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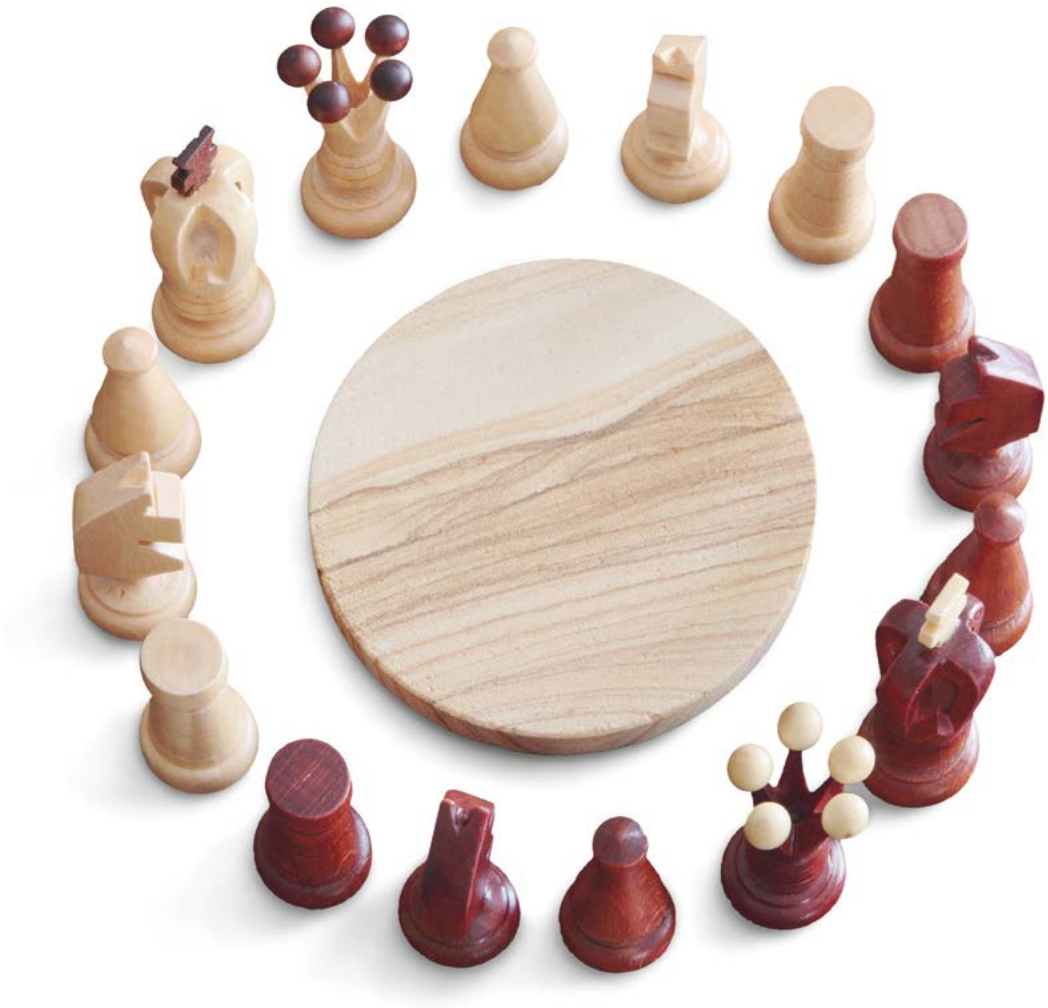

Guidance for Companies Entering into Collaboration Agreements in Brazil

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Summary

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Success through planning

Deloitte and IBDEE's survey revealed the important role of the Legal department in negotiating these agreements and the need to involve other areas of the company to improve their results.

The Brazilian Institute of Law and Business Ethics (IBDEE) and Deloitte have noted in recent years a significant growth of agreements signed between companies and public agencies, whether in the form of terms of conduct agreement or in leniency agreements. In this measure, they jointly conducted the unprecedented survey **"Collaboration Agreements 2018 – Business Community's Perception on the Topic and Adopted Practices"** in order to understand more precisely the reasons for this increase and better guide entrepreneurs in preventing irregularities and non-compliance.

The study revealed the important role of the Legal department in the negotiation of these agreements and the need to involve other areas of the company to improve their results. Especially in areas that are able to mitigate the causes at the origin of these irregularities and to better evaluate the financial and operational consequences of the agreements.

Based on the results of the survey, the IBDEE and Deloitte brought together specialists in their respective areas to guide entrepreneurs on the best ways to plan and execute these agreements. Their infringement may lead to the imprisonment of those involved, new fines and a huge impact on the company's image, depending on the case.

Have a good reading!

Rodrigo de Pinho Bertoccelli
President of the IBDEE

The role of collaboration agreements

Faced with the finding of eventual non-compliances, one observes that companies are increasingly seeking to negotiate collaboration agreements with regulatory agencies. Thus, in addition to implementing the improvements pointed out by inspectors, organizations reduce their exposure to fines and penalties applicable by law.

According to a survey conducted by Deloitte in partnership with the Brazilian Institute of Law and Business Ethics (IBDEE), "**Collaboration Agreements – Business Community's Perception on the Topic and Adopted Practices**", released in May 2018, the participating companies have carried out, on average, four agreements with public agencies in the last five years.

The results of the study, in which 40 companies operating in Brazil have participated, reflect the significant growth of agreements signed in recent years. One of the reasons for this increase is that companies see them as a faster solution. Also according to the survey, organizations understand that the main benefits of this resource are: mitigation of risks and sanctions, image preservation and continuity of activities.

The Government also tends to adopt a more pragmatic approach, using the cooperation with the offending companies to achieve more practical and speedy results. It is essential that organizations are ready and able to perform in this new model.

This preparation entails the creation of a model in which the Legal department – essential in the negotiation of the agreements and one of the main actors in these negotiations – collaborates with other areas, to take care of the causes and the unfolding of situations that led to the need for an agreement. Depending on their nature, it is extremely important that areas such as Compliance, Internal Audit, Finance and Projects are actively involved in this process, which also implies the response and monitoring of collaboration agreements.

The lack of detailed planning can have catastrophic consequences for companies, both in terms of assets and image.

Collaboration agreements have gained even more force with the advent of the Anti-Corruption Law – in the form of leniency agreements – and they represent an important milestone in the fight against bad practices, attesting that Brazil has gained maturity in its regulatory environment. However, despite the importance of this resource, any agreement signed with the Government has significant financial and operational consequences for the organizations. This solution should be used as an exception, instead of replacing the companies' internal controls.

The healthiest alternative for companies still is to organize a robust compliance framework, with multidisciplinary groups and preventive measures that mitigate the risks of adverse situations.

Camila Araújo
Deloitte Risk Advisory Partner

Collaboration agreements represent a legitimate and increasingly used alternative for companies, but this resource cannot replace internal controls and a good compliance framework.

Objectives and structure of the booklet

Leniency agreement, cessation commitment, concentration control agreement, terms of commitment, oversight agreement and term of adjustment of conduct are legal concepts that exemplify an understanding of Law guided by the values of consensus and utilitarianism / pragmatism.

Each one of these concepts has its own legal regime with specific actors, procedures and benefits, but all of them present the possibility of transactions and carry within themselves the utilitarian / pragmatic logic of stimulating collaboration in exchange for some benefit. The doctrine suggests names for this phenomenon, among which: premier law, consensual administration and administrative coordination.

This model, of growing insertion in our legal framework, comes to compete with a merely positivist and imperative position of Law – opening opportunities for consensus and transactions in the definition of the "rules of the game" and in the application of sanctions by the competent authorities. Through it, Public Administration bodies and entities can engage in transactions on the exercise of their authority to achieve better results in various regulated areas (environmental, labor, competition, anti-corruption, among others).

The change brings challenges to the law and business operators, regarding the training of their legal departments and related areas that should perform in this model. New multidisciplinary skills and knowledge are needed so that they can assess the convenience and legal certainty of the agreement, negotiate its terms and monitor its implementation.

The IBDEE, in partnership with Deloitte, has developed this booklet, which provides practical legal analyses of the main agreements, as a guide to companies on the operation and best practices in the planning and execution of collaboration agreements that can be signed by organizations with regulatory and control agencies.

The booklet brings together contributions from experts who lead legal departments of large companies and areas of renowned firms. For each agreement, the booklet provides approaches on: a) legal base and purpose, b) benefits and legal certainty, and c) phases of the signing procedure and actors involved.

In all, 10 types of collaboration agreements were analyzed: leniency agreements (Ministry of Transparency and Comptroller General's Office – MTCGU and Administrative Council for Economic Defense – CADE), cessation commitment (CADE), concentration control agreement (CADE), term of commitment (Central Bank – BACEN), oversight agreement (BACEN), term of commitment (Brazilian Securities and Exchange Commission – CVM), oversight agreement (CVM), term of adjustment of conduct in labor matters and term of adjustment of conduct in environmental matters.

In addition to the descriptive analysis of the purpose and benefits, the proposal of this booklet is to provide elements that can support the evaluation of the decision makers about the option to enter into these modalities of agreement, considering the complex scenario of encouragement and uncertainties in which they are inserted.

Otavio Venturini
Academic coordinator and IBDEE's associate

The booklet provides a comprehensive approach for each type of agreement, detailing their benefits and the various stages of the signing process.

Leniency agreements

The word leniency refers to the notions of gentleness and tolerance. In this sense, the phrase leniency agreement is justified to the extent that the public body or entity should be tolerant with the legal entity that decides to spontaneously and effectively collaborate with its investigations.

The leniency agreements are based on a logic of inducting collaborative behavior, synthesized in the well-known carrot and stick approach, in which a lenient (carrot) treatment is guaranteed for those who voluntarily decide to cease and report unlawful conduct to the authorities, so they are not exposed to severe penalties (stick) provided for in the legislation.[1]

This logic does not arise or is related to the modalities of leniency provided for in special laws. For this reason, leniency agreements can be understood as a kind of genre encompassing different types of collaboration agreements provided for in special laws (protected collaborations and leniency agreements)[2].

In spite of the verifiable peculiarities in each normative document, which imply differences in the applicatory instance or even of the benefits granted, the logic behind these institutes is quite similar.

There are currently a number of legal frameworks providing for models of the same genre. Under Criminal Law, the types of protected collaborations[3] are intended to reduce the individual's custodial sentence penalty.

These collaborations are negotiated, as a rule, at the time of the investigation with the Public Prosecutor Officer or chief of police, and are approved by the Judiciary Branch.

In the Public International Law legislation, the Palermo Convention against Transnational Organized Crime, of 2000 (Article 26[4]) and the Merida Convention against Corruption, 2003 (article 37[5]) – all of which are in force in Brazil – also establish the duty of each State Party to take appropriate measures to encourage persons involved in illicit acts to collaborate and provide useful information to the authorities.[6]

With regard to the leniency agreement, which is proposed in the administrative sanctioning proceeding, there are two relevant characteristics that distinguish it from other forms of protected criminal collaboration: a) the application to legal entities; and b) the role of Public Administration in conducting and executing it.

The first leniency agreement modality was inserted in the Brazilian legal system in 2000, through Provisional Measure No. 2,055, in the context of the defense of competition. The PM was confirmed by the Brazilian Competition Defense System Law (Law 12,529/11).

This leniency agreement modality is conducted by the Administrative Council for Economic Defense (CADE) and provides for the extinction or reduction of administrative penalties for individuals and legal entities that are authors of infractions against the economic order who effectively collaborate with the investigations[7].

Based on the experience of the Antitrust Law, the modalities of leniency agreement provided for in the Anti-Corruption Law were formatted. The leniency agreements of the Anti-Corruption Law are intended to exempt or alleviate the sanctions of legal entities responsible for acts of corruption or illegal administrative actions provided for in the Bidding Law (Federal Law 8,666 / 93).

Thus, the Anti-Corruption Law provides for two types of leniency agreement: a) one relating to corruption infractions and b) another relating to bidding infractions. The great distinctive feature of the two modalities is the type of illegal action driving its application, which in the first modality refers to acts of corruption that are harmful to the national or foreign Public Administration, and in the second, to administrative infraction acts against the bidding process.

Comparative table of transaction types[8]

	Protected Collaboration	Leniency program - CADE	Leniency agreement – MTCGU (Anticorruption)	Leniency agreement – MTCGU (Anticorruption)
Law	Law of Criminal Organizations	Antitrust Law	Anti-Corruption Law	Anti-Corruption Law
Competent authority	Police or Public Prosecutor Office, ratified by the Judiciary Branch	Public Administration - CADE	Public Administration – Internal Control Body (MTCGU)	Public Administration – Internal Control Body (MTCGU)
Subject	Individual	Legal entity / individual	Legal entity	Legal entity
Type of illicit act	Criminal organization	Infraction against the economic order	Acts of corruption harmful to the Public Administration	Administrative infraction against the bidding process
Duties of the collaborator	a) Collaborate effectively and voluntarily; b) Identify co-authors; c) Reveal the organization's structure; d) Prevent new crimes; e) Recover proceeds from the crime; and f) Locate victims.	g) Identify those involved; h) Obtain documents proving the infraction; and i) Always cooperate.	j) Identify those involved k) Obtain documents proving the infraction; and l) Always cooperate.	m) Identify those involved n) Obtain documents proving the infraction o) Always cooperate
Benefits	p) Judicial pardon; q) Reduction of up to 2/3 of the custodial sentence; r) Substitution of custodial sentence by restriction of rights; or s) No pressing of charges (if the collaborator is the first to collaborate and is not the head of the criminal organization).	t) Extinction of punitive action; or u) Reduction of 1 to 2/3 of the penalty applicable to the individual or legal entity; and v) Immunity to criminal actions directly related to the practice of cartel for the individual collaborator.	w) No publication of the condemnatory administrative decision; x) Exemption from the penalty of prohibition of receiving resources from the Government; and y) Reduction of up to 2/3 of the applicable fine.	z) Exemption or mitigation of sanctions restricting or impeding rights to bid and contract.
Secrecy	Until the receipt of the complaint	Yes	Yes	Yes
Effects of failed negotiation	Ban of using the evidence	Withdrawal of the confession	Withdrawal of the confession	Withdrawal of the confession
Consequences of defaulting the agreement	The Law does not provide	Ban to enter into new agreement for 3 (three) years	Ban to enter into new agreement for 3 (three) years	Ban to enter into new agreement for 3 (three) years

Leniency agreement – Law No. 12,529 / 11

A. Legal base and purpose of the agreement

The Leniency Program from Law No. 12,529 / 11 is legally stipulated in articles 86 and 87 of the respective law and in articles 237 to 251 of the CADE's Internal Regulation (RICade).

The signing of a leniency agreement with the CADE, contrary to what is provided for in the Anti-Corruption Law, allows that individuals involved in some joint anticompetitive practice obtain benefits because of the cooperation, in addition to companies.

That is, the agreement can be signed by both companies and individuals, as it will be explained later.

As stated above, the possibility applies to collective anticompetitive conduct[9], that is to say illegal cartel actions and the promotion or influence to uniform or concerted commercial conduct among competitors.

If the proponent is a company, the benefits of the agreement can reach its former and current employees, as well as companies of the same economic group, de facto or de jure, involved in the infringement, provided there is cooperation with the investigations and they sign the agreement together with the proposing company[10].

At the CADE's discretion and convenience, collaborators may subsequently join the agreement, in a separate document[11].

However, the most appropriate and safe way of participation is signing jointly.

It is important to keep in mind that the individual can enter the company's "umbrella", but the opposite is not true. If the proponent of the agreement is an individual and the agreement is signed without the participation of the company, its benefits will not extend to it[12].

Indeed, by creating this possibility of leniency only by individuals, the law ultimately increases the cartel's instability, so that all participants involved, whether they are companies or individuals, remain encouraged to report anticompetitive practices as soon as possible.

Finally, it is interesting to note that the legislation has evolved and that Law 12.529/2011 allows even the leader of the cartel to propose a leniency agreement.

B. Benefits of the agreement and legal certainty

The cartel practice is an administrative and criminal offense. Regarding administrative liability, fines for violating the economic order are:

- In the case of companies, a fine of 0.1% to 20% of the gross revenue of the company, group or conglomerate, obtained in the year prior to the initiation of the administrative proceeding, in the business activity in which the infraction occurred, which will never be lower than the advantage obtained, when its estimation is possible;
- In the case of individuals or companies that do not engage in business activity, if it is not possible to use the gross revenue criterion, a fine between R$ 50,000.00 and R$ 2,000,000,000.00; and
- In the case of administrators directly or indirectly responsible for the infraction committed, when their guilt or intent is proven, a fine of 1% to 20% of that applied to the company.

Moreover, other not directly monetary decisions can be applied alone or cumulatively, among which:

- The requirement of publication of the conviction decision in a major newspaper;
- The prohibition to contract with financial institutions and to participate in public biddings;
- Company spin-off or sale of assets;
- The recommendation for compulsory licensing of intellectual property rights;
- The prohibition of granting installment payment of taxes;
- The prohibition to engage in trade and / or any other act or measure necessary for the elimination of the effects harmful to the economic order.

Regarding the criminal responsibility, provided for in article 4, II, of the Law on Crimes Against Economic Order, cartel crime can lead to sentences of two to five years imprisonment. The sentence can be increased by half if: the crime cause serious harm to the community, it is committed by a public servant while performing his duties, or it is related to goods or services essential for life or health.

If, on the one hand, the legal consequences of cartel practice are heavy, the benefits arising from the leniency agreement are quite attractive:

- Termination of the punitive action from the Public Administration in relation to Law No. 12.529/2011, when the proposal presented to the General Superintendence narrates a case still unpublished and unknown by the CADE; or
- Reduction of one to two thirds of the penalties applicable under Law No. 12.299/2011, when the proposal is presented and the CADE already has some investigation on the infraction.

Criminally, the signing of the agreement suspends the statute of limitations and prevents the presentation of charges regarding crimes against the economic order and those directly related to cartel practice.

Once the agreement is fulfilled, the punishment is terminated[13].

It is interesting to note that, in the civil sphere, Law No. 12.529/2011 does not condition the agreement to reimburse the victims, but it does not exempt the beneficiary from the obligation to indemnify the injured party.

Finally, it is important to note that there is no legal provision that the benefits granted under the leniency agreement result in the termination of the punishment or reduction of administrative penalties in other administrative infractions other than those provided for in article 87, caption, of Law No. 12.529/2011, although this list is illustrative.

In practice, the CADE's experience has already solidified in the sense that the company cannot leave a leniency program in a worser situation than it was before.

Perhaps due to the lapse of time and the number of agreements already signed[14], the market and the legal environment have a good degree of confidence in the CADE regarding leniency agreements. Without such confidence, any incentive to report against and destabilize the cartels would have little effect in practice.

In other words, in illicit acts involving only competitive and criminal matters, the signing of the agreement is undoubtedly a good risk mitigation strategy. However, for the same reasons presented in the topic on leniency agreement of the Anti-Corruption Law, if the competitive infraction involves illicit acts against the Public Administration and this attracts the jurisdiction of other actors, such as the Federal Court of Accounts (TCU) and the Ministry of Transparency and Office of the Comptroller General (MTCGU), legal certainty begins to be somewhat shaken.

Thus, if, for example, the formation of the cartel was intended to guarantee the participation of those involved in public biddings, this practice will also constitute administrative improbity, punishable by fines, compensation for damages and prohibition of contracting with the Government. By express legal provision, it is currently forbidden to transact on administrative improbity proceedings. Therefore, eventual agreement to be entered into with the CADE will not have the power to exclude the risks inherent in administrative improbity.

C. Phases of the signing procedure and actors involved

The negotiation of a leniency agreement is carried out in three phases:

1. Request for password ("marker");
2. Presentation of information and documents proving the infraction reported or under investigation; and
3. Formalization of the leniency agreement

The request for password is a manifestation of willingness to begin the attempt to sign a leniency agreement. In this phase, the proponent contacts the CADE's General Superintendence to report their interest in cooperation.

It exists precisely because of the fact that the benefit is granted only to the first proponent who is able to sign an agreement. To this end, the proponent must submit the following information in order to enable the CADE to evaluate whether there is another proponent in the queue for an agreement on the same infraction:

- **Who?** qualification of the leniency agreement's proponent and other offenders;
- **What?** products or services affected by the infraction;
- **When?** approximate duration of the infraction;
- **Where?** the geographical area where the infraction generated effects.

In this manner, after obtaining the Marker Term and sending the initial agreement proposal, the negotiation phase begins, in which the proponent is called to provide, in an organized and detailed manner, information and evidence about the practice reported.

In practice, the CADE has dedicated negotiating agents who do not participate in any administrative proceedings or investigations if the agreement proposal is unfruitful.

It is important that the proponent organize all documents necessary for the CADE's formation of judgment on the infraction in advance. One should at least be able to obtain such evidence; otherwise, the attempted agreement of leniency may be rejected. Given this picture, an efficient compliance program and detailed internal assessment are indispensable for an optimum evidence collection outcome.

Articles 86 of Law No. 12.529/2011 and 238 of the RICade indicate the following requirements for the signing of a leniency agreement:

- The company is the first to qualify with respect to the infraction reported or under investigation;
- The company and/or individual ceases their participation in the infraction reported or under investigation;
- At the moment of the presentation of the agreement, the General Superintendence did not have sufficient evidence to ensure the conviction of the company and/or the individual;
- The company and/or individual confesses their participation in the illegal act;
- The company and/or individual cooperate fully and permanently with the investigation and administrative proceeding, appearing, at their own expense, whenever requested, to all procedural acts, until the final decision on the infraction reported by the CADE; and
- The cooperation results in the identification of the others involved in the infraction and information and documents proving the infraction reported or under investigation are obtained.

Once all the information and documents required have been submitted, if the General Superintendent considers the negotiation complete, the agreement formalization phase starts.

The CADE's experience and the search for greater legal certainty and reliability in the leniency program led to the custom of always permitting the inclusion of the Public Prosecutor Office (MP) during the agreement's formalization.

In practice, in order to achieve greater degree and reliability, the CADE and the MP increasingly create partnerships so that there are specialized public prosecutor offices on the subject, which facilitates the negotiations and prevents a case from being randomly distributed among several possible prosecutors. The creation of specialized public prosecutor's offices means more predictability and continuity for the actors involved.

The State and/or Federal Public Prosecutor Office participates as an intervener in the agreement, since it is the owner of the criminal action related to cartel crime – which creates a greater degree of security and facilitates the investigation of the other members of the cartel.

After adjusting the terms and signing the agreement by all parties and by MP, the lenient is in charge of the definitive delivery of the documents evidencing the infraction.

Thereafter, the CADE may initiate an investigation or administrative proceeding to investigate the reported infraction and also carry out other investigation and intelligence measures.

The signatory party undertakes, as soon as requested, to cooperate with the investigations, always at their own expenses[15].

Leniency agreement – Law No. 12.846 / 13

A. Legal base and purpose of the agreement

Leniency agreements became possible as regards the practice of acts harmful to the national and foreign Public Administration only in 2013 with the issuance of Law No. 12.846/2013 (Anti-Corruption Law). The legislation disciplined the agreements in a similar manner to the Antitrust Law.

From then on, the scope of leniency agreements was extended, until then it had been limited to investigations related to anti-competitive practices. As a result, it was possible to sign such agreements with legal entities involved in acts harmful to the Public Administration, which may enjoy the benefits that may arise.

Leniency agreements related to the investigation of acts harmful to the national and foreign Public Administration are regulated in Articles 16 and 17 of the Anti-Corruption Law. Moreover, Decree No. 8.420/2015 regulated that law at the federal level., which deals with leniency agreements between Articles 28 and 40.

It is observed that the leniency agreements are aimed at achieving satisfactory and useful results, backed by the collaboration of the legal entity involved. This is done by the provision of consistent information and evidence that are effectively added to the ongoing investigations. In this sense, Article 16 of the Anti-Corruption Law expressly provides that the agreements have the following purposes:

- The identification of the others involved in the infraction, when applicable; and
- The rapid obtaining of information and documents proving the illegal act under investigation.

In short, through leniency agreements, the State eases its burden of ascertaining the truth of the facts, transferring it (wholly or partially) to the collaborating legal entity. The collaborating legal entity needs to present the necessary evidence to clarify the administrative infractions committed. The individual, in this way, has an effective participation in the conflict solution, whose responsibility, historically, always belonged to the State.

The leniency agreements offer innumerable advantages to the State:

(a) Reducing the time of the sanctioning process, making it more effective and leading to an undeniable savings in material and human resources in the criminal conduct investigation;

(b) Optimization of the administrative activity leading to the administrative proceeding, enabling the State to overcome issues that would be difficult to clarify without the collaboration of the lenient company or that, to be clarified, would take enormous time and consumption of material and human resources;

(c) Broader knowledge of the facts investigated, through the support of the individual participating in the infraction events; and, as a consequence

(d) The possibility of identifying other agents - public or private - involved in the infraction; and

(e) To obtain immediate compensation for damages to the treasury, without having to resort to legal redress claims, which, in many cases, exceed decades of proceedings, among other aspects.

B. Benefits of the agreement and legal certainty

The Anti-Corruption Law provides for two independent areas of accountability of the legal entity: a) the administrative sphere and b) the judicial sphere, each with its own sanctions. The administrative sphere acts through an administrative proceeding, under the jurisdiction of the Ministry of Transparency and Office of Comptroller General (MTCGU) in the Federal context, while the judicial sphere derives from the judicial proceeding, in an extra-criminal court. In any of the spheres, the rules of the legal process must be strictly observed.

In addition to the differences regarding the method, it is important to note that the sanctions arising from the administrative proceeding are less incisive than the sanctions arising from the judicial proceeding.

In the scope of administrative proceedings, the following sanctions are taken:

- Fine, in the amount of 0.1% to 20% of the gross revenue of the fiscal year prior to the initiation of the administrative proceeding, excluding taxes, which will never be less than the advantage obtained, when it is possible to estimate it;
- Special publication of the sanctioning administrative decision; and
- Restriction of the rights to participate in biddings or to enter into contracts with the public administration.

While in the scope of the judicial proceeding, the sanctions are:

- Loss of assets, rights or amounts that represent advantage or direct or indirect benefit obtained from the violation, except for the rights of the injured party or third party in good faith;
- Suspension or partial interdiction of their activities;
- Compulsory winding-up of the legal entity; and
- Prohibition on receiving incentives, subsidies, grants, donations or loans from public bodies or entities and public financial institutions or controlled by the government, for a minimum term of 1 (one) and a maximum of 5 (five) years.

In short, the benefits of any of the leniency agreement modalities of the Anti-Corruption Law are limited to exempting or mitigating legal entities only from the sanctions arising from the administrative proceeding and from the prohibition of receiving funds from the Government.

To be more exact, the benefits brought to the legal entity by signing leniency agreements are:

- Exemption from the obligation to publish the punitive decision;
- Exemption from the prohibition of receiving incentives, subsidies, loans, grants, donations, etc. for a period of at least 1 and a maximum of 5 years;
- Possibility of complete reduction of the fine for the first legal entity to sign the leniency agreement. For the others, within the scope of the same acts and facts investigated, reduction of the fine by up to two-thirds (2/3) of the total amount; and
- Exemption or mitigation of the prohibition of bidding or contracting with the Public Administration, in the case of the leniency agreement modality set forth in art. 17 of the Anti-Corruption Law.

The limits of the scope of leniency benefits make the deal unattractive to the company. It is worth mentioning that the most serious sanctions – implying in the loss of assets, suspension or partial interdiction of their activities or even in the compulsory winding-up of the legal entity – are not covered by leniency agreements.

Another fact that contributes to its lack of attractiveness is that, unlike the Brazilian Competition Policy System, leniency agreements of the Anti-Corruption Law do not make the collaborating party immune to criminal actions. It can be argued that this is due to the fact that the Anti-Corruption Law has restricted application to the legal entity. However, inasmuch as legal persons are always conducted by individuals, it is necessary to ask "what individual will be motivated to propose an adjustment under the risk of being criminally prosecuted?".[16]

Moreover, the legislation does not include all the actors and normative instruments that somehow provide for the accountability of legal entities for an act of corruption. The legal entity was already susceptible to be held accountable and subjected to strict sanctions for acts of corruption, especially under the Improbity Law and the Organic Law of the Federal Court of Accounts (TCU).

The Improbity Law, which provides for the legitimacy of the Public Prosecutor Officer and the interested legal entity for the filing of the proceedings, allows the extension of its punitive effects to the individual or legal entities benefiting from the illegal act, notably in relation to the sanctions of: a) loss of amounts unlawfully added to their equity; b) civil fine; c) reparation of the damage caused, if the necessary requirements are present; and d) prohibition of contracting with the Government or of receiving benefits from it[17].

In addition, the Organic Law of the Federal Court of Accounts (TCU), makes it possible for the body to declare the legal entity disreputable, when proven fraud to the bidding has occurred (Article 46 of its Organic Law – Law No. 8.443/92).

In this sense, the company that signs a leniency agreement, within the scope and under the terms of the Anti-Corruption Law, is not exempt from being punished for the same fact by the Improbity Law or TCU's Organic Law.

Therefore, without the effective integration and involvement of other actors, notably the Public Prosecutor Officer and the Court of Accounts, and without expanding their effects in relation to other norms, including those of a criminal nature, the leniency agreement modalities become an unattractive instrument to the collaborator.

Moreover, there is an extremely unstable normative environment, with the enactment of decrees, normative instructions and provisional measures[18], which constantly change the requirements and benefits of the leniency agreement model.

For all this, the leniency agreement modalities under the Anti-Corruption Law still lack attractiveness and a greater degree of legal certainty, which should only be achieved over time, through normative improvements that ensure the integration of actors and normative anti-corruption micro-systems.

In any case, it appears that the control bodies have sought to consolidate some degree of coordination[19].

Measures of this nature are essential to the success of leniency agreements, because only with the integration and conformation of the anti-corruption system will the legal certainty necessary for the success of leniency agreements be achieved.

C. Phases of the procedure for signing the agreement and actors involved

In relation to the Federal Executive Branch, the Ministry of Transparency and Office of Comptroller General (MTCGU) is the competent body to sign leniency agreements with legal entities involved in acts harmful to the Public Administration, as provided in paragraph 10 of article 16 of the Anti-Corruption Law. Moreover, it is also incumbent upon the MTCGU to sign a leniency agreement in relation to harmful acts against the foreign public administration.

Within the scope of other Powers and Public Administration entities, the caption of article 16 provides that it is up to the highest authority of each body or entity to sign leniency agreements. It must therefore be determined, in this case, which authority is competent to sign such agreements.

It should be noted that the Anti-Corruption Law makes it clear that its content does not exclude the powers of the CADE, the Ministry of Justice and the Ministry of Finance to prosecute and judge a fact that violates the economic order (article 29). Another provision (Article 30) records that the penalties provided for do not affect the accountability processes and respective penalties resulting from administrative improbity (Law No. 8,429 / 92) and unlawful acts reached by Law No. 8.666/93.

Article 16 of the Anti-Corruption Law provides in its paragraph 2 on the requirements necessary for signing leniency agreements by the legal entities involved in acts harmful to the Public Administration, as follows:

- The legal entity is the first to express its interest in cooperating to determine the illegal act;
- The legal entity completely ceases its involvement in the infraction investigated from the date of filing of the agreement.
- The legal entity admits its participation in the illegal act and cooperates fully and permanently with the investigations and the administrative proceeding, appearing, at its own expense, whenever requested, to all procedural acts until its closure.

It is noted that paragraph 2 of article 16 of the Anti-Corruption Law essentially reproduced the provisions of paragraph 1 of article 86 of the Antitrust Law[20], with the exception of one of the subsections.

The leniency agreement must be proposed by the interested legal entity. There is no definite form, and the request may be oral or written. If an Administrative Accountability Case has been filed, the proposal must be submitted at the latest until the completion of the respective report (paragraph 2, art. 30, of Decree 8.420/15), otherwise the agreement will no longer be possible.

Once the proposal is submitted, it will receive confidential treatment, with access to its contents restricted to the servants designated by the body to participate in the leniency agreement negotiation[21-22]

The next step is the signing of a memorandum of understanding between the proposing legal entity and the body with the purpose of defining the parameters of the future leniency agreement.

The negotiations must be concluded within a maximum of 180 (one hundred and eighty) days from the date of submission of the proposal, and may be extended at the body's discretion, if it is duly justified (article 32 of Decree 8.420/15). The legal entity may withdraw from the agreement at any time prior to its signature.

If the proposed leniency agreement is rejected, this will not harm the legal entity in the context of any accountability administrative proceedings, since it will not imply recognition of the practice of the investigated illegal act. Besides, documents submitted during the negotiation will be returned, without retention of copies, being forbidden its use for accountability purposes (arts. 33 and 35 of Decree 8.420/15).

The agreement shall contain the following clauses:

- The commitment to fulfill the requirements established in art. 16, paragraph 2, of the Anti-Corruption Law (described above);
- The loss of the agreed benefits in case of noncompliance;
- The extrajudicial administrative nature of the agreement's instrument;
- The adoption, application or improvement of the integrity program.
- After the fulfillment of the leniency agreement by the collaborating legal entity, the following effects will be declared in its favor, in addition to others eventually agreed:
- Exemption from the special publication of the sanctioning administrative decision;
- Exemption from the prohibition on receiving incentives, subsidies, grants, donations or loans from public bodies or entities and public financial institutions or controlled by the Government;
- Reduction of the final amount of the applicable fine;
- Exemption or mitigation of administrative penalties provided for in the bidding and public procurement legislation.

Below, the illustrative flowchart of the phases of the procedure of signing of the leniency agreement:

Stage of manifestation of interest	Negotiation phase	Monitoring phase	Declaratory phase
Leniency agreement proposal	**Signing of the leniency agreement**		**Declaration of compliance and definitive allocation of benefits**
• The legal entity must be the first to manifest itself (article 16, paragraph 1, I); • The proposal does not require any special form; • The proposing legal entity may sign a memorandum of understanding with CGU; • The procedure will remain confidential.	• At the federal level, the leniency agreement will be signed with MTCGU; • The agreement must result in: the identification of the others involved in the administrative infraction, when applicable, information and documents proving the infraction under investigation are obtained.		• When the monitoring of the leniency agreement is concluded by the CGU and its compliance by the proponent company is verified, begins the phase of declaring the fulfillment and the attribution of definitive benefits in favor of the company.
• MTCGU Executive Secretary shall designate the committee responsible for negotiating and supervising the work; • The deadline for negotiation is 180 days, renewable; • Failed negotiation: withdrawal or rejection of the proposal cannot imply the recognition of the practice of the illegal act (maintaining secrecy); • Fruitful negotiation: signing of the leniency agreement.		• The leniency agreement should establish the deadline and means of monitoring by MTCGU; • In case of noncompliance with the leniency agreement, the legal entity will lose the agreed benefits and will be prevented from signing a new agreement for a period of 3 years. Furthermore, the administrative accountability process (RAP) will be resumed.	
Implementation of the Negotiation Committee		**Monitoring the implementation of the leniency agreement**	

Cessation commitment (CADE)

A. Legal base and purpose of the agreement

The cessation commitment ("TCC"), supported by art. 85 of Law No. 12.299/2011, is an agreement signed between the CADE and companies and/or individuals investigated for any violation of the economic order.

With the signing of a TCC, the CADE agrees to suspend the continuation of the investigations with respect to the committed party provided that the terms of the signed TCC are met.

The regulation of the TCC negotiation procedure is foreseen in RICade in its articles 224 et seq. and also in the "Guide to Cessation Commitment for cartel cases", a non-binding guidance document produced by the CADE.

In practice, the TCC is used to avoid expenses related to litigation and exposure of the company's image over a long period of time, as well as to mitigate an expected fine, either for concerns regarding the amounts or the possibility of alternative sanctions (e.g. prohibition to contract with the Public Administration). Moreover, in cases that do not involve collusive practices, the TCC may also mean the non-payment of any monetary amount.

B. Benefits of the agreement and legal certainty

The signing of TCCs with the CADE has been an interesting experience for companies and individuals who want to avoid the confrontation costs (financial and reputational) of an antitrust investigation.

When it comes to more complex practices (e.g. vertical restraints), that do not necessarily involve bad faith, the signing of a TCC can serve to resolve the issue without significant financial trauma to companies, which have the opportunity to discuss with the CADE about alternative solutions to the scenario that bothered the competition authority.

It is the example of the TCC signed between the CADE and the online travel agencies that, after negotiation, decided to prepare a term in which, on the one hand, the CADE would not take the investigation forward and, on the other hand, those represented would change their way of making contractual arrangements with hotels.

Regarding the TCC in cases of cartels, the CADE has a somewhat harder position, always requiring the collection of some amount. That is, whereas in TCCs that are not related to collusive practices, it is possible for the CADE to accept simply a change of conduct of those represented, that is not the case with cartels, where there is always the requirement to collect some monetary amount.

In fact, the strategic variables for deciding whether or not to do a TCC are:

- The mere exposure of my image in an antitrust investigation is unbearable?
- Is it interesting to advance the payment of a fine at a discount?
- Can litigation costs exceed the amount of the fine (something common when it comes to individuals)?

If the answer is "yes", the signing of a TCC can be very advantageous, since it brings benefits to those represented and at the same time, it shows itself as a tool connected to a robust legal certainty.

C. Phases of the signing procedure and actors involved

The represented party may request to sign a TCC at the Superintendence, where there are better conditions for negotiation, or before the Board, with more limited negotiations.

The TCC requirement usually keep on the following path:

- Request for signing a TCC.
- Receipt of certificate with the password (marker).
- After receiving the marker, a term of 5 days for formal manifestation of the interest in starting the negotiation through a CBT is opened.
- Following the manifestation before the General Superintendence, a negotiation period of 60 days begins, which may be extended according to the case's complexity. If the proceedings occur before the Board, the deadline is 30 days, renewable at the discretion of the Board member responsible, for a further 30 days.
- During the negotiation phase, a commission is formed of three servants who hold meetings and negotiations.
- At the end of the term, the represented party submits its proposal and the Reporting Counselor or Superintendent (depending on the case), sends the result of the negotiation to the Board, with recommendation for rejection or approval of the agreement.
- Finally, the Board decides whether or not to approve the agreement.

In practice, the TCC negotiation may or may not involve cooperation to produce more evidence to assist in the investigation.

The time when the TCC is negotiated and whether or not new evidence is produced serves as a parameter for the quantification of the monetary contribution – being certain that the sooner and the more evidence is produced, the better the agreement's condition.

Moreover, it is important to know that the TCC negotiation involves high interaction with the 'Game Theory' logic, because the sooner and the more evidence I produce, the better my agreement will be. In practice, in cases with similar evidence gathering, within the same case, CADE always adopts the size of the benefit of the last TCC signed as the limit for the negotiation of some subsequent TCC (within the same case).

That is, the time variable is extremely important. Hence the importance of deciding in a timely manner on the feasibility of requesting for a TCC, a fact that can be facilitated in the scenario of a company with an effective Antitrust Compliance Program.

Concentration control agreement (CADE)

A. Legal base and purpose of the agreement

The concentration control agreement (ACC), provided for in article 9, VI, of the Antitrust Law and in article 165 of the RICade, is used to overcome problems identified in concentration acts submitted to the CADE. That is, when the authority sees that a movement will be harmful to the market, the parties anticipate a possible recommendation of rejection of the concentration act and present to the CADE some proposals that can overcome any harm generated by the act.

In other words, the ACC's purpose is to make the operation feasible by remedying points that could render the approval of the analyzed operation unfeasible.

B. Benefits of the agreement and legal certainty

The ACC is beneficial to the parties involved in the transaction as well as to society, because while it fosters the M&A activity and allows the growth of large businesses, it already remedies possible effects anticipated by the antitrust authority.

Moreover, the ACC allows decisions to be more adaptable to the reality of the parties involved, because there is no "cake recipe", they are studied case by case.

One of the problems related to the proposed remedies is the cost of supervising compliance with the ACC, which often includes activities related to the company's daily routine, such as training on competition risks.

In recent years, the financial market has seen two relevant cases approved through proposals and approval of ACCs that contained interesting measures, such as an obligation to improve the availability of information and transparency for consumers, including information such as financial education and responsible credit. The agreements in question also included initiatives to improve the corporate antitrust policy and commitment to train employees to better serve the public.

The ACC is therefore a valid way of circumventing problems that, in the absence of the possibility of formalizing agreements, would mean the unfeasibility of the concentration.

However, it is interesting to note that the CADE, in its judgment of convenience and opportunity, may determine that activities related to the fulfillment of the ACC are carried out by consulting or auditing firms or by another independent institution, at the expense of the company.

The fact is that, depending on the remedy used, the operation can be more or less safe, since it does not depend exclusively on the parties involved.

C. Phases of the signing procedure and actors involved

Pursuant to article 165 of RICade, the authority may receive ACCs proposals from the moment of notification until thirty days after the objection by the General Superintendence, without prejudice to the analysis of merit of the operation.

If the ACC is negotiated at the General Superintendence, it must be referred to the Court for approval along with the objection of said concentration.

In practice, the ACC can be presented from the beginning by the parties or may be requested in the middle of the concentration act, when it is perceived that it will be denied. As stated above, the limit for the receipt of the ACC proposal is 30 days after the General Superintendence's objection.

The remedies have been the solution to approve a series of acts that would probably be denied.

Given the complexity of the topic, both the General Superintendence and the Reporting Counselor, actors directly involved in the case, may request assistance from other CADE bodies.

The strategic and creative use of ACCs has been an effective response to the impetus of denial of a series of concentrations.

Term of commitment (BACEN)

A. Legal base and purpose of the agreement

The Central Bank (BACEN), with its legal status as a federal authority linked to the Ministry of Finance and with its main institutional mission to ensure the stability of the currency's purchasing power and a solid and efficient financial system has the full legal framework in the context of its supervision governed by Law No. 13.506/2017, no longer applying, for example, the precepts of art. 44 of Law No. 4.595/64 (except for infractions related to the prevention of money laundering and combating the financing of terrorism, provided for in Law 9.613/98).

According to the institution itself, the promulgation of Law No. 13.506/2017 (and subsequent publication by the authority of Circular Letter No. 3.857/2017) contributed to increase legal certainty for institutions, their administrators, other administered parties affected by the norm and for Bacen itself, making the legal regime applicable to sanctioning administrative procedures (PAS)[23] more adherent to international standards (for example, the fundamental Basel principles for Effective Banking Supervision), by granting this state entity improvements in the PAS procedural rite, structuring decision-making committees and having supervisory instruments to modulate the conduct of institutions and those managed in a much more effective and timely manner[24].

The main purpose of the term of commitment, from the Bacen's point of view, is to give efficiency to the Bacen's oversight function, preserving the educational and dissuasive nature essential to sanctioning processes; while, for the individual, it is to provide them with the extinction of the punishment in relation to the reported infraction. The term of commitment cannot be signed in case of serious infractions and the presentation of the proposal will not suspend the progress of the administrative proceeding (article 11, paragraphs 1 and 4).

B. Benefits of the agreement and legal certainty

The possibility of signing a Central Bank's term of commitment presents certain characteristics attractive to the individual. In a synthetic and objective way, its main advantages, in our view, are:

(a) Time of filing: its filing and signing may be made at any stage preceding the decision of the lower court, even before the institution of a PAS. Here is the opportunity for the company to engage in voluntary self-disclosure, that is, to spontaneously take the facts to the authorities to obtain the benefits of the agreement;

(b) Parties: possible for individuals and legal entities.

(c) Wide range of infractions where an agreement is possible: all the extensive – and illustrative – list of infractions described in art. 3 of Law No. 13.506/2017 are possible for the signing of a Term of Commitment by the Central Bank. However, it should be noted that, in the case of infractions considered serious (cf. article 4 of the same law), this term cannot be signed;

(d) Bacen concessions: with its signature, the term may cause the PAS to cease to be established (when it has not yet been), or to be suspended for a certain period, at the end of which, with the conditions agreed fully met, the punishment of the individual is terminated in relation to the infraction part of the term;

(e) Considerations of a reasonable nature: according to art. 11 of the Law, for the agreement to be signed, the individual should undertake to, cumulatively, (1) terminate the practice under investigation or its harmful effects, (2) correct the alleged irregularities; (3) indemnify the losses caused by the infraction; and (4) comply with the other conditions that are agreed upon in the specific case, with mandatory payment of monetary contribution. The term of commitment, therefore, does not require the individual to report or give documents that may incriminate others.

However, it also presents important repellent aspects to the individual, such as:

(a) Lack of objective and prior parameters on the sanctioning mitigation: cf. the art. 9, exclusive penalties for serious infractions cannot be agreed by Bacen in Terms of Commitment, thus leaving only the public admonition and fine penalties. Moreover, in our view, the normative omission in relation to the objective parameters of sanctioning mitigation (for example, percentage of decrease of amounts to be paid) removes, to a large extent, the attractiveness of signing the agreement;

(b) Lack of more objective limits to the discretion of the administrative decision: even if the individual undertakes to cease the practice – or the effects of the infraction – to correct the irregularities and to compensate the losses the Central Bank will not be required to accept the signing of the term because it may, without minimally objective and/or standardized parameters, also require other conditions not specified in the standard from the individual, otherwise the document will not be signed.

(c) Mandatory communication to the Public Prosecutor Officer: even if the Law has established that its signature will not imply confession and has stipulated the confidential nature of the proposed terms of commitment, it has also established that its communication to the Public Prosecutor Office is mandatory.

The latter aspect significantly weakens the attractiveness and legal certainty of the individual interested in proposing terms of commitment to the Central Bank. For no other reason, this was the main subject of heated debates during the discussion phase of the bill that gave rise to it.

Thus, even taking into account its positive characteristics, the proposition, by the individual, of a term of commitment to the Bank, is not, in our view, sufficiently attractive to them. At least not in the manner in which it is normatively envisaged, nor in the event that the individual does not wish to sign similar agreements with the Public Prosecutor Office.

C. Phases of the signing procedure and actors involved

The stages of the procedure for signing the terms of the commitment are, as a rule, the following[25]:

- Preparation and presentation of the proposal of term of commitment by an individual[26] to the Bacen;
- Preparation of technical note by the Committee for Analysis and Negotiation of Term of Commitment Proposals (COANP) on serious infraction indications;
- Preliminary deliberation of the Administrative Sanctioning Process Decision Committee and Term of commitment (COPAT); possibility of preliminary rejection of the proposal;
- Negotiation of the term of commitment between the COANP and the individual proposer (possibility of adjustments proposed by the Central Bank);
- Issuance of the COANP technical opinion on the merit of the term of commitment;
- COPAT's final decision;
- Signing of the term of commitment.

Oversight agreement (BACEN)

A. Legal base and purpose of the agreement

As with the term of commitment possible of being signed with it, the Bacen's oversight agreement (administrative agreement in the oversight process) also has its rules set forth in Law No. 13.506/2017 and Circular Letter No. 3.857/2017.

The purpose of the oversight agreement, for the Bacen, is to obtain, through its signing, the cooperation of the individual (a) in the identification of the others involved in the practice of the reported infraction (if any) and (b) in the identification of information and documents that may prove the infraction reported or under investigation (article 30 of the Law).

To the individual proponent, in turn, its purpose is to obtain the termination of the punishment or mitigation of the applicable penalties in relation to the reported infraction.

B. Benefits of the agreement and legal certainty

In our opinion, as it is normatively foreseen, the Bacen's oversight agreement presents a merger between some of the positive characteristics of the CADE leniency agreement and many of the discouraging aspects of the leniency agreement provided for in Law No. 12.846, already addressed in this booklet and on which we have already had the opportunity to deeply discuss in a specific master's dissertation on the subject[27].

Very briefly, it is possible to point out as the main attractive features of the Bacen's oversight agreement:

(a) Parties: possible for individuals and legal entities. Here we have a difference in relation to leniency agreements governed by Law No. 12.846/2013 (the Anti-Corruption Law), which are signed with the legal entities involved;

(b) Possibility of granting a significant disciplinary benefit: with its signing, the individual may be granted the extinction of Bacen's punitive action or a reduction of 1/3 (one third) to 2/3 (two thirds) of the penalty applicable thereto; and

(c) A slightly more detailed way of choosing the benefit to be granted: Circular Letter No. 3.857/2017 brings, in its art. 90, temporary/procedural criteria that give a little less uncertainty to the individual about the proportional magnitude of the benefit that may be granted by the Bank (extinction or reduction of 2/3 when a reported infraction is unknown by the Bank, or a reduction of 1/3 to 3/5 when already known by the agency).

However, its main repellent aspects make the signing of this type of agreement, as a rule, a very inadvisable option. The most relevant of these aspects are, for example:

(a) Sensitive uncertainties as to the consideration required from the individual: one must provide information and documents proving the infraction, or is his "effective, full and permanent cooperation" sufficient? Do the information and documents to be provided by the individual need to be unprecedented? If yes, unprecedented to whom? How to know if they are unprecedented (high – and discouraging – exposure of the individual to risk)?

(b) Lack of minimum structuring of a marker system: similar to what occurs with respect to the instruments of collaborative and sanctioning[28] negotiation of the antitrust legislation, Law 13.506/2017 provided for the possibility of a temporal criterion as one of those to be used for the stipulation of the consideration to be granted to the individual, giving better sanctioning benefits to the first who formally proposes the agreement, and smaller to the others.
However, there are yet no rules that ensure fairness and are capable of giving legal certainty to the individual in relation to compliance with this "checklist". That is, in this context, there is no such structure and regulation of the antitrust marker system.

(c) Obligation of confession and participation of the Public Prosecution Officer: among the requirements of acceptance by the Central Bank is the confession of the person proposing it (article 30, paragraph 2, IV, of the Law). Moreover, the same Law clarifies that the signing of the agreement does not have the effect of affecting the performance of the Public Prosecutor Officer and other state bodies on the infraction object of the agreement. The law also stipulates that the Bacen shall keep the Public Prosecutor Officer permanently informed on the matter, and the authority shall be required to grant them broad access to the computerized system containing all information on administrative agreements in the Bacen's oversight processes, "without be enforceable confidentiality" (article 31, paragraph 3 of the Law).

C. Phases of the signing procedure and actors involved

The stages of the procedure for signing the oversight agreement are, as a rule, the following[29]:

- Preparation and presentation of the oversight agreement proposal by an individual[30] to Bacen;
- Final decision of the Administrative Agreement Board on Oversight Process (COAPS);
- Signature or rejection of the proposed oversight arrangement.

Term of commitment (CVM)

A. Legal base and purpose of the agreement

The Brazilian Securities and Exchange Commission (CVM) is an autonomous entity under a special regime, and although connected to the Ministry of Finance, it has not only its own legal personality and equity, but also, by law, has independent administrative authority, no hierarchical subordination, of fixed terms and stability of its leaders, as well as of financial and budgetary autonomy. Thus, an entity with a degree of autonomy and independence much greater than the Bacen.

Its institutional purpose is to ensure the efficient functioning, integrity and development of the capital market, promoting a balance between the agents' initiative and the effective protection of investors, having as one of its main functions the control, ascertaining and condemning infringements to the securities market legislation.

In order to better serve the stakeholders involved, the CVM was legally granted the possibility of signing terms of commitments, the legal provision of which is established in its implementing law, Law No. 6.385/76 and the current process set forth by the CVM Resolution 390/2001 (last amended by CVM Resolution 759/2016). However, having as one of its purposes the improvement of this instrument, the aforementioned Law No. 13.506/2017 amended, revoked and included some of the provisions of said law. Moreover, the special agency published, on June 18, 2018, the Public Notice of Public Hearing SDM No. 02/2018, containing a broad Instruction proposal which, once approved, will consolidate, in a single document, all the rules related to its sanctioning activity and, consequently, will repeal CVM Resolution 759/2016.

On the other hand, it should be noted that the main purpose of the term of commitment signed with CVM for the individual, such as that signed with the Central Bank, is to provide for the termination of the punishment in relation to the reported infraction.

B. Benefits of the agreement and legal certainty

The possibility of signing a CVM's term of commitment presents certain characteristics attractive to the individual. In a synthetic and objective way, the main advantages are:

(a) Time of filing: its filing and signing may be made at any stage preceding the decision of the lower court, even before the institution of a sanctioning administrative proceeding (PAS).

(b) Parties: possible for individuals and legal entities.

(c) CVM Concessions: with its signature, the term may cause the PAS to cease to be established (when it has not yet been), or to be suspended for a certain period, at the end of which, with the conditions agreed fully met, the punishment of the individual is terminated in relation to the infraction part of the term;

(d) Considerations of a reasonable nature: according to art. 11, paragraph 5 of Law No. 6.385/76, for its signing the individual should undertake, cumulatively (1) to terminate the practice of activities or acts considered illegal by the CVM, (2) to correct the irregularities mentioned above, and (3) indemnify the losses caused by the infraction;

(e) Independence of the Public Prosecutor Office as a significant endorsement of confidentiality and the non-confessional nature: such as those signed with the Bacen, the terms of commitment entered into with the CVM also have a legal provision stating that their signature will not imply confession regarding the matter of fact, nor acknowledgment of illegality of the conduct analyzed (Article 11, paragraph 6 of Law No. 6,385/76). However, differently from what happens in those, the CVM does not have any obligation to communicate details of the proposal to the Public Prosecutor Office. In fact, the only provision on a similar matter is that contained in article 12 of the aforementioned law, which establishes that such communication is mandatory only when the investigation initiated concludes that a crime of public action has occurred. In any case, it is important to remember examples of success in the signing of terms of commitment and adjustment of conduct (TCAC), a kind of CVM term of commitment cumulated as a term of conduct adjustment of the Public Prosecutor Office, the most famous (for innumerous reasons) being the one signed on October 6, 2016 between the authority, the MPF and the company Embraer.

There is undoubtedly a greater attractiveness of this instrument when signed with the CVM, when compared with the one signed with the Bacen. However, this does not mean that it is not needed to give it greater legal certainty.

In addition to the uncertainty as to whether or not the new regulatory rule will be approved (referred to as the proposed Instruction, which, if approved, will replace CVM Resolution 390/01), it is necessary to draw attention to the omission in relation to the possible penalties that can be incurred through terms of commitment with the CVM. According to paragraph 3 of art. 11 of Law No. 6.385/76 (with wording given by Law No. 13.506/2017), warning and fine penalties may be applied without regard to the seriousness of the infraction, while penalties for temporary disqualification, suspension of authorization and temporary prohibition may only be imposed in cases of serious infringement. Furthermore, paragraph 13 of the same article (included by Law No. 13;506/2017) adds the possibility of another type of penalty (prohibition, for up to five years, of contracting with official financial institutions and of participating in any public bidding of any state body or entity), but without indicating whether its application depends on the seriousness of the infraction committed.

Although there is no provision (in law or even in the Instruction proposal), prohibiting the application of serious penalties by Terms of Commitment signed with CVM (as it exists in the case of those signed with Bacen), it is certain that the presumption that this is possible is, to some extent, risky.

In any case – and for all the above – it is generally possible to consider as attractive for the individual to sign terms of commitment with the CVM.

C. Phases of the signing procedure and actors involved

According to the updated version of CVM Resolution 390/2001, the phases of the procedure of signing of terms of commitment with CVM are, as a rule, as follows:

- Preparation and presentation of the term of commitment proposal by the individual to the CVM Coordination of Administrative Proceedings Control (CCP). Or, when still in the preliminary investigation phase, to the responsible superintendence or, yet, exceptionally, to the SBP reporter;
- Preparation of an opinion by CVM's Specialized Federal Prosecutor's Office;
- Submission to the Term of Commitment Board, which may also negotiate terms with the proponent, but which, at the end, with or without negotiation, should prepare an opinion with recommendation to the CVM board;
- Final decision rendered by the CVM board;
- Drawing up of the term of commitment and its publication in the Official Gazette (DOU).

Oversight agreement (CVM)

A. Legal base and purpose of the agreement

The possibility of signing, with the CVM, an oversight agreement (administrative agreement in the oversight process), did not exist before, and was established by art. 34 of Law No. 13.506/2017, which, however, only provides that the same rules of the Bacen's oversight agreements should be applied, where applicable.

Moreover, unlike Bacen (which has already issued Circular Letter No. 3.857/2017), the possibility of using this new instrument of collaborative and sanctioning negotiation by the CVM has not yet been regulated. The special agency published, on June 18, 2018, the Public Notice of Public Hearing SDM No. 02/2018, containing a broad Instruction proposal that, once approved, will consolidate, in a single document, all the rules related to its sanctioning activity and brings, in several provisions, rules on the oversight agreement.

In any case, the purposes of this are the same as in Bacen's oversight agreements: for the CVM to obtain, through its signing, the cooperation of the individual (a) in identifying the other parties involved in the practice of the reported infraction (when applicable) and (b) in the identification of information and documents that may prove the infraction reported or under investigation; while for the individual, to obtain the termination of the punishment or mitigation of the applicable penalties in relation to the reported infraction.

B. Benefits of the agreement and legal certainty

Since art. 34 of Law No. 13.506/2017 determined the reproduction, to the CVM, of the legal regime of Bacen's oversight agreements, as well as the current non-existence of a complementary standard issued by CVM (which, as already mentioned, is in the public hearing stage), the same observations recorded for Bacen's agreements should be considered here.

In a prospective exercise, however, it is opportune to mention two characteristics contained in the aforementioned Instruction proposal, which, if approved, may make the signing of this instrument with CVM a little more attractive to the individual than those in the scope of Bacen:

(a) Possible provision for an independent and separate body: the draft of the Instruction proposal brings the creation of the Oversight Agreement Committee (CAS), an independent body that is separated from the superintendence units that oversee and formulate accusations under CVM's PAS. If accepted, this creation could, at least in theory, bring a little more hope to the individual regarding his proposal's secrecy.

(b) Prediction of objective temporal criteria for prior knowledge verification: the draft of the Instruction proposal foresees the detailed determination of objective temporal frameworks to characterize the existence or not of prior knowledge (remembering that, according to Law No. 13.506/2017, when the infraction reported by the agreement is unknown by the state entity, the individual should be granted a more significant sanctioning mitigation).

However, even if these provisions of the Instruction proposal are approved, we believe that the attractiveness of the signing of a supervisory agreement to the individual will still be very insufficient to cover the excess of legal certainty present.

C. «Phases of the signing procedure and actors involved

Also, for reasons already explained, in a prospective exercise, the main phases of the procedure for signing the supervisory agreement with CVM described in the draft of the Instruction proposal are as follows:

- Preparation and presentation of the oversight agreement proposal by an individual to the CAS;
- Manifestation of the CAS on the admissibility of the proposal or need for improvement;
- If requested by the proposer, the CAS shall issue to them a term regarding the prior knowledge or not of the infraction reported;
- Possibility of requesting assistance, through the CAS, from the CVM's Specialized Federal Prosecutor's Office
- Final decision from the CAS on whether to accept the proposal or not.
- Signature or rejection of the proposed oversight arrangement.

Term of adjustment of conduct in labor matters

A. Legal base and purpose of the agreement

The Term of Adjustment of Conduct (TAC) is an administrative legal act entered into in the course of a preparatory/promotional procedure or public civil inquiry to avoid the filing of a public civil action, having legal base in the same provisions that govern the civil investigation itself and public civil action.

In general terms, the TAC in the labor context is based on articles 129, item III, of the Federal Constitution of 1988 (CF/88); 5, paragraph 6 of Law No. 7.347/85; 83, item III and 84, item II both of Complementary Law No. 75/93, all applicable to the labor proceedings by virtue of the provisions of article 76, of the Consolidation of Labor Laws (CLT).

The purpose of the the TAC is to curb the practice of irregularities, referring to diffuse and collective interests arising from a work or employment relationship, representing a true type of extrajudicial executive document, in which the offender declares and guarantees that from then on he will spontaneously modify his behavior, under penalty of fine, without the need for a long, bureaucratic and costly judicial process.

The TAC in the labor context is an important instrument for the effectiveness of labor rights, who cannot wait for a lengthy judicial process to see their rights respected.

For example, with regard to work environment, if the applicable health and safety standards are not being strictly observed by the employer, until the judicial proceeding and the final decision of the proceeding to begin the execution, innumerous accidents with irreparable damage to the health of the workers involved can occur.

Thus, the TAC was not created as a way to obstruct the right of access to justice, but rather to ensure that offenses against social rights – that go beyond the individual context and with this, can seriously damage an entire group or category of workers – are quickly repelled.

It should be pointed out that, although the TAC is a unilateral administrative act with regard to the obligations established therein, it is bilateral in relation to the parties' will, that is, in no case is the TAC established without the respondent agrees in assuming the obligations to do or not to do that are part of it.

Because of its consensual nature, the agreement encourages the spontaneous fulfillment of the agreed obligations and, consequently, the termination of offenses against social rights more effectively than in the course of a lawsuit.

B. Benefits of the agreement and legal certainty

The TAC is an extrajudicial executive document that normally has no fixed term. Consequently, even after full compliance with the obligations contained therein, there is nothing to prevent the Labor Ministry (MPT), from time to time, re-inspecting the company to verify that those obligations continue to be fulfilled.

If it is found that any of the obligations agreed in the TAC clauses has been disregarded, the company may be penalized according to the fines set out in that document, which are usually quite significant, without the need for a new civil inquiry to determine irregularities.

Because it is an extrajudicial executive document, it is not even necessary to file an acknowledgement suit for the execution of the penalties provided. This is not the case, for example, with the agreement reached in court proceedings, which is in force until the parties have fulfilled their obligations. Once the stipulated terms have been fulfilled, the agreement is deemed to have been fulfilled and the proceedings are closed.

In this case, if the MPT wishes to re-inspect the company, it must initiate a new investigation and, in case of noncompliance, it cannot refer to the terms of the agreement nor to the fines stipulated therein.

Thus, in view of the lack of assurance that, in fact, inspections are guided by reasonableness and proportionality, the TAC can prove to be disadvantageous to the employer. On the other hand, if the company refuses to sign the TAC, the MPT, convinced of the irregularity incurred by the company, may file a public civil action in the Labor Court.

These actions, depending on the topic addressed, can cause significant reputational damage to the company. On the financial side, it should also be noted that the costs for defense are quite high, including due to the collection of differentiated legal fees due to the complexity of the proceeding.

Another important point that the company should pay attention to are the terms of the clauses drafted in the act. To ensure greater legal certainty, the ideal is the stipulation of objective clauses that contain clear obligations of what should be done.

This will avoid overly comprehensive oversight or even doubts about the steps that must be taken as a result of signing the document. Generic clauses tend to involve a great subjectivism both on the part of the work's tax auditor and by the company, which can become a problem.

Otherwise, in view of the fact that the TAC does not have a specific deadline, in a new inspection, the company can be fined for obligations that it did not have in mind when signing the document.

It is therefore understood that the signing the TAC may or may not be beneficial to the company depending on the factual circumstances and the purpose of the document. Issues involving significant risks of reputational damage to the company, such as the use of slave or child labor, lead to the signing of the TAC so that it can immediately repel any unlawful practices of the company and mitigate, to the extent possible, the damage to the image generated by it.

On the other hand, when the irregularities prove less serious to the workers, or when the company understands that it does not perform the acts indicated by the controlling body, the most appropriate way may be to await the filing of the public civil action. In this action, a judicial agreement can be signed with objective obligations and a fixed term, thus avoiding ***bis in idem*** of penalties in disfavor of the employer.

C. Phases of the signing procedure and actors involved

The TAC is entered into in the course of the civil inquiry/preparatory or promotional procedure, which in turn may be initiated ex officio or when there is representation of injury to diffuse, collective and individual homogeneous interests that authorize the exercise of protection of unavailable social rights connected to employment relationships.

In the course of these procedures, it is possible to produce all the legal evidence allowed to clarify the facts of the investigation, such as witness testimony, request for documents and information by the reporting company, performance of investigations, etc.

Contrary to the judicial proceeding, there is no specific order for the collection of evidence, so that interested parties can submit subsidies for the best investigation of the facts at any time during the investigation process without any estoppel (it will be up to the prosecutor in charge, therefore, to define phases and set deadlines). However, it is extremely important that the defense strategy be discussed and reviewed with the lawyers in charge to mitigate the risks involved.

Once the irregularities have been verified, the MPT may schedule an administrative hearing, in which the legal representatives of the reporting party should appear to analyze the terms and eventually establish a TAC.

After this hearing, it is possible to present/request the production of a new set of evidences, if, for example, the reporting party agrees to commit to only part of the obligations proposed (because they understand that the other clauses involve issues that are in fact effectively observed by the company). Or, if the reporting party refuses to sign a TAC and the MPT gives them another opportunity to demonstrate compliance with the obligations.

In the labor context, the competent body to establish a TAC is the MPT. Although article 8, item III, of CF/88, gave them jurisdiction to defend collective rights and interests – including in judicial and administrative matters, pursuant to paragraph 6, of article 5 of Law No. 7.347/1985 – labor unions do not have standing to sign terms of adjustment of conduct.

However, there are judgments handed down by the Labor Court in the direction of recognizing the legitimacy of the unions to file an enforcement action aiming at compliance with the TAC clause signed by the MPT.

Term of adjustment of conduct in environmental matters

A. Legal base and purpose of the agreement

According to article 225, paragraph 3, of the Federal Constitution, "conducts and activities considered harmful to the environment shall subject offending individuals or legal entities to criminal and administrative sanctions, regardless of the obligation to repair the damages caused".

This provision makes clear that, in matters of environmental law, there are three areas of responsibility: criminal, administrative and civil. Criminal liability, as the name itself explains, punishes the occurrence of crimes against the environment. In the administrative context, the infraction is punishable by the environmental legislation, applying sanctions against such conduct, among which the warning, the fine, the embargo, the suspension of activities, etc. Finally, civil liability, as provided by the constitutional text itself, is related to the obligation to repair damages caused to the environment.

Even before the promulgation of the Constitution in 1988, the National Environmental Policy (Law No. 6.938/1981) already provided for this triple environmental responsibility.

The aforementioned Policy, in relation to civil liability, provided that the Public Prosecutor Office would have the legitimacy to propose action seeking compensation for damages caused to the environment. Despite this provision, the Policy lacked a judicial instrument to seek redress and, in a related way, an extrajudicial instrument with the same objective.

Shortly afterwards, the public civil action (ACP), created by Law No. 7.347/1985, established the liability for pain and suffering and property damages caused to the environment. And although it is not the only instrument, the ACP has become the most effective and common instrument for defending diffuse and collective interests in the environmental context.

In addition to the ACP, the aforementioned Law established the civil investigation, the owner of which is the Public Prosecutor Office, aiming at the promotion of sufficient steps to convince itself or not of the existence of grounds for bringing the public civil action.

In an intermediate way, and influenced by the provisions of the Consumer Protection Code, of 1990, which provided for a commitment of adjustment of conduct, in collective custody, Article 5 of Law No. 7.347/1985, was amended to state that "legitimated public bodies may take from the parties a commitment of adjustment of conduct to the legal requirements, through sanctions, which will be effective as an extrajudicial executive document."

In this way, the public bodies legitimized to propose a public or collective civil action, have also become legitimate to establish a TAC with the interested parties – in an extrajudicial manner.

In short, the purpose of the TAC is to resolve conflicts involving civil liability in the environmental context, without the need to trigger the Judiciary Branch. This commitment constitutes an extrajudicial executive document.

There is much debate, especially in the environmental law doctrine, to what extent the representatives of the Public Prosecutor Office could transact about the ACP's purpose, since protection of the environment would be a non-disposable right. However, in negotiating the terms of the TAC, the Public Prosecutor Office does not give up protection of the environment, but only adopts a more flexible position, as necessary, on the terms and deadlines for complying with the environmental recovery/compensation obligations.

B. Benefits of the agreement and legal certainty

As stated in the previous item, the legislator's objective – specifically having the possibility of signing TACs in the environmental context – was, without a doubt, to create a faster route of civil reparation and recovery of environmental damage, in an extrajudicial manner, and to resolve any doubts whether such an instrument would be appropriate to address diffuse interests.

In this sense, the immediate and perhaps most obvious advantage is the possibility of discussing the clauses of the agreement – albeit in a reduced form because it is a matter of diffuse interests – and seeking a better agreement for those interested in signing this instrument with regard to the term and mode of compliance.

Moreover, the TAC provides the parties with the possibility of negotiating outside the judicial environment, enabling the cessation of the degrading practice and the recovery of the damage to the environment, without the need to establish sanctions or determinations of a repressive nature.

On the guilt, it is important to mention that there were discussions in the past involving the possibility of the environmental TAC serving as admission of guilt in the criminal context. However, according to the Superior Court jurisprudence, the courts have decided for the independence of the civil, administrative and penal spheres, regardless of the TAC signing in the civil area, in any type of accountability in other spheres.

Thus, it is understood that this discussion has been overcome in the sense that there is no need for guilt recognition for the TAC signature. Moreover, these are independent spheres and no administrative or criminal penalties can be imputed simply as a result of the facts outlined in the TAC clauses.

C. Phases of the signing procedure and actors involved

In relation to those legit to enter into a TAC with those managed, it is important to mention that not all the legitimized are active in the public or collective civil action – for only public agencies are admitted, excluding from the list of article 5 of the LACP the civil associations, trade unions, mixed capital companies, private foundations and public companies[31].

Law 9.605/1998, as amended by Provisional Measure 2.163-41/2001, which added art. 79-A, extended the legitimacy to sign the commitment of adjustment of conduct, granting this power also to "the environmental bodies members of SISNAMA, responsible for the execution of programs and projects and for the control and oversight of establishments and activities that may degrade the environmental quality" [32].

On the other side, the "polluter" appears as the compromiser, interpreted here as broadly as possible, since in the environmental civil sphere, as we have seen, responsibility is not guilt. In this way, the definition of polluter from article 3, IV, of the National Environment Policy, may be used, according to which it is an "individual or legal entity, whether public or private, directly or indirectly responsible for activity causing environmental degradation".

As it is an extrajudicial executive document, the TAC exempts the court approval and its non-compliance leads to the execution of an obligation to do and not to do, based on the instrument itself.

Some of the clauses typically contained in the TAC are those relating to the fine for noncompliance, in addition to clauses related to noncompliance with obligations due to unforeseeable circumstances and force majeure.

In practice, schedules to meet specific obligations are normally added, which may be individually required by the Public Prosecutor Office, under penalty of fine. For example, if the subject of the TAC is the reforestation of a given area or the decontamination of a land plot, the schedule may establish detailed measures, providing the parties to follow each of the activities implemented and the respective deadlines.

Environmental agencies, such as the IBAMA, have also used the so-called terms of commitment, which are diverse in nature and aim at making compliance with administrative measures possible. For example, the Brazilian Institute for the Environment and Renewable Natural Resources (IBAMA) has recently published standards to enable the conversion of imposed fines, the amounts of which – at a discount – will be used in environmental recovery projects. This is another example of an agreement envisaged by environmental standards.

Pillars of regulatory risk

Although they do not have the prestige of strategic risks, or the momentum of the cybernetic ones, regulatory risks are extremely important within companies. Organizations in virtually all industries must meet complex rules and regulations – under penalty of sanctions, direct impacts on reputation and market share. The challenges of regulatory compliance are numerous and, therefore, having a structured and segmented view of its scope is fundamental: from compliance strategy to regulatory response. These pillars are relevant so that companies can efficiently structure the regulatory compliance of their business, establishing an acceptable level of risk with an adequate investment.

1) Regulatory strategy: with so many political movements in the current scenario, the need to anticipate and adapt to regulatory changes becomes more poignant. Companies should develop strategies, map risks and processes, and implement internal controls to assess regulatory trends and their impact on their business model.

It is also needed to align your planning to the dynamic environment to allow for proper adherence monitoring while reducing unnecessary costs.

It is no easy task. Companies that sought to pioneer in compliance initiatives had difficulties precisely in the preliminary study of the greater regulatory risks associated with their business strategies. They raised numerous compliance items, culminating in the failure of the initiative even before it was put into practice, because of a disproportionate effort to respond to often unnecessary topics.

Strategically analyzing regulatory risks that most impact companies' operations and businesses is the first major step in defining an effective monitoring scope, plausible to the operating model and at reasonable cost. Thus, instead of monitoring thousands of regulatory items, organizations are limited to the most relevant ones, which brings them security.

If we consider the increasingly constant frequency of collaboration agreements with the Government, this solution will certainly be raised to a strategic condition and need to be incorporated into the companies' compliance programs. It is noted, however, that many companies prioritize the signing of agreements, as already mentioned in this booklet, thinking only of their benefits, without actually analyzing whether compliance is feasible.

It is important to emphasize that, despite the protection of the company's image at first, the fact that companies cannot comply with the requirements stipulated in the agreements hurts more drastically the name and the brand associated with this failure. The costs involved in rebuilding and strengthening of reputation can often make the business unfeasible.

The involvement of multidisciplinary expertise during the negotiation phases of the agreements is highly recommended so that they result in requirements and obligations that can be effectively met.

The regulatory compliance strategy involves not only the identification of relevant regulatory risks, but also the definition of the scope of compliance, internal processes, systems and people, who should focus on an appropriate monitoring.

2) Regulatory compliance: compliance is considered by many companies as an unavoidable cost of the business. For others, it is seen as a competitive advantage. The best alternative is to work with an efficient cost structure and improve regulatory security through well-designed frameworks tailored to each organization's model.

In the case of compliance with the collaboration agreements, it is essential to define the service model, from the formation of multidisciplinary working groups capable of interpreting the formal requirements in the agreements, until the establishment of internal processes to capture the necessary information for the reports. This structure must still be able to identify any noncompliance, to address its causes immediately.

Depending on the mapped risks and regulatory requirements, it is advisable to adopt technological tools. They make it possible to monitor actions, file documents, record approvals, etc., so that those in charge have access, in real time, to feasible and integral information that supports the reports and decision making.

Compliance officers should work with governance models that primarily address:

- Independent reporting: compliance loses value if it is under an operating area of the company. Operational issues, or even political ones, can obscure their objectivity. Such structure should report directly to management bodies, such as the board of directors or compliance committee, or to the CEO or president of the company.
- Clear objectives: compliance should present clear goals, like any other business area, with policies and procedures defined and disseminated to all.
- Right to access information: compliance professionals are often required to access information from the companies' operating areas to judge compliance with rules and regulations. This access must be unrestricted, considering, of course, all the care taken with confidentiality and security of the information.
- Authority and responsibility: Compliance professionals are responsible not only for attesting compliance, but also for tracking remedies in cases of irregularities. Its scope should encompass the entire organization, not just a specific business area or unit. They need to be able, and must have authority, to reassemble critical situations to those directly responsible for the health of operations.
- Communication with regulators: it is compliance's responsibility to establish relationships with regulators. Both for the knowledge of the business risks, and for the compliance monitoring work and preparation for dealing with public authority representatives, always interested in attesting the companies' due compliance.

In line with collaboration agreements, all of the best practices above are recommended. Companies that care for good governance, that are aware of the requirements of the agreements and are concerned about costs – in addition to their image and reputation – seek to structure a compliance activity that meets these recommendations.

3) Regulatory response: although prevention is always the best solution, in some situations, the "post-facto" response is inevitable. Companies may be subject to penalties, fines or sanctions for failing to properly follow the rules or regulations to which they are subject. Or due to flaws in their processes and internal compliance systems.

In the same way, we can observe several companies that have committed themselves to regularize a noncompliance in an official agreement, but they failed to fulfill the agreement by not investing resources for its fulfillment.

In these cases, it is necessary to adopt a responsive and emergency position to correct such failures, their causes and consequences. Analyzing gaps, identifying their sources, remedying them by using/implementing internal controls, and creating a crisis committee are just a few of the actions that can be taken to appropriately respond to an irregularity.

The costs to remedy noncompliance are always greater than those invested in their prevention. Moreover, impacts on the company's image and reputation can have repercussions over a long period of time, bringing an even greater risk to business continuity or recovery.

Planning, execution and monitoring of collaboration agreements

In order for collaboration agreements to be properly established and fulfilled by companies, it is essential to observe the following steps:

1) Planning: Planning begins at the moment of negotiations with the Government. The involvement of professionals with complementary knowledge and experience – and directly associated with the object of the agreement – is fundamental for the establishment of plausible conditions that can be implemented by the organization.

It is common to observe agreements that were signed without this care and that did not anticipate situations conflicting with other laws, including international ones, making it impossible to comply. In these cases, resuming a process of negotiation with the Government is something painful, costly and exhausting for any company.

Other instruments can be used in the planning phase to strengthen negotiations:

- Benchmarking with signatories of similar agreements: knowing what other companies have done, as well as the types of commitments assumed can help in the better scaling of conditions with the Government;
- The formation of an internal multidisciplinary team: as mentioned, uniting different backgrounds adds much value in the discussions regarding possible solutions to the flaws identified by the Government;
- Internal / external communication plan: Engaging communication teams to use "the best words" allows the engagement of internal collaborators and supports the company's positioning in visual and written media.

It is always advisable to invest in the planning and the involvement of key professionals in the negotiation phase, with the technical support of the legal department and the tools indicated above, for the preparation and proper management of the collaboration agreements.

2) Execution: effective execution of compliance requires tools, internal instruments, and dedicated people. Each requirement arising from collaboration agreements must be treated as a project, containing an action plan, deadlines and associated responsibilities.

Another important point is the creation of an agreement management committee, with trained professionals, periodic meetings and a strong and sustainable agenda throughout the project.

This committee should consolidate all actions, persons in charge, deadlines and costs in monitoring reports, to periodically position the company administrators. The management committee is also responsible for reporting the actions to the Government, whenever requested, with evidence and answers to possible questions.

Finally, it is always recommended that this agreement compliance process is thoroughly supported by qualified and trained professionals, who can always bring value-added practices and market benchmarking, to better execute the proposed remedies.

3) Monitoring: the agreement management committee is directly responsible for monitoring the implementation and performance of the defined actions, taking into account several aspects:

- Operational: the best response was adopted in face of the challenge presented
- Financial: the amount invested was properly used and did not generate losses or extra costs
- Strategic: the proposed action was aligned with business strategies and did not hurt other initiatives
- Personnel: the people involved were properly dedicated to the delegated actions and remained engaged throughout the project.

It is also recommended that the management committee maintain a close monitoring of the fulfillment of critical clauses of the agreement – those with greater difficulty in implementation, longer term and cost.

Conclusions

Companies see cooperation agreements with regulators as a way to mitigate exposure to fines and other penalties provided by law. At the same time, the Government seeks more practical results through cooperation with the offending companies.

Although risk prevention and noncompliance remain the most recommended practice, it is essential that organizations are ready and able to act in this new model. The lack of detailed planning and integrated intelligence between strategic areas can have catastrophic consequences for companies, both in terms of assets and image.

The legal analyses point out that the issues of legal security and institutional articulation are the major challenges to the implementation of this transactional methodology in the Brazilian context.

Normative instability, jurisprudential oscillation and lack of clear goals in relation to the regulatory and control bodies that participate in the agreements are factors that justify critical considerations regarding legal certainty, which affects the decisions' degree of predictability and trust in institutions.

In leniency agreements and related instruments, another challenge is the articulation of the various agencies that work in the fight against corruption, cartel and financial fraud. In view of the configuration of our control model, characterized by the institutional multiplicity – also called multiagency model – the advantage and legal certainty of the agreements should be measured by: a) analysis of the nature and degree of the sanction to be mitigated or removed and b) verification of which bodies and competent authorities are included in the agreement modality to be signed.

In other words, apart from the evaluation of the agreement's benefits, especially from the point of view of the sanction that can be mitigated or removed, the company concerned should assess which authorities are part of the agreement. Without this, it may be sanctioned by another entity or body, with its own jurisdiction, that was not an integral part of the transaction.

In view of our institutional configuration, these are important criteria for a company to evaluate the convenience of signing an agreement. For the same pragmatic rationality that encourages an organization to seek it for some benefits, does not recommend that a company leave an agreement worse off than it was before its formalization.

For this reason, all steps of the agreement, from the negotiation to compliance, must be evaluated and aligned with the company's strategy. Any compliance initiative, whether of a prevention or remediation nature, will only have a positive effect if supported by the board of the companies and their managers. Their perception and ethical example move the integrity standards in the business, essential for the good functioning of the Brazilian market and its relationship with the society in general.

Notes

1. MARTINEZ. Ana Paula. Challenges of Leniency Agreements provided for in Law No. 12,846 / 2013. Revista do Advogado no. 125. 2014. p. 26.
2. C.f. MARTINEZ. Ana Paula. Challenges of Leniency Agreements provided for in Law No. 12,846 / 2013. Revista do Advogado no. 125. 2014. p. 26. SIMÃO, Valdir Moysés; VIANNA, Marcelo Pontes. The leniency agreement in the Anti-Corruption Law. History, challenges and perspectives. São Paulo: Trevisan Editora, p. 59.
3. The model is already provided for: a) in the Law of Heinous Crimes (Federal Law No. 8.072 / 90), art. 8, sole paragraph; c) in the Brazilian Penal Code, for the crime of Extortion through abduction, art. 159, paragraph 4; d) in the Law on Crimes against the National Financial System (Federal Law No. 7,492 / 86), art. 25, paragraph 2; e) in the Money Laundering Law (Federal Law No. 9,613 / 98), art. 1, paragraph 5º; f) in the Law on Victims and Witnesses Protection (Federal Law No. 9,807 / 99), art. 14; g) Drug Law (Federal Law \no. 11,343 / 06), art. 41; h) in the Law on Combating Organized Crime (Federal Law No. 12,850 / 13), article 4.
4. Article 26 Measures to enhance cooperation with law enforcement authorities 1. Each State Party shall take appropriate measures to encourage persons who participate or have participated in organized criminal groups: (a) to provide useful information to the competent authorities for the purposes of investigation and production of evidence, including: (i) the identity, nature, composition, structure , location or activities of organized criminal groups; ii) Connections, including international connections, with other organized criminal groups; (iii) infractions which organized criminal groups have committed or may commit; (b) to provide effective and concrete assistance to the competent authorities which may contribute to depriving organized criminal groups of their resources or the proceeds of a crime. 2. Each State Party may consider the possibility, in appropriate cases, of reducing the punishment of a defendant who substantially cooperates in the investigation or prosecution of perpetrators of an infraction provided for in this Convention. 3. Each State Party may consider, in accordance with the fundamental principles of its domestic legal system, to grant immunity to a person who substantially cooperates in the investigation or prosecution of perpetrators of an infraction provided for in this Convention. 4. The protection of such persons shall be ensured in accordance with Article 24 of this Convention. 5. When one of the persons referred to in paragraph 1 of this Article is in a State Party and is able to provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements, in accordance with their domestic law, concerning the possible grant, by the other State Party, of the treatment described in paragraphs 2 and 3 of this Article.
5. Article 37 Cooperation with law enforcement authorities 1. Each State Party shall take appropriate measures to rehabilitate persons who are or have participated in the practice of qualified infractions under this Convention who provide to the competent authorities useful information for investigative and evidentiary purposes and to provide effective and concrete assistance to them, which may contribute to depriving criminals of the proceeds of crime, as well as to recovering these proceeds. 2. Each State Party shall consider the possibility of providing, in appropriate cases, for the mitigation of punishment of any defendant who provides substantial cooperation in the investigation or prosecution of the qualified infractions provided for in this Convention. 3. Each State Party shall consider the possibility of providing, in accordance with the fundamental principles of its domestic law, for the granting of judicial immunity to any person who provides substantial cooperation in the investigation or prosecution of qualified infractions provided for in this Convention. 4. The protection of such persons shall be, mutatis mutandis, as provided for in Article 32 of this Convention. 5. When the persons referred to in paragraph 1 of this Article are in a State Party and are able to provide substantial cooperation to the competent authorities of another State Party, the interested States Parties may consider the possibility of entering into agreements or treaties, in accordance with their domestic law, concerning the possible grant, by this State Party, of the treatment described in paragraphs 2 and 3 of this Article..
6. By way of illustration, it is worth noting that the last terms of protected collaboration in criminal investigations carried out in the context of criminal investigations to combat corruption have been founded in the joint and systematic interpretation of articles 13 to 15 of Federal Law No. 9,807/99; 1, paragraph 5, of Federal Law 9,613 / 98; 26 of the Palermo Convention; 37 of the Merida Convention; and 4 to 8 of Federal Law No. 12,850 / 13.
7. Art. 86. Cade, through the General Superintendence, may enter into a leniency agreement, with the extinction of the public administration's punitive action or the reduction of one (1) to two thirds (2/3) of the applicable penalty, under the terms of this article, with natural and legal persons that are authors of infractions against the economic order, provided that they effectively collaborate with the investigations and the administrative process and that from that collaboration results: I - the identification of the others involved in the infraction; and II - obtaining information and documents proving the infraction reported or under investigation.
8. This table was inspired by the comparative tables of Thiago Marrara in: MARRARA, Thiago. Leniency agreements in the Brazilian administrative proceeding: modalities, legal regime and emerging problems. Revista Digital de Direito Administrativo, v. 2, no. 2, p. 509-527, 2015.
9. Article 36, paragraph 3, item I, lines "a", "b", "c" and "d" and item II of Law No. 12,529/2011.
10. Article 86, paragraph 6 of Law No. 12.529/2011 with art. 238, paragraph 1 of RICade.
11. Article 238, paragraph 2o of RICade.
12. Article 86, paragraph 6, Law No. 12.529/2011 c/c art. 238, paragraph 3 of RICade.
13. Article 87 of Law No. 12,529/2011 c/c art. 249, sole paragraph of RICade.
14. According to information available at the CADE website (http://www.cade.gov.br/assuntos/programa-de-leniencia), the country's first leniency agreement was signed in 2003 and since then more than 50 agreements have already been concluded by the Brazilian antitrust authority.
15. Article 86, paragraph 6 of Law No. 12,529 / 2011 and 238 with art. 247, I to VIII of RICade.

16. MARRARA, Thiago. Leniency agreements in the Brazilian administrative proceeding: modalities, legal regime and emerging problems. Revista Digital de Direito Administrativo, v. 2, no. 2, p. 522.
17. GARCIA, Emerson; ALVES, Rogério Pacheco. Administrative Improbity. 6th edition. Rio de Janeiro: Editora Lumen Juris, 2011, p. 269.
18. It is worth mentioning the well-known MP 703/2015, which brought important changes and changed the rules for leniency agreements between public administration and companies accused of committing corruption, but which had the term of validity ended on 05.29.2016, losing its effectiveness.
19. Measures such as TCU Normative Instruction No. 74 of 2015, which established five monitoring phases of the leniency agreements concluded by the MTCGU.
20. Art. 86 (...) Paragraph 1 The agreement referred to in the caption of this article can only be signed if the following requirements are met cumulatively: I - the company is the first to qualify with respect to the infraction reported or under investigation; II - II - the company completely ceases its involvement in the infraction reported or under investigation from the date of filing of the agreement; III - the General Superintendence did not have sufficient evidence to ensure the conviction of the company or individual when the agreement is proposed; and IV - the company confesses its participation in the illegal act and cooperates fully and permanently with the investigations and the administrative process, appearing, at its own expense, whenever requested, to all procedural acts until its closure.
21. Decree 8,420/15 exempts secrecy in case the proponent authorizes the disclosure of the existence of a proposal or its content, as long as the CGU agrees (Article 31, paragraph 1).
22. In the case of a federal agreement, as soon as the proposal is submitted, the CGU may request the records of ongoing administrative proceedings in other federal public administration bodies related to the facts of the agreement (art.31, paragraph 3, Decree 8,420 / 15)
23. Sanctioning Administrative Procedures
24. CENTRAL BANK OF BRAZIL, Vote 247 /2017-BCB, of November 14, 2017.
25. Cf. COZER, Cristiano. First effects of Law 13,506, of 2017, in the Central Bank administrative proceedings, slides presentation, dated June 27, 2018, available at http://www.bcb.gov.br/conteudo/home-ptbr/TextosApresentacoes/Apresentacao_Procurador_Cristiano_Cozer_Primeiros_Efeitos_IASP.pdf, accessed on 07.21.2018.
26. The Term of Commitment will be proposed to Bacen by individuals or legal entities which are subject to the oversight and sanctioning actions of this autarchy, that is: (a) multiple banks, commercial banks and savings banks; (b) investment, development and exchange banks; (c) development agencies; (d) financial companies; (e) brokers and distributors; (f) leasing companies; (g) real estate credit companies; (h) savings and loan associations; (i) mortgage companies; (j) credit cooperatives; (k) microentrepreneur credit societies; (l) consortium administrators and their administrators; (m) administrators and members of statutory committees of financial institutions and other institutions authorized to operate by the Central Bank; (n) audit firms and independent auditors; (o) auditor responsible for auditing financial institutions and other institutions authorized to operate by the Central Bank; (p) cooperative audit entities; (q) clearing and settlement system operators; (r) payment arrangement organizers; (s) individuals and legal entities that are in breach of exchange rate and international capital flow regulations; and (t) individuals or legal entities that act, without Bacen's authorization, in activities supervised by it. Cf. BRAZILIAN CENTRAL BANK. On administrative sanctioning processes at the Central Bank of Brazil, available at http://www4.bcb.gov.br/fis/PAD/port/Menu/ProcessoAdministrativo.asp?idpai=procadm, accessed on 07.21.2018.
27. FAGALI, Bruno. The leniency agreement of the Brazilian anti-corruption law: the difficult balance between its usefulness and attractiveness, Master's Dissertation, São Paulo: Faculty of Law of the University of São Paulo – FADUSP, 2018.
28. Terminology used in: FAGALI, Bruno. The leniency agreement of the Brazilian anti-corruption law: the difficult balance between its usefulness and attractiveness, Master's Dissertation, São Paulo: Faculty of Law of the University of São Paulo – FADUSP, 2018.
29. Cf. COZER, Cristiano. First effects of Law 13,506, of 2017, in the Central Bank administrative processes, slides presentation, dated June 27, 2018, available at http://www.bcb.gov.br/conteudo/home-ptbr/TextosApresentacoes/Apresentacao_Procurador_Cristiano_Cozer_Primeiros_Efeitos_IASP.pdf, accessed on 07.21.2018.
30. The same individuals described in the item about Term of Commitment.
31. MAZZILLI, Hugo Nigro. The defense of diffuse interests in court – 30th edition – São Paulo: Saraiva, 2017, p. 504.
32. BELTRÃO, Antonio G. Environmental Law Course, 2nd edition. Método, 08/2014. [Minha Biblioteca].

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