Chapter I – The development of leniency policies in Brazilian criminal justice and the contractualist approach to collaboration agreements

1. Introduction

Until recently, negotiations between public authorities and defendants played a minor role in the Brazilian system of criminal justice, basically serving to provide a swift resolution for the investigation of minor offenses.[34] The recent growth of leniency policies in Brazilian law, especially after the introduction of the rewarded collaboration regulation by the 2013 Organized Crime Act, has changed this scenario, decisively boosting the use of consensual arrangements in criminal proceedings, particularly in the investigation of corrupt practices and corporate wrongdoing.[35] A distinctive mark of this development has been the detachment between the textual provisions of the Organized Crime Act and the collaboration agreements negotiated in the judicial practice by procedural participants, which have designed innovative solutions and inventive arrangements, expanding the negotiation forum well beyond the statutory limits.[36]

---

34 The Brazilian Code of Criminal Procedure does not contain rules authorizing the resolution of cases through consensual arrangements. The first possibilities of inter-party negotiations were introduced by the 1995 Small Claims Act, but had its use restricted to the investigation of minor offenses. On this issue, see section I.2.

35 According to Fabiano Silveira: "It is from 2013 onwards that the model of negotiated justice will take a heavy toll on the Brazilian tradition of criminal procedure". See Fabiano Augusto Martins Silveira, 'O Papel Do Juiz Na Homologação Do Acordo de Colaboração Premiada' (2018) 17 Revistas de Estudos Criminais 107, 114. As noted by Daniel Sarmento, this development has occurred mainly in investigations of white-collar crimes, often involving high-ranking politicians and businessmen. See Daniel Sarmento, 'Colaboração Premiada. Competência Do Relator Para Homologação e Limites à Sua Revisão Judicial Posterior. Proteção à Confiança, Princípio Acusatório e Proporcionalidade', *Direitos, democracia e República: escritos de direito constitucional* (Fórum 2018) 452. On the connection between the practice of collaboration agreements and the investigation of Brazilian macro-delinquency, see items II.2 and II.4.

36 Multiple authors have extensively registered this detachment. See Andrey Borges de Mendonça, 'Os Benefícios Possíveis Na Colaboração Premiada: Entre a Legalidade e a Autonomia Da Vontade' in Maria Thereza de Assis Moura and Pierpaolo

Because of the innovative nature of the Brazilian practice of collaboration agreements, a correct assessment of the rewarded collaboration regulation can only be carried out with attention to the "law in action".[37] This chapter depicts the central features of the inventive practice of collaboration agreements and the solid support this practice has received from the Brazilian judiciary, especially from the Brazilian Federal Supreme Court.[38]

Cruz Bottini (eds), *Colaboração premiada* (Revista dos Tribunais 2017) 77-101; Salo de Carvalho, 'Colaboração Premiada e Aplicação Da Pena: Garantias e Incertezas Dos Acordos Realizados Na Operação Lava Jato' in Américo Bedê Júnior and Gabriel Silveira de Queirós Campos (eds), *Sentenca criminal e aplicação da pena: ensaios sobre discricionariedade, individualização e proporcionalidade* (Juspodivm 2017) 516; Thiago Bottino, 'Colaboração Premiada E Incentivos À Cooperação No Processo Penal : Uma Análise Crítica Dos Acordos Firmados Na " Operação Lava Jato "' (2016) 122 Revista Brasileira de Ciências Criminais 359; Marcelo Costenaro Cavali, 'Duas Faces Da Colaboração Premiada: Visões "Conservadora" e "Arrojada" Do Instituto Na Lei 12.850/2013' in Maria Thereza de Assis Moura and Pierpaolo Cruz Bottini (eds), *Colaboração premiada* (Revista dos Tribunais 2017); Vinícius Gomes de Vasconcellos, *Colaboração Premiada No Processo Penal* (Revista dos Tribunais 2018) 17; JJ Gomes Canotilho and Nuno Brandão, 'Colaboração Premiada e Auxílio Judiciário Em Matéria Penal: A Ordem Pública Como Obstáculo à Cooperação Com a Operação Lava Jato' (2016) 146 Revista de Legislação e Jurisprudência 16, 31-35.

37 Martin Heger and Robert Pest note that the detachment between statutory provisions and legal practice has also been a central characteristic of the German experience with negotiated criminal judgments. See Martin Heger and Robert Pest, 'Verständigungen Im Strafverfahren Nach Dem Urteil Des Bundesverfassungsgerichts' (2014) 126 Zeitschrift für die gesamte Strafrechtswissenschaft 446, 468. In the same vein: Thomas Weigend, 'Neues Zur Verständigung Im Deutschen Strafverfahren?' in Leblois-Happe, Jocelyne/Stuckenberg and Carl-Friedrich (eds), *Was wird aus der Hauptverhandlung? Quel avenir pour l'audience de jugement?* (Boon University Press 2014) 208. For a more thorough exam of the development and regulation of these negotiations in German criminal procedure, see item IV.2.b and IV.2.d.

38 In Germany, various studies have attempted to capture the characteristics of the practice of informal negotiations developed by procedural participants before courts. For one of the first attempts, see Bernd Schünemann, 'Gutachten, Kongressvortrag, Aufsatz | Absprachen Im Strafverfahren - Grundlagen, Gegenstande Und Grenzen' (1990) Deutscher Juristentag 58 b12. Recently, an empirical study conducted in 2012 showed a strong dissociation between legal practice and legal regulation, indicating a pattern of widespread disregard for the statutory rules. See Karsten Altenhain, Frank Dietmeier and Markus May, *Die Praxis Der Absprachen in Strafverfahren* (120th edn, Nomos 2013). The study and its findings had a major impact on the 2013 ruling of the German Federal Constitutional Court on the constitutionality of the regulation of negotiated criminal judgments. On this issue, see item IV.2.e.

Therefore, its main focus is the analysis of the consensual innovations engendered by legal practitioners in agreements concluded over recent years, as well as the judicial decisions that validated these agreements.[39]

The chapter proceeds as follows. Section I.2 gives a brief overview of the Brazilian procedural system, indicates the traditional limits for the development of inter-party negotiations in criminal procedure and describes the development of the two leniency policies in Brazilian law that affect directly criminal investigations: the rewarded collaboration regulation and the antitrust leniency program. Item I.2.a describes the introduction of the first antitrust leniency program in 2000, the changes brought in 2011 by the enactment of the current Competition Act and the strong expansion of the program afterwards. Item I.2.b describes the Brazilian experience with the granting of benefits to cooperating defendants in criminal investigations up to the introduction of the rewarded collaboration regulation by the 2013 Organized Crime Act. It also depicts the boom in the use of collaboration agreements since 2014, especially in the prosecution of corporate crimes and corrupt practices.

Section I.3 portrays the central aspects of the legislative regulation of the two leniency policies. Item I.3.a analyzes the dynamics of negotiation established in both regulations, based on informal communication between the parties and directed at the conclusion of a written agreement. Item I.3.b examines the terms of negotiation between public authorities and cooperating defendants, describing the attainable benefits for cooperators provided by the Competition Act and in the Organized Crime Act as well as the associated duties regarding the assistance of official investigations. Item I.3.c analyzes the separation between the moment of signing of the written agreement and the moment of assessment of its fulfilment, highlighting the division of function between public authorities involved in the development of leniency policies.

Section I.4 addresses the central point of the chapter: the development in Brazilian legal practice of an innovative system of negotiating collaboration agreements, which has engendered an unambiguous detachment between the provisions of the Organized Crime Act and the "law in action".

---

39 Other studies have already focused their analysis on the innovations brought by the Brazilian practice of collaboration agreements, but usually from a small sample of specific cases. Canotilho and Brandao assessed various clauses of two collaboration agreements concluded in 2014. See Canotilho and Brandão (n 36). Bottino analyzed these two agreements and also a third one. See Bottino (n 36). Vinicius Vasconcellos examined a total of five agreements. See Vasconcellos, *Colaboração Premiada No Processo Penal* (n 36).

Item I.4.a analyzes four central innovations created by the Brazilian practice of the rewarded collaboration regulation: (i) the granting of benefits not provided by the Organized Crime Act; (ii) the exact definition of imprisonment penalties through consensual arrangements; (iii) the development of 'package deals'; (iv) the development of provisions for cooperating defendants to serve imprisonment penalties in advance, at early stages of the criminal proceeding. Item I.4.b describes the environment of broad contractual freedom and the model of tailor-made arrangements developed by legal practitioners. Item I.4.c examines the support of public authorities – prosecutors and courts – to the development of a broad and flexible system of negotiation of collaboration agreements and its correlation to the ideal of a new model of consensual criminal justice. It also depicts two central points in Brazilian case-law regarding the practice of the rewarded collaboration regulation: the understanding that collaboration agreements have a binding effect upon judicial decisions (I.4.b.i) and the position that these agreements create obligations and rights only for the contracting parties and do not affect the other accused (I.4.b.ii).

2. *The Brazilian procedural tradition and the recent development of leniency policies*

Brazilian criminal procedure is traditionally structured as an official investigation to ascertain criminal conduct and identify its perpetrators, conferring little space for procedural participants to dispose of criminal cases through consensual arrangements.[40] The Code of Criminal Procedure does

40 Describing this structure of Brazilian criminal procedure, Marcelo Cavali states: "The natural path for the definition of criminal liability, in our system, starts with the ascertainment of the occurrence of a crime and of its perpetrator through a formal investigation; subsequently, once the perpetrators are identified, an indictment must be elaborated, exposing the criminal facts and all their circumstances, assigning them a certain legal qualification and requiring, as an automatic consequence, the imposition of the applicable penalties (…)". See Cavali (n 36) 258. In the same vein, Fabiano Silveira notes that the traditional model of Brazilian criminal justice is structured as an official inquiry to ascertain the truth, and leaves little room for negotiation between procedural parties. See Silveira (n 35) 109-110. Langer notes that the traditional backbone of several Latin America countries, including Brazil, consists of a written dossier assembling documentary evidence and compiled by investigate authorities, limiting the possibilities for the parties to resolve the case without going to trial. See Langer (n 28) 621, 629-631.

not establish any option for inter-party transactions, and the first possibilities for the consensual resolution of criminal cases were introduced by the 1995 Small Claims Act.[41] Unlike jurisdictions where parties of a criminal proceeding are largely free to forge various types of transactions,[42] public prosecutors and defendants in Brazil face several structural restrictions on their capacity to settle criminal cases through consensual arrangements.[43]

A key restriction arises from the principle of compulsory prosecution, which determines that the Public Prosecution Office must press charges whenever the statutory thresholds are fulfilled.[44] Based on this principle, the Brazilian Code of Criminal Procedure entails several rules limiting prosecutorial discretion regarding the opening, conduction and withdrawal of a criminal process and enables judicial control of prosecutorial acts at different phases of the proceeding. Although the Public Prosecution Office

41 According to Alexandre Wünderlich, the 1995 Small Claims Acts introduced "the first model of negotiated criminal justice in the country". See Alexandre Wunderlich, 'Colaboração Premiada: O Direito à Impugnação de Cláusulas e Decisões Judiciais Atinentes Aos Acordos' in Maria Thereza de Assis Moura and Pierpaolo Cruz Bottini (eds), *Colaboração premiada* (Revista dos Tribunais 2017) 20. Similarly, Vladimir Aras asserts that the 1995 Small Claims Acts "introduced a new paradigm in the national legal order: consensual criminal justice". See Vladimir Aras, 'Acordos Penais No Brasil: Uma Análise à Luz Do Direito Comparado' in Rodrigo Leite Ferreira et al Cabral (ed), *Acordo de não persecução penal - Resolução 181/2017 do CNMP com as alterações feitas pela Res. 183/2018* (Juspodivm 2019) 268.

42 The most analyzed example is, of course, the U.S. system of criminal justice and its well-known model of plea bargaining. For a historical description, see Albert W Alschuler, 'Plea Bargaining and Its History' (1979) 13 Law & Society Review 211.

43 Despite these restrictions, Vinicius de Vasconcellos notes critically a trend, in the last two decades, towards the expansion of scope for negotiation in Brazilian criminal justice. See Vinícius Gomes de Vasconcelos, *Barganha e Justiça Criminal Negocial : Análise Das Tendências de Expansão Dos Espaços de Consenso No Processo Penal Brasileiro* (Editora IBCCRIM 2014) 97-142. Noting the same trend, but with a favourable view: Jamil Chain Alves, 'Justiça Consensual e "Plea Bargaining"' in Rodrigo Leite Ferreira et al Cabral (ed), *Acordo de não persecução penal - Resolução 181/2017 do CNMP com as alterações feitas pela Res. 183/2018* (Juspodivm 2019) 194-200.

44 According to Eugenio Pacelli, the Brazilian legislation opted for the "adoption of the principle of compulsory prosecution or legality, according to which the Public Prosecution Office must act guided by objectivity (criteria defined by statute)". See Eugênio Pacelli, *Curso de Processo Penal*, vol 53 (Atlas 2013) 13-14. Aury Lopes Jr. asserts that this implies that prosecutors may not dispose of cases according to their discretion and must observe the statutory requirements. See Aury Lopes Jr., *Direito Processual Penal* (Saraiva 2019) 202-203.

has a monopoly regarding the decision to press criminal charges, this decision must respect the legal requirements, and prosecutors may not freely choose whether or not to present charges against criminal suspects.[45] According to the Code of Criminal Procedure, courts can question the decision of a prosecutor to close a criminal investigation without pressing charges.[46] Furthermore, the Public Prosecution Office may not drop criminal charges or appeals after they have been filed.[47] A prosecutorial motion for the defendant's acquittal does not end the process, and courts, faced with such a motion, may convict the accused and even identify aggravating circumstances that were not alleged by the prosecutor.[48]

Another important constraint arises from the state's commitment to adequate process of fact-finding, which prevents defendants from terminating a criminal proceeding through a confession or an admission of guilt.[49] The Code of Criminal Procedure establishes that the defendant's confession does not interrupt the official investigation, and the gathering of evidence must continue even when the accused has admitted to committing the investigated acts.[50] A confession is insufficient to substantiate a conviction, representing an element that must be analyzed under the same criteria used to examine the other pieces of evidence.[51] The accused may with-

45 In a relevant ruling, the Brazilian Federal Supreme Court affirmed that, in Brazilian criminal procedure, "compulsory prosecution is the rule; the prosecutor is constrained to present charges, whenever there exist legal and factual grounds for the indictment". The ruling recognized, however, that the principle could be somewhat loosened in the circumstances established by the Small Claims Act. See STF, HC 75343 [1997].

46 Brazilian Code of Criminal Procedure, art 28. According to the provision, if a court does not accept the prosecutor´s decision to close the investigation without pressing charges, the case must be analyzed by the Prosecutor General. If the decision to close the investigation is upheld, the court must then accept it.

47 Brazilian Code of Criminal Procedure, arts 42 and 576. Regarding this point, the Brazilian Federal Supreme Court recently decided that "once presented the criminal charge or lodged an appeal, the accusation may not withdraw its claim." See STF, AP 921 [2017] (Fux J).

48 Brazilian Code of Criminal Procedure, art 385. Asserting that the Public Prosecution Office may not dispose of the criminal proceeding, the Federal Supreme Court decided that the final arguments presented by a prosecutor "are mere allegations, preparatory acts, oriented to convince the court, without, however, delimiting the scope of the judicial assessment or the direction of the verdict." See STF, AP 1006 [2018].

49 Brazilian Code of Criminal Procedure, art 197.

50 ibid art 158

51 ibid art 197.

draw the confession at any time, and courts are free to examine its reliability, taking into consideration the entire body of evidence.[52] Furthermore, parties cannot freely dispose of the gathering of evidence and the factual inquiry, since courts also have powers to determine the production of evidence and the hearing of witnesses that were not requested by the parties.[53]

In this context, the standard model of Brazilian criminal procedure provides little room for the parties to dispose of criminal cases thorough mutual understandings. As in other continental tradition countries, Brazil's criminal procedure is traditionally structured as an official investigation carried out by state authorities with the objective of impartially determining the circumstances of criminal conduct, ascertaining the criminal liability of the responsible individuals and imposing the applicable legal consequences.[54] Throughout the whole process, courts have a central function in carrying out the official investigation, acting not only as a passive referee, but also taking measures to ensure an accurate and reliable reconstruction of the investigated conduct.[55]

In a system marked by rules of compulsory prosecution, by the limited value of a defendant's confession and by the central role of courts in the process of fact-finding and assessment of criminal liability, prosecutors and defendants had – until the end of the twentieth century – no space to develop legitimate negotiations and alter the normal course of a criminal proceeding. The introduction of the first possibilities for consensual inter-party arrangements arose when the 1995 Small Claims Act was enacted, establishing two mechanisms for consensual solutions in Brazilian criminal procedure.

---

52 ibid art 200.

53 ibid art 156 II and art 209.

54 Langer compares jurisdictions that conceive criminal procedure as an official investigation, particularly in countries in Latin America and continental Europe, with others that envisage it as a dispute between two parties, most notably the United States. See Langer (n 28) 17-26. Noting the similarities of Brazilian criminal procedure with traditional pillars of continental criminal justice, see Canotilho and Brandão (n 36) 22. For a good description of traditional Brazilian criminal procedure as a system of official investigation, see Cavali (n 36) 258; Silveira (n 35) 109-110.

55 On the differences regarding the role played by judicial bodies in the Anglo-American and in the continental systems of criminal justice, see Heger, 'Adversarial and Inquisitorial Elements in the Criminal Justice Systems of European Countries as a Challenge for the Europeanization of the Criminal Procedure' (n 25).

The main consensual mechanism introduced by the 1995 Small Claims Act was the 'criminal transaction', through which the Public Prosecution Office may, in the investigation of crimes punishable with a maximum of two years' imprisonment, offer the direct imposition of penalties of restriction of rights or monetary fines.[56] Should the defendant accept the offer, the court can impose the negotiated penalty without further inquiry into the investigated facts.[57] The 1995 Small Claims Act also authorizes the Public Prosecution Office, in the investigation of crimes in which the minimum penalty is one year or less, to request the suspension of the proceeding.[58] If the accused agrees with the request, the court may establish conditions – such as the duty to compensate the caused damages, the prohibition of visiting specific locations and leaving their district without judicial authorization, and compulsory appearance before the court every month – for the the proceeding's suspension.[59]

The 1995 Small Claims Act introduced the first possibilities for consensual solutions in Brazilian criminal producing, but at the same time imposed several limits on the use of these mechanisms. Besides the restricted applicability regarding the gravity of the offenses, the consensual solutions designed by the Small Claims Act do not allow for the imposition of imprisonment penalties, but only sanctions the restriction of rights, the imposition of fines and damage compensation. The effects of these solutions are limited to the imposition of the negotiated penalties and are not equivalent to the legal consequences of a judicial verdict on the defendant´s guilt.[60] They do not affect the defendant´s criminal record and his status regarding the issue of recidivism.[61] Unlike a judicial conviction, they do not establish civil liability of the accused in relation to the damages caused by the crime.[62]

---

56 Brazilian Small Claims Act 1995, art 76.
57 ibid art 76 § 3-4.
58 ibid art 89.
59 ibid art 89, § 1.
60 The Brazilian Federal Supreme Court drew a clear distinction between the effects of consensual solutions established in the Small Claims Act and judicial convictions achieved through regular proceedings. According to the Court, the determination of wrongful conduct and the establishment of the defendant´s guilt depend on a judicial verdict and sentence, which cannot be achieved through a transaction and may only be delivered after the completion of the regular criminal proceeding. See STF, RE 795567 [2015].
61 Brazilian Small Claims Act 1995, art 76 § 5-6.
62 ibid art 76 § 6.

Under these conditions, the impacts of the 1995 Small Claims Act were narrow and full-blown proceedings remained the normal reality in Brazilian criminal justice. The restricted value of an accused's confession, the rules related to the principle of compulsory prosecution and the central role of judicial bodies in the fact-finding process restricted the formation of a wider system of inter-party negotiations within Brazilian criminal procedure. While in investigations of minor offenses, defendants and prosecutors could use the limited negotiation forum designed by the 1995 Small Claims Act, in investigations of medium or grave crimes there was simply no space for the development of inter-party consensual arrangements.

a. Competition law

The antitrust leniency program was first introduced in Brazilian law in 2000, through the amendment of the former Brazilian Competition Act, and established the possibility for participants in cartels – both individuals and companies – to obtain certain benefits, should they provide effective assistance in the prosecution of former co-conspirators.[63] In general terms, the program enabled firms and individuals involved in cartels to obtain immunity from administrative sanctions or, at least, reductions in the penalties established by the former Brazilian Competition Act.[64] For individuals, the antitrust leniency program also granted immunity from criminal prosecution for offenses provided by the 1990 Economic and Tax Crimes Act.[65]

According to the rules approved in 2000, in order to obtain the leniency benefits, the agent had to cease the illegal conduct and fully cooperate with the investigation, providing useful information for the prosecution of

63 The antitrust leniency program was introduced into the 1994 Brazilian Competition Act through a legislative amendment occurred in 2000. See Law 10149 [2000], art 2.

64 Law 8884 [1994], art 35-b. According to the OECD, the disposition allowed the Brazilian competition authority "to enter into leniency agreements under which individuals and corporations, in return for their cooperation in prosecuting a case, are excused from some or all of the penalties for unlawful conduct under Law 8884". See OECD, *Brazil - Peer Review of Competition Law and Policy* (OECD IDB 2005) 51.

65 ibid art 35-c. "The leniency provision is supplemented by new Article 35-C, which provides that successful fulfilment of a leniency agreement will also protect cooperating parties from criminal prosecution under Brazil's economic crimes law (Law 8137/90)" (ibid., 51).

other cartel members.[66] In each case, this cooperative relationship had to be established in an agreement between offenders and the Brazilian competition authorities, which would be formalized through a written document.[67]

The introduction of the antitrust leniency program in Brazilian law was strongly influenced by foreign legal practices. According to the legislative proposal, leniency policies were already being successfully used in the prosecution of cartels in the United States, Canada, the United Kingdom and the European Union.[68] The parliamentary debates also stressed the effectiveness of the leniency program in the United States, asserting that the number of cartels uncovered had increased fivefold since its introduction.[69] A previous study by the Organization for Economic Co-operation and Development (OECD) had already suggested the amendment of the former Brazilian Competition Act in order to introduce a leniency program.[70] Following the United States' example,[71] the antitrust leniency program introduced in 2000 adopted a "winner-takes-all" model,[72] in which the benefits are granted only to the first individual or company to cooperate with law enforcement authorities, and other agents involved in the

66 ibid art 35-b para I-II.

67 ibid art 35-b § 3º.

68 On this point, the explanatory notes of the proposal stressed: "In the case of the United States, the adoption of an amnesty program, similar to the one which is now proposed, has enabled an increase without precedents in the detection of cartels, including international cartels." See Senado Federal, ´Diário do Congresso Nacional´ (35, 10 October 2000) 22276.

69 As noted in the legislative report that approved the bill. See Senado Federal, ´Diário do Congresso Nacional´ (42, 15 October 2000) 28120.

70 In 2000, an OECD study affirmed the need for an increase in the investigative powers of the Brazilian antitrust authorities, to enable more effective prosecution of cartels. See OECD, 'Competition Law and Policy Developments in Brazil' (2000) 2 OECD Journal of Competition Law and Policy 1, 207. According to the 2005 OECD Peer Review on Brazil, "most of the recommendations in the 2000 Report to which it could respond have been accomplished, including particularly the recommendations relating to increased efficiency in merger reviews and reallocation of resources to cartel enforcement". See OECD, *Brazil - Peer Review of Competition Law and Policy* (n 64).

71 Several authors point out the influence of the success of the U.S. leniency program on the introduction of antitrust leniency in Brazil. In this regard, see Gary R Spratling, 'Detection and Deterrence: Rewarding Informants for Reporting Violations' (2001) 69 George Washington Law Review 798, 800; Jason D Medinger, 'Antitrust Leniency Programs: A Call for Increased Harmonization as Proliferating Programs Undermine Deterrence' (2003) 52 Emory Law Journal 1439, 1440.

72 Martinez (n 8) 261.

same conduct cannot apply for leniency afterwards.[73] Also following the U.S. model, the program also prevented ringleaders from applying for antitrust leniency.[74]

In 2011, the current Competition Act came into force, restructuring several aspects of the Brazilian competition law. Once again, the legislative changes were mainly based on international experiences and followed, to a large extent, the recommendations of two OECD Reports, from 2005[75] and 2010.[76] Although the basic structure of the leniency program introduced in 2000 remained the same, including the "winner-takes-all" model, the 2011 reform made significant modifications. The new legislation revoked the provision that excluded ringleaders from the leniency program.[77]

Another important change amplified the immunity from criminal prosecution granted by the antitrust leniency program. In the original program introduced in 2000, this immunity was restricted to "crimes against the economic order"[78] and it was possible for beneficiaries of the antitrust leniency to be held criminally liable for conduct connected to the antitrust offense.[79] The current antitrust leniency provisions establish that the agreement covers not only crimes against the economic order but also "other crimes directly related to the practice of cartel."[80] They also expressly provide immunity for some crimes established by the Criminal Code, such as the crime of a being member of a "criminal association", and crimes under the Public Procurement Act, such as bid rigging.[81]

---

73 For a discussion regarding these models, see OECD, 'Leniency for Subsequent Applicants' (OECD 2012).

74 According to the explanatory notes of the proposal that introduced the antitrust leniency program, this rule was necessary to prevent offenders from "benefiting from their own villainy." See Senado Federal, ´Diário do Congresso Nacional´ (35, 10 October 2000) 22276.

75 OECD, *Brazil - Peer Review of Competition Law and Policy* (n 64).

76 OECD, *Competition Law and Policy in Brazil - a Peer Review* (n 8).

77 The rules introduced in 2000 provided that the antitrust leniency program "does not apply to companies or individuals who have been at the forefront of the conduct", while the current 2011 Competition Act does not impose any similar restriction.

78 See Law 8884 [1994], art 35-C.

79 At the time, the limited immunity from criminal prosecution was identified as one of the biggest obstacles to the effectiveness of the Brazilian antitrust leniency program.

80 Brazilian Competition Act 2011, art 87.

81 Explaining the effects on criminal prosecution of the current Brazilian antitrust leniency program, Luz and Spagnolos assert: "In Brazil, cartels are both an ad-

Since its introduction, in 2000, the Brazilian antitrust leniency program has evolved significantly and gained prominence, both domestically and abroad.[82] Nowadays, Brazil is internationally recognized as a significant player in field of anti-cartel enforcement[83] and its leniency program plays an important role in the prosecution of global cartels.[84] Regarding the practical use of the mechanism, the approval in 2011 of the current Competition Act represented a milestone in the development of antitrust leniency in Brazil.[85]

An important development which has occurred recently is the strengthening of the relationship between the antitrust leniency program and criminal prosecution of high-profile cases. In recent years, the program has played an important role in the discovery and prosecution of business cartels in public procurements that were intertwined with corruption

---

ministrative offense and a crime, punishable by a criminal fine and imprisonment. Additionally, the Brazilian Public Procurement Law specifically targets bid rigging, providing for imprisonment, and a criminal fine. To prevent these different criminal provisions from interacting negatively and undermining the leniency program, the Competition Law expressly states that the execution of a leniency agreement requires the suspension of the statute of limitations and prevents denunciation of the leniency beneficiary for each of the aforementioned crimes. Once the leniency agreement has been fully complied with by the agent, the punishments for the crimes will automatically cease". See Reinaldo Diogo Luz and Giancarlo Spagnolo, 'Leniency, Collusion, Corruption, and Whistleblowing' (2017) 13 Journal of Competition Law & Economics 729, 16.

82 Marcelo Calliari and Denis Guimarães note that "The Brazilian leniency regime has achieved reasonable international recognition". See Marcelo Calliari and Denis Alves Guimarães, 'Brazilian Cartel Enforcement: FromRevolution to The Challenges of Consolidation' (2011) 25 Antitrust Magazine 67, 69.

83 According to the OECD, Brazil's "anti-cartel programme is now widely respected in Brazil and abroad". See OECD, *Competition Law and Policy in Brazil - a Peer Review* (n 8).

84 On the subject of global cartels and international cooperation between leniency programs, see Jay Pil Choi and Heiko Gerlach highlighting that Brazil is one of the countries that have a bilateral antitrust cooperation agreement with the U.S. Department of Justice. See Jay Pil Choi and Heiko Gerlach, 'Global Cartels, Leniency Programs and International Antitrust Cooperation' (2012) 30 International Journal of Industrial Organization 528.

85 According to Linhares and Fidelis, the enactment of the 2011 Brazilian Competition Act "represents a new momentum of development of the Brazilian Leniency Program", which is marked by an "accentuated cartel prosecution activity". See Amanda Athayde Martins Linhares and Andressa Lin Fidelis, 'Nearly 16 Years of the Leniency Program in Brazil : Breakthroughs and Challenges in Cartel Prosecution' (2016) 3 Antitrust Chronicle 39, 5.

schemes and other criminal practices, like money laundering.[86] This situation required increased cooperation between the Brazilian competition agency and law enforcement authorities in the criminal sphere, especially regarding the interrelation between the antitrust leniency program and the rewarded collaboration regulation, introduced by the 2013 Organized Crime Act. [87]

b. Criminal law

Collaboration agreements were formally introduced in Brazilian criminal law in 2013, when the current Organized Crime Act came into force and provided a specific regulation for so-called "rewarded collaboration". Prior to the current Organized Crime Act, several laws already provided for the granting of benefits to offenders who cooperated with criminal investigations.[88] However, none of them had established that this transaction would occur through written agreements between law enforcement authorities and defendants.[89]

---

86 This has occured mainly in the context of the so-called "Operation Car Wash", as noted by Burnier and Oliveira: "The challenges faced by the Brazilian competition authority in bid rigging fighting have become exponential in the context of the world-famous "Car Wash" investigation, the largest corruption scheme uncovered in Latin America". See Burnier and Fernandes (n 7).

87 Ribeiro, Cordeiro and Guimarães (n 5) 196-198.

88 As highlighted by Walter Barbosa Bittar, the development of these criminal policies in Brazil is linked to "contemporary criminality, particularly, to what we intend to classify as large-scale crimes, whose justification for legal provision, although diffuse, is oriented to the protection of diffuse and collective legal goods (…)". See Walter Barbosa Bittar, *Delação Premiada: Direito Estrangeiro, Doutrina e Jurisprudência* (Lumen Juris 2011) 89. Cooperation in the criminal field can be understood as a recent phenomenon in Brazilian law, which only started to grant benefits in exchange for the handing over of accomplices in the final decades of the 20th century. See Bottino (n 36). Regarding the development of the Brazilian legislation about the subject, see also: Natália Oliveira de Carvalho, *A Delação Premiada No Brasil* (Lumen Juris 2009) 99; Luiz Flávio Gomes and Raúl Cervini, *Crime Organizado - Enfoques Criminológicos, Jurídicos (Lei 9.034/95) e Político-Criminal* (Revista dos Tribunais 1997) 164.

89 As stressed by Marcelo Costenaro Cavali, when analyzing the previous legislation: "there was no provision of an agreement that could be concluded by the parties and validated by the judge: if cooperation was provided, the judge would grant the benefits on the occasion of the sentence". See: Cavali (n 36) 4. In this respect, Matheus Felipe de Castro notes that before the 2013 Organized Crime Act cooperation between defendants and enforcement authorities "was not designed as a

In 1990, the Heinous Crime Act established that, for serious crimes committed by a group of criminals, the participant who reported the offense to authorities and cooperated against former co-conspirators could receive a penalty reduction.[90] Over subsequent years, similar provisions were enacted to encourage offender cooperation in the prosecution of other crimes. The former Organized Crime Act, enacted in 1995, permitted a reduction of the offender's imprisonment sentence by up to two-thirds when their cooperation helped to elucidate the case.[91] In the same year, a legislative amendment established that these benefits could also be granted in the investigation of financial, tax and economic crimes.[92] In 1998, the Anti-Money Laundering Act set forth a similar rule.[93] Finally, in 1999, the Victim and Witness Protection Act extended this possibility to all offenses committed by more than one criminal[94] and introduced, for the first time and in specific cases, the granting of a judicial pardon to cooperators.[95]

All these statutes regulated the granting of benefits to cooperating offenders in a similar fashion. This regulation occurred mainly in the sphere of substantive criminal law, without the enactment of any procedural provisions.[96] None of these laws explicitly contemplated written agreements between offenders and law enforcement authorities as a mechanism to determine the cooperator's obligations and benefits. According to this body of law, the granting of benefits to cooperating defendants stems from a unilateral assessment by the judge, and not from an agreement reached

---

legal transaction, but as a voluntary act between the defendant and the judge, in which the latter, due to his discretionary power, could grant the legal favor to collaborators who had effectively met the legal requirements". See Matheus Felipe de Castro, 'Abrenuntio Satanae! A Colaboração Premiada Na Lei Nº 12.850/2013: Um Novo Paradigma de Sistema Penal Contratual?' (2018) Revista de Estudos Criminais 171, 202. On the same topic: Bottino (n 36) 7.

90 Law 8072 [1990], arts 7-8.

91 Law 9034 [1995], art 6.

92 Law 9080 [1995], arts 1-2.

93 In addition to reducing the collaborating offender's punishment, the 1998 Anti-Money Laundering Act provided for the substitution of an imprisonment sentence by a penalty of restriction of rights. See Law 9613 [1998], art 1 § 5.

94 Despite the initial controversy over the scope of its application, the position established in Brazilian case law was that the benefits provided by the 1999 Victim and Witness Protection Law were applicable to any crime. See STJ, REsp 1109485 [2012].

95 Law 9807 [1999], art 14.

96 Vasconcellos (n 39) 81.

with the law enforcement authorities.[97] Such provisions are sentencing phase rules, which authorize the judge to acknowledge the offender's cooperation and grant him, unilaterally, the benefits provided for by law.

In 2003, in the investigation of an international money laundering scheme, the Federal Public Prosecution Office concluded what is considered the first written collaboration agreement in Brazilian modern criminal law, although at the time no statutory provision authorized this type of negotiation.[98] Appealing to constitutional and legal provisions, including the Code of Civil Procedure, the Federal Public Prosecution Office and an accused signed a written contract that detailed the accused's obligations and defined his benefits. Although this particular agreement was considered valid by the Judiciary,[99] this kind of arrangement did not become a common practice in Brazil, since there was no clear statutory basis for it.[100]

Only in 2013, with the enactment of the current Organized Crime Act, did an express provision come into force in Brazilian criminal law permit-

97 In the prosecution of drug trafficking, there was – for a short period of time – a different legal provision:
In 2002, a law was enacted allowing the Public Prosecution Office and the defendant to negotiate a deal that could lead to the "suspension of the procedure or the reduction of the penalties". See Law 10409 [2002], art 32§ 2. This provision, however, was revoked in 2006.
Regarding the subject, Matheus Felipe de Castro affirms that the "recent Brazilian laws, since Law 8.072/1990, with the rare exception of Law 10.409/2002, which attempted to provide a similar regulation, but was quickly revoked, never granted to the rewarded collaboration the character of a deal that is freely settled by the parties, as now happens in the legislation under analysis". See Castro (n 89) 200.

98 The agreement was concluded, on 16 December 2003, between the Federal Public Prosecution Office and a defendant in a criminal proceeding before the Federal Justice in the State of Paraná, in the investigation known as "Operation Banestado". See JFPR, AP 2003.70.00.056661-8 [2003]. According to the Federal Public Prosecution Office, this arrangement can be considered the first written collaboration agreement in Brazil. See Ministério Público Federal, 'Lava-Jato – FAQ' <http://www.mpf.mp.br/grandes-casos/lava-jato/faq> accessed 28 September 2019. Along the same lines, see Cibele Benevides Guedes da Fonseca, *Colaboração Premiada* (Del Rey 2017) 85.

99 In this regard, see TRF4, COR PAR 035046-4 [2009].

100 Highlighting the absence of legal basis for this kind of agreement, Heloisa Estellita stated that "in the current stage of our positive law, the conclusion of any agreement between the prosecution and the defendant or between the judge and the defendant is illegal". See Heloísa Estellita, 'A Delação Premiada Para a Identificação Dos Demais Coautores Ou Partícipes: Algumas Reflexões à Luz Do Devido Processo Legal' (2009) 17 Boletim IBCCRIM 2, 2.

ting written agreements between law enforcement authorities and offenders willing to cooperate with investigations. In the system created by the Organized Crime Act, negotiations take place between the accused and the public prosecutor or the chief of police.[101] The judge does not take part in the negotiations and only assesses the agreement after the parties have reached a consensus.[102] The collaboration agreement must be recorded in writing and contain the collaborator's statement, the expected outcomes for the investigation, the conditions of the investigating authorities' proposed agreement and, finally, the signatures of all those involved in the negotiations, i.e., the collaborator, his or her lawyer and the law enforcement authorities.[103] Unlike previous statutes, the Organized Crime Act has also introduced specific procedural provisions for the negotiation and development of the cooperative relationship between law enforcement authorities and offenders.[104] It establishes the cooperator's rights during the process,[105] defines confidentiality rules for the collaboration agreement[106] and permits the defendant to withdraw the proposal.[107]

Although it innovated in several ways in comparison to previous legislation, the Organized Crime Act adopted similar wording regarding the granting of benefits to cooperators. According to the Organized Crime Act, "the judge may, at the request of the parties, grant judicial pardon, reduce the imprisonment sentence by up to two thirds, or replace it with a penalty of restriction of rights".[108] At the same time, the Organized Crime Act provided that – as a reward for cooperative behavior – the Public Pros-

101 See Brazilian Organized Crime Act 2013, art 4 § 2. The possibility for chiefs of police to negotiate collaboration agreements was subject to extensive discussion, especially regarding the risk of invading the constitutional remit of the Public Prosecution Office. In 2018, the Brazilian Federal Supreme Court decided that the provision was constitutional and validated the powers of chiefs of police to negotiate collaboration agreements. See STF, ADI 5508 [2018].

102 ibid art 4 § 6.

103 ibid art. 6.

104 According to Pereira, prior to the 2013 Organized Crime Act "the legislator had not bothered to establish any procedural rules to the rewarded collaboration, what created difficulties and uncertainties", and the new legislation overcame "the criticisms to the regulatory insufficiency on important procedural aspects". See Frederico Valdez Pereira, *Delação Premiada: Legitimidade e Procedimento* (Juruá Editora 2016) 119-120. In this regard: Vasconcellos (n 39) 81.

105 Brazilian Organized Crime Act 2013, art 5.

106 ibid art 7.

107 ibid art 4 § 10.

108 ibid art 4.

ecution Office may in some circumstances drop the charges against the cooperating defendant.[109]

Since the enactment of the Organized Crime Act, the practice of the rewarded collaboration regulation has rapidly evolved, with major impact on Brazilian criminal justice, especially in the investigation of corporate crimes perpetrated within legitimate companies and corrupt acts performed by public officials and elected representatives.[110] A central stage for the development of the practice of collaboration agreements was the so-called "Operation Car Wash", which since 2014 has investigated criminal practices related to cartels, corruption, and money laundering in the bidding process of Petrobras, the Brazilian state-owned oil company. [111] In August 2014, the first collaboration agreement in "Operation Car Wash" was signed by the Federal Public Prosecution Office and a former Petrobras director. In March 2015, one year after the investigations began, 12 agreements had been concluded, a number that rose to 44 by March 2016 and to 155 by March 2017.[112] At the end of 2017, data from the Federal

109 According to the Organized Crime Act, this benefit can only be granted to an offender that was not the leader of the criminal organization and was the first to effectively cooperate. ibid art 4 § 4.

110 Concerning the features of the criminality investigated in the Brazilian experience with the rewarded collaboration, see section II.3.

111 "Operation Car Wash" is the name of a vast group of proceedings that investigate a "massive alleged malfeasance by corporate, as well as political, elites surrounding the enormous state-run oil company Petrobrás". See Prado and Carson (n 13) 753. The investigations started in 2014 and are yet to be finished. For more information, see section II.2.

112 According to data released by the Federal Public Prosecution Office. See Ministério Público Federal, 'Lava Jato: Em Um Ano, Foram Propostas 20 Ações Criminais Contra 103 Pessoas Na Primeira Instância' (*Ministério Público Federal*, 17 March 2015) <http://combateacorrupcao.mpf.mp.br/atuacao-do-mpf/noticias/lava-jato-em-um-ano-foram-propostas-20-acoes-criminais-contra-103-pessoas-na-primeira-instancia> accessed 28 September 2018; Ministério Público Federal, 'Dois Anos Da Lava Jato: R$ 2,9 Bi Já Foram Recuperados' (*Ministério Público Federal*, 16 March 2016) <http://www.mpf.mp.br/pr/sala-de-imprensa/noticias-pr/dois-anos-da-lava-jato-r-2-9-bi-ja-foram-recuperados-1> accessed 28 September 2018; Ministério Público Federal, 'Lava Jato Completa Três Anos Com Mais de 180 Pedidos de Cooperação Internacional' (*Ministério Público Federal*, 17 March 2017) <http://www.mpf.mp.br/pr/sala-de-imprensa/noticias-pr/lava-jato-completa-tres-anos-com-mais-de-180-pedidos-de-cooperacao-internacional> accessed 28 September 2019.

Public Prosecution Office pointed to almost 300 collaboration agreements concluded under "Operation Car Wash".[113]

The large-scale use of the collaboration agreements in the prosecution of corporate crimes and corruption schemes received intense media coverage.[114] The group of individuals who entered into such agreements include shareholders and executives of some of Brazil's largest companies, as well as senior politicians.[115] Due to the list of high-profile defendants, the extent of the reported crimes and the amount of evidence gathered through these agreements, collaboration agreements became a hot topic both in Brazilian legal scholarship and in public debates,[116] also drawing international attention.[117]

3. The legal structure of Brazilian leniency policies

The antitrust leniency program, provided for in the 2011 Competition Act, and the rewarded collaboration regulation, established by the 2013 Organized Crime Act, enable the granting of benefits to offenders who choose to cooperate with official investigations. The objective of both policies is not simply to obtain a confession from offenders, but rather create a coop-

113 According to data presented by the Federal Prosecutor General in December 2017. See Alessandra Modzeleski, 'Lava Jato Tem 293 Acordos de Delação Premiada Homologados, diz PGR' (*G1 Política*, 4 December 2017) <https://g1.globo.com/politica/noticia/lava-jato-teve-293-acordos-de-delacao-homologados-diz-pgr.ghtml> accessed 28 September 2018.

114 Melo (n 14) 60.

115 On this matter, see section II.2 and II.4.

116 For more information on the increase of media coverage and academic interest in the subject, as well as on its importance, see: Armando Castro and Shaz Ansari, 'Contextual "Readiness" for Institutional Work. A Study of the Fight Against Corruption in Brazil' (2017) 26 Journal of Management Inquiry 351.

117 On this subject, the Organisation for Economic Co-operation and Development – OECD has highlighted the importance of collaboration agreements in the prosecution of government corruption in Brazil. See OECD, 'OECD Economic Surveys: Brazil´ (2018) 35. A recent article published in "The Economist" has praised the Brazilian experience with collaboration agreements, stating that it allowed investigations to "cut through the country´s once-untouchable politicians, thanks to evidence provided by bribe-paying businessmen desperate to stay out of jail". See 'A Deal You Can't Refuse: The Troubling Spread of Plea-Bargaining from America to the World' *The Economist* (London, 9 November 2017) <https://www.economist.com/international/2017/11/09/the-troubling-spread-of-plea-bargaining-from-america-to-the-world> accessed 27 October 2018.

erative relationship with law enforcement authorities to ensure more effective prosecution of co-conspirators.[118] In both cases, the development of this relationship is preceded by an open negotiation between offenders and law enforcement authorities and by the signing of a written agreement that establishes the terms and conditions of the cooperation.

Over recent years, the number of antitrust leniency agreements and collaboration agreements has increased substantially, turning negotiations between offenders and law enforcement authorities into a common practice. This phenomenon is new to Brazilian law, which until recently had evolved largely oblivious to the global movement of expansion of consensual mechanisms in criminal proceedings,[119] which led – under the clear influence of the U.S. plea bargaining system –[120] many countries of continental tradition to introduce negotiating mechanisms between procedural parties in criminal cases.[121]

With the exception of the 1995 Small Claims Act, which provided guidelines for the judicial treatment of minor crimes and allowed for consensual resolution of these cases,[122] Brazil had up until recently no legal provisions enabling negotiations between public authorities and accused

---

118 In neither of the programs is the mere confession of a defendant´s own acts sufficient to justify the conclusion of an agreement.

119 For an overview of this movement, see: Thaman (n 28) 952, who notes that "'Consensual' procedural forms are part and parcel of criminal procedure reforms worldwide".

120 For a strong criticism of this influence, see Schünemann, 'Zur Kritik Des Amerikanischen Strafprozessmodells' (n 25) 555-575.

121 Although they share common features, the experiences of each country with these mechanisms have specific characteristics. Concerning the subject, see: Langer (n 28) 3–4. When analyzing the experiences of Germany, France, Italy and Argentina with consensual mechanisms in the criminal procedure, the author points out that: "Not only has each of these jurisdictions adopted a version of plea bargaining different from the American model, but also, each one of these jurisdictions has adopted forms of plea bargaining different from one another".

122 The 1995 Small Claims Act introduced two negotiation mechanisms between the Public Prosecution Office and defendants: the "criminal transaction" and the "conditional suspension of the process". The "criminal transaction" can be used in proceedings related to crimes with a maximum penalty of up to 2 years, (art. 76), while the "conditional suspension of the process" is restricted to crimes with a minimum penalty not superior to 1 year (art. 89). See Brazilian Small Claims Act 1995, arts 76 and 89. Through a "criminal transaction", prosecutor and defendant negotiate and establish a penalty of fines or sanctions of restriction of rights. In the case of "the conditional suspension of the process", the procedure is interrupted immediately after the receipt of the indictment and the de-

in criminal investigations.[123] Moreover, informal negotiations in criminal proceedings did not become a common practice in Brazilian criminal justice, as remarkably occurred in Germany in the final decades of the twentieth century.[124] Thus, in the vast majority of criminal investigations, there was no space for consensual arrangements, with the Public Prosecution Office being bound by the rules of compulsory prosecution and the defendant unable to dispose of the case by confessing to the charged crimes.

The Competition Act and the Organized Crime Act changed this scenario, setting up a room for legitimate negotiations between cooperating defendants and law enforcement authorities. Both the antitrust leniency program and the rewarded collaboration regulation set up a communication forum where offenders and law enforcement authorities can negotiate, over several rounds and over a long period, a written agreement that will have a decisive impact on the official investigation of serious crimes.

a. The negotiation dynamic: consensual arrangements, written agreements and informal communication

The statutory frameworks for both the antitrust leniency program and the rewarded collaboration regulation have a common feature: they establish a mechanism of inter-party negotiation that may lead to a written consensual arrangement between law enforcement authorities and offenders. The central aspect of the two legal mechanisms is basically the same: law enforcement authorities negotiate with offenders in order to obtain information and evidence that are useful in the investigation of criminal activities committed by co-conspirators, offering in return certain benefits.[125]

---

fendant is subjected to a probation period, during which they must observe certain conditions, such as repairing the damage, not going to certain places and appearing, periodically, before the court (these conditions do not have, however, the character of criminal punishment). See STF, HC 108914 [2012]. In both cases, the consensual resolution does not entail recognition of the facts or of individual guilt, so that, in case of breach of agreement, the criminal prosecution continues from the stage in which the agreement was concluded. See STF, RE 795567 [2015] and STF RE 602072 QO-RG [2009].

123 Vasconcelos, *Barganha e Justiça Criminal Negocial: Análise Das Tendências de Expansão Dos Espaços de Consenso No Processo Penal Brasileiro* (n 43).

124 On the development of German practice of negotiated judgments ("Verständigung"), see section IV.2.

125 On the rationale of this type of exchanges, see section III.

Both policies clearly separate the negotiation period from the moment of the conclusion of the written agreement. Thus, it is possible that, despite the submission of a proposal by a defendant, the parties do not reach an understanding and do not conclude the transaction. The rejection of an application is expressly regulated by both statutes. According to the Competition Act, the rejection of a leniency proposal does not imply a confession, nor an acknowledgment of the illegality of the conduct reported by the applicant.[126] The Competition Act also provides that the rejected leniency proposal should not be disclosed.[127] The Organized Crime Act establishes that if one of the parties withdraws from the proposal, the evidence produced by the cooperating offender cannot be used exclusively against him.[128]

The possibility of reducing penalties through cooperation with investigations has long existed in Brazilian criminal legislation. The main novelty brought by the Competition Act and the Organized Crime Act is the setting up of a legitimate room for negotiation between law enforcement authorities and defendants, giving the parties an opportunity to meet securely and, through active and open communication, discuss the conditions needed to reach an agreement that benefits both sides. Moreover, both statutes establish that the agreement must be written and contain the conditions set forth throughout the negotiation,[129] creating a kind of negotiation that is clearly new to the Brazilian legal system.[130]

Although the Competition Act and the Organized Crime Act establish a room for negotiation that enables frank interaction between the law enforcement authorities and defendants, they do not establish rigid rules for the communication process between the parties before the agreement is signed.[131] Therefore, in the timeframe between the defendant's application and the actual signing of the agreement, the contact between law enforce-

126 Brazilian Competition Act 2011, art 86 § 10.

127 ibid 86 § 9º.

128 ibid art 4 § 10. With respect to this subject and to the several interpretations derived from this legal provision, see Vasconcellos, *Colaboração Premiada No Processo Penal* (n 39) 290-291.

129 Brazilian Organized Crime Act 2013, art 6 II, and Brazilian Competition Act 2011, art 86, § 3.

130 In previous legislations, benefits granted to cooperating defendants were not the result of an agreement between law enforcement authorities and offenders, but rather the result of a unilateral decision from a judicial body, carried out after the offender's cooperation.

131 Apart from the definition of competences and of certain prohibitions and guarantees, the legislation did not regulate the negotiation procedure for these

ment authorities and defendants tends to be informal,[132] with parties approaching each other and exchanging information gradually up to the point at which there is sufficient trust and confidence on both sides for the conclusion of the agreement.[133] According to the legal rules, adjudicative

---

agreements, which are now regulated by guidelines and orientations from the authorities responsible for their application. Regarding the antitrust leniency program, see the Internal Regulation of the Administrative Council for Economic Defense (CADE) <http://en.cade.gov.br/topics/legislation/internal-regulation> accessed 28 October 2018.

132 According to Gustavo Schiefler, the negotiations prior to the formalization of leniency agreements can be described as examples of "public-private dialogues", which, he says, are located "in the midst of the duality that emerges between the search for consensuality and an aggravated culture of distrust about public-private relationships" and marked by being "potentially informal and immune to the control mechanisms". See Gustavo Henrique Carvalho Schiefler, *Diálogos Público-Privados: Da Opacidade à Visibilidade Na Administração Pública* (DJur Universidade de São Paulo 2016) 19. Concerning collaboration agreements, Alexandre José Garcia de Souza points out that "although there is no specific legal provision as to the procedure to be followed, it is possible to observe that, in current investigations, meetings are being held previously to the formalization of the collaboration agreement", but, despite having an "absolutely fundamental role in the conduction of the investigations", those meetings are usually not documented. According to the author, "in our judicial reality, the terms of collaboration don't come with any records of the negotiations prior to the formalization". He affirms that the need for documentation is especially important due to news of "sudden changes of version" and "harassment of defendants that are incarcerated" in the context of the Car Wash Operation. See Alexandre José Garcia de Souza, 'Colaboração Premiada: A Necessidade de Controle Dos Atos de Negociação' (2017) 25 Boletim IBCCRIM 12, 12-13.

133 The regulation issued by the Brazilian competition authority expressly allows defendants to apply to the antitrust leniency program orally and confidentially, over a series of meetings. See CADE's Internal Rules, art. 241). In the same vein, in relation to the negotiation of collaboration agreements: "The negotiation phase, prior to the conclusion of the agreement, is always very difficult. The member of the Federal Public Prosecution Office will not commit to the granting of a benefit to the collaborator without knowing, beforehand, exactly how the investigated party can cooperate effectively with the investigations (statements, documents, bank statements, etc.). The collaborator, on the other hand, has a reasonable fear of self-incriminating preliminarily, reporting what he knows and presenting evidence, without knowing if the collaboration agreement will actually be concluded. What to do in the face of this dilemma? The establishment of a minimum trust relationship is essential to the development of the negotiations. Without that element, it is impossible to imagine the conclusion of an agreement between the parties. However, there is something con-

bodies should not take part in negotiations,[134] which gives parties (defendants and enforcement authorities) to meet and discuss the conditions of arrangements without many formalities. In this scenario, it is common that negotiations carried out under the antitrust leniency program last for several months.[135] Much like the process in the antitrust sphere, the negotiations preceding the signing of a collaboration agreement are marked by informality and confidentiality, with the Public Prosecution Office and the defendants bargaining over several rounds and for long periods before a formal written arrangement is concluded.[136]

b. Terms of trade

i. Benefits: immunities and reduction of penalties

The development of leniency policies takes place through the construction of an incentive structure that makes it attractive for offenders to defect from criminal organizations (or cartels) and cooperate with law enforce-

---

crete, besides that subjective bond, that can effectively leverage the negotiations, which is: a preliminary agreement whereby the collaborating party reveals a sample of the evidence they have and the investigators commit not to use it until formally signing the collaboration agreement". See Cleber Masson and Vinícius Marçal, *Crime Organizado* (Método 2006) 223-224.

134 Brazilian Organized Crime Act 2013, art 4 § 6; and Brazilian Competition Act 2011, art 86.

135 According to the Guidelines of CADE's Antitrust Leniency Program: "As the information and documents are submitted by the leniency applicant, the negotiation period can be extended by means of 'Meeting Terms' ('Termos de Reunião' in its Portuguese acronym) (art. 201, III and IV, RICADE). Therefore, the negotiation of a Leniency Agreement ends when the interim deadlines defined by SG/CADE are concluded (art. 204, introductory paragraph, RICADE)". See CADE (n 131). Art. 239, paragraph 3, of CADE's Internal Rules, states that these "interim deadlines" are defined by CADE's General Superintendence, in each case.

136 According to a report of the Federal Public Prosecution Office, the negotiation of the 77 agreements signed with executives from a Brazilian business conglomerate has demanded "48 meetings between the parties, amounting to almost 10 months of negotiation to maximize the disclosure of the illicit acts and of the corroborating evidence". See Ministério Público Federal, 'Relatório de Resultados Do Procurador-Geral Da República: Diálogo, Unidade, Transparência, Profissionalismo, Efetividade: 2015-2017' (2017) 24 <http://www.mpf.mp.br/conheca-o-mpf/gestao-estrategica-e-modernizacao-do-mpf/sobre/publicacoes/pdf/relatorio-gestao-pgr-2015-2017.pdf> accessed 28 June 2019.

ment authorities.[137] Although there is a wide range of benefits that can be granted to cooperators, the main incentive normally set forth by leniency policies is the granting of immunity or the reduction of penalties.[138] This is the model adopted by the Brazilian Competition Act and the Organized Crime Act.

According to the Competition Act, antitrust leniency agreements may lead to the non-imposition of administrative penalties or to their reduction by betwen one-third and to two-thirds. [139] In criminal proceedings, the signing and fulfillment of an antitrust leniency agreement always leads to immunity from criminal prosecution in regard to crimes directly related to the practice of cartel, such as the crimes established by the Economic and Tax Crimes Act and by the Public Procurement Act. [140]

The rewarded collaboration regulation established by the Organized Crime Act has a similar structure: besides allowing the granting of immunity from criminal penalties, whether through judicial pardon or by dropping of charges by the Prosecution Office, it provides for the possibility of reducing the imprisonment sentence by up to two thirds, or its replacement with a penalty of restriction of rights.

Thus, the leniency benefits expressly provided for in these two statutes are strictly related to the offenders' criminal punishment. There is not, for example, a provision permitting financial rewards in exchange for cooperation, as in other countries.[141] Brazilian leniency policies also offer cooperators no relief from civil liability, as occurs in German competition law[142]

---

137 For a discussion on the incentive structure of leniency policies, see section III.2.

138 Some authors argue, based on econometric tests, that a simple softening of the penalties would not, in some cases, create a sufficient incentive to stimulate cooperation, suggesting therefore the granting of financial rewards. See Maria Bigoni and others, 'Fines, Leniency, and Rewards in Antitrust' (2012) 43 RAND Journal of Economics 368.

139 Brazilian Competition Act 2011, art 86.

140 ibid art. 87.

141 Regarding this topic, see Spagnolo, 'Leniency and Whistleblowers in Antitrust' (n 30).

142 The "Ninth Amendment of the Act against Restrains of Competition" (ARC – Gesetz gegen Wettbewerbsbeschränkunge) restricted the individuals and entities that can file damage claims against the cooperator. In this regard: "whereas leniency applicants thus far only benefitted in relation to the imposition of fines, applicants will now also benefit from restricted civil damages liability. In this regard, they only have to compensate for damages incurred by their direct or indirect purchasers. In relation to other damaged parties, leniency applicants are liable only if these parties cannot obtain full compensation from the other

or in the U.S. leniency program.[143] In this regard, leniency beneficiaries are in the same legal situation as the others responsible for the reported illegal activity.[144]

Although the nature of the benefits under the antitrust leniency program and the rewarded collaboration regulation is similar, the definition of the advantages in particular cases is subject to different rules in each legislation.

In the same manner as the U.S. antitrust leniency program,[145] the Brazilian Competition Act establishes a "winner-takes-all" system,[146] which is deliberately aimed to create a race between cartel participants to be the first to blow the whistle to the competition authority. The Competition Act permits the conclusion of only one leniency agreement with a corporation per investigation.[147] In cases where the application was submitted before the Brazilian competition authority had knowledge of the reported cartel, the cooperating agent will be entitled to obtain full immunity, both in criminal and administrative proceedings.[148] When the competition authority was already aware of the offense before the leniency application, the co-

---

cartel members (Section 33e ARC new version)". See Freshfields Bruckhaus Deringer, 'Germany: Ninth Amendment of the Act against Restraints of Competition Enters into Force' (2017) <http://knowledge.freshfields.com/en/Global/r/3511/germany__ninth_amendment_of_the_act_against_restraints_of> accessed 28 September 2019.

143 In the United States, the legislation "also reduced the successful leniency applicant's exposure in follow-on civil actions: unlike its conspirators who face joint and several liability for treble civil damages caused by the cartel, successful leniency applicants are liable only for the actual damages caused by their conduct if they provide 'satisfactory cooperation' to the private plaintiffs". See Maurice E Stucke, 'Leniency, Whistle-Blowing and the Individual: Should We Create Another Race to the Competition Agency?' in Caron Beaton-Wells and Christopher Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age : Leniency Religion* (Hart Publishing 2015) 309.

144 In a case judged by the Superior Court of Justice, it was highlighted that the benefits of the antitrust leniency are restricted to the criminal and administrative spheres. Pursuant to the Court, "the 'award' granted to the one who adheres to the leniency program is restricted to the administrative and criminal spheres, without any legal mention of civil claims from individuals that were harmed by the conducts practiced against the market." See STJ, REsp 1554986 [April 2016].

145 Jindrich Kloub, 'Leniency as the Most Effective Tool in Combating Cartels', *2009 Latim American Competition Forum* (Latin American Competition Forum 2009) 6.

146 Martinez (n 8) 261.

147 Brazilian Competition Act 2011, art 86 § 1 I.

148 ibid art 86, § 1 II.

operator will only be eligible for a reduction of up to two-thirds of the administrative penalties[149], while still receiving full immunity from criminal prosecution.[150]

On the other hand, in the Brazilian Organized Crime Act, there is no legal restriction on the number of offenders who may apply for a collaboration agreement in a criminal investigation. Nor is there a single criterion defining the benefits granted to the cooperating offender. The central provision of the rewarded collaboration regulation authorizes judicial bodies to, at request of the parties, grant judicial pardon, reduce imprisonment sentences by up to two thirds or replace them with penalties of restriction of rights.[151] The main rule regarding the criteria for defining the benefits establishes that "in any case, the granting of the benefit shall take into account the personality of the cooperating offender, the nature, circumstances, severity and social repercussion of the criminal act and the effectiveness of the cooperation".[152]

Thus, while the antitrust leniency program is designed in the Competition Act under the "winner-takes-it-all" model, where full immunity is granted to the first agent to report the violation regardless of the set of evidence presented, the collaboration agreement is structured in a system of "quid-pro-quo" agreements, in which the granting of benefits is evaluated in each negotiation according to the relevance of the submitted evidence.[153]

ii. Duties: cooperation with the investigations

The antitrust leniency program and the rewarded collaboration regulation both establish the same central prerequisite for granting benefits to coop-

149 ibid art 86, § 1º, II.

150 In criminal proceedings, the effects of the antitrust leniency agreement are always the same, regardless of the time of its signing: the extinguishment of criminal punishment for the crimes related to the practice of cartel (ibid art 87).

151 ibid art 4.

152 ibid art 4 § 1.

153 For an economic analysis of the difference between these two types of leniency programs, see Eberhard Feess and Markus Walzl, 'Quid-pro-Quo or Winner-Takes-It-All? An Analysis of Corporate Leniency Programs and Lessons to Learn for US and EU Policies' (2005) METEOR Research Memorandum 059, Maastricht University School of Business and Economics <https://cris.maastrichtuniversity.nl/portal/files/1144059/guid-89205720-706f-4ddb-89a8-3aa1e71508f8-ASSET1.0> accessed 18 June 2019.

erating defendants: effective and useful cooperation with official investigations against co-conspirators. According to the Competition Act, an antitrust leniency agreement should lead to the identification of other agents involved in the cartel and assist the competition authority in gathering information and evidence against them.[154] Similarly, the Organized Crime Act establishes that collaboration agreements must lead to one or more of the following outcomes: a) identification of the members of the criminal organization and the crimes committed by them; b) disclosure of the criminal organization's structure; c) prevention of future crimes by the criminal organization; d) recovery of proceeds from illegal activities; e) the victim's location, with his or her physical integrity preserved. [155]

Both the Competition Act and the Organized Crime Act design an incentive structure that clearly links the level of the granted benefits to the relevance and usefulness of the cooperation. The Competition Act provides that, when the cooperating offender does not receive full immunity, a penalty reduction should be granted according to the effectiveness of his or her cooperation.[156] Similarly, the Organized Crime Act determines that the granting of benefits in collaboration agreements should take into account, among other factors, the usefulness of the cooperation.[157] It also establishes that, if the cooperation proves to be especially helpful, the Public Prosecution Office and the chief of police may request the judge to grant a judicial pardon.[158]

In both criminal and antitrust arenas, the introduction and development of leniency policies are based on the need to increase the effectiveness of the prosecution of organized crime and cartels. [159] Thus, the main intended purpose of these leniency policies is to maximize the state's ca-

154 Brazilian Competition Act 2011, art 86 para I-II.
155 ibid art 4.
156 ibid art 86 § 4 para II.
157 ibid art 4, § 10.
158 ibid art 4, § 2.
159 As can be seen in the legislative debate regarding the Bill 6578/2009, which gave rise to the 2013 Organized Crime Act: "the approval of this proposition is as a necessary measure for governmental action, for providing instruments for greater effectiveness in the results of criminal investigations of those executioners who organize to jeopardize Brazilian society." See Brazilian Chamber of Deputies - Committee of Public Security and Combat to Organized Crime, Report to Bill 6578/2009 (1 December 2010). On the same vein, the explanatory notes of the bill that introduced the leniency agreements in the former Competition Act state: "Leniency agreements are already being used in several jurisdictions (...) for its key role as an instrument for speeding and reducing the investi-

pacity to prosecute and punish members of criminal organizations and cartels, through the creation of investigative channels to access information and evidence held by offenders. On the other hand, the antitrust leniency program and the rewarded collaboration regulation are not directly aimed at compensating the victims of the offenses. The Brazilian Competition Act does not establish, as a requirement for the closure of an antitrust leniency agreement, the obligation of compensating the damages to those affected by the cartel. In the Organized Crime Act, compensation of damages is also not a condition for the obtainment of benefits granted by the rewarded collaboration regulation.[160]

c. Signing and fulfillment of the agreement

Unlike previous criminal legislation that provided for the possibility of granting benefits to cooperating defendants, the Competition Act and the Organized Crime Act established a procedural framework for the negotiation and execution of antitrust leniency and collaboration agreements. Both statutes clearly separate the moment of closure of the agreement from the moment of assessment of its fulfillment, creating a division of functions between law enforcement authorities, responsible for the negotiation and the signing of the agreements, and adjudicative organs, responsible for analyzing the fulfillment of the arrangement.

The Competition Act assigns the task of negotiating and closing an antitrust leniency agreement to the General Superintendence of the Brazilian competition authority, the administrative body that investigates antitrust offenses.[161] Given the repercussions of the antitrust leniency program in

---

gation costs in the identification of infractions to the economic order. In the case of the United States, the adoption of an amnesty program similar to the one proposed herein has led to an unprecedented increase in the detection of cartels, including international ones." See Senado Federal, ´Diário do Congresso Nacional´ (35, 10 October 2000) 22276.

160 See Brazilian Organized Crime Act 2013, art 4.

161 This division of tasks is made explicit by Brazilian Competition Act 2011, art 86. Regarding this matter, the Guidelines for CADE's Antitrust Leniency Program state that: "the body responsible for negotiation and execution of Leniency Agreements is CADE's General Superintendence. CADE's Tribunal does not participate in the negotiation and/or execution of Leniency Agreements and is only responsible for declaring whether or not the leniency agreement has been fulfilled, at the time it issues a final decision on the corresponding administrative proceeding". See CADE, *Guidelines: CADE's Antitrust Leniency Program*

criminal proceedings, the General Superintendence normally invites the Public Prosecution Office to participate in the signing of the agreement.[162] In all important cases, antitrust leniency agreements are signed by the applicant, on one side, and the General Superintendence and representatives of the Public Prosecution Office, on the other.

The assessment of the fulfillment of an antitrust leniency agreement and the granting of benefits to the applicant are carried out by the Administrative Court of the Brazilian competition authority, the body responsible for adjudicating on antitrust violations and for applying the penalties provided by law.[163] At the moment of the trial, after the end of the investigative phase, the Administrative Court must verify whether the agreement has been fulfilled and establish the reduction of the applicable administrative penalties.[164] Whenever the fulfillment of the agreement is verified, the offender will automatically be immune to criminal prosecution.

The Organized Crime Act also determines that law enforcement authorities – in this case, the Public Prosecution Office or the chief of police – are responsible for negotiating and signing collaboration agreements.[165] It is expressly prohibited for the judge to take part in the negotiation pro-

---

(2016) 17. <http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines-cades-antitrust-leniency-program-1.pdf/view> accessed 4 March 2019

162 In this regard: "It is CADE's standard practice to invite criminal prosecutors to sign the leniency agreement. This is viewed as means to help maximize benefits for potential applicants and to ensure that administrative and criminal liabilities are addressed together". See Martinez (n 8) 4. In the same respect, CADE's Guidelines on the antitrust leniency program clarify that: "Although articles 86 and 87 of Law No. 12.529/2011 do not expressly require the participation of the state and/or federal Public Prosecution Services for entering into a Leniency Agreement, CADE's consolidated experience shows that, in light of the criminal repercussions of a cartel, the Public Prosecution Service should be invited to cosign, as it is the competent body to bring criminal charges and initiate a public criminal action". See CADE (n 161) 17-18.

163 Brazilian Competition Act 2011, art 86 § 4.

164 According to an OECD report: "Once CADE's Tribunal adjudicates a case in which a leniency agreement took place, it must verify whether the applicant complied with the terms and conditions of the negotiated agreement. If full compliance is confirmed, the benefit, which may vary from a full immunity to a fine reduction, is granted". See OECD, 'Use of Markers in Leniency Programs' (Working Party No. 3 on Co-operation and Enforcement, 2014) 3 <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2014)9&doclanguage=en> accessed 4 March 2019.

165 Brazilian Organized Crime Act 2013, art 4 § 6.

cess.[166] The Organized Crime Act provides, however, a procedural step that does not exist in the antitrust leniency program: the homologation of the agreement by the court. After the parties reach a common understanding and formalize the collaboration agreement in writing, it must be submitted to a court, which is responsible for verifying the agreement's "regularity, legality and voluntariness".[167] If these requirements are met, the agreement is ratified; if not, the judicial body will reject it or make the necessary adjustments.[168]

The granting of benefits in collaboration agreements is also, as a rule, a responsibility of the courts, who may grant the judicial pardon, reduce the imprisonment sentence or substitute it for a sanction of restriction of rights.[169] According to the text of the Organized Crime Act, the benefits will be granted in a particular case by a judicial decision rendered at the end of the process, when the terms of the agreement and their efficacy will be assessed. [170] The Organized Crime Act also enables the Public Prosecution Office, in specific situations, not to press charges against the cooperating offender.[171]

4. The inventive practice of collaboration agreements: development and judicial support

a. Law in action, consensual innovations and the expansion of the room for negotiations

The Organized Crime Act and the Competition Act introduced an important innovation in Brazilian law by setting up rooms for negotiations that enable law enforcement authorities and offenders to openly negotiate with each other, conclude written agreements and act cooperatively in investigations of serious offenses. According to the text of both statutes, collaboration agreements and antitrust leniency agreements allow offenders to ob-

166 ibid.
167 ibid art 4 § 7.
168 ibid art 4 § 8.
169 ibid art 4.
170 ibid art 4 § 11.
171 According to the 2013 Organized Crime Act, this can only occur when the defendant is the first one to provide effective cooperation and is not the leader of the criminal organization. See Brazilian Organized Crime Act 2013, art. 4 § 4 indents I and II.

tain benefits such as immunities and penalty reductions and, at the same time, enable law enforcement authorities to obtain the assistance of offenders in the prosecution of former accomplices.

However, as the practice of the rewarded collaboration regulation developed, a distinctive phenomenon occurred: the participants in criminal proceedings expanded the room for negotiation created by the Organized Crime Act beyond its statutory boundaries.[172] In several cases, collaboration agreements established solutions that are not expressly supported by the text of the Organized Crime Act.[173] This expansion of the scope of negotiations is visible in numerous agreements signed over recent years, which contain clauses that go far beyond the statutory provisions. These agreements show that legal practitioners utilized the communication forum established by the Organized Crime Act to develop a broad and flexible system of negotiation, deciding consensually on various aspects of the criminal procedure.[174]

The consensual innovations brought by this "bold" practice of collaboration agreements[175] created a clear detachment between the "law in action" and the statutory provisions of the Organized Crime Act.[176] Legitimizing this detachment, the Federal Public Prosecution Office enacted, in 2018, an orientation note on the negotiation of collaboration agreements that endorsed the innovations created by legal practice, affirming the legality

172 Several authors note this phenomenon. Luis Manzano and Tiago Essado observe that several recent collaboration agreements bring "some legal innovations, not expressly provided in the legislation". See Antonio Scarance Fernandes, 'O Equilíbrio Entre a Eficiência E O Garantismo E O Crime Organizado' in Denise Provasi Vaz and others (eds), *Eficiência e garantismo no processo penal*, vol 70 (LiberArs 2008) 208. For a detailed description and an emphatic defense of the innovations brought forth by the practice of collaboration agreements, see Mendonça (n 36) 53-101. For a critical view on the matter, see Bottino (n 36).

173 Analyzing the agreements concluded in the "Car Wash Operation", Salo de Carvalho affirms the existence of "sui generis" agréments. See Carvalho (n 36) 516. For a critical view on the new solutions generated by the use of rewarded collaboration: Gustavo Henrique Badaró, 'A Colaboração Premiada: Meio de Prova, Meio de Obtenção de Prova Ou Um Novo Modelo de Justiça Penal Não Epistêmica?' in Maria Thereza de Assis Moura and Pierpaolo Cruz Bottini (eds), *Colaboração premiada* (Revista dos Tribunais 2017) 142-143.

174 Fabiano Silveira speaks of "headlong jump towards a negotiated model" within Brazilian criminal justice. See Silveira (n 35) 119.

175 Expression used by Cavali (n 36) 256.

176 Along the same lines, Vasconcellos states, in a very critical way, that the use of rewarded collaboration in Brazil strongly contradicts several statutory provisions. See Vasconcellos, *Colaboração Premiada No Processo Penal* (n 36) 17.

and usefulness of these consensual developments.[177] Over the last years, the Brazilian judiciary has also provided strong support for the innovations engendered by legal practice, repeatedly validating collaboration agreements with provisions going far beyond the statutory provisions.[178]

The design of inventive solutions is a well-documented consequence of the use of negotiation mechanisms in the criminal justice systems of various countries.[179] In the daily routines of the justice system, legal practitioners have incentives to explore the negotiation forum and the informal bonds of trust to develop new forms of consensual solutions.[180] In the Brazilian scenario, several authors noted the recent development of the inventive practice of the rewarded collaboration regulation, and some studies have analyzed small groups of specific collaboration agreements.

Affirming the importance of evaluating the "judicial and practical reality", and after scrutinizing three agreements concluded at the early stage of "Operation Car Wash", Thiago Bottino concluded that "the examination of these documents reveals that the agreements were concluded without the benefits granted therein being based on the law".[181] Canotilho and Brandao conducted a rigorous assessment of various clauses of two collaboration agreements, and criticized the "creation through case-law of solu-

177 This orientation note, approved by the Federal Public Prosecution Office in 2018, is not binding upon prosecutors, but serves as guideline in the negotiation and conclusion of collaboration agreements. See Ministério Público Federal-MPF, 'Orientação Conjunta nº 1/2018: Acordos de Colaboração Premiada' (2018) <http://www.mpf.mp.br/atuacao-tematica/ccr5/orientacoes/orientacao-conjunta-no-1-2018.pdf> accessed 4 May 2019, hereinafter: MPF, Joint Orientation Note 1/2018.

178 See item I.4.c.

179 For an analysis of the German experience, see Altenhain, Dietmeier and May (n 38). In the U.S., an interesting development is the negotiation of the so-called "Alford plea", through which the defendant accepts the imposition of criminal penalties, albeit not confessing to the investigated facts. See Stephanos Bibas, 'Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas' (2003) 88 Cornell Law Review 1361.

180 Examining the German practice of negotiated criminal judgments, Martin Heger and Robert Pest recognize the obstacles to effective judicial control that arise from the informal nature of these negotiated solutions. See Heger and Pest (n 37) 468. In an important ruling issued in 2013, the German Federal Constitutional Court asserted that consensual mechanisms carry an inherent risk of disregard of legal rules by legal practitioners. See BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10 u.a. = BVerfGE 133, 168, para 107.

181 Bottino (n 36) 7.

tions that do not fit into the procedural models designed by legislation."[182] Vasconcellos examined five agreements and observed that "the practice carried out before courts has largely exceeded the statutory rules".[183]

The objective of this section is to provide a more solid and systematic picture of the innovations brought by the Brazilian practice of collaboration agreements. For that purpose, the first step was to assemble a larger group of collaboration agreements than seen in previous studies, which have focused basically on agreements that were widely disseminated in Brazilian press. From the analysis of the public records of criminal proceedings related to the so-called "Operation Car Wash" and other recent investigations into corrupt practices in Brazil, it was possible to compile a collection of 106 collaboration agreements, which enables a more comprehensive view of the innovations developed by legal practitioners through consensual arrangements.[184] The examination of these documents reveals a model of transaction that is clearly dissociated from the legal rules provided for by the textual provisions of the Organized Crime Act.

Based on the examination of this data, the following topics analyze four central innovations engendered by the Brazilian practice of collaboration agreements: (i) the granting of benefits not provided by law for cooperators; (ii) the exact definition of imprisonment penalties through agreements concluded at early stages of criminal proceedings; (iii) the development of 'package deals', which set a single unified penalty for several wrongdoings confessed by the cooperator; (iv) the establishment of the possibility for the cooperator to serve imprisonment penalties in advance, before the pronouncement of the judicial verdict and sentence.

i. Granting of benefits not provided for by law

A major innovation brought by the practice of collaboration agreements is the granting of benefits not provided for in the Organized Crime Act.[185]

182 Canotilho and Brandão (n 36) 30.

183 Vasconcellos, *Colaboração Premiada No Processo Penal* (n 36) 19.

184 The list of the analyzed collaboration agreements, as well as the methodology used to identify them, can be found in the Annex of the thesis.

185 Several authors point out that the Brazilian rewarded collaboration is marked by the awarding of benefits that are not provided by law. See Canotilho and Brandão (n 36) 30-35; Bottino (n 36) 7-8. Defending this practice, see Mendonça (n 36). Similarly, the National Strategy to Combat Corruption and Money Laundering (ENCCLA), a body that gathers several Brazilian law enforcement

The statutory text establishes that offenders may receive, through collaboration agreements, the following benefits: (i) judicial pardon, (ii) reduction by up to two-thirds of an imprisonment sentence, (iii) substitution of an imprisonment sentence for penalties of rights restrictions, (iv) dropping of charges by the Public Prosecution Office and (v) progression between detention regimes.

Although there is no provision in the Organized Crime Act that authorizing the grant of other benefits than these, several collaboration agreements have significantly expanded the types of privilege obtained by cooperating defendants.

Among these new benefits, one is worth highlighting: the design of new forms of detention regimes.[186] Brazilian criminal legislation provides for three detention regimes: (a) the closed regime, in which the sentence is served in high- or average-security prisons, (b) the semi-open regime, in which the penalty is served in an agricultural or industrial colony, or in a similar institution and (c) the open regime, which is served in a shelter or other appropriate institution.[187] Each of these regimes imposes different restrictions on the freedom of a convicted person. The initial detention regime is defined by the sentencing judge, depending to a great extent on the length of the imprisonment sentence imposed on the defendant, who, for example, must serve the sentence in the closed regime if he or she is sentenced to more than eight years of imprisonment.[188]

In the Brazilian practice of collaboration agreements, procedural participants have repeatedly designed new detention regimes, with specific characteristics for each cooperating defendant. These new regimes, which have gained denominations such as "differentiated closed regime,"[189] "differen-

---

authorities, approved a guideline defending this practice. According to this position, collaboration agreements can grant benefits not foreseen in the Organized Crime Act "as long as they respect the Constitution, the law, the general principles of law and do not harm good morals and public order". See ENCCLA, 'Manual: Colaboração Premiada' (Brasília, January 2014) <http://www.mpf.mp.br/atuacao-tematica/sci/dados-da-atuacao/eventos-2/eventos-internacionais/conteudo-banners-1/enccla/restrito/manual-colaboracao-premiada-jan14.pdf/view> accessed 4 January 2019, 7.

186 Marcelo Cavali notes that several collaboration agreements established "detention regimes nor provided for by law". See Cavali (n 36) 262. The innovation was endorsed by the Federal Public Prosecution Office in its orientation note on collaboration agreements. See MPF, Joint Orientation Note 1/2018, art 27.

187 Brazilian Criminal Code, art 33 § 1.

188 ibid art 33 § 2 indent "a".

189 See STF, Collaboration Agreeement of J.S.O.M [2016], appendix 1.

tiated semi-open regime"[190] and "differentiated open regime",[191] establish completely different rules from those provided for in Brazilian criminal law. Although the details may vary from agreement to agreement, these "differentiated" regimes clearly permit favorable situations not provided under Brazilian criminal legislation. A common feature of the negotiated detention regimes is the possibility for the defendant to serve long imprisonment sentences in their own private residence, an option that is not available under Brazilian criminal legislation.[192] Another hallmark is the setting of tailor-made regulations for each cooperator,[193] which gives rise to very detailed and idiosyncratic regulations regarding the conditions of the detention regime.

One agreement, for instance, established a "differentiated closed regime" with the following conditions: i) obligation of the cooperator to serve the imprisonment sentence in his own private residence during the negotiated period; ii) permission to leave, on eight days per year, his residence for a period of six continuous hours; iii) obligation to be constantly monitored through electronic anklets; iv) permission to receive visits from 27 family members and friends included in a list attached to the agreement. [194] Another agreement created a "differentiated semi-open regime", in which the cooperator was subject to the following restrictions: i) obligation to remain – on business days from 10:00 p.m. to 06:00 a.m., and during the whole day on weekends – in his own private residence; ii) permission to stay, during three days per year, in other location than his residence; iii) obligation to be constantly monitored through electronic anklets; iv) obligation to perform 22 hours per month of community service; v) prohibition of travel, except within Brazilian territory and for work purposes. [195]A third agreement designed a "differentiated open regime" with the following characteristics: i) obligation of the cooperator to remain – on business

190 See STF, Collaboration Agreeement of J.C.S.F. [2017], clause 4 para I item "c.

191 See STF, Collaboration Agreement of R.R.P. [2015], clause 5 item "c".

192 The Brazilian legislation establishes two conditions for the convicted person to be eligible for serving the sentence in their private residence: i) to already be serving an open regime sentence and ii) to fit one of the following categories: a) being more than 70 years old, b) having a serious illness, c) being pregnant, d) being a woman and being mother to a minor or a disabled person.

193 For a defense of an extensive negotiation regarding different types of agreement benefits, considering the specificities of each case, see Fonseca (n 98) 173–174; 212–215.

194 See STF, Collaboration Agreeement of J.S.O.M [2016], appendix 1.

195 See STF, Collaboration Agreeement of J.C.S.F. [2017], clause 4 para I item "c".

days, from 08:00 p.m. to 06:00 a.m., and during the whole day on weekends – in his own private residence; ii) prohibition of international travel, except for medical purposes; iii) obligation to present bimonthly reports on his professional activities; iv) obligation to perform 30 hours per month of community service.[196] Several other agreements have also designed "differentiated detention regimes", with tailor-made regulation that set up very specific rules, such as the prohibition of holding parties or social events at the cooperating defendant's house.[197]

Developed in practice by procedural participants, the design of new detention regimes was expressly embraced by the Federal Public Prosecution Office in its orientation note on collaboration agreements, notwithstanding the lack of any statutory provision on the matter. According to the orientation note, "in case of establishment of differentiated detention regimes, the agreement must specify the applicable rules". [198]

In addition to the new detention regimes, the practice of collaboration agreements conceived other innovations in favor of cooperators. An example is the granting of benefits related to personal assets of the defendants.[199] While the Brazilian legislation generally determines that assets obtained through criminal activities must be confiscated and auctioned,[200] collaboration agreements have created specific regulations regarding the cooperator's assets, although such a possibility is not foreseen by the Organized Crime Act. One agreement[201] established that the cooperator's family members would be temporarily allowed to keep assets obtained through criminal activities.[202] In the same case, a property belonging to the cooperator was handed to his ex-wife and another to his daughters, even though it was unclear whether these assets were associated with criminal activities.[203] It was also decided that, if the cooperation provided by the defen-

196 See JFPR, Collaboration Agreement of P.J.B.F. [2014], clause 5 para III-IV.
197 See STF, Collaboration Agreement of L.B.F. [2017], clause 4 para II item "b" indent "iv".
198 See MPF, Joint Orientation Note 1/2018, art 27.
199 For a discussion concerning the subject, see Pereira, *Delação Premiada: Legitimidade e Procedimento* (n 104) 151–152.
200 Criminal Code, art. 91, II and Code of Criminal Procedure, arts. 125 e 133.
201 See STF, Collaboration Agreement of A.Y. [2014], clause 7 para 3.
202 Bottino (n 36).
203 See STF, Collaboration Agreement of A.Y. [2014], clause 7 para 5-6.

dant led to the recovery of illegal assets of a certain value, the cooperator's family would be allowed to retain a commercial real estate property.[204]

Another benefit created in the practice of collaboration agreements is the definition not only of the cooperator's rights and obligations, but also of the legal situation of his or her family members. Although the Organized Crime Act does not mention the possibility for a cooperator to obtain benefits in favor of other individuals, various agreements have provided for conditions regarding family members of a cooperating defendant. In one case, an agreement clause established that the Public Prosecution Office would offer the cooperator's family members individual collaboration agreement proposals with pre-determined benefits.[205] Another agreement dedicated a whole section to regulating the "legal treatment of family members", in which the cooperator agreed to obtain evidence that was in the possession of his family and, in return, the Public Prosecution Office consented not to open charges against any family member that acceded to the agreement.[206]

ii. Exact definition of imprisonment penalties

The practice of collaboration agreements has also innovated with respect to the manner in which the penalties imposed on the cooperating defendant are defined. In several cases, agreements outlined the exact penalties to be imposed on the cooperator and the detention regime for serving them,[207] in a way that is not established in the Organized Crime Act.

---

204 See STF, Collaboration Agreement of A.Y. [2014], clause 7 para 4. All these transactions were considered valid by the Federal Supreme Court, which decided that "the collaboration agreement can regulate property matters related to the profit obtained by the collaborator through the crimes of which he is accused." See STF, HC 127483 [2015] (Toffoli J). According to the decision, although the traditional rules of Brazilian criminal law determine the seizure of all assets obtained through criminal activities, the United Nations Convention against Transnational Organized Crime (the Palermo Convention) and the United Nations Convention against Corruption (the Merida Convention) recommend the adoption of measures to promote cooperation with offenders, which justifies the concession of that type of benefit.

205 See STF, Collaboration Agreement of P.R.C. [2014], clause 5 para VII-VIII.

206 See STF, Collaboration Agreeement of J.S.O.M [2016], clause 5 para 4.

207 On this subject, Salo de Carvalho notes that the concrete experience regarding agreements, through an "anomalous" use of the rewarded collaboration, is determining "penalties, in quantity and quality". See Carvalho (n 36) 515-516.

According to the statutory text, when a defendant provides criminal investigations with effective cooperation, 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. The practice of collaboration agreements, however, has created a system of transactions in which defendants and the Public Prosecution Office, rather than negotiating over the benefits provided by law, precisely decide the imposed penalties.[208] These agreements stipulate not only the length of the imprisonment penalty, but also the detention regimes in which the penalties must be served, specifying exactly the period that the cooperator will spend in each detention regime.

In one case, the agreement established the imprisonment penalty as follows: (i) one hundred and sixty days of imprisonment under closed regime;[209] (ii) one year and six months of imprisonment under "differentiated closed regime"; (iii) one year and six months of imprisonment under "differentiated semi-open regime"; (iv) one year of imprisonment under "differentiated open regime". [210] Another agreement provided for the following punishment of the cooperator: (i) two years of imprisonment under closed regime; (ii) two years of imprisonment under "differentiated closed regime"; (iii) two years of imprisonment under "differentiated semi-open regime"; (iv) two years of imprisonment under "differentiated open regime"; (e) four years of community service, with a workload of 7 hours per week; (vi) six years of study in courses defined in accordance with the

---

Marcelo Cavali also observes this trend, highlighting its similarity to the U.S. system of plea bargaining. See Cavali (n 36) 262.

208 From the analysis of some agreements, Guilherme de Oliveira Alonso concludes that this practice is characterized by the determination, through agreements concluded in initial stages of the procedure, of a maximum penalty for the collaborator, with the definition of a regime for the immediate serving of the sentence. See Guilherme de Oliveira Alonso, 'A Colaboração Premiada e o Princípio "Nulla Poena Sine Judicio"' (2018) XIV Revista Magister de Direito Penal e Processual Penal 71, 89. Gustavo Badaró emphasizes, in a critical way, the concentration of attributions brought by this model of negotiation, noting that collaboration agreements are serving, at the same time, to investigate, establish the truth, define the cooperator's penalty and to effectively punish them. See Badaró (n 173) 143.

209 In this case, considering that the defendant was already in custody under in pretrial detention, the agreement determined that the extent of the sentence he would have to serve in closed regime should be decreased by the period he was detained under preventive detention. See STF, Collaboration Agreeement of J.C.S.F. [2017], clause 4 I.

210 See STF, Collaboration Agreeement of J.C.S.F. [2017], clause 4.

Federal Public Prosecution Office, with a total course load of 200 hours per year.[211] A third agreement established the criminal punishment of the cooperator in the following manner: (i) one year and six months of imprisonment under "differentiated closed regime"; (ii) three years of imprisonment under "differentiated semi-open regime"; (iii) three years of imprisonment under "differentiated open regime"; (iv) payment of fine of almost 10.5 million Brazilian reals; (v) during the period of imprisonment penalty, the removal of any position in corporations that have contracts with the public sector; (vi) prohibition of maintaining contact with public agents during the period of imprisonment penalty; (vii) prohibition of contracting with the public sector during the period of imprisonment penalty; (viii) the duty to attend to courses of professional ethics, with a total course load of 40 hours per year, during the period of imprisonment under the differentiated semi-open and open regimes.[212]

Thus, instead of applying the specific benefits provided by law, several agreements have directly determined the cooperator's criminal punishment and detailed how it should be fulfilled.[213] On several occasions, this has occurred at very early stages of the criminal investigation, even before the Public Prosecution Office had presented any formal indictment against the cooperating defendant.[214] Even though the Organized Crime Act does not provide for this type of arrangement, this negotiation method was explicitly regulated by the Federal Public Prosecution Office in its orientation note on collaboration agreements: according to the document, the cooperator's benefit should preferably be determined through the establishment of the exact imprisonment penalty and the definition of the appropriate detention regimes.[215]

iii. Package deals and "unified punishment"

Another development brought about by the practice of collaboration agreements is the negotiation of "package deals", through which the coop-

211 See STF, Collaboration Agreement of L.B.F. [2017], clause 4.
212 See STF, Collaboration Agreement of B.B.S.J. [2016], clause 4.
213 See e.g. STF, Collaboration Agreement of Z.S. [2016], clause 5; STF, Collaboration Agreement of R.S.A [2017], clause 4; STF, Collaboration Agreement of F.A.F.S. [2015], clause 5; STF, Collaboration Agreement of A.P.F. [2017], clause 4; and Collaboration Agreement of C.R.R. [2017], clause 4.
214 As noted by Cavali: Cavali (n 36) 265.
215 See MPF, Joint Orientation Note 1/2018, art 26.1.b.

erator confesses simultaneously to several crimes and receives a single penalty for all his offenses.[216] The Organized Crime Act provides that courts may grant judicial pardon or reductions of the imprisonment sentence by up to two thirds for cooperating defendants. According to this textual provision, the granting of benefits depends on the prior assessment of each wrongdoing committed by a cooperating defendant and on the determination of the adequate sentence. After determining the sentence, courts may apply the benefits of the rewarded collaboration regulation, reducing the penalties or granting pardon for each of the convictions.

In judicial practice, however, a very different type of arrangement has emerged. In various cases, parties have signed agreements which established a unified single penalty that encompassed all the practices described in the defendant's cooperating report or that were somehow related to the reported crimes.[217] In this model of negotiation, the negotiation unfolds not by defining the illegal acts committed by the cooperator, assigning to each of these acts the appropriate punishment and granting afterwards the benefits provided for by the Organized Crime Act. It rather unfolds by determining a single encompassing penalty for a series of acts reported by the offender.

The "unified" penalty covers not only a wide range of wrongdoings, but also encompasses different criminal proceedings.[218] One collaboration agreement, for instance, established that the cooperating defendant should be sentenced "to a maximum penalty of twenty years of imprisonment, considering for this end the unification of the penalties set in the existent criminal proceedings and in the proceedings that will be opened based on this agreement".[219] Another agreement fixed a maximum penalty of eighteen years of imprisonment "in the aforementioned criminal proceedings, in those already existent and in those that will be opened to investigate the facts revealed through this cooperation, as well as the facts narrated in the appendixes that are part of this agreement and the facts exposed in depositions that exceed the scope of the appendixes."[220]

---

216 For a good description of this practice, see Mendonça (n 36) 89-91.

217 See JFPR, Collaboration Agreement of A.R.M.N. [2014], clauses 3-5; JFPR, Collaboration Agreement of C.A.P.C. [2016], clauses 3-4; STF, Collaboration Agreement of C.R.R. [2017], clauses 3-4; JFPR, Collaboration Agreement of E.H.L. [2015], clauses 3-5; STF, Collaboration Agreement of F.M.S. [2017], clauses 4-5.

218 Criticizing the purported wide reach of collaboration agreements, see: Canotilho and Brandão (n 36) 27-28.

219 STF, Collaboration Agreement of A.C.O.R. [2016], clause 5 para 1 item "a".

220 STF, Collaboration Agreement of R.R.P. [2015], clause 5.

Various agreements contain clauses that show the wide reach of the unified punishment negotiated by the parties. On agreement stipulated, for example, that "this agreement encompasses all illegal acts practiced by the cooperator up to the date of signature, as well as all illegal acts that are of his knowledge, which are described in the appendixes that are part of this agreement."[221] Another agreement specified that its scope comprised "the facts analyzed in the investigative proceedings listed in this agreement and in the following appendixes, in addition to all proceedings that will be opened based on them or that are related to them, as well as facts that are still not under investigation but that are of the cooperator's knowledge and will be the object of future questioning".[222] In one case, an agreement stipulated that even wrongdoings investigated in criminal proceedings that would be opened before other courts would be encompassed by the scope of the arrangement and its unified punishment.[223]

In this system of far-reaching and fully encompassing transactions, the legal qualification of the wrongdoings confessed by the cooperating defendant is usually described in broad terms. One agreement provided that the arrangement covered "crimes against the financial system, corruption, embezzlement, money laundering and criminal organization".[224] Another agreement established a unified penalty for acts involving "the practice of various crimes, especially corruption, money laundering, and criminal organization, as well as the illegal transacting of tens of millions of dollars."[225] In one case, a collaboration agreement fixed a unified penalty for "unlawful acts that include, among others, the following kinds of offenses: criminal organization, active bribery, passive bribery, money laundering, bidding fraud, formation of cartel, misrepresentation, tax crimes, and capital flight."[226]

In this manner, a kind of package deal was created: the cooperating defendant reports a series of unlawful acts, which are investigated or could lead to several different criminal procedures and, instead of receiving specific benefits in each of these procedures – as established by the Organized Crime Act – he or she receives a unified penalty. From a system of benefits based on a specific assessment of each criminal act as provided by the Or-

221 STF, Collaboration Agreement of D.Q.G.F. [2017], clause 3.
222 STF, Collaboration Agreement of S.C.B. [2017], clause 1 para 1.
223 See STF, Collaboration Agreeement of J.S.O.M [2016], clause 4 para 1.
224 STF, Collaboration Agreement of R.R.P. [2015], clause 4.
225 See JFPR, Collaboration Agreement of P.J.B.F. [2014], clause 4 para 1.
226 See STF, Collaboration Agreeement of J.S.O.M [2016], clause 4 para 1 and clause 5 para 1.

ganized Crime Act, the practice of collaboration agreements eventually evolved towards a model of negotiation that permits a cooperating defendant to solve simultaneously all the criminal charges he or she faces or could face. This type of negotiation, which clearly leads to more generous benefits than those provided for in the Organized Crime Act, has been defended as a practical need to design an attractive and secure option for cooperating defendants.[227] Despite the lack of statutory basis, the innovation was regulated by the Federal Public Prosecution Office in its orientation note on collaboration agreements, which recommends that collaboration agreements may establish "a unified punishment for the amount of facts".[228]

iv. The serving of imprisonment penalties in advance

A final important innovation in the Brazilian practice of rewarded collaboration was the provision that the cooperator may serve the negotiated imprisonment penalties at early stages of the criminal investigation, before the court pronounces the verdict and sentence.[229] Several agreements established that the cooperating defendant would start serving the imprisonment penalties immediately upon the conclusion of the deal and its ho-

227 In this regard, Andrey Borges de Mendonça argues that: "As has been seen in practice, revealed by investigations on corruption in recent years, it is quite common for a single agent to report 30 or more crimes. In this situation, offering the cooperator a sentence reduction, in a range between one and two thirds, would not be of interest to either party. For the defendant, because a decrease of this amount in each of the reported crimes would lead to a final penalty that is still excessive. Imagine if the offender were to be convicted, in each of the 30 crimes that he reports, to five years imprisonment for each of them. Summing the sentences, the final sentence could come to 150 years. If the penalty were reduced by two-thirds – the maximum in law – it would still be excessively high, with the offender having to serve 50 years in prison! Accepting a generic benefit under such circumstances can be extremely prejudicial to the cooperator, in addition to leaving him in a situation of absolute uncertainty, due to not knowing beforehand which potential penalty he will have to serve in the end". See Mendonça (n 36) 89.

228 See MPF, Joint Orientation Note 1/2018, art. 27 and 26.1.a.

229 Marcelo Cavali describes this innovation: "Several concluded agreements have established sanctions – including prison regimes not provided for in the law – to be faced by the cooperators, without even the need for a conviction". See Cavali (n 36) 262. Vasconcellos also noticed the practice: Vasconcellos (n 36) 115.

mologation by the court, regardless of any judicial decision affirming the defendant´s guilt.[230] Others enabled the cooperator to seek judicial permission to serve the imprisonment penalties "beforehand", prior to the end of the criminal proceeding.[231]

The possibility that the cooperator serves in advance the negotiated imprisonment punishment constitutes a clear innovation in Brazilian law, as it creates a situation in which the individual may serve imprisonment penalties before being convicted by a judicial body.[232] This situation is completely new to Brazilian law, since the traditional rules of criminal procedure establish that the imposition of an imprisonment penalty can only be made after the completion of the full-blown criminal process.[233] The defendant's confession does not end the official investigation, which must continue even when the accused has admitted culpability for the wrongdoing.[234] According to the Brazilian Code of Criminal Procedure, a defendant's confession must be analyzed together with all other evidence collected by judicial bodies, who must confirm their consistency.[235] Defendants may at any time withdraw their confession, and courts are free to reach a decision analyzing the complete body of evidence.[236]

Contrary to these standard rules, and based primarily on the confession and on the evidence presented by the cooperator, the practice of collaboration agreements allowed defendants to serve imprisonment sentences at very early stages of the criminal investigation. In some occasions, in which the collaboration agreement was signed before the charges were pressed, the authorization for the early serving of penalties was granted even before

230 In this regard, see STF, Collaboration Agreeement of H.M.A.S.F. [2017], clause 4 para II, providing that "the imprisonment penalty will be served right after the homologation of this agreement". See also JFPR, Collaboration Agreeement of D.S.A [2015], clause 5 para IV, establishing that the serving of the imprisonment penalties will start "from the moment of the signature of this agreement". Furthermore, see STF, Collaboration Agreeement of I.U.C.S. [2017], clause 4, item ii; STF, Collaboration Agreement of D.A.G. [2016], clause 13; STF, Collaboration Agreement of B.B.S.J. [2016], clause 4 item ii; STF, Collaboration Agreement of M.B.O. [2017], clause 4 item ii.

231 See STF, Collaboration Agreeement of J.S.O.M [2016], clause 5 para 1 item "e".

232 As noted by Alonso (n 208) 90. Very emphatically, Badaró criticizes situations in which, through collaboration agreements, individuals serve penalties without having been formally investigated. See Badaró (n 173) 143.

233 See section I.1.

234 Brazilian Code of Criminal Procedure, art 158.

235 ibid art 197.

236 ibid art 200.

the formal start of a criminal proceeding against the cooperating defendant.[237]

This situation differs from the consensual solutions designed by the 1995 Small Claims Act, which can not define imprisonment punishment and may impose only sanctions of restriction of rights and fines.[238] There is also another important difference: unlike the consensual solutions of the Small Claims Act, which put an end to the official investigation of the facts after the conclusion of an arrangement between the parties, the signing of a collaboration agreement does not lead to the termination or the suspension of the criminal proceeding. According to the Organized Crime Act, the guilt of all the accused, including the cooperator, will be determined by a judicial decision issued at the end of the criminal proceeding, and no guilty verdict shall be based only on the statements of the cooperator.[239]

Thus, the practice of the anticipatory serving of imprisonment penalties, as designed in various collaboration agreements, may lead to a scenario in which the cooperator serves voluntarily a sanction of imprisonment and, at the end of the proceeding, is acquitted. In other words, these provisions contain the implicit recognition that the cooperator can be acquitted after signing the collaboration agreement and serving the penalty.[240] Because of this possibility, some collaboration agreements exempted the state of any liability in the event that the cooperator, after serving the imprisonment penalties in advance, is acquitted at the end of the process or that the sentence imposes lower penalties than the ones established in the agreement.[241] This exemption clause is also an original development, since the Brazilian Constitution expressly establishes the right of compensation to individuals who have been imprisoned for longer than the period established in the sentence.[242]

237 See e.g. STF, Collaboration Agreeement of J.S.O.M [2016].
238 Brazilian Small Claims Act 1995, art 76.
239 Brazilian Organized Crime Act 2013, art 4 § 11 and § 16.
240 As noted by Vasconcellos (n 36) 115.
241 See STF, Collaboration Agreeement of J.S.O.M [2016], clause 5 para 1 item "e".
242 Brazilian Federal Constitution, art 5 LXXV.

b. Contractual freedom, tailor-made arrangements and unique consensual solutions

From the reading of the collaboration agreements, it is clear that legal practitioners used the system of "quid-pro-quo" negotiations established by the Organized Crime Act to develop an elastic model of transactions.[243] Collaboration agreements concluded in the last years are drafted over several pages, contain dozens of clauses and regulate a wide range of aspects of the criminal procedure. The tailor-made approach adopted in the drafting of these agreements enabled the parties to design innovative and creative solutions,[244] customized for the specific situation of each case.[245]

This system of tailor-made negotiations generated unique – and quite peculiar – contractual provisions. One collaboration agreement, for instance, designed a sort of "success fee" for the cooperator, stipulating that two percent of the value of the illegal assets recovered with his assistance would be written off his compensation fine.[246] Another agreement created a right to "penalty equalization", establishing that, if other defendants from the same company negotiated a collaboration agreement with lower imprisonment penalties, the cooperator's punishment would be equalized, so that his legal situation would not be less favorable.[247] According to the provision, in these circumstances the cooperator and the Federal Public Prosecution Office should negotiate an amendment to the original agreement and submit it to the competent judicial body.[248]

---

243 It is interesting to note that the phenomenon observed in the criminal law experience has no matching example in the antitrust sphere. Although there isn't a specific analysis of the subject, the greater rigidity of the antitrust leniency model – in the form of the winner-takes-it-all model – presents itself as an important factor to understand such a discrepancy. For a more detailed comparison of the practice of both leniency programs, see Chapter VI.

244 In this aspect, the Brazilian practice of collaboration agreements resembles the U.S. system of plea bargaining, where the prosecutors "bring the same spirit of inventiveness to their task that American business lawyers bring to the drafting of contracts". See James Whitman, 'No Right Answer' in John Jackson, Máximo Langer and Peter Tillers (eds), *Crime, procedure and evidence in a comparative and international context: essays in honour of professor Mirjan Damaska* (Hart Publishing 2008) 387.

245 For a defense of this practice, see Fonseca, to whom the collaboration agreements concluded recently "are, in fact, bringing more benefits than costs to society". See Fonseca (n 98) 212-215.

246 See STF, Collaboration Agreement of A.Y. [2014], clause 7 para 4.

247 See STF, Collaboration Agreement of F.M.S. [2017], clause 5 para 4

248 See STF, Collaboration Agreement of F.M.S. [2017], clause 5 para 5.

Many agreements designed singular rights for cooperating defendants during the serving of imprisonment penalties in the so-called "differentiated regimes". Amongst several cases, some provisions of various agreements are illustrative, such as the permission to travel on two weekends per month to three specific cities in Brazil;[249] the possibility for the cooperator to obtain a special visit approval, in case his mother faces health problems that demand medical intervention;[250] and the authorization to spend three days per month in the cooperator's agricultural property for work purposes.[251] Other agreements established a type of vacation time: after each period of twelve months serving an imprisonment sentence under a "differentiated regime", cooperators acquired the right to spend some days outside their own residence.[252] The consensual definition of detention regimes has been so meticulous that in one case the collaboration agreement specifically authorized the cooperator to leave his residence, for a continuous period of six hours, to celebrate of Father's Day at his children's school.[253]

The uniqueness of each collaboration agreement can also be observed in the definition of the payment conditions for the monetary fines established in the consensual arrangements. One agreement established that the cooperator could pay the negotiated fine after he succeeded in selling his real estate properties located in Miami.[254] Another agreement authorized the cooperator to pay the fine within one year as long as he presented a bank letter of guarantee with credit rating "AAA" or "AA+" given by an international credit rating agency.[255]

Besides establishing unique rights, collaboration agreements also designed new kinds of duties for cooperators, according to the specific circumstances of each individual. One agreement established the duty for the cooperating defendant to collaborate, over a period of thirty years, "with the production of studies, analyses, counseling activities in favor of the Federal Public Prosecution Office and the Federal Police".[256] In another

249 See STF, Collaboration Agreement of D.A.G. [2016], clause 13 para 8.
250 See STF, Collaboration Agreeement of J.S.O.M [2016], appendix 2 clause 4.
251 See STF, Collaboration Agreeement of H.M.A.S.F. [2017], clause para 3 item "c" indent "ii".
252 See STF, Collaboration Agreement of B.B.S.J. [2016], clause 4 para II item b indent "ii". Also: STF, Collaboration Agreeement of I.U.C.S. [2017], clause 4, para II item b indent "ii".
253 STF, Collaboration Agreement of F.A.F.S. [2015], appendix 1 clause 1 para 1.
254 STF, Collaboration Agreement of A.C.O.R. [2016], clause 5 para 3 item "iii".
255 See STF, Collaboration Agreement of B.B.S.J. [2016], clause 4 para III item "a".
256 See STF, Collaboration Agreement of L.B.F. [2017], clause 4, para II, item "g".

case, the cooperator was prohibited from having contact with public agents and political representatives and from providing marketing services for election campaigns during the penatly period.[257] In some situations, cooperating defendants agreed to attend courses of ethics, integrity and compliance with a total workload of forty hours per year.[258] Collaboration agreements also forbade cooperators from going to bars, gambling spots and prostitution houses.[259]

The system of tailor-made transactions also led to the creation of innovative clauses regarding the conduct of public prosecutors. One agreement established that, due to the cooperative behavior of the defendant, the Brazilian Federal Public Prosecution Office would try to convince foreign authorities, particularly from the United States and Switzerland, not to press charges against the defendant.[260] Another agreement stipulated that the cooperating defendant would forfeit financial assets housed abroad and transfer them directly to a bank account of the Judiciary or the Federal Prosecution Office, for the purpose of future use in activities related to the prosecution of money laundering.[261] A third one authorized the Federal Public Prosecution Office to request, based on the effectiveness of the assistance provided by the cooperator, the progression of the detention regime after the cooperator had served over half of the imprisonment penalty.[262]

The assessment of collaboration agreements indicates, therefore, an environment of broad contractual freedom, in which the parties negotiate unrestrictedly over a large set of issues. In this context, collaboration agreements provided for unique and peculiar clauses, geared to address the particular interests of the cooperator and public prosecutors. The analysis of agreements concluded between cooperating defendants and Public Prosecution Office reveals an abundance of specific and detailed clauses, creating an original set of rights and obligations for each situation.

257 See STF, Collaboration Agreeement of J.C.S.F. [2017], clause 4 para V and VII.
258 See STF, Collaboration Agreeement of H.M.A.S.F. [2017], clause 4 para VIII; and STF, Collaboration Agreement of M.B.O. [2017], clause 4, para VIII.
259 See JFPR, Collaboration Agreement of C.A.P.C. [2016], clause 4 para II item "c"; STF, Collaboration Agreement of A.P.C.S.D. [2016], appendix 2, clause V; STF, Collaboration Agreement of E.N.A.J. [2016], appendix 3 clause III.
260 See JFPR, Collaboration Agreement of A.M.C. [2015], clause 5 para 4.
261 See JFPR, Collaboration Agreement of A.A.C.B. [2014], clause 7.
262 See STF, Collaboration Agreement of M.B.O. [2017], clause 4, para II item "b" indent "vi".

c. A new model of criminal procedure? Collaboration agreements and consensual criminal justice

Over recent years, the inventive practice of collaboration agreements has received solid support from the Federal Public Prosecution Office and from the Brazilian judiciary, particularly from Brazilian higher courts. Since 2014, defendants have negotiated with the Federal Public Prosecution Office, particularly in criminal investigations related to corruption practices and corporate wrongdoings, several hundred collaboration agreements, which have been validated by judicial bodies.

The Federal Public Prosecution Office has fully embraced this flexible and comprehensive model of negotiation. Since the enactment of the Organized Crime Act, it has negotiated and concluded hundreds of collaboration agreements that contain a wide range of innovations and decide on matters that go far beyond those regulated in the statutory provisions. In 2018, it also enacted a formal orientation note supporting the innovations brought about through legal practice.[263] The Brazilian judiciary has also played an important role in the development of this ingenious and elastic system of transactions. According to the Organized Crime Act, as soon as the parties reach a common understanding, the collaboration agreement must be submitted to a court and only becomes valid after the judicial body verifies its regularity.[264] Besides the repeated validation of innovative collaboration agreements, Brazilian courts have, in paradigmatic decisions regarding the limits of the rewarded collaboration regulation, affirmed the legality of the consensual innovations developed by cooperators and the Public Prosecution Office, repeatedly rejecting judicial remedies and petitions presented by other defendants.[265]

Judicial support was essential for the expansion of the room for negotiation designed by the Organized Crime Act and enabled the development of a broad and flexible system of negotiation. The endorsement of the innovative practice of collaboration agreements is frequently based on the concept that the Organized Crime Act has fostered a new model of criminal justice, different from the traditional system of the Brazilian criminal

263 See MPF, Joint Orientation Note 1/2018.

264 Brazilian Organized Crime Act 2013, art 4 § 7. See section I.3.

265 See item I.4.c.ii. For an overview of the case law of the Brazilian Supreme Court regarding collaboration agreements, see André Callegari and Raul Linhares, *Colaboração premiada: lições práticas e teóricas de acordo com a jurisprudência do Supremo Tribunal Federal* (Livraria do Advogado 2019).

procedure. In an important case decided by the Federal Supreme Court, a Justice's opinion affirmed that the rewarded collaboration is part of "a new paradigm of criminal justice, in which the central element is the consent of the participants of the criminal procedure".[266] According to this opinion:[267]

> The legislative regulation of the institute of rewarded collaboration has brought a significant transformation of the criminal scene in Brazil, creating means intended to legitimize and forge, legally, 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.

Other judicial decisions adopted a similar position and correlated the practice of collaboration agreements with the ideal of a new model of criminal justice, in which procedural participants would have broad scope to consensually decide on diverse aspects of criminal proceedings. On multiple occasions, the Federal Public Prosecution Office adopted an analogous stance, stating that collaboration agreements integrate a "system of consensual justice" and should be interpreted according to the "principle of the consensual due process of law".[268]

The practice of collaboration agreements has also gained support in legal scholarship,[269] with some authors arguing that the "rewarded collaboration regulation imposes a reflection on a new model of criminal justice, based on consensus".[270] According to this view, the rewarded collaboration regulation, provided for by the Organized Crime Act, gave rise to new

266 STF, PET 7074 [2017] (Celso de Mello J).

267 STF, PET 7074 [2017] (Celso de Mello J).

268 See also the allegations of the Federal Public Prosecution Office in the following proceedings: STF, PET 7265 [2017] and STF, PET 5779 [2015].

269 For a general defense of the practice of collaboration agreements, see Mendonça (n 36). Also favourably: Fonseca (n 98) 212-215. Different practices are defended in specific articles: Alonso (n 208); Douglas Fischer, 'Em Busca Da Aplicação Correta e Justa Das Penas Perdidas: O Caos Decorrentes de Um Sistema Anacrônico e Repetitivo de "Precedentes-Ementas"' in Américo Bedê Júnior and Gabriel Silveira de Queirós Campos (eds), *Sentença criminal e aplicação da pena: ensaios sobre discricionariedade, individualização e proporcionalidade* (Juspodivm 2017) 195. Presenting a contrary view: Canotilho and Brandão (n 36); Badaró (n 173); Bottino (n 36).

270 Mendonça (n 36) 7.

paradigm in Brazilian criminal law,[271] one based on a contractual system between procedural participants.[272] This model should be interpreted as having its own operating form, grounded on the principles of individual autonomy, efficiency, honesty and good faith.[273] Another principle commonly indicated as paramount for the proper functioning of collaboration agreements is the protection of legitimate expectations and legal certainty,[274] leading to the application of the "venire contra factum proprium" doctrine,[275] which prevents a party from adopting a behavior that contradicts previous acts on which the co-contracting agent has relied.[276]

The expansion of the scope for negotiation in collaboration agreements is also often based on the experience of other countries with consensual mechanisms in criminal justice, particularly the U.S. model of plea bargaining.[277] In one of the first judicial decisions to accept the practice of

---

271 Márcio Adriano Anselmo, 'Colaboração Premiada Como Novo Paradigma Do Processo Penal Brasileiro', *Estudos em homenagem ao professor Sérgio Moro* (Instituto Memória Editora 2017).

272 Castro (n 89).

273 Mendonça (n 36).

274 For a strong argument in this respect, see Sarmento (n 35) 464–468.

275 Alexandre Morais da Rosa, 'A Aplicação Da Pena Na Justiça Negocia: A Questão Da Vinculação Do Juiz Aos Temos Da Delação', *Sentença criminal e aplicação da pena: ensaios sobre discricionariedade, individualização e proporcionalidade* (Juspodivm 2017) 72.

276 The "venire contra factum proprium" doctrine is a classic principle of Roman private law and is still mentioned in various legal debates today, especially in relation to questions of abuse of rights. See Bénédicte Fauvarque-Cosson and others, *European Contract Law: Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*. See: Bénédicte Fauvarque-Cosson and Denis Mazeaud (Sellier European Law Publishers 2009); Antonio Gambaro, 'Abuse of Rights in Civil Law Tradition' (1995) 3 European Review of Private Law 561. For a German perspective, see: Hans Josef Wieling, 'Venire Contra Factum Proprium Und Verschulden Gegen Sich Selbst' (1976) 176 Archiv für die civilistische Praxis 334.

277 There are frequent references in Brazilian legal literature to the practices implemented in the United States and Italy. See Márcio Barra Lima, 'A Colaboração Premiada Como Instrumento Constitucionalmente Legítimo de Auxílio à Atividade Estatal de Persecução Criminal' in Bruno Calabrich, Douglas Fischer and Eduardo Pelella (eds), *Garantismo penal integral: questões penais e processuais, criminalidade moderna e a aplicação do modelo garantista no Brasil* (Juspodivm 2013); Antonio Sergio Peixoto Marques, 'A Colaboração Premiada: Um Braço Da Justiça Penal Negociada' (2014) 10 Revista Magister de Direito Penal e Processual Penal 32. For a critical opinion on the attempt to bring rewarded collaboration close to the U.S. system of plea bargaining, see: Badaró (n 173); Cavali (n 36); Canotilho and Brandão (n 36).

flexible negotiations between cooperating defendants and law enforcement authorities, it was stated that the innovations created in such agreements were legitimate, "either by the incorporation of models of comparative law, where the matter is effectively treated as a negotiation of the right of action, or because the results of more extensive agreements permit better protection of the cooperator and the achievement of justice".[278] The influence of the experience of countries integrated into the common law tradition is often cited to justify the consensual innovations developed by legal practitioners through collaboration agreements.[279]

In this scenario of strong support both from public prosecutors and judicial bodies, the introduction of the 2013 rewarded collaboration regulation unveiled a comprehensive and flexible model of transactions, in which the parties' room for negotiation is not strictly limited by statutory provisions and can be expanded through tailor-made transactions. The notion that collaboration agreements are part of a distinct system of criminal justice, in which parties can resolve different matters through consensual arrangements, informed two recent developments in Brazilian case-law regarding the employment of these mechanisms.

The first concerns the understanding that collaboration agreements concluded by cooperators and public prosecutors at early stages of criminal investigations have a binding effect on judicial decisions at the sentencing stage, assuring that courts abide by the arrangements negotiated by the contracting parties. The second refers to the concept that collaboration agreements are legal transactions that create obligations and rights only for the contracting agents (cooperator and Public Prosecution Office) and do not affect third parties, a position that prevents other accused from questioning before a court the legality of collaboration agreements.

278 TRF4, COR PAR 035046-4 [2009].

279 On this point, a 2017 report of the Federal Public Prosecution Office affirmed: "All this legal framework, which intensifies and favors a consensual environment, brings innovations that also affect the way in which state prosecution operates and imposes a new comprehension of the legal order, to adapt it to new paradigms, adopted by the influence of the common law systems of the Anglo-Saxon law". See Ministério Público Federal, 'Estudo Técnico nº 01/2017' (Brasília 2017) <http://www.mpf.mp.br/atuacao-tematica/ccr5/coordenacao/grupos-de-trabalho/comissao-leniencia-colaboracao-premiada/docs/Estudo Tecnico 01-2017.pdf> accessed 30 May 2019, 34.

i. The binding effect of collaboration agreements: pacta sunt servanda in criminal procedure

One of the main innovations in the Brazilian practice of rewarded collaboration was the adoption of a negotiation model in which the defendant, through the conclusion of a single agreement at an early stage of the criminal investigation, can obtain a precise and unified penalty that encompasses various offenses described in the cooperation report. In this type of arrangement, the cooperator and the Public Prosecution Office precisely establish, through a written agreement, the imprisonment penalties – including the detention regimes – for all criminal charges faced by the cooperator.

Although this model of transaction is not provided for in the text of the Organized Crime Act, Brazilian courts have repeatedly validated it, providing decisive support for the practice of collaboration agreements by understanding that these arrangements have a binding effect upon judicial bodies.[280] This position created a secure negotiation environment for cooperators and public prosecutors, who could be confident that the tailor-made agreements – with their ingenious solutions and innovative provisions – would be honored in the future by the courts responsible for deciding on the verdict and the sentence of the cooperator. The judicial reasoning on this matter closely resembles the contract law principle of "*pacta sunt servanda*", according to which a consensual arrangement is "the law of the parties",[281] who are bound to comply with the contractual duties once the other contracting party fulfils his obligation.[282]

In this regard, the Federal Supreme Court has ruled, in one of its central decisions on the matter, that

> "the principles of legal certainty and the protection of trust render indeclinable the State's duty to honor the commitment assumed in the collaboration agreement, granting the negotiated benefits and the stipulated penalty, as a legitimate consideration for the performance of the cooperator's obligation".[283]

---

280 See STF, HC 127483 [2015] and STF, PET 7074 [2017].
281 Fauvarque-Cosson and others (n 276) 461.
282 Basil S Markesinis, Hannes Unberath and Angus Johnston, *The German Law of Contract : A Comparative Treatise* (2nd edn, Hart Publishing 2006) 263.
283 STF, HC 127483 [2015].

According to this decision, if the cooperative behavior produces effective results, the cooperator has a subjective right to the benefits established in the agreement and may demand judicially the fulfillment of the state's obligation.[284]

Similarly, in an opinion issued on another relevant case analyzed by the Federal Supreme Court, it was affirmed that "the competent judicial body, in the final judgment of the criminal case, must respect what has been established in the agreement, once the cooperating agent has complied with the terms defined in the legal transaction".[285] On the same occasion, it was affirmed that the content of the collaboration agreement is an issue to be decided consensually between the defendant and the law enforcement authorities, while the judiciary must not intrude in the parties' legitimate choices.[286] The final decision of the Federal Supreme Court on the matter affirmed that "the subjective right of the cooperating defendant arises insofar as he fulfills his duties" and that "the agreement homologated as regular, voluntary and legal engenders a binding effect, that is conditional on the fulfillment of the duties assumed by the cooperating defendant".[287]

This position has also gained wide support in legal scholarship. In this regard, it has been stated that failure to grant the benefits established in the agreement would be unfair conduct from the state, in view of the cooperative behavior adopted by the defendant.[288] According to this view, once the obligations assumed by the offender are fulfilled, the court is

284 ibid.

285 STF, PET 7074 [2017] (Celso de Mello J).

286 STF, PET 7074 [2017] (Moraes J).

287 See the summary of the decision released by the Brazilian Federal Supreme Court: STF, ´Informativo 870´ (June 2017) <http://www.stf.jus.br/arquivo/informativo/documento/informativo870.htm> accessed 30 May 2019, 34.
STF, Info 870, Brasília, 19 a 30 de junho de 2017 Nº 870, Data de divulgação: 7 de julho de 2017

288 From the analysis of the Federal Supreme Court's case law, Pierpaolo Bottini argues that, in the field of rewarded collaboration, the judge's remit is limited to assessing the "effectiveness" of the assistance offered by the collaborator, and that, once the agreement is fulfilled, the collaborator has a subjective right to the benefits. See Pierpaolo Cruz Bottini, 'A Homologação e a Sentença Na Colaboração Premiada Na Ótica Do STF' in Maria Thereza de Assis Moura and Pierpaolo Cruz Bottini (eds), *Colaboração premiada* (Revista dos Tribunais 2017) 194-195. In the same vein: Renato Brasileiro de Lima, *Legislação Criminal Especial Comentada* (Juspodivm 2016) 735.

obliged to grant the agreed benefits,[289] otherwise there would be no legal certainty in the transaction.[290] In the scope of negotiated justice, the definition of the agreement's content should be left solely to the parties, while the judge should respect in full the terms of the negotiation.[291]

ii. The principle of "res inter alios acta" and the prohibition of legal challenges by third parties

Another jurisprudential development of great significance for the practice of rewarded collaboration was the understanding that collaboration agreements are legal transactions concluded by the cooperator and the law enforcement authorities, which do not affect third parties. According to this position, the effects of collaboration agreements are restricted to the legal spheres of the signatory parties, and only they have the right to challenge before a court the legality of a collaboration agreement. Based on this argument, Brazilian courts have repeatedly declined to examine judicial appeals presented by other defendants, accused of committing crimes by the cooperator, that challenged some aspects of collaboration agreements.[292]

In one of the main decisions on the subject,[293] the Federal Supreme Court affirmed that "the collaboration agreement, as a legal transaction of a personal nature, does not bind a defendant accused by the cooperator and does not directly affect his legal sphere: res inter alios acta".[294] For

289 Douglas Fischer claims that the possibility of the judge analyzing the intensity of the benefits offered to the collaborator, in a collaboration agreement, is "absolutely impertinent, inappropriate and contrary to the legal system". According to the author, only if the collaborator provides assistance that is inferior to what was stipulated by the agreement, can the judge reduce the agreed benefits. See Fischer (n 269) 194-195.

290 Cleber Masson and Vinícius Marçal state that, in case the collaborator fulfills all the negotiated obligations, the judge is bound by the terms of the agreement, "because, otherwise, 'the notion of cooperative procedure would be empty and there would be an undesirable atmosphere of legal uncertainty in the use of the institute (…)'". See Masson and Marçal (n 133) 219.

291 Fonseca (n 98) 125.

292 In this respect, see different ruling from the Superior Court of Justice: STJ, HC 392452 AgInt [2017]; STJ, RHC 69988 [2016]; STJ, RHC 68542 [2016]; STJ, APn 843 AgRg [2016].

293 STF, HC 127483 [2015]. This ruling is often mentioned as an important in Brazilian case law. See e.g. STF, PET 5885 AgR [2016]; STF INQ 4405 AgR [2018]; and STJ, RHC 43776 [2017].

294 STF, HC 127483 [2015].

these reasons, "the collaboration agreement cannot be challenged by the cooperator's accomplices in the criminal organization and in the committed offenses, even if they are explicitly named in the cooperation report".[295] According to the decision, a collaboration agreement is essentially a bilateral transaction that does not itself interfere in the rights of other defendants, who may defend themselves by "crosschecking, in court, the report on relevant facts made by the cooperator and the evidence brought by him". [296]

This decision of the Federal Supreme Court addressed collaboration agreements within the traditional framework of private contract law and applied explicitly the *res inter alios acta* principle, according to which a third party cannot interfere in agreements they have not concluded.[297]

The ruling provided the basis for several judicial decisions that repeatedly denied accused the right to question before a court the legality of a collaboration agreement concluded by a cooperating defendant. In this regard, the Brazilian Superior Court of Justice decided that a collaboration agreement "generates rights and obligations only for the signing parties, in no way interfering in the legal sphere of third parties, even if they are referred to in the cooperator's report".[298] Another decision affirmed that a collaboration agreement "does not by itself affect the rights of third parties, who lack a legal interest to question the legality of the arrangement". [299] A third ruling decided that "in a collaboration agreement, there

295 ibid.
296 ibid.
297 The *res inter alios acta* principle is long-standing in private contract law, both in common law and civil law countries. On this concept Herbert F. Goodrich notes: "No one disputes the soundness of the general proposition that to recover for the consequences of a negligent act the plaintiff must be one to whom the actor owed a duty to be careful. (…) Subject to exceptions not important here, C, a stranger to the contract, gains no rights from it. That transaction is as to him *res inter alios acta*". See Herbert F Goodrich, 'Privity of Contract and Tort Liability' (1922) 21 Michigan Law Review 200, 200. Similarly, Weir asserts that "third persons under the common law system cannot claim rights, in the ordinary case, under contracts to which they were not parties and with respect to which they gave no consideration". See JA Weir, 'Contract - Rights of Third Persons under Contracts to Which They Are Not Parties' (1943) 5 Alberta Law Quarterly 77. For an analysis of the principle in Brazilian private law, see Otavio Luiz Rodrigues Junior, 'A doutrina do terceiro cúmplice: autonomia da vontade, o princípio res inter alios acta, função social do contrato e a interferência alheia na execução dos negócios jurídicos' (2004) 821 Revista dos Tribunais 80.
298 STJ, RHC 68542 [2016].
299 STJ, RHC 69988 [2016].

is no provision that affects the interests of third parties" and, therefore, an accused has no right to contest an agreement concluded by a cooperator and public prosecutors.[300]

According to this position, only the contracting parties – the Public Prosecution Office and the cooperator – can discuss judicially the arrangements they have negotiated. Other defendants, whose acts have been reported by the cooperator, have the right to refute at trial the allegations and cross-examine the evidence, but may not submit judicial appeals to question the regularity of the collaboration agreement. The application of the *res inter alios acta* principle protects collaboration agreements from legal challenges filed by defendants accused by the cooperator of criminal behavior, preventing more intense judicial scrutiny of the practice of the rewarded collaboration regulation and fostering a negotiation-friendly environment.

5. Conclusion: a contractualist approach to collaboration agreements

Until recently, negotiations between defendants and law enforcement authorities played a minor role in Brazilian criminal justice. In 1995, the Small Claims Act introduced possibilities for the resolution of criminal proceedings through negotiated solutions, but limited the employment of these mechanisms to cases related to minor offenses. Besides these possibilities, Brazilian law did not establish other legitimate space for negotiation between procedural participants, and the traditional model of official investigation remained the normal reality. The introduction of leniency policies by the Competition Act and especially by the Organized Crime Act changed this scenario. Over recent years, the negotiation of antitrust leniency agreements and collaboration agreements has become a common feature of the Brazilian justice system, particularly in the prosecution of corporate wrongdoing and acts of corruption.

According to the text of both statutes, the terms of exchange in these negotiations are quite simple: defendants assist enforcement authorities in the investigation of other agents and receive in return a reduction – partial or full – of penalties. The practice of collaboration agreements, however, has evolved in a highly distinctive manner. Through collaboration agreements, cooperating defendants and public prosecutors have designed original clauses, set up sophisticated solutions and expanded the negotiation fo-

300 STF, INQ 4619 AgR [2018].

rum well beyond its statutory limits. As an extensive body of cases indicates, legal practitioners drew on the communication forum engendered by the Organized Crime Act to develop a flexible and comprehensive system of arrangements and devise striking innovations.

This unexpected development received strong support from public authorities. The Federal Public Prosecution Office defended this system of negotiation on multiple occasions and enacted, in 2018, an orientation note that endorsed the innovations forged through the practice of collaboration agreements. The Brazilian judiciary, led by the Federal Supreme Court, repeatedly validated ingenious agreements and, in crucial disputes, affirmed the legality of the inventive employment of the rewarded collaboration regulation.

This solid judicial support was often based on the notion that collaboration agreements are part of a distinct system of criminal justice, one with a different rationale and different foundations from the traditional Brazilian criminal procedure. In this emerging paradigm of "consensual criminal justice", procedural participants would enjoy wide freedom to negotiate over the matters examined in investigations and dispose of criminal cases. According to this view, that could be called a "contractualist approach" to collaboration agreements, concepts and principles usually related to private law become central elements in the application of the rewarded collaboration rules.

Within this context, principles such as individual autonomy, good faith, legal certainty and protection of legitimate expectation are repeatedly used to devise answers to the many questions that arise from legal practice. Traditional doctrines of contract law – such as the rules of "*res inter alios acta*", of "*venire contra factum proprium*", and of "*pacta sunt servanda*" – become frequent interpretative tools in disputes regarding collaboration agreements. Courts ratify important decisions regarding the limits of collaboration agreements with express reference to civil law and to the Code of Civil Procedure. The assimilation of the experience of other countries with consensual mechanisms in criminal procedure, particularly the U.S. system of plea bargaining, is also frequently invoked to validate the novelties brought about by negotiations of collaboration agreements.