Chapter V – Truth and consent in collaboration agreements: a rebuff to the contractualist approach

1. Introduction

The enactment of the Organized Crime Act in 2013 represented a major turning point in the role played by consensual arrangements within Brazilian criminal justice.[994] Until then, negotiations between law enforcement authorities and defendants in criminal investigations were of secondary importance.[995] The 1995 Small Claims Act introduced possibilities for procedural participants to resolve criminal cases through negotiated transactions, but restricted the use of these mechanisms to investigations of minor offenses.[996] Apart from that, Brazilian law did not provide other opportunities for consensual arrangements within criminal procedure. Negotiated solutions also did not arise informally in the daily operations and routines of legal practitioners, as occurred in German criminal procedure from the late 1970s onwards.[997] This scenario changed completely after the enactment of the Organized Crime Act, which introduced the rewarded collaboration regulation, allowing offenders who committed serious crimes to negotiate and enter into written agreements with law enforcement authorities. Since then, hundreds of collaboration agreements have been concluded, especially in investigations of corruption networks and corporate crimes directly affecting Brazils political and economic elites.[998]

In view of the recent boom in collaboration agreements, several new concerns arose during high-profile investigations, which required courts, including the Brazilian Federal Supreme Court, to quickly respond to fundamental questions regarding the role of consensual arrangements in the

994 Regarding the rapid development of the practice of collaboration agreements since 2013, see items I.2.b. and I.4.

995 On the restricted possibilities for inter-party negotiations within Brazilian criminal procedure, see item I.1.

996 Only minor crimes, punishable with a maximum of two years of imprisonment, can be subject of a consensual solution provided in the 1995 Small Claims Act. See item I.1.

997 On the development of the practice of negotiated judgments in Germany, see section IV.2.

998 See sections II.2 and II.4.

Brazilian criminal justice system. Which aspects of criminal proceedings can be negotiated between cooperators and law enforcement authorities? How constrained are parties by the statutory provisions of the Organized Crime Act? When can other defendants question in court the legality and the terms of a cooperator's agreement? To what extent are inter-party transactions binding upon judicial bodies? A decision on these issues proved to be of paramount importance, given the development of an inventive model of negotiation in the Brazilian practice of collaboration agreements, which devised a comprehensive and flexible system of arrangements that was plainly detached from the text of the Organized Crime Act.[999]

Faced with agreements that established audacious consensual innovations, the Brazilian judiciary, following guidelines from the Brazilian Federal Supreme Court, opted to give strong support to the practice of collaboration agreements.[1000] On numerous occasions, Brazilian courts validated the conclusion of inventive and ingenious collaboration agreements, endorsing the development of a model of negotiation that conferred enormous discretion and freedom upon cooperating defendants and law enforcement authorities.

To that end, two jurisprudential developments were fundamental. The first refers to the understanding that collaboration agreements are bilateral transactions between the state and the cooperator that do not affect the legal interests of third parties.[1001] From this perspective, courts applied the *res inter alios acta* doctrine and denied other defendants the right to question in court the legality of a cooperators agreement. The second relates to the position that collaboration agreements have a binding effect upon judicial bodies, who must comply in their sentences with the terms negotiated by the cooperator and law enforcement authorities.[1002]

This chapter rejects this "contractualist" approach to collaboration agreements and the broad model of negotiation developed in the Brazilian practice of the rewarded collaboration regulation.[1003] It asserts that the contractualist approach misunderstands the function fulfilled by the rewarded collaboration regulation in Brazilian law and seriously undermines basic values protected by the Brazilian system of criminal justice. Further-

999 On the detachment between the textual provisions of the rewarded collaboration regulation and the judicial practice, see item I.4.a and I.4.b.
1000 See section I.4.
1001 See item I.4.c.ii.
1002 See item I.4.c.i.
1003 On the contractualist approach to collaboration agreements, see section I.5.

more, it argues that the characteristics of the current practice of collaboration agreements also jeopardize the development of a sound leniency policy and may have, from an effectiveness point of view, disturbing side effects.

Section V.2 rejects the use of concepts from private contract law to interpret the rewarded collaboration regulation and highlights the grave risks brought by the consensual innovations that mark the Brazilian practice of collaboration agreements. It also argues that the Brazilian rewarded collaboration represents, in a similar manner to the German crown-witness regulation, an extraordinary tool to overcome situations of investigative emergencies, and not an aspect of the parties´ powers to dispose of criminal proceedings. Section V.3 rejects the association of the rewarded collaboration regulation with the concept of consensual justice and repudiates the idea that collaboration agreements integrate a new system of criminal justice, separate from the traditional Brazilian criminal procedure. Instead, it asserts that collaboration agreements must be understood as durable public-private partnerships between public authorities and defendants, leading to a complex process of partial privatization of investigative and prosecutorial functions. Section V.4 rejects the notion that parties may bind judicial sentences through collaboration agreements and highlights the negative externalities that arise from such transactions, asserting the need for strict judicial control to guarantee the regularity, legitimacy and effectiveness of the practice of collaboration agreements.

2. *The practice of collaboration agreements: incompatibility with Brazilian criminal justice and counterproductive effects*

The rewarded collaboration regulation designed a communication forum that enables law enforcement authorities to engage in negotiations with offenders and conclude written agreements in order to obtain their cooperation in the prosecution of former co-conspirators. According to the provisions of the Organized Crime Act, these transactions are quite simple: in return for the cooperator's assistance, courts may grant a judicial pardon, lower the imprisonment penalties by up to two-thirds or replace them with a penalty of restriction of rights.[1004] In specific circumstances, the

1004 On the benefits provided by the rewarded collaboration regulation, see item I.3.b.i.

Public Prosecution Office may also drop charges against the cooperator. [1005]

The Brazilian practice of collaboration agreements, however, evolved in a very distinctive manner. As a wide array of cases demonstrates, procedural participants used the communication forum to formulate complex consensual arrangements and devise striking innovations not provided for by the Organized Crime Act. Rather than implementing the system of simple transactions designed by the Organized Crime Act, legal practitioners devised intricate and comprehensive consensual arrangements that resembled sophisticated private contracts, meticulously predefining a broad spectrum of issues within criminal proceedings.

A major innovation was the exact definition of imprisonment penalties in early stages of the investigation: instead of outlining the benefits provided by law, collaboration agreements have precisely determined the criminal punishment of the cooperating defendant and detailed how it should be fulfilled.[1006] Another novelty was the design of "package deals", which defined a "unified penalty" for a wide range of wrongdoings and encompassed multiple criminal proceedings.[1007] Collaboration agreements also provided several new benefits not foreseen in the rewarded collaboration regulation, such as the design of "differentiated" detention regimes, which allowed cooperators to serve long imprisonment sentences in their private residences with several prerogatives.[1008] They also contained clauses authorizing cooperating defendants to serve the negotiated imprisonment penalties in advance, before the pronouncement of the judicial verdict and sentence.[1009]

The adoption of a model of tailor-made negotiations led to the development of customized transactions, with every agreement having unique provisions to meet the specific needs of different cooperating defendants. Instead of conforming to the standard provisions of statutory regulation, collaboration agreements formulated a unique set of rights and duties for each case, creating a rich assembly of original clauses and innovative solutions.[1010]

1005 According to the Organized Crime Act, this can occur when the cooperating defendant was not the leader of the criminal organization and was the first to effectively cooperate. See Brazilian Organized Crime Act 2013, art 4 § 4.

1006 See item I.4.a.ii.

1007 See item I.4.a.iii.

1008 See item I.4.a.i.

1009 See item I.4.a.iv.

1010 See item I.4.b.

The clear detachment between the text of the Organized Crime Act and the emergent 'law in action' has often been justified by the notion that the rewarded collaboration regulation is a part of a developing paradigm of "consensual criminal justice".[1011] In this context, concepts normally associated with private contract law have emerged as tools to interpret and develop the provisions of the rewarded collaboration regulation.[1012] The elastic system of transactions is also repeatedly justified on efficiency grounds: the successful investigation of sophisticated criminal organizations depends, in this view, on flexible tools, allowing a more effective prosecution of powerful offenders, particularly in the realm of white-collar criminality.[1013]

This section argues that this contractualist approach to collaboration agreements misunderstands the function fulfilled by the rewarded collaboration regulation in Brazilian law and seriously undermines basic values protected by the Brazilian system of criminal justice. Furthermore, it asserts that the inventive practice of collaboration agreements has counterproductive effects and maximizes the inherent risks of leniency policies.

1011 See item I.4.c. For an emphatic defense of this position, see: Mendonça (n 36). This position also gained recognition in a decision of the Brazilian Federal Supreme Court. See STF, PET 7074 [2017] (Celso de Mello J). On different occasions, the Federal Public Prosecution Office associated the rewarded collaboration regulation with a "system of consensual justice", defending its interpretation according to the "principle of the consensual due process of law". See its allegations in the following proceedings: STF, PET 7265 [2017] and STF, PET 5779 [2015].

1012 See items I.4.c.i and I.4.c.ii. Several judicial decisions of Brazilian higher courts followed this line of reasoning. See items I.4.c.i and I.4.c.ii. Several judicial decisions of Brazilian higher courts followed this line of reasoning. See STF, HC 127483 [2015]; STF, PET 7074 [2017] and STF INQ 4405 AgR [2018]. Several authors defend the interpretation of the rewarded collaboration regulation according to traditional principles of private contract law, such as individual autonomy, contractual stability and protection of legitimate expectations. See Daniel Sarmento, 'Colaboração premiada. Competência do relator para homologação e limites à sua revisão judicial posterior. Proteção à confiança, princípio acusatório e proporcionalidade', *in* Daniel Sarmento (eds), *Direitos Democracia e República* (Fórum 2018); Alexandre Morais da Rosa, 'A aplicação da pena na justiça negocial: a questão da vinculação do juiz aos termos da delação', *in* Américo B Júnior and Gabriel SQ Campos (eds.), *Sentenca criminal e aplicação da pena: ensaios sobre discricionariedade, individualização e proporcionalidade* (Juspodiuvm 2017).

1013 See section II.4. Also Dino, 'A colaboração premiada na improbidade administrativa: possibilidade e repercussão probatória'(n 425) 533; Kurtenbach and Nolte (n 16) 5.

Item V.2.a argues that, like the German crown-witness regulation, the Brazilian rewarded collaboration regulations represents an extraordinary investigative tool to be employed under specific circumstances, and not a facet of the parties' discretionary powers to dispose of criminal proceedings. From this perspective, item V.2.b asserts that collaboration agreements must respect the guarantee of due process and cannot alter the natural chain of events of Brazilian criminal procedure. Item V.2.c sustains that the rewarded collaboration regulation did not modify the system of separation of functions within Brazilian criminal justice, and that collaboration agreements must respect the exclusive powers of judicial bodies in the determination of the verdict and the sentence. Item V.2.d affirms that, because the legitimacy of collaboration agreements stems from investigative successes achieved at the end of criminal proceedings, premature definition of the cooperator's benefits and punishment carries serious risks for the sound development of a sound leniency policy.

a. Collaboration agreements as exceptional tools for investigative emergencies

The introduction of leniency policies, such as the Brazilian rewarded collaboration regulation, expands the field of action of parties in criminal procedure. They enable defendants to cooperate with the investigations and obtain benefits that did not exist before. They also allow law enforcement authorities to develop cooperative relationships with offenders in order to obtain information and evidence from an internal source of the criminal organization. This process of fact-finding is clearly different from the use of other investigative techniques, such as the interception of communications and the execution of searches and seizures. Its success depends on the conversion of an offender, who has profited from wrongdoings, into an active partner of state authorities.[1014] Thus, leniency policies require a very different attitude from law enforcement authorities compared to traditional investigative tools. Instead of gathering evidence directly with the use of state prerogatives, they must dialog with offenders

1014 Florian Jeßberger notes that leniency policies create a scenario where the defendant is both the object and subject of a criminal investigation. See: Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrecht* (n 1) 26.

and persuade them to, in exchange for some benefits, cooperate in the investigation against co-conspirators.[1015]

Under what circumstances should law enforcement authorities engage in these negotiations? How should they select the individuals that deserve and will honor an agreement? How should they decide the benefits that each cooperator will receive?

The development of the Brazilian practice of collaboration agreements has clearly been influenced by the ample American experience with the use of cooperating defendants.[1016] In the United States, the above questions are answered based on the assumptions that prosecutors have wide discretion in deciding the format and the fate of criminal proceedings,[1017] that their decisions are connected to the system of local representation[1018] and that they are ultimately controlled by the democratic electoral process.[1019] The concept that criminal proceedings are disputes between two parties leads to a scenario where cooperation between offenders and enforcement authorities appears as a normal feature of the U.S. criminal justice.[1020] The particular structure of American criminal procedure, that rests upon the notion that procedural parties are the "real owners of the process",[1021] has made the use of cooperating defendants a common and widespread reality.[1022]

1015 The foreseeable concession of benefits is a key part of a leniency policy. Stefanie Mehrens observes that a distinctive feature of leniency policies is the granting of a specific compensation in return for a concrete assistance in an investigation. According to the author, "The compensation comprises normally not a financial sum, but a benefit in the criminal proceeding regarding the conduct of the cooperator" . See: Mehrens (n 11) 30.

1016 See item I.4.c.

1017 Dubber and Hörnle note that: "Prosecutorial discretion in the U.S. system, however, is essentially unconstrained (…)" . See: Dubber and Hörnle (n 670). On the same note, Jaeger asserts that "American prosecutorial bodies have a discretion over the criminal proceeding that is virtually unrestricted and beyond control". See: Jaeger (n 3).

1018 Robert L Misner, 'Recasting Prosecutorial Discretion' (1996) 86 Journal of Criminal Law and Criminology 717, 731. On this point, Dominik Brodowsky observes that the legitimacy of the discretionary powers of American prosecutors arise from the political system. See: Brodowski (n 24) 742.

1019 Langbein (n 682) 445-446.

1020 Jaeger (n 3) 274.

1021 Langer (n 28) 36.

1022 Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrecht* (n 1) 153-154.

Because of their wide discretionary powers, U.S. prosecutors are generally free from constraints when it comes to selecting the situations where cooperation with offenders is appropriate.[1023] The broad discretion conferred upon prosecutorial bodies allows them to make and honor specific promises to cooperating defendants without depending on the decisions of judicial bodies.[1024] The enormous freedom of action of American prosecutors enables the use, in agreements with offenders, of techniques similar to those employed by private attorneys in the negotiation of contractual arrangements.[1025] Promises of benefits and threats of retaliation, for example, are natural elements of this negotiation process.[1026]

In Continental tradition countries, the situation is completely different, since the structure of criminal procedure – based on principles such as legality and compulsory prosecution – restricts the possibilities for negotiations between law enforcement authorities and offenders.[1027] Because

1023 According to Ian Weinsten, this wide discretion generates strong discrepancies in the "cooperation market" in U.S. criminal justice. The author observes that "cooperation is unevenly distributed and subject to wide variations in local practices and policies" and that "the system is rife with individual and district-to-district disparities". See: Weinstein (n 3) 564.

1024 Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrecht* (n 1) 208-209.

1025 Whitman asserts that "American prosecutors have the widest range of charging discretion. Indeed, they bring the same spirit of inventiveness to their task that American business lawyers bring to the drafting of contracts". See Whitman (n 244) 387.

1026 Luis Greco notes that it is acceptable in the U.S. justice system for prosecutors to threaten to present harsher charges in order obtain the consent of the defendant. See: Greco, *Strafprozesstheorie Und Materielle Rechtskraft* (n 668) 278. Regarding this matter, the U.S. Supreme Court has decided that: "The Due Process Clause of the Fourteenth Amendment is not violated when.a State prosecutor carries out a threat made during plea negotiations to have the accused reindicted on more serious charges on which he is plainly subject to prosecution if he does not plead guilty to the offense with which he was originally charged." See See Bordenkircher v. Hayes, 434 U.S. 357 (1978).

1027 In Germany, Lorenz Frahm points out that incompatibility with the principle of compulsory prosecution ("Legalitätsprinzip") was the most common argument against the introduction of the crown-witness regulation See: Frahm (n 482) 167. Similarly: Hoyer (n 442) 234; Buzari (n 12) 68-69. Comparing the prosecution of corporate wrongdoings in U.S. and in continental countries, Ana Pena asserts that in the latter ones "the principle of legality prevents prosecutors from not bringing charges when a crime has been committed. Therefore, the power to negotiate agreements is more reduced, at least in theory". See: Neira Pena (n 375) 205.

criminal procedure is understood not as a simple dispute between two parties, but rather as an official investigation to ascertain whether a crime has been committed and by whom, the parties' capacity to dispose of criminal cases is much smaller than in the American criminal justice system. [1028] Judicial bodies play a central role in the fact-finding process, overseeing and reviewing decisions of public prosecutors to guarantee an accurate and impartial reconstruction of past events.[1029] The granting of benefits to cooperating defendants cannot stem from discretionary concessions of public prosecutors, since such discretionary powers do not exist or are very narrow.[1030]

As the German experience shows, the use of cooperating offenders to investigate co-conspirators has, in a context where a criminal proceeding is understood as an official investigation, very different foundations and, consequently, follows a distinct rationale when compared to the American experience.[1031] While in the U.S. the granting of benefits to cooperators arises – due to particularities of the party-driven criminal procedure – as a common feature and a recurrent practice, in the structure of German criminal justice it can occur only as an exceptional response to situations of investigative emergencies ("*Ermittlungsnotstand*"), which arise when serious obstacles hinder an appropriate inquiry of serious crimes.[1032] The so-called crown-witness regulation represents a relaxation – occasional and limited – of traditional pillars of German criminal procedure that can be employed only under specific circumstances.[1033] As an extraordinary reaction to extraordinary situations,[1034] the development of cooperative relationships between public authorities and offenders must strictly abide by statutory rules, which circumscribe the applicability and define the conditions of these exchanges.[1035] The effectiveness of the justice system cannot depend on the routine granting of benefits to offenders, since that would contra-

1028 Langer (n 28) 22.

1029 Schünemann stresses the central role played by courts in German criminal procedure. See: Bernd Schünemann, 'Die Zukunft des Strafverfahrens – Abschied vom Rechtsstaat?' (2007) 119 ZStW 945, 946.

1030 Comparing the legitimacy of the discretionary decisions of American and German prosecutors, see: Brodowski (n 24) 773-776.

1031 Jeßberger, *Kooperation und Strafzumessung: der Kronzeuge im deutschen und amerikanischen Strafrecht* (n 1) 304; Jaeger (n 3) 266-268.

1032 On the requirement regarding the existence of investigative emergencies ("*Ermittlungsnotstand*"), see item III.3.c.

1033 Hoyer (n 442) 240.

1034 Jung (n 442) 42.

1035 Schlüchter (n 495) 69.

dict basic principles of German criminal justice.[1036] Nor can the crown-witness regulation become a tool for public prosecutors to manipulate the criminal procedure and circumvent their legal duties.[1037]

These differences reflect on how cooperation with offenders is implemented within the justice system: whereas in American procedure prosecutors have discretionary powers to make and honor promises that favor the cooperator, in Germany judicial bodies play a central role in the definition and granting of the benefits.[1038] The German general crown-witness regulation, introduced in 2009, establishes a relationship of exchange between the cooperating defendant and the state in which the public authorities receiving the cooperation (the police and prosecutors) are not the same authorities responsible for determining the cooperator's benefits (the judicial bodies).[1039] The regulation also devises a temporal separation between the moment of assistance and the moment of definition of the cooperator's legal situation: while cooperating defendants must provide the relevant information and evidence before the beginning of the criminal process, only at the sentencing phase will the consequences of their conduct be determined.[1040]

Since the concession of privileges to cooperating offenders constitutes a departure from traditional pillars of German criminal procedure, it can only be accepted when clear thresholds are met. The provided material must lead to a concrete investigatory achievement ("Aufklärungserfolg"), effectively contributing to the prosecution of individuals who would otherwise go unpunished.[1041] The defendant's mere confession is insufficient to support the granting of benefits established by the crown-witness regulation.[1042] The sharing of generic information, of speculative versions or of narratives without evidence also does not justify any differential treatment.[1043] The assistance provided by the defendant must represent an es-

1036 Jung (n 442) 40.
1037 Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrecht* (n 1) 307.
1038 See item III.3.b.
1039 Malek, 'Die Neue Kronzeugenregelung Und Ihre Auswirkungen Auf Die Praxis Der Strafverteidigung' (n 481) 203.
1040 As provided in the German Criminal Code (*StGB*), § 46b (2) 2.
1041 On the issue of investigative achievements, see item III.4.d.
1042 Item IV.3.b. See Buzari, *Kronzeugenregelungen in Straf- und Kartellrecht unter besonderer Berücksichtigung des § 46b StGB* (*Strafrecht in Forschung und Praxis*) (n 12) 55.
1043 ibid 52.

sential contribution ("wesentlicher Beitrag") to the discovery or prevention of serious criminal activities;[1044] for this purpose, the simple confirmation of information already possessed by authorities is not enough.[1045] Furthermore, the use of the crown-witness regulation needs to result in a positive balance regarding the punishment of all the accused.[1046] The reduction of the cooperator's penalties can be accepted only when associated with a significant increase of the criminal punishment imposed upon the other co-conspirators.[1047]

There are, therefore, significant contrasts in the use of cooperating defendants in a system of official investigation, like Germany, when compared to jurisdictions where criminal procedure is understood as a dispute between two conflicting parties, as in U.S. criminal justice.[1048] This provides an interesting perspective for analyzingvarious controversies regarding the Brazilian rewarded collaboration regulation and the developments implemented by legal practitioners.

As in the German system and other jurisdictions of Continental tradition, the development in Brazil of cooperative relationships between offenders and enforcement authorities cannot derive from the authorities' wide discretionary powers to dispose of criminal procedures, since this type of discretion does not exist in Brazilian criminal justice.[1049] Public

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1044 Kneba (n 861) 66.

1045 Frahm (n 482) 54-55.

1046 Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrecht* (n 1) 102-103.

1047 Hoyer (n 442) 236.

1048 For an analysis of the differences between the concept of criminal proceeding as a "dispute" and as an "official investigation", see Langer (n 28) 20-24.

1049 In an important decision regarding the use of the negotiation mechanisms provided for in the Small Claims Act, the Brazilian Federal Supreme Court recognized that, in Brazilian criminal justice, "compulsory prosecution is the rule; the prosecutor is constrained to present charges, whenever there exist legal and factual grounds for the indictment". The decision acknowledged that the rule of compulsory prosecution could be loosened in specific situations established in the Small Claims Act, granting prosecutors a margin of discretion to negotiate with defendants in proceedings related to minor offenses. However, even in those situations, the Federal Supreme Court affirmed that the loosening of the rule of compulsory prosecution could not open space for "the free enlargement of personal temperaments, the subjectivism of criteria or the daily emotion of each prosecutor, throughout Brazil." For this reason, the decision authorized courts to monitor and eventually challenge the decisions made by prosecutors in the negotiations engendered by the Small Claims Act. See STF, HC 75343 [1997].

prosecutors and defendants do not represent, in Brazilian criminal procedure, two disputing parties that contend before a passive referee.[1050] Courts play a major role throughout the whole process of fact-finding, which is understood not as a clash between two alternative versions presented by each contender, but rather as an official investigation into what really occurred and who is responsible for it.[1051] Given the judicial commitment to ascertaining the facts, the confession of an accused is insufficient to justify a criminal conviction and constitutes only an additional piece of evidence to be analyzed by the court.[1052] Therefore, accused cannot dispose of the criminal procedure through confession of the facts, and the state's commitment to an adequate reconstruction of the facts prevents defendants from waiving basic procedural rights.[1053]

1050 Regarding the role of the prosecutor in the Brazilian criminal justice system, a recent decision of the Brazilian Superior Court of Justice affirmed that "the Public Prosecution Office, regardless of being a formal part of the criminal proceeding, acts in an objective manner, fulfilling its duty to verify the correct observance of law and to ensure the observance of the defendant´s rights and guarantees." Because of this position, the Prosecution Office has "the duty to press charges whenever the legal prerequisites are present, committed with the discover of truth and the pursuit of justice." See STJ, REsp 1340709 [2014].

1051 The Brazilian Criminal Procedural Code empowers courts to ascertain facts and determine *ex officio* the production of evidence. A recent decision of the Federal Supreme Court validated these powers, asserting that the principle of impartiality "does not oblige courts to adopt a mere contemplative stance, especially because of the principle of search for the material truth that guides criminal procedure." See STF HC 126501 [2016] (Marco Aurélio J).

1052 The Brazilian Code of Criminal Procedure explicitly provides that courts have the duty to compare a defendant's confession with other pieces of evidence to ascertain their compatibility. See Brazilian Code of Criminal Procedure, art 197. Countless judicial decisions affirm the basic rule that a mere confession is insufficient to justify a criminal conviction. The Federal Supreme Court, for instance, has decided that a confession "must not necessarily lead to the conviction of the defendant" and that "a confession, when incompatible with other pieces of evidence, must be appraised with caution." See STF, RHC 91691 [2008] (Menezes Direito J).

1053 On this point, a ruling of the Brazilian Superior Court of Justice affirmed that the defendant´s right to contest the charges "also concerns the State, since it aims at clarifying the facts in search for the material truth." See STJ, RHC 13985 [2003]. Another ruling of the Court decided that: "The right of defense can not be waived, and it can not be disposed of by the accused, his lawyer, the Prosecution Office, even when the accused admits the wrongdoing and is willing to serve the penalty." See STJ, RHC 15.258 [2004]. For a strong defense of the position that the Brazilian Constitution prevents the free disposition of the

The notion that parties cannot freely dispose of criminal cases is a core concept of the Brazilian criminal justice system, with various consequences across the structure of criminal proceedings, limiting the field of action of law enforcement authorities and allowing for strict judicial control at different phases of the process. According to Brazilian criminal procedure, the Public Prosecution Office is not allowed to withdraw a criminal charge[1054] or an appeal after it has been filed.[1055] A request for acquittal by the Public Prosecution Office does not bind the judicial organ, which may convict the defendant and acknowledge aggravating circumstances even if they are not raised by the prosecutor.[1056] The decision to close an investigation and not to press charges can also be questioned by courts.[1057]

In this context, the introduction of the rewarded collaboration regulation by the Organized Crime Act appears – just like the German crown-witness regulation[1058] – as an extraordinary investigative measure to overcome situations of extreme difficulty in the discovery and prosecution of serious crimes.[1059] In Brazilian law, the legitimacy of collaboration agreements arises not from the parties' power to freely dispose of criminal proceedings, but from a specific and limited statutory authorization, which seeks to increase the state's capacity to punish and prevent the activities of criminal organizations. In this context, cooperation between offenders and enforcement authorities represents an exceptional tool for guaranteeing an adequate finding of facts and effective evidence collection in scenarios of investigative emergencies. From this perspective, the practice of collaboration agreements can be more thoroughly analyzed.

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right to defense in criminal procedure, see the ruling of the Federal Supreme Court in STF, HC 70600-2 [1994].

1054 Brazilian Code of Criminal Procedure, art. 42. In this regard, the Brazilian Federal Supreme Court has already decided that the Public Prosecutor's Office the principle of compulsory prosecution prevents the Public Prosecution Office of withdrawing an appeal that has been already filed. See STF, AP 905 QO [2016].

1055 Brazilian Code of Criminal Procedure, art 576.

1056 Brazilian Code of Criminal Procedure, art 385.

1057 In this situation, the investigation will be sent to the Prosecutor General, who will be responsible for the decision to present the indictment, to appoint another member of the Public Prosecutor's Office to handle the case or to reiterate the request for closure, in which case the court will be obligated to accept it. See Brazilian Code of Criminal Procedure, art 28.

1058 Jung (n 442) 42.

1059 Defending the argument of investigative emergencies as plausible in the Brazilian context, there is: Frederico V Pereira, 'Compatibilização Constitucional Da Colaboração Premiada' (2013) 17 Revista CEJ 84, 91-92.

b. Due process, search for truth and the chain of events in criminal procedure

The Brazilian Organized Crime Act provides that courts may grant judicial pardon, reduce the imprisonment sentence by up to two-thirds or substitute an imprisonment sentence for penalties of restriction of rights for defendants who successfully cooperate with law enforcement authorities, leading to an effective outcome.[1060] According to the statutory provisions, while law enforcement authorities (the Public Prosecution Office or the chief of police) are responsible for the negotiation and conclusion of collaboration agreements, the reduction of a cooperator's penalties is to be defined by a judicial decision at the end of the criminal proceeding.[1061]

In the practice of collaboration agreements, however, collaboration agreements – instead of outlining the benefits provided for by the statute – have defined the exact punishment of the cooperating defendant, stipulating precisely the length of the imprisonment penalty and the period that the cooperator must spend in each detention regime.[1062] The Brazilian practice of collaboration agreements has also developed a model of "package deal", which allows cooperating defendants to simultaneously negotiate a single overall penalty for a series of confessed crimes, even when they are investigated by different criminal proceedings.[1063]

In this system of agreements, the negotiation unfolds through the definition of a unified punishment that encompasses all conducts described in the cooperation report, and not through the establishment of the different crimes committed by the cooperator and the imposition of the correspondent penalties with the applicable benefits. In the Brazilian practice of collaboration agreements, the Public Prosecution Office and the cooperating defendant negotiate for long periods of time, in confidential and informal meetings, before reaching a consensual arrangement.[1064] When they reach a final common position, the concluded written agreement, laying down the exact negotiated punishment, and the cooperation report – often containing confession, evidence and information about a myriad of suspected conducts – are submitted for homologation to the competent judicial

1060 See item I.3.b.ii.
1061 See item I.3.c.
1062 See item I.4.a.ii.
1063 See item I.4.a.iii.
1064 See item I.3.a.

body, who must verify the agreement's "regularity, legality and voluntariness".[1065]

The exact definition, in collaboration agreements, of the cooperator's punishment and the model of "package deals" raise serious questions regarding the guarantee of due process, since this type of arrangement leads to a very different order of events when compared to the traditional Brazilian criminal procedure. Given that collaboration agreements are normally concluded at early stages of the investigations, sometimes even prior to the filing of any formal charges, this type of transaction entails that the outcome of the investigation is already determined before the facts of the case have been established in trial, engendering a complete inversion of the ordinary course of events of a criminal proceeding.

In the United States, parties have wide freedom to alter the course of criminal proceedings through consensual arrangements.[1066] Throughout the whole process, prosecutors have the discretionary power to drop or modify the charges against the accused.[1067] The defendant, in turn, has the option of pleading guilty at any time.[1068] Either one of these possibilities decisively affects the course of the criminal process, precipitating the end of the case. In these circumstances, the conclusion of a plea agreement between prosecutors and defendants represents a "break in the chain of events" of the criminal process:[1069] all the previous acts become practically irrelevant and no further inquiry to determine the guilty of the accused is necessary.

1065 Brazilian Organized Crime Act 2013, art 4 § 7.

1066 According to Maximo Langer, the understanding that the parties are the "owners of the process" and that judges are passive observers is a key factor for the development of negotiation practices. See: Langer (n 28) 36.

1067 Dominik Brodowski observes that the wide room for maneuver obtained by American prosecutors arises from (i) the strong attachment of judicial bodies to the prosecutorial charges and (ii) from the absence of statutory limits to prosecutorial discretion. See: Brodowski (n 24) 740-741.

1068 According to Bernd Scünemann, the concept of "guilty plea" can be understood as a normal consequence of "a radical form of party-driven criminal procedure". See: Schünemann, 'Zur Kritik Des Amerikanischen Strafprozessmodells' (n 25) 565.

1069 As famously established by the U.S. Supreme Court in Tollett v. Henderson (411 U.S. 258 - 1973): "a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea".

The negotiation forum established by the Brazilian Criminal Organized Act, however, clearly has different characteristics. The rewarded collaboration regulation did not design a fast-track route to the premature resolution of criminal investigations, but rather enabled the development of cooperative relationships between enforcement authorities and offenders.[1070] As occurs in the German crown-witness regulation,[1071] these relationships are developed within the traditional criminal procedure, and do not replace it.

The conclusion of collaboration agreements causes the broadening or, sometimes, even the opening of official investigations. It allows law enforcement authorities to access evidence and information that until then was known only to the cooperator. These new pieces of evidence will have to be analyzed throughout the trial, and there is no guarantee that they will generate a conviction of the cooperating defendant or other accused.[1072] The scenario of the cooperator's acquittal is not a hypothesis that can be ruled out, but rather a reality that may occur.

In the Brazilian legal system, the imposition of imprisonment penalties depends on the regular course and completion of the proceeding, which includes the formal indictment of the accused, the gathering of evidence and, finally, the verdict rendered by a judicial body, which is responsible for assessing the defendant's criminal liability.[1073] The sentencing phase, in which courts, based on the elements gathered throughout the proceeding, analyze the objective characteristics of the crime and the subjective particularities of the defendant, can only occur after the rendering of a judicial verdict on the defendant's guilt.

Thus, collaboration agreements in Brazilian law do not represent a break in the natural chain of events of the criminal process, which must follow a logical sequence of stages to (i) investigate suspicious facts through the regular production of evidence before a court, (ii) assess the

1070 For a more detailed analysis of the characteristics of these cooperative relationships, see section V.3.

1071 For the examination of the German experience, see items IV..3.b and IV.4.ii.

1072 For a comparison between Brazilian collaboration agreements and American plea agreements, see item V.3.d.

1073 On this point, the Brazilian Federal Supreme Court has already decided, in a case involving the consensual mechanisms provided by the Small Claims Act, that the seizure of criminal assets and other legal consequences associated with a criminal conviction can only occur after a judicial verdict rendered at the end of the criminal proceeding, demanding the regular collection of evidence. See STF, RE 795567 [2015].

guilt of the defendant and (iii) determine, in the case of a guilty verdict, the sentence.[1074] The definition and serving of imprisonment penalties can only occur at the final stage of the procedure, once the question of the criminal liability of the accused has already been resolved. The sequential and progressive logic of the criminal procedure is inherent to the constitutional guarantee of due process.[1075]

The statutory rules of the rewarded collaboration regulation do not contradict this sequential logic. The Organized Crime Act did not alter the structure of the Brazilian Criminal Procedure Code and, according to the statutory provisions, the cooperator's situation is to be defined by the judicial body at the end of the proceeding.[1076] It is only at this moment that the evidence related to the investigated facts, the guilt of all defendants (including the cooperator) and the usefulness of the collaboration agreement can be properly evaluated. The Organized Crime Act introduced collaboration agreements as an exceptional tool for the collection of evidence in situations of investigative emergencies, and not as a new type of criminal procedure in which parties can freely dispose of criminal punishment.

Despite that, the Brazilian practice of collaboration agreements has repeatedly established, in consensual arrangements concluded at very early stages of the investigation, the exact criminal punishment imposed upon cooperating defendants, allowing them, in some cases, to serve the penalties in advance. This definition of imprisonment penalties before the completion of the investigation and verdict phases breaches the logic of Brazilian criminal procedure, in a clear violation of the guarantee of due process.[1077] Without the prior establishment of a factual basis, it is senseless to analyze the legal implications of the defendant's conduct. If the facts of the crime are yet to be determined, how is it possible that its legal consequences have already been exactly defined? If a judicial verdict is an essential requirement for establishing criminal liability, how can the cooperat-

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1074 For a similar interpretation of the Brazilian rewarded collaboration regulation, see: Badaró (n 173).

1075 On this point, The Brazilian Federal Supreme Court has ruled that the Public Prosecution may not adopt procedural maneuvers that invert the logic of criminal process and that lead to situations in which issues related to sentencing are discussed before the completion of the collection of evidence and before the judicial assessment of the defendant´s guilt. See STF, RE 602527 QO-RG [2009].

1076 Brazilian Organized Crime Act 2013, art 4 § 11.

1077 Also noted by Cavali (n 36).

ing defendant serve an imprisonment penalty before a formal proceeding has even started?

By establishing criminal punishment through an inter-party written agreement at the beginning of the proceeding, the Brazilian practice of collaboration agreements has transformed an investigative tool into a mechanism for consensual resolution of the process. In this model of transaction, the outcome of the investigation against the cooperating defendants derives solely from their acquiescence to the negotiated penalties established in the agreement, becoming disconnected from the factual finding that will occur during the criminal proceeding.

c. Separation of functions in criminal procedure: the return of the inquisitorial process?

In the Brazilian practice of collaboration agreements, the state's response to the alleged criminal behavior of the cooperator is decided through the negotiation with law enforcement authorities, and not from a judicial verdict on the factual aspects of the investigated conduct. This type of transaction, besides violating the guarantee of due process, is also incompatible with the model of separation of powers enshrined in the Brazilian justice system.

The introduction of the rewarded collaboration regulation clearly widens the field of action of prosecutors and defendants in criminal procedure, giving them the possibility to communicate, interact and devise a cooperative relationship.[1078] Although the establishment of this negotiation forum is legitimate, it cannot be understood as a new model of criminal justice, different from the system set forth in the Brazilian Constitution and in criminal legislation, which impose a clear separation between the prosecutorial activities, on the one hand, and the adjudicative function, on the other.[1079]

1078 As noted by Florian Jeßberger: "Leniency policies open for the procedural participants additional and new room for maneuver (…)". See: Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrecht* (n 1) 140.

1079 In a 2014 ruling, the Brazilian Federal Supreme Court affirmed that the Federal Constitution stipulated "a rigid separation between the tasks of investigating and accusing, on one side, and the adjudicative function, on the other." See STF ADI 5104 MC [2014] (Barroso J).

This separation prevents judges from interfering in some decisions that fall within the responsibility of the Public Prosecution Office,[1080] but also establishes a range of activities that can only be performed by judicial bodies.[1081] Among these exclusive judicial functions is the power to decide on the guilt or innocence of the accused and to impose, through a judicial sentence, an imprisonment penalty. In Brazilian criminal procedure, the defendant's conduct is assessed through an official and impartial investigation and the determination of the defendant's guilt is an act performed by courts or, in very specific situations, by juries.[1082] According to the Brazilian Code of Criminal Procedure, the offender's confession does not entail the end of the official investigation, which is mandatory even in cases where the suspect has confessed to the crime.[1083] The defendant may at any time withdraw their confession and the judge must establish the veracity of a confession taking into account all the evidence collected during the regular proceeding.[1084]

Furthermore, the definition of a criminal sentence is also an inalienable function of the judiciary, which must impose a penalty consistent with the objective and subjective circumstances of each specific case.[1085] Given the guarantee of individualization of criminal punishment, the judicial power to define the appropriate sentence for each defendant enjoys constitutional status and cannot be suppressed. [1086]

1080 In this regard, the Federal Supreme Court has already decided that courts cannot determine the amendment of the indictment presented by the Public Prosecution Office to add facts contained in the police report. See STF, RHC 120379 [2014].

1081 Those are activities in which, as observed by the Federal Supreme Court, "the Judiciary not only has the final word, but, above all, has the unquestionable prerogative to say the first word, thus excluding, by virtue of the Constitution, the possibility of other State bodies and authorities exercising the same duties." See STF, MS 23452 [1999].

1082 In Brazil, juries are responsible for assessing the defendant´s guilt in willful crimes against life. See Brazilian Federal Constitution, ar. 5 XXXVIII indent "a", and Brazilian Code of Criminal Procedure, art 74 § 1.

1083 Criminal Procedure Code, Article 158.

1084 Criminal Procedure Code, Article 200.

1085 In this regard, see the ruling of the Brazilian Federal Supreme Court asserting that the definition of a criminal sentence must respect "the judicial circumstances, that is, the objective and subjective facts determined in the criminal process." See STF, HC 82959 [2006] (Marco Aurélio J).

1086 The Brazilian Federal Supreme Court has issued different rulings affirming the constitutional relevance of the sentencing phase and considering unconstitutional laws that limit the capacity of judicial bodies to define a sentence ad-

The introduction of the rewarded collaboration regulation does not change this model of separation between the prosecutorial and adjudicative functions. Collaboration agreements are designed to initiate or expand an official investigation, and not resolve it. All evidence obtained by means of a collaboration agreement must be confirmed throughout the proceeding, at the end of which the competent judicial body shall assess the guilt, define the legal qualification of the criminal conduct and determine an appropriate sentence for all accused, including the cooperating defendant. The conclusion of a collaboration agreement, therefore, does not exempt judicial bodies from their obligation to oversee an impartial investigation of the facts, analyze carefully the produced evidence, assess the defendant's guilt and impose a sentence compatible with the particularities of the case.

Viewed in this light, the Brazilian practice of collaboration agreements shows complete disregard for the system of separation of functions in Brazilian criminal justice.[1087] In the comprehensive model of negotiation developed by legal practitioners, public prosecutors amass an enormous set of powers, predefining – through consensual arrangements negotiated secretly with defendants – practically every issue of the criminal proceeding. When the case is submitted for the judicial verdict, even the conditions under which the sentence will be served have already been determined. Regarding the establishment of the cooperator's punishment, courts become bystanders of a play with a predefined end, written jointly by defendants and prosecutors

The irony of the situation is hard to miss. Support for the large-scale use of collaboration agreements is often based on the concept that these mechanisms embody the values of a new – more modern – system of consensual criminal justice.[1088] Examined more closely, the Brazilian practice of collaboration agreements shows a striking resemblance to antique inquisitorial procedures, in which criminal punishment was defined through a "secret, professional, goal-oriented and undisturbed" process.[1089]

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equate to the circumstances of each defendant. See STF, HC 97.256 [2010] and STF, HC 82959 [2006].

1087 In a similar sense, see Canotilho and Brandão (n 36) 27.

1088 See item I.4.c.

1089 Expressions used by Winfried Hassemer to criticize the German practice of informal negotiated judgments. See Hassemer, 'Pacta Sunt Servanda - Auch Im Strafprozess?' (n 679) 895.

d. Investigative achievements, information asymmetry and the risks of forward purchases in the practice of collaboration agreements

Besides violating the due process guarantee, the early definition and imposition of criminal punishment in collaboration agreements also raises concerns about the effectiveness of the rewarded collaboration regulation. In the Brazilian justice system, as in German criminal law, the use of cooperating defendants occurs not as an everyday operation arising from the broad and discretionary powers of law enforcement authorities, but rather as an extraordinary response to extreme situations of investigative emergencies.[1090] In both jurisdictions, cooperation between defendants and enforcement authorities represents an exceptional tool to enhance the state's capacity to control sophisticated criminal structures, and not a facet of the procedural participants' discretion.

Collaboration agreements, like other leniency policies, are utilitarian mechanisms.[1091] They must play the role of investigative trampolines, enabling official authorities to go further in their task of enforcing criminal law.[1092] The rewards conferred through collaboration agreements depend, consequently, on clear investigative achievements resulting directly from the cooperation. The favorable treatment conferred on cooperators arises not from the mere confession of their own acts, but from an effective contribution to the prosecution of third parties.[1093] The knowledge and evidence shared must be accurate and relevant, representing a substantial contribution to establish the criminal liability of other agents.[1094] A qualified causal link must exist between the material provided by the cooperating defendant and the enhancement of the investigation against other accused.[1095]

In addition to producing a concrete investigative achievement, the use of the rewarded collaboration regulation must also produce a positive balance in the overall level of imposed penalties.[1096] The granting of benefits to an offender can occur only if it optimizes the level of punishment ap-

1090 See item V.2.a.
1091 On the utilitarian nature of leniency policies, see section III.2.
1092 Hoyer (n 442) 237.
1093 Jeßberger, 'Nulla Poena Quamvis in Culpa: Ammerkungen Zur Kronzeugenregelung in § 46StGB' (n 2) 1153-1154.
1094 Kneba (n 861) 66.
1095 Hoyer (n 442) 237.
1096 On the need to achieve positive balances, see item IV.3.d.

plied to the other investigated.[1097] Although they create an amnesty effect for the cooperating defendant, leniency policies must, in a comprehensive perspective, bring the level of penalties closer to the ideal standard set by legislation, through the effective prosecution of other individuals who would remain unpunished without the cooperator's assistance.[1098] Between the losses and gains engendered by leniency policies, there must remain a clear net profit.[1099]

In this context, the exact definition of the cooperator's punishment and benefits – through a package deal that sets a single penalty for a wide range of criminal conducts – at an early stage of the investigation entails serious risks for the public interest. Collaboration agreements give rise to durable partnerships between offenders and law enforcement authorities with the purpose of investigating and punishing other individuals.[1100] The results of this enterprise depend on various external factors and are highly uncertain for both parties, even when they fully comply with all the terms of the agreement.[1101] The shared information and evidence will have to face several tests of accuracy and legality before proving to be useful in the prosecution of third parties. A clear outcome will appear only after the completion of a complex process, which will involve several actors who did not take part in the consensual arrangement. [1102]

Thus, it is not possible to foresee, at the moment of conclusion of a collaboration agreement, the actual outputs that it will produce. Only at the end of the criminal proceeding can one assess the investigatory achievements brought about by the assistance provided by the cooperating defen-

1097 Jung (n 442) 40.

1098 Hoyer (n 442) 236.

1099 Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrecht* (n 1) 102-103.

1100 For a more detailed analysis of these partnerships, see item V.3.c.

1101 Jeßberger, 'Nulla Poena Quamvis in Culpa: Ammerkungen Zur Kronzeugenregelung in § 46StGB' (n 2) 1163.

1102 As noted by David Moss in an analysis of the Italian experience with cooperating defendants: "for both the state and former terrorists, the full value of a confession—respectively, obtaining convictions and securing a reduced sentence—is only realised at the conclusion of the trial, when verdict and sentence are handed down. In practice, several different judges and juries are likely to be involved since confessions contain details of multiple crimes which may have to be tried separately and sentences are usually appealed to two tiers of higher courts". See: David Moss, 'The Gift of Repentance: A Maussian Perspective on Twenty Years of Pentimento in Italy' (2001) 42 Archives Europeennes de Sociologie 297, 303-304.

dant. In this context, the early definition of the cooperator's punishment and benefits seems counterproductive, especially due to the many risks arising from the informational asymmetry that exists between the two signing parties.

Collaboration agreements, like other leniency policies, give rise to principal-agent relationships, in which law enforcement authorities have little knowledge about the defendant's activities and face great difficulties in monitoring the accuracy and correctness of the provided assistance.[1103] As in other fiduciary relationships with such characteristics, the cooperative bond is vulnerable to exaggeration, omission and misrepresentation of facts, which may result from situations both of under-cooperation and over-cooperation.[1104] In addition to the risk of factual misrepresentation, the informational asymmetry also creates opportunities for the obtainment of excessive benefits[1105] and even for reinforcement of the criminal strategy.[1106]

Leniency policies pose a permanent danger of the excessive granting of benefits, maximizing the rewards for wrongful behavior, creating an easy way out for wrongdoers and reducing the overall deterrent effect of criminal law.[1107] The premature definition of the exact punishment of the cooperating defendant at early stages of an investigation – when the informational asymmetry between public authorities and accused is at its peak – greatly increases this danger.[1108] In this type of transaction, the defendant guarantees upfront several benefits, while the state retains all the risks of a

1103 See section III.3. Also: Centonze (n 1).
1104 See item III.3.a.
1105 See item III.3.b.
1106 See item III.3.d.
1107 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) 57–80; Wils (n 378).
1108 The Brazilian Federal Police has recognized this risk in the practice of early definition of penalties through collaboration agreements. In a petition directed to the Brazilian Federal Supreme Court, it asserted: "A by-product of this practice is the possibility of the cooperating defendant to obtain benefits beforehand of clauses established in the agreement (…), albeit providing elements already present in the investigation or false, or concealing relevant information" (ADI 5508, Ofício 6/2017 – PF, Posicionamento da Polícia Federal – Colaboração Premiada, 08/08/2017, p. 18).

possible investigative failure.[1109] Besides contradicting basic pillars of Brazilian criminal procedure, the model of "package deals" developed in the practice of collaboration agreements also deviates from the rationale of a sound leniency policy. [1110]

Lowering the cooperator's level of penalties can only be justified if it goes hand in hand with an increase in the punishment of third parties. The determination and granting of benefits depend, thus, on an effective and thorough demonstration that the cooperation provided by the defendant was useful for law enforcement authorities to identify and punish other individuals. This assessment can only be carried out after the completion of the investigation and verdict phases, exactly as determined by the text of the Organized Crime Act. Before that, there is no reliable basis for the definition and the attribution of privileged treatment to cooperators, since it is impossible to determine if (and to what extent) their assistance will be useful to prosecute and punish other suspects.[1111]

3. *Collaboration agreements as public-private partnerships within criminal justice: the privatization of truth-finding and its effect on third parties*

The practical development of the rewarded collaboration regulation is marked by the devising of consensual innovations in agreements concluded by cooperating defendants and public prosecutors.[1112] Over the years, procedural participants have used the negotiation forum designed by the Organized Crime Act to decide consensually on multiple issues of criminal proceedings, developing a broad and flexible system of transactions going far beyond the statutory provisions. The adoption of a tailor-made approach has generated complex and rich negotiated arrangements, which

1109 As noted by Florian Jeßberger, in the German crown-witness regulation the cooperating defendant is the main bearer of the risks of a failure in the investigation. See Jeßberger, 'Nulla poena quamvis in culpa: Ammerkungen zur Kronzeugenregelung in § 46StGB' (n 2).

1110 Ian Weinstein also observes that, in the U.S. system of criminal justice, cooperating defendants bear the risk of not receiving any reward, despite their efforts to assist enforcement agencies. The author notes the "government's power to simply refuse to pay for cooperation". See: Weinstein (n 3) 584.

1111 Defending this position, Brazilian Federal Police asserted that the "The efficacy of the collaboration can only be assessed at the end of the process of investigation, observed the due process of law" (ADI 5508, Ofício 6/2017 – PF, Posicionamento da Polícia Federal – Colaboração Premiada, 08/08/2017, p. 2).

1112 See item I.4.a.

contain dozens of provisions and devise innovative solutions customized to address the peculiarities of each case.[1113]

The distinctive evolution of the Brazilian practice of collaboration agreements could not have occurred without the solid support of the judiciary. Brazilian courts, particularly the Brazilian Federal Supreme Court, have endorsed this versatile model of negotiation and validated the contractual creativity of legal practitioners. This quite often has been done based on the argument that collaboration agreements are part of a new model of consensual criminal justice, which has separate foundations and operates in a different manner from traditional Brazilian criminal procedure.[1114] Throughout this process, the U.S. system of plea bargaining has clearly influenced the practice of collaboration agreements, providing the archetype of an effective criminal system that should be emulated. Besides the comparison with the model of plea bargaining, it is also common to correlate collaboration agreements with the consensual mechanisms established by the Brazilian Small Claims Act, that allow parties to resolve investigations of minor offenses through negotiated transactions.[1115]

This section argues that association of the Brazilian practice of collaboration agreements with the U.S. system of plea bargaining and with the ideal of consensual justice is conceptually mistaken, leading to unfounded and unacceptable consequences, among which the application of the the *res inter alios acta* doctrine stands out.

Item V.3.a asserts that collaboration agreements are intrinsically linked to the state's duty to search for truth, having different foundations and purposes when compared to mechanisms of consensual justice. Item V.3.b rejects the application, proposed by the Brazilian Federal Supreme Court, of the *res inter alios acta* doctrine to collaboration agreements. Item V.3.c advances the concept that collaboration agreements should be interpreted as durable public-private partnerships between law enforcement authorities and offenders, leading to a complex scenario of partial privatization of investigative and prosecutorial activities. Item V.3.d rebuffs the comparison between collaboration agreements and the U.S. model of plea bargaining, asserting that this analogy is misleading and can lead to perverse consequences in Brazilian law. Item V.2.d rejects the concept that parties can invent, through collaboration agreements, new benefits not provided for

1113 See item I.4.b.
1114 Rejecting this position, see item V.2.c.
1115 For a description of these mechanisms, see section I.1.

by law, stressing the risks of a regime of contractual freedom for the sound development of leniency policies.

a. Triangular relationships, not bilateral transactions

The Brazilian Federal Supreme Court has decided on several occasions that collaboration agreements are legal transactions, concluded by the cooperating defendant and law enforcement authorities, which do not affect third parties.[1116] According to this position, collaboration agreements create obligations and rights only for the contracting parties and do not affect the legal sphere of other defendants.[1117] Based on this understanding, Brazilian courts refuse to examine judicial appeals filed by other accused regarding the legality of collaboration agreements, asserting that they are not part of the arrangement and, therefore, lack the right to interfere in a bilateral relationship.[1118] This line of reasoning, which seeks to frame collaboration agreements in the classical model of private contracts, including through the application of the *res inter alios acta* principle, is seriously flawed and ignores the central features of the rewarded collaboration regulation.

Like the German crown-witness regulation, the Brazilian rewarded collaboration regulation seeks to maximize the state's capacity to prosecute and punish individuals responsible for serious crimes that are difficult to detect through traditional investigative tools.[1119] As with the German crown-witness regulation, the legitimacy of the consensual exchanges under the Brazilian rewarded collaboration regulation stems from their capacity to strengthen the state's prosecution of other offenders in situations of investigative emergencies, and not from the parties' power to freely dis-

1116 See item I.4.c.ii. See e.g. STF, HC 127483 [2015] and STF, Pet 5885 AgR [2016].

1117 According to the Brazilian Federal Supreme Court: "the collaboration agreement, as a legal transaction of personal nature, does not bind a defendant accused by the cooperator and does not directly affect its legal sphere: res inter alios acta." See STF, HC 127483 [2015] (Toffoli J).

1118 There are several decisions of Brasilian courts affirming this position. See e.g. STJ, RHC 43776 [2017]; and STJ, HC 392452 AgInt [2017].

1119 For an analysis of the German crown-witness regulation, see item IV.3.a and IV.3.b. See also: Jung (n 442) 40; Frahm (n 482) 171-172.

pose of criminal procedure.[1120] The consensual exchanges between enforcement authorities and cooperating defendants clearly affect other individuals, since their main purpose is the establishment of a basis for imposing criminal punishment upon third parties.[1121]

The development of an evidentiary basis against third parties is both the starting point and the end goal in the negotiation of a collaboration agreement. It is the starting point because, if the offender does not possess information or evidence that is useful for the prosecution of other agents, there is no basis for the opening of a negotiation.[1122] It is also the end goal because if the cooperation provided under an agreement proves for any reason to be wrong, false, or unnecessary in the investigation against other accused, there will be no legal basis for granting the benefits.[1123]

The rewarded collaboration regulation expressly conditions the degree of benefits obtained by the offender to the relevance and usefulness of the cooperation in the prosecution against co-conspirators.[1124] In other words, there is a direct relationship between the level of benefits obtained by cooperating defendants and the potential of their cooperation to affect third parties. The more the material provided assists in the prosecution of other individuals, the greater the advantage that cooperating defendants can re-

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1120 Analyzing the German scenario, see Jeßberger, *Kooperation und Strafzumessung: der Kronzeuge im deutschen und amerikanischen Strafrecht*, (n 1) 304-305. Stressing the need of the existence of an investigative emergency for the use of cooperating defendants, see: Hoyer (n 442) 240. Regarding the Brazilian context, see item V.2.a.

1121 Regarding this point, Stefanie Mehrens notes the similarities between the crown-witness regulations and the use of undercover agents. See: Mehrens (n 11) 29-30.

1122 Because of this requirement, it is common that individuals highly involved in serious crimes may access leniency policies, while agents with lower degree of culpability can not obtain the same benefits. Florian Jeßberger analyzes this situation and describes it as the problem of "big fish's privilege." See Jeßberger, *Kooperation und Strafzumessung: der Kronzeuge im deutschen und amerikanischen Strafrecht* (n 1) 271-274. In economic literature, there is a wide debate regarding whether ringleaders should be allowed to benefit from leniency policies. See: Iwan Bos and Frederick Wandschneider, 'A Note on Cartel Ringleaders and the Corporate Leniency Programme' (2013) 20 Applied Economics Letters 1100.

1123 Analyzing the German crown-witness regulation, Nicolas Kneba observes that the granting of benefits can only occur when there is a qualified causal link between the assistance provided by the cooperator and an investigative achievement against other accused. See: Kneba (n 861) 66. On the issue of investigative achievements, see item IV.3.d.

1124 Brazilian Organized Crime Act 2013, art 4, § 1.

ceive. Thus, not only is the production of negative effects upon third parties the purpose of collaboration agreements, but the maximization of such effects is also stimulated by the system of "quid-pro-quo" transactions established by the Organized Crime Act.[1125]

Viewed in this light, the rewarded collaboration regulation gives rise to a very specific situation: a negotiation forum in which a consensual arrangement between two parties depends on its capacity to cause adverse effects over another agent. In fact, in the absence of a third party that will be negatively affected by the arrangement, the conclusion of a collaboration agreement is simply impossible.[1126]

In this context, the Federal Supreme Court's understanding that collaboration agreements are pure bilateral contracts between the state and the offender is clearly mistaken. This position ignores the fact that the consensual understanding reached in collaboration agreements does not resolve a dispute between two parties, but rather initiates a relationship of cooperation directed to hold accountable other individuals, who did not participate in the conclusion of the agreement.[1127] As in the German crown-witness regulation, the purpose of collaboration agreements is the attribution of criminal behavior to third parties and not merely the self-incrimination of the cooperator.[1128] Although there is a consensual element in these exchanges, collaboration agreements can not be interpreted in the light of the *res inter alios acta* principle, since they necessarily give rise to triangular relationships in which law enforcement authorities partner with cooperating defendants to investigate and prosecute other accused.

Here a comparative perspective proves useful. In the German legal system, defendants have two different ways to proactively interact with public authorities and obtain benefits in investigation of serious offenses: the framework of negotiated judgments, established by § 257c StPO, and the crown-witness regulation, set by § 46b StGB. In the framework of negotiated judgments (§ 257c StPO), the offender enters into an agreement in which he or she consents to confess to a crime in order to receive a milder

1125 Regarding the system of "quid-pro-quo" transactions set in the Organized Crime Act, see I.3.b.i.

1126 On this point, Stefanie Mehrens asserts that the assistance provided in the crown-witness regulation must relate to crimes committed by other agents and that are not identical to the acts practiced by the cooperator himself. See: Mehrens (n 11) 29.

1127 For an analysis of the similarities and differences between mechanisms for consensual resolution of criminal cases and leniency policies, see item IV.4.a.i.

1128 Buzari (n 12) 55.

sentence.[1129] The confession of the offender concerns his own acts and leads to an accelerated end to the criminal proceeding.[1130]

Brazilian law establishes some possibilities for the resolution of criminal proceedings through negotiated transactions, but only in cases related to minor offenses, as provided for under the 1995 Small Claims Act.[1131] In the situations covered by the Small Claims Act, the Public Prosecution Office may offer the defendant a settlement that, once accepted, leads to a swift closure of the criminal investigation. Like the German framework of negotiated solutions (§ 257c StPO), the negotiations between the parties under the Brazilian Small Claims Act relate only to the conduct of the defendant and do not reflect on investigations against other individuals.

This situation is clearly different from the negotiation of collaboration agreements. The Brazilian Organized Crime Act makes it clear that the rewarded collaboration regulation constitutes a new channel for the state to collect information and evidence against individuals who are not part of the collaboration agreements.[1132] As occurs in the German crown-witness regulation (§ 46b StGB), the material obtained through collaboration agreements relates not only to the wrongful acts practiced by the cooperating defendant, but must be relevant to the prosecution of individuals who did not participate in the formation of the consensual relationship. [1133]

1129 Regarding the exchanges developed in the German practice of negotiated judgments, see item IV.2.b and IV.2.d.

1130 As Luis Greco notes, the acceleration of criminal proceedings is the main reason for the development of negotiated judgments in the Germany. See: Greco '„Fortgeleiteter Schmerz" – Überlegungen zum Verhältnis von Prozessabsprache, Wahrheitsermittlung und Prozessstruktur' (n 26) 5.

1131 Outside the circumstances envisaged in the Small Claims Act, prosecutors and defendants have no powers, in Brazilian criminal procedure, to freely dispose of criminal cases through consensual arrangements. On this issue and the negotiation mechanisms introduced by the 1995 Small Claims Act, see item I.1.

1132 The Organized Crime Act specifically includes the rewarded collaboration regulation in a legislative catalog of special investigative measures, which also contains the interception of communications, the lifting of banking confidentiality and the employment of undercover agents. See Brazilian Organized Crime Act 2013, art 3.

1133 As expressly provided by German Criminal Code (*StGB*), § 46b para 3. See Buzari (n 12). André Buzari asserts that a confession related to the defendant's own acts is not enough to justify the granting of benefits under the crown-witness regulation, which demands assistance in the factual determination of wrongdoings commited by other agents (ibid 55-56). Stefanie Mehrens observes that the assistance provided by cooperating defendants resembles other

It is senseless, therefore, to affirm that collaboration agreements do not affect third parties, just as it would be unthinkable to state that the interception of communications or the use of undercover agents do not affect the individuals investigated. As occurs in the German crown-witness regulation, the conclusion of an exchange under the Brazilian rewarded collaboration regulation depends on the existence of a third party that will be negatively affected by the arrangement negotiated by enforcement authorities and cooperating defendant. Without this third party, the triangular relationship set up by collaboration agreements cannot exist, and the use of the rewarded collaboration regulation becomes unfeasible.

b. Collaboration agreements as mechanism of consensual justice? Disenchantment and reenchantment with truth-searching in criminal procedure

There is a widespread notion, in Brazilian scholarship and case-law, that collaboration agreements are – just like the negotiation mechanisms established by the Brazilian Small Claims Act – part of a new model of consensual justice, which has a different logic than, and distinct foundations from, standard criminal procedure.[1134] According to this view, the conclusion of a collaboration agreement alters the defensive stance of the accused and accelerates the criminal proceeding, in a similar way to what occurs in the settlement possibilities provided for by the Brazilian Small Claims Act.[1135] This correlation between collaboration agreements and the notion of a system of consensual criminal justice is inaccurate and misleading.

Leniency policies, such as the Brazilian rewarded collaboration regulation, are tools devised to maximize the state's capacity to control new forms of criminal structures in modern society, addressing the problems of

investigative tools used by enforcement authorities, such as the infiltration of agents in criminal organizations, insofar as it generates evidence regarding wrongdoings committed by third parties. See: Mehrens (n 11) 29.

1134 See item I.4.c. For further information: Aras (n 41) 271-274; Mendonça (n 36) 68.

1135 Vasconcellos, *Colaboração Premiada No Processo Penal* (n 36) 26. Also associating collaboration agreements with the negotiation mechanisms of the Small Claims Act, see Alves (n 43).

impunity that arise in certain fields.[1136] In view of the great challenges that exist in the investigation of organized crime, leniency policies arise as extraordinary devices for law enforcement authorities to detect offenses, identify offenders and collect relevant evidence for successful prosecutions.[1137] Furthermore, they also have a preventive function, distorting the incentives for co-conspirators and creating instability inside criminal organizations.[1138]

None of these characteristics can be observed in the mechanisms of so-called consensual criminal justice, which are designed to resolve criminal proceedings in a more expedient manner and spare resources through negotiated arrangements between procedural participants.[1139] Such mechanisms do not attempt to reduce impunity of sophisticated offenders or prevent the formation of criminal organizations, but rather aim at increasing the pace of criminal procedures and enabling effective use of the scarce resources of the criminal justice system.[1140]

While leniency policies seek to enhance the state's capacity to discover the facts of complex criminal conducts and improve deterrence of serious

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1136 On this point, Ellen Schlüchter argues that the development of some types of wrongdoings in modern society - like those practiced by terrorists and criminal organizations - challenge the rule of law and require a strong answer from state authorities, authorizing the use of cooperating defendants. See: Schlüchter (n 495) 69-71. Also: Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrech*t (n 1) 304.

1137 Heike Jung describes the German crown-witness regulation as an "extraordinary model to handle extraordinary situations" Jung (n 442) 42. Musco argues that the use of cooperating defendants aims to restore the state capacity to develop an effective answer in face of new and severe challenges posed by organized criminality. Musco (n 346) 38. On this point, see item III.2.a.

1138 Andreas Hoyer asserts that leniency policies transform the incentives in criminal organizations: instead of seeing each other as a means to obtain illegal profits, co-conspirators starts to see each other as a means to obtain immunity. See: Hoyer (n 442) 235. For a more detailed analysis of the preventive effect of leniency policies, see item III.2.b.

1139 According to Thaman, "´Consensual´ procedural forms are part and parcel of criminal procedure reforms worldwide and are driven by the desire for procedural economy". See: Thaman (n 28) 952.

1140 In Germany, Julia Peters notes that the main argument for the development of negotiated judgments has been the scarcity of resources of the system of criminal justice. See: Peters (n 680) 17. On the same line, see the 2005 ruling of Federal Court of Justice, affirming the importance of consensual solutions to guarantee the proper functioning of the justice system. See BGH, Beschl. v. 3.3.2005 – GSSt 1/04 = BGHSt 50, 40, para 50-51.

wrongdoings, mechanisms of consensual justice pursue different goals.[1141] These mechanisms are not an expression of the state's commitment to search for truth, nor are they designed to maximize deterrence. In fact, they mitigate this commitment, since they abbreviate the official inquiry and allow for the rendering of a verdict before the full conclusion of the investigative phase.[1142]

These differences become even clearer when one analyzes the impacts that the consensual mechanisms have on criminal proceedings. In leniency policies, agreements with offenders lead to an expansion of the state's prosecution activity, either through the discovery of crimes hitherto unknown or through the gathering of new material regarding unclarified conduct.[1143] Collaboration agreements, for instance, lead, through the collection of information and evidence previously unavailable, to the opening of new investigations or the enlargement of an existing one. In contrast, the use of mechanisms of consensual justice bring the criminal procedure to an abrupt close, limiting, rather than expanding, the investigative activities.[1144] In Brazilian criminal law, for example, the consensual solutions designed by the Brazilian Small Claims Act allow the parties to swiftly wrap up criminal proceedings, replacing full factual investigations with negotiated arrangements.[1145]

Although collaboration agreements do establish relationships of voluntary exchanges between offenders and public authorities, they are clearly connected to the state's duty to search for the truth and to the ideal of maximizing deterrence, whereas mechanisms of consensual justice operate in accordance with the principles of simplicity, procedural economy, and celerity.[1146] Therefore, it is not possible to understand collaboration agreements as a part of a new system of consensual justice.[1147] Nor is it possible to draw a parallel between the rewarded collaboration regulation, set by

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1141 On these diferences, see item IV.4.a.i.

1142 In Germany, different authors note the opposition between the state's commitment to search for truth and the enlargement of consensual mechanisms in criminal procedure. See Weßlau (n 25) 563-564; Hornle (n 963) 833.

1143 The sharing of evidence or information that already is in possession of the enforcement agencies does not authorize the granting of benefits. See: Frahm (n 482) 54-55. On the issue of investigative achievements, see item I.3.d.

1144 Regarding the impact of negotiated judgments in German criminal procedure, see: Greco, '„Fortgeleiteter Schmerz" – Überlegungen Zum Verhältnis von Prozessabsprache, Wahrheitsermittlung Und Prozessstruktur' (n 26) 5.

1145 See item I.1.

1146 See item IV.4.a.i.

1147 In the same vein: Canotilho and Brandão (n 36) 22.

the Organized Crime Act, and mechanisms for consensual resolutions of criminal cases, such as the ones provided by the Brazilian Small Claims Act. Although in both situations there are rooms for exchanges between law enforcement authorities and defendants, these negotiation forums have completely different – if not opposite – foundations, purposes, and consequences.[1148]

The prevailing view in Brazilian law, which associates collaboration agreements with a system of consensual justice, ignores the conceptual difference between fact-finding tools, used to investigate suspected conducts, and mechanisms of consensual resolution of criminal cases, that provide for a negotiated closure of investigations. At this point, the use of the comparative analysis can be enlightening.

In the German legal system, such a distinction is very clear in the separation between the crown-witness regulation, established by § 46b StGB, and the framework of negotiated solutions, set by § 257c StPO. Although both provisions carry consensual elements and share some common features, they fulfill very different purposes: while the first empowers law enforcement authorities with a new investigative device to counterbalance the techniques of criminal organizations, in an inverted reading of the principle of equality of arms, the latter devises a mechanism for acceleration of criminal proceedings, linked with the principle of procedural economy.[1149] Whereas the crown-witness regulation § 46b StGB emerges as a tool for maximizing the state's prosecution against sophisticated criminal structures in the context of investigative emergencies, the negotiated judgments of § 257c StPO are mechanisms to provide a quick consensual end to criminal investigations, maintaining the functional capacity of the justice system.

Even in the United States, where procedural participants dispose of a very wide room for inter-party negotiations and may create different types of consensual solutions, this distinction is made through the concept of a "cooperation agreement", as opposed to the traditional concept of "plea agreement".[1150] Plea agreements are procedural mechanisms through which the defendant and prosecutor dispose of the case, and which nor-

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1148 See item IV.4.a.ii.

1149 See item IV.4.a.i.

1150 According to Strang: "By comparison to traditional plea agreements, cooperation agreements are investigatory tools. The cooperating defendant´s admission of personal guilt is not the primary goal; the point is to use this cooperating defendant, proactively or historically, to develop evidence to prosecute other individuals". See: Robert R Strang, 'Plea Bargaining, Cooperation Agree-

mally contain a guilty plea of the defendant in exchange for a lighter sentence.[1151] Cooperation agreements, in contrast, are primarily instruments to investigate crimes committed by other individuals, in which the admission of guilt by the cooperating defendant is not an end in itself, but rather a means to prosecute and punish co-conspirators.[1152]

It is not possible, therefore, to understand the Brazilian rewarded collaboration regulation as part of a new system of consensual justice, where the solution of criminal proceedings stems not from a thorough factual investigation, but from the consent of the procedural participants.[1153] Unlike mechanisms for the consensual resolution of criminal cases, collaboration agreements do not create an alternative route to a faster end of the proceeding. They actually operate in the opposite manner, through the creation of a cooperative relationship between law enforcement authorities and offenders that reinforces the state's commitment to discover criminal conduct, gather the relevant evidence and establish individual liability through an accurate fact-finding process.

In view of the evidentiary challenges present in the prosecution of organized crime, the rewarded collaboration regulation offers a solution to deepen, not to curtail, the state's efforts to determine how relevant events really happened. While consensual mechanisms thrive in scenarios of dis-

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ments and Immunity Orders.'(2014) 155th International Training Course Visiting Experts' Papers, 30 <https://www.semanticscholar.org/paper/PLEA-BARGAINING-%2C-COOPERATION-AGREEMENTS-%2C-AND-Strang/04ee8da129e50f2cf4f8ce3cdc4df46bc3cabfa3> accessed 14 September 2019.

1151 Langer (n 28) 35.

1152 Even though they are generally accompanied by a guilty plea, cooperation agreements have characteristics that clearly distinguish them from the more simple practice of plea bargaining. Ian Weinsten highlights "the unique problems associated with cooperation, in addition to those of ordinary plea bargains". See: Weinstein (n 3) 567. According to Malvina Halberstram: "Agreements by the prosecutor to lower or dismiss the charges against a defendant or to make sentencing recommendations in exchange for something other than a guilty plea by the defendant, such as the defendant's agreeing to testify against someone else or to provide the government with vital information, although usually accompanied by guilty pleas, involve different considerations (…)". See: Halberstam (n 981) 4.

1153 In the opposite direction, see the ruling of the Brazilian Federal Supreme Court that understood that the rewarded collaboration regulation forged a "new model of criminal justice that favors the expansion of the space of consensus and the adoption, in the definition of controversies arising from criminal offenses, of solutions based on the consent of the agents who are parties of the criminal procedural." See STF, PET 7074 [2017] (Celso de Mello J).

enchantment with the objective of truth finding, collaboration agreements promise to detect concealed conduct and shed light on obscure situations, in a process of re-enchantment with the old ideal of seeking truth in criminal procedure.[1154]

c. Collaboration agreements as public-private partnerships and the privatization of official investigations

The Federal Supreme Court's position that collaboration agreements are pure bilateral contracts offers a very shortsighted perspective on the complexities and difficulties that arise from the use of leniency policies to overcome investigative emergencies. Collaboration agreements represent the start of a new momentum in the official inquiry, expanding the fact-finding efforts through the establishment of a stable and durable partnership between law enforcement authorities and offenders directed at holding other accused accountable.

In jurisdictions where criminal process is understood as an official investigation, such partnerships represent the active sharing with private agents of activities that for a long time have been understood as a monopoly of public authorities.[1155] Through the establishment of cooperative bonds with private agents, [1156] enforcement authorities seek to overcome the serious obstacles that exist in the prosecution of sophisticated criminal struc-

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1154 According to Bernd Schunemann, the German practice of negotiated judgments was developed in a context of disenchantment with the objective of search for truth, particularly in cases of monster proceedings. See: Schünemann, 'Die Verständigung Im Strafprozeß – Wunderwaffe Oder Bankrotterklärung Der Verteidigung?' (n 27) 1898. Regarding the process of "re-enchantment" with the ideal of search for truth, see item IV.4.a.ii.

1155 For a strong critic of this model of enforcement through "Public Private Partnership" between enforcement authorities and corporations in the field of economic crimes, see: Hefendehl, 'Außerstrafrechtliche Und Strafrechtliche Instrumentarien Zur Eindämmung Der Wirtschaftskriminalität' (n 12) 846-847. Analyzing this evolution in the German context, Klaus Malek criticizes fiercely the privatization of activities of law enforcement and describes this process as the "americanization of German criminal procedure". See: Malek, 'Abschied von Der Wahrheitssuche' (n 470) 561.

1156 These partnerships between enforcement agencies and private agents can also arise from whistleblowing mechanisms and the so-called "internal investigations". Regarding the problems generated by the model of internal investigations, see: Greco and Caracas (n 23). On the issue of whistleblowing, see: Martín (n 23) 69–92.

tures, like corruption networks and business cartels.[1157] The prosecution of criminal cases and the investigation of serious wrongdoing cease to be performed exclusively by law enforcement authorities and start to be carried out through partial delegation to offenders involved in serious crimes, who are remunerated on the basis of penalty reductions. In this scenario, the principal task of law enforcement authorities is not to conduct an autonomous search for evidence, but rather to construct a system of incentives for offenders to abandon the criminal organization and cooperate against former accomplices.[1158]

For the accused, the conclusion of a collaboration agreement represents a complete change of role in the criminal process.[1159] Instead of adopting a defensive stance and limiting the access of law enforcement authorities to evidence, they will seek to share the necessary material to secure leniency benefits.[1160] The beneficiary ceases to be a passive object of the investigation and becomes a *longa manus* of law enforcement authorities, whose duty is to aid in obtaining evidence to convict other offenders.[1161]

From this perspective, the relationships developed under the Brazilian rewarded collaboration regulation should be understood, rather than as simple bilateral transactions, as complex public-private partnerships, in which state organs and private agents establish a long-lasting cooperative bond to jointly develop specific activities and achieve defined objectives, sharing the costs, benefits and risks involved in this endeavor.[1162] Like other public-private partnerships, collaboration agreements lead to a partial

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1157 On the structural obstacles to the effective prosecution of these crimes, see section II.3.

1158 The introduction of leniency policies is a game changer for the strategy and operation of enforcement agencies. On this point, see item III.3.c.

1159 According to Jeßberger, leniency policies transform accused in active agents of criminal prosecution See: Jeßberger (n 1) 27-30.

1160 Regarding the risks of over and under-cooperation, see item III.3.a. See also: Spagnolo (n 30) 295; Forrester and Berghe (n 566) 251-252.

1161 Analyzing the prosecution of corporate crimes in the U.S., Harry First describes "an important, if gradual, change in the role of the public corporation in the criminal process, from potential criminal target to branch office of the prosecutor whose role it is to partner with prosecutors in investigating and prosecuting business crimes". See: First (n 609) 97.

1162 Public-private partnerships (PPP) can be defined as the "cooperation between public and private actors with a durable character in which actors develop mutual products and/or services and in which risk, costs, and benefits are shared". See: Erik-Hans Klijn; and Geert R Teisman., 'Institutional and strategic barriers to public-private partnership: an analysis of Dutch cases' (2003) 23 Public Money and Management 137. For a good description of these partnerships in

privatization of state functions, transferring to offenders activities in the criminal procedure that were formerly performed by official bodies.

This process of privatization has a utilitarian nature and is founded strictly on practical reasons: the cooperation of private agents (the offenders) shall assist law enforcement in controlling certain forms of criminality and preventing impunity in situations where traditional investigative tools are ineffective.[1163] As in other public-private partnerships, the partial privatization of state functions is carried out with the expectation of carrying out a specific activity in a more efficient manner and with greater quality. In the realm of leniency policies, the expectation is twofold: first, collaboration agreements should lead to a more extensive collection of evidence and information, helping to identify and punish individuals responsible for serious crimes;[1164] second, they should enhance instability and instigate conflicts within criminal organizations, restricting the conditions for the adoption of criminal behavior.[1165]

On the other hand, the establishment of public-private partnerships within the apparatus of state prosecution may create several problems, which arise from the principal-agent relationships engendered by leniency policies.[1166] These partnerships are especially problematic when the activities carried out by private agents have a complex nature and unpredictable outcomes, because in such situations agents have incentives to cut costs and reduce their efforts, even if this leads to a lower quality of service.[1167] Given the different goals pursued by each of the contracting parties and the asymmetry of information between them, private actors can develop various strategies to maximize their interests through partial and selective cooperation with public authorities.[1168] Sophisticated agents may even ex-

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the prosecution of international corruption, see: Centonze (n 1). Critically, in the field of corporate crimes: Hefendehl, 'Außerstrafrechtliche Und Strafrechtliche Instrumentarien Zur Eindämmung Der Wirtschaftskriminalität' (n 12) 846-847.

1163 On the utilitarian nature of these mechanisms, see item III.2.

1164 See item III.2.a.

1165 See item III.2.b.

1166 According to Centonze, "the state embodies the role of the principal enlisting private organizations (its agents) to perform activities to prevent business crimes". See: Centonze (n 1) 44. On this issue, see item III.3.

1167 Oliver Hart, Andrei Shleifer and Robert W Vishny, 'The Proper Scope of Government: Theory and an Application to Prisons' (1997) The Quarterly Journal of Economics 1127,1148-1159.

1168 See item III.3.a and III.3.b.

plore the association with law enforcement authorities to reinforce criminal strategies, "gaming" the leniency system.[1169]

In this context, it is clear that collaboration agreements engender very different relationships between defendants and law enforcement authorities than mechanisms of consensual resolution of criminal cases, consequently raising diverse challenges and problems. Collaboration agreements are, like other public-private partnerships, risky joint ventures. In contrast to consensual mechanisms, in which a negotiated arrangement settles the case with some degree of certainty for the parties, collaboration agreements create complex and durable relationships, whose outcomes depend on different variables and will only be known after a lengthy period.[1170] Allegations made by the beneficiary of the agreement must be confirmed by other evidence and will undergo multiple tests of legality and accuracy before reaching the expected outcome: the successful prosecution of other offenders.[1171]

Therefore, the position that collaboration agreements are purely bilateral arrangements underestimates the complexities, expectations and risks that arise from the establishment of durable cooperation bonds with offenders within the apparatus of state prosecution. The understanding that collaboration agreements are public-private partnerships directed at establishing the criminal liability of third parties offers a better perspective to correctly address the important questions raised by the Brazilian rewarded collaboration regulation.

1169 See item III.3.d.

1170 Examining the German crown-witness regulation, Klaus Malek observes that the regulation does not create "do ut des" relationships between public authorities and cooperating defendants. See: Malek, 'Die neue Kronzeugenregelung und ihre Auswirkungen auf die Praxis der Strafverteidigung' (n 480) 203. On this issue, see III.3.b.

1171 Florian Jeßberger notes the uncertainties and risks faced by the cooperating defendant. See Jeßberger, 'Nulla Poena Quamvis in Culpa: Ammerkungen Zur Kronzeugenregelung in § 46StGB' (n 2) 1162. According to David Moss, due to the inherent risks and obstacles of complex criminal investigations and the various challenges that must be collectively faced by cooperators and public authorities, the establishment of bonds of a personal nature appears as a recurring feature of these investigative joint ventures. See: Moss (n 1103) 309.

d. Is there a Brazilian system of plea bargaining? Legal transplants, legal translations and legal counterfeits

The inventive practice of collaboration agreements wrought significant innovations and created a detachment between the text of the Organized Crime Act and the "law in action" carried out before courts.[1172] The examination of various agreements reveals that legal practitioners drew on the negotiation forum designed by the rewarded collaboration regulation to develop a wide and flexible system of transactions, which allowed the parties to negotiate tailor-made and complex consensual arrangements. The U.S. model of plea bargaining has repeatedly been used as a role model to justify these consensual innovations and validate the partial abandonment of traditional principles of Brazilian criminal procedure.[1173] The term "plea agreement" is nowadays often used by public officials and legal scholars to refer to the recent collaboration agreements concluded between the Brazilian Public Prosecution Office and cooperators, implying that the enactment of the Organized Crime Act represented some type of importation of this American legal institution. [1174]

The debate on the transmission of legal practices between countries is extensive, commonly under the concept of "legal transplants".[1175] In the last decades, a vast literature has been developed on the subject[1176] point-

1172 See item I.4.a.

1173 See item I.4.c.

1174 See: Moro (n 31) 160; Armando Castro and Shaz Ansari, 'Contextual "Readiness" for Institutional Work. A Study of the Fight Against Corruption in Brazil' (n 115) 351–365; De Almeida and Zagaris (n 332) 89; Brian Winter, 'Brazil's never-ending corruption crisis: why radical transparency is the only fix' (2017) 96 Foreign Affairs 87, 90; Rodrigo Janot, 'Rodrigo Janot: the lessons of Car Wash' (2017) Americas Quarterly, <https://www.americasquarterly.org/content/lessons-car-wash>, accessed 23 July 2019.

1175 Alan Watson, *Legal transplants: an approach to comparative law* (Univesity of Georgia Press 1974); Alan Watson, 'From legal transplants to legal formats' (1995) 43 The American Journal of Comparative Law, 469; William Ewald, 'Comparative jurisprudence (II): the logic of legal transplants' (1995) 43 The American Journal of Comparative Law 489; Nuno Garoupa and Anthony Ogus, 'A Strategic Interpretation of Legal Transplants' (2006) 35 Journal of Legal Studies 339.

1176 For an analysis of the conception and evolution of the concept of "legal transplant", see: John W Cairns, 'Watson, Walton, and the History of Legal Transplants' (2013) 41 The Georgia Journal of International and Comparative Law 637.

ing out its advantages,[1177] as well as highlighting its risks and limits.[1178] The concept of "legal transplants" is now widely used to analyze developments in several fields, such as private law,[1179] environmental law,[1180] intellectual property[1181] and legislative process.[1182]

In the field of criminal law, a point that stands out is the recent dissemination in several countries, even in those integrated into the continental tradition, of consensual mechanisms in criminal procedure, which have traditionally been associated with the U.S. criminal justice system.[1183] Over the last decades, different countries have adopted mechanisms that allow procedural participants to resolve criminal cases through consensual arrangements that resemble to a greater or lesser extent the U.S. system of plea bargaining.[1184] In this context, it is worth asking if the Brazilian Criminal Organization Act has really established a mechanism equivalent to the American model of plea bargaining, since that would entail profound impacts on the Brazilian justice system.

Once it is established that collaboration agreements do not constitute a consensual mechanism for prosecutors and defendants to resolve criminal

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1177 See, e.g.: Rainer Kulms, 'Optimistic normativism after two decades of legal transplants and autonomous developments' *in* Christa Jessel-Holst, Rainer Kulms and Alexander Trunk (eds), *Private Law in Eastern Europe: Autonomous Developments or Legal Transplants?*(Mohr Siebeck 2010) 7–14; Loukas Mistelis, 'Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform - Some Fundamental Observations' (2000) 34 International Lawyer 1055.

1178 See: Pierre Legrand, 'The impossibility of "legal transplants"' (1997) 4 Maastricht Journal of European and Comparative Law 111; Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies' (2003) 61 The Modern Law Review 11.

1179 Kulms (n 1177).

1180 Jonathan B Wiener, 'Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law' (2001) 27 Ecology Law Quarterly 1295.

1181 Paul Edward Geller, 'Legal Transplants in International Copyright: Some Problemas of Method' (1994) 13 UCLA Pacific Basin Law Journal 199.

1182 Anders Fogelklou, '"The Regional Ombudsman as a Western (Swedish) Legal Transplant: ",: Experiences from the Legislative Process in St. Petersburg' (2003) 13, Transnational Law and Contemporary Problems 537.

1183 As noted by Schunemman: Schünemann, 'Zur Kritik Des Amerikanischen Strafprozessmodells' (n 25) 569-571.

1184 For a thorough analysis of the introduction of mechanisms similar to the U.S. system of plea bargaining in jurisdictions of continental tradition, particularly in Germany, Italy, Argentina and France, see: Langer (n 28).

cases,[1185] representing instead public-private partnerships directed at investigating and prosecuting third parties,[1186] it becomes clear that the answer to this question must be in the negative.

Plea agreements are mechanisms of consensual disposal of criminal cases, which allow procedural participants to terminate criminal proceedings through a negotiated arrangement that normally contains the acknowledgement of the defendant's guilt.[1187] The understanding, enshrined in U.S. justice, that criminal proceedings represent a dispute between prosecution and defense, grants wide discretionary powers for the parties to dispose of the case: prosecutors are basically free to decide on which criminal charges should be presented,[1188] and accused can accept the charges through a guilty plea.[1189] Regarding charging decisions, judicial bodies clearly play a passive role and parties have, within these boundaries, broad autonomy to resolve the case through consensual arrangements.[1190]

None of these characteristics can be found in the Brazilian rewarded collaboration regulation. According to the text of the Organized Crime Act, the conclusion of a collaboration agreement does not lead to the interruption or abbreviation of the proceeding against the cooperating defendant, nor does it generate any of the effects associated with plea agreements in the American system.[1191] The cooperator shall be convicted, and the sentence determined, only after a full inquiry of the facts and an independent determination of criminal liability. The cooperating defendant's statements alone are not sufficient to substantiate any conviction, even his

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1185 See item V.3.b.

1186 See section V.3.c.

1187 According to Alschuler: "plea bargaining consists of the exchange of official concessions for a defendant's act of self conviction". See: Alschuler (n 42) 3.

1188 Recognizing the very broad space of action held by American prosecutors, Dominik Brodowsky notes that these wider powers are understood as an expression of a political function. See: Brodowski (n 24) 742.

1189 Bernd Schünemman observes that the concept of "guilty plea", which allows defendants to accept the criminal charges presented by the prosecutor, is the foundation for the development of the practice of plea bargaining. See: Schünemann, 'Zur Kritik Des Amerikanischen Strafprozessmodells' (n 25) 564-565.

1190 Notwithstanding the autonomy of the parties, William T. Pizzi acknowledges that the judge retains broad powers to determine the sentence, describing this situation "an inquisitorial soul in an adversarial body". See: William Pizzi, 'Sentencing in the US: an inquisitorial soul in an adversarial body?' *in* John Jackson, Maximo Langer and Peter Tillers (eds) *Crime, procedure and evidence in a comparative and international contex*t (Hart Publishing 2008) 65–79.

1191 Brazilian Organized Crime Act 2013, art 4.

own.[1192] A confession under a collaboration agreement does not mean a "break in the chain of events" of the criminal proceeding, representing rather just another link – often the first one – in this chain.[1193]

In the Brazilian rewarded collaboration regulation, as occurs in the German crown-witness regulation, the benefits granted to cooperating defendants stem from their contribution to investigations against third parties in situations of investigative emergencies.[1194] Collaboration agreements represent, in Brazilian law, investigative devices for the detection and deterrence of serious crimes, connected to the state's commitment to search for truth and to an inverted reading of the principle of equality of arms.[1195] They engender a partial privatization of investigative and prosecutorial activities, transforming defendants into a *longa manus* of law enforcement authorities, responsible for collecting information and evidence concerning the acts of other accused.[1196]

From this perspective, to assert an equivalence between collaboration agreements, established in the Brazilian Organized Crime Act, and the American concept of plea agreements reveals not only a terminological mistake, but also a translation decision that, if disseminated, may have a profound impact on the Brazilian justice system. In the structure of meanings and practices associated with the U.S. plea bargaining system, prosecutors and accused are largely free to dispose of the criminal process through consensual arrangements.[1197] This broad power of the parties to dispose of the criminal procedure is a completely foreign body to the Brazilian legal system.[1198] Although the provisions of the Organized Crime Act have increased the field of action of law enforcement authorities and defendants within criminal proceedings, they have not created a wide room for interparty negotiations and do not permit the parties to resolve criminal cases through agreements.[1199]

1192 Brazilian Organized Crime Act 2013, art 4, § 16.

1193 In its ruling on Tollett v. Henderson, 411 U.S. 258 (1973), the U.S. Supreme Court affirmed that "a guilty plea represents a break in the chain of events which has preceded it in the criminal process". On this issue, see item V.2.b.

1194 See item V.2.a. For a more detailed analysis of the the German crown-witness regulation, see item IV.3.c.

1195 See item V.3.a.

1196 See item V.3.c.

1197 Langer (n 28) 36.

1198 On the limited capacity of parties to dispose of criminal cases in Brazilian criminal justice, see item I.1.

1199 Marcelo Cavali notes that the Brazilian practice of collaboration agreements forged arrangements similar to the U.S. plea bargain model, but rejects this de-

At this point, it is important to note that the circulation of legal institutions between different countries occurs by a complex process with various dimensions.[1200] Ideas and practices imported from other countries acquire their own meaning in the new environment and lead to results that are different from those achieved in their original context.[1201] This assimilation process leads not only to adaptation of the foreign concepts but also to the reconstruction of the national system in order to receive the new rules.[1202] In this process, the decisions made by the actors directly involved in the dynamics of the reforms, who act as translators responsible for integrating the imported concepts into the national law, are of extreme relevance.[1203] Such translation decisions are not neutral and reflect power struggles between various groups, which concern not only abstract matters of terminology, but also define the social practices that will implement the structure of meanings assimilated by the domestic legal system.[1204]

The rewarded collaboration regulation was enacted as a device for the collection of information and evidence in situations of investigative emergencies, through the development of public-private partnerships within the traditional structure of Brazilian criminal procedure. The practice of collaboration agreements has transformed the narrow and limited negotiation forum introduced by the Organized Crime Act into a free bargaining zone, where almost any type of transaction is possible.[1205] The proposed equivalence between collaboration agreements and plea bargains seeks to

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velopment because of the lack of a solid legal basis. See: Cavali (n 36) 262 and 274. In the same vein: Canotilho and Brandão (n 36) 22. In the opposite direction, defending the existence of wide negotiation forum in the rewarded collaboration regulation, see: Mendonça (n 36).

1200 Langer (n 28) 30-35.

1201 Mirjan Damaška, 'The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments' (1997) 45 American Journal of Comparative Law 839, 840.

1202 In Gunther Teubner's description, legal institutions transposed from one jurisdiction to another "are not transformed from something alien into something familiar, not adapted to a new cultural context, rather they will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed, and the internal context will undergo fundamental change". See: Teubner (n 1179) 12.

1203 Langer (n 28) 32-33.

1204 ibid 34-35.

1205 On Item VI.2.b, it is argued that the granting of benefits in collaboration agreements must abide by the numerus clausus principle, respecting the limits set by the Brazilian Organized Crime Act.

legitimize this new reality and portray it as a reasonable and acceptable scenario.

However, in view of the striking differences between collaboration agreements, provided for in the Brazilian Organized Crime Act, and the U.S. plea bargaining system, it is no exaggeration to classify this comparison as a case of "legal counterfeit", where the distorted reproduction of foreign legal practices is used as a rhetorical recourse to justify certain understandings and to immunize them from criticism. [1206] The objective of this deceptive comparison is quite straightforward: to lend some type of legitimacy to a system of accelerated conviction and sentencing operated by law enforcement authorities without any effective judicial control.[1207]

Curiously, in the process of emulating the worst aspects of the American criminal justice system, Brazilian courts have developed a devotion to consensual arrangements that appears unusual even by U.S. standards. This can be seen on the analysis of the binding effect of collaboration agreements, a subject that will be discussed in the following section.[1208]

e. The contractual redesign of Brazilian criminal law

The rewarded collaboration regulation established a simple exchange between individuals and public authorities: in return for their assistance in the prosecution of third parties, cooperating defendants may receive full immunity, the reduction of imprisonment penalties or their replacement with a sanction of rights´ restriction. In the practice of collaboration agreements, however, legal practitioners have used the negotiation forum of the rewarded collaboration regulation to design innovative consensual arrangements that are much more complex than the transactions foreseen in

1206 As observed by Luís Greco and Alaor Leite regarding the use of the theory of dominion of the act ("*Tatherrschaft*") in an important ruling of the Brazilian Federal Supreme Court. According to the authors, "the ruling represents, from the perspective of comparative law, an interesting case of a foreign theory, allegedly internalized (the so-called legal transplant), that came out as nothing more than a sham (a legal counterfeit)". See: Greco and Leite (n 17) 292.

1207 Criticizing the American system of plea bargaining, Bernd Schunemman asserts that "behind the shiny facade of the ideal of party-process, in more than 90% of the cases something very different occurs: a swift condemnation implemented by the investigative authorities without genuine judicial supervision". See: Schünemann, 'Zur Kritik Des Amerikanischen Strafprozessmodells' (n 25) 556.

1208 See particularly item V.4.a.

the Organized Crime Act. Instead of following the model of simple exchanges established in the statutory text, cooperating defendants and public prosecutors have drafted long and sophisticated agreements, with dozens of clauses and annexes, devising customized solutions to meet the particularities of each different situation and regulating a wide array of matters that go far beyond the textual provisions.

One agreement, for instance, designed a success fee for the cooperator, determining that two percent of the value of the recovered assets would be written-off his compensation fine.[1209] Another agreement established for the cooperator a right to "penalty equalization": according to the clause, if another defendant concluded a collaboration agreement regarding the same investigated facts with a lower penalty, the cooperator's punishment would be equalized, preventing the cooperator from having a less favorable situation.[1210] A third established the duty of the cooperator to provide studies, analyses and technical advice for public authorities for a period of thirty years.[1211] Collaboration agreements precisely regulated very specific issues, such as when and to where a cooperator could travel, in which professional fields another cooperating defendant was authorized to work and even which individuals had the right to visit cooperators during their period of imprisonment. One collaboration agreement even authorized the defendant to leave his residence, for six hours, on the date of celebration of Father´s Day in the school of his children.[1212]

Scrutiny of collaboration agreements concluded over recent years unveils a flexible and comprehensive system of transactions, where defendants and public prosecutors are largely free to consensually regulate multiple aspects of criminal cases, negotiating in a similar manner to contracting parties in private law. Within this system, the consequences of the commitment of a crime are not defined by the legislation, being rather determined through negotiated arrangements with the Public Prosecution Office. The Brazilian Federal Supreme Court has endorsed this system of wide contractual freedom, affirming that the parties' transactions are not limited by the statutory boundaries.[1213]

1209 See STF, Collaboration Agreement of A.Y. [2014], clause 7 para 4.
1210 See STF, Collaboration Agreement of F.M.S. [2017], clause 5 para 4-5.
1211 See STF, Collaboration Agreement of L.B.F. [2017], clause 4, para II, item "g".
1212 For a description of these and other innovations brought by the negotiation of tailor-made arrangements, see item I.4.b.
1213 See STF, HC 127483 [2015] and STF, INQ 4405 AgR [2018].

This understanding is deeply flawed and has widespread perverse effects on the justice system. In the private sphere, contractual freedom is understood as the embodiment of personal autonomy and self-determination, conferring wide discretion for agents to change, through consensual arrangements, their patrimony.[1214] Thus, in traditional contract law, individuals are free to create new forms of transactions, as long as some basic guidelines are respected.[1215]

Criminal proceedings, however, are obviously not simple disputes between two parties, since the result of a criminal process has far-reaching implications for society, affecting a wide spectrum of interests that go well beyond the legal sphere of the procedural participants.[1216] The seriousness of criminal punishment, which limits the liberty and jeopardizes the social existence of a person, does not permit the imposition of imprisonment penalties based solely on individual consent.[1217] Therefore, the determination of a solid factual basis, through an impartial production of evidence in a public and transparent process, is essential to establish individual guilt and justify a criminal sentence.[1218]

Therefore, although the rewarded collaboration regulation does open a legitimate space for consensual arrangements, this negotiation forum does not represent a full acknowledgement of private autonomy and contractu-

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1214 Describing the traditional view of contract law, Florian Rödl asserts that under this approach "contracting means exercising one's freedom, and the law, generally made to enable and to protect human freedom, makes such exercises effective. That is why contractual autonomy is at the core of this understanding of contract law". See: Florian Rödl, 'Contractual Freedom, Contractual Justice, and Contract Law (Theory)' (2013) 76 Law and contemporary problems 57, 59. See also: Marcelo Cama Proença Fernandes, *Contratos: Eficácia e Relatividade Nas Coligações Contratuais* (Saraiva 2014) 37.

1215 In this sense, it is recurrent to note that the principle of freedom of contract implies "the freedom to choose the content of the contract as well as the form". See: Bénédicte Fauvarque-Cosson; Denis Mazeaud (eds.), *European contract law: materials for a common frame of reference: terminology, guiding principles, model rules* (Sellier. European Law Publishers 2008) 423. According to the authors, "Freedom of contract is therefore understood in this sense as a freedom of form" (424).

1216 Noting that criminal procedure affects several interests, and not only those of the procedural participants, see: Tatjana Hörnle, '"Justice and Fairness": Ein Modell Auch Für Das Strafverfahren?' (2004) 35 Rechtstheorie 175,194. Also: Weigend, 'Unverzichtbares Im Strafverfahrensrecht' (n 23) 304.

1217 Schünemann, 'Zur Kritik Des Amerikanischen Strafprozessmodells' (n 25) 187.

1218 Greco, *Strafprozesstheorie Und Materielle Rechtskraft* (n 668) 183.

al freedom in the realm of criminal procedure. For the accused, a collaboration agreement represents, above all, a mechanism to avoid or mitigate a harsh intervention in their individual freedom.[1219] The offender's consent in such situations can be only partial: it affects a small part of the proceeding and is granted in a context where the other alternative is the natural continuation of the process, with the constant threat of more severe penalties.[1220] For law enforcement authorities, collaboration agreements represent a a punctual mitigations of the principle of compulsory prosecution, in order to increase the state's capacity to properly prosecute and punish co-conspirators, bringing the overall level of punishment closer to the ideal established in legislation.[1221]

Under these circumstances, it becomes clear that collaboration agreements must be negotiated within the statutory limits of the Organized Crime Act, since procedural participants lack, beyond these limits, the legal capacity to develop new forms of consensual solutions.[1222] This restrictive view of the negotiation forum of the rewarded collaboration regulation is necessary to preserve the myriad of other interests enshrined in criminal law and protected by criminal procedure. To understand otherwise, envisioning a wide contractual freedom in the context of the rewarded collaboration regulation, means to allow law enforcement authorities and defendants to freely dispose, in each case, of the most essential values of society. Such an understanding transforms the justice system into a flea market, where every type of transaction is possible and contractual creativity gives rise to increasingly innovative provisions that are completely disconnected from substantive criminal law.[1223]

Furthermore, this virtually unrestrained contractual freedom also erodes, in the long term, the effectiveness of the rewarded collaboration regulation. The rewarded collaboration regulation, like other leniency policies, leads to a partial or total amnesty for offenders who should otherwise be punished.[1224] The purpose of this mitigation is to strengthen the state's

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1219 Luis Greco notes that, within criminal procedure, the defendant´s consent will always be announced in a structure of coercion ("Zwangstruktur") (ibid 270).

1220 Hassemer, 'Konsens Im Strafprozeß' (n 699) 187.

1221 See item V.2.a. Affirming this position in relation to the German crown-witness regulation, see: Hoyer (n 442) 240; Jung (n 442) 41-42.

1222 On this point, see item I.1.

1223 Arguing that the negotiations developed under the rewarded collaboration regulation must respect the principle of *numerus clausus*, see section VI.2.b.

1224 This is the "dark side" of leniency policies, as mentioned in: Acconcia and others (n 29) 1118.

capacity for prosecution in face of new and challenging criminal realities, whether by facilitating the obtainment of evidence or by creating obstacles to the commitment of new crimes.[1225] Nevertheless, the reduction of penalties, if excessive or unjustified, can lead to outcomes that are exactly the opposite to those originally expected, creating scenarios of unjustified impunity.[1226] The positive and negative effects of leniency policies must, thus, be balanced through a delicate structure of incentives, designed to maximize the gains and minimize the losses generated by the granting of benefits to offenders.[1227]

In the rewarded collaboration regulation, this balance is defined, firstly, by the provisions of the Organized Crime Act, which set forth the situations in which collaboration agreements can be used, the benefits that can be granted and the individuals who can benefit from them. The broadening of the negotiation room beyond the statutory boundaries, as has occurred in the practice of collaboration agreements, undermines the structure of incentives designed by the legislator and enables offenders to end up in situations much more advantageous than those established in the Organized Crime Act. The boom in the adverse amnesty effect is clear and undeniable.

The adoption of a flexible regime for the negotiation of collaboration agreements clearly facilitates the resolution of cases by law enforcement authorities, as it allows them to constantly devise new incentives for cooperation. The development – through consensual agreements rather than by statute – of a generous range of leniency benefits tends to lead to a scenario where an increase in the number of solved cases is accompanied by a reduction in the deterrent effects of criminal law.[1228] However, the primary purpose of leniency policies is not to simplify the investigative activities of law enforcement authorities, but rather to maximize detection and deter-

1225 For a more detailed analysis of these two expected effects of leniency policies, see item II.2.

1226 See item III.3.b.

1227 Affirming the need for limits in the granting of leniency benefits, see: Spagnolo, 'Leniency and whistleblowers in antitrust' (n 30) 293; Wils (n 378) 227.

1228 On the field of anti-cartel enforcement: Harrington Jr. and Chang affirm that "a leniency program can result in more cartels, and this can occur at the same time that a leniency program is generating many applications". See: Harrington and Chang (n 626) 419. Highlighting this risk, Kovacic notes that an agency focused on maximising activity levels runs a risk of making compromises that increase the number of visible outcomes (for example, fines recovered), at the expense of future deterrence". See: Kovacic, 'A case for capping the dosage: leniency and competition authority governance' (n 378) 130.

rence of serious criminal conduct.[1229] The proper functioning of the criminal justice system must not constantly depend on the granting of benefits to offenders, which should occur only in a limited and specific manner.[1230]

4. The judicial control of collaboration agreements

A pivotal innovation brought by the Brazilian practice of collaboration agreements has been the development of transactions that allowed cooperating defendants to define, at very early stages of an investigation, an exact and all-inclusive punishment that encompassed a wide range of crimes reported in their cooperation report.[1231] In this type of "package deal", the written agreement precisely outlines the imprisonment penalties, the monetary fines and even the conditions and time of the detention regimes under which the defendant would serve the negotiated punishment. Given the all-embracing reach of agreements, accused can effectively foresee and determine the final results of complex criminal proceedings, often involving a myriad of suspicious conduct related to white-collar crimes, even before any formal charges have been presented.

The Brazilian judiciary has provided an essential support for the consolidation of this type of transaction by understanding that collaboration agreements have a binding effect and that courts must respect, in their decisions, the terms negotiated between cooperating defendants and public prosecutors.[1232] According to this view, cooperators have – after the fulfillment of their duties – an enforceable right regarding the obtainment of the penalties and benefits established in the written arrangements.[1233] This position was again grounded in concepts from private contract law: the principles of legal certainty, contractual stability and protection of legitimate expectations compelled courts to honor, in the sentencing phase, the commitments assumed in the agreements concluded by public prosecutors.

1229 As noted by Giancarlo Spagnolo: "The aim of leniency programs is (at least should) not be making the job of prosecutors easier, but rather increasing cartel deterrence". See: Spagnolo (n 30) 293.

1230 Jung (n 442) 40.

1231 See item I.4.a.iii.

1232 See item I.4.c.ii.

1233 Important decisions of the Brazilian Federal Supreme Court affirmed this understanding. See STF, HC 127483 [2015] and STF, PET 7074 [2017].

A more thorough analysis reveals how unfounded this facet of the contractualist approach to collaboration agreements is. Retrieving the perspective provided by the 2013 ruling of the German Federal Constitutional Court on the constitutionality of the regulation of negotiated judgments, item V.4.a rejects the position that collaboration agreements engender a compelling binding effect upon judicial sentencing decisions. Item V.4.b denounces the distorted use of collaboration agreements as hedging mechanisms, highlighting the negative externalities that the transactions generate. Item V.4.c concludes by asserting that the existence of rigorous judicial control – in procedural as well as substantive aspects – is a key feature for the development of a sound and legitimate practice of collaboration agreements.

a. Pacta sunt servanda or nemo dat quod non habet? The issue of the binding effect

In its 2013 decision on the constitutionality of the statutory regulation of negotiated judgments, the German Federal Constitutional Court decided that consensual arrangements within criminal investigations could not be carried out in disagreement with basic principles of German criminal procedure.[1234] According to the court, the principle of individual guilt, the state's commitment to search for truth and the guarantee of due process forbade that legal practitioners disposed unrestrictedly, through consensual arrangements, of the factual inquiry and the definition of criminal punishment.[1235] Affirming that the imposition of imprisonment penalties can be justified only after the completion of a thorough fact-finding process, the court rejected the possibility of an imprisonment penalty deriving from a simple settlement between procedural participants, rather than from an independent collection of evidence that demonstrates the individual guilt in the commitment of an offense.[1236]

From this perspective, the German Federal Constitutional Court dedicated different parts of its 2013 decision to the issue of the binding effect

1234 For a description of the decision, see item IV.2.e.

1235 See BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10 u.a. = BVerfGE 133, 168, para 105.

1236 According to the decision, the imposition of imprisonment penalties without robust evidence of the defendant's guilt is incompatible with the principle of human dignity (ibid., para. 54).

of consensual solutions within criminal proceedings. The Court expressly recognized that non-binding dialogs between procedural participants can bring benefits to the administration of justice.[1237] At the same time, the German Federal Constitutional Court asserted that negotiated solutions cannot exempt judicial bodies from their duty to impose a sentence that is compatible with the factual aspects of the case and with their correct legal qualification.[1238] Due to the state's commitment to ascertain the facts of the case, whenever consensual arrangements do not adequately reflect the factual or legal characteristics of the case, their binding effect on judicial bodies lapses.[1239] The Court affirmed the importance for defendants to be correctly informed that a consensual solution cannot define the outcome of the criminal proceeding and that judicial bodies may deviate from inter-party arrangements.[1240] Consequently, the Court reasserted that judicial bodies have the duty to expressly inform defendants that consensual arrangements cannot bind judicial decisions under certain circumstances: given the impact of this information on the behavior of the defendant, any negotiated solution that is not preceded by a correct judicial instruction regarding the restricted binding effect of the consensual arrangement must be considered illegal.[1241]

Under the light shed by the 2013 ruling of the German Federal Constitutional Court, the strict application of the principles of contractual stability and protection of legitimate expectations to collaboration agreements, as proposed by the Brazilian Federal Supreme Court, reveals itself as completely inadequate. In the model of negotiation validated by the Brazilian Supreme Court, the parties – the Public Prosecution Office and cooperating defendant – transact over an extensive array of matters, deciding consensually on the wrongful conducts committed by the defendant, on the legal qualification of these conducts, and on the exact punishment applicable.

All these decisions are made at the moment that the parties conclude an agreement, i.e., before the end of the formal investigation and often before the filing of any formal charges. In this type of transaction, the criminal punishment imposed upon the cooperating defendant stems unequivocally from consensual arrangements, becoming detached from any serious

1237 ibid., para. 106.
1238 ibid., para. 73-74.
1239 ibid., para. 69.
1240 ibid., para. 125-126.
1241 ibid., para. 127.

fact-finding process. The position of the Brazilian Federal Supreme Court affirming the binding effect of collaboration agreements has led to a scenario where cooperating defendants earn, through arrangements negotiated with prosecutors in the beginning of the criminal process, the right to predefined penalties and benefits. Judicial bodies, bound by the inter-party consensual arrangements, become spectators of a play with a previously defined end.

This situation materializes violations of several guarantees of criminal procedure, especially the principle of individual culpability and the state's commitment to search for truth. As noted by the German Federal Constitutional Court in its 2013 ruling, criminal punishment is a state reaction to reproachable individual conduct, and without robust evidence of the individual guilt of the accused, the imposition of criminal penalties violates the concept of human dignity.[1242] As a condition for the fulfillment of the principle of individual culpability, the state's duty to search for factual truth is the central concern of criminal procedure.[1243] The principle of individual guilt, the state's duty to search for truth and the guarantee of due process prevent procedural participants from transacting freely over the factual investigation, the legal qualification of the defendant's conduct and the definition of criminal sentences.[1244] They also exclude the possibility for parties to bind, through consensual arrangements, the judicial decision regarding the determination of the facts and its legal qualification.[1245]

It is interesting to note that the purported binding effect of collaboration agreements in relation sentencing decisions of courts, as understood by the Brazilian Federal Supreme Court, indicates a level of deference to consensual arrangements in criminal procedure that appears staggering even by the loose U.S. standards. Throughout the enhanced development of the American system of plea bargaining in the last century, the U.S. Supreme Court supported the widespread use of consensual arrangements in criminal justice based on the concepts of individual autonomy and efficiency.[1246] This support, however, did not prevent the U.S. Supreme Court from establishing a firm position conferring broad sentencing powers to

1242 ibid., para. 54-55.
1243 ibid., para. 56 and 104.
1244 ibid., para. 105.
1245 ibid., para. 69 and 73-74.
1246 See item IV.4.b.iii. Also: Greco (n 668) 266; Bibas (n 179) 1367.

courts, who generally enjoy wide discretion over the definition of the appropriate criminal punishment upon convicted individuals.[1247]

These sentencing powers remain largely undisturbed by the inter-party transactions: even when the parties reach an agreement regarding the charges to which the accused will plead guilty, courts normally hold the capacity to define the adequate sentence according to the facts of the case.[1248] When it comes to cooperating defendants, the vast sentencing powers held by courts unavoidably brings some level of uncertainty to agreements concluded between parties, since the sentencing judge may not recognize the relevance of the provided assistance and confer little or no penalty mitigation for it.[1249] Therefore, a cooperating defendant cannot know beforehand what precise benefits he will receive at the end of the proceeding, and there is even a chance that his sentence may be aggravated by the elements he voluntarily provided.[1250]

1247 Regarding the development of this jurisprudence, see: Douglas A Berman, 'Foreword: Beyond Blakely and Booker: Pondering Modern Sentencing Process' (2005) 95 The Journal of Criminal Law and Criminology 653, 661-666. For an analysis of the broad sentencing powers of U.S. courts, see: Pizzi (n 1191). The author notes the "tremendous sentencing power vested in the trial judge" (69) and that "the judge shifts from neutral and passive referee at trial to the central decision-maker at sentencing" (70).

1248 Stephanos Bibas, 'Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas' (2001) 110 The Yale Law Journal 1097,1155-1156 and 1169. See also the 2011 ruling of the U.S. Supreme Court in Pepper v. United States (570 F. 3d 958), affirming the longstanding principle that "the punishment should fit the offender and not merely the crime" (U.S. Supreme Court, Williams v. New York , 337 U. S. 241), which confers the judicial organ wide discretion to obtain information about the offender, including about the offender's rehabilitation, for an accurate sentencing.

1249 As noted by Ian Weinstein: "Another risk is that the judge will give either little or no reward to the cooperator. The court's decision whether and how much to mitigate the sentence is unreviewable on appeal and may turn on the court's own evaluation of the cooperation, the offense or leniency already granted the defendant in the plea agreement". See: Weinstein (n 3) 592.

1250 As observed by Shana Knizhnik: "In reality, a defendant has no idea what the benefit will be if he cooperates. (…) there is a very real possibility that his cooperation will not be successful (for whatever reason) - in which case, he may end up in a much worse position than had he not said anything at all" . See: Shana Knizhnik, 'Failed Snitches and Sentencing Stitches: Substantial Assistance and the Cooperator's Dilemma' (2015) 90 New York University Law Review 1722, 1745. Noting the same risks faced by cooperating defendants in the U.S. system of criminal justice: Rachel E Barkow, 'Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law' (2009) 61 Stanford Law Review 869.

In this context, the fierce binding effect of collaboration agreements envisaged by the Brazilian Federal Supreme Court looks even more outlandish. Faced with the broadening of the negotiation room in the practice of collaboration agreements, the Brazilian Supreme Court not only refused to assert the basic principles of the Brazilian criminal justice system – as the German Constitutional Court did in the 2013 ruling on the constitutionality of the § 257c StPO – but also displayed a reverence for negotiated criminal solutions that would appear as extreme even in the American legal system.

In the Brazilian legal system, law enforcement authorities responsible for the negotiation of collaboration agreements lack the power to determine verdicts and impose sanctions. Given the inalienable function of judicial bodies in the imposition of a correct verdict and an adequate sentence, collaboration agreements cannot – in regard to the exact definition of imprisonment penalties – entail a "*do ut des*", but only a "*do ut spero*" relationship.[1251] Therefore, any arrangement reached with defendants regarding these issues cannot legally bind the judicial organs' final decisions on these matters. Instead of envisioning a rudimentary application of the concept of *´pacta sunt servanda´* in criminal procedure, the Brazilian Federal Supreme Court should have applied another traditional adage of private law: *nemo dat quod non habet*, which expresses the basic notion that one can not give what one does not own.

b. Negative externalities, private gains and social costs: the distorted use of collaboration agreements as hedging mechanisms

The broadening of the negotiation forum beyond its statutory limits, as seen in the practice of collaboration agreements, is not an exclusive experience of Brazilian criminal procedure. Comparative scholarship indicates that, once the genie of contractual freedom is released within the criminal justice system, it is very difficult to imprison it again.[1252] In Mirjan Damaska's metaphor, "preventing the spread of inter-party dealings is hard as stifling a yawn once it has begun".[1253] The German experience with the em-

1251 Malek, 'Die Neue Kronzeugenregelung Und Ihre Auswirkungen Auf Die Praxis Der Strafverteidigung' (n 481) 376.

1252 For an analysis of the German experience, see item IV.4.b.

1253 Mirjan Damaska, 'Negotiated Justice in International Criminal Courts' (2015) 2 Journal of International Criminal Justice 1018, 1030.

ployment of negotiated solutions is a clear example of how legal actors will constantly seek to extend, in day-to-day judicial routines, the boundaries of consensual mechanisms established in criminal legislation.[1254] In the hands of self-interested practitioners, the legislative regulation, projected to be the ceiling for the possibilities of consensual arrangements, becomes the basis for the development of progressively more audacious transactions.[1255]

Consensual mechanisms allow complex criminal investigations to be replaced by arrangements that lead to a speedy resolution of cases, in a manner that both parties consider appropriate. Especially in circumstances in which the process of truth-finding is burdensome and has uncertain outcomes, as occurs in the so-called "monster-proceedings" of white-collar crimes, all legal actors can take great advantage from a consensual solution.[1256] The problem with this expansionist movement is that agreements between prosecution and defense in criminal proceedings can create serious negative externalities for the legitimate interests of third parties.[1257] Consensual mechanisms give rise to the risk that the solution of a criminal proceeding arises from a purely bilateral arrangement and gravely ignores the factual aspects of the case and their correct legal qualification. The es-

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1254 For a good description of the widespread disregard of the legislative regulation of negotiated judgments by German legal practitioners, see: Altenhain, Dietmeier and May (n 38). See, also, items IV.2.b and IV.2.e.

1255 A bold innovation in the German practice of negotiated judgments is the development of "package deals" ("Gesamtlösungen"), which resolve simultaneously several proceedings involving one accused. In its 2013 ruling, the German Constitutional Court cites a negotiation that ended in a "family solution": in the case, the defendant accepted a higher imprisonment penalty and, in return, his wife obtained a suspended sentence so that she could take care of their children. See BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10 u.a. = BVerfGE 133, 168, para 49. Highlighting the inherent risks in inter-party negotiations in criminal justice, Martin Heger e Robert Pest notes that "as long as a procedure of consensual solution exist, there will occur a bypassing of the regulation of the procedure in the legal practice". See Heger and Pest (n 37) 486.

1256 On the impact of the appearance of "monster-proceedings" on the development of consensual solutions, see Bernd Schünemann, 'Zur Kritik des amerikanischen Strafprozessmodells' (n 25) 555-571.

1257 On this subject, see item IV.4.b. Luis Greco argues that a main problem with the use of consensual solutions in criminal justice relates to the effect of these solutions on the position of other accused. See: Greco, *Strafprozesstheorie Und Materielle Rechtskraf* (n 668) 276-279. Mirjan Damaska notes that: "It is indeed unlikely that the parties will take into account the full cost that their transaction imposes on others with whom they have no immediate relationship". See: Damaška (n 668) 1028.

calation of consensual aspects in criminal procedure reduces the state's responsibility in the correct determination of the investigated facts;[1258] overreliance on mechanisms of consensual solutions within a criminal justice system can lead to a scenario of "systematic abstinence from the search for truth".[1259]

Criminal punishment epitomizes a public recognition that an individual has behaved wrongly and must therefore be sanctioned.[1260] Since this recognition generates a wide array of effects on society, the completion of a thorough process of fact-finding before the definition of the sentence and verdict, apart from safeguarding the rights of the accused, represents a guarantee for the protection of a multitude of social interests.[1261] The distortion and tampering of criminal procedure through consensual mechanisms have, thus, impacts that go well beyond the legal sphere of procedural participants. The expansion of the negotiation forum beyond the statutory limits widens the parties' ability to reach an agreement that meets their own interest and externalizes new costs, which will be felt by society or other individuals only in the future.

The risks of the expansion of the negotiation forum beyond the statutory limits are even greater when it comes to leniency policies, such as the rewarded collaboration regulation. Leniency policies give rise to multiple negative externalities that do not affect the contracting parties, leading commonly to scenarios of excessive use.[1262] Leniency policies offer defendants several opportunities to misrepresent facts,[1263] obtain disproportionate benefits[1264] and to 'game the system' through sophisticated strategies.[1265] For law enforcement authorities, leniency policies provide a much faster and less costly manner of obtaining information and evidence, which makes their use highly attractive when compared to other investiga-

1258 Hornle (n 963) 833.
1259 Winfried Hassemer, 'Human Dignity in the Criminal Process: The Example of Truth-Finding' (2011) 44 Israel Law Review 185, 198.
1260 Greco, *Strafprozesstheorie Und Materielle Recthskraf* (n 668) 1092.
1261 On this point, Thomas Weigend asserts that a purely consensual approach to criminal justice misses "the social function of criminal procedure". According to the author, this objective of criminal procedure can only be achieved "through a serious and intense pursuit of truth and fairness". See: Thomas Weigend, 'Unverzichtbares im Strafverfahrensrecht' (2001) 113 Zeitschrift für die gesamte Strafrechtswissenschaft 271, 304.
1262 Weinstein, 'Regulating the Market for Snitches' (n 3) 565.
1263 See item III.3.a.
1264 See item III.3.b.
1265 See item III.3.d.

tory tools, even if that comes at the cost of an excessive lowering of penalties or other types of social cost.[1266] Furthermore, the offender's consent creates an apparent mantle of legitimacy for the imposition of penalties, validating the investigative efforts. [1267]

The practice of collaboration agreements in Brazil is a typical example of the undue advantages that parties can obtain through the reckless expansion of the negotiation forum within a leniency policy. For cooperating defendants, this expansion has enabled the achievement of outcomes in criminal procedures that are far better than the ones that could be obtained by complying with the provisions of the Organized Crime Act. The inventive practice of collaboration agreements has allowed offenders to obtain "package deals", leading to much milder penalties than should have been imposed if the rules of the Organized Crime Act were followed.[1268] It has forged detention regimes that do not exist in Brazilian law, enabling offenders to serve long imprisonment sentences at their own private residences, under very favorable circumstances.[1269] It has also authorized cooperators to protect part of their wealth from the general rule that determines the seizure of assets obtained through criminal activities.[1270]

The purported binding effect of collaboration agreements has given these extravagant innovations the appearance of enforceable individual rights, much like those derived from private contracts. Due to the application of the principles of contractual stability and protection of legitimate expectations, cooperating defendants and public prosecutors have been able to define in advance the outcome of complex investigations, even before the formal start of a criminal proceeding. As occurred in Germany, the field of white-collar criminality proved a very fertile ground for consensual transactions.[1271] Given the uncertainties arising from ambiguous legislation, the automatic side effects of criminal prosecution upon legiti-

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1266 On this subject, see Kovacic, 'A Case for Capping the Dosage: Leniency and Competition Authority Governance' (n 378); Megan Dixon, Ethan Kate and Janet McDavid, 'Too Much of a Good Thing? Is Heavy Reliance on Leniency Eroding Cartel Enforcement in the United States?' (2014) 12 CPI Antitrust Chronicle 2, 2–6.

1267 Winfried Hassemer, 'Konsens im Strafprozeß', *in* Regina Michalke and others (eds), *Festschrift für Rainer Hamm zum 65. Geburtstag am 24. Februar 2008* (De Gruyter, 2009) 180.

1268 See item I.4.a.iii.

1269 See item I.4.a.i.

1270 See item I.4.a.i.

1271 Since the beginning, the development of the German practice of negotiated judgments has occurred mainly in investigations of white-collar crimes. See:

mate corporations, and the difficulties in distinguishing criminal behavior from regular conduct, it is hardly surprising that Brazilian legal practitioners tried to overcome the lack of predictability and the excessive costs of "monster proceedings" related to white-collar crimes through negotiated arrangements.[1272]

Based on the combination of wide contractual freedom and a compelling binding effect, procedural participants were able to design sophisticated arrangements that resemble hedging contracts, used in financial markets to minimize volatility and reduce risks in future scenarios of uncertainty.[1273] In the light of the Brazilian Federal Supreme Court´s position, cooperating defendants were able, through collaboration agreements, to 'lock in' a defined amount of criminal punishment for a later moment, in a very similar fashion to hedging contracts, which design purchasing transactions of assets at a fixed price at a future moment.[1274] Some collaboration agreements even established the cooperator's right to a potential penalty equalization, in case other cooperating defendants from the same business conglomerate managed to obtain a better deal.[1275]

The comparison to the finance industry seems here more suitable than ever: in the brand-new Brazilian market of criminal justice, collaboration agreements not only 'lock in' an exact criminal penalty for a future moment, but also design an insurance policy that triggers the renegotiation of the transaction whenever other buyers purchase the product of the merchants of penalties at a lower price. This type of transaction, apart from contradicting multiple principles of Brazilian criminal procedure, leads to

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Schünemann, 'Gutachten, Kongressvortrag, Aufsatz | Absprachen Im Strafverfahren - Grundlagen, Gegenstande Und Grenzen' (n 38) 17-18; Altenhain, Dietmeier and May (n 38) 20. See also item IV.2.b.

1272 For an analysis of the development and the support of the widespread use of collaboration agreements in the field of corporate criminality, see items II.4 and II.5.

1273 The literature on the use of hedging contracts by corporations is very large. According to Smith and Stulz, the focus of the literature on hedging practices "is generally on risk-averse producers who use forward or futures markets to reduce the variability of their income". See: Clifford W Smith and Rene M Stulz, 'The Determinants of Firms' Hedging Policies' (1985) 20 The Journal of Financial and Quantitative Analysis 391, 391. See also: Peter M DeMarzo and Darrell Duffie, 'Corporate Incentives for Hedging and Hedge Accounting' (1995) 8 The Review of Financial Studies 743; Qiang Li and others, 'Buy Now and Price Later: Supply Contracts with Time-Consistent Mean–Variance Financial Hedging' (2018) 268 European Journal of Operational Research 582.

1274 See Item I.4.a.ii and I.4.c.i

1275 Pet. 6533, Fernando Migliaccio, Clausula 5ª , parágrafos 4º e 5º

a variety of inexplicable situations. While the gains and losses stemming from hedging contracts in financial exchanges are understood as normal occurrences of a market economy, the disparities and inconsistencies generated by this kind of arrangement are irreconcilable with basic values of substantive and procedural criminal law, such as the principle of individual culpability, the transparency requirement and the commitment to a minimum standard of truth-searching.[1276]

c. The overheated cooperation market and the problem of monopoly of selection: a case for broad and in-depth judicial control of collaboration agreements

Much of the Brazilian debate about the limits of the use of the rewarded collaboration regulation is based on a presumed opposition between the public interest in fighting organized crime, particularly corruption schemes and corporate wrongdoing, and the individual rights of the defendants.[1277] The problem with this position is that it overshadows the most serious challenges that exist in the development of a sound leniency policy. The main risk posed by such policies is not the erosion of individual rights of other accused, which remain (or at least should remain) the same, but rather the many opportunities that these policies provide for the contracting parties (cooperating defendants and law enforcement authorities) to adopt solutions that reflect their own interests and, concurrently, cause diffuse negative externalities.

The introduction of a negotiation forum between prosecution and defense permits procedural participants to develop transactions that inevitably affect other agents who are nor part of the criminal proceed-

1276 As noted by the 2013 ruling of the German Federal Constitutional Court on the constitutionality of the regulation of negotiated judgments. See BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10 u.a. = BVerfGE 133, 168, para 105.

1277 For a detailed defense of this position, see: Sarmento (n 35) 450-457. According to the author, the rewarded collaboration regulation "cannot be devised and applied in a manner that violates the fundamental rights of cooperators and other defendants, and cannot be weakened to the point of failing to protect the fundamental rights of the population, which are violated by organized crime and by corruption" (455).

ing.[1278] In view of the incentives for parties to design consensual arrangements that create value for them while externalizing costs for other agents, the emergence of an "overheated cooperation market" is not surprising.[1279] In this regard, the investigatory public-private partnerships between enforcement authorities and offenders resemble production activities that emit air pollution: while they deliver perceptible results and clear advantages for the involved agents, they also produce invisible externalities, which will affect society in a diffuse and protracted manner.[1280]

These risks are exacerbated by the fact that leniency policies greatly increase the relevance of the investigative phase of criminal prosecution, which becomes the defining moment of the course and the outcome of a criminal case. Leniency policies confer a broad field of action on law enforcement authorities in the preliminary stages of the procedure, including the control over which elements of the investigation will be formally registered for future analysis in the trial phase. This "monopoly of selection" [1281] hinders the judiciary in assessing whether the facts narrated by law enforcement authorities have been discovered in an impartial and correct manner. This scenario is particularly delicate because, in the scenario of partial privatization of state prosecution, the access of public authorities to the shared evidence occurs only after private agents have screened the material and decided what is relevant for the investigation.[1282]

1278 Luis Greco highlights, for instance, the effect of consensual solutions on defendants who are not willing to confess and negotiate a settlement. According to the author, the whole existence of consensual mechanisms in criminal procedure "rests on the stricter punishment of those who insist on asserting their procedural rights". See: Greco, *Strafprozesstheorie Und Materielle Rechtskraf* (n 668) 278.

1279 Noting the existence of an "overheated cooperation market" in the U.S, see: Weinstein, 'Regulating the Market for Snitches' (n 3) 564.

1280 On the externalities that arise from polluting activities, see: Peter Lewin, 'Pollution externalities: social cost and strict liability' (1982) 2 Cato Journal 205; J V. Henderson, 'Externalities in a Spatial Context. The Case of Air Pollution' (1977) 7 Journal of Public Economics 89.

1281 According to Bernd Schünemann, a current trend in criminal procedure is huge increase of relevance of the pre-trial inquiry phase, in a scenario where the investigative authorities have a "monopoly of selection" over the elements that will be formally registered for exam during the trial phase. See: Schünemann, 'Die Zukunft Des Strafverfahrens – Abschied Vom Rechtsstaat?'(n 695) 948-949.

1282 For a thorough analysis of the risks of the privatization of investigative activities within criminal procedure, see: Stoffer (n 23).

In this context, in which law enforcement authorities and defendants gain enormous power over the course of criminal investigations, there is no reason to understand that courts should merely perform procedural oversight of the practice of collaboration agreements. Given the specific risks that partnerships between offenders and law enforcement authorities entail, judicial control over collaboration agreements should be just as, or even more intense than, the scrutiny exercised by courts over other aspects of the criminal proceeding.

Regarding this point, it is important to note that Brazilian criminal procedure reserves a central role for judicial bodies. Unlike in U.S. criminal justice, Brazilian courts play an active role throughout different phases of the criminal procedure. In Brazilian criminal procedure, the ascertainment of criminal behavior, the legal qualification of offenses, and the definition of a criminal sentence are exclusive functions of judicial bodies.[1283] Brazilian courts perform a central function in criminal proceedings, in order to ensure that a conviction is imposed only when the investigation of the facts demonstrates, in an objective and impartial manner, the criminal liability of an individual.[1284]

Leniency policies such as the rewarded collaboration regulation have genuine potential for expanding the state's capacity to discover and solve serious and complex crimes.[1285] They can also have an important deterrent effect on criminal organizations.[1286] Nonetheless, these policies entail a series of new risks, which arise from the establishment of principal-agent relationships between law enforcement authorities and offenders in a context of strong informational asymmetry.[1287] The structure of these partnerships creates various possibilities for defendants to gain undue advantages, through the misrepresentation of facts,[1288] the obtainment of excessive

1283 See item V.2.c.

1284 For that purpose, Brazilian courts are responsible not only for assessing the defendant's guilt and defining the legal qualification of criminal offenses, but also for guaranteeing an adequate determination of the facts of a criminal case. In order to guarantee proper fact-finding, courts have the power to determine, *ex officio*, the production of relevant evidence to clarify points of the investigation. Judges may hear witnesses who have not been indicated by the parties and, in urgent situations, may order the production of evidence even before the criminal procedure has begun. See Brazilian Code of Criminal Procedure, art. 156, I and II; art. 209; art. 234.

1285 See item III.2.a.

1286 See item III.2.b.

1287 See item III.3.

1288 See item III.3.a.

benefits[1289] and the reverse exploitation of the leniency system.[1290] These risks are exacerbated by the existence of several incentives for enforcement authorities to transform leniency policies, in the day-to-day routines of the justice system, into instruments of procedural economy.[1291]

In this context, there is a clear need for strict judicial control over the development of leniency policies, in order to avoid the multiple risks that such policies engender. This control must be broad enough to cover the different phases of the practice of collaboration agreements, comprising issues such as the criteria for the selection of the cooperator, the negotiation techniques employed by law enforcement authorities and the benefits granted. It must also be in-depth, in order to ensure compliance with the fundamental principles of Brazilian law, such as proportionality, equality, transparency and the guarantee of individualization of punishment.

The existence of broad and in-depth judicial control is an essential element for the development of a sound practice of collaboration agreements, one that contributes to the discovery of serious crimes, to the distinction between innocent and guilty individuals and to the punishment of the latter through a transparent and legitimate procedure.

5. *Conclusion: the contractualist approach from a comparative perspective*

Confronted with complex and sophisticated transactions concluded between cooperating defendants and the Public Prosecution Office in the investigation of corporate and government crimes, the Brazilian Federal Supreme Court has followed a dubious path.

First, the Court ignored that collaboration agreements are tools that express the state's commitment to search for truth, choosing rather to understand collaboration agreements as simple bilateral transactions that do not affect third parties. Through this understanding, the Court overlooked a fundamental difference between leniency policies, designed to reduce impunity through the enhancement of detection and deterrence of serious

1289 See item III.3.b.

1290 See item III.3.d.

1291 Noting these incentives, see: Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrecht* (n 1) 307. On the distortion of incentives caused by leniency policies on the behavior of enforcement authorities, see item IV.3.c.

crimes, and mechanisms of consensual justice, aimed at abbreviating criminal proceedings and achieving procedural economy.

Secondly, the Federal Supreme Court refrained from asserting basic pillars of Brazilian criminal law, such as the norms of due process, the system of separation of functions, the principle of presumption of innocence and the guarantee of individualization of punishment. Instead, the Court decided to interpret collaboration agreements under the light of principles and concepts of private contract law, such as the protection of legitimate expectations and good faith, the "*res inter alios acta*" principle, the "*venire contra factum proprium*" doctrine and the rule of "*pacta sunt servanda*".

Finally, the Federal Supreme Court neglected the risks arising from the establishment of public-private partnerships within the apparatus of state prosecution and from the partial privatization of official investigations. The Court did not once examine seriously the perils stemming from the principal-agent relationships and from the informational asymmetries that characterize the dynamics of cooperation between offenders and enforcement authorities. The risks of misrepresentation of facts through under- and over-cooperation, of an excessive amnesty effect or of a reverse exploitation of the rewarded collaboration regulation were never meaningfully considered.

Given the challenges that exist in the prosecution of white-collar networks, the main field of development of collaboration agreements, the recent enthusiasm of Brazilian legal practitioners for consensual solutions is understandable. As the German experience demonstrates, when faced with complex and burdensome criminal investigations, all actors of the criminal process have strong incentives to search for a settlement that renders a fast and secure outcome. This is particularly true in the context of "monster proceedings" related to white-collar crimes, given the extravagant costs of fact-finding, the uncertainties steaming from vague and ambiguous legislation and the multiple side effects of criminal prosecution upon legitimate corporations. In such circumstances, it is not surprising that procedural participants have tried to employ consensual arrangements as hedging mechanisms to reduce risk, offset costs and achieve a secure result in a scenario of volatility and distress.

What is astonishing in the Brazilian experience with collaboration agreements is the unconditional support granted by the Federal Supreme Court to the bold innovations developed through consensual arrangements. The shortcomings and flaws of the contractualist approach to collaboration agreements are emphasized when contrasted with the position of the German Constitutional Court in the assessment of the constitutionality of ne-

gotiated solutions in criminal proceedings. Faced with pervasive disregard for the statutory rules by legal practitioners, the German Constitutional Court took a path that, although not immune to criticism, directly confronted several questions that the Brazilian Federal Supreme Court preferred to neglect.

Unlike the German Constitutional Court, the Brazilian Federal Supreme Court did not attempt to tame the inventive practice of consensual arrangements that emerged after the enaction of Organized Crime Act. On the contrary, the Brazilian Court fuelled the growth of consensual innovations, invoking principles of private contract law to block legal actions of third parties against collaboration agreements and to affirm the binding effect of these agreements upon the judiciary.

This tremendous deference to consensual arrangements and the oblivion of traditional pillars of Continental criminal procedure stands in sharp contrast to the German Constitutional Court's affirmation of the principle of individual guilt and the state's duty to search for truth in criminal proceedings. Even when compared to the U.S. experience, the contractualist approach to collaboration agreements appears excessively radical. From a comparative perspective, the approach of the Brazilian Federal Supreme Court regarding collaboration agreements reveals itself as an incomprehensible position that has led to a truly unique experience: the redesign of Brazilian criminal law through sophisticated written agreements. In the blurred context of white-collar criminality, legal practitioners had no problems using the blank check given by the Federal Supreme Court to develop staggering consensual innovations and achieve secure outcomes.

Some aspects of the inventive use of collaboration agreements have become so entrenched in Brazilian case-law and legal scholarship that nowadays it is even difficult to suggest that another model of negotiation is feasible. The rejection of the contractualist approach, and its replacement by the understanding that collaboration agreements represent a type of privatization of official investigations through public-private partnerships, have important consequences for Brazilian legal practice. Chapter VI is dedicated mainly to examining the implications of the rebuff to the contractualist approach. At the end, it also hypothesizes about the reasons for the widespread support found by the inventive practice of collaboration agreements in Brazilian law.