

## Chapter II – Collaboration agreements and macro-delinquency in Brazilian recent experience: notable results in the prosecution of corruption networks

### 1. Introduction

The introduction of the rewarded collaboration regulation was part of a wide set of measures designed by the 2013 Organized Crime Act to strengthen the prosecution and punishment of activities committed by criminal organizations. According to the 2013 Organized Crime Act, a criminal organization is an association of four or more individuals, with an organized structure characterized by the division of tasks, and aimed at the acquisition of gain through the commitment of crimes.<sup>301</sup> The 2013 Organized Crime Act authorizes the negotiation of collaboration agreements in the investigation of a wide array of crimes: it stipulates that the maximum imprisonment penalty for these crimes must be higher than four years<sup>302</sup>, but this threshold is not difficult to reach in Brazilian criminal law.

Despite the broad applicability of the rewarded collaboration regulation, the Brazilian practice of collaboration agreements thrived in the investigation of corporate and government crimes and, unlike the experience of other countries, was not developed for the prosecution of violent crimes. In Germany, political terrorism and drug traffic have been the main concerns that led to the introduction of the crown-witness regulation.<sup>303</sup> In Italy, cooperation with offenders has been used prominently in investigations of mafia groups.<sup>304</sup> In the United States, where the use of cooperating defendants is an antique and entrenched practice in the justice system, law enforcement authorities draw on the assistance of accused in investigations

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301 Brazilian Organized Crime Act 2013, art 1° § 1°.

302 *idem*.

303 See item IV.3.a. Also: Breucker and Engberding (n 11) 11-16; Hassemer, 'Kronzeugenregelung Bei Terroristischen Straftaten Thesen Zu Art. 3 Des Entwurfs Eines Gesetzes Zur Bekämpfung Des Terrorismus' (n 11).

304 Mehrens (n 11) 173-179.

of a wide array of wrongdoings, including violent crimes committed by street gangs and terrorist organizations.<sup>305</sup>

Unlike these experiences, the Brazilian practice of collaboration agreements was developed essentially for the prosecution of government corruption and corporate wrongdoing, often involving prominent executives and senior politicians. Since the enactment of the Organized Crime Act, the main scenario in which the practice of collaboration agreements has been developed is the group of large-scale investigations dubbed “Operation Car Wash”, which over recent years has inquired into corruption schemes, business cartels and money laundering practices. Since the conclusion, in 2014, of the first collaboration agreement in “Operation Car Wash”, law enforcement authorities have repeatedly relied on the assistance of cooperating defendants to investigate corporate wrongdoing and corrupt practices.

This chapter analyzes the central characteristics of these crimes and their importance in the development of the Brazilian practice of collaboration agreements. Section II.2 gives an overview of “Operation Car Wash” and describes its comprehensive scope, long duration and far-reaching impacts on Brazilian political and economic life. Section II.3 analyzes the types of wrongdoings investigated in the context of “Operation Car Wash”, particularly under the concept of “corruption networks”, and underlines some of their essential features: item II.3.a examines the legal interests affected by these conducts; item II.3.b assesses the organizations involved in these practices; and item II.3.c addresses their social impact. Section II.4 analyzes the strong public support for the Brazilian practice of collaboration agreements and their connection to the prosecution of macro-delinquency and to the ideal of consensual justice.

## 2. Operation Car Wash

Since the enactment of the 1988 Federal Constitution, corruption has been a perennial subject in Brazilian public debate and political life.<sup>306</sup> The new Constitution empowered law enforcement authorities and boosted expectations regarding control of the long-standing problems with corruption of

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305 Acconcia and others (n 29) 1119. For a thorough description of the U.S. experience, see Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrecht* (n 1) 208-248.

306 Prado and Carson (n 13) 742-768.

political representatives and public officials.<sup>307</sup> Since 1988, every elected president has confronted serious investigations of corruption at different levels of the Administration<sup>308</sup> and corruption scandals have played a major role in Brazilian democratic life.<sup>309</sup> In recent decades, investigations of corruption schemes have increased, often through joint efforts by different enforcement agencies, drawing intense media coverage.<sup>310</sup> The development of these investigations and a permanent perception of impunity – associated with the problems of Brazilian criminal justice system, often portrayed as slow moving, ineffective,<sup>311</sup> and complacent with regard to the wrongdoings of the political and economic elites<sup>312</sup> – led to growing impatience with corruption in Brazilian public opinion.<sup>313</sup>

In this context, the investigations dubbed “Operation Car Wash”, which since 2014 have inquired into different criminal practices in large public contracts carried out by Petrobras, the Brazilian state-owned oil and gas company, represent a key milestone. Started in 2014 as a small inquiry of a local money-laundering scheme, “Operation Car Wash” rapidly evolved in-

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307 For an historic overview regarding political corruption in the process of re-democratization in the first years of the 1988 Constitution, see David Fleischer, ‘Political Corruption in Brazil: The Delicate Connection with Campaign Finance’ (1996) 25 *Crime, Law and Social Change* 297.

308 As stated by Timothy J. Power and Matthew M. Taylor, “each of the five post-authoritarian presidential administrations has been sullied by accusations of corruption”.

309 For an analysis of the important role played by the concept of corruption in Brazilian society, see Ana Frazão and Ângelo Carvalho, ‘Corrupção, Cultura e Compliance: O Papel Das Normas Jurídicas Na Construção de Uma Cultura de Respeito Ao Ordenamento’ in Ricardo Villas Bôas Cueva and Ana Frazão (eds), *Compliance: perspectivas e desafios dos programas de conformidade* (Fórum 2018) 133-136.

310 As noted by Mariana Mota Prado and Lindsey Carson, these investigations are usually called “operations” and “are very visible, often being described by catchy nicknames that facilitate publicity. They are accompanied by wide press coverage”. See Prado and Carson (n 13) 758.

311 Katherine Bersch, Sérgio Praça and Matthew Thaylor, for instance, note “[...] the problems of Brazil’s judiciary, which is exceedingly slow and overburdened, leading to few convictions for corruption”. See Katherine Bersch, Sérgio Praça and Matthew M Taylor, ‘State Capacity, Bureaucratic Politicization, and Corruption in the Brazilian State’ (2017) 30 *Governance* 105, 112.

312 For such a critical portrait of the Brazilian Judiciary, see Augusto Zimmermann, ‘How Brazilian Judges Undermine the Rule of Law : A Critical Appraisal’ (2008) 11 *International Trade and Business Law Review* 179.

313 Frances Hagopian, ‘Delegative Democracy Revisited Brazil’ s Accountability Paradox’ (2016) 27 *Journal of Democracy* 119, 120.

to a “monster investigation” (*“Monster-Verfahren”*),<sup>314</sup> being nowadays recognized as the largest corruption investigation ever conducted in Brazil and probably one of the largest ever conducted in Latin America.<sup>315</sup>

According to the complaints filed by the Federal Public Prosecution Office, the case deals with “a huge criminal scheme, involving the practice of economic crimes, corruption, and money laundering, with the formation of a large and powerful cartel”.<sup>316</sup> Pursuant to the criminal charges, shareholders and executives of the main Brazilian construction companies formed a “club” that divided the market and rigged the bids on Petrobras contracts, illegally overcharging the company.<sup>317</sup> In accordance with the complaints, while the corrupt conduct of Petrobras employees provided stability for the cartel's market division and ensured favorable treatment for its members, illegal payments were also made to senior political figures, responsible for endorsing and maintaining Petrobras directors in their positions.

Because of the large ensemble of individuals and companies investigated, the financial sums involved and the rapid results achieved, “Operation Car Wash” has profoundly affected Brazilian society. The media coverage generated by the investigations produced an “informational tsunami” about corruption schemes in the public sector,<sup>318</sup> with little parallel in other contemporary democracies. Dozens of politicians from various parties and different ideological orientations were formally prosecuted for alleged involvement in the practices, generating extremely harmful repercussions for the political elite of the country.<sup>319</sup> The development of the “Operation

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314 The concept of “monster investigation” or “monster proceeding” (*“Monster-Verfahren”*) is well known in German criminal law. According to Bernd Schünemann, the concept relates to complex and broad investigations, which can last for months or even years, often in the field of economic criminality. See Schünemann, ‘Zur Kritik Des Amerikanischen Strafprozessmodells’ (n 25) 570-571. Analyzing a 2012 judgment of the Brazilian Federal Supreme Court related to another corruption scandal, Luís Greco and Alaor Leite employed the term “monster decision” (*“Monsterentscheidung”*). See Greco and Leite (n 17).

315 Kurtenbach and Nolte (n 16) 5.

316 According to the charges presented by the Federal Public Prosecution Office in the following proceeding: JFPR, AP 5013405-59.2016.404.7000 [2016].

317 See the charges presented by the Federal Public Prosecution Office in the following proceeding: JFPR, 5046512-94.2016.4.04.7000/PR [2016].

318 Melo (n 14) 60.

319 In this regard: “As the Operation Car Wash investigations deepened, the political sphere was near panic”. See Felipe Nunes and Carlos Ranulfo Melo, ‘Impeachment, Political Crisis and Democracy in Brazil’ (2017) 37 *Revista de Ciência política* (Santiago) 281, 282.

Car Wash” played a major role in the 2016 impeachment process of the Brazilian President,<sup>320</sup> and led to the filing of two criminal cases against her successor in 2017.<sup>321</sup> The investigations led to the arrest of executives of leading Brazilian infrastructure conglomerates and of the chairman of the largest investment bank in Latin America.<sup>322</sup>

Data from 2018 shows that more than 150 individuals have already been convicted in proceedings related to “Operation Car Wash”.<sup>323</sup> This group contains several individuals from the country’s economic and political elite, including a former President of the Republic, a former President of the House of Representatives, members of Congress and former Ministers, as well as partners and directors of some of Brazil’s largest corporate groups.

“Operation Car Wash” also seriously affected the companies involved in the investigated conduct, which were subject to grave financial fines and other penalties, such as the termination and suspension of contracts with the public sector. The financial situation of some of the main Brazilian conglomerates was so badly shaken by the investigations that the Central Bank of Brazil stated that this situation could bring risks to the national financial system.<sup>324</sup> Given that several of the investigated corporations have global presence and that some of the scrutinized conduct took place out-

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320 President Dilma Rousseff’s impeachment, in 2016, occurred on the grounds that she had disrespected budget rules, and not because she had committed any act investigated under the Car Wash Operation. However, the development of the criminal investigations, since 2014, was essential to create a political climate favorable to the development of the impeachment procedure. In this regard, Nunes and Melo warn of the need “to distinguish between the casual elements without which the context of the crisis would have not been configured, and the mechanism that were effectively capable of leading to the interruption of the tenure in question”. See Nunes and Melo (n 320) 283. Along the same lines, Brian Winter recognizes that, although “the technical grounds for her impeachment were that she manipulated the federal budget to conceal the scale of the country’s mounting deficits”, “the impeachment was driven by public anger at a president who had overseen the country’s worst recession in more than a century and by the exposure of a multibillion-dollar corruption scandal”. See Brian Winter, ‘Brazil’s Never-Ending Corruption Crisis Why Radical Transparency Is the Only Fix’ 96 *Foreign Affairs* (2017) 87.

321 Mello and Spektor (n 9) 114.

322 Melo (n 14) 60.

323 Moro (n 31) 157.

324 Oliveira, Gesner and Rodas, Joao and Guimaraes, Denis and Marcato, Fernando Scharlack and Curi, Andrea and Pastore, Ricardo and Farina, Tatiana, ‘Working Paper on Brazilian Cartel Investigations, the ‘Operation Car Wash’

side of Brazil, “Operation Car Wash” ended up causing legal consequences in different countries, gaining international attention.<sup>325</sup> In an agreement jointly signed with Brazilian, American and Swiss authorities, one of the investigated corporate groups agreed to pay US\$ 3.5 billion as a penalty for conduct related to the corruption of public officials in Brazil and abroad”.<sup>326</sup> In 2018, Petrobras entered into a 2.95 billion dollar agreement to compensate foreign investors in the United States, who alleged they had been harmed by acts of corruption in the company.<sup>327</sup> In Peru, investigations led to the pre-trial detention of a former President and former First Lady.<sup>328</sup> In Ecuador, a former Vice-President was sentenced to six years’ imprisonment for involvement in illicit activities carried out with Brazilian companies.<sup>329</sup> Investigations also reached one of the leading shipbuilding companies in Singapore, which agreed to pay a penalty of US\$ 422

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(Operação Lava Jato) and Its Impacts on the Economy’ (CEDES - Center of Studies on Economic and Social Law 2015) <<https://ssrn.com/abstract=2710438>> accessed 1 May 2019, 98-99.

- 325 With regards to the subject, Tourinho states that: “Like many major corruption schemes, Brazil’s was in many ways fundamentally transnational. The uncovered facts so far directly involve 14 countries, with implications for former or current heads of states of Argentina, Chile, Colombia, the Dominican Republic, Ecuador, Guatemala, Mexico, Panama, Peru, and Venezuela (BBC-Brasil 2017). Odebrecht alone paid almost US\$ 800 million in bribes abroad. As a result, investigations have thus far involved 44 jurisdictions (Giacomet Junior and Silveira 2017) and agreements are simultaneously being negotiated (or have been reached) in several states, most notably the United States and Switzerland”. See Tourinho (n 15) 1-2.
- 326 For more information regarding this case, see: Department of Justice, ‘Odebrecht and Braskem Plead Guilty and Agree to Pay at Least \$3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History’ (*Department of Justice*, 21 December 2016) <<https://www.justice.gov/opa/pr/odebrecht-and-braskem-pled-guilty-and-agree-pay-least-35-billion-global-penalties-resolve>> accessed 1 October 2019.
- 327 For more information regarding this subject, see: Sabrina Valle, ‘Petrobras to Pay \$3 Billion to End U.S. Lawsuits over Graft’ *Bloomberg: Markets* (3 January 2018) <<https://www.bloomberg.com/news/articles/2018-01-03/petrobras-to-pay-3-billion-to-end-u-s-class-action-over-graft>> accessed 2 October 2019.
- 328 For more information regarding this case, see: ‘Peru Ex-President Ollanta Humala and Wife Put in Pre-Trial Detention’ *BBC News* (14 July 2017) <<https://www.bbc.com/news/world-latin-america-40605823>> accessed 2 October 2019.
- 329 For more information concerning this case, see: ‘Odebrecht Scandal: Ecuador Vice-President given Six Years’ Jail’ *The Guardian* (14 December 2017) <<https://www.theguardian.com/world/2017/dec/14/odebrecht-scandal-ecuador-vice-president-given-six-years-jail>> accessed 2 October 2019.

million after admitting to making illegal payments to Brazilian government officials.<sup>330</sup>

A defining feature of “Operation Car Wash” was the large-scale use of the rewarded collaboration regulation, introduced in 2013 by the Organized Crime Act.<sup>331</sup> From August 2014, when a former Petrobras director signed the first collaboration agreement with the Public Prosecution Office, up to the end of 2017, nearly 300 agreements with cooperators were signed within the scope of “Operation Car Wash”.<sup>332</sup> The investigations also relied on the antitrust leniency program, provided for in the Competition Act. In March 2015, the first antitrust leniency agreement related to “Operation Car Wash” was signed and, since then, nine other agreements have been concluded during the investigation of multiple cartels in public tenders.<sup>333</sup> The group of individuals and companies that have concluded collaboration agreements and antitrust leniency agreements contains high-ranking politicians, world-renowned executives and some of the biggest Brazilian corporate groups.

### 3. Corruption networks

Since the introduction of the antitrust leniency program by the Competition Act, and of the rewarded collaboration regulation by the Organized Crime Act, the use of leniency policies in Brazil has occurred mainly in investigations of cartels between companies and offenses related to corrup-

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330 For more information on this subject, see: Nate Raymond, ‘Keppel Unit to Pay \$422 Million to Resolve Petrobras Bribery Probes’ *Reuters* (23 December 2017) <<https://www.reuters.com/article/us-keppel-corp-settlement/keppel-unit-to-pay-422-million-to-resolve-petrobras-bribery-probes-idUSKBN1EH035>> accessed 2 October 2019.

331 Monica Arruda de Almeida and Bruce Zagaris, ‘Political Capture in the Petrobras Corruption Scandal: The Sad Tale of an Oil Giant’ (2015) 39 *The Fletcher Forum of World Affairs* 87, 89. Highlighting the changes brought by these developments to the position of Brazilian lawyers, see Frazao and Athayde (n 6) 309-314.

332 According to data submitted by the Federal Prosecution Office in December 2017. See Modzeleski (n 113).

333 According to the data disclosed by CADE (Administrative Council for Economic Defense). See CADE, ‘Cade Celebra Acordo de Leniência Em Investigação de Cartel Em Licitações No Distrito Federal’ *Notícias* (12 July 2017) <<http://www.cade.gov.br/noticias/cade-celebra-acordo-de-leniencia-em-investigacao-de-carte-l-em-licitacoes-no-distrito-federal>> accessed 26 September 2019.

tion of public officials.<sup>334</sup> In many of these investigations, these two types of wrongdoings – business cartels and public sector corruption – have been intrinsically connected, requiring the joint action of law enforcement authorities from different branches.<sup>335</sup> In the context of “Operation Car Wash”, the scenario described by enforcement authorities involves an interconnection between cartels, corruption schemes and money laundering.<sup>336</sup> According to the criminal charges, cartels generated greater profits for corporations in contracts with state-owned companies, while the corruption of political agents and public employees facilitated the collusion and financial transactions laundered the proceeds of wrongdoings.<sup>337</sup>

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334 As noted by Cavali (n 36) 256.

335 Concerning the joint action between authorities in those cases, see Ribeiro, Cordeiro and Guimarães (n 5) 196-197.

336 A report of the Federal Prosecution Office affirms that Operation Car Wash is “the most relevant investigation to uncover the largest corruption scheme entrenched in the political and economic system”. See Ministério Público Federal, ‘Relatório de Resultados’ (n 136) 17. According to the report: “The dynamics of the scheme, that had existed for more than a decade, functioned based on bribe payments to high executives of the state company and to other public agents. The illicit amounts were paid by big contractors that organized themselves in a cartel to sign contracts with Petrobras through fraudulent bids. The contractors were cartelized in a “club” to settle the winners of bids. (...) To ensure the cartelization, public agents of the state company were coopted. Employees not only omitted themselves in face of the cartel, of which they had knowledge, but also favored it, restricting the number of companies invited to bids and including the winner between the cartel participants, as in a fixed game. Investigations demonstrated that, between the beneficiaries, there were political agents. (...) Those political agents used their influence to appoint people they trusted to Petrobras’ boards, according to the political parties to which they belonged, to, based on the signed contracts, receive illicit amounts” (17).

337 The connection between business cartels and corruption practices is often cited in the criminal charges presented by the Federal Public Prosecution Office in the cases related to Operation Car Wash: “in the course of Operation Car Wash, the investigation discovered a gigantic criminal scheme, of which Petrobras was a part, that operated since, at least, 2004, involving the practice of economic crimes, corruption, bid rigging and money laundering, with the formation of a large and powerful cartel (...) Besides that, (...) the investigation revealed the existence of a complex and sophisticated criminal organization, structured to enable a scheme of political corruption and allocation of public offices to raise bribes that financed political parties and increased the assets of the politicians involved. For that scheme to work, high-ranking officials from Petrobras and from other government bodies and public companies were co-opted. Therefore, the companies that concluded agreements with Petrobras (“economic branch”), due to a systemic corruption scheme, paid undue advantages to Petrobras’ direc-

This dynamic, rather than being a uniquely Brazilian arrangement, reflects a pattern that has been observed in other countries, as has been reported in the literature. In this regard, Donatella della Porta and Alberto Vannucci describe so-called “complex networks of corruption”, in which

various actors intervene, supplying the resources necessary not only to the successful conclusion of the hidden exchange but also to guarantee its implementation, protection from risks of external intrusion, reinvestment of illicit capital, and the maintenance of a resilient conspiracy of silence.<sup>338</sup>

In these systems of corruption, cartels formed by legitimate corporations carve up the public bidding market, bribing public officials and political agents in order to ensure higher public procurement prices, to guarantee compliance with cartel decisions and to exclude companies that are not part of the collusion.<sup>339</sup>

Likewise, Britta Bannenberg, analysing the German experience, describes the so-called “corruption networks” (“*Korruptions-Netzwerke*”), in which “various persons on both sides (payers and receivers) are involved for years, sometimes decades,” and where “corruption is strategic, is employed in a massive manner by corporations and is connected to other crimes”.<sup>340</sup> According to the author, in these structures “corruption is developed as a system, to define important decisions for the benefit of a group or a cartel, generally favoring a company, to eliminate or discourage competition”.<sup>341</sup>

The concept of corruption networks closely matches the arrangements described by Brazilian law enforcement authorities in the context of “Operation Car Wash”, with large contractors, prominent businessmen and senior politicians colluding over decades to obtain illicit gains in public con-

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tors (“administrative branch”) and to political officials (“political branch”) that varied from 1% to 3% of the contract value.” See the criminal charges presented by the Federal Public Prosecution Office in the following proceeding: JFPR, AP 5063271-36.2016.4.04.7000 [2016].

338 Alberto Vannucci and Donatella Della Porta, *The Hidden Order of Corruption: An Institutional Approach* (Ashgate Publishing Limited 2013) 30.

339 *ibid* 31.

340 Bannenberg (n 17) 108. Also using the term “corruption networks” (“*Korruptions-Netzwerke*”), see Simone Nagel, *Entwicklung Und Effektivität Internationaler Maßnahmen Zur Korruptionsbekämpfung* (Nomos 2007) 34.

341 Bannenberg (n 17) 108. Also noting that business cartels and corrupt practices are often connected, see Dölling (n 12) 348.

tracts.<sup>342</sup> The individuals responsible for these conducts hold central positions in legitimate organizations, such as multinational corporations and political parties, disposing of a wide array of resources to implement sophisticated strategies.<sup>343</sup>

Thus, the Brazilian practice of leniency policies has arisen largely from the prosecution of a specific form of criminality, carried out with the support, and in the interest of, business conglomerates and within sectors of the state, involving a large group of individuals – many of them high-ranked – in legitimate organizations.<sup>344</sup> This scenario is clearly different from the experience of other countries with the use of cooperating defendants as investigative mechanisms, which have occurred mainly in the context of illicit markets and violent crime, especially in the fields of drug trafficking and terrorism.<sup>345</sup>

The specific characteristics of corruption networks and business cartels create an environment that is conducive for law enforcement authorities to seek the cooperation of private agents for the prosecution and prevention

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342 According to the Federal Public Prosecution Office, the investigations revealed “the systemic corruption entrenched in the Brazilian political and economic system that spread among other countries”, marked by the formation of strong cartels with the capture of public employees and political representatives. See Ministério Público Federal, ‘Relatório de Resultados’ (n 136) 13 and 17-18.

343 Bannenberg (n 17) 109-111. Also Vannucci and Della Porta (n 339) 31-33.

344 This can be seen from the examination of the main rulings of Brazilian higher courts regarding the use of collaboration agreements, all of them concerning controversies arising of investigations into suspected white-collar offences. See e.g. STF, HC 127483 [2015]; STF, PET 7074 [2017]; STF, PET 5885 AgR [2016]; STJ, RHC 43776 [2017] and STJ, HC 221231 [2017].

345 In Germany, the modern development of these mechanisms is directly related to the occurrence of acts considered to be political terrorism. See: Breucker and Engberding (n 11) 11-16. The investigation of drug trafficking has also been a major concern for this development. See: Jaeger (n 3). In the Italian experience, the prosecution of mafia organizations constituted the central factor of the use of cooperating defendants. See: Mehrens (n 11) 173-179; Enzo Musco, ‘Los Colaboradores de La Justicia Entre El Pentitismo y La Calumnia: Problemas y Perspectivas’ (1998) 2 *Revista Penal* 35, 36-38. For a general overview, see: Tak (n 4).

of criminal behavior,<sup>346</sup> either through leniency policies<sup>347</sup> or other legal mechanisms.<sup>348</sup> The following items analyze some of these characteristics, which – while favoring the use of leniency policies – also bring specific risks and concerns.<sup>349</sup>

a. Collective goods, diffuse losses

A shared characteristic of corruption networks and cartels is the presence of serious obstacles faced by law enforcement authorities in the prosecution of the individuals responsible for the commitment of the offenses.<sup>350</sup> The prosecution of these types of crimes faces structural limitations,<sup>351</sup> which make the cost of investigating suspicious conduct particularly high

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346 For a critical view on this type of “Public Private Partnership” in the prosecution of corporate crimes, see: Hefendehl, ‘Außerstrafrechtliche Und Strafrechtliche Instrumentarien Zur Eindämmung Der Wirtschaftskriminalität’ (n 12), 846-847. For a good description of this trend in the prosecution of corruption, see: Centonze (n 1).

347 For an emphatic defense of the use of leniency policies in the prosecution of economic crimes, see: Buzari (n 12) 112-114. For another favorable argument, see: Jeßberger (n 1) 305. Similarly, with regards to corruption investigation and prosecution, see: Lejeune (n 12) 87.

348 Besides leniency policies, another main mechanism of cooperation between public authorities and private agents are the so-called “internal investigations”, through which corporations conduce, autonomously and with their own resources, inquiries for clarifying suspicious conducts committed by their employees. For a good overview of the theme, see: Martín (n 23) 69-92. The author draws attention to the “aggressiveness” of the model developed in the United States for this type of cooperation. For a critical approach to that kind of cooperation, see Greco and Caracas (n 23) 1-16, stating that the combination between the private and public elements in the internal investigations brings serious risks to the liberal model of the criminal procedure.

349 For a more thorough analysis of the expectations and risks associated with the employment of leniency policies in the prosecution of corporate crimes and corruption, see Chapter III.

350 The literature on the matter is extensive. Greco and Leite describe the evidentiary difficulties as a “constant problem in the field of the prosecution of corporate and government criminality (“Regierungskriminalität”)”. See Greco and Leite (n 17) 290. Similarly, Simone Nagel points out that the discovery of corrupt conducts by the investigating authorities encounters multiple difficulties. See Nagel (n 341) 33. In this respect, see also: Bannenberg (n 17) 64-65.

351 Michael Lindemann mentions “structural specificities” that create “substantial difficulties” in the prosecution of corruption and of economic crimes: Lindemann (n 17) 127-130. Regarding the challenges regarding the collection of evi-

and create particular challenges for the effective enforcement of criminal law.<sup>352</sup>

One difficulty arises from the type of interests affected by corruption networks and cartels. Although these conducts may cause losses for specific agents or corporations, their negative effects go far beyond any individual legal sphere, affecting an undetermined and unlimited group of subjects.<sup>353</sup> The direct economic impacts caused by cartels and corruption networks are identical: an increase in prices and a reduction in quality of services and products.<sup>354</sup> But the economic repercussions are not the only damage caused by these offenses: cartels and corruption impair the proper functioning of the competition process in a market economy and the public confidence in the state, causing a series of pervasive harmful effects that spread throughout society, such as the erosion of democratic values<sup>355</sup> and the reduction of economic opportunities.<sup>356</sup> In both cases, the safeguarded interests are non-rivals and non-excludable in their consumption and cannot be divided and distributed among individuals.<sup>357</sup>

Cartels and corruption networks cause losses that are felt diffusely by society, diluted over time and, therefore, are very difficult to associate direct-

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dence in the investigation of antitrust offenses, see Ana Frazão, *Direito Da Concorrência: Pressupostos e Perspectivas* (Saraiva 2017) 294-297.

352 Martin (n 23).

353 In this regard, Roland Hefendehl states that conducts that restrict competition and corrupt conducts, perpetrated by public agents harm the so-called “collective legal goods” (“Kollektive Rechtsgüter”). See Roland Hefendehl, *Kollektive Rechtsgüter Im Strafrecht* (Carl Heymanns Verlag KG 2002), 277-280 and 320-323.

354 Armando Zambrano Leal, *Sociedad de Control y Profesión Docente. Las Imposturas de Un Discurso y La Exigencia de Una Nueva Realidad* (Ashgate Publishing Limited 2012).

355 Bannenberg (n 17) 334.

356 In this regard: “Markets can be dominated by a few firms, charging exorbitant prices and blocking the entry of more efficient rivals and new technologies. Markets, left to their own devices, can cease to be inclusive, becoming increasingly dominated by the economically and politically powerful. Inclusive economic institutions require not just markets, but inclusive markets that create a level playing field and economic opportunities for the majority of the people. Widespread monopoly, backed by the political power of the elite, contradicts this”. See Ron Smith, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty*, vol 157 (Crown Business 2012) 323-324.

357 According to Roland Hefendehl, these features are condition for the characterization of collective legal goods. See Roland Hefendehl, ‘Das Rechtsgut Als Materialer Angelpunkt Einer Strafnorm’, *Die Rechtsgutstheorie: Legitimationsbasis des Strafrechts oder dogmatisches Glasperlenspiel?* (Nomos 2003) 126-127.

ly with a specific conduct.<sup>358</sup> The increase in the level of prices and the loss of quality caused by criminal conduct are not registered in commercial invoices or accounting documents and can only be measured by estimates – almost always inaccurate – made by experts.<sup>359</sup> While victims of traditional crimes against life or property are usually individuals immediately affected by the perpetrator’s conduct, losses caused by corporate and government criminality tend to be indirect and abstract,<sup>360</sup> leaving no tangible evidence of the damage caused.<sup>361</sup>

The lack of clear victims and direct losses causes major obstacles to the detection of wrongful behavior.<sup>362</sup> The results produced by corporate crimes and corruption acts are complex and very difficult to identify and prove judicially.<sup>363</sup> This characteristic hinders the effective enforcement of criminal law, generating particular worrisome dark figures of criminal behavior.<sup>364</sup>

#### b. Legitimate and sophisticated organizations

Another distinctive feature in the prosecution of cartels and corruption networks concerns the means employed for the commitment of the offenses. Unlike crimes such as robbery or murder, committed through the use of physical violence or the threat of its use, corporate wrongdoing and corruption strategies are implemented through social technologies, which enable individuals to make use of their positions in legitimate organizations

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358 Lindemann (n 17) 127.

359 Patrick L Anderson, Theodore R Bolema and Ilhan K Geckil, ‘Damages in Antitrust Cases’ (2007) 2 Antitrust Damages - Anderson Economic Group.

360 For more information on the subject, see Klaus Tiedemann, ‘Der Entwurf Eines Ersten Gesetzes Zur Bekämpfung Der Wirtschaftskriminalität’ (1975) 87 *Zeitschrift für die gesamte Strafrechtswissenschaft* 253, 271-272.

361 Maarten Schinkel notes that “anticompetitive acts often leave no obvious traces. There is not necessarily a body, signs of a break-in, or a crime scene”. See Maarten Pieter Schinkel, ‘Forensic Economics in Competition Law Enforcement’ (2008) 4 *Journal of Competition Law and Economics* 1, 6.

362 Martín (n 23) 70.

363 Lindemann (n 17) 127.

364 Winfried Hassemer, ‘Kennzeichen Und Krisen Des Modernen Strafrechts’ (1992) 25 *Zeitschrift für Rechtspolitik* 378, 382; Buzari (n 12) 112-114.

to obtain illegal gains.<sup>365</sup> These practices are largely based on ordinary business practices and administrative actions, such as meetings between competitors, payments to other companies, bank transactions and exchanges of information, within the regular functioning of legitimate organizations.<sup>366</sup> The acts constituting the illegal conduct are normally performed in environments where all the individuals are co-conspirators, eliminating any direct relationship between the offenders and the victims.<sup>367</sup> Because these offenses occur through legitimate routines, their criminal nature is normally only perceptible by collecting and connecting several events, which are often separated by temporal, hierarchical and even geographical distances.<sup>368</sup>

Such offenses are commonly carried out within legitimate social organizations, such as corporations, political parties and business associations, benefiting from the complexity inherent to their daily routines.<sup>369</sup> The structures and processes of these organizations create several opportunities for the development of wrongdoing, insofar as they provide the means to perform and to conceal illegal acts.<sup>370</sup> Cartels, for instance, commonly make use of business associations for their activities, employing the legitimate structure of these institutions to provide greater cohesion and strength to the collusive agreement.<sup>371</sup> A similar situation is also observed in corruption networks, which resort to legitimate expedients – such as po-

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365 Susan P Shapiro, 'Collaring the Crime, Not the Criminal: Reconsidering the Concept of White-Collar Crime' (1990) 55 *American Sociological Review* 346, 350.

366 In this respect, see Jack Katz, 'Legality and Equality: Plea Bargaining in the Prosecution of White-Collar and Common Crimes' (1979) 13 *Law & Society Review* 431, 436. The author describes crimes committed through acts that "appear to be part of ordinary occupational routines".

367 Wolfgang Lindner observes that corruption is committed through offender-offender relationships ("Täter-Täter-Beziehungen"). See Wolfgang Lindner, 'Korruptionsbekämpfung Im Anonymen Dialog. Ein Webbasieretes Hinweisgebersystem Im Einsatz Bei Der Zentralstelle Korruptionsbekämpfung Des LKA Niedersachsens' in Transparency International (ed), *Korruption in Deutschland: Strafverfolgung der Korruption Möglichkeinten und Grenzen* (allprintmedia 2004) 67. In this regard, also about economic crimes, see: Lindemann (n 17).

368 Shapiro (n 366) 354.

369 Stanton Wheeler and Mitchell Lewis Rothman, 'The Organization as Weapon in White-Collar Crime' (1982) 80 *Michigan Law Review* 1403.

370 Diane Vaughan, 'The Dark Side of Organizations: Mistake, Misconduct, and Disaster' (1999) 25 *Annual Review of Sociology* 271.

371 Scott D. Hammond highlights that the use of trade associations is a common tactic in international cartels: Scott D Hammond, 'Caught in the Act: Inside an

litical donations and hiring of services from consultants – to make illegal payments to public agents.<sup>372</sup> The development of criminal practices within legitimate organizations tends to be accompanied by active strategies of concealment and evidence destruction.<sup>373</sup> As the main evidence of these crimes consists of internal documents – contracts, receipts of payments or transfers and electronic messages – there are various possibilities for manipulation or removal of these records through planned routines.<sup>374</sup>

A striking characteristic of corruption networks and cartels is their sophistication and capacity for developing complex strategies to implement illegal conduct. The creation of a long-term and stable system of illicit exchanges demands the development of a complex governance architecture and of “entrepreneurial management”,<sup>375</sup> fostering a secure and predictable environment for the wide range of transactions that must occur for the success of the illegal enterprise.<sup>376</sup> The organizations responsible for these offenses are constantly learning and evolving new ways to execute and conceal these strategies.<sup>377</sup>

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Internacional Cartel’ (*Justice News*, 2005) <<https://www.justice.gov/atr/speech/caught-act-inside-international-cartel>> accessed 3 October 2019.

372 Vincenzo Dell’Osso, ‘Empirical Features of International Bribery Practice: Evidence from Foreign Corrupt Practices Act Enforcement Actions’ in Stefano Manacorda, Francesco Centonze and Gabrio Forti (eds), *Preventing corporate corruption: the anti-bribery compliance model* (Springer International Publishing 2014).

373 Shapiro (n 366) 354.

374 Ana María Neira Pena, ‘Corporate Criminal Liability: Tool or Obstacle to Prosecution?’ in Dominik Brodowski and others (eds), *Regulating corporate criminal liability* (Springer 2014) 199.

375 On this subject, see Vannucci and Della Porta (n 339) 34-37, 112-114.

376 Regarding corruption networks, Simone Nagel states that: “In addition, cases of corruption are often characterized by a particular complexity of the crime. For example, in order to cover up the criminally relevant factors, sham transactions are made, or wrong invoices are recorded. The main goal of this approach is to disguise the effective equivalent of benefits. The situation is further complicated by the fact that corruption cases do not take the form of singular exchanges but take place within elaborate corruption networks in which intermediaries or other persons of trust are used in arranging the unfair dealings. There are often enormous sums that are distributed through a complicated system of trust accounts and letterbox companies to numerous profiteers. The unmasking of corrupt machinations, which would lead to a legal application, is therefore often equated with a Sisyphean task”. See Nagel (n 341), 34.

377 Wouter PJ Wils, ‘Leniency in Antitrust Enforcement: Theory and Practice’ (2007) 24 *Conferences on New Political Economy* 203; William E Kovacic, ‘A

The sophistication of these criminal strategies is also seen in the development of complex systems of task division, purposely designed to disperse illicit conduct over multiple acts practiced by several agents, at different times and in different places.<sup>378</sup> This makes these behaviors appear legal and generates a distance between them, which hinders linking those acts to the practice of unlawful conduct and to the individuals actually responsible for the criminal offense.<sup>379</sup> In hierarchical organizations, execution of illicit acts generally involves actions by subordinates, mere executors of superior orders, who may not even be aware of the illicit purpose accomplished through their acts. Division of tasks within the organization disrupts the flow of information about the offense not only to external investigators, but also to the organization's own members.<sup>380</sup> The hierarchical structure and the organizational culture guarantee an atmosphere of strict obedience and create neutralizing effects that encourage the development of illegal activities.<sup>381</sup> In this context, legitimate structures become instruments of protection for the final beneficiaries of sophisticated criminal schemes.

Another hindering factor in the effective prosecution of corruption networks and cartels arises from the problems of international judicial cooperation.<sup>382</sup> Corruption networks and cartels often have a transnational dimension.<sup>383</sup> Modern communication technology and wide mobility of people and goods facilitate the execution of criminal strategies across multiple countries, while legal issues regarding differences in justice systems hold back the efforts enforcement authorities.<sup>384</sup> A main issue is the use of financial services offered by institutions located in tax havens, jurisdictions

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Case for Capping the Dosage: Leniency and Competition Authority Governance' in Caron Beaton-Wells and Christopher Tran (eds), *Anti-cartel enforcement in a contemporary age: leniency policies* (Hart Publishing 2015).

378 Shapiro (n 366) 354.

379 Greco and Leite (n 17) 290.

380 Neira Pena (n 375) 199.

381 Hefendehl, 'Außerstrafrechtliche Und Strafrechtliche Instrumentarien Zur Eindämmung Der Wirtschaftskriminalität' (n 12) 819.

382 Gherardo Colombo, 'Investigating and Prosecuting Large-Scale Corruption: The Italian Experience' (2006) 4 *Journal of International Criminal Justice* 510, 519.

383 Nagel (n 341) 35-38.

384 According to Mark Pieth, "Under the conditions of deregulation, increased mobility and the potential of modern means of communication, corporate crime has also changed its image dramatically. The pressure to survive is a strong incentive and nationally diverging legal structures offer ample opportunity for

with fiscal and corporate legislation characterized by low requirements in terms of information disclosure, creating a favorable environment for the concealment and laundering of criminal proceeds.<sup>385</sup>

c. Major impacts on social life

A main concern in the prosecution of corporate crimes and corruption acts relates to the grave impacts they produce. The use of legitimate organizations to implement illicit strategies expands the resources and the range of transactions at disposal of the wrongdoers, enabling the development of schemes that go well beyond traditional “face-to-face transactions”.<sup>386</sup> Legitimate organizations act on a much larger scale than isolated individuals and, when used for illegal purposes, enable the obtainment of massive illicit gains, consequently resulting in severe social losses.<sup>387</sup>

Recent decades have been marked by increasing concern regarding the losses caused by corporate crimes and corruption schemes.<sup>388</sup> Multiple examples of corporate fraud have demonstrated how these offenses can abruptly wipe out the savings of thousands of individuals.<sup>389</sup> Although the losses caused by corporate misbehavior have been neglected for a long

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transnational illegal economic activities”. See Mark Pieth, ‘The Harmonization of Law Against Economic Crime’ (2013) 1 *European Journal of Law Reform* 527, 529.

385 For a description of money laundering as an international problem, see: Lisa Barbot, ‘Money Laundering: An International Challenge’ (1995) 3 *Tul. J. Int’l & Comp. L.*

386 Susan Shapiro, *Thinking About White Collar Crime: Matters of Conceptualization and Research* (National Institute of Justice 1980) 8

387 Wheeler and Rothman note that “the havoc caused when organizations are used outside the law far exceeds anything produced by unaffiliated actors”. See Wheeler and Rothman (n 370) 1417-1418.

388 Several authors recognize this development. Regarding corruption, Dieter Dölling notes that “in the last decades, the consciousness regarding the dangers of corruption and the need for a vigorous control seems to have increased”. See Dölling (n 12) 334. Greco observes that corruption is nowadays a matter of high relevance, both for legal policy and legal doctrine. See Luís Greco, ‘Annäherungen an Eine Theorie Der Korruption’ (2016) 163 *Goldammer's Archiv für Strafrecht* 249, 249. Regarding corporate and economic crime, see Hefendehl, ‘Außerstrafrechtliche Und Strafrechtliche Instrumentarien Zur Eindämmung Der Wirtschaftskriminalität’ (n 12) 817-818.

389 Citing the examples of the Enron and Worldcom crisis: Roland Hefendehl, ‘Enron, Worldcom Und Die Folgen: Das Wirtschaftsstrafrecht Zwischen Er-

time, recent estimates suggest that this damage is of great relevance and affects multiple fields of the economy.<sup>390</sup> Similarly, corrupt practices are recognized nowadays as highly harmful crimes.<sup>391</sup> The damage is particularly relevant when it comes to sophisticated corruption networks, which may cause enormous social losses through the manipulation of public tenders and reinforcement of monopolistic positions.<sup>392</sup>

Besides causing severe monetary losses, corporate crimes and government corruption also entail important non-material consequences. Corruption erodes a central pillar of the concept of the liberal State: the division between public interest and private matters.<sup>393</sup> The consequences of this erosion go well beyond the monetary damages, affecting in the long term multiple facets of a society, such as equality, productivity, economic investment and the quality of public services.<sup>394</sup> Likewise, cartels and other collusive practices have far-reaching social effects, distorting competition and reducing incentives for innovation.<sup>395</sup> Corporate fraud and economic crimes undermine public trust in the functioning of markets, without which contemporary capitalism cannot thrive.<sup>396</sup> Particularly worrisome are practices of bid rigging, which put into question the integrity of governmental decisions.<sup>397</sup>

The major impacts caused by criminal conduct carried out through legitimate organizations have raised growing awareness of public authorities both in national and international arenas. The massive scale of economic

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forderungen Kriminalpolitischen Erwartungen Und Dogmatischen Erfordernissen' (2004) 59 *JuristenZeitung* 18, 19.

390 Lindner (n 368), 66-67.

391 Pieth (n 385) 535-539.

392 Bannenberg (n 17) 243-245.

393 Greco, 'Annäherungen an Eine Theorie Der Korruption' (n 389) 257.

394 For a detailed description of the consequences of corruption, see: Johann Graf Lambsdorff, 'Causes and Consequences of Corruption: What Do We Know from a Cross-Section of Countries?' in Susan Rose-Ackerman (ed), *International Handbook on the Economics of Corruption* (Edward Elgar 2006) 22-38.

395 Herbert Hovenkamp, *The Antitrust Enterprise* (Harvard University Press 2015) 13-14, 126.

396 Asserting the role of economic criminal law in preserving this public trust in market economies, see Hefendehl, *Kollektive Rechtsgüter Im Strafrecht* (n 354) 255-259.

397 Paulo Burnier and Victor Oliveira assert that a main consequence of bid rigging is "the diminishing of public confidence in the competitive process and in government. Those effects are even more harmful in developing economies like Brazil, where the strict control of public expenditure still remains a key factor for sustaining the domestic economy". See Burnier and Fernandes (n 7) 2.

transactions now carried out by business corporations creates clear possibilities for the abuse of economic power, with enormous repercussions for the property and individual rights of a large group of individuals.<sup>398</sup> Globalization and liberalization of markets has fostered the development of transnational organizations, whose activities may simultaneously affect various countries.<sup>399</sup> All these factors have led to a global trend towards the enhancement in the enactment and prosecution of laws regarding corporate wrongdoing and corrupt practices.<sup>400</sup>

Another important issue in this context relates to the social standing of the main beneficiaries of these types of wrongdoings, who often hold positions of command and prestige in legitimate organizations. The traditional obstacles to holding these individuals accountable generate relevant questions regarding the notion of equal treatment within the criminal justice system.<sup>401</sup> Increased awareness regarding corporate criminality has been accompanied by a widespread perception that criminal law does not reach the political and economic elites, who remain unaccountable despite their reckless behavior.<sup>402</sup> The structure of modern corporations allows for an enormous concentration of power in the hands of few individuals, who profit greatly from the gigantic organizations following their instructions.<sup>403</sup> When the activities of these organizations cause widespread losses, a public demand emerges for the punishment of the same individuals that profited the most in the buoyant times.<sup>404</sup> The great damage caused by these practices and the social standing of the involved individuals demand,

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398 For an analysis of the impact of economic crimes on individual freedom, see Naucke (n 18) 4-6, 80-85.

399 On the importance and difficulties of prosecuting transnational economic crime, see Pieth (n 385), 528-529.

400 Noting this trend in Germany: Schünemann, 'Vom Unterschichts- Zum Oberschichtsstrafrecht: Ein Paradigmawechsel Im Moralischen Anspruch?' (n 18) 16-18. Also: Marc Engelhart, 'Development and Status of Economic Criminal Law in Germany' (2014) 15 German Law Journal 693, 695-699.

401 For a thorough examination of this problem, see Schünemann, 'Vom Unterschichts- Zum Oberschichtsstrafrecht: Ein Paradigmawechsel Im Moralischen Anspruch?' (n 18).

402 Reporting on this perception in the United States in the aftermath of the 2008 financial crisis: Samuel W Buell, 'Is the White Collar Offender Privileged?' (2014) 63 Duke Law Journal 823, 826-827.

403 Naucke underlines the political consequences of this type of concentration of economic power: Naucke (n 18) 3-6.

404 Noting, in a critical tone, this trend, see Hefendehl, 'Enron, Worldcom Und Die Folgen: Das Wirtschaftsstrafrecht Zwischen Erfordernissen Kriminalpolitischen Erwartungen Und Dogmatischen Erfordernissen' (n 390) 22.

#### 4. *Storming the castle: macro-delinquency, consensual justice and public support*

for the preservation of the credibility of the justice system, a comprehensive investigation of this conduct and the imposition of penalties commensurate with the gravity of the offenses.<sup>405</sup>

#### 4. *Storming the castle: macro-delinquency, consensual justice and public support for leniency policies*

Since its introduction by the 2013 Organized Crime Act, the practical development of the rewarded collaboration has occurred mainly in the prosecution of corporate crimes and corruption schemes, generating fast and visible results. A main sphere of development has been the investigations of “Operation Car Wash”, in which hundreds of defendants opted to cooperate with enforcement authorities and assist in the prosecution against other accused.

Through collaboration agreements, cooperating defendants agreed to pay multi-million fines and compensate the Public Administration for the losses caused.<sup>406</sup> Evidence provided by cooperators became central elements for justifying harsh investigative measures, such as dawn raids and pre-trial detentions. The agreements brought confessions from senior businessmen and public officials regarding an extensive list of crimes, as well as detailed accounts of conduct attributed to other individuals in crucial positions in the Brazilian political and economic system, such as former Presidents of the Republic and Chairmen of both Chambers of Congress.<sup>407</sup> Cooperation reports also attributed unlawful conduct to hundreds of elect-

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405 Hans Richter, ‘Zur Wirtschaftskriminalität’ in Dr Christian Müller-Gugenberger and Klaus Bieneck (eds), *Wirtschafts-strafrecht: Handbuch des Wirtschaftsstraf- und -ordnungswidrigkeitenrechts* (Verlag Dr Otto Schmidt Köln 2011) 148.

406 According to the Federal Prosecution Office, until 2017, around 10,3 billion Brazilian Reais must be recovered through agreements concluded in the context of the Car Wash Operation in the Brazilian state of Paraná. See Ministério Público Federal, ‘Relatório de Resultados’ (n 136) 22.

407 For a description of the impact of Operation Car Wash in Brazilian political life, see Melo (n 14) 60.

ed representatives,<sup>408</sup> as well as shareholders and executives of transnational corporations.<sup>409</sup>

The recent use of collaboration agreements in Brazil has been highly publicized and received strong media coverage.<sup>410</sup> Based on the understanding that criminal prosecution should be as transparent as possible and that the evidence collected should be public, substantial parts of the material supplied by cooperators to law enforcement authorities were disclosed as the investigations progressed, even though judicial or administrative proceedings were in their early stages or, in some cases, no formal charges had yet been filed.<sup>411</sup> Through collaboration agreements, different types of evidence – such as corporate documents and spreadsheets, tapped private reunions and countless hours of videotaped depositions – related to activities performed by the Brazilian business and political elites were widely publicized.<sup>412</sup>

These results created high hopes for the emergence of a solution for the long-standing problem of impunity and inequality within the Brazilian criminal justice system, generating strong popular support and interna-

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408 Concerning the magnitude of the impact caused by the Car Wash Operation in Brazilian public life, it is worthwhile to mention the comparison made by the American journalist Anderson Cooper with the Watergate case: “Imagine if the Watergate investigation had led not only to the downfall of President Nixon, but also to allegations against his successor, plus the Speaker of the House, the leader of the Senate, a third of the cabinet, and more than 90 members of Congress”. See Anderson Cooper, ‘Brazil’s “Operation Car Wash” Involves Billions in Bribes, Scores of Politicians’ *CBS News* (2017) <<https://www.cbsnews.com/news/brazil-operation-car-wash-involves-billions-in-bribes-scores-of-politicians/>> accessed 21 October 2018.

409 With regard to this subject, Cavazotte *et al.* state that: “This investigation, initiated on March 2014, involved several national companies. As a result, seven of the ten largest Brazilian contractors had their executives investigated by the operation”. See Flavia Cavazotte, Marcos Cohen and Mariana Brunelli, ‘Business Ethics in Brazil: Analyzing Discourse and Practice of the Brazilian Contractors Involved in Operation Lava Jato’ in Christopher Stehr, Nina Dziatzko and Franziska Struve (eds), *Corporate Social Responsibility in Brazil* (Springer, Cham 2019) 251.

410 Melo (n 14) 60.

411 According to Moro: “Everything to do with the Lava Jato cases, from the prosecution, evidence, and hearing of witnesses to the judgment and sentencing, has been conducted openly and in the light of day”. See Moro (n 31) 163.

412 Mello and Spektor (n 9) 113-114.

tional acknowledgment.<sup>413</sup> The recognition obtained by leniency policies is directly associated with their capacity to improve the prosecution of individuals and organizations that occupy central positions in society.<sup>414</sup> Much of the Brazilian experience with leniency policies occurred under the banner of fighting the so-called “macro-delinquency, the delinquency of the powerful”.<sup>415</sup> Particularly in the context of “Operation Car Wash”, collaboration agreements were used to investigate conducts committed by executives and shareholders of some of Brazil's largest business conglomerates, as well as acts committed by some of the country's major political leaders.

The difficulties of this type of investigations are well known.<sup>416</sup> In corruption networks, criminal strategies are implemented through separate activities committed by multiple individuals at different times.<sup>417</sup> These activities consist basically of ordinary business and administrative acts, integrated in the routines of legitimate organizations and indistinguishable from regular practices.<sup>418</sup> The damages caused by the criminal conduct are diffuse and hard to associate with specific individual misbehavior,<sup>419</sup> even when the losses are of enormous proportions.<sup>420</sup> The fragmentation of criminal strategy generates a temporal, spatial and hierarchical distance between the occurrence of illegal acts and the organization's top brass in-

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413 In 2016, for instance, the Operation Carwash Task Force was granted the Anti-Corruption Award Transparency International. According to Transparency International Secretariat: “The ongoing Carwash Operation has triggered additional criminal investigations and proceedings in other sectors and is recognised as a landmark for white-collar criminal prosecution and defense in Brazil. The investigations have gained traction and huge popular support on both national and international levels”. See ‘Brazil Carwash Task Force Wins Transparency International Anti-Corruption Award’ (n 19).

414 Sabine Kurtenbach and Detlef Nolte associated the Operation Car Wash with the “end of impunity” in Brazil, stating that “for the first time, top executives and high-ranking politicians were charged and convicted (and given lengthy prison sentences) by an independent judiciary and under pressure from civil society”. See Kurtenbach and Nolte (n 16) 5.

415 In the words of Roland Hefendehl: Roland Hefendehl, ‘Addressing White Collar Crime on a Domestic Level’ (2010) 8 *Journal of International Criminal Justice* 769, 782.

416 On this subject, see item II.3.

417 Bannenberg (n 17) 108-110.

418 Katz (n 367) 436.

419 Lindemann (n 17) 127.

420 See item II.3.c.

volved with its practice.<sup>421</sup> In these circumstances, the establishment of criminal liability faces serious difficulties, especially regarding the leaders of the organization.<sup>422</sup>

In this scenario, the 2013 rewarded collaboration regulation has often been portrayed as a necessary tool to bring about effective prosecution of powerful and resourceful offenders,<sup>423</sup> especially in the field of corporate and governmental crimes.<sup>424</sup> According to this view, the rewarded collaboration regulation, provided for in the Organized Crime Act, as well as the antitrust leniency program, established in the Competition Act, are part of a special subsystem in Brazilian law, one in which expediency, simplicity and efficiency are main vectors of state prosecution.<sup>425</sup>

On this point, the influence of the U.S. model of plea bargaining on the Brazilian experience with collaboration agreements is undeniable.<sup>426</sup> Through the negotiation forum created by the Organized Crime Act, procedural participants developed a flexible and comprehensive system of transactions, creating consensually innovative solutions for various issues within criminal procedures.<sup>427</sup> Collaboration agreements concluded at very early stages of the investigation defined the exact penalties of cooperators and detailed how it should be fulfilled,<sup>428</sup> outlined new forms of imprisonment regimes,<sup>429</sup> established a unified punishment for several conducts investigated in different procedures<sup>430</sup> and created the possibility for

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421 Shapiro (n 366) 354.

422 Greco and Leite (n 17) 290.

423 In this regard, see Lima (n 277) 305-308; Moro (n 31) 160, 166.

424 Multiple authors emphasize the importance of collaboration agreements in the investigation of these type of crimes. See e.g. Fonseca (n 98); Kurtenbach and Nolte (n 16) 5.

425 Nicolao Dino, 'A Colaboração Premiada Na Improbidade Administrativa: Possibilidade e Repercussão Probatória' in Daniel de Resende Salgado and Ronaldo Pinheiro de Queiroz (eds), *A prova no enfrentamento à macrocriminalidade* (2nd edn, Juspodivm 2016) 533.

426 Different authors note this influence. See, e.g., Silveira (n 35) 114-115. Criticizing the convergence between the Brazilian rewarded collaboration regulation and the American model of plea bargaining, see: Badaró (n 173).

427 Marcelo Cavali notes that "Several concluded agreements have established sanctions – detention regimes not provided for by law – to be served by cooperating defendants, without even the need of a judicial conviction. Thus, a mechanism similar to the American plea bargain was implemented in practice (...)". See Cavali (n 36) 262.

428 See section I.4.a.ii.

429 See section I.4.a.i.

430 See section I.4.a.iii.

defendants to serve negotiated penalties, even imprisonment ones, before any judicial pronouncement on the verdict and sentence.<sup>431</sup>

The tailor-made negotiations gave rise to complex contractual arrangements between Federal Public Prosecution Office and cooperating defendants, drafted in several pages and with dozens of provisions, creating unique solutions for each case. This system of transactions was often justified on the ground that collaboration agreements were part of a new paradigm or a new model of criminal justice, in which the autonomy, the self-determination, and the consent of procedural participants played a central role.<sup>432</sup> In this context, the U.S. system of plea bargaining has often provided a role model of an efficient criminal procedure, validating the innovations brought by this new form of “consensual justice” and the detachment from traditional principles of Brazilian criminal law, such as compulsory prosecution and strict legality.<sup>433</sup>

Based on these two pillars – (i) the visible results in the prosecution of macro-delinquency and (ii) the alleged harmonization with the international experience of consensual criminal justice – the Brazilian practice of collaboration agreements quickly gained ground. The confessions, reports and evidence offered by cooperating defendants generated tangible results, such as major recoveries of criminal proceeds and criminal convictions of individuals from Brazil’s economic and political elite. Consensual arrangements boosted the progress of complex investigations and led to fast outcomes, in clear contrast to the traditional slow pace of the Brazilian justice

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431 See section I.4.a.iv.

432 For a detailed analysis of this argument, see item I.4.c.

433 In this regard, a study of the Federal Prosecution Office affirmed the relevance of the American experience with consensual mechanisms for the Brazilian practice of collaboration agreements. See Ministério Público Federal, ‘Estudo Técnico nº 01/2017’ (n 279) 34. According to Andrey Borges de Mendonça: “The rewarded collaboration regulation imposes, therefore, a reflection about a new model of criminal justice, based on consensus. This model points – even in order to protect the traditional system – to the need of a reinterpretation of guarantees under the light of a due consensual criminal procedure. For that purpose, it is ideal to think of a new paradigm: the due consensual procedure”. See Mendonça (n 36) 59. Along the same lines, see the opinion issued by Min. Celso de Mello in Pet 7074, associating the rewarded collaboration with the emergence of “a new paradigm of criminal justice, in which the central element is the consensus of the participants of the criminal procedure.” See STF, PET 7074 [2017] (Celso de Mello J).

system. The achieved results were actively publicized by law enforcement authorities<sup>434</sup> and attracted massive media attention.<sup>435</sup>

In this context, the advent of a new form of negotiated criminal justice, inspired by the U.S. system of plea bargaining and grounded in principles and concepts traditionally associated with private contract law, such as individual autonomy, legal certainty and protection of legitimate expectations, appeared as a reliable and efficient path to overcome the well-known problems of impunity in the Brazilian system of criminal justice, one that allowed for the effective prosecution of powerful white-collar offenders.<sup>436</sup>

### 5. Conclusion: the will and the way for the practice of collaboration agreements

The prosecution of corruption networks and business cartels is marked by structural constraints and high costs in the process of fact-finding and collection of evidence.<sup>437</sup> The wrongful conduct is executed through interactions between criminals, which do not leave clearly identifiable losses or direct victims.<sup>438</sup> The illegal transactions are carried out amidst the regular

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434 The Federal Public Prosecution Office extensively promoted the results achieved in Operation Car Wash. According to a report of the Office: “(...) in order to promote transparency, the Federal Public Prosecution Office allowed the Brazilian society to check the technical and impartial work of the Institution. The Car Wash Operation website ([www.lavajato.mpf.mp.br](http://www.lavajato.mpf.mp.br)) contains the result of the work done by the Institution’s members. The website has received more than 3 million views. To that, a professional interface with the national and international press was added. In the last 24 months, the Federal Prosecution Office has been asked to respond to 7.423 demands from press professionals, radio and TV stations, blogs and websites”. See Ministério Público Federal, ‘Relatório de Resultados Do Procurador-Geral Da República: Diálogo, Unidade, Transparência, Profissionalismo, Efetividade: 2015-2017’ (n 136) 13.

435 Based on the development of the treatment given by the media to corruption cases, Castro and Ansari state that “The press coverage of the Car Wash operation has received by far the largest corruption coverage in recent Brazilian history”. See Castro and Ansari (n 116) 358. According to the authors, the disclosure of information regarding the Operation was one of the fundamental elements to what they call “change in deviant institutionalized practices”.

436 The link between the consensual nature of collaboration agreements and efficient prosecution of corporate crimes and corruption is a constant in Brazilian legal literature. See, among others, Fonseca (n 98) 125-129 and 212-215; Dino (n 426) 531-535; Sarmiento (n 35) 452-453. Foreign authors, such as Kurtenbach and Nolte, also highlight this link: Kurtenbach and Nolte (n 16) 5.

437 See section II.3.

438 See item II.3.a.

routines of legitimate organizations, often using sophisticated mechanisms of concealment and destruction of evidence.<sup>439</sup>

The strong social losses caused by this type of offense and the social standing held by their beneficiaries demand a detailed investigation of the facts and an imposition of penalties commensurate with the gravity of the wrongdoings.<sup>440</sup> At the same time, the existence of serious obstacles to effective prosecution leads to recurrent situations of impunity. These different elements engender a scenario conducive to the use of leniency policies by public authorities, in order to address situations that combine the presence of severe damages and the existence of a serious enforcement deficit.<sup>441</sup>

Grounded on such circumstances, the Brazilian practice of collaboration agreements grew exponentially.<sup>442</sup> Within a very short space of time, cooperation with offenders, which has never played an important role in Brazilian criminal justice, has undergone a huge expansion and become a central tool in the prosecution of conduct committed in the highest business and political circles, with enormous repercussions for Brazilian society. Due to the fast and visible results produced, collaboration agreements arose as an indispensable tool for addressing the problems of impunity of macro-delinquency in Brazil.

If the effective prosecution of corruption schemes and corporate wrongdoings provided the will for the massive use of collaboration agreements in Brazil, the ideal of a new system of negotiated justice provided the way. The concepts associated with a new paradigm of criminal proceeding, based less on the principles of legality and compulsory prosecution and

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439 See item II.3.b.

440 See item II.3.c.

441 Writing on the use of cooperating defendants in German criminal law, Florian Jeßberger asserts that the combination of these two factors often lead to a scenario of “investigate emergencies” in the prosecution of corporate crimes, authorizing the granting of benefits to cooperating defendants. See Jeßberger, *Kooperation Und Strafzumessung: Der Kronzeuge Im Deutschen Und Amerikanischen Strafrecht* (n 1) 305. Also defending firmly the use of cooperating defendants in these investigations: Buzari (n 12). The concept of “investigate emergencies” and its implications will be examined in Chapter IV, particularly in section IV.3. On the issue, see: Andreas Hoyer, ‘Die Figur Des Kronzeugen: Dogmatische, Verfahrensrechtliche Und Kriminalpolitische Aspekte’ (1994) 49 *Juristen-Zeitung* 233, 239-240; and Heike Jung, ‘Der Kronzeuge – Garant Der Wahrheitsfindung Oder Instrument Der Überführung?’ (1986) 19 *Zeitschrift für Rechtspolitik* 38, 42.

442 See item I.2.b.

more on the notions of autonomy, good faith and legal certainty, lent legitimacy to consensual arrangements that, until very recently, were inconceivable in Brazilian criminal procedure.<sup>443</sup> Through an inventive and bold negotiation practice, procedural participants developed a broad and flexible system of transactions that is clearly detached from the statutory provisions of the Organized Crime Act, creating innovations such as new forms of detention regime and the possibility for cooperators to serve the negotiated imprisonment penalties in advance, before any judicial verdict has been rendered.<sup>444</sup>

The combination of the ostensible effectiveness of leniency policies in the prosecution of macro-delinquency and the theoretical appeal of consensual justice proved to be irresistible. In this context, the practice of collaboration agreements has flourished, gaining enormous media attention and solid support from the Brazilian judiciary, particularly from the Brazilian Federal Supreme Court.<sup>445</sup> The following chapters carry out a more careful analysis of these two driving forces of the Brazilian practice of collaboration agreements.

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443 See item I.4.c.

444 For a description of the inventive practice of collaboration agreements and its innovations, see item I.4.a and I.4.b.

445 See item I.4.c.i and I.4.c.ii.