced law also establishes in Article 42 that “*no public servant may receive, monthly by way of compensation, an amount exceeding the sum of the amounts received as compensation, in legal tender, for any reason, within the sphere of the respective Branches, by the Ministers of State, members of the National Congress and Justices of the Federal Supreme Court. Single paragraph. The benefits provided in paragraphs II to VII of Article 62 are excluded from the compensation ceiling.*” (emphasis added)

[476] Article 61 also provides that “*In addition to the salary and benefits provided in this law, the following rewards, bonuses and additions shall be granted to public servants: I – reward for exercising a management, leadership and advisory role; II – Christmas bonus; IV – addition for carrying out unsanitary, dangerous or difficult activities; V – addition for providing extraordinary service; VI – nighttime bonus; VII – holiday bonus; VIII – others related to the location or nature of the work; IX – bonus for course or competition.*”

[477] Supplementary Law No. 35 of March 14, 1979, establishing the Organic Law of the National Judiciary, stipulates that “*judges’ salaries are set by law, for a fixed amount,*” and that “*the non-reducible nature of judges’ salaries does not bar deductions set by law.*” Article 63 of the referenced law establishes that “*the salaries of Judges in the Courts of Justice of the States and the Court of Justice of the Federal District and the Territories shall not be less, in the first case, that those of the Secretaries of State, and in the second case, those of the Government*

¹⁸¹ Law No. 12.777 of December 28, 2012 is available at:

http://www.planalto.gov.br/ccivil_03/ Ato2011-2014/2012/Lei/L12777.htm#anexoI

¹⁸² Law 12.300 of July 28, 2010 is available at:

http://www.planalto.gov.br/ccivil_03/ ato2007-2010/2010/lei/L12300.htm

¹⁸³ Law 8.112 of December 11, 1990 may be consulted at: http://www.planalto.gov.br/ccivil_03/leis/L8112cons.htm

¹⁸⁴ See Art. 40 of Law 8.112 of December 11, 1990.

¹⁸⁵ See heading of Art. 41 of Law 8.112 of December 11, 1990.

¹⁸⁶ See Art. 41 (4) of Law 8.112 of December 11, 1990.

¹⁸⁷ See Art. 41 (5) of Law 8.112 of December 11, 1990.

Secretaries of the Federal District, but may not exceed those set for the Justices of the Federal Supreme Court [...] § 2. – For purposes of the equivalence and limit on salaries provided in this article, only benefits that are personal or transitory in nature are excluded from the calculation.” (emphasis added)

[478] In addition to salaries, the Organic Law of the National Judiciary provides that the following benefits, by law, may be granted to justices: “*I – expense allowance, for transportation and relocation expenses; II – expense allowance, for housing in Districts in which there is no official residence for the judge, except in the capitals; II – expense allowance, for housing, in locations where there is no official residence available to the judge; III – family allowance; IV – per diems; V - representation; VI – bonus for rendering service to Electoral Justice; VII – bonus for rendering service to Labor Justice, in districts where Conciliation and Judgment Boards were not established; VIII – additional bonus of five percent for every five years of service, up to a maximum of seven; IX – teaching bonus, for class conducted in an official preparatory course for the judiciary or in the Official School for the Improvement of Magistrates (Arts. 78 (1) and 87 (1), except when they receive specific compensation for this activity; X – bonus for effective exercise in a district difficult to access, as defined and indicated by law. § 1. – The representation allowance, except when granted based on the temporary exercise of a position, includes salaries for all legal purposes. § 2. – The granting of monetary additions or benefits not provided for this law, as well as bases and limits exceeding those set therein is prohibited.*”

[479] Supplementary Law No. 75 of May 20, 1993,¹⁸⁸ which governs the organization, powers and the statute of the Federal Prosecution Service, also contains provisions on salaries and benefits. Article 224 thereof establishes that the members of the Federal Prosecution Service (MPF) “*shall receive the salary, allowance and bonuses provided by law. § 1. An additional bonus shall be added to salaries for time in service, at a rate of one percent per year of effective public service, with time in legal practice being calculated, up to a maximum of 15 years, provided these years are not cumulative with time in public service. § 3. Salaries shall be set with a difference of no more than ten percent from one step to another in each career.*”

[480] Article 225 of the referenced law establishes that “*the salary of the Attorney General of the Republic is equal to that of the Assistant Attorney General of the Republic, plus 20 percent, and may not exceed the amounts received as compensation, in legal tender, for any reason, by the Justices of the Federal Supreme Court.*” (emphasis added). Article 227 specifies the benefits to which members of the MPF are entitled and Article 228 establishes that, “*except as imposed by legal or judicial order, no deduction shall apply to the compensation or proceeds and pension due to members of the Federal Prosecution Service or their beneficiaries.*”

[481] Law No. 13.316 of July 20, 2016¹⁸⁹ governs the careers of public servants in the Federal Prosecution Service and the careers of public servants in the National Council of the Federal Prosecution Service and sets the amount of their compensation, according to the effective positions they carry out, which are structured in grades and steps, as shown in Annex I of the law, in the various areas of activities. According to Article 4 of the law, the staffing schedule of the Federal Prosecution Service also includes positions of trust FC-1 to FC-3, commissioned positions CC-1 to CC-7 and special positions, to serve in executive, leadership, and advisory roles, under the terms of Annexes IV, V and VI of the law.

¹⁸⁸ Supplementary Law No. 75 of May 20, 1993 is available at: http://www.planalto.gov.br/ccivil_03/leis/lcp/lcp75.htm

¹⁸⁹ Law No.13.316 of July 20, 2016 may be consulted at:

http://www.planalto.gov.br/ccivil_03/ato2015-2018/2016/lei/L13316.htm#anexoii

2.2.2. Adequacy of the legal framework and/or other measures

[482] With respect to provisions regarding the establishment of objective and transparent criteria to determine the compensation of public servants, which the Committee examined based on the information it had at its disposal, the Committee notes that those criteria are relevant for the purposes of the Inter-American Convention against Corruption.

[483] Nonetheless, the Committee considers it appropriate to make some observations regarding the adequacy of the current legal order:

[484] First, during the on-site visit, public servants in the Ministry of Planning, Development and Management reported on a study in progress called “Expanding the compensation structures for positions belonging to various careers and levels – Stretch,” with the following explanation: *“in general, careers are not uniform in terms of their structures in grades and steps, nor in their ranges that vary from 3 to 20 steps (progression)... In some careers, the public servant reaches the highest level of his career in a short amount of time (up to six years). In other careers, this time varies between 13 and 20 years for reaching the highest level, considering that the interval for purposes of functional progression may be 12, 18 or 24 months, according to the legislation on each career.”*

[485] Regarding the above-mentioned study, the country under review declared that *“it was felt that an increase should be promoted in the respective widths of grades and patterns so as to include 30 steps, with initial compensation amounting to five thousand reales. E.g.: careers in the Governmental Management Group, careers in the Regulatory Agencies, AGU, ABIN, among others. Senior level positions, belonging to various plans that today show a compensation table starting at five thousand reales will start at three thousand, two hundred reales. E.g.: PGPE, PST, PEC-FAZENDA among others. For intermediate-level positions in various plans, initial compensation will be two thousand, eight hundred reales.”*

[486] The Ministry of Planning, Development and Management also clarified that *“a public servant’s career development will correspond to the time needed to reach retirement. There will be specific regulation to define career progression, based on three aspects: Time (in service); Performance (evaluation); and Training (certification). A public servant who enters a career will perform the duties related to his position, according to the degree of complexity of the activities and the qualifications established for the grade and pattern of the position, so as to encourage his professional growth. It should be clarified that the measure being studied will only impact public servants who begin their careers after the new law is enacted. Introducing this proposal will require the development of a draft law, with a view to altering all of the current specific legislation, as well as the respective compensation tables and expanding the structure of career grades and patterns.”*

[487] In this context, the Committee notes that that data from the “Compensation Table for Civilian Federal Public Servants and in the Former Territories”¹⁹⁰ confirm the inequality in the grades and patterns that make up the federal salary structure, as mentioned during the on-site visit and in writing in the documents received later.

[488] On the other hand, with respect to the study on reform of the compensation system for careers of federal public servants, the Committee notes that the country under review did not present objective and transparent criteria for determining the need to *“increase the respective*

¹⁹⁰ See Compensation Table for Civilian Federal Public Servants and in the Former Territories, No. 73, available at: <http://www.planejamento.gov.br/assuntos/gestao-publica/arquivos-e-publicacoes/tabela-de-remuneracao-1>

widths of grades and patterns to thirty steps” or to establish the amount of five thousand reales as the initial compensation. In this regard, the Committee will formulate a recommendation that the Brazilian State consider adopting and implementing an equitable compensation system that creates adequate incentives based on merit, allows for mobility, and overcomes the salary differentials existing in the Brazilian federal public service, depending on the sector and entity to which the public servant belongs, based on objective and transparent criteria, including the constitutional parameters, such as the nature, degree of responsibility and the complexity of the positions included in each career, the requirements for investiture and the specific characteristics of the positions. (see recommendation 2.2.3.1 of section 2.2.3 in Chapter III of this Report)

[489] With regard to the salary limit for public servants, the Committee notes that the Brazilian Constitution is quite clear and precise: “*the remuneration and compensation of the holders of public offices, functions and positions [...], the pay, pension or other type of remuneration, earned on a cumulative basis or not, including advantages of a personal nature or of any other nature, may not be higher than the monthly compensation, in legal tender, of the Justices of the Federal Supreme Court.*” (emphasis added). In this context, the Committee notes that the Constitutional ceiling on salaries was established with Constitutional amendment No. 19 of 1998, which was confirmed and increased by Constitutional amendment No. 41 of 2003.

[490] However, the Committee notes that certain benefits are not subject to the constitutional ceiling rule. For example, Supplementary Law No. 35 of March 14, 1979, which established the Organic Law of the National Judiciary, establishes that “*for purpose of equivalence and the salary limit provided in this article, only advantages of a personal or transitory nature are excluded from the calculation.*” (emphasis added) Similarly, Law No. 8.112 of December 11, 1990,¹⁹¹ which governs the legal regime for civilian public servants at the federal level, in the autonomous agencies and foundations establishes in the single paragraph of Article 42 that “*the advantages provided in paragraphs II to VII of Article 61 are excluded from the compensation ceiling.*” (emphasis added)¹⁹²

[491] In addition, the Committee notes that some legislation allow the monthly salary of certain public servants to exceed the amount set for Justices of the Federal Supreme Court (STF). This is true, for example, in the case of Legislative Decree No. 276, of 2014,¹⁹³ which set the monthly salary of the members of the National Congress at the same amount as that set for the Justices of the STF and additionally established that “*members of the National Congress are due, at the*

¹⁹¹ Law 8.112 of December 11, 1990 may be consulted at: http://www.planalto.gov.br/ccivil_03/leis/L8112cons.htm

¹⁹² On March 8, 2018, the State under review reported the following: “*within the Brazilian legal system, these exceptions make sense, considering that they relate to holidays, 13th month salary, overtime, bonus for nighttime work and unhealthy work –meaning that these are not individual advantages but rather workers’ rights also provided for in the Constitution. Imposing the constitutional limit would remove these rights, in addition to characterizing unlawful enrichment of the Administration. In this regard, the case law is settled. See, for example, the decision in RE 276434, STF, 02/25/2010, Rapporteur, Justice Joaquim Barbosa. Also to be cited is the Acórdão of the 5th Panel of the TRT in the 1st Region, handed down in an Ordinary Appeal decided in November 2014: ‘Both Christmas bonuses and the constitutional bonus of 1/3 on holidays are portions not included in the worker’s compensation for all legal purposes. This means they are rights due above the minimum civilized threshold that seek to guarantee the worker (lato sensu) an extraordinary monetary increase for an exceptional situation. That is why, just like indemnity payments, it would be unreasonable to consider such amounts within the limit of the compensation ceiling.’*”

¹⁹³ Legislative Decree No. 276, of 2014 is available at: <http://www2.camara.leg.br/legin/fed/decleg/2014/decretolegislativo-276-18-dezembro-2014-779806-norma-pl.html>

beginning and end of their term, an expense allowance equal to the value of their salary, intended to offset expenses for relocation and transportation.” (emphasis added)¹⁹⁴

[492] For the reasons presented above, there are currently public servants¹⁹⁵ who receive, each month, more than the monthly salary, in legal tender, of the Justices of the Federal Supreme Court.¹⁹⁶ In this regard, the Committee considers it appropriate to formulate a recommendation that the country under review consider regulating, through a general law applicable to all public employees, Article 17 of the Transitory Provisions Acts of the Federal Constitution, to stipulate that “salaries, compensation, benefits and additions, as well as retirement payments being received in violation of the Constitution shall be immediately reduced to the limits resulting therefrom, not allowing, in this case, invocation of acquired rights or receipt of excess for any reason”, in order to prevent the existence of salaries that exceed the value established as the maximum ceiling by the Constitution (see recommendation 2.2.3.2 of section 2.2.3 in Chapter III of this Report)

2.2.3. Conclusions and Recommendations

[493] Based on the review conducted in the above sections regarding the implementation by Brazil of Article III, paragraph 12 of the Convention, the Committee offers the following conclusion:

[494] **Brazil has considered and adopted measures intended to establish objective and transparent criteria for determining the compensation of public servants, as described in Chapter III, Section 2 of this Report.**

[495] In view of the comments made in Section 2 of this Chapter, the Committee suggests that the country under review consider the following recommendations:

2.2.3.1. Adopt and implement an equitable compensation system for federal public servants that creates adequate incentives based on merit, permits mobility, based on objective and transparent criteria, including the constitutional parameters, such as the nature, degree of responsibility and the complexity of the positions included in each career, the requirements for investiture and the specific characteristics of the positions (see paragraph 488 in section 2.2.2 in Chapter III of this Report).

2.2.3.2. Consider regulating, by means of a general law applicable to all public employees, Article 117 of the Transitory Provisions Acts of the Federal Constitution, ”, in order

¹⁹⁴ On March 8, 2018, the State under review reported the following: “according to settled case law, amounts received as indemnifications are excluded from the constitutional ceiling. See Resolution 13, of March 21, 2006, from the National Council of Justice, Article 8 of which reads: “The following are excluded from the impact of the constitutional compensation ceiling: I – amounts indemnifying in nature, as provided by law: a) expense allowance for relocation and transportation.”

¹⁹⁵ For example, net total compensation of an active member of the Federal Prosecution Service in October 2017 amounted to R\$34,512.72, according to the table available on the Office’s Transparency Page, p. 2: http://www.transparencia.mpf.mp.br/conteudo/contracheque/remuneracao-membros-ativos/2017/remuneracao-membros-ativos_2017_Outubro.pdf

In addition, net total compensation of two legislative analysts, in the Chamber of Deputies, in November 2017, was R\$33,927.71 and R\$42,671.68, according to the body’s Transparency Page, p. 3: <http://www2.camara.leg.br/transparencia/recursos-humanos/remuneracao/relatorios-consolidados-por-ano-e-mes/2017/novembro-de-2017-pdf>

¹⁹⁶ On March 8, 2018, the State under review reported that PEC 63/2016 has been proposed in the sense of suggesting consideration of restructuring the constitutional ceiling so as to restrict the creation of so-called “super-salaries” through infra-constitutional legislation.

to prevent the existence of salaries that exceed the value established as the maximum ceiling by the Constitution (see paragraph 492 in section 2.2.2 in Chapter III of this Report).

IV. BEST PRACTICES

[496] In keeping with section VI of the Methodology for follow-up of implementation of the recommendations formulated and provisions reviewed in the Second Round and for the review of the provisions of the Convention selected for the Fifth Round, the following describes the best practices identified by the country under review that it has wished to share with the other member countries of the MESICIC in the belief that they could be of benefit to them.

[497] – Public Spending Observatory, implemented by the Ministry of Transparency and the Office of the Comptroller General (CGU). In its Response to the Questionnaire, the country under review reported, *inter alia*, the following:

[498] *“The Public Spending Observatory, created by the CGU in 2008, uses scientific methodology based on data science to monitor public spending. The issues monitored include government purchases, spending with Federal Government payment cards, per diems and transportation expenses, and outsourcing expenses. Warnings are issued on transactions fitting within one of the many typologies of illegal actions mapped, generally used in CGU audits.”*

[499] *“The methodology consists of using advanced data mining techniques and tools and correlating information from various governmental databases. [...] A high level of monitoring of governmental spending is expected to be achieved, emphasizing prevention as well as a high level of adherence in the use of the information produced.”*

[500] - System of Ombudsman’s Offices (e-Ouv) of the Federal Executive Branch, also implemented by the Ministry of Transparency and the Office of the Comptroller General (CGU). In its Response to the Questionnaire, the country under review reported, *inter alia*, the following:

[501] *“The System of Ombudsman’s Offices (e-Ouv) of the Federal Executive Branch is a web-based system that allows anyone to approach the bodies of the public administration to report, complain, praise, suggest or make requests. A single entry channel, from the perspective of the user’s experience, makes it possible for the user to determine which body he should approach just by specifying the matter to be addressed, in addition to standardizing the process of dialogue with the State, increasing legal security and even allowing anonymous communications. On the other hand, from the State’s perspective, it allows the creation of a single database on communications, facilitating their analysis for purposes of planning and the execution of control actions and corrective actions.”*

[502] *“The Federal Executive Branch now has 306 public ombudsman’s offices distributed in all entities of the federation, and some of them, such as that of the Single Health System, include more than 1,600 units. The e-Ouv was designed as a mechanism for integrating this system, from both the technological and the standard-setting point of view, by replicating the deadlines, processes, and typologies adopted by the Guidelines from the central body of the Ombudsman’s Office units. [...] Greater control over the processes of the ombudsman’s offices that use the e-Ouv made it possible to reduce the time needed to address communications from an average of 60 days immediately prior to use of the system to an average of less than 16 days after its adoption.”*

ANNEX

**AGENDA FOR THE ON-SITE VISIT TO
THE FEDERATIVE REPUBLIC OF BRAZIL***

Monday, October 2, 2017	
16:00 hrs. – 16:30 hrs. Mercure Brasília Líder Hotel	Coordination meeting between the representatives of the member states of the subgroup and the Technical Secretariat
16:30 – 17:00 Mercure Brasília Líder Hotel	Coordination meeting between the representatives of the country under review, the member states of the subgroup and the Technical Secretariat

Tuesday, October 3, 2017	
8:30 – 12:30 Palácio do Itamaraty	Meetings with civil society organizations and/or, inter alia, private sector organizations, professional organizations, academics or researchers.
Meeting 8:30 – 12:30	Topics: <ul style="list-style-type: none">• Systems for the hiring of public employees, training for performance of their duties and ethical standards;• Systems for the procurement of goods and services by government• Definition of acts of corruption and systems to protect whistleblowers <p><u>Participants:</u> Antonio Rodrigo Machado, Chairman of the Anti-corruption and Compliance Legislation Commission, Order of Attorneys of Brazil (OAB/DF) Fabiano Angélico, Senior Consultant, Transparency International Marina Ferro, Ethos Institute of Corporations and Corporate Responsibility Michael Freitas Mohallem, Coordinator of the Justice and Society Center, Getúlio Vargas Foundation Márcio Rocha, Federal Judge, member of the Association of Federal Judges of Brazil (AJUFE) and Coordinator of Action 4/2016 of the ENCCLA</p>

* This agenda was agreed upon in compliance with provisions 13 and 14 of the *Methodology for Conducting On-site Visits* (document SG/MESICIC/doc.276/11 rev. 2), available at: http://www.oas.org/juridico/english/met_onsite.pdf

	Roberto Veloso, Federal Judge and President of the AJUFE
12:30 – 14:00	Lunch
14:00 – 17:30 Palácio do Itamaraty	Meetings with public officials. Definition of acts of corruption and systems for protecting those reporting acts of corruption
14:00 – 16:00	<p>Panel 1:</p> <ul style="list-style-type: none"> • Definition of acts of corruption <ul style="list-style-type: none"> - New development - Results <p><u>Participants:</u></p> <p>Maria Regina Reis, Legislative Consultant, Chamber of Deputies Tiago Ivo Odon, Legislative Consultant, Federal Senate Douglas Fischer, Regional Prosecutor, Federal Prosecution Service Tiago Santos Farias, Legal Advisory, Federal Prosecution Service Rolando Alexandre de Souza, Delegate and Head of Office for the Repression of the Diversion of Public Resources, Federal Police Márcio Rocha, Federal Magistrate</p>
16:00 – 17:30	<p>Panel 2:</p> <ul style="list-style-type: none"> • Systems for protection of those reporting acts of corruption <ul style="list-style-type: none"> - Advances, difficulties, new developments and technical cooperation needs with respect to the implementation of recommendations formulated in the Second Round. <p><u>Participants:</u></p> <p>Márcio Rocha, Federal Magistrate Marcos Gerhardt Lindenmayer, Head of the Federal Ombudsman’s Office, Federal Comptroller General (CGU) Maria Regina Reis, Legislative Consultant, Chamber of Deputies Melina Castro Montoya Flores, Prosecutor, Federal Prosecution Service Douglas Fischer, Regional Prosecutor, Federal Prosecution Service Tiago Santos Farias, Legal Advisor, Federal Prosecution Service</p>

<p>18:00 Hotel Mercure Brasília Líder</p>	<p>Informal meeting between the representatives of the member states of the subgroup and the Technical Secretariat¹⁹⁷</p>
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<p>Wednesday, October 4, 2017</p>	
<p>8:30 – 12:00 Palácio do Itamaraty</p>	<p>Meetings with public officials: Public employee hiring systems</p>
<p>First Meeting 8:30 – 12:00</p>	<p>Panel 3:</p> <ul style="list-style-type: none"> • Public employee hiring systems <ul style="list-style-type: none"> - Advances, new developments, results and difficulties in implementing the recommendations formulated in the Second Round. <p><u>Participants:</u></p> <p>Renato Capanema, Director of Integrity Promotion, Agreements and International Cooperation, Office of the Comptroller General (CGU)</p> <p>Fenando Mendes Monteiro, Director of Governance and Management, Office of the Comptroller General (CGU)</p> <p>Camila Colares, General Coordinator of Agreements and International Cooperation, Office of the Comptroller General (CGU)</p> <p>Elizabeth Cosmo, General Coordinator of Agreements and International Cooperation, alternate, Office of the Comptroller General (CGU)</p> <p>Tatiana Petry, Federal Auditor of Finances and Control, Office of the Comptroller General (CGU)</p> <p>Simei Spada, General Coordinator of Personnel Management, Office of the Comptroller General (CGU)</p> <p>Veronica Gomes Silva, Advisor, Personnel Management, Office of the Comptroller General (CGU)</p> <p>Liz Costa Rocha Alves, Department of Personnel Legislation and Placement, Ministry of Planning, Development and Management</p> <p>João Trindade Cavalcante Filho, Legislative Consultant, Federal Senate</p> <p>Alexandre Peixoto de Melo, Legislative Consultant, Chamber of Deputies</p> <p>Douglas Fischer, Regional Prosecutor, Federal Prosecution Service</p>

¹⁹⁷The second paragraph of provision 20 of the *Methodology for Conducting On-site Visits* states: “...At the conclusion of the meetings on each day of the on-site visit, the Technical Secretariat shall organize an informal meeting with the members of the Subgroup, to exchange preliminary points of view on the topics addressed at those meetings...”

	Tiago Santos Farias, Legal Advisor, Federal Prosecution Service
12:00 – 14:00	Lunch
14:00 – 17:30 Palácio do Itamaraty	Meetings with public officials: Government goods and services procurement systems
14:00 – 17:30	<p>Panel 4:</p> <ul style="list-style-type: none"> • Government goods and services procurement systems <ul style="list-style-type: none"> - Advances, new developments, results and difficulties in implementing the recommendations formulated in the Second Round. <p><u>Participants:</u></p> <p>Fernando Mendes Monteiro, Director of Governance and Management (CGU)</p> <p>Flávio Rezende Dematte, Sectoral Inspector in the Areas of Finance and Foreign Relations (CGU)</p> <p>Clarice Knihs, Federal Auditor of Finance and Control, Planning and Institutional Evaluation Coordinating Office (CGU)</p> <p>Lorena Férrer Pompeu, General Coordinator of Bidding, Contracts and Documentation (GCU)</p> <p>Giovanni Dematte, General Coordinator of Budget, Finance and Accounting (CGU)</p> <p>Maria Eduarda Pacheco da Silva Olcha, Planning and Institutional Evaluation Coordinating Office (CGU)</p> <p>Jefferson de Freitas Martins, Federal Auditor of Finance and Control (CGU)</p> <p>Aureliano Júnior, General Coordinator of Open Government and Transparency, alternate (CGU)</p> <p>Wesley Rodrigo Couto Lira, Director of the Department of Standards and Logistics Systems, Ministry of Planning, Development and Management</p> <p>Daniel Miranda Pontes Rogério, Department of Standards and Logistics Systems, Ministry of Planning, Development and Management</p> <p>Alexandre Peixoto de Melo, Legislative Consultant, Chamber of Deputies</p> <p>Rafael Jardim, Secretary of Institutional Relations in Combating Fraud and Corruption. Federal Court of Accounts (TCU)</p>
18:00 Hotel Mercure Brasília Líder	Informal meeting with representatives of the member states of the subgroup and the Technical Secretariat.

Thursday, October 5, 2017	
8:30 – 12:30 Palácio do Itamaraty	Meeting with public officials. Continuation of panel on government goods and services procurement systems; and start of panel on government agency personnel training and instruction to ensure proper understanding of their responsibilities and the ethical rules governing their activities
First Meeting 8:30 – 10:00	Panel 5: <ul style="list-style-type: none">• Government goods and services procurement systems<ul style="list-style-type: none">- Advances, new developments, results and difficulties in implementing the recommendations formulated in the Second Round. <p><u>Participants:</u> Melina Castro Montoya Flores, Prosecutor, Federal Prosecution Service Tiago Santos Farias, Legal Advisor, Federal Prosecution Service Francisco Eduardo Carrilho Chaves, Legislative Consultant, Federal Senate</p>
Second Meeting 10:00 – 13:00	Panel 6: <ul style="list-style-type: none">• Government agency personnel training and instruction to ensure proper understanding of their responsibilities and the ethical rules governing their activities<ul style="list-style-type: none">- Legal framework, programs, competent bodies and use of technologies.- Results- Difficulties <p><u>Participants:</u> Cyro Dornelas, Executive Secretary of the Ethics Committee (CGU) Marcos Gerhardt Lindenmayer, Federal General Ombudsman (CGU) Renato de Oliveira Capanema, Director of Integrity Promotion, Agreements and International Cooperation (CGU) Armando de Nardi Neto, Coordinator General of Planning and Correctional Actions (CGU) Liliane de Paiva Nascimento, Projects Manager, Integrity Program (CGU) Simei Spada, General Coordinator of Personnel Management (CGU) Elainne Carvalho, Coordinator of Development and Training (CGU) Gustavo Caldas, Executive Secretary, Public Ethics Commission (CEP) Mariana Melo, Deputy Executive Secretary, Public Ethics Commission (CEP)</p>

	Mariana Montenegro, Training Sector, Public Ethics Commission (CEP) Pedro Arthur Braune Guedes, Public Ethics Commission (CEP)
13:00 – 14:30	Lunch
14:30 – 17:30 Palácio do Itamaraty	Meetings with public officials. Study of preventive measures that take into account the relationship between equitable compensation and probity in public service.
14:30 – 15:30	<p>Panel 7:</p> <ul style="list-style-type: none"> • Study of preventive measures that take into account the relationship between equitable compensation and probity in public service. <ul style="list-style-type: none"> - Objective and transparent criteria for determining the compensation of public servants <p><u>Participants:</u></p> <p>Erasmio Veríssimo de Castro Sampaio, Director, Department of Compensation and Benefits, Ministry of Planning, Development and Management</p> <p>Marcos Kroll, Director, Department of Organizational Models, Management Secretariat, Ministry of Planning, Development and Management</p> <p>Eduardo Pastore, Coordinator General of the Department of Organizational Models, Ministry of Planning, Development and Management</p> <p>Teomair de Oliveira, Administrator, Personnel Management Secretariat, Ministry of Planning, Development and Management</p> <p>Gabriela de Castro, Administrator, Personnel Management Secretariat, Ministry of Planning, Development and Management</p>
15:30 – 16:00 Palácio do Itamaraty	Informal meeting between the representatives of the member states of the subgroup and the Technical Secretariat.
16:00 – 17:00 Palácio do Itamaraty	Final meeting between the representatives of the country under review, the member states of the subgroup and the Technical Secretariat. ¹⁹⁸

¹⁹⁸ The third paragraph of provision 20 of the Methodology for Conducting On-site Visits states: *At the end of the on-site visit, a meeting shall be held, to be attended by the Subgroup experts, the Technical Secretariat, and the Lead Expert of the country under review and/or the official appointed in his place in accordance with provision 10, second paragraph, of this Methodology. That meeting shall identify, if necessary, the information that, exceptionally, the country under review is still to submit through the Technical Secretariat and the deadline within which it is to do so, and it shall also coordinate any other pending matters arising from the on-site visit.*

**CONTACT AUTHORITY FROM THE COUNTRY UNDER REVIEW FOR
COORDINATION OF THE ON-SITE VISIT, AND REPRESENTATIVES OF THE
MEMBER STATES OF THE PRELIMINARY REVIEW SUBGROUP AND THE
TECHNICAL SECRETARIAT OF THE MESICIC**

COUNTRY UNDER REVIEW

BRAZIL

Renato de Oliveira Capanema

Lead Expert with the MESICIC Committee of Experts
Director of Integrity, Agreements and International Cooperation
Ministry of Transparency and Federal Comptroller General's Office

Elizabeth Cristina Marques Cosmo

Alternate Expert with the MESICIC Committee of Experts
General Coordinator of Agreements and International Cooperation, Substitute
Ministry of Transparency and Federal Comptroller General's Office

MEMBER STATES OF THE PRELIMINARY REVIEW SUBGROUP

EL SALVADOR

Orlando Israel Rivas Ávila

Legal Advisor
Department for Strengthening Internal Control and Audit
Secretariat of Citizen Participation, Transparency and Anti-Corruption

TECHNICAL SECRETARIAT OF THE MESICIC

Veronica Alonso

Legal Officer
Department of Legal Cooperation
OAS Secretariat for Legal Affairs

Enrique Martínez

Senior Legal Officer
Department of Legal Cooperation
OAS Secretariat for Legal Affairs