



The Brazilian Experience in Fighting Corruption through Leniency Programs and Plea Agreements and its impacts in Latin America

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1. Introduction

1.1. Crucial points that contributed to the transformation on fighting corruption in Brazil:

a) maturity of the institutions after the 1988 democratic constitution (strengthening of the Public Prosecution in a unique way)

b) Plea Agreements (2013)

c) Leniency Programs (2013)

- protected from political interferences

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1. THE FEDERAL PROSECUTION SERVICE

- One of the most trustworthy institutions in Brazil, according to 48 per cent of respondents to the FGV survey, behind only the armed forces and the church (FGV 2014)
- Among other important roles: ensure inter-branch balance and the respect for fundamental rights
- Article 127 of the Constitution: PS's role is “the defense of the legal order, of the democratic regime and of the social and inalienable individual rights”, and its fifth paragraph establishes certain guarantees for its members, such as immovability (a prosecutor can only be re-stationed if they consent to it) and tenure (after two years, prosecutors can only be terminated by a final judicial decision).

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2. The New Legislation: Leniency And Plea Agreements – Overview

- essential for investigations and for the uncovering of the largest corruption scheme ever investigated in Brazil

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3. Plea Agreements

- August, 2013: Act 12.850, or 'Criminal Organizations Act' (COA)
- 'Special techniques of investigation': one of them: plea agreement
- in Brazil plea agreements serve exclusively to obtain one of the following results:
 - 1) identifying other criminals;
 - 2) revealing the structure of the criminal organization;
 - 3) preventing other crimes by the organization;
 - 4) recovering assets accrued through the criminal activity; or
 - 5) locating a victim of the crime in safety (CRIMINAL ORGANIZATIONS ACT, article 4).
- Means of collecting evidence rather than proof of guilt,

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-7 months after the Criminal Organizations Act came into force: **Operation Car Wash**

- largest investigation of corruption in the history of the country; largest of the world nowadays

-Uncovered kickbacks systematically paid by private companies to politicians, political parties and civil servants in exchange for contracts with Petrobras.

- Impressive numbers: recovering of US\$ 11.81 billion;
- criminal charges: bribes amounting to US\$ 1.98 billion.

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3. Plea Agreements

- Defendant must enter the process voluntarily and “spontaneously”: no way plea agreements are coercive
- Attorneys: significant discretion in shaping the negotiations.
- Defendant assists in identifying those who engaged in organized crime; reveals the structure, hierarchy, and roles of the criminal organization; helps prevent future infractions; and/or enables the state to reclaim illicit benefits.

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3. Plea Agreements:

- Judges: prohibited from participating in these negotiations
- Defence lawyer's presence: mandatory (for the express purpose of assisting and protecting the rights of the defendant).
- The more the defendant collaborates, the greater their ability to negotiate. Less collaboration means less or even no bargaining.
- Immunity can be granted

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4. Leniency Programs:

- Chapter V of the Clean Companies Act regulates leniency agreements.
- Clean Companies Act: enacted in 2013
- Marked the beginning of corporate liability for corruption

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-4. Leniency Programs

-Although companies are not subject to criminal liability, the Clean Company Act establishes civil and administrative penalties for companies that engage in corrupt conduct.

-Clean Company Act does not require proof of corrupt intent

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-4. Leniency Programs

- Became an effective tool for investigating corrupt practices in Brazil
- Only in Car Wash Operation, more than ten agreements have been executed to date, making possible to identify bribery-related practices that would otherwise remain undetected.

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-4. Leniency Programs

-August 24th 2017: 5th Review Board of the Federal Prosecutors' Office, composed by three federal prosecutors responsible for coordinating and setting rules of conduct in connection with corruption investigations, issued Resolution n.º 07/2017 on the negotiation and execution of leniency agreements for legal entities interested in settling bribery-related cases ("Guidelines")

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-4. Leniency Programs

- Federal Prosecutor's Service Guideline:

- a) Authority in charge: prosecutor with authority to file civil claims. Agreement shall be accompanied by at least another federal prosecutor
- b) Formal aspects (confidentiality, documented meetings)
- c) Applicant's obligations
- d) Prosecutor's obligations
- e) Other authorities
- f) Fines and damage compensation
- g) Transnational corruption
- h) Always approval by the 5th Review Chamber

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- 5. Conclusions

- Operation Car Wash: investigation of one company can expose a web of corruption involving many other actors
- Leniency programs and plea bargain agreements are playing a key role in the evolution of the probe, along with the maturity of the institutions on a democratic system

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- 5. Conclusions

- Changes would be significant steps in forming an incentive structure in Brazil that parallels the incentive structure in all Latin America.
- Growing alignment of incentives across jurisdictions is a welcome development for prosecutors and companies alike

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Thank you!

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