

Francisco Schertel Mendes

# Leniency Policies in the Prosecution of Economic Crimes and Corruption

Consensual Justice and Search for Truth in Brazilian  
and German Law



**Nomos**

Schriften zum Internationalen und  
Europäischen Strafrecht

Herausgegeben von

Professor Dr. Martin Heger, Humboldt-Universität zu Berlin

Professor Dr. Florian Jeßberger, Humboldt-Universität zu Berlin

Professor Dr. Frank Neubacher, M.A., Universität zu Köln

Professor Dr. Helmut Satzger, LMU München

Professor Dr. Gerhard Werle, Humboldt-Universität zu Berlin

Band 48

Francisco Schertel Mendes

## Leniency Policies in the Prosecution of Economic Crimes and Corruption

Consensual Justice and Search for Truth in Brazilian and German Law



**Nomos**

**The Deutsche Nationalbibliothek** lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

a.t.: Berlin, HU, Diss., 2020

ISBN 978-3-8487-7849-2 (Print)  
978-3-7489-2259-9 (ePDF)

#### **British Library Cataloguing-in-Publication Data**

A catalogue record for this book is available from the British Library.

ISBN 978-3-8487-7849-2 (Print)  
978-3-7489-2259-9 (ePDF)

#### **Library of Congress Cataloging-in-Publication Data**

Schertel Mendes, Francisco

Leniency Policies in the Prosecution of Economic Crimes and Corruption

Consensual Justice and Search for Truth in Brazilian and German Law

Francisco Schertel Mendes

345 pp.

Includes bibliographic references.

ISBN 978-3-8487-7849-2 (Print)  
978-3-7489-2259-9 (ePDF)

1st Edition 2021

© Francisco Schertel Mendes

Published by

Nomos Verlagsgesellschaft mbH & Co. KG

Waldseestraße 3-5 | 76530 Baden-Baden

[www.nomos.de](http://www.nomos.de)

Production of the printed version:

Nomos Verlagsgesellschaft mbH & Co. KG

Waldseestraße 3-5 | 76530 Baden-Baden

ISBN (Print): 978-3-8487-7849-2

ISBN (ePDF): 978-3-7489-2259-9

DOI: <https://doi.org/10.5771/9783748922599>



Onlineversion  
Nomos eLibrary



This work is licensed under a Creative Commons Attribution  
– Non Commercial – No Derivations 4.0 International License.

*To Rosa, for a lifetime of extraordinary lessons.*

*“To be free of an erroneous opinion (...) one must at some time have professed it.”*  
Jorge Luis Borges, Averroes' Search.

## Preface

This book is the result of a doctoral research carried out before the Humboldt University of Berlin and the University of Brasilia between 2014 and 2018. After the defense of the thesis, in 2019, only minor terminological adjustments were made.

The research started as an inquiry into the possibilities of improvement and strengthening of leniency policies in the prosecution of economic offenses., a subject with which I have been occupied for some time. Between 2009 and 2014, I worked for the Brazilian Competition Authority, and there I had the opportunity to steer a wide policy reform to enhance the use of cooperating defendants in Brazilian anti-cartel enforcement. Coming from this background, the original research project had a narrow and inward-looking approach, as commonly found in the official discourse regarding leniency policies.

The research changed course when several aspects of the recent use of cooperating defendants in Brazilian criminal investigations proved, once analyzed from a comparative perspective, to be highly inventive and somewhat eccentric. I am extremely grateful to my supervisor, Professor Dr. Martin Heger, who gave solid advice for the development of a critical stance towards the subject. His enthusiasm and trust in the research played a pivotal role in the development of the thesis.

I am also thankful to Professor Dr. Luís Greco, who supported the research from the beginning and offered me the opportunity to discuss the thesis in the “Rechtsphilosophisches Donnerstag-Seminar,” at the Faculty of Law of Humboldt University. I am as well obliged to Professor Ana Frazão, who co-supervised the thesis and provided valuable guidance, and Professor Paulo Burnier, who contributed to the research in many ways. I also express my gratitude to my friends Robert Pest and Alao Leite, who have always provided a safe harbor in Berlin.

This thesis has been written - over four years and sometimes under challenging circumstances - in Berlin, Brasília, and Maastricht. All along, the love and support of Lorena Coutinho transformed a rough challenge into an incredible journey, full of joy, warmth, and affection.

*Francisco Schertel Mendes*



# Contents

Abbreviations	15
Introduction	17
Chapter I – The development of leniency policies in Brazilian criminal justice and the contractualist approach to collaboration agreements	29
1. Introduction	29
2. The Brazilian procedural tradition and the recent development of leniency policies	32
a. Competition law	37
b. Criminal law	41
3. The legal structure of Brazilian leniency policies	46
a. The negotiation dynamic: consensual arrangements, written agreements and informal communication	48
b. Terms of trade	51
i. Benefits: immunities and reduction of penalties	51
ii. Duties: cooperation with the investigations	54
c. Signing and fulfillment of the agreement	56
4. The inventive practice of collaboration agreements: development and judicial support	58
a. Law in action, consensual innovations and the expansion of the room for negotiations	58
i. Granting of benefits not provided for by law	61
ii. Exact definition of imprisonment penalties	65
iii. Package deals and “unified punishment”	67
iv. The serving of imprisonment penalties in advance	70
b. Contractual freedom, tailor-made arrangements and unique consensual solutions	73
c. A new model of criminal procedure? Collaboration agreements and consensual criminal justice	76
i. The binding effect of collaboration agreements: <i>pacta sunt servanda</i> in criminal procedure	80

ii. The principle of “res inter alios acta” and the prohibition of legal challenges by third parties	82
5. Conclusion: a contractualist approach to collaboration agreements	84
Chapter II – Collaboration agreements and macro-delinquency in Brazilian recent experience: notable results in the prosecution of corruption networks	86
1. Introduction	86
2. Operation Car Wash	87
3. Corruption networks	92
a. Collective goods, diffuse losses	96
b. Legitimate and sophisticated organizations	98
c. Major impacts on social life	102
4. Storming the castle: macro-delinquency, consensual justice and public support for leniency policies	105
5. Conclusion: the will and the way for the practice of collaboration agreements	110
Chapter III – Leniency policies: rationale, expectations and risks	113
1. Introduction	113
2. The rationale and expectations of leniency policies: optimal deterrence through increased detection and prevention	117
a. Detection of crimes and gathering of evidence	121
b. Prevention of illegal activities	125
3. Principal-agent relationships, information asymmetry and the risks of leniency policies	129
a. Misrepresentation of facts: under- and over-cooperation	133
b. The dark side of leniency: amnesty effect, recidivism and the need for limits	136
c. Distortion of incentives for enforcement authorities: leniency over-reliance, statistical boost and the overheated market for cooperation	140
d. Gaming the leniency system: repeated games, sophisticated agents and reverse exploitation	144
4. Conclusion: leniency revolution and leniency religion	147

Chapter IV – Consensual exchanges in German criminal procedure: the practice of negotiated judgments and the crown- witness regulation	150
1. Introduction	150
2. Negotiated judgments: practice and regulation	155
a. Search for truth, compulsory prosecution and consent in the German tradition	158
b. Development of the practice of negotiated judgments	162
c. Judicial acknowledgement	165
d. The legislative regulation of negotiated judgments	168
e. The 2013 ruling of the German Constitutional Court	172
3. The general crown-witness regulation	175
a. Development	177
b. Structure	181
c. Scope of application: investigative emergencies	185
d. Investigative achievements, essential contributions and positive balances	188
e. Inside and outside cooperators: the issue of the connection requirement	191
4. Points of analysis	193
a. The prosecution of economic crimes: between consent and search for truth	195
i. Negotiated judgments and crown-witness regulation: parallels and differences	195
ii. Consent and search for truth: different answers to similar questions? Disenchantment and re-enchantment with truth-finding in criminal procedure	199
b. Expansion of the negotiation forum, externalities and abstinence from the search for truth	203
i. The tension over the boundaries of the room for negotiation and the troublesome taming of negotiated judgments	203
ii. Negative externalities and abstinence from the search for truth	205
iii. The 2013 ruling of the German Federal Constitutional Court and the case-law of the U.S. Supreme Court: unnoticed virtues?	208
5. Conclusion	212

Chapter V – Truth and consent in collaboration agreements: a rebuff to the contractualist approach	214
1. Introduction	214
2. The practice of collaboration agreements: incompatibility with Brazilian criminal justice and counterproductive effects	216
a. Collaboration agreements as exceptional tools for investigative emergencies	219
b. Due process, search for truth and the chain of events in criminal procedure	227
c. Separation of functions in criminal procedure: the return of the inquisitorial process?	231
d. Investigative achievements, information asymmetry and the risks of forward purchases in the practice of collaboration agreements	234
3. Collaboration agreements as public-private partnerships within criminal justice: the privatization of truth-finding and its effect on third parties	237
a. Triangular relationships, not bilateral transactions	239
b. Collaboration agreements as mechanism of consensual justice? Disenchantment and reenchantment with truth-searching in criminal procedure	243
c. Collaboration agreements as public-private partnerships and the privatization of official investigations	248
d. Is there a Brazilian system of plea bargaining? Legal transplants, legal translations and legal counterfeits	252
e. The contractual redesign of Brazilian criminal law	257
4. The judicial control of collaboration agreements	262
a. Pacta sunt servanda or nemo dat quod non habet? The issue of the binding effect	263
b. Negative externalities, private gains and social costs: the distorted use of collaboration agreements as hedging mechanisms	267
c. The overheated cooperation market and the problem of monopoly of selection: a case for broad and in-depth judicial control of collaboration agreements	272
5. Conclusion: the contractualist approach from a comparative perspective	275

Chapter VI – Legal consequences and practical implications	278
1. Introduction	278
2. Consequences	281
a. The right of third parties to question collaboration agreements in court: protection of individual rights and of the public interest	281
b. The array of leniency benefits: a case for <i>numerus clausus</i>	284
c. The guarantee of equal treatment and the bazaar of punishment	288
d. Disclosure and confidentiality: cooperators as the monopolists of truth	291
e. Advanced enforcement of penalties and the paradox of investigating what has already been determined	295
f. Preparatory acts, the control of the negotiation process and the duty to register	298
3. Governing through white-collar crime: collaboration agreements and the fight against corruption	302
a. Collaboration agreements, the anti-corruption movement and the dynamic of “governing through crime”	302
b. Under the law, above the law	306
c. Investigative achievements, failures and the effectiveness discourse: collaboration religion?	309
d. The symbiotic relationship between collaboration agreements and the Brazilian anti-corruption movement	314
4. Conclusion: a prosperous life for consensual mechanisms in Brazilian criminal justice	316
Conclusion	319
Annex – List of collaboration agreements analyzed	323
References	327



## Abbreviations

### *German Courts*

BGH – Bundesgerichtshof (Federal Court of Justice)

BVerfG – Bundesverfassungsgericht (Federal Constitutional Court)

Deutscher Bundestag – German Parliament

### *Brazilian Courts*

JFDF – Federal Justice of the Federal District

JFPR – Federal Justice of the State of Paraná

STF – Supremo Tribunal Federal (Federal Supreme Court)

STJ – Superior Tribunal de Justiça (Superior Court of Justice)

TRF4 – Appeal Court of the 4th Circuit of the Federal Justice

MPF – Federal Public Prosecution Office

