

## **SecexConsenso is ready to help address controversies in the federal public administration**

*The TCU invested in server training; workflows have already been defined*

The Department of External Control for Mutual Agreement and Conflict Prevention (SecexConsenso) was created within the scope of the Federal Court of Accounts - Brazil (TCU), in December 2022, by the President of the Court, Minister Bruno Dantas, with the purpose of contributing to the effectiveness of public policies and the legal certainty of timely solutions built in a quick and collaborative manner alongside society and public entities.

In operation since early 2023 at the Court, the creation and powers of the new department have been defined in Normative Instruction (IN) [91/2022](#), amended by IN [92/2023](#).

The Court has been offering training opportunities with Brazilian and international entities, ensuring the team's adequate preparation in self-compositional methods and conducting mutual agreement commissions. Workflows have also been created for the new demands that began to arrive at the Department.

The unit is divided into four main axes that prioritize, in a cross-sectional manner, the collaborative construction of mutual agreement in the public administration, dialogue with institutions in conflict prevention; exchange of information between public entities during the negotiation phase of leniency agreements, with the inclusion of TCU proceedings in the scope of these agreements; preparation and execution of strategies for citizen participation in the TCU's daily activities, with the exchange of good practices at the national and international level; and the articulation of external control actions with the Brazilian Courts of Accounts, in addition to the sharing of good practices of decentralized public policies.

The operation of SecexConsenso does not exclude the Court's role in any other procedure or audit instrument and institutionalizes a process that was already carried out informally, by email or through meetings during audits and follow-ups.

Read the FAQ below and clarify your doubts about the Court's newest Department:

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### **Frequently Asked Questions**

#### **1. How does the decision-making process work in mutual agreement commissions?**

Mutual agreement, as its name implies, requires unanimous approval by the integral parts. With that, if all parties agree, the proposed solution follows the rite of analysis until approval by the TCU Full Court. In the event that any of the parties disagrees with the proposal, there will be no agreement and the proceeding will be referred to the President with a proposal for filing.

In the evaluation by the rapporteur and by the full court, there are three possible results: agreement with the proposal and subsequent approval by Full Court; disagreement with the proposal and subsequent filing; and agreement, with a proposal for modifications, which will be submitted to analysis by external stakeholders who are part of the commission and are required to respond within 15 days. In the latter case, if there is a consensus, final approval occurs; otherwise, the proceeding will be closed.

## **2. Where is this form of action by the TCU foreseen? Does it compete with the other competencies of the Court?**

The mutual agreement on conflicts is one of the priorities of the Federal Court of Accounts (TCU) for 2023, thus giving rise to the need to establish the Department of External Control for Mutual Agreement and Conflict Prevention (SecexConsenso). Normative Instruction 91/2022 regulates the procedures for handling requests for mutual agreements.

This regulation was inspired by the principle of efficiency, included in the Federal Constitution of Brazil following Constitutional Amendment 19/1998. This principle assigns to the “Public Administration and its agents the search for the common good, through the exercise of its competencies in an impartial, neutral, transparent, participative, and efficient manner, without bureaucracy and always in search of quality, striving for the adoption of the legal and moral criteria necessary for the best possible use of public resources, in order to avoid waste and guarantee greater social profitability.”<sup>[1]</sup>

It is a mechanism to resolve relevant controversies and prevent conflicts affecting bodies and entities of the Federal Public Administration, as well as referring to the provisions of Article 26 of the Brazilian Law Standards Introduction Act, which provides for the establishment of a commitment by the public authorities.

Mutual agreements do not exclude the Court’s performance in any other procedure or audit instrument. The Court is offering one more possibility to deal with demands, aiming to bring gains in efficiency and legal certainty to complex cases.

Each request for mutual agreement has its admissibility evaluated, following materiality, risk, and relevance criteria, in addition to verifying whether the object is part of the TCU’s competencies.

<sup>[1]</sup> Janaína Jacolina Morais, in “Princípio da Eficiência na Administração Pública.”

## **3. If the principle of efficiency inspired the SecexConsenso standard, what happens regarding compliance with the principle of legality?**

The principle of efficiency and the search for a mutual agreement cannot overrule the principle of legality, as doing so could jeopardize the Rule of Law itself. It is important to note that any proposal for a mutual agreement will seek, within the principle of legality, the most efficient alternative for society. Moreover, within the mechanisms for checks and balances

established by the TCU itself, the draft mutual agreement will undergo scrutiny by both the Public Prosecution Office within the TCU (MPTCU) and the Full Court itself.

#### **4. How will the composition of the Commission in SecexConsenso be?**

The Commission that works on building a mutual agreement is composed of representatives of SecexConsenso, who coordinate it, the audit unit specializing in the subject, representatives of public bodies and entities, and any individual involved in the controversy.

#### **5. How did the SecexConsenso public servants prepare to work in search of mutual agreements?**

A rapprochement was conducted with bodies and entities that use self-composition methods to resolve disputes, such as the Office of the Attorney General (AGU), the Administrative Council for Economic Defense (CADE), and the Court of Accounts of the State of Mato Grosso. These agendas were of great relevance in supporting the design of the SecexConsenso workflow, in addition to preparing the team for the situations that would come.

In terms of training, a number of negotiation courses were given, using the Harvard methodology on mediation and conflict resolution, starting with the hiring and participation of public servants in courses offered by Brazilian and international institutions.

It is also true that the team's development process is constant and requires permanent improvement, whether through guided studies, supervision, formal courses, or certification processes.

#### **6. What are the deadlines for completing mutual agreement processes?**

A speedy resolution of controversies, with legal security, is what guides the work of the Department. To this end, tight deadlines are established, making it possible to discuss the matter and design solutions in a collaborative way.

After the request is accepted and the mutual agreement commission is constituted, a period of 90 days, extendable by another 30, is established for the completion of the technical work. Within that period, the commission may present a proposal for an agreement, which will be submitted to the President of the TCU for verification of compliance with formal requirements. The proceeding then undergoes a mandatory hearing by the Public Prosecution Office within the TCU, which has a deadline of 15 days to respond. Finally, the rapporteur will be chosen by random selection, having a deadline of 30 days to examine the matter and submit it for plenary appreciation.

In the event that the committee fails to come up with a viable proposal for a resolution within the established period, the proceeding will be referred to the President for deliberation, with a proposal for closing.

**7. Is there a risk that one of the parties involved in the controversy may use the mutual agreement appeal for the purposes of “buying time?”**

IN 91/2022 stipulates a period of 90 days to reach a mutual agreement, extendable by another 30 days, under penalty of the proceeding being closing. Therefore, this risk is mitigated by the regulation itself.

**8. How are SecexConsenso auditors protected from external pressures, whether at the political or technical level?**

The choice of proceedings that will be the subject of a mutual agreement process depends on the request of the legitimate stakeholders, as provided in IN 91/2022, with requests undergoing an admissibility examination, based on objective criteria.

Additionally, proceedings only remain in the Court, with the formation of a commission, if everyone agrees to participate, following the principle of voluntariness, which governs self-composition processes.

SecexConsenso auditors, as well as other Court auditors, have functional independence to conduct committees, follow judgment parameters and professional skepticism in their analyses, and are also subject to the institution’s code of ethics.

The composition of the committee – with the participation of the specialized audit unit and the parties affected by the controversy, the very dynamic of having to reach a consensus in decision-making, and the supervisory and reviewing bodies at SecexConsenso – are relevant elements that contribute to the fairness of the entire process.

Thus, more than one TCU auditor participates in the commission, dividing responsibilities, and the same procedures applicable to other proceedings are present, including a manifestation by the director and the secretary, as well as the opinion of the MPTCU, followed by the random selection of the rapporteur and deliberation by Full Court.

**9. Does a decision resulting from a mutual agreement process apply to other cases, such as established jurisprudence?**

Even if there is a mutual agreement in a given case, nothing indicates that it may be automatically applied to other cases, as there are specificities that require separate analysis.

Nevertheless, the robustness of the discussions in the commissions indicates that the public agents will have more tools for decision making, with a maturity that may serve to continue with possible proceedings that fail to be resolved in the Department, thereby reducing judicialization.

Therefore, there will be no generalization or possibility that similar cases will be automatically decided in the same way as previous judgments.

**10. Can there be a loss of the educational effect of the control action?**

The way in which the TCU works to carry out audits, identify deviations, and apply sanctions will continue to coexist with this new way of acting, whose scope comprises the pursuit of making public goods and services available in their entirety to citizens. Before the creation of this new unit, there was a perception that important decisions were avoided or postponed due to the public agent's fear of how the Court would subsequently evaluate the decision taken by the manager.

**11. Is there a risk of co-management?**

Regarding the fear of envisioning the TCU as co-manager of a given administrative act, the mutual agreement, once approved, will be implemented by the relevant public bodies and entities, which ultimately will be responsible for perfecting the legal deed. Thus, the mere participation of the TCU in the definition of the mutual agreement does not make it a co-manager, as it will not impose a way of acting, nor will it perform any administrative acts on its own initiative.

**12. Can there be any questioning of the TCU decision or request for recusal by the Court within the scope of the Judiciary, even at the initiative of the Public Prosecution Office?**

Any decision handed down by the TCU may be questioned in the Judiciary. Under the principle of the independence of the instances, the Court may act in matters that lie within its institutional competence, notwithstanding the fact that any party that feels aggrieved may resort to the Judiciary. It is understood that for decisions taken by consensus, this risk tends to be mitigated, as the parties have the prerogative, within the commissions, of not adhering to the proposed agreement, in which case the proceeding would be closed. With regard to the Public Prosecution Office, the TCU seeks, in cases where there are actions by this body on the subject in search of a mutual agreement, to listen to it and try, as far as possible, to address its concerns within the scope of the mutual agreement.

**13. Is it possible for the conflict to expand without a more comprehensive analysis, as would be done within the scope of an audit?**

From the admission process of the request for a mutual agreement, SecexConsenso's auditors carry out a complete survey of the history of the issue, including an analysis of previous audits on the subject. One of the requirements for admissibility is that the object be described according to the materiality, risk, and relevance of the situation presented. Additionally, technical and legal opinions are requested on the controversy, which requires a pre-existing analysis on the subject. During the term of the Mutual Agreement Commission, auditors continue to analyze the issue alongside the audit unit specializing in the subject.

**14. Does SecexConsenso run the risk of presenting a solution that benefits the parties, to the detriment of the public interest?**

The focus of the Court – both the specialized audit unit and SecexConsenso – will always be on maximizing the public interest. It is the ultimate body responsible for guiding the performance of the Court's auditors.

**Do you have another question that you would like answered here? Please send a message to [secexconsenso@tcu.gov.br](mailto:secexconsenso@tcu.gov.br).**