CONTROL MEASURES AGAINST CORRUPTION IN BRAZIL[1]

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1. Regulation of corruption crimes in the Penal Code

The brazilian Penal Code (hereinafter CP) describes the corruption crimes into two autonomous types: on the one hand, he characterized the crime of passive corruption (art. 317 CP) in "Title XI, chapter I, which deals with "crimes committed by public officers against the general administration". On the other hand, the crime of active corruption (art. 333 CP) in "Chapter II, which deals with "crimes practiced in particular against the administration in general ".

It is necessary to point out that, although the Penal Code accepted, as a rule, the monist theory, it creates, in relation to certain crimes, some exceptions in favor of the pluralist theory, as it occurs precisely in relation to the crimes of corruption. So, for a single fact of corruption, if the public officer "receives", for himself or for others, directly or indirectly, an undue advantage, or accepts the promise of such an advantage, there is a crime of necessary bilateral participation of several subjects in which each active subject responds for a different crime: the corrupt officer (*intraneus*) who receives the undue advantage responds as

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perpetrator of the crime of passive corruption (art. 317 CP), while the private person (*extraneus*) that corrupts the employee and offers him or promises an undue advantage, to determine him to practice, omit or delay an *sua sponte action*, responds as the actor of crime of active corruption (art. 333 CP).

However, it may happen that the employee refuses the offer or undue promise, when there will only be a crime of active corruption (art. 333 CP). And if the public officer takes the initiative and performs the conduct of "asking" for himself or for others, directly or indirectly, an undue advantage – regardless of whether the individual accepts or refuses to deliver an undefined advantage – will be held responsible only for a crime of passive corruption. (art. 317 CP), because in this case: a) the *intraneus* conduct of "requesting" an undue advantage denotes that he is already corrupted; b) in addition, the penal type of art. 333 CP does not describe the conduct of handing over or giving undue advantage to a public officer[3].

The Penal Code also punish the crime of privileged corruption (paragraph 2 art. 317 CP). It is an crime autonomous (*sui generis*) in relation to the basic form of passive corruption provided for in the *caput* of art. 317 CP, considering that the civil servant does not seek any undue advantage, but stops practicing or delays an *sua sponte action*, with a breach of functional duty, yielding to the request or influence of others.

It is also worth mentioning that the special legislation also punishes other forms of corruption (active or passive) that occur in other specific areas, such as: a) tax (article 3, subsection II, of Act n. 8.137/1990, which defines crimes against the tax, economic and consumer relations); b) electoral (article 299 Act n. 4.737/65 - Electoral Code); c) sports competitions (art. 41-C Act n. 12.299/2010); d) international commercial transactions (art. 337 – B CP)[4].

Finally, it is necessary to point out that in Brazil there is no crime of corruption between private individuals. Thus, cases of corruption in football such as those that occurred in 2015, in the so-called FIFA-GATE, would go unpunished. However, the New Penal Code Project (Senate Bill n. 236/2012) describes the

[3] GONÇALVES, Victor Eduardo Rios. Direito Penal esquematizado: Parte Especial – 6ª ed. – São Paulo: Saraiva, 2016, p.837.

[4] GONÇALVES, Victor Eduardo Rios. Direito Penal, op. cit., p.802 e 839.

crime of corruption among private individuals, thus aligning itself with other European Union countries (Italy, Spain, France, Germany, and England), which have already punish such crime, in line with the guidelines of the Foreign Corrupt Practices Act (FCPA) of 1977, of the UN Convention on Combating Corruption, of 2009, as well as of the *Bribery Act* of 2010, which advocate, at a global level, the punishment of bribery in the private sphere.

A comparison between the two basic types of corruption provided for in the CP reveals that while the law in relation to the crime of *passive* corruption (art. 333 CP) expressly describes as its constitutive element "*act of office*", in turn, the type law of the crime of *active* corruption (art. 317 CP) does not require such an elementary circumstance of the crime. An "*sua sponte action*" is understood to be one that falls within the scope of the civil servant's functional duties.

The Supreme Federal Court (henceforth STF), since the trial of AP 470-MG, in the widespread case called "Mensalão – scheme of payment of undue advantage to parliamentarians to form an "ally base" to the federal government in the Chamber of Deputies – changed its judicial precedents and started to consider that the "*sua sponte action*" is not an elementary circumstance of the crime of passive corruption (article 317 CP), but only one cause of increase of the penalty (§ 1º of the same legal provision). Therefore, for the consummation of this crime, it is sufficient to request or receive an unlawful advantage due to the civil service, and the subsequent practice of *sua sponte action* is irrelevant. For the attribution of the passive corruption crime, it is not necessary to describe a specific "*sua sponte action*", the causal link between the offer (or promise) of undue advantage (payment of bribes) and the duties of the public officer being sufficient, acting the public officer no longer in the public interest, but in favor of your personal interests[5].

2. The brazilian anti-corruption Act

The Anti-Corruption Act n. 12.846, of 8/1/2013, hereinafter LAC, has the structural objectives of controlling the acts of corruption committed by legal entities within the scope of the Public Power, in Brazilian territory or abroad,

[5]AP 470, MG, rel. Min. Joaquim Barbosa, j. 17/12/2012; AP 694/MT, rel. Min. Rosa Weber, 1a. T., j. 02/05/2017; AO 2057/RN, rel. Min. Luiz Fux, 1a. T., j. 02/10/2018; Inq 4506/DF, rel. Min. Marco Aurélio, rel. Min. Roberto Barroso, 1a. T., j. 17/04/2018.

establishing systems and requirements administrative and civil liability, their respective sanctions, rules on compliance programs and the leniency agreement.

LAC is applicable to a wide range of legal entities: corporate or simple companies, personified or not, regardless of the form of organization or corporate model adopted, foundations, associations of entities or persons, foreign companies, which have their headquarters, branch or representation in the territory Brazilian, constituted in fact or by law, even if temporarily (sole paragraph art. 1 LAC).

2.1. Liability systems

The liability system is cumulative: the liability of the legal entity does not exclude the individual liability of its directors or administrators or of any natural person, perpetrators or accomplices in the illegal act (art. 3 LAC).

The anti-corruption Act provides for two types of liability for legal entities, which correspond to two types of processes for investigating their harmful acts and applying sanctions that complement each other.

2.1.1. Administrative liability

First, the legislation establishes an administrative process with punitive sanctions for activities corruptives that are harmful to the State (art. 5 of the LAC), whose purpose is the protection of the legal good represented by the damage to the principles of public administration: morality and probity of the State (articles 6, 7 and 8. LAC).

The competence to initiate and judge the Administrative Accountability Process - PAR of the legal entity lies with the maximum authority of each body or entity of the Executive, Legislative and Judiciary Powers, that is, it is the maximum authority of the entity against which it was committed the harmful act, or, in the case of a direct administration body, of its Minister of State (art. 8º. LAC and art. 3º of Decree n. 8420/2015).

The *administrative liability* of legal entities follows the strict liability criterion, regardless of the proof of subjective liability in relation to the corrupt activity of the legal entity or individual[6].

[6] COSTÓDIO FILHO, Ubirajara e ANACLETO ABDUCH SANTOS, José. In VV. AA. Comentários à Lei 12.846/2013 – 2a. ed.: São Paulo: RT, 2015, p. 89 e 206.

It is sufficient to prove the company's corruptive harmful act and the causal link among the act and the harmful result to the public administration, even if it is not possible to identify the individual. The corporation objectively assumes administrative responsibility and its civil effects (compensation) for its lack of organizational capacity in compliance with the legislation.

Article 5 LAC defines a detailed series of harmful acts to public administration, national or foreign, practiced by legal entities that violate national or foreign public assets, principles of public administration or international commitments assumed by Brazil.

The administrative proceeding has a punitive nature, requiring, therefore, the observance of numerous criminal and procedural guarantees: a) principle of legality (*nullum crimen sine lege*) and prohibition of analogy in relation to the harmful acts provided for in the list of art. 5th LAC; b) due process of law: right to contradictory and broad defense (art. 8, in fine, LAC); c) right to evidence; d) standard of proof that requires overcoming any reasonable doubt; e) individualization of penalties in accordance with the principles of reasonableness and impartiality; f) the right to appeal to the Judiciary against the decision on the merits; g) principle of jurisdictionality of evidentiary precautionary orders: the administrative authority does not have the power to directly carry out that measures necessary for the investigation and processing of infractions, so that the processing commission must request the Judge to seek and seizure of documents held by the legal entity or the unavailability of assets, rights or values of the legal entity for civil reimbursement to public coffers (§ 1 art. 10 LAC)[7].

The punitive administrative responsibility of companies for illicit acts damaging corruption depends on the demonstration of three requirements: a) proactive conduct by the legal entity in carrying out corrupt acts, even if these have been committed by third parties who are not part of its staff; b) agreement or receptivity to the practice of illegal acts of corruption, even if extorted by public officers, it is not appropriate to claim irresistible moral coercion; c) practiced in your interest or benefit, exclusive or not, direct or indirect, sought (even if frustrated) or obtained,

[7] See CARVALHOSA, Modesto. Considerações sobre a Lei Anticorrupção das Pessoas Jurídicas. São Paulo: Revista dos Tribunais, 2014, p.355-357.

for yourself or for another legal entity, in the face of the Public Power (art. 2º LAC)[8].

LAC establishes the direct and isolated liability of the legal entity, completely unrelated to that of its administrators (individuals) and third parties as to the criminal, administrative-sanctioning and civil effects with respect to the harmful acts of corruption (art. 3º). The anti-corruption Act does not apply to corrupt public officers, but the liability provided for in other special criminal Acts. Thus, only the legal person is the active subject of the corrupt act and not its officers, managers and employees or third parties. Individuals respond in the criminal and civil spheres, at the initiative of the MP or any legitimate interested party, and not within the scope of the administrative process. Therefore, LAC does not require double imputation[9], requirement also removed by STF judicial precedents in relation to environmental crimes[10].

The corporations convicted in the administrative proceeding are subject to two punitive sanctions: a) fine and b) publication of the conviction sentence.

The administrative punitive fine (subsection I art. 6º LAC) is the main sanction applicable to the legal entity. The amount of the fine is not directly related to the damage caused to the State by the corrupt activity, but rather based on the criterion of 0.1% up to 20% on the company's annual gross revenue. This criterion can be replaced by another one consisting of a monetary value set by the administrative authority decision-maker (§ 4º. LAC). The civil reimbursement will occur in a subsequent judicial proceeding by filing a public civil action.

Art. 7 LAC states other complementary criteria in the application of sanctions that act as mitigating factors for the penalty, such as the seriousness of the infraction; the advantage obtained or intended by the lawbreakers; the cooperation of the legal entity for the investigation of violations; the existence of internal compliance programs, auditing and encouraging the reporting of irregularities and the effective application of codes of ethics and conduct within the scope of the legal entity, among others.

[8] CARVALHOSA, Modesto. Considerações..., *op.cit*., p.52-54.
[9] CARVALHOSA, Modesto. Considerações..., *op.cit*., p.65 e ss. e 186 e ss.
[10] RE 548181/PR, 1ª. T., STF, rel. Min. Rosa Weber, j. 06/08/2013.

2.1.2. Judicial civil liability

Second, the LAC provides for *judicial civil liability* of the legal entity as a necessary effect of administrative punishment. No question concerning administrative punishment can be discussed again in the context of public civil action. The conviction of the legal entity in the punitive administrative process has the effect of its judicial liability in the civil sphere for indemnity for the damages to its tutelary image of the public good through public civil action. The moral damage caused to the State consists of the breach of State administrative morality. The State is hit in its objective honor, in addition to the material damage to the public coffers[11]. Administrative condemnation for corrupt conduct is sufficient to generate, within the scope of public civil action, the imposition of civil liability for the repair of damages, and other civil sanctions provided for in art. 19 LAC: a) loss of assets, rights or values that represent a direct or indirect advantage or profit from the corruptive activity; b) the partial suspension or interdiction of its activities; c) the compulsory dissolution of the legal entity; d) the prohibition on receiving incentives, subsidies, grants, donations or loans from public bodies or entities and from public or controlled financial institutions, for a minimum period of 1 and a maximum of 5 years.

The civil liability object of the public civil action is objective based on the risk created and has a non-contractual nature, for violating the duty of non-corruptive conduct vis-à-vis the Public Power, which may be: a) direct or by its own act; b) indirect or due to a third party.

Direct or self-responsibility results from the attribution of conduct by the individual that is part of its (i) internal bodies: generally designated by its statutes or contracts, responding, in this case, directly by the legal entity's own act and will, or its (ii) representatives: people who are not members of any body of the legal entity, but who are in charge of carrying out the orders of the decision-making bodies and the resolutions of the deliberative bodies. They can be individuals with employment or people who are not part of the corporate body, but with powers of representation. In this case, the acts performed by the

[11] CARVALHOSA, Modesto. Considerações..., *op.cit*., p.394 e ss. e 406 e ss.

representative are equivalent to acts specific to the legal entity (responsibility for its own act).

If not, that is, without powers of representation, the responsibility will be *indirect* or due to the fact of a third party (subjective), which depends on the demonstration of intent/negligence of the employee or agent. There will be strict liability for the fact of a third party between controlling, affiliated and consortium companies (art. 4, § 2 LAC)[12].

The extent of the civil damages suffered by the Public Power resulting from the crime of corruption will be determined in the administrative administrative procedure (art. 13 LAC) and have a different nature from the advantage or benefit intended or achieved by the legal entity with the corrupt activity.

The judge, when fixing the moral reparation, must take into account the magnitude of the damage caused to the State's image according to its repercussion (Municipality, Member State or Union), dimension (involvement of higher political, administrative and judicial agents) and the effect of duration in collectivity and public opinion.

The competent authority that, having knowledge of the infractions foreseen in this Act, does not take measures to determine the facts will be held criminally, civilly and administratively responsible under the terms of the applicable specific legislation (art. 27 of the LAC).

If the competent authorities omit to promote administrative accountability, the MP may act as a procedural substitute in the administrative criminal proceedings itself, applying the sanctions provided for in art. 6 LAC, without prejudice to the civil sanctions provided for in art. 19 LAC[13].

The art. 4 LAC provides for the transfer of responsibility between legal entities involved in transformation, incorporation, merger or division operations. The legislator establishes limitations on the successor's liability up to the limit of the

[12] COSTÓDIO FILHO, Ubirajara. In VV. AA. Comentários à Lei 12.846/2013 – 2ª. ed.: São Paulo: RT, 2015, p.62 e 88 e ss.; CARVALHOSA, Modesto. Considerações..., op.cit., p.394 e ss. e 405 e ss.

[13] CARVALHOSA, Modesto. Considerações..., op.cit., p.418. Some author considers that if the administrative authority omits and does not initiate the administrative procedure, the MP may, in the public civil action, postulate the compensation of the damages caused to the Administration as the application of the administrative sanctions of art. 6 LAC (BITTENCOURT, Sidney. Comentários à Lei Anticorrupção: Lei 12.846 - 2a. ed. - São Paulo: RT, 2015, p.170).

transferred assets; the inapplicability of other sanctions for acts and facts that occurred before the date of the merger or incorporation, except in the case of simulation or evident intention of fraud, duly proven, hypotheses in which the liability is not objective, but depends on proof of guilt (§ 1 art. 4 LAC)

The joint and several liability of the controlling, affiliated or consortium companies – within the scope of the respective contract – is restricted to the payment of a fine and full compensation for the damage caused (§ 2 art. 4 LAC).

2.2. Compliance programs

The existence of internal "*integrity*" programs and mechanisms ('compliance programs') (art. 7, subsection VIII and its sole paragraph, art. 16 LAC, and art. 41 Decree n. 8.420/2015, of 03/18/2015, audit and incentive to report irregularities and the effective application of codes of ethics and conduct within the scope of the legal entity, will be taken into account to mitigate the sanctions applicable to corporations. The integrity program will be evaluated, regarding its existence and application, according to a series of parameters provided for in art. 42 of Decree n. 8.420/2015).

3. The leniency agreement

The "*leniency agreement*" consists of a collaboration pact, signed between the administrative administrative authority and the legal entity that has effectively collaborated with the investigations and the administrative process, through which the promise of exemption from the legal entity to submit to the sanctions for publication of the conviction sentence (subsection II art. 6) and the prohibition on receiving incentives, subsidies, subsidies, donations or loans from public bodies or entities and from public or controlled financial institutions, for the term minimum of 1 and maximum of 5 years (subsection IV art. 19), and a reduction of up to 2/3 of the applicable fine (§ 2 art. 16 LAC). However, the leniency agreement does not exempt the legal entity from the obligation to fully repair the damage caused (§ 3 art. 16 LAC)[14].

The Comptroller General of the Union Office (CGU) is the agency that has exclusive competence in the Federal Executive Branch to conclude leniency agreements with companies investigated for harmful acts against the Public

[14] CARVALHOSA, Modesto. Considerações..., op.cit., p.370-372.

Administration, pursuant to (§ 10 art. 16 LAC and Joint Ordinance n° 4, of 08/09/2019 from CGU and Advocacia-Geral da União, from 08/01/2013.

The Federal Prosecutor Office does not have the competence to make leniency agreements with companies, since it has no legitimacy to have public funds. The agreement eventually signed by the federal prosecutor will only come into force if the CGU ratifies it[15].

3.1. Requirements

The leniency agreement may be made with the legal entities responsible for the practice of harmful acts of corruption, provided that they effectively collaborate with the investigations and the administrative process, with the result that: a) the identification of the others involved in the infringement, when fit; b) the speedy obtaining of information and documents that prove the illegal under investigation.

In addition, the leniency agreement can only be entered into if the following requirements are cumulatively met: a) the legal entity is the first to express its interest in cooperating in the investigation of the illegal act; b) completely cease their involvement in the investigated infraction as of the date the agreement was filed; c) admit their participation in the crime and cooperate fully and permanently with the investigations and the administrative process, appearing, at their expense, whenever requested, to all procedural acts, until their closure (art. 16 *caput* and § 1 LAC); d) compensate for the financial damage and commit to implementing or improving compliance programs.

3.2. Effects

The signing of the leniency agreement at LAC: a) will exempt the legal entity from the sanctions of extraordinary publication of the conviction sentence and from the prohibition on receiving incentives, subsidies, grants, donations or loans from public bodies or entities and from public or controlled financial institutions. public authority, for a minimum term of 1 and a maximum term of 5 years; b) it will reduce by up to 2/3 the amount of the applicable fine (2 art. 16 LAC).

[15] TRF4, 3a. T., AI n. 5023972-66.2017.4.04.0000/PR, rel. Desa. Vânia Hack de Almeida, j. 22/08/2017.

However, the leniency agreement does not release the legal entity from the obligation to fully repair the damage caused (§ 3 art. 16 LAC) .

On the other hand, the leniency agreement will be considered as mitigating the fines and publication of the conviction sentence (subsection VII art. 7 LAC).

4. The cooperation agreement[16]

For decades, Brazilian legislation has allowed the granting to individuals charged with criminal proceedings of certain criminal benefits as a prize for their collaborative work with the police or judicial authorities to the detriment of third parties, as a rule, in the form of "*delation*" with them[17].

The "cooperation agreement" is provided for in the Penal Code, in relation to the crime of extortion through kidnapping (§ 4º. of art. 159 CP), and also in several special Acts dealing with economic-financial and tax crime: § 2º of art. 25 of Act n. 7.492 / 86 (crimes against the national financial system); § 5º of art. 1st. of Act n. 9.613 / 98 (money laundering crime); art. 16, sole paragraph, of Act n. 8.137/90 (crimes against the tax, economic and consumer relations); art. 41 of Act n. 11.343 / 06 (Drug Prevention and Repression Act); art. 13 and 14 of Act n. 9.807/99 (protection for victims and threatened witnesses).

The recent Act n. 13.964/2019 – called "Anticrime Act", included in the art. 28-A of the Criminal Procedure Code (hereinafter CPP) a "*plea-bargain*" for criminal penal justice, the so-called "*non-criminal prosecution agreement*" – also applicable to crimes of corruption when committed outside the context of criminal organizations. This agreement can be proposed and formalized in writing and signed by the MP, the investigated person and his defense attorney, as long as necessary and sufficient for the disapproval and prevention of the crime, if the investigated person formally and circumstantially confesses the practice of a

[16] To express the meaning of the Portuguese term "*acordo de colaboração premiada*", we prefer to use the term "*cooperation agreement*", instead of the terms: "*accomplice witness*" (https://www.law.cornell.edu/wex/accomplice_witness), "*state's evidence*" (Merriam-Webster's. Dictionary of Law, 1996, p.468) or "*witness inducement agreements*". *See generally* Yvette A. Beeman, Accomplice Testimony Under Contingent Plea Agreements, 72 Cornell L. Rev. 800 (1987), available at: http://scholarship.law.cornell.edu/clr/vol72/iss4/5; Hon. H. Lloyd King, Jr., Why prosecutors are permitted to offer witness inducements: a matter of constitutional authority, available at https://www.stetson.edu/law/lawreview/media/why-prosecutors-are-permitted-to-offer-witness-inducements-a-matter-of-constitutional-authority.pdf;Spencer Martinez, Bargaining for Testimony: Bias of Witnesses Who Testify in Exchange for Leniency, 47 Clev. St. L. Rev. 141 (1999) available at https://engagedscholarship.csuohio.edu/clevstlrev/vol47/iss2/3.

[17] GOMES CANOTILHO, J. J./BRANDÃO, Nuno. Colaboração Premiada..., op.cit., p.21.

crime or misdemeanor without violence or serious threat and with a minimum penalty of less than 4 years, subject to the following cumulatively and alternatively adjusted conditions: a) repairing the damage or restoring the thing to the victim, except in the impossibility of doing so; b) voluntarily renouncing assets and rights indicated by the MP as instruments, proceeds or proceeds of the crime; c) provide service to the community or public entities for a period corresponding to the minimum penalty imposed on the crime reduced by one to two thirds, in a place to be indicated by the enforcement court, in the form of art. 46 Penal Code; d) pay cash benefits, to be stipulated under the terms of art. 45 CP, the public or social interest entity, to be appointed by the enforcement court, whose preferential function is to protect legal assets equal to or similar to those apparently injured by the offense; or e) comply, for a determined period, with another condition indicated by the MP, provided it is proportional and compatible with the attributed criminal offense.

For the approval of the agreement, a hearing will be held in which the judge must verify his/her willingness – through the hearing of the investigated in the presence of his/her defense attorney – and its legality (§ 3 and 4 art. 28-A CPP). If the judge considers the conditions set out in the non-criminal prosecution agreement to be inadequate, insufficient or abusive, he will return the case file to the Public Prosecutor's Office to reformulate the proposed agreement, with the settlement of the investigated and his defense attorney. The judge may refuse to ratify the proposal that does not meet the legal requirements or when the adequacy is not carried out (§ 5 and 7 art. 28-A CPP). Complied with the agreement fully, the competent court will decree the extinction of punishment (§ 13 art. 28-A CPP).

[This article will only address the main aspects of the cooperation agreement provided in art. 3-A, of Act n. 12.850/2013 (hereinafter LOC), which regulates the investigation of crimes committed by criminal organizations.

The cooperation agreement provided for in the LOC is the State's proposal to the accused person of the concession of certain criminal or criminal procedural advantages consisting of impunity or mitigation of criminal liability in exchange

for useful evidence for the investigation and disclosure of facts and persons related to the criminal organization to which it belongs[18].

4.1. Forms

LOC provides for two modalities of an cooperation agreement: a) pre-sentence, which can be signed prior to the offer of the prosecutor's information, and b) post-sentence, later until the moment of the judgement being issued (art. 4 §§ 1st to 4th LOC).

If the collaboration is after the sentence, the penalty may be reduced to half or an improvement of the inprisonment regime will be admitted even if the objective requirements are absent (§ 5 art. 4º LOC).

4.2. Requirements, conditions and effects

The term of cooperation agreement must be made in writing and contain: a) the report of the collaboration and its possible results; b) the conditions of the proposal of the MP or by the chief police officer; c) the declaration of acceptance of the collaborator and his defense attorney; d) the signatures of the MP representative or the chief police officer, the collaborator and his defense attorney; e) the specification of the protection measures for the collaborator and his family, when necessary (art. 6º LOC).

In the cooperation agreement, the collaborator must narrate all the illicit facts for which he concurred and which are directly related to the investigated facts (art. 3-C. § 3 LOC).

The cooperation agreement proposal must be accompanied by a letter of attorney of the interested party with specific powers to initiate the collaboration procedure and its dealings, or signed personally by the party seeking the collaboration and its defense attorney or public defender (art. 3-C LOC).

The recording of negotiations and collaborative acts must be made by means or resources of magnetic, stenotype, digital or similar recording techniques, including audiovisual, aimed at obtaining greater fidelity of information (art. 3 -C § 13 LOC).

The request for approval of the agreement will be confidentially distributed, containing only information that cannot identify the collaborator and his object

[18] GOMES CANOTILHO, J. J./BRANDÃO, Nuno. Colaboração Premiada..., op.cit., p.23.

and will be addressed directly to the Judge, who will decide within 48 hours (art. 7, *caput* and §1 LOC).

If there is no summary rejection, the parties must sign a Confidentiality Term to continue the negotiations, which will bind the bodies involved in the negotiation and prevent the subsequent rejection without just cause (§ 2 of art. 3-B LOC).

The receipt of the proposal to formalize a cooperation agreement marks the beginning of negotiations and also constitutes a mark of confidentiality, constituting a breach of confidentiality and breach of trust and good faith, the disclosure of such initial negotiations or of a document that formalizes them, until the lifting of secrecy by judicial decision (art. 3-B, caput, LOC).

The cooperation agreement and the collaborator's statements will be kept confidential until the receipt of the information or criminal complaint (§ 3 of art. 7º LOC).

Access to the case file will be restricted to the judge, the MP and the chief police officer, as a way of guaranteeing the success of the investigations, ensuring the defense attorney, in the interest of the represented, ample access to the evidence relating to the exercise of the right of defense, duly preceded by judicial authorization, except for those related to ongoing proceedings (§ 2 of art. 7º LOC). Therefore, the defense counsel does not have unrestricted access to all statements made, but only to the evidence resulting from the cooperation agreement that concerns him in the exercise of his right of defense. The STF's case law, based on statement 14 of its binding judicial precedent, has been ensuring that the person reported by a judge, in terms of a cooperation agreement, has the right of access to all the evidence already documented in the records of the collaboration agreements, including the audiovisual recordings of the acts of collaboration of codefendant, with the scope of confronting them, and not to challenge the terms of the agreements themselves, provided that two requirements are present: a) the act of collaboration must point out the applicant's criminal responsibility; b) the act of collaboration should not refer to the diligence in progress[19].

[19] Rcl 21.258 AgR) (Rcl 30742 AgR/SP, 2ª. T., STF, rel. Min. Ricardo Lewandowski, j. 04/2/2020; See also the PET 6.601 e 7.356, 2ª. T., STF, rel. Min. Edson Facchin, judgment not yet concluded awaiting the vote of Min.Carmen Lúcia.

In addition, the STF has been deciding that the accused has no legitimacy to challenge the cooperation agreement. As it is a very personal legal business, the cooperation agreement cannot be challenged by co-actors or accomplices of the collaborator in the criminal organization and in the criminal offenses committed by him, even if they will be expressly named in the respective instrument in the "collaboration report and their possible results "(art. 6, I, Act n. 12.850/2013). It is because his interest is restricted to the evidence obtained from the cooperation agreement, and eventual criminal action would be the proper forum for this challenge. However, in the proceedings in which they appear as accused, the coauthors or reported accomplices – in the exercise of the adversarial principle – may confront, in court, the collaborator's statements and the evidence indicated by him, as well as challenge, at any time, the measures restrictions on fundamental rights eventually adopted to their disadvantage[20].

The cooperation agreement has the legal nature of a procedural legal bargain and means of obtaining evidence, which presupposes public utility and interest (art. 3º-A LOC)[21]. Thus, the cooperation agreement has a mixed nature with a twofold effect: (i) procedural: in its form and in its content it has the nature of a) means of obtaining incriminating evidence – and not exactly a type of evidence – both from the collaborator himself and mainly third parties; b) implies not offering a information; (ii) material: produces material effects of a penalty[22].

The cooperation agreement can benefit the collaborator with four (04) benefits (the first three has criminal nature and the last criminal procedure) that the judge may, at the request of the parties, apply alternatively (and not cumulatively) : a) grant judicial mercy (exemption from any penalti); b) reduce the penalty of deprivation of liberty by up to 2/3 (two thirds); c) replace it by restricting the rights of those who have collaborated effectively and voluntarily with the investigation and the criminal process; d) not offering a information by the MP, if the proposal

[20] HC 127483/PR, STF, Tribunal Pleno, rel. Min. Dias Toffoli, j. 27/08/2015; Inq 4405 AgR, DF, rel. Min. Roberto Barroso, 1ª. T., STF, j. 27/02/2018; PET 7.226, rel. Min. Luiz Fux, j. 27/11/2017.

[21] The STF had already decided so even before this recent legislative change: HC 127483/ PR, STF, Tribunal Pleno, rel. Min. Dias Toffoli, j. 27/08/2015.

[22] GOMES CANOTILHO, J. J./BRANDÃO, Nuno. Colaboração Premiada..., op.cit., p.23; SANTOS, Marcos Paulo Dutra. Colaboração (delação) Premiada. Salvador: Jus Podium editora, 2016, p.86-87; HC 127483/ PR, STF, Tribunal Pleno, rel. Min. Dias Toffoli, j. 27/08/2015.

for a collaboration agreement refers to an infraction the existence of which has not been previously known and the collaborator: (i) is not the leader of the criminal organization; (ii) is the first to provide effective collaboration under the terms of this article (§ 4 art. 4º LOC).

The cooperation agreement may provide for the confiscation of assets (as an extrapenal effect of a patrimonial nature of the conviction) acquired with the product of the infraction by the collaborating agent, in view of the existence of a provision in Conventions signed by Brazil so that "the measures appropriate to encourage" "forms of cooperation agreements (art. 26.1 of the Palermo Convention) and for" mitigation of the penalty "(art. 37.2 of the Mérida Convention), in order to mitigate the consequences of crime[23].

In any case, the granting of the benefit will take into account the collaborator's personality, nature, circumstances, severity and social repercussion of the criminal fact and the effectiveness of the collaboration (§ 1 art. 4º LOC). However, the collaborator's personality or the confidence inspired by it does not constitute an element of existence or a requirement for the validity of the collaboration agreement, but only a vector to be considered in the establishment of its clauses, notably in the choice of the premium sanction to which it will be entitled the collaborator, as well as when the sanction is applied by the judge in the sentence[24].

The judicial granting of premium benefits will always be conditioned to the effectiveness of the collaboration. Once the states evidence agreement is made, the judge will analyze, at the time of approval, the adequacy of the collaboration results to the minimum legally required results (subsection III of § 7 art. 4 LOC). The judge will examine whether the collaborator has fulfilled all agreed obligations and whether one or more results legally required in subsections I to V of art. 4 LOC were reached, namely: a) the identification of the other co-authors and participants in the criminal organization and the criminal offenses committed by them; b) disclosure of the criminal organization's hierarchical structure and division of tasks; c) the prevention of criminal offenses arising from the activities

[23] HC 127483/ PR, STF, Tribunal Pleno, rel. Min. Dias Toffoli, j. 27/08/2015.
[24] HC 127483/ PR, STF, Tribunal Pleno, rel. Min. Dias Toffoli, j. 27/08/2015.

of the criminal organization; d) the total or partial recovery of the product or the benefit of criminal offenses committed by the criminal organization; e) the location of any victim with his physical integrity preserved.

The non-compliance that is restricted to the previous collaboration agreement, does not prevent, *a priori*, the bargain of future agreements of the same nature[25].

4.3. The role of the Public Prosecutor's office

In relation to the participating subjects, the Public Prosecutor's Office (hereinafter MP), as "*dominus litis*" of public criminal action, under the terms of art. 129, subsection I, of the CF, assumes the role of protagonist of the cooperation agreements.

Within the scope of cooperation agreement cases, the legislator made more flexible several traditional principles in criminal proceedings: a) the principle of mandatory public criminal action (art. 24 CPP); b) the indivisibility of public criminal action, since – despite the just cause for triggering the prosecution – does not offer a information (decides to file the investigation for lack of interest in acting) against the whistleblower; c) the principle of procedural legality in favor of the principle of regulated opportunity[26].

The proposal for cooperation agreement may be summarily rejected, with due justification, making the interested party aware (§ 1 of art. 3-B LOC).

Furthermore, the Supreme Court considered it inadmissible for the Judiciary to oblige the MP to formalize a cooperation agreement, despite the voluntary collaboration activity of the collaborator, if the corroboration elements presented are not of the consistency necessary to elucidate what was reported, nor are they conclusive as to the certification of the irregularities pointed out. This motivated valuation of the MP, from a business point of view, is not subject to the scrutiny of the Judiciary, under the risk of directly affecting the formation of the independent ministerial conviction. Therefore, based on the accusatory principle and the regulated discretion, it is exclusively up to the MP to evaluate the

[25] HC 127483/ PR, STF, Tribunal Pleno, rel. Min. Dias Toffoli, j. 27/08/2015.

[26] SANTOS, Marcos Paulo Dutra. Colaboração (delação) Premiada, op.cit., p.150-153; VALDEZ PEREIRA, Frederico. Delação Premiada. Legitimidade e Procedimento. 3a. ed., Curitiba: Juruá editora, 2016, p.143.

convenience and the opportunity to conclude the negotiation act, safeguarding, however, the subjective rights of the agent, in case of non-formalization of the agreement, to granting of premium sanctions by the judge State at the time of the sentence. This question, however, could be subject to eventual scrutiny at the internal level of the MP Office, applying, by analogy, art. 28 CPP)[27].

The receipt of a collaboration proposal for analysis or the Confidentiality Term does not, in itself, imply the suspension of the investigation, except for an agreement to the contrary regarding the proposition of precautionary and criminal procedural measures, as well as civil procedural measures admitted by civil procedural law in force (§ 3 of art. 3-B LOC).

The cooperation agreement may be preceded by an instruction, when there is a need to identify or complement its object, the facts narrated, its legal definition, relevance, utility and public interest (§ 4º art. 3 - B LOC).

The STF examined the constitutionality of §§ 2 and 6 of art. 4 LOC and decided that the chief police officer can also formalize cooperation agreements – which presupposes the phase of police investigation –, however, it is up to the subsequent manifestation of the MP, which must manifest, without binding character, previously to the court decision[28].

The legislator expressly guarantees a series of subjective rights to the collaborator, namely: a) to enjoy the protection measures provided for in the specific legislation; b) have your name, qualification, image and other personal information preserved; c) be conducted, in court, separately from other co-authors and accomplices; d) participate in hearings without eye contact with the other accused; e) not having your identity revealed by the media, nor being photographed or filmed, without your prior written authorization; f) serve the sentence or preventive detention in a criminal establishment other than the other prisoners or convicts (art. 5º LOC).

4.4. The role of the defense attorney

In all acts of negotiation, confirmation and execution of the collaboration agreement, the collaborator must be assisted by a defense attorney (§ 1 of art. 3

[27] MS 35693 AgR/DF, 2ª. T., STF, rel. Min. Edson Fachin, j. 28/05/2019.
[28] ADI 5508/DF, STF, rel. Min. Marco Aurélio, j. 20/06/2018.

- C LOC). The assistance of a defense attorney is an essential guarantee to ensure that the accused's collaboration with the MP or chief police officer is voluntary and aware of its consequences. The lack of intervention by the defendant's attorney, since the beginning of the deal dealings, generates absolute procedural nullity of the cooperation agreement (art. 564, subsection III, and art. 572, *a contrario sensu*, both from CPP)[29].

Once the agreement has been made, the respective term, the collaborator's statements and a copy of the investigation will be sent to the judicial analysis, and the judge must listen to the collaborator in secret, accompanied by his defense attorney (§ 7 art. 3-C LOC).

The STF was already deciding that the denounced defendants have the right to present defensive closing argument written after the term of the defending collaborators, and it is not permissible to set a common term for the defending collaborators and denounced, under penalty of nullity for offense to the fundamental law rules, contradictory and wide-ranging defense (subsections LIV and LV article 5 CF), regardless of the existence of an express provision of infraconstitutional rules[30]. The recent legislative change expressly stipuleted this guarantee: "at all stages of the process, the accused defendant must be guaranteed the opportunity to speak up after the expiry of the period granted to the defendant who reported it." (§ 10-A art. 3-C LOC).

4.5. The role of the judge

The judge will not participate in the negotiations carried out between the parties for the formalization of the collaboration agreement, which will take place between the chief police officer, the investigated and the defense attorney, with the manifestation of the MP, or, as the case may be, between the MP and the investigated or accused and his defense attorney (§ 6 art. 4 LOC).

In the initial stage, the role of the judge or court essentially consists in the approval and, in the later step, in the jurisdictional review of the cooperation agreement, an opportunity in which to carry out a regularity and legality control of

[29] SANTOS, Marcos Paulo Dutra. Colaboração..., op.cit., p.125 e 128.

[30] HC 157627 AgR/PR, 2ª. T., STF, rel. orig. Min. Edson Fachin, red. for the judgement Min. Ricardo Lewandowski, j. 27/08/2019; HC 166373/PR, STF, rel. Min. Edson Fachin, j. 25 e 26/09/2019.

the agreement, the voluntariness of the collaborator's expression of will, especially in cases in which it is or has been under the effect of preventive coercitive measures (for example, pre-trial detention), as well as its adequacy to the results of the collaboration (§ 7, subsections I to IV, art. 4 LOC)[31].

The judge must refuse the approval of the proposal that does not comply with the legal requirements, returning it to the parties for the necessary adjustments (§ 8 of art. 4 LOC) by means of the suppression or alteration of illegal or unconstitutional clauses. In addition, it is up to the judge to clarify to the collaborator that the agreement does not have an absolute binding force, since only in the sentence will the terms of the agreement and its objective effectiveness verified by the judge. However, the STF considers that the collaborator has a subjective right to the benefit of the premium sanction, as long as their collaboration is effective and produces the desired results. The principles of legal certainty and protection of trust make the State's duty to honor the commitment assumed in the cooperation agreement indeclinable, granting the stipulated premium sanction, legitimate consideration for the collaborator's performance of the obligation[32].

In a second step, the judge or Court must proceed to a reasoned analysis of the merits of the information, the judicial mercy and the first stages of application of the sentence, before granting the agreed benefits, except when the agreement provides for the non-offering of the penalty information (§§ 4 and 4-A art. 4 LOC) or sentence has already been rendered (§ 7º-A art. 4 LOC). The STF had already decided that the judicial control in the ratification of the penal agreement also covers the assessment of the legitimacy of criminal prosecution in cooperation agreements, criminal transactions or conditional suspension of the process, so that the cases of manifest atypical conduct narrated, extinction of the punishment of the accused or evident impracticability of the information due to absence of just cause, result in the proposal not being approved. In view of the risks inherent to criminal business justice, the accused's consent, even if assisted by a technical defender, cannot be overvalued to the point of removing any need for judicial

[31] See in this sense: HC 127483/ PR, STF, Tribunal Pleno, rel. Min. Dias Toffoli, j. 27/08/2015.
[32] HC 127483/ PR, STF, Tribunal Pleno, rel. Min. Dias Toffoli, j. 27/08/2015.

control[33]. Thus, the sentence will analyze the terms of the approved agreement and its effectiveness (§ 11 art. 4 LOC). In this way, according to the STF, the judge or Court responsible for the case may review and annul the ratified agreement, in the sentence of the process originating from the information, in case of non-compliance with the duties assumed, if it is discovered, during the process, facts that demonstrate illegalities or defects in the negotiation of the collaboration, such as: corruption of the judge, coercion of one of the parties, false evidence or judicial error[34].

The cooperation agreement may be rescinded in two cases: a) willful omission by the collaborator on the facts object of the collaboration (§ 17 art. 4 LOC); b) the collaborator's persistence in engaging in illegal conduct related to the object of the collaboration (§ 18 art. 4 LOC).

4.5.1. The judicial control

Regarding the constitutionality of the cooperation agreement, it should be mentioned that in 2004 Brazil subscribed and incorporated the United Nations Convention against Organized Crime (Palermo Convention) in its domestic law, whose article 26 and §§ urge each State Party to consider the possibility of cooperation agreement by reducing the penalty or granting judicial mercy. In addition, the United Nations Convention against Corruption (Mérida Convention), promulgated by Brazil, in its art. 37 provides for sentence reduction and judicial mercy in § 2 and 3. The STF also highlighted the existence of provision in Conventions signed by Brazil so that appropriate measures are adopted to encourage forms of cooperation agreements" (art. 26(1) of the Palermo Convention) and for "penalty mitigation" (art. 37(2) of the Convention de Mérida), in the sense of mitigating the consequences of the crime, by establishing the premium sanctions to which the collaborator is entitled[35].

In this way, the option of a cooperation agreement is a benefit that integrates the range of defense strategies available to the investigated or accused, either to

[33] Accordind the vote of Min. Gilmar Mendes no HC 176.785/DF, 2a. T., STF, j. 17/12/2019.

[34] Pet 7074 QO/DF, Pleno do STF, rel. Min. Edson Fachin, j. 21, 22, 28 e 29.6.2017; Pet 7074/DF, rel. Min. Edson Fachin, j. 21, 22, 28 e 29.6.2017, STF Newsletter n. 870, june/2017.

[35] HC 127483/PR, STF, Tribunal Pleno, rel. Min. Dias Toffoli, j. 27/08/2015, DJe 04-02-2016; see in this sense too: SANTOS, Marcos Paulo Dutra. Colaboração (delação) Premiada, op.cit., p.76 e 78.

preserve their "*libertatis status*" from the beginning, or to reduce, exempt, replace the penalty or modify their compliance regime so that it enhances both due process and broad defense[36].

However, the cooperation agreement creates undeniable risks to constitutional rights and principles. Thus, its constitutionality requires that cooperation agreement be considered an exceptional solution to control exceptional criminal problems, characterized by their gravity and complexity of investigation, and always strictly subordinated to the principle of legality (*nullum crimen sine lege)*, proportionality (prohibition of excess) and intangibility of essential core of fundamental rights[37].

Therefore, the due process of law clause must be scrupulously observed (subsection LIV art. 5 Federal Constitucion (hereinafter CF), according to which "*no one will be deprived of liberty or of his property without due process law*". In the Democratic Rule of Law, legitimation depends on strict adherence to a specific, previously formally defined procedure. Protecting the formality of the process is no less important than convicting the guilty and restoring legal peace[38].

It is essential, therefore that the judge or Court uses its supervisory powers in the initial control and subsequent review of the terms and content of the cooperation agreements as to legality, regularity, voluntariness and objective effectiveness, as to their ability to ensure their full legitimacy and compatibility with the constitutional rights.

This procedural compliance must be examined by the judge in the act of homologation provided for in § 7 art. 4 LOC, which must be refused if the procedure that culminated in the cooperation agreement does not fit the legally established procedural iter. New control of procedural correction will be made by the judge later in the sentence of eventual granting of previously agreed benefits[39].

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[36] SANTOS, Marcos Paulo Dutra. Colaboração (delação) Premiada, op.cit., p.75-76.

[37] GOMES CANOTILHO, J. J./BRANDÃO, Nuno. GOMES CANOTILHO, J. J./BRANDÃO, Nuno. Colaboração Premiada e auxílio judiciário em matéria penal: a ordem pública como obstáculo à cooperação com a operação lava jato. In Revista de Legislação e de Jurisprudência. n. 4000, ano 146, Setembro-Outubro, 2016, p.23-24.

[38] GOMES CANOTILHO, J. J./BRANDÃO, Nuno. Colaboração Premiada..., op.cit., p.25.

[39] GOMES CANOTILHO, J. J./BRANDÃO, Nuno. Colaboração Premiada..., op.cit., p.25.

The STF starts from the premise that the setting of premium sanctions not expressly provided for LOC, but freely and consciously accepted by the investigated, does not render the agreement invalid, as the principle of legality, which prohibits the imposition of more severe penalties. than those provided for by law, it is a guarantee instituted in favor of the jurisdicted person before the State, so that this principle does not violate the setting of a more favorable penalty, there being no mention of safeguarding the guarantee against the guarantor[40].

However, in subsequent precedents, the STF departed from this initial premise and decided that there is no legal authorization for the contracting parties to agree, in advance, in a collaboration agreement, replacing the Judiciary, the species, the level and the serving sentece regime, cases of suspension of the criminal process or set deadlines and legal frameworks for fluency of the prescription different from those established by law. Validating such an aspect of the agreement would correspond to allowing the MP, the prosecution organ, to act as legislator, establishing, in advance, the accused, criminal penalties not provided for in the legal system. It is the Judiciary that has, by virtue of constitutional provisions, the monopoly of jurisdiction, and it is only through a condemnatory criminal sentence, handed down by a competent magistrate, that it is possible to establish or forgive custodial sentences in relation to any jurisdiction, especially when there is no judicial process in progress[41].

The recent legislative reform considers that the clauses stipulated in the cooperation agreement are null and void, which violate the legal criteria for the definition of the legal regime and the requirements of serving time, except for the possibility of improvement of the imprisonment regime even though the objective requirements, if the cooperation agreement is awarded after the sentence of conviction (subsection II of § 7 of article 4 of the LOC).

The legislation also expressly establishes that in the testimonies that they provide, the collaborator will renounce, in the presence of his defense attorney,

40 Inq 4405/DF, STF, 1a. T., AgR, rel. Min. Roberto Barroso, j. 27/02/2018.

41 See decision of Min. Lewandowski in the PET 7265/DF, j. 14/11/2017 and decision of Min. Celso de Mello in the ADIn n. 5.508/DF, rel. Min. Marco Aurélio, j. 20/06/2018; GOMES CANOTILHO, J. J./BRANDÃO, Nuno. Colaboração Premiada..., op. cit., p.27 e 31-33.

the right to silence and will be subject to the legal commitment to tell the truth (§ 14 art. 4 LOC). This waiver by the collaborator in the cooperation agreement does not violates the constitutional guarantee of "remaining silent" (subsection LXIII of art. 5 CF), in whose clause the fundamental right of non-self-incrimination is inserted (*nemo tenetur se detegere*/privilege against self incrimination), in accordance with decisions of the European Court of Human Rights, the Spanish Constitutional Court and the USA Supreme Court[42].

Nevertheless, the infraconstitutional legislator has established a series of legal limits in order to ensure the compatibility of the collaborator's waiver with the privilege against self-incrimination. Thus, the promise of benefits in the cooperation agreement that are legally inadmissible, that is, without legal coverage, such as the guarantee of impunity offered to a defendant to incriminate his accomplice, constitute illegally obtained evidence; statements extorted through manipulation and deception do not represent an exercise in freedom and self-determination, so that it violates privilege against self incrimination (*nemo tenetur se ipsum acusare*)[43].

The legislator also establishes that "the provisions of waiver of the right to challenge the homologatory decision are null and void" (§ 7º-B of art. 4 LOC). The STF had already recognized that there is no effect before the Judiciary that the general and unrestricted waiver of the guarantee against self-incrimination and the right to silence, as well as the early withdrawal of the presentation of appeals, since such waivers, to all evidence, violate fundamental rights and guarantees of the collaborator[44].

On the other hand, "in the event that the agreement is not entered into at the initiative of the celebrant, he may not use any of the information or evidence presented by the collaborator, in good faith, for any other purpose (§ 6 of art. 3-B LOC).

[42] See VALDEZ PEREIRA, Frederico. Delação Premiada…, op.cit., p.63 e notas 109 -110.

[43] GOMES CANOTILHO, J. J./BRANDÃO, Nuno. Colaboração Premiada..., op.cit., p.35-37. The Brazilian CF provides that "evidence obtained by unlawful means is inadmissible in the process" (subsection LVI of art. 5th.); the CPP (art. 157) provides that "those obtained in violation of constitutional or legal rules" are understood as such".

[44] See decision in the PET 7265/DF, j. 14/11/2017, rel. Min. Lewandowski.

Another limitation established by the recent legislative reform is that "the parties can retract the proposal, in which case the self-incriminating evidence produced by the collaborator cannot be used exclusively to his disadvantage" (§ 10 art. 4 LOC), however, can be valued against third parties involved in the crime.

The legislator also expressly included the prohibition of "receipt of a information or criminal complaint" or of a "sentence of conviction" based only on the collaborator's statements (subsections II and III of § 16 art. 4 LOC). The STF had previously rejected accusations (informations or complaints) based exclusively on a unilateral statement by the collaborator[45].

Furthermore, the STF had also already decided that enacting preventive detention based only on cooperation agreement violates the law and the CF[46]. This case law guidelines was accepted by the recent legislative reform that expressly prohibited the enactment of any preventive coercitive measures based only on the colaborator's statements (subsection I of § 16 art. 4 LOC).

On the other hand, order a pretrial detention as a mechanism to obtain a cooperation agreement violates the constitutional right that protects the citizen against self-incrimination. Any deviation in purpose, through the use of punitive purposes in anticipation of punishment or apocryphal grounds with the use of another coverage rule is illegal and unconstitutional for violation of the principle of legality (*nulla coactio sine lege*), the principle of reasonableness/ proportionality (subprinciple of adequacy), the presumption of innocence, the right to silence and the privilege against self-incrimination (*nemo tenetur se ipsum accusare*) and the guarantee of judicial impartiality[47].

The STF addressed this issue of the hidden or apocryphal grounds of pre-trial detention and rejected the possibility of pretrial detention in order to obtain confession in a cooperation agreement. Thus, if preventive detention has solid

[45] Inq 4005/DF, 2ª. T., STF, rel. Min. Edson Fachin, rel. for the judgement Min. Gilmar Mendes, j.11/12/2018; Inq 3994, DF, 2a. T., STF, rel. Min. Edson Fachin, rel. for the judgement Min. Dias Toffoli, j. 18/12/2017.

[46] HC 169119/RJ, 2ª. T., STF, rel. Min. Gilmar Mendes, j. 02/04/2019.

[47] SANGUINÉ, Odone. Prisión provisional y derechos fundamentales. Valencia: Tirant lo Blanch, 2003, p. 645 e ss.; ID. A inconstitucionalidade do clamor público como fundamento da prisão preventiva. Estudos Criminais em Homenagem a Evandro Lins e Silva (Criminalista do Século). São Paulo: Ed. Método, 2001, p. 257 e ss.

grounds, which make its fit unequivocal, a supposed hidden purpose loses its importance. Any provision by the Public Ministry to negotiate the prisoner's collaboration will not be linked to the prison. However, if the grounds for the pretrial detention are found to be that the lack of cooperation to clarify the facts constituted a determining factor in ordering that measure, there is a clear reason for the annulment of the decision and to consider the evidence derived therefrom to be illegal. In summary, if it is found that the real purpose (hidden or apocryphal) of the preventive prison is to force the defendant's collaboration, it is up to the Court to annul that decision for manifest illegality and unconstitutionality, for violating the right to silence and the privilege against self-incrimination. Therefore, it is forbidden pretrial detention or remand as a bargaining instrument in order to coerce the investigated or accused person to collaborate[48]. In order to avoid the decree of the pretrial deterntion with the spurious purpose of a coercive mechanism to obtain the cooperation agreement, the recent legislative reform establishes that the judge will obligatorily analyze, among other aspects, in the homologation, “the voluntariness of the manifestation of will when the collaborator is or was subject to preventive coercitive measures” (subsection IV of § 7 art. 4 LOC).

In addition, non compliance with a cooperation agreement does not constitute a cause for the imposition or reestablishment of the previously revoked pretrial detention, since there is no necessary relationship between the conclusion and/or noncompliance of a cooperation agreement and the judgment of adequacy of serious preventive measures. The pretrial detention requires the presence of any of the requirements provided for in art. 312 CPP[49].

5. Concluding remarks

[48] SANGUINÉ, Odone. A inconstitucionalidade da prisão cautelar como mecanismo para obter a delação (colaboração) premiada. In: SANTORO, Antonio Eduardo Ramires; MALAN, Diogo Rudge; MADURO, Flávio Mirza. (Org.). Crise no processo penal contemporâneo: escritos em homenagem aos 30 anos da Constituição de 1988. 1a.ed. Belo Horizonte: D'Plácido, 2018, p. 331-346; CAPEZ, Rodrigo. Prisão e medidas cautelares diversas. A individualização da medida cautelar no processo penal. São Paulo: Quartier Latin, 2017, p.430-431; SANTOS, Marcos Paulo Dutra. Colaboração (delação) Premiada, op.cit., p.131; see decision of Min. Gilmar Mendes, HC/MC SP n. 156.600, STF, j.11/05/2018; HC 127186/PR, STF, 2a. T., rel. Min. Teori Zavascki, j. 28/04/2015.

[49] HC 138207, PR, 2a. T., STF, rel. Min. Edson Fachin, j. 25/04/2017.

After this outline of the legislative and judicial precedents panorama of the strategies to control corruption in Brazil, it is necessary expose some brief final remarks.

According to updated data until December 2019, CGU, together with AGU, signed eleven leniency agreements with companies investigated for the harmful acts provided for in the Anticorruption Act and for the administrative offenses provided for in the Bidding Act n. 8.666 / 1993 and adjusted the return of R$ 13.67 billion, having already returned R$ 3.12 billion to public coffers. Another 22 leniency agreements were in progress[50]. According to Federal Prosecution Agency sources, updated until March 2020, more than R$ 4 billion have already been returned through 185 collaboration agreements and 14 leniency agreements, in which the return of approximately R$ 14.3 billion has been adjusted[51]. The three largest agreements for the practice of crimes investigated in the context of Operation "*Lava Jato*", were entered into with the contractors Odebrecht (R$ 2.7 billion); Braskem (R $ 2.87 billion) and OAS (R $ 1.9 billion to the Union until December 2047)[52].

Therefore, there is a real effectiveness of leniency and cooperation agreements as criminal policy strategies to the control of corruption in Brazil.

This effectiveness became a reality not only due to the current legislation, but especially by the joint work of independent institutions: an MP independent from the Executive Power; cooperation of the investigative task force composed of the MP and the Federal Police, and an independent Judiciary Power, with emphasis on the judicial control made by the STF establishing limits to the "*Lava Jato*" operation. Also, the important alterations of the LOC included by the new "*Anticrime Act*" acquire relevance, accepting the main guarantee standards established by the STF, and adding others that contribute to the improvement

[50] See https://www.gov.br/cgu/pt-br/assuntos/responsabilizacao-de-empresas/lei-anticorrupcao/acordo-leniencia, acesso em 06/04/2020.

[51] See: http://www.mpf.mp.br/pr/sala-de-imprensa/noticias-pr/lava-jato-completa-seis-anos-com-500-pessoas-denunciadas-e-numeros-recordes-em-2019,
acess in 04/06/2020.

[52] See: https://economia.uol.com.br/noticias/estadao-conteudo/2019/11/14/oas-fecha-leniencia-de-r-19-bi-terceiro-maior-acordo-da-historia.htm, acess in 04/06/2020.

and evolution of the institute of the cooperation agreement according to the canons of the Rule of Law.