Introduction

Over recent decades, there has been a clear movement in numerous countries towards expanding the use of leniency policies in the prosecution of different types of wrongdoing.[1] Leniency policies establish that defendants who confess to committing illegal activities and assist law enforcement authorities in prosecuting other agents may receive, in return for this cooperation, certain benefits.[2] In the United States, the development of transactions and cooperative relationships between accused and public authorities has long since become a common feature of the state prosecution apparatus.[3] In Continental tradition jurisdictions, where leniency policies have ordinarily been treated with high degrees of skepticism and mistrust, there are also clear signs of growing interest in the use of cooperating defendants in specific areas of law enforcement.[4]

Similar to other countries, Brazil has recently experienced a surge in the use of leniency policies. In 2000, an amendment to the former Brazilian

---

1 Different authors note this trend. See Nicholas Fyfe and James Sheptycki, 'International Trends in the Facilitation of Witness Co-Operation in Organized Crime Cases' (2006) 3 European Journal of Criminology 319, 339; Stephan Christoph, *Der Kronzeuge Im Strafgesetzbuch: Die Ermittlungshilfe Gemäß § 46b StGB Aus Dogmatischer Und Empirischer Perspektive* (13th edn, Nomos 2019) 37-49; Florian Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrecht* (Duncker & Humblot GmbH 1999) 20-21; Francesco Centonze, 'Public-Private Partnerships and Agency Problems: The Use of Incentives in Strategies to Combat Corruption' in Springer International (ed), *Preventing Corporate Corruption* (Springer International Publishing 2014) 44.

2 Florian Jeßberger, 'Nulla Poena Quamvis in Culpa: Ammerkungen Zur Kronzeugenregelung in § 46StGB' in Christian Fahl and others (eds), *Festschrift für Werner Beulke* (C F Müller 2015) 1153.

3 See Michael Jaeger, *Der Kronzeuge Unter Besonderer Berücksichtigung von § 31 BtMG* (Peter Lang 1986) 266-281; Ian Weinstein, 'Regulating the Market for Snitches' (1999) 47 Buffalo Law Review 563, 564-565.

4 According to Peter Tak: "This figure, the crown witness, takes various names in foreign legal systems. In the Netherlands and in Germany it is called the 'kroongetuige' (NL) and 'Kronzeuge' (FRG), in Italy it was called 'pentito' and is now called 'collaboratore della giustizia'; in Great Britain he is known as `supergrass', and in France such a witness is called 'repenti'." See Peter JP Tak, 'Deals with Criminals: Supergrasses, Crown Witnesses and Pentiti' (1997) 5 European Journal of Crime, Criminal Law and Criminal Justice 2, 2.

Competition Act introduced the first Brazilian antitrust leniency program ("*Programa de Leniência Antitruste*"), which provided immunity from administrative penalties and criminal punishment for cartelists denouncing the conduct and cooperating in the prosecution of co-conspirators. In 2011, the enactment of the current Competition Act expanded and restructured the antitrust leniency program. In 2013, the Organized Crime Act came into force and established the rewarded collaboration regulation ("*Colaboração Premiada*"), which allowed cooperating defendants to obtain different benefits in exchange for providing assistance to law enforcement authorities. Also in 2013, the Clean Company Act authorized the granting of privileged treatment to companies that cooperate with public officials in the prosecution of corrupt practices. Last of all, in 2017 Brazilian lawmakers approved a statute permitting the Central Bank and the Securities and Exchange Commission to conclude leniency agreements with agents accused of practicing illegal transactions.

These legal mechanisms share a common feature: all of them engender a negotiation process with the objective of setting up an exchange in which defendants provide information and evidence to public officials and, in return, receive privileged treatment, normally in the form of full or partial immunity from applicable penalties.[5] This negotiation process and the establishment of cooperative relationships between accused and enforcement authorities have raised several questions and caused perplexities in Brazilian law, demanding new solutions from courts and attracting substantial attention in legal scholarship.

The main subject of this thesis is the practice of the rewarded collaboration regulation, introduced by the 2013 Organized Crime Act. The thesis also analyzes, on a smaller scale, the Brazilian antitrust leniency program, provided for by the 2011 Competition Act. Among the leniency policies introduced recently in Brazilian law, the rewarded collaboration regulation and the antitrust leniency program are the only ones with a direct effect on criminal prosecution. The rewarded collaboration regulation allows cooperating defendants to obtain either full immunity from criminal

5 As noted by Ribeiro, Cordeiro and Guimarães: "It is clear that each type of leniency agreement incentivizes offenders to provide information to the authority - information that may be highly useful in order to uncover possible infringement crimes and prosecute other offenders. Thus, the underlying policy reason of such legal regimes is to deter infringements". See Diaulas Costa Ribeiro, Néfi Cordeiro and Denis Alves Guimarães, 'Interface between the Brazilian Antitrust, Anti-Corruption, and Criminal Organization Laws: The Leniency Agreements' (2016) 22 Law and Business Review of the Americas 195, 198.

punishment or the reduction of criminal penalties. The antitrust leniency program, besides granting full or partial reduction of the administrative sanctions applicable to anti-competitive behavior, also provides immunity from criminal prosecution regarding crimes related to the practice of cartels. The other leniency policies don't establish any benefit for cooperating defendants in the field of criminal law, and their effects are limited to administrative sanctions.

In recent years, both the rewarded collaboration regulation and the antitrust leniency program have undergone significant growth and gained substantial importance in legal practice.[6] Since the introduction of the antitrust leniency program, almost one hundred leniency agreements have been concluded, more than half of those after the enactment of the current Competition Act in 2011.[7] Due in large part to the antitrust leniency program, Brazil is nowadays internationally recognized as an important actor in the enforcement of anti-cartel policies.[8]

The practice implementation of the rewarded collaboration regulation has also rapidly accelerated since the enactment of the 2013 Organized Crime Act, with law enforcement authorities and cooperating defendants concluding hundreds of collaboration agreements thereafter. The use of collaboration agreements has mainly been developed in the enormous group of investigations dubbed "Operation Car Wash", which since 2014 has inquired intensively into corruption practices, bid rigging and money laundering concerning public procurement in Brazilian state companies.[9]

---

6 Noting this change, see Ana Frazao and Amanda Athayde, 'Leniência, Compliance e o Paradoxo Do Ovo Ou Da Galinha: Do Compliance Como Instrumento de Autorregulação Empresarial.' in Ana Frazao and Ricardo Villas Boas Cuevas (eds), *Compliance Perspectivas e desafios dos programas de conformidade* (Forum 2018) 297, 309-314.

7 Paulo Burnier and Victor Oliveira Fernandes, 'The "Car Wash Operation" in Brazil and Its Challenges for Antitrust Bid Rigging Enforcement' in Paulo Burner da Silveira and William Evan Kovacic (eds), *Global Competition Enforcement: New Players, New Challenges* (Kluwer 2019) 128.

8 See OECD, *Competition Law and Policy in Brazil – a Peer Review* (OECD IDB 2010) 73; Ana Paula Martinez, 'Challenges Ahead of Leniency Programmes: The Brazilian Experience' (2015) 6 Journal of European Competition Law & Practice 260, 261-262.

9 According to Eduardo Mello and Matias Spektor, the investigation "revolves around contractors bribing public officials in sums adding up to billions of U.S. dollars in order to secure construction and service contracts in the oil, nuclear, and public-infrastructure sectors—contracts that also became a device for siphoning money from state-run institutions into private pockets through overcharging." See

The rapid growth in the use of collaboration agreements has resulted in important developments within the Brazilian criminal justice system.

Until recently, negotiations between public officials and defendants played a minor role in criminal investigations. In the traditional structure of Brazilian criminal procedure, parties have little freedom to dispose of criminal cases: defendants may not end the proceeding through confession of the facts and admission of guilt, while prosecutors are bound by the principle of compulsory prosecution and by several statutory rules limiting prosecutorial discretion.[10] Furthermore, Brazilian courts are not passive observers of the parties' efforts to produce evidence and have the duty and the powers to guarantee an adequate factual inquiry, which limits the parties' capacity for developing consensual exchanges. The 1995 Small Claims Act authorized parties to resolve criminal proceedings through consensual transactions, but limited this possibility to investigations of petty crimes. Apart from these situations, the full-blown criminal proceeding remained the common reality in the investigation of medium and serious criminal behavior, in a context where the parties were not allowed to develop consensual exchanges within criminal proceedings.

The introduction of the rewarded collaboration regulation has modified this scenario, providing a legitimate negotiation forum in which accused and enforcement authorities can interact to achieve a common understanding that will decisively impact the investigation of grave crimes. The recurrent use of this forum to forge innovative collaboration agreements raised several questions regarding the role of consensual arrangements in Brazilian criminal justice. Which matters can be negotiated by the parties in a collaboration agreement? To what extent are these negotiations constrained by the limits set by statutory rules? What is the role of judicial bodies after the conclusion of an agreement? What are the effects of these agreements on other defendants?

Due to the swift development of the practice of rewarded collaboration regulation, the Brazilian judiciary has had to address these and other questions promptly. Unlike the experience of various other countries, where the assistance of cooperating defendants has often been used to investigate terrorism, drug trafficking and other forms of violent crimes, the Brazilian practice of collaboration agreements has occurred primarily in the investi-

---

Eduardo Mello and Matias Spektor, 'Brazil: The Costs of Multiparty Presidentialism' (2018) 29 Journal of Democracy 113, 113.

10 See section I.2.

gation of white-collar criminality,[11] in particular in the prosecution of corrupt acts and corporate wrongdoing.[12] These investigations have led to the arrest and conviction of several high-ranking politicians and prominent businessmen, directly affected Brazil's economic and political elite, and left a permanent mark on the country´s social landscape.[13] In this context, the recent boom in the employment of collaboration agreements has drawn massive media coverage and become a frequent subject of legal disputes and debate by the Brazilian public.[14] Because some of the conduct investi-

11 In Germany, the use of cooperating defendants has been developed initially in the prosecution of terrorism and drug traffic. See Matthias Breucker and Rainer OM Engberding, *Die Kronzeugenregelung - Erfahrungen, Anwendungsfalle, Entwicklungen* (Richard Boorberg Verlag 1999) 11-16; Winfried Hassemer, 'Kronzeugenregelung Bei Terroristischen Straftaten Thesen Zu Art. 3 Des Entwurfs Eines Gesetzes Zur Bekämpfung Des Terrorismus' (1986) 550 StrafVert. In Italy, it has been used largely in investigations of mafia groups. See Stefanie Mehrens, *Die Kronzeugenregelung Als Instrument Zur Bekämpfung Organisierter Kriminalität: Ein Beitrag Zur Deutsch-Italienischen Strafprozessrechtsvergleichung* (Iuscrim 2001) 173-179.

12 More recently, the investigation of corporate crimes and corruption practices has been a field of significant development of leniency policies in several countries. Defending this trend, see André Buzari, *Kronzeugenregelungen in Straf- Und Kartellrecht Unter Besonderer Berücksichtigung Des § 46b StGB (Strafrecht in Forschung Und Praxis)* (Dr Kovac 2015), 112-114; Stefanie Lejeune, 'Brauchen Wir Eine Kronzeugenregelung Zur Verfolgung von Korruptionsfällen?' in Transparency International (ed), *Korruption in Deutschland: Strafverfolgung der Korruption Möglichkeinten und Grenzen* (2004) 88. And also Dieter Dölling, 'Die Neuregelung Der Strafvorschriften Gegen Korruption' (2000) 112 Zeitschrift für die gesamte Strafrechtswissenschaft 334, 354–355. Critically: Roland Hefendehl, 'Außerstrafrechtliche Und Strafrechtliche Instrumentarien Zur Eindämmung Der Wirtschaftskriminalität' (2007) 119 Zeitschrift für die gesamte Strafrechtswissenschaft 816, 846-847.

13 Regarding the widespread impact of the investigations, see Mariana Mota Prado and Lindsey Carson, 'Corruption Scandals, the Evolution of Anti-Corruption Institutions, and Their Impact on Brazil's Economy' in Edmund Amann, Carlos R Azzoni and Werner Baer Print (eds), *The Oxford Handbook of the Brazilian Economy* (Oxford University Press 2018) 753-754.

14 Noting the high publicity obtained by collaboration agreements in Brazil, Marcus Melo states that "Media coverage of the scandal hit citizens with an informational tsunami. The level of exposure of corrupt deals has probably no precedent in any democracy except for Italy during the Mani Pulite (Clean Hands) investigations of the early and mid-1990s." See Marcus André Melo, 'Crisis and Integrity in Brazil' (2016) 27 Journal of Democracy 50, 60.

gated occurred abroad, the corruption inquiries spread to other jurisdictions and eventually gained international attention.[15]

The general reaction to the Brazilian rewarded collaboration regulation has been of a laudatory nature.[16] Through collaboration agreements, law enforcement authorities achieved fast and remarkable results. Hundreds of defendants agreed to cooperate with the investigations, pay multi-million fines and serve prison sentences. Evidence and information provided by cooperators played a central role in the conviction of other accused and bolstered new inquiries. In view of the long-lasting problems of slowness and ineffectiveness in the prosecution of corporate crimes and corruption practices,[17] collaboration agreements became an essential device for the successful prosecution of so-called "macro-delinquency".[18] The results achieved in recent years indicate an apparent case of remarkable success in the reduction of impunity and the enhancement of deterrence.[19]

---

15 According to Marcos Tourinho: "(…) investigations have thus far involved 44 jurisdictions and agreements are simultaneously being negotiated (or have been reached) in several states, most notably the United States and Switzerland." Marcos Tourinho, 'Brazil in the Global Anticorruption Regime' (2018) 61 Revista Brasileira de Politica Internacional 1, 1-2.

16 See, e.g. Sabine Kurtenbach and Detlef Nolte asserting that the findings of Operation Car Wash were only possible because of collaboration agreements and that "While this procedure is not beyond criticism, it was the only viable strategy to identify the politicians and businesses involved in this extensive corruption network". Sabine Kurtenbach and Detlef Nolte, 'Latin America's Fight against Corruption: The End of Impunity' (2017) 3 GIGA Focus Latin America, 5.

17 The structural difficulties perceived in successful prosecution of these wrongdoings is well registered in literature: Michael Lindemann, 'Staatlich Organisierte Anonymität Als Ermittlungsmethode Bei Korruptions- Und Wirtschaftsdelikten' (2006) 39 Zeitschrift für Rechtspolitik 127, 127-130; Britta Bannenberg, *Korruption in Deutschland Und Ihre Strafrechtliche Kontrolle* (Hermann Luchterhand 2002), 64-65; Luís Greco and Alaor Leite, 'Die „Rezeption" Der Tat- Und Organisationsherrschaft Im Brasilianischen Wirtschaftsstrafrecht' (2014) 6 ZIS - Zeitschrift für Internationale Strafrechtdogmatik 285, 290.

18 Affirming the social relevance of the prosecution of these crimes, see Wolfgang Naucke, *Der Begriff Der Politischen Wirtschaftsstraftat* (LIT 2012), 85-91; Bernd Schünemann, 'Vom Unterschichts- Zum Oberschichtsstrafrecht: Ein Paradigmawechsel Im Moralischen Anspruch?' in Hans-Heiner Kühne and Koichi Miyazawa (eds), *Alte Strafrechtsstrukturen und neue gesellschaftliche Herausforderungen in Japan und Deutschland* (Duncker unb Humblot 2000) 15-36.

19 See Transparency International Secretariat, ´Brazil´s Carwash task force wins Transparency International anti-corruption award´ (Transparency International, 3 December 2016) <https://www.transparency.org/news/pressrelease/brazils_carwash_task_force_wins_transparency_international_anti_corruption> accessed 23 June 2019.

The practice of the rewarded collaboration regulation received strong support from Brazilian public authorities, particularly the Federal Public Prosecution Office and the Federal Supreme Court. The Federal Public Prosecution Office has negotiated and concluded hundreds of agreements with cooperating defendants, designing ingenious solutions and developing consensual innovations that expanded the negotiation forum set by the Organized Crime Act. The Federal Supreme Court has adopted positions granting substantial freedom for cooperating defendants and law enforcement authorities to develop a flexible and broad system of negotiations.[20] This support was largely grounded on the notion that collaboration agreements are part of a new model of consensual justice, which has a specific logic and works in a different manner to traditional Brazilian criminal procedure.[21] Principles and doctrines normally associated with private contract law have gained great relevance as tools to interpret the rewarded collaboration regulation and resolve disputes regarding the use of collaboration agreements. In this context, several disputes regarding the correct use of collaboration agreements have been decided by courts based on the application of concepts such as the "*res inter alios acta*" principle, the "*venire contra factum proprium*" doctrine and the rule of "*pacta sunt servanda*".

The thesis develops a critical analysis of the practice of collaboration agreements and rejects core elements of the dominant view in Brazilian law regarding the rewarded collaboration regulation. This critical evaluation is based on two main arguments. First, it asserts that this understanding, which can be called a "contractualist approach" to the rewarded collaboration regulation, is irreconcilable with the structure of the Brazilian criminal justice system and jeopardizes fundamental guarantees of criminal procedure. Secondly, it asserts that the practice of collaboration agreements, as developed by legal actors in the last years, has serious – albeit unnoticed – side effects and leads to significant counter-productive results.

While rejecting the "contractualist approach" and refuting the notion that the rewarded collaboration regulation should be interpreted according to the principles of private contract law, the thesis offers an alternative perspective on the questions raised by the widespread use of collaboration agreements in criminal investigations. The thesis argues that collaboration agreements must be understood not as simple bilateral transactions between prosecutors and defendants, but rather as complex and durable public-private partnerships directed at establishing an evidentiary basis for the

20 See STF, HC 127483 [2015] and STF, PET 7074 [2017].
21 See item I.4.c.

imposition of criminal punishment upon third parties.[22] In this sense, the rewarded collaboration regulation entails a privatization process in the criminal law enforcement system, transferring to defendants functions that were previously performed by public officials.[23] The understanding that these agreements represent a form of partial privatization of investigative and prosecutorial activities offers an interesting perspective to address the possibilities and risks arising from the large-scale deployment of the rewarded collaboration regulation. After elaborating this perspective, the thesis criticizes well-established concepts in Brazilian legal scholarship and case-law, analyzing consequences of the proposed approach on legal practice.

The critical appraisal proposed in the thesis has two cornerstones. In order to examine the association of the rewarded collaboration regulation with the ideal of consensual justice, the thesis analyzes the German experience with the practice of negotiated judgements ("*Verständigung*") in criminal cases and with the crown-witness regulation ("*Kronzeugenregelung*"). The assessment of these two legal mechanisms provides useful insights to comprehend the limits and contradictions of the Brazilian practice of collaboration agreements, especially in relation to the role of consensual arrangements within the process of fact-finding, determination of individual guilt and imposi criminal penalties. As a country of Continental tradition, Germany provides a noteworthy example of the questions and complexities that arise with the introduction of consensual mechanisms in a system where criminal process is understood as an official investigation carried

22 Regarding the formation of public-private partnerships in the enforcement system, see critically Hefendehl, 'Außerstrafrechtliche Und Strafrechtliche Instrumentarien Zur Eindämmung Der Wirtschaftskriminalität' (n 12) 846-847. For a descriptive view, see Centonze (n 1).

23 For a comprehensive view of the process of "privatization" in the Germany criminal procedure, see Hannah Stoffer, *Wie Viel Privatisierung „verträgt" Das Strafprozessuale Ermittlungsverfahren?* (Mohr Siebeck 2016). Weigend notes a general trend of privatization of state functions and its impacts on the state's commitment to search for truth in criminal procedure See Thomas Weigend, 'Unverzichtbares Im Strafverfahrensrecht' (2001) 113 Zeitschrift für die gesamte Strafrechtswissenschaft 271, 303. The risks of this process have also been noted in the realm of the so-called "internal investigations". See Luís Greco and Christian Caracas, 'Internal Investigations Und Selbstbelastungsfreiheit' (2015) 7 NStZ 1, 1-16; Adán Nieto Martín, 'Internal Investigations, Whistle-Blowing, and Cooperation: The Struggle for Information in the Criminal Process' in Stefano Manacorda, Francesco Centonze and Gabrio Forti (eds), *Preventing Corporate Corruption* (Springer 2014) 69-92. Examining the interconnections between corporate compliance programs and leniency policies, see Frazao and Athayde (n 6) 298-307.

out by public authorities and aimed at correctly establishing the facts.[24] In such an environment, basic pillars of criminal justice – like the state's commitment to search for truth and the principle of compulsory prosecution – limit the parties´ capacity to dispose of criminal cases and pose several obstacles to the negotiation of consensual exchanges within criminal proceedings.[25] The question regarding the potential development of a consensual model of criminal justice in Germany has been a long and controversial topic of discussion, both in legal scholarship and in case-law.[26] This debate has been especially significant in the field of economic crimes, in particular with the emergence of the so-called "monster proceedings" ("Monster-Verfahren"), complex investigations that can last several years and en-

24 The many differences between the U.S. party-driven justice system and the German model of official investigation have different impacts on the use of leniency policies in criminal investigations. See Jaeger (n 3) 266-281; Jeßberger, *Kooperation und Strafzumessung* (n 1) 159-163. They also affect the development of inter-party negotiations regarding the confession of the accused. See Thomas Weigend, *Absprachen in Ausländischen Strafverfahren: Eine Rechtsvergleichende Untersuchung Zu Konsensualen Elementen Im Strafprozess* (Max-Planck-Inst für ausländisches und internat Strafrecht 1990); Dominik Brodowski, 'Die Verfassungsrechtliche Legitimation Des US-Amerikanischen „plea Bargaining" – Lehren Für Verfahrensabsprachen Nach § 257 c StPO?' (2013) 124 Zeitschrift für die gesamte Strafrechtswissenschaft 733.

25 Comparing the Anglo-American system of criminal procedure with the model traditionally adopted by continental European countries, Martin Heger highlights two main differences: "1) the working relationship between the judge and the other parties to the proceedings and 2) a vastly different expectation of the court's responsibility to ascertain the truth of a case". See Martin Heger, 'Adversarial and Inquisitorial Elements in the Criminal Justice Systems of European Countries as a Challenge for the Europeanization of the Criminal Procedure', in: BSU Law Faculty (ed.), *Criminal proceeding based on the rule of law as the means to ensure human rights* (Publishing Centre of BSU Minsk 2017) 199. See also Edda Weßlau, 'Wahrheit Und Legenden: Die Debatte Über Den Adversatorischen Strafprozess' (2014) 191 Zeitschrift für Internationale Strafrechtsdogmatik 558, 563-564; Bernd Schünemann, 'Zur Kritik Des Amerikanischen Strafprozessmodells' in Edda Wesslau and Wolfgang Wohlers (eds), *Festschrift für Gerhard Fezer zum 70. Geburtstag am 29. Oktober 2008* (De Gruyter 2008) 557-560.

26 According to Luis Greco, the development of consensual arrangements in criminal procedure must be the most discussed subject in German criminal procedure literature in recent decades. See Luis Greco, '„Fortgeleiteter Schmerz" – Überlegungen Zum Verhältnis von Prozessabsprache, Wahrheitsermittlung Und Prozessstruktur' (2016) 1 Goltdammer's Archiv für Strafrecht 1, 1.

counter enormous difficulties in the fact-finding process.[27] Because of these different aspects, the German experience offers an interesting perspective for a critical analysis of the Brazilian practice of collaboration agreements and its purported association with a new system of consensual criminal justice.[28]

Secondly, the thesis draws on a growing body of literature that has emerged to provide a more thorough review of the effects of leniency policies.[29] The widespread dissemination of leniency policies in the last decades and the much-vaunted results obtained by enforcement agencies have led several authors to speak of a "leniency revolution".[30] Highlighting the palpable outcomes achieved with the use of cooperating defendants,

---

27 Bernd Schünemann, 'Die Verständigung Im Strafprozeß – Wunderwaffe Oder Bankrotterklärung Der Verteidigung?' [1989] Neue Juristische Wochenschrift 1895, 1898.

28 Because of its unique features, the German experience with the introduction of consensual mechanisms in criminal justice has already gained vast attention in comparative scholarship. See Thomas Swenson, 'The German "Plea Bargaining" Debate' (1995) 7 Pace International Law Review 373; Markus Dirk Dubber, 'American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure' (1997) 49 Stanford Law Review 547; Máximo Langer, 'From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure' (2004) 45 Harvard International Law Journal 1; Stephen C Thaman, 'Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases' in Katharina Boele-Woelki & Sjef van Erp (eds), *General Reports of the XVIITH Congress of the International Academy of Comparative Law* (Bruylant/ Eleven 2007).

29 This has occurred mainly in the field of anti-cartel enforcement. See the seminal paper by Motta and Polo: Massimo Motta and Michele Polo, 'Leniency Programs and Cartel Prosecution' (2003) 21 International Journal of Industrial Organization 347. After that, several studies have attempted to test different aspects of leniency policies in the prosecution of cartels, corruption and organized crime. See, e.g. Cécile Aubert, Patrick Rey and William E Kovacic, 'The Impact of Leniency and Whistle-Blowing Programs on Cartels' (2006) 24 International Journal of Industrial Organization 1241; Paolo Buccirossi and Giancarlo Spagnolo, 'Leniency Policies and Illegal Transactions' (2006) 90 Journal of Public Economics 1281, 1296; Joseph E Harrington Jr., 'Optimal Corporate Leniency Programs' (2008) 56 The Journal of Industrial Economics 215; Antonio Acconcia and others, 'Accomplice Witnesses and Organized Crime: Theory and Evidence from Italy' (2014) 116 Scandinavian Journal of Economics 1116.

30 As noted by Giancarlo Spagnolo: "The last ten years have witnessed what one could call, with little or no exaggeration, a revolution in competition policy and antitrust enforcement, "the leniency revolution." See Giancarlo Spagnolo, 'Leniency and Whistleblowers in Antitrust' in Paolo Buccirossi (ed), *Handbook of Antitrust Economics* (The MIT Press 2008) 259.

such as the growing number of investigations opened, the increase in penalties imposed and the boost in fines collected, the discourse of public authorities portrays leniency policies as a crucial tool in the prosecution of sophisticated criminal organizations and powerful offenders.[31] More recently, a substantial number of economic studies have arisen examining and testing the effects of leniency policies, pointing out various risks and side-effects, such as the excessive reduction of penalties, the distortion of incentives for enforcement agencies and the possibilities of reverse exploitation of the leniency system.[32] This body of economic research suggests that the traditional approach of enforcement agencies to leniency policies is reductionist and uncritical, largely ignoring the hazards and trade-offs involved.[33] Because the legitimacy of the Brazilian practice of collaboration agreements stems largely from the results achieved, this body of literature offers a valuable perspective for a critical analysis.

The thesis proceeds as follows. Chapter I presents the development and structure of the rewarded collaboration regulation, introduced by the 2013 Organized Crime Act, and the antitrust leniency program, as provided in the 2011 Competition Act, describing the central subject of analysis: the inventive use of collaboration agreements, as developed in Brazilian legal practice. Chapter II examines the types of investigations in which the Brazilian practice of collaboration agreements was developed, and describes its impacts on the prosecution of corruption networks and macro-delinquency. Chapter III discusses the rationale, expectations and risks associated with leniency policies, particularly in the field of white-collar

31 For such a view regarding the U.S. antitrust leniency program, see Ann O'Brien, 'Leadership of Leniency' in Caron Beaton-Wells and Christopher Tran (eds), *Anti-cartel enforcement in a contemporary age: leniency policies* (Hart Publishing 2015); Scott D Hammond, 'Cornerstones of an Effective Cartel Leniency Programme' (2008) 4 Competition Law International 4. For a similar approach regarding the Brazilian experience with collaboration agreements, see Sérgio Fernando Moro, 'Preventing Systemic Corruption in Brazil' (2018) 147 Daedalus 157; Rodrigo Janot, 'The Lessons of Car Wash' *Americas Quarterly* (New York, 12 January 2018) <https://www.americasquarterly.org/content/lessons-car-wash> accessed 10 July 2018.

32 For a good overview of this body of literature, see Catarina Marvão and Giancarlo Spagnolo, 'What Do We Know about the Effectiveness of Leniency Policies? A Survey of the Empirical and Experimental Evidence' in Caron Beaton-Wells and Christopher Tran (eds), *Anti-cartel enforcement in a contemporary age: leniency policies* (Hart Publishing 2015).

33 See Caron Y Beaton-Wells, 'Immunity for Cartel Conduct: Revolution or Religion? An Australian Case Study' (2014) 2 Journal of Antitrust Enforcement 126.

criminality, reviewing the body of literature that has recently emerged testing the effects of these mechanisms. Chapter IV examines the German experience with the practice of negotiated criminal judgements and with the crown-witness regulation, establishing points of analysis that are useful to assess the Brazilian practice of collaboration agreements. From the concepts discussed and the results achieved in Chapters III and IV, Chapter V carries out a critical appraisal of the Brazilian practice of collaboration agreements and presents an alternative perspective on the rewarded collaboration regulation in Brazilian law. Chapter VI exposes important legal consequences of the positions defended in Chapter V.