

LEGAL UPDATE

## CGU and AGU determine criteria for the reduction of applicable fines in leniency agreements

In December, the Brazilian Office of the Comptroller General ("CGU") and the Brazilian Office of the Attorney General ("AGU") published Normative Instruction No. 36/2022 ("IN 36/2022"), which determines the criteria to reduce up to two-thirds of the amount of the applicable fine in the negotiation of leniency agreements, as provided by Law No. 12,846/2013 ("Anti-Corruption Law")<sup>1</sup>.

The main purpose of IN 36/2022 is to increase the predictability of the application of sanctions in the scope of leniency agreements celebrated between investigated legal entities, CGU, and AGU with respect to the practice of unlawful acts against national or foreign public administrations.

Specifically, IN 36/2022 determines the methodology to be adopted by Brazilian authorities regarding the application of the criteria provided by Article 47 of Decree No. 11,129/2022<sup>2</sup> to calculate the percentual reduction of the applicable fine in leniency agreements. The authorities must consider adequate acts performed by the investigated legal entities during agreement negotiations, such as (a) self-disclosure, (b) level of cooperation and (c) commitment to undertake relevant conditions to comply with the agreement.

Among the main reduction criteria introduced by IN 36/2022, we highlight the following:

SELF-DISCLOSURE	LEVEL OF COOPERATION	RELEVANT CONDITIONS
Authorities will consider promptness to self-disclose and the unprecedented nature of the information regarding the unlawful acts as parameters, <b>especially</b> the following:	Authorities will consider the <b>existence of an internal investigation, the submission of information and documents evidencing the unlawful acts, and swiftness of the negotiation</b> as parameters, especially the following:	Authorities will consider <b>payment conditions of financial commitments undertaken by the legal entity in the agreement</b> parameters, especially the following:
(i) Whether there was prompt adoption of investigative and reporting measures to CGU and AGU by the legal entity, including the submission of relevant information and documents within the scope of the cooperation;	(i) Whether the legal entity has adopted adequate and effective internal investigative measures and promptly submitted legally valid information and documents about the reported misconduct, with an adequate level of accuracy and scope as to the facts and parties involved;	(i) Promptness of payment condition of the leniency agreement amount and, in case of instalment payments, the payment schedule outlined by the installments; and

<sup>1</sup> Article 16, § 2 of the Anti-Corruption Law – The execution of the leniency agreement will exempt the legal entity of the sanctions set forth in item II of Article 6 and in item IV of Article 19 and will reduce the amount of the applicable fine by up to 2/3 (two thirds).

<sup>2</sup> Article 47 of Decree No. 11,129/2022 – The reduction percentage of the applicable fine referred to in Paragraph 2 of Article 16 of Law No. 12,846, 2013, shall take into consideration the following criteria: I – the promptness of the self-disclosure and the unprecedented nature of the damaging acts; II – the effectiveness of the legal entity's cooperation; and III – the commitment to undertake relevant conditions for the execution of the agreement.

<p>(ii) Prompt self-disclosure will be considered if the period elapsed between the legal entity's knowledge of the suspected unlawful act and its indication of interest in entering into a leniency agreement with CGU and AGU does not exceed nine months. In cases in which knowledge of the evidence of the unlawful act occurred prior to the date of the publication of IN 36/2022, the term for prompt self-disclosure will be six months as of its publication; and</p>	<p>(ii) The investigation of the unlawful acts will be evaluated as to the scope and relevance of the measures adopted to prove their materiality and authorship;</p>	<p>(ii) In cases where the payment of the agreement amounts does not occur within six months, the guarantees provided for the payment will have their characteristics considered as part of the evaluation criteria.</p>
<p>(iii) Authorities will evaluate the unprecedented nature of the information regarding the unlawful acts addressed in the negotiation considering the existence of facts or information reported by the legal entity that are new to public knowledge or to CGU or AGU, even if they refer to non-disclosed facts.</p>	<p>(iii) The information submitted will be evaluated based on its relevance, quantity, and sufficiency for the purposes of cooperation in the leniency agreement, in addition to the existence of new information regarding facts already known by CGU or AGU;</p>	
	<p>(iv) The supporting documents will be evaluated based on the quality and quantity of the evidence collected and provided by the legal entity for the purposes of cooperation in the leniency agreement, as well as its organization, structuring and connection with the reported misconduct; and</p>	
	<p>(v) The negotiation's swiftness will be evaluated by considering (a) the completeness, swiftness, and accuracy of the report on the unlawful acts, with the assumption of liability by the legal entity and identification of other parties involved, following the standards established by CGU; and (b) the promptness in carrying out other measures required to fulfill the agreement negotiation.</p>	

It is important to note that the provisions of IN 36/2022 will not be applicable to cases in which there is already a Final Report submitted for executing the leniency agreement by the time it comes into effect (i.e., December 9, 2022).

If you are interested in reading the **complete** IN 36/2022, please visit: <https://www.in.gov.br/web/dou/-/portaria-normativa-interministerial-n-36-de-7-de-dezembro-de-2022-449321104> (in Portuguese)

For more information regarding the reduction criteria of applicable fines in leniency agreements, please contact the Anti-Corruption & Compliance team of Tauil & Chequer Advogados in association with Mayer Brown.