PRAWO W DZIAŁANIU
SPRAWY KARNE
41/2020
DOI: 10.32041/pwd.4101

Rodrigo Brandalise*

Collaboration agreements in Brasil: a legal transaction with the perpetrator of an offence in criminal proceedings**[1]

I. DESCRIPTION OF THE PARADIGMATIC CASE

To analyse the collaboration agreements, we will examine a Brazilian Supreme Court decision rendered on a provisional remedy in Habeas Corpus[2].

Initially, the constitutional remedy was filed against the ratification of the collaboration agreement made by J.M.B., W.M.B., R.S., F.A.S., F.C.O., V.A.B., and D.A.C. with the General Attorney's Office in Petition 7.003-DF[3]. The approved collaboration agreement was intended to support the investigation carried out by the General Attorney's Office. It was not yet a conviction stage of a court proceeding.

According to Petition 7.003-DF, the purpose of the investigation was to confirm alleged illicit advantages obtained by Brazilian politicians, including members of the Federal Executive Branch, and to further the interests of collaborating parties (obviously, before the collaboration) with advantages specially granted to the latter.

The individuals who decided to accept the collaboration agreement were already being investigated, which motivated them to indicate the participation of third parties as a way of obtaining criminal procedural benefits.

Consistent with the case summary of the decision rendered on the provisional remedy in habeas corpus, the petitioner did not dispute the willingness of the collaborating party and the regularity (including in the formal sense) of the collaboration agreement, but the legality of the benefit of not filing a criminal indictment

* Dr Rodrigo Brandalise, Fundação Escola Superior do Ministério Público, Rio Grande do Sul, Brazylia, ORCID 0000–0003–1311–1511, e-mail: rsbrandalise@gmail.com

** The manuscript was submitted by the author on 25 July 2019; the manuscript was accepted for publication by the editorial board on 8 January 2020.

[1] This work is an English version adapted from the text 'O acordo de colaboração processual no Brasil: um negócio jurídico inserido no direito probatório' that will be published by Editora Almedina in Portugal as a part of the book *Prova Penal Teórica e Prática*, edited by Professors Paulo Sousa Mendes and Rui Soares Pereira. It contains amendments introduced by Brazilian Federal Law 13.964/2019 (section 14) in Brazilian Federal Law 12.850/2013 (sections 3-A to section 7, paragraph 3). Except when specified, the legal provisions previously mentioned have already been updated.

[2] Brazilian Supreme Court's (Supremo Tribunal Federal – STF) decision in Provisional Remedy in Habeas Corpus HC 144.652-DF, dated 12 June 2017.

[3] Brazilian Supreme Court's decision concerning motion Pet 7.003-DF, dated 11 May 2017 (the contents of the decision are protected by the secrecy of justice).

against those who collaborated, which included heads of criminal organizations (Brazilian Federal Law 12.850/2013, section 4, paragraph 4[4]). According to the petitioner, the General Attorney's Ofiice should have filed an indictment[5] against J.M.B., W.M.B., R.S., F.A.S., F.C.O., V.A.B., and D.A.C.

On account of the alleged illegality of the benefit granted, the petitioner pursued before the Brazilian Supreme Court an action for invalidation of the collaboration agreement ratified by the Court and all the criminal evidence produced after that.

The Brazilian Supreme Court decided not to accept the remedy in Habeas Corpus for several reasons[6]. However, some considerations made in the decision are of interest for the present analysis, namely the following:

- the judge´s reasoning to ratify the collaboration agreement was based on the triple perspective of its voluntariness, regularity, and legality;
- in the ratification decision there was no substantive appreciation on the content of the testimonies given by the collaborating party, which would only be subject to judicial appraisal at the time of the judgment in the criminal proceeding when it would be evaluated in the light of other evidence produced in the case;
- in the ratification proceeding, the judge should only control abusive, disproportionate or illegal clauses;
- the appropriate moment for the competent judicial body to examine the effectiveness of the collaboration is the final judgment of the criminal case.

That is, the Brazilian Supreme Court understood that the collaboration agreement has two stages of consideration by the court: the approval of the deal itself (ratification) and the ruling after discovery. Which leads us to the questions: how should the collaboration agreement be considered within the evidence law? As a valid agreement, when does its begin to be effective? How soon can the agreement be withdrawn from, so that the self-incriminating evidence from the collaborating party could not be used? Are the considerations of the Brazilian Supreme Court correct?

It should be noted that, according to Petition 7.003, of February 2018, the General Attorney´s Office requested the Brazilian Supreme Court to ratify the termination of the collaboration agreements comprised in HC 144.652-DF, and to declare the loss of the benefits previously granted, while preserving the validity of the statements given by W.M.B. and F.A.S. as evidence in the criminal procedure. The request was submitted to the Court so that they would be guaranteed the rights to full defence and to be heard (principle of *audi alteram parte*). The request is not available for public access and, until the completion of this study, decision was still pending.

---

[4] According to the valid terms at the time of the agreement, once the conditions for that have changed, as it will be mentioned below.

[5] First document filed with the Court, in which the Prosecutor´s Office presents the accusation, in the hypothesis of public criminal action cases. As for section 24 of the Brazilian Criminal Procedure Code: 'In case of public action crimes, this will be promoted by denunciation of the Prosecutor's Office [...]'.

[6] Specifically: the judicial challenge to the collaboration agreement submitted by third parties was illegitimate; the criminal investigation is a legal duty and a legitimate response of the state to the reported crimes; it is not possible to file habeas corpus against the act of a Supreme Court Justice (in this case, the court which approved the collaboration agreement); the habeas corpus is not the proper recourse to challenge the collaboration agreement; and that the collaborating party is a 'leader of the criminal organization' is a fact that would depend on evidence appraisal, which is not possible through habeas corpus.

Given the above, the present study examines the collaboration agreements based on Brazilian Federal Law 12.850/2013, and compares it, when appropriate, to foreign laws and leniency agreements provisions (due to their similarity), addressing its consequences in terms of the agreements' existence, validity, and effectiveness.

The choice of the subject is not only motivated by its current relevance to Brazil. The German legal literature, for example, shows a genuine concern that the German legislature should ensure reduction of technical errors in the provisions relating to the *Kronzeugenregelung*[7], including through examination of other legal systems[8].

Also, in June 2017, there was an event promoted by the Portuguese Bar Association to discuss the procedure of the accused turning state´s evidence. There was also an event organized by the Institute of Criminal Law and Criminal Sciences of the University of Lisbon School of Law in April 2019 on this subject[9]. Furthermore, there are diverse opinions on the need to adopt this mechanism in the Portuguese criminal system as a way to deal with economic and financial crime (while the Public Prosecutor defends it, the Bar Association refutes it).

In other words, we hope to contribute to the important debate that is taking place around the possibility of collaboration agreements in high-profile criminal cases. Last, but not least, we are aware of the criticism of collaboration agreements[10], especially as a means of obtaining evidence[11]. Nevertheless, the present study does not aim to discuss the arguments to disapprove them, but to understand the procedure established by the Brazilian law for ratifying collaboration agreements[12]. The criticism of collaboration agreements as a mechanism of evidence law refers to the possibility of establishing the collaboration itself (see the study on criminal cases negotiation[13]), a subject that is outside the remit of the present study.

We can now move forward to the actual object of our study.

---

[7] As collaboration agreements are called in Germany.

[8] J. Zopfs, *Dogmatisch fragwürdig und weitgehend ohne praktischen Nutzen. Die Vorschriften zur Bekämpfung des Missbrauchs der Kronzeugenregelung,* Mainz 2011, p. 673.

[9] 'Workshop and Conference on Plea Agreement', available on <http://www.idpcc.pt/en/news/Workshop-and-Conference-on-Plea-Agreement/474/> (accessed on 17 January 2020).

[10] Among others, the following: it is not possible to guarantee that the penalty would be greater if there were the ordinary judgment of the accused who collaborates; there is the possibility of false confessions to obtain procedural benefits and to avoid the risk of a conviction, which would break the presumption of innocence, the right to defence and the right not to provide self-incriminating evidence; and that punishment might not further the social interest impaired by the committed crime (for a more detailed discussion, see R. Rauxloh, *Plea Bargaining in National and International Law: A Comparative Study,* London 2012, 85–94). Or, as Schünemann criticizes, there is a supposed principle of consensus (*Konsensprinzip*), a fiction that contributes nothing to the necessary link between the process and criminal law (B. Schünemann, *Estudos de direito penal, direito processual penal e filosofia do direito*, São Paulo 2013, p. 257).

[11] For example, there could be 'moral torture' to achieve collaboration and pretrial prisons, with violations of the principle of presumption of innocence and due process, and the prevalence of information elements obtained at the investigation phase over evidence produced during the criminal proceeding (I. Martins, A. Oliveira, *O Direito de Defesa na Constituição. A Natureza Jurídica da Prisão Preventiva. Exercício Abusivo como Forma de Obtenção de Delações Premiadas. Inconstitucionalidade. Parecer*, Porto Alegre 2015, p. 22, 25 and 35). In addition, the alleged proximity to inquisitorial methods to serve as a cause of reversal of the burden of proof, and the use of prison to constrain the accused and force the collaboration. (F. Carata, *Colaboração Premiada: reflexões sobre o seu valor probatório e a postura do magistrado na sua avaliação*, Ribeirão Preto 2015, p. 11, 13 and 17).

[12] The procedure established in Brazilian law was welcomed by local legal literature. Notably, because the written agreement provides greater security for the parties, especially the collaborating one, also regarding its enforceability by the Judiciary, so that collaboration differs from confession (T. Bottino, *Colaboração premiada e incentivos à cooperação no processo penal: uma análise crítica dos acordos firmados na 'Operação Lava Jato'*, São Paulo 2016, p. 375).

[13] Without excluding other authors: R. Brandalise, *Justiça penal negociada: negociação de sentença criminal e princípios processuais penais relevantes*, Curitiba 2016.

II. COLLABORATION AGREEMENTS IN BRAZIL: AN OVERVIEW OF BRAZILIAN FEDERAL LAW 12.850/13

For a proper understanding of this study, it is imperative to present collaboration agreements[14] as contemplated in Brazilian Federal Law 12.850/2013, known as the Organized Crime Law[15].

Organized crime is a category of illegal activity that demands the reinvention of investigative forms[16], especially as regards the means of obtaining evidence. It is well known that more serious offences present difficulties in terms of clarification with traditional methods of acquiring evidence, which have been developed for standard criminality, in which active and passive participation is distinguished[17].

The collaboration agreements studied here are a means of obtaining evidence[18], especially since there is a regulated procedure for their validation. They aim to find evidence within the criminal structure, insofar as its members are those who possess privileged information[19]. That is the provision of Brazilian Federal Law 12.850/2013, section 3, subsection I, section 3-A and section 4, respectively[20].

Under the terms of the aforementioned Law, collaboration agreements are instruments of investigation of organized crime or macro-crime. They assume disclosure of information by one or more participants of a particular criminal operation, either by identifying the others involved or by indicating the place where the assets, values, and interests that were obtained through crime are. The statement given by the collaborating party becomes a confession, and its purpose is to get the proceeding discontinued, obtain judicial pardon or a reduction of the applicable quantum of penalty[21].

---

[14] Procedural collaboration is also a generic definition, of which the confession, the proceeding of attaching a co-accused to the case (which occurs only at the judicial phase, without recognition of guilt), the whistleblowing (which occurs at any stage and requires confession), the collaboration agreeements (which presuppose the accused contribution to the investigation of the offence and those responsible for it), and the procedural collaboration *stricto sensu* (which includes any form of collaboration that results in a procedural benefit, such as the absence of prosecution) are specific examples. (R. Brandalise, *Justiça penal*..., p. 149).

[15] To explain why this is needed, it is important to point out some characteristics of organized crime, such as the division of assignments and dissolution of individual responsibility; the commutativity of the members; the secret; the combination of legitimate and illegal activities; the ability to transfer earnings and profits; and the ability to counter the efforts to enforce criminal law (J. Fonseca, *Reforma do Processo Penal e Criminalidade Organizada*, Coimbra 2004, no. 12, p. 417–418,).

[16] F. Turessi, *Breves Apontamentos sobre Crime Organizado, Delação Premiada e Proibição da Proteção Penal Insuficiente*, São Paulo 2013, p. 231–232.

[17] F. Pereira, *Compatibilização Constitucional da Colaboração Premiada,* São Paulo 2013, 328. The criminal procedure exists for a conciliation between the restatement of the ethical-juridical community, protected by criminal law, and the essential respect for the individual freedom and dignity (A. Neves, *Sumários de Processo Criminal,* Coimbra 1968, p. 7).

[18] E. Pacelli, D. Fischer, *Comentários ao Código de Processo Penal e sua jurisprudência,* São Paulo 2016, 351. Case law: Brazilian Supreme Court decision Petition 5.700-DF, dated 22 September 2015; and Brazilian Supreme Court decision Precautionary Measure in Habeas Corpus HC 144.652-DF, dated 12 June 2017.

[19] F. Pereira, *Compatibilização Constitucional*…, 322. The evidence derived from the collaboration agreement arises from a situation in which there would be no other way to obtain it, and the collaboration agreement provides an opportunity to break the internal solidarity of the group, and to establish the responsibility of the same (E. Amodio, *I Pentiti Nella Common Law*, Milan 1986, p. 1003). It is, therefore, an instrument to obtain evidence through procedural negotiation, although it does not have a private nature (L. Carvalho, P. Wunder, *Colaboração premiada: justa causa para quê?*, São Paulo 2018, p. 285).

[20] In foreign law, there is similar interpretation. In Italy, for example, there are those who claim that collaboration agreements have 'the functional nature of a procedural tool for searching evidence' (T. Padovani, *La Soave Inquisizione: Observazioni e Rilevi a Proposito delle Nuove Ipotesi di 'Ravvedimento',* Milan 1981, p. 542, own translation).

[21] J. de C. Penteado, *Delação Premiada*, São Paulo 2006, p. 637.

Alternatively, as it may be summarized, a collaboration agreement consists in 'granting the accused in the criminal prosecution certain benefits in return for collaborative action with the police or judicial authorities to the detriment of third parties, as a general rule in the form of an indictment agreed with them'[22].

Once the above-mentioned requirements are met, *usefulness* and *public interest* are justified and they become the *prerequisites* of the collaboration agreement[23].

It is also relevant to mention the need to adjust Brazilian law to two international documents. The United Nations Convention against Transnational Organized Crime, incorporated into the Brazilian legal system through Decree 5.015, dated 12 March 2004, encourages States to grant benefits to those who participate or have participated in criminal activities, in exchange for essential and useful information for investigative and evidentiary purposes in the fight against organized crime (Article 26, paragraphs 1, 2 and 3). The same applies to the United Nations Convention against Corruption, incorporated into the Brazilian legal system through Decree 5.687, dated 31 January 2006, in its Article 37, paragraphs 1, 2 and 3.

As explained above, collaboration agreements in criminal cases correspond to a collaborative agent turning state's evidence by admitting guilt and testifying against an accomplice[24] through statements that can be effectively used as evidence in criminal prosecution, and thereby advance procedurally and substantively the criminal case[25] (it is a type of benefit in criminal proceedings[26]).

In Brazil, several legislative instruments provide the possibility of a collaborative agent turning state's evidence and other forms of collaboration of the accused with the prosecution. As an example, the provisions contained in Brazilian Federal Law 9.613/98 (which concerns the crimes of money laundering and concealment of assets, rights, and values), modified by Brazilian Federal Law 12.683/12[27], and Brazilian Federal Law 9.807/99 (which regulates witnesses protection), in its sections 13[28] and 14[29].

---

[22] J. Canotilho, N. Brandão, *Colaboração premiada e auxílio judiciário em matéria penal: a ordem pública como obstáculo à cooperação com a operação Lava Jato*, Coimbra 2016, 21, own translation. Its purpose is greater investigative effectiveness combined with a partial reduction of guilt of the collaborating party (E. Romero, *A Colaboração Premiada*, São Paulo 2017, p. 255).

[23] Brazilian Federal Law 12.850/2013, section 3-A, *in fine*.

[24] The confession is a prerequisite of the agreement and any doubt as to its freedom and credibility prevents the ratification of the agreement (J. Dias, *Acordos sobre a sentença em processo penal: o 'fim' do Estado de direito ou um novo princípio,* Porto 2011, p. 47).

[25] Brazilian Supreme Court's decision in Habeas Corpus HC 127.483-PR, dated 27 August 2015.

[26] I. Paz, *El Coimputado que Colabora con la Justicia Penal,* Granada 2005, p. 2.

[27] Section 1, paragraph 5 provides that the sentence may be reduced from one to two-thirds and be served in open or semi-open system, allowing the judge to stop applying it or to replace it, at any time, by a rights--restricting penalty, if the accused, co-accused or participant spontaneously cooperates with the authorities, providing clarifications that lead to the determination of criminal offences, the identification of its perpetrators, co-perpetrators and participants, or the location of property, rights or values being proceeds of the crime.

[28] It provides that the judge may, *ex officio* or at the request of the parties, grant judicial pardon and cancellation of punishment to the accused who, has collaborated effectively and voluntarily with the investigation and criminal prosecution, provided that this collaboration has resulted in the identification of other co--perpetrators or participants in the criminal action, the location of the victim with his/her physical integrity preserved, and total or partial recovery of the proceeds of crime. To this end, the judge will also take into account the personality of the beneficiary and the nature, circumstances, gravity, and social repercussions of the criminal act.

[29] It provides that the accused who cooperates voluntarily with the police investigation and the criminal proceeding to identify the co-perpetrators or other participants in the crime, locate the victim alive and recover all or part of the proceeds of crime, shall have the sentence reduced by one to two-thirds, in case of conviction.

Nevertheless, these instruments have been criticized for a reason of great importance: the absence of regulation of the procedural aspects of collaboration agreements in the Brazilian legal system[30]. In view of these comments, Brazilian Federal Law 12.850/2013 shows its most important significance: from its section 3-B to 7[31], the Law establishes the rules that apply in the criminal proceeding, regulating on what terms a collaborating agent turns state's evidence.

To understand the impact of Brazilian Federal Law 12.850/2013, it is necessary to clarify its provisions regarding concessions and obligations for both prosecution and defence[32].

Initially[33], it provides that the judge may at the request of the parties grant judicial pardon, reduce the custodial sentence by up to two-thirds, or replace it with a restriction of rights for those who have collaborated effectively and voluntarily during the investigation and in the course of criminal proceedings.

To this end, the statements of the collaborating agent (accused) must result in the identification of accomplices in the criminal organization and the criminal infractions they committed; and/or disclosure of the hierarchical structure and division of tasks within the criminal organization; and/or prevention of future criminal offences arising from the activities of said criminal organization; and/or total or partial recovery of the proceeds of criminal offences committed by the criminal organization; and/or location of any victim with their physical integrity preserved[34].

Therefore, the prerequisites of *usefulness* and *public interest* are reinforced, as indicated previously.

In terms of relevance of the collaboration offered, the following situations may arise[35]: (a) the Prosecutor`s Office (at any time) and the Police (during the police investigation[36]) may request judicial pardon for the collaborating agent; (b) the Prosecutor`s Office may request suspension of the deadline for filing the indictment against the collaborating agent to 6 (six) months, extendable for the same period, so that the collaborative measures can be implemented, with the combined suspension

[30] F. Pereira, *Valor Probatório da Colaboração Processual*, São Paulo 2009, p. 476.

[31] According to the Brazilian case law, Brazilian Federal Law 12.850/2013: '[...] brings positive contributions by ensuring that the co-accused is able to challenge the testimony of the collaborating party, by reducing the possibility of judicial error through prohibiting the conviction based exclusively on the of the collaborating parties, by guarantying physical integrity of the collaborating party, and by regulating the collaboration agreement [...]' [own translation of the Brazilian Supreme Court's decision rendered in the matter of Precautionary Measure in Habeas Corpus HC 144.652-DF, dated 12 June 2017].

[32] Contrary to what is argued in legal literature (J. Canotilho, N. Brandão, *Colaboração premiada*…, p. 29), according to Brazilian law, it is possible to apply the procedure used in collaboration agreements to other hypotheses of collaboration in the Brazilian legal system. As we will see, the collaboration agreement is executed through a legal document that gives certainty to the parties, so that the rule of section 3 of the Brazilian Criminal Procedure Code cannot be ignored ('Criminal procedural law will allow extensive interpretation and application by analogy, as well as supplementing the general principles of law'). Brazilian law, therefore, is not basis for the views expressed in legal literature. It is not aimed to trivialize collaboration agreements, but to make them viable, whenever possible (in this sense, Brazilian Federal Law 12.850/2013 can be considered a general procedural law: C. Masson, V. Marçal, *Crime Organizado,* Rio de Janeiro 2017, p. 141).

[33] Brazilian Federal Law 12.850/2013, section 4, subsections I to V.

[34] The extent of the benefits will depend on the scope and relevance of the collaboration. First, the content of the collaboration offered must be known so that promises can be made to the would be collaborating party (E. Pacelli, D. Fischer, *Comentários ao Código de Processo Penal e sua jurisprudência*, São Paulo 2017, p. 335).

[35] Brazilian Federal Law 12.850/2013, section 4, paragraphs 2, 3, 4 and 5.

[36] According to Brazilian legislation, the police officer is the authority responsible for conducting the criminal investigation (Brazilian Federal Law 12.830/2013, section 1).

of the statutory term; (c) the Prosecutor`s Office may not file the indictment[37] if the collaborating party is not the leader of the criminal organization, and he/she is the first to provide effective collaboration, as long as the proposed agreement with him/her concerns a crime not previously known[38] (this requirement did not feature in the previous wording of Brazilian Federal Law 12.850/2013); and (d) if the collaboration takes place after the decision, the judge may reduce the sentence by half or lessen the penalty regime even if the requirements are not met.

It is interesting to note that the judge does not participate in the negotiations concerning the collaboration agreement, which is agreed between the police, the accused, and the defence lawyers, and approved by the Prosecutor's Office (this is not a binding document, once it is up to the judiciary to define the possible disagreements between the Public Prosecutor's Office and the police regarding the collaboration agreement[39]), or between the Prosecutor's Office and the accused, and his/her defence lawyers[40].

As it was said before, here lies the great importance of Brazilian Federal Law 12.850/2013: the possible consequences of collaboration depend on the existence of a written agreement. The collaboration agreement must include the object of the collaboration (the collaborating party must report all criminal acts they were involved in, which were directly connected to the investigation[41]) and its potential results; the conditions of the offer made by the Prosecutor's Office or by the Police; the acceptance of the collaborating party and his/her defence lawyer; a specification of the measures to protect the collaborating party and his/her family[42], when necessary, and the signatures of all parties involved – the Prosecutor's Office, the Police Authority, the collaborating party, and his/her defence lawyer. It can also include other terms of the agreement, as long as they are essential to it[43].

The collaboration agreement will be presented to the court for ratification under judicial secrecy[44] (and it will be processed separately from the investigation until then[45]), and it will only contain information that does not identify the collaborating

[37] Essado states that this hypothesis characterizes the application of the principle of opportunity in unconditional public criminal actions. It is important to note that the delimitation of granting the benefit to the one who gives the information first has a logic (T. Essado, *Delação Premiada e Idoneidade Probatória,* São Paulo 2013, p. 212). If it was possible to grant it to others, the leniency program would not be effective, since all those involved would expect a co-accused to manifest before coming forward themselves and obtain the same benefit (United Nations Conference on Trade and Development, *Competition Guidelines: Leniency Programmes*, Geneva 2016, p. 5).

[38] Brazilian Federal Law 12.850/2013, section 4, paragraph 4.

[39] Brazilian Supreme Court's decision in Appeal ADIN 5,508-DF, dated 20 June 2018.

[40] Brazilian Federal Law 12.850/2013, section 4, paragraph 6.

[41] Brazilian Federal Law 12.850/2013, section 3-C, paragraph 3. Moreover, the legislator was consistent, once the approved agreement can be terminated in case of intentional omission of facts that are the object of the collaboration agreement. (Brazilian Federal Law 12.850/2013, section 4, paragraph 17).

[42] Brazilian Federal Law 12.850/2013, section 6.

[43] E. Pacelli, D. Fischer, *Comentários ao Código*..., 2016, p. 354.

[44] In the original version of Brazilian Federal Law 12.850/2013, section 7, paragraph 3, the collaboration agreement ceases to be confidential as soon as charges are pressed. In its new wording, paragraph 3 states that the collaboration agreement and the *collaborating party's testimonies* are kept confidential until charges are pressed, *and the judge is prohibited from deciding to disclose them under any circumstances.*

[45] The receipt of a collaboration proposal for analysis or the Confidentiality Term do not imply in themselves the suspension of investigation, except for an agreement in reverse regarding the proposal of pre-trial measures such as detention, search and seizure and so on, as well as civil procedural measures included in the Brazilian Civil Procedure Code in force (Brazilian Federal Law 12.850/2013, section 3, paragraph 3). A controlled action may be undertaken upon receipt of the proposal for analysis in order to enhance the terms and results of future collaboration, according to Brazilian Federal Law 12.850/2013, section 8.

party or its object. It will be presented to the competent judge, who must issue a decision within 48 hours. To ensure the success of the collaboration, only the judge, the Prosecutor, and the Police Authority responsible for the investigation can have access to the request for ratification. The defence lawyers will be granted full access to the evidence necessary to exercise the right of the accused to be heard, provided that it is preceded by judicial authorization, except the evidence which concerns the ongoing proceedings[46].

Once the judge has ratified the collaboration agreement, it will be inserted into the original investigation file as part of it. Then, the collaborating party, accompanied by his/her defence lawyer, may be heard at the General Attorney's Office or by the Police Officer responsible for the investigation. Moreover, even if the benefit of the ratified agreement is the judicial pardon or not indicting the collaborating party, he/she may be heard in court at the request of other parties to the criminal case or upon initiative of the judicial authority[47].

Brazilian Federal Law 12.850/2013 provides that collaboration agreements can be made at the investigation stage, at the judicial phase, and after the judgment imposing a sentence[48], with *res judicata* or not (at the appeal stage or at the stage of serving the sentence[49]).

III. A MEANINGFUL COMPARISON: LENIENCY PROGRAMMES

Brazilian Federal Law 12.850/2013 has had substantial impact on Brazilian criminal procedural law concerning the treatment of collaboration agreements, especially for the evidentiary purposes they seek to achieve. Nevertheless, they are not new, either in terms of the concept of granting benefits or in terms of the intention of collecting future evidence, since before that there were the leniency programmes[50], instated in the United States of America.

The leniency programs are based on the idea of collaborating with an investigation (including the collection of evidence), for which the offender obtains future benefits.

In the US, leniency programs were established in 1978 as part of the leniency policy managed by the Department of Justice, with a substantial revision in 1993. Today, there are both corporate leniency policy[51] and individual leniency policy[52].

[46] Brazilian Federal Law 12.850/2013, section 7, paragraps 1 and 2.
[47] Brazilian Federal Law 12.850/2013, section 4, paragraphs 9 and 12.
[48] According to section 4, paragraph 5 of Brazilian Federal Law 12.850/2013, if the collaboration agreement is executed after the sentence has been passed, the penalty already imposed the collaborating party may be reduced by half or it can be admitted the progression of the prison system, even if the objective requirements are not met. It is clear, however, that collaboration at this stage does not have the power to reverse the conviction (the prosecution's merits).
[49] An example of procedural collaboration in the stage of the enforcement of the sentence is the adoption of measures that could assure the final direct and indirect product of the crime did not happen during the persecution, which makes possible the procedural collaboration in this stage of the criminal proceeding (R. Lima, *Manual de processo penal*, Salvador 2016, p. 788).
[50] As stated in one of the opinions issued in the Federal Senate Bill 150/2006, which gave rise to Brazilian Federal Law 12.850/2013, signed by former Senator Aloísio Mercadante: 'Paragraph 4 deals with the hypothesis of an immunity agreement similar to the agreement of leniency provided for in sections 35-B and 35-C of Brazilian Federal Law 8.884/1994', own translation. It should be said that the legal provisions referred to in Brazilian Federal Law 8.884/1994 were revoked by Brazilian Federal Law 12.529/2011, section 127).
[51] United States Department of Justice, *Corporate Leniency Policy*, Washington 1993.
[52] United States Department of Justice, *Leniency Policy for Individuals*, Washington 1994.

In short, leniency programmes have emerged to encourage cartel members to take the initiative to approach the Department of Justice, to confess their participation in illegal activities, and to assist authorities in investigating them, the objective being to act effectively at the centre of the cartel[53].

In corporate cases, the inclusion in a leniency programme must occur before the investigation starts, and it will be admitted if six conditions are fulfilled. For the present study, the following conditions should be noted: the investigating authority may not have received notice of the illegal activity from any other source than the applicant company itself (there should be spontaneous denunciation)[54]; the applicant company should collaborate with the investigation as an entity and in the broadest possible way[55], not confusing the confession of the legal entity with the admission of guilt by its executives or legal representatives[56].

In that case, all directors, officers, and employees who admit involvement in illegal actions will be granted leniency, so that they will not be criminally prosecuted for these actions. To this end, they should collaborate during the entire investigation[57].

Nevertheless, there is also the possibility of applying for the leniency programme after the investigation has begun. In this case, in addition to some of the previous conditions, it is required that the applicant company be the first to report the illegal activities and that the investigative authority have insufficient evidence to support a conviction against the company that presents itself for the agreement until this moment.

In cases involving individual applicants, the inclusion in a leniency programme must also occur prior to the initiation of the investigation and it will be admitted upon fulfilment of the following conditions: the investigating authority may not have received notice of the illegal activity from any other source than the applicant individual himself/herself (the accused must self-report); the applicant individual should collaborate with the investigation in the broadest possible way, and the applicant individual cannot have forced the participation of others in the illegal practice, nor can he/she be the leader or the person responsible for creating the criminal activity.

If it is not possible to reach an agreement with a particular individual, they may still be granted a statutory or informal immunity from criminal prosecution[58],

[53] United Nations Conference on Trade and Development, *Competition Guidelines: Leniency Programmes*, Geneva 2016, p. 1.

[54] According to legal literature, leniency is automatically granted when this happens before the investigation (S. Hammond, *The Evolution of Criminal Antitrust Enforcement over the Last Two Decades*, Washington 2010, p. 2).

[55] Among others, the company can report on other participants, the nature of the activity, the affected product(s), the affected territory, and the duration of the activity (United Nations Conference on Trade and Development, *Competition Guidelines: Leniency Programmes*, Geneva 2016, p. 8).

[56] In addition, it is required that: once aware of the illegal activity, the company promptly and effectively cease to participate in it, unless otherwise approved by the investigating authority (Spratling 1998: document with no page numbers – text indicated by the US Department of Justice on the subject); whenever possible, the company should compensate the injured parties; and the company cannot be the one that forced others to participate in the illicit practice, nor can it be the leader or the person responsible for creating the illegal activity (the latter situation is similar to Brazilian Federal Law 12.850, section 4, paragraph 4).

[57] If the benefits were not extended to the individuals working for the company, they could influence the decision of the other members of the company involved to avoid collaboration and thereby avoid prosecution against themselves. (United Nations Conference on Trade and Development, *Competition Guidelines...*, p. 6).

[58] This is also the treatment accorded to members of the company who confirm involvement in the illegal practice when the company cannot benefit from the leniency for having already started the investigation.

which should be assessed at the discretion of the prosecuting authority. Nonetheless, as a general rule, the protection of criminal prosecution for all officers, directors, and employees who collaborate is a strong incentive for making leniency proposals.

In both corporate and individual leniency policy, after fulfilling the conditions, a recommendation is issued in favour of granting leniency. Subsequently, the Assistant Attorney General will be responsible for the final decision. If there is no recommendation for the grant of leniency, the applicant or his/her defence attorney can still present their intentions, upon which leniency may be granted at the discretion of the Department of Justice (it is not a right, but a possibility).

If the Department of Justice grants leniency, this does not produce effects immediately, as they will depend on the collaborating party then fulfilling the obligations imposed on him/her, particularly concerning the investigation of other participants on the illegal activity and the reimbursement of the crime proceeds. If the collaborating party does not comply with his/her obligations satisfactorily, leniency may be revoked[59].

It is important to remind that, once the Department of Justice expressly acknowledges that the conditions for leniency have been met (even partially) by the applicant, it is no longer possible to withdraw from the programme. The application can only be withdrawn at the previous stage, when the conditions for obtaining future amnesty are being assessed[60].

It is essential to consider that the US measures had influence on other initiatives[61].

In Brazil, there are two options of leniency programs. Section 86 of Brazilian Federal Law 12.529/2011 introduces the Brazilian System for the Protection of Competition. According to this provision, benefits such as the termination of the punitive action by the public administration[62], or the reduction by a third (1/3) up to two-thirds (2/3) of the applicable penalty, can be granted to natural and legal persons who are guilty of a crime against the economic order. To do so, the accused must collaborate effectively during the investigation and the administrative proceeding, as well as identify other participants involved in the illegal activity, and collaborate to obtain information and documents that prove the crime reported or investigated.

With regard to the previous scenario, according to Brazilian Federal Law 12.529/2011, section 86, paragraph 1, points I to IV, there are other requirements that must be complied with: the applicant company must be the first to report the illegal activity under investigation; the applicant company must cease its involvement in the reported actions as of the date of filing the request for the agreement; the General Superintendence of the Administrative Counsel for Economic Defence

[59] K. Wallace, *To cooperate or not: obtaining amnesty under the DOJ's Corporate Leninecy Policy*, Chicago 2010, document with no page number.

[60] G. Spratling, *The Corporate Leniency Policy: answer to recurring questions*, Washington 1998, document with no page numbers. According to the original version: '[…] Also, once an applicant has fulfilled all of the conditions for amnesty and the Division has issued a final amnesty letter, the Department will not permit the company to withdraw'.

[61] United Nations Conference on Trade and Development, *Competition Guidelines...*, p. 12.

[62] Although there is no legal provision for its application in civil actions, only in administrative proceedings, it may have judicial consequences in the future. (P. Machado, *Acordo de Leniência...*, p. 112–113).

(in Portuguese, *CADE*) must not have sufficient evidence to ensure the conviction of the company or individual when the application for the agreement is presented; the applicant company must confess its participation in the illegal activity and cooperate fully and permanently during the investigation and the administrative proceeding, appearing, at their expense, whenever requested, in all procedural activities, until their conclusion[63].

According to Brazilian Federal Law 12.529/2011, section 86, paragraph 2, the agreement can also be entered into with a natural person, provided that the last three conditions are met. According to section 86, paragraph 3, the leniency agreement entered into with the CADE must stipulate the conditions to ensure the effectiveness of the collaboration and usefulness of its results.

As the collaboration agreements, the leniency programme provided for by the competition law also tries to affect the relations of trust and secrecy between corruptors. Its goal is to be a more effective tool in producing results that serve the public and social interests[64].

According to Brazilian Federal Law 12.529/2011, section 87, in crimes against the economic order, as described in Brazilian Federal Law 8.137/1990, and other crimes directly related to cartel practice, such as those defined in Brazilian Federal Law 8.666/1993 and section 288[65] of the Brazilian Criminal Code, the leniency agreement results in suspension of the period of limitation of the offence and prevents the offer of the complaint in relation to the collaborating party. Once the leniency agreement's obligations are accomplished, there is the extinction of the criminal liability of the offender[66].

The second possibility of leniency programs is provided for by Brazilian Federal Law 12.846/2013, which establishes administrative and civil liability of legal entities for acts against national or foreign public administrations. According to section 16, subsections I and II, the supreme authority of each public body[67] may enter into

[63] According to section 86, paragraph 4, subsections I and II, § 4 of Brazilian Federal Law 12.529/2011, once the compliance with the agreement is verified, the Administrative Court shall terminate the punitive action of the public administration in favour of the transgressor, if the settlement proposal has been submitted to the General Superintendence without prior knowledge of the notified violation; or in the other cases, reduce the applicable penalties from one (1) to two-thirds (2/3), subject to section 45 of this Law, also considering the classification of the penalty taking into acocunt the effective collaboration provided and the transgressor's good faith in the complying with the lenience agreement. The effects of the leniency agreement shall be extended to companies of the same group, de facto or de jure, and to their directors, administrators or employees involved in the offence, provided they enter into the agreement jointly, respecting the imposed conditions. (Brazilian Federal Law 12.529/2011, section 86, paragraph 6º).

[64] P. Machado, *Acordo de Leniência...*, p. 104–105.

[65] It defines criminal association as the association of 3 (three) or more persons, for the specific purpose of committing crimes.

[66] In Brazil, it is unconstitutional to provide for effects in the criminal procedure of leniency agreements in which the Public Prosecution Office does not participate, since Prosecutor's Office is the one entitled to present criminal actions, under section 129, subsection I, of the Brazilian Constitution (P. Machado, *Acordo de Leniência...*, p. 173). CADE corroborates that the Prosecutor's Office participation is imperative, in view of all criminal repercussions of leniency agreements for CADE. In this case, the Public Prosecutors must intervene to assist in criminal investigations (Brazil's General Superintendence of the Administrative Counsel for Economic Defence, *Programa de Leniência Antitruste do CADE*, Brasília 2016, p. 41), but they will not have access to the information and documents negotiated withing the leniency agreement prior to its signature. (Brazil's General Superintendence of the Administrative Counsel for Economic Defence, *Programa de Leniência Antitruste do CADE*, Brasília 2016, p. 42).

[67] The Federal Inspector's Office is the competent body to enter into leniency agreements within the Federal Executive Branch, as well as in cases of illegal acts against foreign public administration (§ 10). It is not the purpose of this study to go further into the subject, but we are aware of the discussion on the possibility of

a leniency agreement with the legal entities responsible for the illegal acts if they effectively collaborate during the investigation and the administrative proceeding, by identifying other participants in the illegal acts or facilitating access to information and documents that prove the illegal acts under investigation[68].

According to section 16, paragraph 1, the applicant company must also be the first to report the illegal activity under investigation; the applicant company must cease its involvement in the reported acts as of the date of filing the request for the agreement[69]; and it must confess its participation in the illegal activity and collaborate fully throughout the investigations and the administrative proceeding, appearing, at their expense, whenever requested, during all procedural acts, until their conclusion.

The request of the applicant company or individual to enter into a leniency agreement does not imply recognition of the practice of the investigated illegal activity if rejected (paragraph 7), but once the parties enter into the deal, it interrupts the period of limitation in relation to the illicit acts provided for in Brazilian Federal Law 12.846/2013 (paragraph 9).

Portugal also has the so-called clemecy program, provided for in Portuguese Law 19/2012[70], section 75[71] et seq.

According to section 77, paragraph 1 of the cited Portuguese Law, the Competition Authority grants penalty exemption[72] for the applicant company which discloses its participation in an alleged unfair agreement or concerted practice, provided that the applicant company is the first to provide information and evidence that, in the opinion of the Competition Authority, enables it to request for search and seizure when otherwise it would not be possible. The exemption from penalty can also be granted if the Competition Authority was aware of the existence of the violation, but did not have sufficient evidence to prove it until the applicant company disclosed its participation and provided information and evidence.

---

leniency agreements being executed by the Public Prosecution Office. In the minutes of the 5th Coordination and Review Chamber (Fight against Corruption) of the Federal Public Prosecutor's Office on situations involving the so-called 'Operation Car Wash' approval was espressed for collaborations in leniency agreements at the Public Prosecutor's Office. However, there is a judicial decision in Brazil that says that the authority competent for the leniency agreement is the Federal Inspector's Office. The Public Prosecutor's Office would only participate within the limits of jurisdiction indicated above (Court of Appeals decision AI No. 5023972–66.2017.4.04.0000/PR of TRF4, dated 22 August 2017.

[68] According to Brazilian Federal Law 12.846/2013, the leniency agreement will exempt legal entities from the santion of prohibition of receiving incentives, subsidies, subsidies, donations or loans from public bodies or entities and from public or state-controlled financial institutions for a minimum term of one (1) and a maximum of five (5) years, and reduce by two-thirds (2/3) the applicable fine. On the other hand, it will not exempt the legal entity from the obligation to fully repair the damage caused and it will stipulate the necessary conditions to ensure the effectiveness of the collaboration and the useful outcome of the process (paragraphs 3 and 4).

[69] Regarding the need to terminate the participation in illicit activities, it was positive that it was included as a legal condition for collaboration agreements in Brazil by the new law (Brazilian Federal Law 12.850/2013, section 4, paragraph 18).

[70] The cited law approved the new legal regime of competition, repealing Portuguese Law 18, of 11 June 2003, and Federal Law 39, of 25 August 2006, and made the second amendment to Portuguese Law 2, of 12 January 1999 (the Press Law).

[71] According to the section 75, the exemption or special reduction of fines is granted in the context of proceedings concerning unfair agreements or concerted practices between two or more competing companies that coordinate their behavior on the market or influence competitive variables by fixing prices or other trading conditions, allocating production or sales quotas, market sharing, including agreements in auctions and public tenders, restriction of imports or exports or anti-competitive actions against others competitors.

[72] Section 78 provides for the possibility of reduction of fines by the Competition Authority, and section 79 provides for the possibility of extending it to individuals working for the company and involved in the illegal activity.

According to section 77 paragraph 2 of the cited Portuguese Law, the Competition Authority will grant the penalty exemption provided that the company complies with certain conditions, mainly ensures full and continuous collaboration with the Competition Authority from the time of the application for annulment or reduction of the fine, including all the information and evidence it has or will have in its possession or under its control, as well as responds promptly to any request for information that may contribute to the determination of the facts[73].

The information and evidence provided by the applicant company must contain full and accurate information on the unfair agreement entered into or the concerted practice and the other companies involved, including information on the product or service which the competition distortion concerns, the adopted actions and procedures, the geographical scope, the duration and specific information on dates, sites, contents and participants and all relevant explanations presented in support of the request (paragraph 3).

Finally, Germany also has such program. Through the *Bundeskartellamt*, the participant of a cartel can receive immunity from fines or their reduction, in two different scenarios[74].

In the first scenario, the collaboration must happen before the *Bundeskartellamt* that will as a result have proof to obtain a warrant for search and seizure. In these cases, the applicant must provide sufficient verbal and written information to get the warrant, besides collaborating fully with the investigation authority[75].

The second scenario of immunity from fines exists after the search and seizure warrant. In that case, the applicant must meet the requirement to be the first to contact the investigating authority, before it has sufficient evidence to confirm the illegal actions, and no other member of the cartel can have been granted immunity under the previous scenario.

In turn, the reduction of fine may occur in cases where it is not possible to apply full immunity, but the applicant provides relevant information to determine the illegal acts and collaboerates fully and continuously with the investigating authority.

To apply for the German leniency program, the applicant must declare the intention and willingness to cooperate[76], and describe the scope of the illegal activity,

[73] There is also a requirement to abstain from any act that may hinder the investigation, in particular the destruction, falsification or concealment of information or evidence related to the infraction; the disclosure of the existence or the contents of, or the intention to present, the request for exemption, unless expressly authorized by the Competition Authority; the termination of participation in the illegal activity, until the company provides the Competition Authority with the information and evidence, except to the extent reasonably necessary in the opinion of the Competition Authority to preserve the effectiveness of the investigation; and that the company has not coerced the other companies to participate in the illegal activity.

[74] As stated in *Notice no. 9/2006 of the Bundeskartellamt on the immunity from and reduction of fines in cartel cases – Leniency Programme – of 07 March 2006*, p. 1, from which the following information was extracted.

[75] In addition, the participant must be the first to contact the Competition Authority, it cannot be the main leader of the cartel, nor can it have forced the participation of others. The *Bundeskartellamt* explains: 'The **first applicant** to disclose information and evidence giving rise to the initial suspicion of a hardcore cartel will be automatically granted immunity from a fine. This provision only applies if the applicant cooperates fully and on a continuous basis with the Bundeskartellamt […]' (Germany Bundeskartellamt, *Effective Cartel Prosecution: benefits for the economy and consumers*, Bonn 2016, p. 21).

[76] In case there is no intention to collaborate, it is established that: 'Once fines proceedings have been instituted, they broadly follow the rules on criminal procedure. In particular, the persons and companies that are suspected of having participated in the illegal cartel agreements are not obliged to cooperate in the proceedings. The *nemo tenetur* principle applies, i.e. no-one is obliged to incriminate themselves. Legal persons will only have to provide information and documents on specific turnovers. All other evidence

including geographical information. Firstly, the *Bundeskartellamt* should confirm the moment of receipt of the application, so it can decide if it is a case of granting immunity as the application is prior to obtaining the search and seizure warrant.

If the application for the leniency programme is made in the second scenario (after the search and seizure order) or based on the premises for fine reduction, the applicant will be advised of the conditions of the programme and that benefits will only be granted if he/she complies fully with the duties of collaboration, notably with regard to obtaining sufficient evidence to demonstrate the illegal activities.

It remains to be said that leniency agreements are intended to be an instrument inserted in the administrative sanctioning procedure to maintain the competitive order[77]. In the countries where criminal proceedings are mandatory, their impact on criminal proceedings is reduced, as regards the benefits granted.

From the above, it is possible to note similarities of the procedural collaboration with regard to the probative plan: the need for confession of employee participation, the requirement that the promised aid be effective during the investigation, the availability of evidence that is available to them (for contributing to the investigation or specific measures, such as the search warrant). Add to this the need to fulfil the legal conditions for the agreement to exist, the requirement of an actual will and the subsequent production of the promised effects.

From the foregoing, it is possible to note similarities between leniency agreements and collaboration agreements as regards the evidentiary aspect: they both require the applicant's self-report, that the collaboration be effective, and that the applicant hand over all the evidence for the purpose of contributing to the investigation or specific measures, such as obtaining the seizure and search warrant. We also have to mention the need to comply with the legal requirements for the agreement to exist, the existence of actual willingness of the applicant and the subsequent production of the promised effects concerning the investigation. Thus, it is possible to say that leniency agreements also inspired Brazilian law.

The last similarity leads us to an interest in the structure of the process of collaboration agreement in order to gauge how important each stage is.

IV. ANALYTICAL STUDY ON THE TIMEFRAMES OF COLLABORATION AGREEMENTS ACCORDING TO BRAZILIAN FEDERAL LAW 12.850/2013

The similarities mentioned above lead us to an important consideration: a collaboration agreement is a legal transaction with consequences in criminal law and criminal proceedings[78]. In 2015[79], the Brazilian Supreme Court defined that the

required for proving an infringement must be obtained and secured by the Bundeskartellamt, in particular from the persons and companies concerned, by means of searching the relevant premises' (Germany Bundeskartellamt, *Effective Cartel Prosecution: benefits for the economy and consumers*, Bonn 2016, p. 23).

[77] Brazilian Superior Court of Justice (Superior Tribunal de Justiça – STJ) decision Habeas Corpus RHC 24.499-SP, dated 20 September 2011.

[78] F. Didier Jr., D. Bomfim, *Colaboração premiada (Lei n. 12.850/2013): natureza jurídica e controle da validade por demanda autônoma – um diálogo com o Direito Processual Civil*, München 2016, p. 144. It is characterized as a contract, considering the advantages expected by the parties because of what was agreed upon (F. Didier Jr., D. Bomfim, *Colaboração premiada*..., p. 151).

[79] Brazilian Supreme Court decision at Habeas Corpus HC 127.483-PR, dated 27 August 2015.

collaboration agreement is a personal legal transaction introduced in the criminal proceeding[80]. This is in line with the understanding of US case-law on non-prosecution arrangements, according to which they must be formalized following the general principles of contract law, while respecting the rules of due process, within of a specific procedure[81].

As a legal transaction introduced in the criminal proceeding, it gives the parties of the collaboration agreement the possibility to choose and establish certain legal procedural situations, within the limits set by the law[82].

That peculiarity brings the need to understand that there is an interconnection between criminal procedural law and civil law, since this is the field of law that best regulates voluntary agreements.

Thus, the parties to the collaboration agreement have the power to propose what is most appropriate for their future collaboration. This includes freedom to negotiate, create, stipulate, and bind themselves in what is called the principle of respect for the autonomy of will in the process[83].

An example of a legal transaction inserted in the Brazilian criminal law is the one provided for in section 89 of Brazilian Federal Law 9.099/95, known as the conditional suspension of proceedings[84], which is the Brazilian equivalent to the Portuguese concept of provisional suspension of the case[85], and the transaction regulated in section 153a of the German Criminal Procedure Code (*Strafprozessordnung*).

After these comments, we identify that Brazilian Federal Law 12.850/2013 provides three different windows of time for the collaboration agreement as part of a criminal proceeding[86].

1. The moment of formation: the relationship between prosecution and defence

According to section 3-B, section 3-C and section 4, paragraph 6 of Brazilian Federal Law 12.850/2013, the first moment of collaboration in the criminal procedure corresponds to the negotiation and execution of the collaboration agreement between the parties. It refers, therefore, to the moment when the transaction comes into existence.

[80] Brazilian Federal Law 12.850/2013, section 3-A (see n. 1).

[81] United States District Court, *United States v. STOLT-NIELSEN S.A.*, et al., 524 F. Supp. 2d 609 (2007), Criminal Action No. 06-cr-466, E.D. Pennsylvania, dated 29 November 2007.

[82] P. Nogueira, *Sobre os acordos de procedimento no Processo Civil Brasileiro,* Salvador 2015, p. 84–85.

[83] F. Didier Jr., *Princípio do respeito ao autorregramento da vontade no Processo Civil*, Salvador 2015, p. 20.

[84] F. Didier Jr., D. Bomfim, *Colaboração premiada*..., p. 145. It is relevant to transcribe section 89 of Brazilian Federal Law 9.099/95: 'In crimes where the minimum sentence commenced is equal to or less than one year, whether or not covered by this Law, the Public Prosecutor may, when filing the indictment, propose the suspension of proceedings for two to four years, provided that the accused is not being prosecuted or has not been convicted of another crime, in addition to the other requirements that would authorize the conditional suspension of the sentence (section 77 of the Criminal Code)', own translation.

[85] As stated in section 281, paragraph 1 of the Portuguese Criminal Procedure Code, if the offence is punishable by imprisonment not exceeding 5 years or by a sanction other than imprisonment, the Public Prosecutor, on his own initiative or at the request of the accused or the assistant, determines, with the agreement of the jugde, the suspension of proceedings, imposing on the defendant injunctions and rules of conduct.

[86] These three stages are used in the context of the established procedural form and, according to legal literature, their verification is necessary to protect the collaborating party and the affected third party, respecting the principle of procedural legality (J. Canotilho, N. Brandão*, Colaboração premiada*…, p. 25).

The moment of existence takes into account all the sufficient facts to which a particular legal standard is applied[87]. By their nature, collaboration agreements are executed outside the criminal proceeding, although it is within it that they produce effects. In such agreements, the parties express their conscious and free will and good faith in the specific situation[88], elements that are firstly expressed in the offers that the parties make to each other.

For a better understanding of the topic, it is essential to comprehend what the offer consists of. The offer is not to be confused with the period of discussion when the parties decide whether they are willing to enter into the collaboration agreement or not[89], since negotiations precede the offer itself.

The offer corresponds to a single act in which one party invites the other to enter into the legal transaction, indicating on what basis the offeror intends to settle[90]. Acceptance, in turn, is the consent of the other party to the offer[91]. Once the acceptance is expressed, the bond is formed[92].

Once these premises are known, section 3-B of Brazilian Federal Law 12.850/2013 is understood. According to its initial part, the receipt of the collaboration agreement offer marks the beginning of negotiations and the obligation of confidentiality, whereas any disclosure of the preliminary talks or documents formalizing the agreement constitute a breach of confidentiality, trust and good faith until they become public by judicial decision.

It is clear that the legislator defined not only the moment when the agreement is perceived to exist, but also that the parties must be committed to keeping the offer confidential, insofar as it must not be used against the presumption of innocence of the collaborating party and the third parties (which may happen when an offer received or made is disclosed in the press or social networks).

This is even more evident when the parties sign the Confidentiality Term[93] to proceed with the deal, except when the offer is summarily rejected (which must be properly justified and notified to the party concerned). This Term will bind the persons involved in the negotiations and prevent later rejection without good reasons[94].

Summary rejection may occur when the collaboration offer does not add any new evidence in the investigation[95], does not present the whole involvement of the collaborating party in the acts or when the collaboration is regarded as terminated with one state body, and the offer is made to another one in an attempt to recover benefits.

---

[87] M. Mello, *Teoria do fato jurídico. Plano da eficácia – 1ª parte*, São Paulo 2010, p. 17.
[88] F. Yarshell, *Convenção das partes em matéria processual: rumo a uma nova era?*, Salvador 2015, p. 68.
[89] N. Rosenvald, *Contratos (geral)*, Barueri 2007, p. 321.
[90] S. Rodrigues, *Direito Civil. Dos contratos e das declarações unilaterais da vontade*, São Paulo 2002, p. 68–69.
[91] S. Rodrigues, *Direito Civil*..., p. 70.
[92] S. Rodrigues, *Direito Civil*..., p. 72.
[93] It aims to determine that none of the parties involved will use the material obtained through collaboration before the judicial approval, as well as to set the beginning of negotiations. (C. Fonseca, *Colaboração Premiada*, Belo Horizonte 2017, p. 112).
[94] Brazilian Federal Law 12.850/2013, section 3, paragraphs 1 and 2. According to Brazilian literature, once the proposal is accepted, and the collaborating party and the Prosecutor sign the confidentiality agreement, the information will effectively be considered as part of the collaboration agreement (E. Pacelli, D. Fischer, *Comentários ao Código*…, 2016, p. 353).
[95] Explaining: 'what matters is to analyse whether the use of collaboration agreements adds evidence' (C. Fonseca, *Colaboração*..., p. 110, free translation).

Precisely in order to avoid a or justify a summary rejection, the law provides that the collaboration agreement may be preceded by evidence gathering (information gathering indeed, once this is not regarded as evidence gathering during judicial proceedings) when its object, facts reported, relevance, usefulness and public interest must be identified or complemented[96].

In order to guarantee the above, the terms of collaboration offer and the obligation of confidentiality are defined and signed by the Public Prosecutor's Office and/or the Brazilian Chief Police Officer, the collaborating party and their lawyer or public defensor with specific powers[97]. No negotiations on a collaboration agreement must be carried out without the presence of a lawyer or public defensor[98], and in case of a possible conflict of interests or a disadvantaged collaborating party, the state body must require the presence of another lawyer or the participation of a public defensor[99].

Those in charge of the collaborating party's defence must present their power of attorney in respect of the offer in order to begin the collaboration proceedings and the negotiations, which can be supplied with the personal signature of the collaborating party and their lawyer or public defensor[100].

Another concern (Brazilian Federal Law 12.850/2013, section 3-B, paragraph 6) is that, in case the agreement is not concluded by the state bodies (Public Prosecutor's Office and/or Brazilian Chief Police Officer)[101], they must not make use of the information or evidence presented by the collaborator in good faith for any other purpose. This circumstance embraces one of the most critical precepts as to the treatment of collaboration agreements in the Brazilian legal system: the parties can withdraw from the offer.

It is a fact that the retraction considered by the Brazilian law occurs at the time the offer exists and it has an *ex tunc* effect, since it makes the offer ineffective[102] as a form of repentance concerning collaboration from its outset[103]. Withdrawal of acceptance of the offer is not to be confused with a breach of contract, which would be a contractual offence and would entail specific consequences[104].

It is, therefore, at the level of existence of the agreement that the retraction of the offer produces its effects[105]. If acceptance of one of the parties is missing, there

[96] Brazilian Federal Law 12.850/2013, section 3, paragraph 4.
[97] Brazilian Federal Law 12.850/2013, section 3, paragraph 5.
[98] The negotiations must be recorded, and a copy of the transcript must be available to the collaborator and his/her defence counsel (Brazilian Federal Law 12.850/2013, section 4, paragraph 13).
[99] Brazilian Federal Law 12.850/2013, section 3-C, paragraphs 1 and 2.
[100] Brazilian Federal Law 12.850/2013, section 3-C. It is understood that special powers are also required from the Public Defensor, once he/she is not a *substitute,* but *a legal representative,* as already decided in another scenario in which the same power was demanded (Brazilian Superior Court decision in Appeal REsp. 1.431.031-MG, dated 16 April 2015).
[101] According to news reports, the Supreme Court decided, in MS 35,693 (proceeding covered by confidentiality), that it is not up to the judge to oblige the Public Prosecutor's Office to carry out a collboration agreement, once its usefulness must be assessed by the parties concerned. The investigated party or the accused do not have an express legal right to it. What is required is that the Prosecutor's rejection be justified so that it may be reviewed by their own Institution. ('Court rules investigated party has no clear legal right to collaboration agreement', available on <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=412407>, accessed on 1 April 2020).
[102] F. Didier Jr., D. Bomfim, *Colaboração premiada*..., p. 160.
[103] E. Pacelli, D. Fischer, *Comentários ao Código*..., 2017, p. 338.
[104] F. Didier Jr., D. Bomfim, *Colaboração premiada*..., p. 160–161.
[105] H. Pinho, P. Wunder, *A revisão do acordo de colaboração premiada e o aproveitamento da prova já produzida*, São Paulo 2018, p. 1.

is no more agreement and the evidentiary content of the agreement whose offer has been retracted may be extracted from evidence in the criminal proceeding.

In sum: the elements collected in the interrupted negotiations by state bodies cannot be used to support the responsibility of the collaborator and of other members of the criminal organization. Likewise, if the collaborator withdraws his/her proposal, all the elements may be used by the state bodies, even if they are self-incriminating.

The point is to reconcile what has been previously discussed (Brazilian Federal Law 12.850/2013, section 3-B, paragraph 6) with the wording of Brazilian Federal Law 12.850/2013, section 4, paragraph 10. According to this last provision, in case of retraction, the self-incriminatory evidence produced by the collaborating party must not be used solely against him/her.

Considering both provisions, we understand that the use of such evidence is only impossible when the state bodies refuse to conclude the agreement, as mentioned above. In addition, in the current version of Brazilian Federal Law 12.850/2013, section 3-B, paragraph 6, if the collaborating party is responsible for retraction of the offer, even the self-incriminating evidence can be used, except if the retraction derives from a previous malicious intent of the state representative who might have influenced the party who was willing to collaborate (as in the use of deceitful means or the promise of legally unacceptable advantages).

Therefore, if the agreement is not executed by the state representative, the evidence obtained on its basis cannot be used by the Attorney's Office in the criminal prosecution against the accused or third parties[106], unless it is voluntarily handed over, independently of the agreement. In conclusion, self-incriminating evidence cannot be used only when the agreement is retracted prior to its approval[107] and in the conditions described above.

Another important aspect appears in Brazilian Federal Law 12.850/2013, section 3-C, paragraph 4: the burden of proof regarding the defence was established, once they are supposed to gather appropriately described facts for the agreement offer, with all the circumstances, indicating evidence that will corroborate the agreement.

This provision is easily explained: as this article has previously described, procedural collaboration is a means of obtaining evidence that brings benefits to the accused. If the accusation already has evidence, the collaboration is not needed. If they do not have it, the means is justified once the benefits are obtained by the one who possesses it, i.e. the investigated party! Therefore, regarding the demands set for the collaboration, especially the confession of all facts they participated in, the investigated party must present all necessary elements so that the source of evidence is useful and of public interest for the prosecution as well as the collaborating party[108].

---

[106] E. Pacelli, D. Fischer, *Comentários ao Código*..., 2016, p. 353. There is a similar provision involving collaboration agreements in the German criminal procedural law: if the agreement is not accepted or finalized, the confession of the accused made during the negotiations cannot be used against him/her. (*Strafprozessordnung*, § 257c, 4).

[107] E. Pacelli, D. Fischer, *Comentários ao Código*..., 2016, p. 355.

[108] After all, the approved agreement may also be terminated in case of a conscious omission of facts that are the object of the collaboration (Brazilian Federal Law 12.850/2013, section 4, paragraph 18).

2. The validity: the ratification that prevents the offer from being withdrawn

The Brazilian procedural collaboration agreement is a means of obtaining evidence (the same can be said of leniency agreements[109]). So far, it has been studied in terms of its existence.

Once the agreement exists, it is necessary to examine its validity, as required in section 4, paragraph 7 of Brazilian Federal Law 12.850/2013, now with four new subsections. Validity corresponds to the perfection of legal acts according to the substantive law of a particular State, especially provisions on the actual free and conscious consent to be bound by the agreement[110]. That involves the future effectiveness[111].

It should be noted that, even if the State is barred from demanding procedural collaboration, the fact that a particular defendant has the purpose of having some advantage cannot be interpreted as a violation of the principles of investigation or of the criminal proceeding[112]. After all, there must be more leniency towards those who want to conform to the values demanded by law and society, by an actual expression of confidence that legitimizes one of the purposes that criminal legislation seeks to achieve[113]. It comprises an attitude of respect for the dignity of persons[114], justice, and the exercise of the right of defence[115].

As we know, autonomy is the ethical foundation of human dignity, based on individual free will, and the capacity we all have to define the best way to live our life. It is conditioned by reason, independence, and choice, and it encompasses essential personal motivations[116]. That is why it would be a disservice to modern societies to rely on individual rights in an absolute way, without respecting individual needs and proportionality in each case[117].

---

[109] As supported by legal literature, it is evident that the leniency agreement is a mechanism to facilitate the collection of evidence and a technique of investigation (P. Machado, *Acordo de Leniência...*, p. 182; Germany Bundeskartellamt, *Effective Cartel Prosecution: Benefits for the Economy and Consumers*, Bonn 2016, p. 19). Thus, it provides an investigation tool for the discovery of cartels that would not be discovered otherwise, and could continue to harm consumers (S. Hammond, *The Evolution of Criminal Aantitrust Enforcement over the Last Two Decades*, Washington 2010, p. 2).

[110] Mello, 2010b: 32–33. Based on US case law: 'With respect to immunity agreements, due process requires prosecutors to scrupulously adhere to commitments made to suspects in which they induce the suspects to surrender their constitutional rights in exchange for the suspects giving evidence that the government needs against others which simultaneously implicates themselves' (*United States v. STOLT-NIELSEN S.A. et al.*, 524 F. Supp. 2d 609 (2007), Criminal Action No. 06-cr-466, United States District Court, E.D. Pennsylvania, dated 29 November 2007.

[111] F. Didier Jr., D. Bomfim, *Colaboração premiada...*, p. 141.

[112] I. Leite, *Arrependido': a Colaboração Processual do Co-Arguido na Investigação Criminal,* Coimbra 2010, p. 383.

[113] G. Silva, *Bufos, Infiltrados, Provocadores e Arrependidos*, Lisboa 1994, p. 32.

[114] In Germany, the dignity of the human person was enshrined in the text of the Basic Law of 1949; it is considered inviolable (section 1.1) and gives rise to the right to 'free development of personality' (section 2.1), which should serve as the basis for the interpretation of the other rights (L. Barroso, *'Aqui, lá e em Todo Lugar'. A Dignidade Humana no Direito Contemporâneo e no Discurso Transnacional*, Rio de Janeiro 2013, p. 102–103).

[115] Also in: G. Silva, *Bufos, Infiltrados...*, p. 30.

[116] L. Barroso, *'Aqui, lá e em Todo Lugar...*, p. 126.

[117] J. Dias, *Acordos sobre a sentença...*, p. 27. As a necessary reverse of recognition of individual autonomy, it must also be protected. After all, if the collaborating party's willingness is misled, by words or by any act that might deceive the party, especially when this error is essential to obtaining the evidence provided by the party, such evidence will be illicit (J. Dias, M. Andrade, *Poderes de Supervisão, Direito ao Silêncio e Provas Proibidas (Parecer)*, Coimbra 2009, p. 32). A very useful list is provided in section 32, paragraph 8 of the Portuguese Constitution, which affirms that all evidence obtained through torture, coercion,

According to the aforementioned legal precept, after the agreement is executed, it will be sent, with the declarations of the collaborating party and a copy of the investigation file, to the judge for ratification. They shall, then, hear the collaborating party, accompanied by the defence attorney, in closed session, and analyse the following aspects of the testimony in order to approve it[118]:

- whether it is consistent with the principles of regularity and legality (subsection I);
- whether the benefits agreed are appropriate according to Brazilian Federal Law 12.850/2013, section 4, paragraphs 4 and 5 (already mentioned in this study) (subsection II);
- whether the results of the collaboration are appropriate in the context of the minimum results specified in subsections I to V of section 4 (already mentioned in this study) (subsection III);
- whether there is voluntariness and willingness, especially in cases in which the collaborating party is or has been under pre-trial measures[119] (subsection IV).

Therefore, the consent of both parties is sufficient for the execution of the legal transaction, because of the existence of two intents, and for achieving the social function that said legal transaction represents[120].

The validity depends on the fulfilment of legal requirements, and the willingness of the collaborating party is a precondition for the validity and future effectiveness of the agreement. The judge will, therefore, be responsible for confirming that there is a reciprocal relation between the benefits provided for in the collaboration agreement in favour of the collaborating party (accused) and the right of defence, which he/she will no longer exercise because of the agreement[121].

It must be said that the judge's absence during the negotiations is related to his/her responsibility for examining the validity of the agreement. Negotiations are conducted between the parties. It is for the judge to act as an arbiter of the balance between them and confirming the regularity of the agreement's terms

offence against physical or moral integrity of the person, abusive interference in private life, at home, in correspondence or in telecommunications is null and void. And its use is not allowed even when agreed upon (F. Pereira, *Compatibilização Constitucional*..., p. 328). It should also be said that, in the Portuguese context, the rule is that the statement to be given by the accused must be preceded by a caution and a warning about the right to remain silent (Portuguese Criminal Procedure Code in its sections 343, 1, 61, nº 1, g, 141, nº 4, and 143, nº 2. In the legal literature: M. Andrade, *Sobre as Proibições de Prova em Processo Penal*, Coimbra 2013, p. 86). In addition, it must be mentioned that, under section 344 of the Portuguese Criminal Procedure Code, the confession that can stop the investigation needs to be provided in court, in a free, complete and unreserved manner (without any possibility of exclusion of the liability reported) (T. Beleza, *'Tão Amigos que nós Éramos': o Valor Probatório do Depoimento do Co-Arguido no Processo Penal Português*, Lisboa 1998, p. 52–53).

[118] In the original version, Brazilian Federal Law 12.850/2013, section 4, paragraph 7 stated that, once the agreement was concluded, its was to be sent, accompanied by the collaborating party's testimony, for approval to the judge, who had to verify its regularity, legality and voluntariness, being able to, for this purpose, secretly listen to the collaborating party in the presence of his/her defence counsel. Note that this hearing, according to the previous version, was a judicial possibility. *Now* it is the judge's *duty* to do that.

[119] This alteration has been made in order to prevent the pretrial measure to be used to coerce the collaborating party to accept the agreement.

[120] From the lessons of Rosenvald (N. Rosenvald, *Contratos*..., p. 321).

[121] F. Didier Jr., D. Bomfim, *Colaboração premiada*..., p. 159.

based on the facts (the judge may reject the agreement when it is not supported by the evidence)[122].

If valid, the agreement will be ratified by the judge at the procedural phase[123], which justifies his/her role. Obviously, the agreement might not be approved: if the judge finds it untenable, the agreement will be returned to the parties for the necessary adaptations (paragraph 8[124])[125].

As asserted by the Brazilian Supreme Court, ratification consists of a judgement of determination of the regularity, voluntariness, and legality of the agreement, without any judgement regarding the substance of the statements of the collaborating party[126].

At the stage of approval of the agreement, the judge is specifically bound by the request made to him/her, since the approval of the agreement depends on the initiative of the parties. At this stage, the court (judge) cannot pursue new information[127] (not even the General Attorney's Office should do so; otherwise, the principle of the party disposition would be infringed[128]). If there are any new facts, they must be stated and verified in an independent file, not at the time of ratification.

The content of the last two paragraphs is also set out in the decision mentioned in the introduction to the present analysis, to which it refers.

Hence it can be said that this assessment concerns the understanding, intelligence, and freedom of manifestation of the collaborating party[129]. All this so that it is always guaranteed that the accused can only be used as evidence if he/she is willing[130].

---

[122] S. Kobor, *Bargaining in the Criminal Justice Systems of the United States and Germany: Matter of Justice and Administrative Efficiency within Legal*, Frankfurt am Main 2008, p. 102; F. Pereira, *Delação Premiada. Legitimidade e procedimento*, Curitiba 2013–2014, p. 142. The judge carries out a 'legality appraisal', not a 'merit appraisal' (C. Masson, V. Marçal, *Crime*..., p. 171).

[123] After all, as Chiovenda taught, jurisdiction is exercised through the process (G. Chiovenda, *Principios de Derecho Procesal Civil*, Madrid 1922, p. 359).

[124] In the previous version of paragraph 8, the judge could refuse to accept an offer that did not meet the legal requirements or *could adapt it to the specific case*. Now, it is not up to the judge, but to the parties, to make such amendments.

[125] It is relevant to mention that the decision issued by the Supreme Court determined the need for the agreement to be adequate. After verifying there was no compatibility between the agreement set forth between the parties and the current normative system, the Court decided not to ratify the agreement presented. Among other reasons, the Court detected that the agreement provided for a custodial sentence and the pardon of crimes to the collaborating party, encroaching upon the powers of the judiciary, when the agreement was not even concluded within a judicial proceeding. Likewise, the parties to the agreement could not agree on the species, the level and the prison regime, under penalty for violation of the separation of powers by the Public Prosecutor's Office. Also, ratification was refused because it is not possible to demand general and unrestricted waiver of the guarantee against self-incrimination, the right to silence and the right of appeal of the collaborating party (Brazilian Supreme Court decision Petition 7.265-DF, dated 14 November 2017).

[126] Brazilian Supreme Court decision in Habeas Corpus no. HC 127.483-PR, dated 27 August 2015.

[127] Brazilian Supreme Court decision on Provisional Remedy in Habeas Corpus MC no. HC 144.652-DF, dated 12 June 2017.

[128] It is worth remembering that 'the perpetrator and the defendant have the judicial process at their disposal to the extent they are the ones who wish to litigate or not' (J. Almeida, *Processo Penal. Ação e Jurisdição*, São Paulo 1975, 15, own translation). The judge, after all, is limited to assessing if the claim of the party is well founded (G. Tuzet, *Filosofia della prova giuridica*, Torino 2016, p. 98).

[129] A. Ristori, *Sobre o Silêncio do Argüido no Interrogatório no Processo Penal Português*, Coimbra 2007, p. 114–115. The interrogation of the accused is a guarantee of the agreement effectivness (US Supreme Court decision *Santobello v. New York*, 404 U.S. 257 (1971), dated 20 December 1971). In addition: privilege against self-incrimination is a guarantee so that no one is compelled to make self-incriminating statements by force (US Supreme Court decision *Kastigar v. United States*, 406 US 441 (1972), dated 22 May 1972).

[130] J. Dias, M. Andrade, *Poderes de Supervisão*..., p. 31.

After all, the collaborating party cannot have his/her will damaged by a promise or advantage that has no legal basis. It is not for the court to substitute legislative intentions, given the rules of separation of powers and equality in law enforcement[131].

It is important to point out that the Brazilian Supreme Court states that: the other defendants cannot be familiar with the contents of the negotiations, otherwise it could impact the validity of the agreement. The contents of the negotiations will be put in the file of the criminal proceeding together with the signed agreement; it is understood that the collaboration agreement ratification does not have any legal effect on third parties[132].

It should be mentioned that there are no obstacles to concluding collaboration agreements with an accused who is imprisoned[133]. First, because the legal circumstance of being in prison is governed by its own rules, which can be reviewed[134]; secondly, because it violates the logic applied to the specific case: it requires mental freedom[135] not freedom of movement[136].

The ability to give up fundamental rights is inherent in their exercise[137]. After all, they are rights and as such their holder can choose to exercise them or not, which follows from the autonomy of will of the accused[138].

In addition, the idea that a prisoner could not collaborate (a) would create a disproportionate decrease of civil capacity of the individuals who are imprisoned; (b) would cause irreconcilable material inequality between the individuals who are at liberty and those who are imprisoned, and (c) in the worst case scenario, would delay the execution of arrest warrants with the individual being arrested only after collaborating with the State.

All these situations are considered and the confirmation that the agreement is flawless will result in its ratification. It must be considered that the defendant does not have the right to silence as an inalienable right[139], so that no authoritarian tendency can be imputed to collaboration.

---

131 J. Canotilho, N. Brandão, *Colaboração premiada*..., p. 24.

132 Brazilian case law: Supreme Court decision RHC 69.988-RJ, dated 25 October 2016; and Supreme Court decision in Appeal Ag. Reg. Rcl 21.258 MC, dated 15 March 2016. Foreign case law, in the same vein: European Court of Human Rights judgment in *Natsvlishvili and Togonidze v. Georgia* (application no. 9053/05), dated 29 April 2014.

133 This was a previous thought; and after the entry into force of the new provision described in this article (Brazilian Federal Law 12.850/2013, section 4, paragraph 7, subsection IV), this understanding is confirmed.

134 E. Romero, *A Colaboração*..., p. 269.

135 Insofar as the restriction relates to the impossibility of being compelled, self-incrimination is an exercise inherent in one's own will and defence, with the possibility of the declaration being reversed for said party's benefit, and integrating the concept of due process of law (which ensures the possibility of the accused being heard) (W. Lafave, J. Israel, *Criminal Procedure,* Saint Paul 1992, p. 1031–1032). The accused has the right to intervene and express himself in his own defence (M. Andrade, *Sobre as Proibições*..., p. 121).

136 E. Pacelli, D. Fischer*, Comentários ao Código*..., 2016, p. 352. In identical terms: Brazilian Supreme Court decision HC 127.483-PR, dated 27 August 2015.

137 J. Novais, *Direitos Fundamentais: Trunfos contra a Maioria,* Coimbra 2006, p. 235.

138 In legal literature: F. Torrão, *A Relevância Político-Criminal da Suspensão Provisória do Processo*, Coimbra 2000, 75. In foreign case law: US Court of Appeal for the Third Circuit decision *United States of America v. Craig A. Grimes*, no. 12–4523, dated 13 November 2013.

139 F. Pereira, *Compatibilização Constitucional*..., p. 322. It is not just a Brazilian understading. The European Court of Human Rights has recognized that there is no impediment to the defendant not using his rights freely, expressly and voluntarily. This should be protected by good faith, which legitimizes the non-exercise of procedural law by the defendant [European Court of Human Rights decision in *Scoppola v. Italy* (para. 2, application no. 10249/03), dated 17 September 2009].

Here is an important milestone for understanding the procedural collaboration agreements in the Brazilian legal system: once the agreement has been ratified[140], there can be no retraction by the collaborating party, since the offer phase is over, and the time limit established by Brazilian Federal Law 12.850/2013 applies, as explained above.

In short: from the ratification onwards, the material that accompanies the collaboration agreement can be used[141].

We should realize the difference between withdrawal of the offer and changing the version of the facts stated in the agreement after the recognition of its validity. The second scenario means a breach of the agreement[142]. In order to guarantee stability and legal certainty, the ratification decision is protected by the principle of formal and material *res judicata*[143]. Therefore, the decision cannot be annulled by a unilateral declaration of one of the parties, only through a new jurisdictional action specifically carried out for this purpose[144].

On the other hand, the ratification of an illegal agreement does not authorize the use of the evidentiary material attached to it and material that was provided in performance of it[145]. Such a case would be covered by section 157, paragraph 1 of the Brazilian Criminal Procedure Code, according to which evidence derived from illicit sources is inadmissible[146] (the widely known metaphor of the fruits of the poisonous tree), especially since the fault would be in the way the evidence was obtained[147].

In summary: the process of ratification explained so far describes a function of the judiciary. Thus, although the statements of the parties expressed in the collaboration agreement will result in acts that will be performed by themselves, they must be submitted to the judge. There is a requirement for judicial intermediation, because the law makes the effectiveness of the extrajudicial transaction conditional on judicial approval[148].

---

[140] R. Lima, *Manual de processo*..., p. 785.

[141] E. Pacelli, D. Fischer, *Comentários ao Código*..., 2016, p. 355.

[142] Brazilian Superior Court of Justice decision in Habeas Corpus HC 186.566-SP, dated 15 February 2011.

[143] F. Didier Jr., D. Bomfim, *Colaboração premiada*..., p. 159.

[144] F. Didier Jr., D. Bomfim, *Colaboração premiada*..., p. 164. Albergaria explains that in the US there is always the freedom to revoke the externalized intention. However, under Rule 11(d)(2)(B) of the Federal Rules of Criminal Procedure, if it takes place after the acceptance of the guilty plea, it can only happen for a justified reason (P. Albergaria, *Plea Bargaining: Aproximação à Justiça Negociada nos E.U.A.*, Coimbra 2007, p. 102), e.g., the collaborating party demonstrates that at the time of the agreement he/she was being coerced by a third party so that a determined and innocent person could be held criminally liable in order to secure the acquittal of those who coerced him/her.

[145] E. Pacelli, D. Fischer, *Comentários ao Código*..., 2017, p. 335; E. Romero, *A Colaboração*..., p. 269.

[146] As it appears, e.g. in section 5, subsection LVI, of the Brazilian Constitution, echoed in the current wording of section 157 of the Brazilian Criminal Procedure Code.

[147] J. Dias, M. Andrade, *Poderes de Supervisão*..., p. 29. Unless it has been demonstrated that the tests were conducted according to legally prescribed exceptions to the theory of the fruits of the poisonous tree, as admitted by Brazilian legislation (the Criminal Procedure Code, section 157, paragraphs 1 and 2, known as an independent source and as an inevitable discovery).

[148] M. Mello, *Teoria do fato jurídico. Plano da eficácia – 1ª parte*, São Paulo 2010, p. 230. It should be pointed out that the Brazilian procedure is not to be confused with the Italian one, provided for in Law of 15 March 1991, nº 82, with its subsequent modifications (especially that of Law of 13 February 2001, nº 45). Section 16-quarter establishes the so-called *verbale illustrativo dei contenuti della collaborazione*, which is applicable in cases of terrorism, subversion of the constitutional order, crimes of mafia and other similar crimes (according to section 9, paragraph 2), but legal literature says it extends to any offence for the purpose of admitting the collaboration (P. Tonini, C. Conti, *Il Diritto delle Prove Penali*, Milano 2014, p. 315, n. 279). Its main objective is not to allow the collaborating party to opportunistically choose the best moment to demonstrate his/her willingness to collaborate (M. D'Elia, *I Collaboratori di Giustizia*, Roma 2012–2013, p. 81). According to the procedure, statements that have been made within 180 days

There is no time limit established in the Brazilian law and once the collaboration agreement has been ratified, it will be fully effective, despite the time it took to do so[149].

Thus, the consensus expressed in a collaboration agreement is connected with the criteria of intention and knowledge, and is therefore not refractory to the concept of truth, especially the concept of truth valid in procedural terms. Knowledge must be supported by the statement itself, therefore, the last stage serves to reveal the truth[150], since it is shared by the participant of the proceding who knows it best: the defendant.

In order to finalize this topic, it is relevant to say that there are clauses that can be called judicially unenforceable, once Brazilian Federal Law 12.850/2013[151] expressly prohibits any clauses that:

- do not meet the rules of the initial imprisonment regime for sentence enforcement according to the Brazilian Criminal Code, section 33[152];
- violate the rules of the given regime, according to the Brazilian law, as well as those which alter the requirements for changing the prison regime to a lighter one, except for Brazilian Federal Law 12.850/2013, section 4, paragraph 5 (as indicated in this article); and
- provide for waiver of the right to appeal against agreement ratification (see note 131).

It is evident that there is a question of criminal policy to be respected and enforced by the Brazilian State. Therefore, those carrying out the agreement must not change the policy.

2.1. More on the moment when the agreement becomes valid: the legal nature of the statements made by the collaborating party. The appraisal of the evidence accompanying the agreement

In essence, procedural collaboration is a means of obtaining evidence[153], so it aims to move forward a criminal investigation. It aims to find evidence within the criminal structure, insofar as its members are those who possess the most privileged

after the manifestation of the will to collaborate and which are relevant to the reconstruction of the facts and circumstances of more serious crimes causing social outcry, in addition to the identification of other participants, may be used for the identification, seizure and confiscation of money, property and any other means belonging to criminal groups (n. 1).

149 Again, it does not follow the *verbale illustrativo*, referred to in the previous footnote. According to the Italian system, after a period of 180 days (*dichiarazioni tardive* – P. Tonini, C. Conti, *Il Diritto*…, p. 315), statements cannot be used against third parties in the *dibattimento*, except in case they are unrepeatable (paragraph 9), but may be used against the person making them. However, they may be used during preliminary investigations for precautionary purposes, at the preliminary hearing or in the case of *giudizio abbreviato* (P. Tonini, C. Conti, *Il Diritto*…, p. 317). It is a case of relative *inutilizzabilità*, since prosecutors have the constitutional duty to initiate the criminal action (Italian Constitution, section 112) on the basis of the received notice of a crime, including the possibility of requesting other means of taking evidence, such as interceptions. The prohibition is, in the first place, at the stage of *dibattimento* (M. D'Elia, *I Collaboratori*…, p. 95).

150 J. Costa, *Consenso, Verdade e Direito*, Coimbra 2001, p. 427 and 429.

151 Brazilian Federal Law 12.850/2013, section 4, paragraph 7, subsection II, and paragraph 7-B.

152 Closed conditions, when the sentence is longer than 8 years; semi-open conditions, when the sentence is longer than 4 year, but no longer than 8 years, except if the convict is a repeat offender; open conditions, sentence of 4 years or less, except if the convict is a repeat offender. Repeat offenders may have worse conditions, regardless of the sentence received.

153 E. Pacelli, D. Fischer, *Comentários ao Código*..., 2016, p. 351. In case law: Brazilian Supreme Court decisions: Motion Petition 5.700-DF, dated 22 September 2015; and Provisional Remedy in Habeas Corpus MC in HC 144.652-DF, dated 12 June 2017.

information[154]. That is clear from the reading of section 3, subsection I, and section 4 of collaboration agreement 12850/2013[155].

The Brazilian Supreme Court stated that the ratification of collaboration agreements makes possible the use of the information presented by the collaborating party[156]. It is now necessary to understand the reasons for such a conclusion, insofar as the Law on Combating Criminal Organizations provides that procedural collaboration agreements can be carried out during the pre-procedural, procedural and sentence execution phases.

As we have already seen, the purpose of the collaboration agreement ratification is to verify the elements on which its validity depends. The exercise of jurisdiction[157] at this stage aims to ensure that the judicial authority imposes a rule to regulate the legal situation in question. Ultimately, it regulates the recognition and protection of public interest[158].

As provided in section 155 of the Brazilian Criminal Procedure Code, it is possible to perceive the difference between information and evidence. As a general rule, the latter is produced in the judicial proceedings and covered by the right to full defence and the principles of adversarial system (requirements for evidence validity). Exceptionally, there is evidence that, even if produced during the investigation, is treated differently and enables conviction, such as as the so-called precautionary, non-repeatable, and anticipated evidence.

Section 155 of the Brazilian Criminal Procedure Code also makes clear that information is collected in the investigative phase and does not have the characteristics of evidence. It serves to support precautionary measures and prosecution decisions[159]. Likewise, information does not serve as the sole basis for convicting the accused, only to supplement the evidence produced in court; otherwise, it would violate section 5, subsection LV, of the Brazilian Constitution[160], which is the reason why, as a rule, it needs to be repeated in court.

Herein lies the connection between the statements inserted in the collaboration agreement and the elements of investigation (including the confession made at the investigation phase): neither of them can result in a conviction! That is what the law establishes for both situations (especially for collaboration agreements: section 4, paragraph 16, subsection III of Brazilian Federal Law 12.850/2013).

If the evidence (information) does not lead to a conviction, there is no evidence. Consequently, as it happens with other investigative factors[161], the statements in-

[154] F. Pereira, *Compatibilização Constitucional*..., p. 322.

[155] In foreign law there are similar views. For example, in Italy, there is the 'natura funzionale di strumenti processuali di ricerca probatoria' (T. Padovani, *La Soave Inquisizione*…, p. 542).

[156] Brazilian Supreme Court decision in Investigation Inq. 4.130QO, dated 23 September 2015.

[157] On jurisdiction: J. Marques, *Da Competência em Matéria Penal*, Campinas 2000, p. 3–4.

[158] As Figueiredo Dias says: 'With regard to criminal proceedings, this means that, as representatives of the legal community and the official power of the state in which it is constituted, the courts are the only competent bodies to decide on the legal and criminal cases that are brought to trial by applying the substantive criminal law' (J. Dias, *Direito Processual Penal*, Coimbra 1974, p. 302, own translation).

[159] R. Lima, *Manual de processo*..., p. 574. It is import to remember that there is no the right to be heard during police investigation, which the parties will only have before the Court, the place of the criminal proceedings (M. Andrade, *Sistemas Processuais Penais e seus Princípios Reitores,* Curitiba 2013, p. 139–140).

[160] R. Lima, *Manual de processo*..., p. 574–575.

[161] In the same sense: 'In addition, besides not being characterized as the evidence sought from a point of view of the final outcome, there is no contradiction in the execution of the collaboration agreement, since the content of the collaborating party´s statements will only be known and confronted in a deferred manner, that is to say, on the occasion of the criminal prosecution' (H. Pinho, P. Wunder, *A revisão*..., p. 287, own translation).

serted in the ratified collaboration agreement are a probability that should not be confused with a condemnatory decision condemnatory decision [162]. It is a standard of proof that can be defined as reasonable suspicion or probable cause[163].

However, due to an explicit legal provision (to the detriment of the collaboration agreements, as some believe[164]), the collaborator's statements cannot be the sole basis for applying any pretrial measures or pressing criminal charges[165].

It must be considered that the collaborating party can present additional material to support his/her statements, such as fiscal documents, bank statements, photographs and general documents, which, during the investigation, will also be considered only as information.

If the result of the investigation is used in a future criminal proceeding, it must be examined whether the materials were presented as evidence or not. If not, they

[162] This idea is reinforced, for example, when analysing the directions given in Brazil regarding the leniency agreement. The CADE explains that the Leniency Agreement gives companies and/or individuals the possibility of obtaining the benefits of extinguishing the punitive action or reduction of the applicable penalty in the judgment issued in administrative proceedings (Brazil General Superintendence of the Administrative Counsel for Economic Defence, *Programa de Leniência Antitruste do CADE*, Brasília 2016, p. 11). Not coincidentally, it states that the leniency agreement and the information contained in the documents and other attached materials may serve to justify a request for search and seizure before the judiciary, as well as other proceedings (Brazil General Superintendence of the Administrative Counsel for Economic Defence, *Programa*…, p. 50).

[163] D. Dallagnol, *A visão moderna da prova indício*, Salvador 2015, p. 110. As already indicated by the Brazilian Supreme Court, the statements about the crime agent are not confused with circumstantial evidence, which leads to conviction, but they are sufficient elements to establish suspicion against the accused (Brazilian Supreme Court decision on Habeas Corpus HC 83.542-PE, dated 26 March 2014).

[164] The previous comment regarding the legal alteration on the subject will be repeated here, once it was possible there was exclusive use of the statements for measures other than the conviction: 'Thus, we cannot agree with the portion of the legal literature that defends that, in themselves, the collaborating party´s statements are not sufficient to justify the receipt of criminal accusation and imposition of precautionary measures' (T. Bottino, *Colaboração premiada*…, p. 385; W. Bittar, *O problema do conteúdo da valoração do depoimento dos delatores diante do conceito de justa causa para o regular exercício da ação penal*, Porto Alegre 2017, p. 247). If it was true that the contents of the collaboration agreements cannot be even used as evidence for investigative actions or for filing the indictment, it would be reduced to a legal nothingness (when in reality the criminal court is the only appropriate forum to appraise its substance). Brazilian case law has already stated that the elements of the investigation may influence the free appraisal of the judge for the decision of the case when complementing other evidence that crosses the screen of the principle of *audi alteram parte* in Court (Brazilian Supreme Court decision in Appeal RE 425.734 AgR-MG, dated 28 October 2005; in the same direction: Brazilian Superior Court decision in AgRg in AREsp 651.663-MG, dated 28 April 2015). There is no obligation for the collaborating party to present the evidence immediately; what is required is the presentation of a way of reaching it (C. Fonseca, *Colaboração*…, p. 190). If otherwise, it would lose all its substance: why would the state seek collaboration if cooperative agreements could not be used for any purpose? What would be the point of collaboration, then? At the moment of the pressing the charges, it should be analysed whether there is a fair cause (as required by section 395, subsection III of the Brazilian Criminal Procedure Code) for their receipt by the court. After all, Public Prosecutors are not obliged to get all the evidentiary elements during the investigation – the consequences of collaboration can be obtained directly in the criminal process. [As it occurs, e.g. when the collaborating party´s statements indicate other evidence that are not disclosed during investigation and will be presented and considered during discovery. (H. Pinho, P. Wunder, *A revisão*..., p. 309)]. That explains the legal provisions according to which even if the collaborating party benefitted from judicial pardon or the absence of criminal accusations, the party can be heard in court at the request of the other parties or on the initiative of the legal authority (Brazilian Federal Law 12.850/2013, section 4, paragraph 12). Section 4, paragraph 16 of Brazilian Federal Law 12.850/2013 only prevents the use of the statements of the ratified procedural collaboration agreement alone to justify a conviction. Legal literature adds there is a character of relative probative effectiveness, even when submitted to the full defence and to the right to be heard system of principles (H. Pinho, P. Wunder, *A revisão*…, p. 289). Moreover, section 114 of the Brazilian Civil Code specifically determines that beneficial legal transactions and renunciation are interpreted strictly. It is clear that the rule of probative corroboration is a benefit in favour of the accused and a restriction on the prosecution. After all, the purpose of investigation is, by definition, to find information that supports the charges, in its construction of *opinio delicti* (A. Gomes Filho, *Limites ao compartilhamento de provas no processo penal,* São Paulo 2016, p. 58).

[165] Brazilian Federal Law 12.850/2013, section 4, paragraph 16, subsections I and II.

still have the status of information. If so, they will be covered by the right to be heard, and they stand as evidence for a possible conviction, including as support for the collaborating party´s statement, even if he/she is not heard in court. The validity and effectiveness of the supporting materials are distinct from the validity and effectiveness of the statements made by the collaborating party[166]: what matters is that they are validly incorporated into the criminal proceeding.

In short, what is not covered by the *audi alteram parte* principle will be treated only as information[167], which also applies to the collaborating party´s statement when he/she is not heard in court[168]. Thus, the statements of the collaborating party can only be considered as evidence once they are covered by the right to full defence and by the right to be heard in the criminal procedure[169].

3. The moment when the agreement becomes effective: credibility, *audi alteram parte* principle, corroboration, and judicial verification of the parties' compliance with the agreement

It is time for the agreement to become effective, that is to say, the moment when its three effects are realized.

The first and immediate effect of the collaboration agreement is provided for in section 4, paragraph 9 of Brazilian Federal Law 12.850/2013, whereby, after the ratification of the agreement, the collaborating party may be heard by the General Attorney's Office or by the investigating police officer, always accompanied by his/her defence attorney. Such circumstance reinforces the condition of information that the agreement has, as explained before.

The second, also immediate, effect of the collaboration agreement is provided for in section 5 of Brazilian Federal Law 12.850/2013. From the moment of execution of the agreement on, the collaborating party will have some rights granted, namely: to benefit from protection measures provided for in the specific legislation; to have his/her name, qualification, image, and other personal information protected; to be conducted to the court separately from the other accused; to participate in hearings without visual contact with the other accused; not to have his/her

[166] E. Pacelli, D. Fischer, *Comentários ao Código*..., 2016, p. 352.

[167] F. Pereira, *Delação Premiada*..., 154. The Brazilian Supreme Court accepts that collaboration agreements are personal transactions and a means of obtaining evidence rather than actual evidence (Brazilian Supreme Court decision RHC 69.988-RJ, dated 25 October 2016). Actually, there are different understandings of the legal nature of collaboration agreements when the collaborating party is heard in court. The first one affirms it is a testimony, which implies punishment for false testimony; the second considers it a *sui generis* proof, which implies application of rules concerning interrogation, confession and testimony; the third affirms it is an interrogation, thus breach of the agreement justifies not applying the agreed benefits (E. Romero, *A Colaboração*..., p. 263–264). However, as we have seen, it is not mandatory that the collaborating party be heard in court, and the collaboration can only be considered as a source of evidence from the moment when the agreement is submitted to the court. At the investigative stage it can not be given such status, as explained above.

[168] F. Pereira, *Delação Premiada*..., p. 154. When discussing collaboration in the Spanish law, Elisa García España states that, according to section 406 of the Spanish Criminal Prosecution Law, the confession made as part of the collaboration, per se, does not constitute evidence, since it does not exempt the judge from doing what is necessary to verify its correctness. Thus, she maintains that the benefit to be granted must result from the contribution that comes from collaboration, instead of the need – or not – for new evidence (E. España, *El premio a la colaboración con la justicia. Especial consideración a la corrupción administrativa*, Granada 2006, p. 52–53).

[169] H. Pinho, P. Wunder, *A revisão*..., p. 295.

identity revealed by the media, or to be photographed or filmed without his/her prior written authorization; to serve a sentence or pretrial detention in a penal establishment separately from the other convicted/accused persons.

The third effect of the collaboration agreement is the most import one and concerns the future, to the moment when the agreement is submitted for ratification and the judge assesses the terms of the agreement and its effectiveness as regards the agreed benefits (Brazilian Federal Law 12.850/2013, section 4, paragraph 11)[170], provided that there is no conviction based exclusively on the statements of the collaborating party[171].

It should be pointed that it is at the moment of the decision that there will be a proper assessment of the collaboration, to verify if, between it and the other evidence brought to the case as a consequence of the agreement, there are sufficient grounds for the accused turning state's evidence[172].

That goes back to a logical origin: confession (at any stage of prosecution) does not qualify as the most important piece of evidence[173], the accused being always guaranteed the right to remain silent, which is why it will be essential to confront the statements of the accused with other evidence of the case[174],[175].

For this reason, the judge or court will proceed to the analysis of whether the accusation has any merit, judicial pardon and the first stages of the sentence according to the Brazilian Criminal Code and the Brazilian Criminal Procedure Code, before granting the benefits agreed. The exception to that is when the agreement provides that the collaborator will not be charged or the sentence has already been delivered (agreement concluded during the penal execution phase)[176].

In short, to overcome the limitations resulting from constitutional guarantees,

---

[170] In legal literature: M. Mendroni, *Comentários a Lei de Combate ao Crime Organizado,* São Paulo 2014, p. 45–46. Pursuant to the Brazilian Supreme Court: 'the granting of the benefits provided for in the collaboration agreement depends on the compliance with the obligations assumed by the collaborating party and achieving one or more of the results indicated in section 4, subsections I to V of Brazilian Federal Law 12.850/2013' (Brazilian Supreme Court decision MC in HC 144.652-DF, dated 12 June 2017, own translation).

[171] Brazilian Federal Law 12.850/2013, section 4, paragraph 16. According to legal literature, the judicial omission is not admitted with respect to the intrinsic relations of the criminal process, which is of public nature. (E. Correia, *Processo Criminal*, Coimbra 1956, p. 13).

[172] T. Essado, *Delação Premiada*..., p. 211; E. Pacelli, D. Fischer, *Comentários ao Código*..., 2016, p. 356.

[173] It should be noted that this position is shared by foreign law. As with other evidence, the collaboration agreement must be submitted to full defence and to the *audi alteram parte* principle, to the verification of lawful evidence and to judicial reasoning as a form of control and verification of its effectiveness (e.g., section 192, (1), (3) and (4) of the Italian Criminal Procedure Code). As the European Court of Human Rights has already established, the collaboration agreement cannot bind the judge, who may even acquit the collaborating accused or reduce the penalty, according to his/her assessment of the contents and adequacy of the agreement (especially as to its usefulness as evidence) [*Natsvlishvili and Togonidze v. Georgia* (application no. 9053/05), judgment of the European Court of Human Rights, dated 29 April 2014 – accessed on 30 January 2019].

[174] A. Ristori, *Sobre o Silêncio do Argüido no Interrogatório no Processo Penal Português*, Coimbra 2007, p. 124. This is the orientation of section 197 of the Brazilian Criminal Procedure Code: 'the value of the confession will be measured by the criteria adopted for the other evidence, and for its assessment the judge must confront it with the other evidence of the process, verifying whether there is compatibility or consistency between it and them' (own translation). Also, in section 406 of the Criminal Prosecution Law: 'The confession of the defendant will not exempt the judge from taking all the necessary steps in order to be certain of the truth of the confession and of the existence of the crime. For this purpose, the judge will interrogate the accused who made the confession to explain all the circumstances of the crime and how much he/she can contribute to prove his/her confession, if he/she was a perpetrator or accomplice, and if he/she knows some people who were witnesses or had knowledge of the fact.'.

[175] F. Pereira, *Valor Probatório*..., p. 479–480.

[176] Brazilian Federal Law 12.850/2013, section 4, paragraph 7-A.

the evidence must be firm and beyond a reasonable doubt; elements that will guide the assessment of the collaboration by a person who has an interest in the outcome of the process[177]. As is well known, criminal proceedings are not intended to demonstrate absolute truth[178], but to establish and impute responsibility, and consequently declare that the presumption of innocence does not apply to the particular accused[179].

That is an actual condition. As civil law literature explains, there are legal facts whose effectiveness requires an integrative element and for this reason, they are conditional on to a future event[180]. According to section 121 of the Brazilian Civil Code, the condition is expressed in the clause that makes the effect of the legal transaction conditional on a future and uncertain event. In the case of collaboration agreements, the condition arises by operation of law, as mentioned before.

Unlike in case of other criminal procedural agreements in Brazil, the effectiveness of collaboration depends on a full trial[181], as stated in section 4, paragraph 16 of Brazilian Federal Law 12.850/2013[182]. There will be a criminal investigation, and the final effectiveness of the collaboration will depend on other evidence presented in the case[183]. Therefore, procedural collaboration consists of an admission of guilt that does not bind the judge[184].

---

177 P. Mesquita, *A Prova do Crime e o que se disse antes do julgamento*, Coimbra 2011, 198; F. Pereira, *Delação Premiada*..., p. 116.

178 There are material limitations (empiricism, indetermination, normative requirements, guarantees against unfavorable analogy, more favorable law enforcement, causes of extinguishment of punishability) and procedural limitations (rules of experience that give rise to personal beliefs and idiosyncrasies; restrictions to the means of proof and to the form of obtaining it, and the fallibility of the witnesses) – F. Monteiro, *O Problema da Verdade em Direito Processual Penal: Considerações Epistemológicas*, Coimbra 2009, p. 330–331.

179 P. Palermo, *Relaciones entre 'el Derecho a la Verdad' y el Proceso Penal. Análisis de la Jurisprudencia de la Corte Interamericana de Derechos Humanos,* Montevideo 2011, p. 268.

180 M. Mello, *Teoria do fato jurídico. Plano da eficácia – 1ª parte*, São Paulo 2010, p. 46–47.

181 Brazilian Federal Law 12.850/2013 envisages a path that makes the judicial decision more distant from the collaborating agreement, forcing the judge to sentence overcoming the presumption of innocence (even allowing the acquittal of the collaborating party). The Brazilian legislation determines that discovery be effectively carried out, and it is not only a formality. The Brazilian judge does not want to repeat what Schünemann says of being already conditioned by the Prosecutor's previous evaluation, which gives him greater difficulties to deviate from the aforementioned evaluation. According to Schüneman, criticism can be summed up as follows: 'the faculties of formulating questions that assist him/her are used not for the purpose of improving information processing, but for self-confirmation of initial hypotheses' (B. Schünemann, *Estudos de direito penal, direito processual penal e filosofia do direito* 2013, p. 221, own translation). By its *mens legis*, the referred Federal Law wants procedural truth to take precedence over consensus.

182 Here lies an important distinction in relation to the leniency agreement. By its nature, the leniency agreement has a substitutive character, since it occupies the place of what should be the unilateral and imperative resolution resulting from the administrative procedure (J. Palma, *Sanção e Acordo na Administração Pública*, São Paulo 2015, p. 110). There is, therefore, an instrumentality of the right to sanction of the Public Administration (J. Palma, *Sanção e Acordo na Administração Pública*, São Paulo 2015, p. 275), which is not admitted in relation to the Brazilian procedural collaboration, which does not per se result in a conviction.

183 E. Romero, *A Colaboração*..., p. 257. Pursuant to the Brazilian Supreme Court, in the case of an agreement executed before a collegiate judicial body, it is the judge-rapporteur's individual responsibility to ratify the collaboration agreement, but it is the responsibility of the collegiate body to analyse the compliance with the terms and the effectiveness of the approved agreement, as provided for in section 4, paragraph 11 (information extracted from the Brazilian Supreme Court news page on Petition 7.074 QO, as the decision has not been published by the completion of this paper).

184 E. Romero, *A Colaboração*..., p. 259. In the same direction section 192, nº 3 of the Italian Criminal Procedure Code, providing that '*le dichiarazioni rese dal coimputato del medesimo reato o da persona imputata in un procedimento conesso* [...] *sono valutate unitamente agli altri elementi di prova che ne confermano l'attendibilità*'. Ruga Riva says that there is '*presunzione relativa di innatendibilità delle dichiarazioni*' (C. Riva, *Il Premio per la Collaborazione Processuale,* Milano 2002, p. 313). The Italian legal literature points out that, in these cases, the related defendants resemble the witness, and they loses

It is important to consider that the relevance is always analysed after the declaration, since it is for the judiciary to establish the guilt (*nulla culpa sine judicio*), to impose the penalty and to decide if the information provided is relevant as required by law[185].

Thus, the function of the criminal system is to understand the facts and establish the responsibility of the perpetrator in a fair process, with the minimum guarantees and standards set for prosecution and defence. That will take into account what the collaboration has contributed to the efficiency of the investigation, to the evaluation of the crime and to finding out who committed it. Depending on this efficiency, a proportional application will be rendered by the judge[186].

It is essential to bear in mind that the prohibition of convictions only supported by the statements of the collaborating party cannot be understood so as to disregard the elements that accompany these statements. This is so because, together with the declarations provided, the collaborating party can present elements of information that will support his/her statements. In such situations, once the agreement has been ratified for other elements, it is valid, and after the procedural contradiction (prosecution, collaborating party and other(s) accused), it can justify the conviction, including in it the terms of the agreement[187].

Besides, for the purpose of determining the benefits, the judge must also consider the personality of the collaborating party, the nature, circumstances, severity and social repercussions of the crime, and the effectiveness of the collaboration[188].

Hence, it is possible that the benefits initially agreed will only be partially granted. According to Brazilian legislation, this is a prerogative of the judge[189]. The collaboration agreement is not self-sufficient, as it consists of a promise, not a guarantee of benefits. Its full implementation depends on full compliance with its terms, due to the principle of legal certainty and the collaborative nature of the process[190].

Another important factor in assessing collaboration agreements is to confront the collaborating party's statements with the contradictory statements of the

---

the right to silence on the account of others (P. Tonini, *'Giusto Processo', Diritto al Silenzio ed Obligo de Veritá: la Possibile Coesistenza*, Firenze 2000, p. 30), thus submitting to the the right to be heard (nº 5 combined with section 500 – case law: decision 45.971/2013 of the Second Criminal Section of the Italian Supreme Court of Cassation, dated 15 October 2013.

185 In this regard: J. Dias, *Acordos sobre a sentença*..., p. 51; I. Leite, *Arrependido'*..., p. 399–400.

186 C. Riva, *Il Premio*..., p. 448–449.

187 E. Pacelli, D. Fischer, *Comentários ao Código*..., 2017, p. 331. It is worth mentioning the content of the Brazilian Supreme Court binding legal precedent (*Súmula Vinculante)* 14: 'It is the right of the defence attorney, in the interests of the represented accused, to have broad access to the evidence already documented in an investigative procedure carried out by the police authority, to allow the exercise of the right to full defence', own translation.

188 Brazilian Federal Law 12.850/2013, section 4, paragraph 1. As explained by the legal literature, this provision contains an 'efficiency clause' (E. Pacelli, D. Fischer, *Comentários ao Código*…, 2016, p. 351). This is because the benefit in question finds legitimacy from its rational relation with a purpose (Italian: *razionalitá rispetto allo scopo*) within the penal system, which justifies assessing the behavior of the accused. It does not have a moral content per se, but a content of criminal policy (C. Riva, *Il Premio*…, p. 10). Similarly understand the Spanish legal literature: 'Therefore, it is not possible to assess whether the reason for the collaboration of the accused is his/her desire to re-establish the order previously violated or simply to try to reduce a possible conviction.' (E. España, *El premio a la colaboración*…, p. 56, own translation).

189 The Brazilian law does not exclude adherence to the principle of indeclinability of the jurisdiction in criminal matters (*nulla poena sine judicio*), situations that are required by the constitutional orders, notably by respect to the principle of presumption of innocence (J. Canotilho, N. Brandão, *Colaboração premiada*…, p. 31–32).

190 C. Masson, V. Marçal, *Crime*..., p. 182–183.

co-accused[191],[192]. This gives rise to another important note: it is essential that the accused acknowledge their responsibility by joining the collaboration agreement[193] and explain exactly what his/her involvement in the illegal act was[194].

In other words, for the collaboration agreement be effective, the collaborating party cannot remain silent on the questions that would lead to self-imputation or charges against third parties. If the collaborating party remains silent or lies, all the content of the collaboration agreement that is not confirmed during adversarial proceedings[195] will be discredited, and the collaborating party will lose the benefits provided for in the agreement. It is not retraction, however.

Once the agreement has been ratified, one of the possibilities is its non-performance (breach of the agreement). That would obliterate its effect, but it would not prevent the use of the evidence acquired from it[196], unless there is a judicial declaration invalidating the agreement after its ratification.

Therefore, it is evident that the collaboration is not compatible with the future silence of the collaborating party, who can always exercise this right, even though, once he/she does exercise it, he/she will lose the benefit granted under the terms of the collaboration agreement[197], pursuant to section 4, paragraph 14 of Brazilian Federal Law 12.850/2013[198].

---

[191] Brazilian Federal Law 12.850/2013, section 4, paragraph 4. In the legal literature: F. Pereira, *Valor Probatório*..., p. 481. In adittion: 'the presumed proximity of the co-defendant to the facts of the investigation makes the acquisition of information from him/her particularly desirable, but must give a warning to the possibility of him/her presenting a "story" or misrepresentation of the facts' (A. Seiça, *O conhecimento probatório do co-arguido,* Coimbra 1999, p. 206, own translation). It is important to consider that foreign case law also expresses similar thoughts. Consistent with the US Supreme Court, the whole circumstance involving the evidence that is materially important for the assessment of guilt and responsibility must be disclosed to the accused during the collaboration, under penalty of violation of due process and the rule of cross-examination, especially when there is some kind of agreement between the prosecution and the witness (US Supreme Court decision *United States v. Bagley*, 473 US 667 (1985), dated of 2 July 1985.

[192] The denounced defendant has the right to speak up after the deadline granted to the defendant who denounced them (Brazilian Federal Law 12.850/2013, section 4, paragraph 10).

[193] S. Trott, *O Uso de um Criminoso como Testemunha: um Problema Especial*, São Paulo 2007, p. 422. In such cases, the confession has two perspectives: the first, that it recognizes the validity of the legal system previously violated; the second, that the reduction of the sentence is due to the aid to the administration of justice (E. España, *El premio a la colaboración*…, p. 50).

[194] S. Trott, *O Uso de um Criminoso*..., p. 426.

[195] F. Pereira, *Valor Probatório*..., p. 481. It is not unknown that, from the collaboration, it is required that the collaborator sticks by his/her declarations, even if they are not true, including considering applying the aggravation when the collaboration has the purpose of covering up a more serious crime (J. Zopfs, *Dogmatisch fragwürdig*..., p. 670–672).

[196] E. Pacelli, D. Fischer, *Comentários ao Código*..., 2017, p. 338. With support in 'legal literature: 'Thus, the contribution of the collaborating party will not be despised or erased, even in relation to his/her statements against himself. Therefore, there is his/her self-responsibility to the evidence, and each party has the burden of their allegations and the resulting consequences. If the collaborating party changes his/her version, the term of the collaboration agreement should not be taken from the case file, which is why both the original statement and the new one, produced after the change of the previous one, will be included in the evidence files, and the judge will decide at his/her discretion' (H. Pinho, P. Wunder, *A revisão*…, p. 3, own translation).

[197] Not exercising the right to silence is justified, because otherwise the accused would always have the duty to deny the charges, which does not exist in the legal systems, especially the Brazilian one (C. Fonseca, *Colaboração*…, p. 142).

[198] According the law, in the presence of his/her attorney, the collaborating party will renounce in his/her testimony to the right to silence and will have a legal commitment to speak the truth. However, this cannot be considered unlimitedly. The waiver of the right to silence refers to the content of the procedural collaboration itself and the prosecution to which it relates. The prosecutor cannot, for example, take advantage of such a legal requirement and force the collaborating party to state facts that are not the object of the ongoing investigation. This is a clear example of a limit to the legal provision. However, other concrete situations cannot be ruled out, given the reality of each investigation or proceeding.

In case of non-performance of a valid collaboration agreement, it is evident that the benefits resulting from it cannot apply. The judge will assess what is produced and ratified at the judicial phase, when the evidence is taken, once the *audi alteram parte* principle is applied, pursuant to section 155 of the Brazilian Criminal Procedure Code[199].

Brazilian Federal Law 12.850/2013 contains now two new causes for termination[200]: in case of intentional omission of facts which the collaboration concerns[201] and when the collaborating party does not stop illicit conduct regarding the object of the collaboration. In addition, the collaboration agreement must have internal and external credibility.

In order to evaluate the statements made in court, there may be considered criteria such as[202] (a) the legal relevance of the statements; (b) the reliability of the source[203]; (c) the coherence of the statements[204]; (d) the truthfulness or consistency with the background version; (e) the completeness (relevant aspects) of the description; and (f) the accuracy of the statements.

As for internal credibility, the data reported must be detailed, credible, and reasonable, especially since the collaborating party is aware of the criminal activity[205].

As far as external credibility is concerned, it is necessary that the evidence produced be valid and suitable from the point of view of coherence and credibility of the collaboration[206]. However, as legal literature points out, the data do not need to prove the *thema probandum* specifically, but rather confirm the material obtained through collaboration[207].

If appropriate, the use of a co-defendant's statement on the liability of another co-defendant is not precluded[208]. It is for the judge to endeavour to corroborate

[199] R. Lima, *Legislação Criminal Especial Comentada,* Salvador 2015, p. 537.

[200] Brazilian Federal Law 12.850/2013, section 4, paragraphs 17 and 18.

[201] Once omission is confirmed, it is advisable to enable the collaborator to express himself/herself, if the termination occurs due to intentional omission, not negligence, and it refers to an obligation that must be accomplished.

[202] G. Tuzet, *Filosofia*..., p. 46.

[203] The probative value of a witness depends on his/her sincerity, memory, objectivity and perceptive sensitivity (G. Tuzet, *Filosofia*…, p. 212).

[204] It should be noted that the coherence of a narrative can lead to truth, but it will not necessarily be the truth (G. Tuzet, *Filosofia*…, p. 71).

[205] F. Pereira, *Valor Probatório*..., p. 482–483. In order to examine the intrinsic value, some parameters found in the foreign law can be cited: knowledge of the matter in question, precision and depth of the subject matter knowledge, motivation to collaborate, internal logic and consistency (judgment 454/99 of the Sixth Criminal Section of the Palermo Civil and Criminal Court (Italy), dated 27 April 1999). This conclusion is also derived from the reading of section 192, paragraphs 1, 3 and 4 of the Italian Criminal Procedure Code and paragraph 244 (2) of the *Strafprozessordnung*.

[206] Although the interpretation of the European Court of Human Rights is not the focus of the present work, one cannot ignore its perception on the point studied here. The Court recognizes the difficulties inherent in the statements made by the collaborating parties (possible manipulations and revenge, for example). However, if the collected evidence is made available, with subsequent corroboration and due respect for the rights of defence, the regularity of the process will be confirmed [judgment of the European Commission on Human Rights, *Flanders v. The Netherlands* (application no. 25982/94), dated 15 January 1996]. It is important to say that corroboration cannot be based on hearsay evidence, due to its indirect nature. Corroboration must be by means direct and objective proofs. [judgment of the European Commission on Human Rights, *Labita v. Italy* (application no. 26772/95), dated 6 April 2000].

[207] F. Pereira, *Valor Probatório*..., p. 484. The demonstration of the content of the agreement as evidence is consistent with the unavailability of the subject matter of the proceedings, so that official investigation is not forbidden for this purpose, since there is always a need to convince the court of its terms (J. Dias, *Acordos sobre a sentença*…, p. 44–45).

[208] It is accepted that the reliability of a statement made as part of collaboration may come from the word of another accused. After all, subjective credibility can be gauged by evidence of any nature, provided it

such a statement, especially as it is obviously sensitive evidence. The lack of it prevents a judgment of conviction[209].

Therefore, it is possible to conclude that the value of the declarations inserted in the collaboration agreement depends on the final result materially produced by them, giving truth priority over the agreement itself[210]. The deconstruction of the *pactum sceleris* is justified only by the confession of the collaborator, added to the denunciation of the other persons involved. However, it must be borne in mind that this cannot be the only form of state action in the crimes in which these persons are involved[211].

It is precisely when the credibility of the collaboration is verified that the accused acquires the right to benefit from the terms of the ratified collaboration agreement, or when he/she has to face the effects that it can cause against him/her.

A necessary requirement for evaluating the collaboration is to confront the statements of the collaborating party with the statements of the co-accused, as well as with the evidence taken subsequently, in an actual contradictory procedure, especially considering that the collaboration can induce the co-accused to give up his/her right to remain silent[212].

As the legal literature suggests, when charges are pressed against the collaborating party, he/she must be interrogated before the other defendants, insofar as he/she offers evidence against the others[213]. If not accused, he/she will be heard during the witness examination phase, pursuant to section 4, paragraphs 12 and 14 of Brazilian Federal Law12.850/2013[214].

Thus, the idea of a fair judgment[215] requires the defendant's defence attorney to be present when a statement is given at the trial stage by the co-defendant, notably because the interrogation also informs the decision of the judge, who is helped by greater participation of parties in the proceedings (parity of arms, right to be heard and full defence) [216].

---

is suitable for such a function (M. D'Elia, *I Collaboratori*…, p. 70). In these cases, the judge has a duty to verify the authenticity of the second statement, which cannot be a mere act of agreement between the two accused to harm a third party (M. D'Elia, *I Collaboratori*…, p. 65). Given the interest of those involved in procedural collaboration, criticism of the risks of verifying the truth and achieving justice in criminal proceedings is well known. The same position in German literature: H. Ostendorf, *Strafprozessrecht,* Baden-Baden 2015, p. 268–269.

209 V. Grevi, *Prove*, Milano 2003, p. 309.

210 To explain the understanding of future effectiveness: 'Although there was initial collaboration with the police authority, the information provided by the collaborator loses relevance, inasmuch as it did not contribute to the accountability of criminal agents. The magistrate could not even use them to substantiate the conviction, since the collaborator had retracted in Court. Their alleged collaboration, after all, failed to achieve the utility intended in the possibility of turning state´s evidence, to the point of justifying cause for reducing penalty' (Brazilian Superior Court decision in Habeas Corpus HC 120.454-RJ, dated 23 February 2010, own translation).

211 E. España, *El premio a la colaboración*…, p. 104–105.

212 F. Pereira, *Valor Probatório*..., 481. The defendant is no longer seen as an object or means of evidence, which is why he/she becomes a contradictor of the person who accuses him/her. Thus, he/she does not prove his/her innocence [R. Patrício, *O Princípio da Presunção de Inocência do Arguido na Fase do Julgamento no Actual Processo Penal Português (Alguns Problemas e Esboço para uma Reforma do Processo Penal Português),* Lisboa 2000, p. 27].

213 E. Romero, *A Colaboração*..., p. 265.

214 According to the Brazilian law, the collaborator may also be cross-examinated by the other defendants, in respect of the *audi alteram parte* principle (Brazilian Superior Court decision in Appeal RHC 1.181.015-SP, dated 19 April 2016).

215 It is essential to remember that there is no the right to be heard at the stage of the police investigation, because it will only apply when the parties appear before the Court, where the criminal proceedings will take place. (M. Andrade, *Sistemas Processuais*..., p. 139–140).

216 Brazilian Superior Court decision in Appeal REsp. 1.181.015-SP, dated 19 March 2013.

After all, the most effective guarantee against abuses lies in submitting statements to the rule cross-examination[217], so that the testimony of the collaborating party is examined with greater care than that of an ordinary witness. The cross-examination is the best way to verify the credibility of the statements, as well as the possible interest of the collaborating party in deceiving the court, much in the same way as it provides the most appropriate moment to check the agreements entered into [218].

It has to be ensured that all defence attorneys have access to the evidence, so it is considered fair, without being subjected to external pressures, and so that any self-incrimination is not seen as the result of coercion, but accepted as a reflection of the justice to be achieved in that specific case by all the parties involved[219].

It is imperative to understand that it is the prosecutor who faces the effects of procedural guarantees: the prosecutor is the one who has the duty to rebut the presumption of innocence and meet the required standard of proof[220]. In this regard, the case law of the European Court of Human Rights is clear and indicates that it is necessary for the accused to have prior knowledge of the contents of the indictment so that he/she can exercise the right to be heard[221], especially when the person is accused as a result of statements made by the collaborating party under the collaboration agreement.

For rational persuasion, it is essential to confirm as much information provided by the collaborative party as possible[222]. The requirement of corroborating the information provided follows from the rule of *negative legal proof*[223] (without corroboration, the evidence cannot be used for conviction), which serves as a kind of guarantee within the system of gathering evidence[224], despite affecting the principle of free appraisal of evidence/rational persuasion[225].

---

[217] Section 111 of the Italian Constitution provides that no guilt can be demonstrated on the basis of statements made by those who voluntarily evade the questioning by the accused and his/her counsel. It establishes a positive and a negative treatment. In a positive way, the right to contradict the accuser; in a negative way, the impossibility of using the declaration previously provided in the event of intentional neglect of the *audi alteram parte* principle. The *inutilizzabilità* will be removed only if it is demonstrated that the withdrawal was due to an external situation (threat, for example) (P. Tonini, *'Giusto Processo'*…, p. 41).

[218] E. Amodio, *I Pentiti*…, p. 1000–1001. The Portuguese example is relevant. Here, the collaborating party can remain silent during the interrogation at the trial stage, which impairs the possibility of contradiction (T. Beleza, *'Tão Amigos que nós Éramos'*…, p. 57). However, in addition to not taking an oath and being able to refuse answering certain questions (section 140 (3) and section 345 (1) of the Portuguese Criminal Procedure Code), this collaboration cannot be used to the detriment of the imputed co-accused (section 345(4), of the Portuguese CPP), but can still be used against the collaborating party himself/herself (I. Leite, *Arrependido*…, p. 402).

[219] B. Schünemann, *Cuestiones básicas de la estructura y reforma del procedimiento penal bajo una perspectiva global*, Bogotá 2004, p. 193.

[220] W. Bauer, *Reflections on the Role of Statutory Immunity in the Criminal Justice System*, Chicago 1976, p. 152.

[221] European Court of Human Rights decision in case *Meftah and Others v. France* (application nos. 32911/96, 35237/97 and 34595/97), 16 July 2002.

[222] S. Trott, *O Uso de um Criminoso como Testemunha: um Problema Especial*, São Paulo 2007, p. 420.

[223] In the same vein: V. Vasconcellos, *Colaboração premiada no processo penal,* São Paulo 2017, p. 221.

[224] J. Langbein, *The Origins of Adversary Criminal Trial,* New York 2010, p. 203. In fact, the legal literature shows that the English House of Lords established that the jury must be warned against a conviction exclusively based on procedural collaboration (E. Amodio, *I Pentiti*…, p. 999). It has been asserted that it was the *Atwood v. Robbins* case that reduced the rule of corroboration to a warning and no longer a rule of exclusion from evidence (J. Langbein, *The Origins*…, 212). It is nevertheless reasonable to say that, even in the common law discretion, there is a need to corroborate the confessions so that they can sustain a conviction, with the consideration that it does not need independent proof in all details. It should strengthen the content of the confession (M. Slough, *Confessions and Admissions*, New York 1959, p. 106–107).

[225] M. Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: a comparative study,* Philadelphia 1973, p. 531, no. 51; C. Riva, *Il Premio*…, p. 313. As the Brazilian Supreme Court said: 'it constitutes an important legal limitation which, concerning state powers, aims to prevent false

Here is the required condition: the law does not establish how the truth is arrived at, but determines how it cannot be arrived at, due to the conflict between the concern for the enforcement of the criminal procedure and the need to protect individual rights[226].

It is important to say that the statements of the co-accused are not considered unusable if not confirmed. They will be valid, but if isolated, they will not be sufficient to rebut the presumption of innocence[227].

Therefore, it is possible to affirm there is a requirement that the decision to accept information as evidence be the consequence of a procedure that protects fundamental rights and provides guarantees in a broad sense; a procedure that confirms proper interpretation and application of the law in a specific case, and establishes an appropriate method of determining the truth, since no justice can result from erroneous grounds[228].

That is what the Brazilian Supreme Court pointed out in the decision indicated in the introduction of the present study, asserting that the procedurally appropriate moment for an objective analysis of the collaboration agreement is the final judgment issued in the case.

V. CONCLUSIONS

To conclude our analysis, it must be said that procedural collaboration as a means of obtaining evidence has met with very divergent assessments: some welcome it, because of its eventual efficiency, the results which further public interest, and because it reflects the autonomy of the suspect/accused; and some criticize it because they believe that it infringes the rights of the collaborating party and the co-accused.

---

imputations to third parties from causing unacceptable judicial errors, with unjust convictions of innocent people "under the pretext of collaboration with justice"' (Brazilian Supreme Court decision in Provisional Remedy in Habeas Corpus MC HC 144.652-DF, dated 12 June 2017, own translation). Outside of Brazil, section 344, paragraph 3, letter a, of the Portuguese Criminal Procedure Code states that the judge can not consider the waiver rule of the production of the evidence relating to the alleged facts not be deemed proved, in cases in which there is a co-accused, and that there is no complete and unreserved confession of all, when the crime is punishment with imprisonment of less than 5 years. In addition: 'I – Section 344 of the Criminal Procedure Code seems to sanction the understanding that the judge will automatically have to accept any full and unreserved "confession" of the defendant, as the supreme and definitive means that leads to his conviction. II – The confession of the accused, alone, is not sufficient for the final conviction. III – Like the other evidence produced, the probative value of the confession of the defendant is evaluated freely by the Court, in accordance with the principle of free evaluation of proof, found in all systems of civilized countries' (Portuguese Superior Court of Justice, Proceeding 046635, dated 2 October 1996).

[226] K. Gössel, *El Proceso Penal Ante el Estado de Derecho: Estudios sobre el Ministerio Publico y la Prueba Penal,* Lima 2004, p. 67. Rational persuasion comes from the *audi alteram parte* principle, so as to make the parties' actions and the judge's certainty more transparent (G. Nucci, *Provas no Processo Penal*, Rio de Janeiro 2015, p. 25), as in section 155 of the Brazilian Criminal Procedure Code and section 93, subsection IX of the Brazilian Constitution. The principle of the judge's freedom in evaluating evidence (in Italy, foreseen in section 192 of the Italian Criminal Procedure Code) is the guide to the assessment of the evidence. However, it is not exempt from the rules and other principles which limit it, especially as regards the choice of evidence as the basis for the decision, in a logical and reasonable manner (Sixth Criminal Section of the Civil and Penal Court of Palermo, case 454/99, dated 27 April 1999, own translation).

[227] F. Pereira, *Valor Probatório...*, p. 478. The Portuguese Criminal Procedure Code provides that the statements of an accused to the detriment of another accused cannot be used when the declarant refuses to answer questions about the facts (section 345, paragraph 4), to the extent that it adversely affects the evidence by lack of confrontation, in which case its valuation as such is prohibited (P. Mesquita, *A Prova do Crime e o que se disse antes do julgamento*, Coimbra 2011, 591), and proves to be an option for Portuguese procedural policy.

[228] M. Taruffo, *Uma Simples Verdade: o Juiz e a Construção dos Fatos,* São Paulo 2012, p. 142.

However, as already mentioned, the purpose of this study is not to analyse the criticism of this means of obtaining evidence, but to present, and reflect on, the existing autonomous procedure of implementing procedural collaboration agreements.

Based on this premise, and leaving aside passionate discussions, no legal system prohibits the accused imputing an illegal act to a third party, if this is the way to exercise his/her right to full defence, and the accused may even be rewarded for it, whether or not this is done under procedural collaboration examined here. The state cannot act in such a way that the interests of criminal networks are protected by their spurious internal agreements, to the detriment of the society.

The collaboration agreement studied here is a formality that intends to guarantee full application of its functions, interests and procedural rights to all (the prosecution, the collaborating party, the co-accused third party, the defence attorney, and the judge). Moreover it is a formal requirement for the collaboration to be valid and effective.

Therefore, this very concept as a judicial legal transaction is appropriate. Obviously, respecting the formalities that are inherent to it: the collaborating party´s voluntariness, the exercise of the right to full defence and of the right to be heard, enjoyed by everyone involved, and the need for the participation of an unbiased judge, who exercises jurisdiction in an adversarial process and complies with the duty to provide adequate reasoning.

In other words, infringing procedural rights of either the collaborating party or the co-accused is not allowed. Collaboration agreements cannot result in conviction by themselves. The position adopted by the Brazilian legislature is therefore correct, since it prevents a sentence from being based exclusively on the statements of the collaborating party. However, it must be said it is not possible to agree with the new restrictions imposed by the law.

In this way, the judgment brought as a paradigm in the present study is correct: the procedural collaboration agreement goes through three stages (existence, validity, and effectiveness), and its presence in the criminal proceeding has consequences that affect, primarily, the one who collaborates (more specifically, such person's rights or duties).

Ultimately, it may affect third parties, not by the collaboration itself, but by the information and/or evidence that comes from it, as well as any other means made available by the state. It is one more element that will be analysed by the judge. The law is consistent with the treatment accorded to the elements of information and evidence in our legal system. After all, the collaboration and statements obtained through it are not above fundamental rights and guarantees.

Abstract

Rodrigo Brandalise, *Collaboration agreements in Brasil: a legal transaction with the perpetrator of an offence in criminal proceedings*

Collaboration agreements had a strong influence on Brazilian procedural law in the face of several operations carried out to investigate crimes like corruption, money laundering, and other crimes committed against the public administration (usually crimes involving

powerful criminal organizations). The Brazilian Criminal Procedure Code of 1941 was not conceived with such facts specifically in mind, providing only for the traditional means of obtaining evidence. Nonetheless, Brazil, like other nations, sought to improve its prosecution system. Thus, it created a procedure that, if not unique, is almost unprecedented: it foresees a judicial procedural phase that involves agreements entered into for the collaboration of the accused and that affects the future outcome of the case. The present article aims to analyse these agreements, perceived as judicial transactions, and the effects of their insertion in the evidence law, based on Brazilian legislation.

Keywords: *procedural collaboration, procedural transaction, ratification, criminal evidence*

Streszczenie

Rodrigo Brandalise, *Porozumienie procesowe w Brazylii – transakcja ze sprawcą przestępstwa w procesie karnym*

Instytucja sądowej umowy o współpracę miała silny wpływ na brazylijskie prawo procesowe w związku z szeregiem postępowań przeciwko przestępczości zorganizowanej dopuszczajacej się korupcji, prania pieniędzy i innych przestępstw przeciwko administracji publicznej. Brazylijski Kodeks postępowania karnego z 1941 r. opierał się pierwotnie na tradycyjnych sposobach pozyskiwania dowodów i nie gwarantował skutecznych sposobów zwalczania przestępczości zorganizowanej. Podobnie jak inne państwa, Brazylia starała się udoskonlić swój system pozyskiwania dowodów w sprawach przeciwko przestępczości zorganizowanej. W związku z tym wypracowano wyjątkową procedurę, która zakłada zawarcie przed sądem porozumienia w sprawie współpracy z oskarżonym, które wpływa na przyszły wynik postępowania. Niniejszy artykuł ma na celu przeanalizowanie tego typu umów, postrzeganych jako zawarcie sądowej transakcji oraz skutków ich włączenia do prawa dowodowego na gruncie ustawodawstwa brazylijskiego.

Słowa kluczowe: *procedura współpracy, porozumienie procesowe, ratyfikacja, dowody w sprawach karnych*

References:

1. A. Ristori, *Sobre o Silêncio do Argüido no Interrogatório no Processo Penal Português*, Coimbra 2007;
2. A. Seiça, *O conhecimento probatório do co-arguido*, Coimbra 1999;
3. A. Neves, *Sumários de Processo Criminal*, Coimbra 1968;
4. A. Gomes Filho, *Limites ao compartilhamento de provas no processo penal*, São Paulo 2016;
5. B. Schünemann, *Cuestiones básicas de la estructura y reforma del procedimiento penal bajo una perspectiva global*, Bogotá 2004;
6. B. Schünemann, *Estudos de direito penal, direito processual penal e filosofia do direito*, São Paulo 2013;
7. Brazil General Superintendence of the Administrative Counsel for Economic Defence, *Programa de Leniência Antitruste do CADE*, Brasília 2016;
8. C. Riva, *Il Premio per la Collaborazione Processuale*, Milano 2002;
9. C. Fonseca, *Colaboração Premiada*, Belo Horizonte 2017;
10. C. Masson, V. Marçal, *Crime Organizado*, Rio de Janeiro 2017;
11. D. Dallagnol, *A visão moderna da prova indício*, Salvador 2015;

12. E. Correia, *Processo Criminal*, Coimbra 1956;
13. E. España, *El premio a la colaboración con la justicia. Especial consideración a la corrupción administrativa*, Granada 2006;
14. E. Romero, *A Colaboração Premiada*, São Paulo 2017;
15. E. Amodio, *I Pentiti Nella Common Law*, Milano 1986;
16. E. Pacelli, D. Fischer, *Comentários ao Código de Processo Penal e sua jurisprudência*, São Paulo 2016;
17. E. Pacelli, D. Fischer, *Comentários ao Código de Processo Penal e sua jurisprudência,* São Paulo 2017;
18. F. Carata, *Colaboração Premiada: reflexões sobre o seu valor probatório e a postura do magistrado na sua avaliação*, Ribeirão Preto 2015;
19. F. Monteiro, *O Problema da Verdade em Direito Processual Penal: Considerações Epistemológicas*, Coimbra 2009;
20. F. Torrão, *A Relevância Político-Criminal da Suspensão Provisória do Processo*, Coimbra 2000;
21. F. Turessi, *Breves Apontamentos sobre Crime Organizado, Delação Premiada e Proibição da Proteção Penal Insuficiente*, São Paulo 2013;
22. F. Yarshell, *Convenção das partes em matéria processual: rumo a uma nova era?*, Salvador 2015;
23. F. Pereira, *Valor Probatório da Colaboração Processual*, São Paulo 2009;
24. F. Pereira, *Compatibilização Constitucional da Colaboração Premiada*, São Paulo 2013;
25. F. Pereira, *Delação Premiada. Legitimidade e procedimento*, Curitiba 2013–2014;
26. F. Didier Jr., *Princípio do respeito ao autorregramento da vontade no Processo Civil*, Salvador 2015;
27. F. Didier Jr., D. Bomfim, *Colaboração premiada (Lei n. 12.850/2013): natureza jurídica e controle da validade por demanda autônoma – um diálogo com o Direito Processual Civil*, München 2016;
28. G. Spratling, *The Corporate Leniency Policy: answer to recurring questions*, Washington 1998;
29. G. Silva, *Bufos, Infiltrados, Provocadores e Arrependidos*, Lisboa 1994;
30. G. Tuzet, *Filosofia della prova giuridica*, Torino 2016;
31. G. Chiovenda, *Principios de Derecho Procesal Civil*, Madrid 1922;
32. G. Nucci, *Provas no Processo Penal*, Rio de Janeiro 2015;
33. Germany Bundeskartellamt, *Effective Cartel Prosecution: benefits for the economy and consumers*, Bonn 2016;
34. Germany Bundeskartellamt, *Notice no. 9/2006 of the Bundeskartellamt on the immunity from and reduction of fines in cartel cases – Leniency Programme – of 07 March 2006*, Bonn 2006;
35. H. Ostendorf, *Strafprozessrecht*, Baden-Baden 2015;
36. H. Pinho, P. Wunder, *A revisão do acordo de colaboração premiada e o aproveitamento da prova já produzida*, São Paulo 2018;
37. I. Leite, *Arrependido': a Colaboração Processual do Co-Arguido na Investigação criminal*, Coimbra 2010;
38. I. Barreto, *A Convenção Europeia dos Direitos do Homem*, Coimbra 2015;
39. I. Paz, *El Coimputado que Colabora con la Justicia Penal*, Granada 2005;
40. I. Martins, A. Oliveira, *O Direito de Defesa na Constituição. A Natureza Jurídica da Prisão Preventiva. Exercício Abusivo como Forma de Obtenção de Delações Premiadas. Inconstitucionalidade. Parecer*, Porto Alegre 2015;
41. J. Canotilho, N. Brandão, *Colaboração premiada e auxílio judiciário em matéria penal: a ordem pública como obstáculo à cooperação com a operação Lava Jato*, Coimbra 2016;
42. J. Zopfs, *Dogmatisch fragwürdig und weitgehend ohne praktischen Nutzen. Die Vorschriften zur Bekämpfung des Missbrauchs der Kronzeugenregelung,* Mainz 2011;
43. J. Almeida, *Processo Penal. Ação e Jurisdição*, São Paulo 1975;
44. J. de C. Penteado, *Delação Premiada*, São Paulo 2006;
45. J. Langbein, *The Origins of Adversary Criminal Trial*, New York 2010;
46. J. Fonseca, *Reforma do Processo Penal e Criminalidade Organizada*, Coimbra 2004;
47. J. Dias, *Direito Processual Penal*, Coimbra 1974;

48. J. Dias, *Acordos sobre a sentença em processo penal: o "fim" do Estado de direito ou um novo "princípio*, Porto 2011;
49. J. Dias, M. Andrade, *Poderes de Supervisão, Direito ao Silêncio e Provas Proibidas (Parecer)*, Coimbra 2009;
50. J. Novais, *Direitos Fundamentais: Trunfos contra a Maioria*, Coimbra 2006;
51. J. Costa, *Consenso, Verdade e Direito*, Coimbra 2001;
52. J. Marques, *Da Competência em Matéria Penal*, Campinas 2000;
53. J. Palma, *Sanção e Acordo na Administração Pública*, São Paulo 2015;
54. K. Gössel, *El Proceso Penal Ante el Estado de Derecho: Estudios sobre el Ministerio Publico y la Prueba Penal*, Lima 2004;
55. K. Wallace, *To cooperate or not: obtaining amnesty under the DOJ's Corporate Leninecy Policy*, Chicago 2010;
56. L. Carvalho, P. Wunder, *Colaboração premiada: justa causa para quê?*, São Paulo 2018;
57. L. Zedner, *Criminal Justice*, New York 2004;
58. L. Barroso, *"Aqui, lá e em Todo Lugar". A Dignidade Humana no Direito Contemporâneo e no Discurso Transnacional"*, Rio de Janeiro 2013;
59. M. Slough, *Confessions and Admissions*, New York 1959;
60. M. Andrade, *Sobre as Proibições de Prova em Processo Penal*, Coimbra 2013;
61. M. D'Elia, *I Collaboratori di Giustizia*, Roma 2012–2013;
62. M. Mendroni, *Comentários a Lei de Combate ao Crime Organizado*, São Paulo 2014;
63. M. Mello, *Teoria do fato jurídico. Plano da eficácia – 1ª parte*, São Paulo 2010;
64. M. Mello, *Teoria do fato jurídico. Plano da validade*, São Paulo 2010;
65. M. Andrade, *Sistemas Processuais Penais e seus Princípios Reitores*, Curitiba 2013;
66. M. Taruffo, *Uma Simples Verdade: o Juiz e a Construção dos Fatos*, São Paulo 2012;
67. M. Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: a comparative study*, Philadelphia 1973;
68. N. Rosenvald, *Contratos (geral)*, Barueri 2007;
69. P. Palermo, *Relaciones entre "el Derecho a la Verdad" y el Proceso Penal. Análisis de la Jurisprudencia de la Corte Interamericana de Derechos Humanos*, Montevideo 2011;
70. P. Tonini, *"Giusto Processo", Diritto al Silenzio ed Obligo de Veritá: la Possibile Coesistenza"*, Firenze 2000;
71. P. Tonini, C. Conti, *Il Diritto delle Prove Penali*, Milano 2014;
72. P. Mesquita, *A Prova do Crime e o que se disse antes do julgamento*, Coimbra 2011;
73. P. Machado, *Acordo de Leniência & a Lei de Improbidade Administrativa*, Curitiba 2017;
74. P. Nogueira, *Sobre os acordos de procedimento no Processo Civil Brasileiro*, Salvador 2015;
75. P. Albergaria, *Plea Bargaining: Aproximação à Justiça Negociada nos E.U.A.*, Coimbra 2007;
76. R. Rauxloh, *Plea bargaining in national and international law: a comparative study*, London 2012;
77. R. Lima, *Legislação Criminal Especial Comentada*, Salvador 2015;
78. R. Lima, *Manual de processo penal*, Salvador 2016;
79. R. Brandalise, *Justiça penal negociada: negociação de sentença criminal e princípios processuais penais relevantes*, Curitiba 2011;80. R. Patrício, *O Princípio da Presunção de Inocência do Arguido na Fase do Julgamento no Actual Processo Penal Português (Alguns Problemas e Esboço para uma Reforma do Processo Penal Português)*, Lisboa 2000;
80. S. Hammond, *The evolution of criminal antitrust enforcement over the last two decades*, Washington 2010;
81. S. Rodrigues, *Direito Civil. Dos contratos e das declarações unilaterais da vontade*, São Paulo 2002;
82. S. Trott, *O Uso de um Criminoso como Testemunha: um Problema Especial*, São Paulo 2007;
83. S. Kobor, *Bargaining in the Criminal Justice Systems of the United States and Germany: Matter of Justice and Administrative Efficiency within Legal*, Frankfurt am Main 2008;
84. T. Beleza, *"Tão Amigos que nós Éramos": o Valor Probatório do Depoimento do Co-Arguido no Processo Penal Português*, Lisboa 1998;
85. T. Bottino, *Colaboração premiada e incentivos à cooperação no processo penal: uma análise crítica dos acordos firmados na 'Operação Lava Jato"*, São Paulo 2016;

86. T. Essado, *Delação Premiada e Idoneidade Probatória*, São Paulo 2013;
87. T. Padovani, *La Soave Inquisizione: Observazioni e Rilevi a Proposito delle Nuove Ipotesi di 'Ravvedimento',* Milano 1981;
88. United Nations Conference on Trade and Development, *Competition Guidelines: Leniency Programmes*, Geneva 2016;
89. United States Department of Justice, *Corporate Leniency Policy*, Washington 1993;
90. United States Department of Justice, *Leniency Policy for Individuals*, Washington 1994;
91. V. Vasconcellos, *Colaboração premiada no processo penal*, São Paulo 2017;
92. V. Grevi, *Prove*, Milano 2003;
93. W. Bittar, *O problema do conteúdo da valoração do depoimento dos delatores diante do conceito de justa causa para o regular exercício da ação penal*, Porto Alegre 2017;
94. W. Lafave, J. Israel, *Criminal procedure*, Saint Paul 1992;
95. W. Bauer, *Reflections on the Role of Statutory Immunity in the Criminal Justice System*, Chicago 1976.