Repercussion of the agreements of leniency and award-winning collaboration concluded by the Federal Public Ministry on the competences of the Federal Court of Accounts (TCU — Brazil)*

Repercussion of the agreements of leniency and award-winning collaboration concluded by the Federal Public Ministry on the competences of the Federal Court of Accounts (TCU — Brazil)

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ABSTRACT:

This paper aims to analyze the repercussion of leniency agreements and award-winning collaboration concluded by the Federal Public Ministry in the scope of criminal prosecution on the exercise of the constitutional and legal powers of the Federal Court of Accounts (TCU Brazil). The paper also seeks to verify if the TCU can dispose on the configuration of a debt and to identify the requirements that must be fulfilled in order the employee in the criminal instance also gains benefits by the jurisdiction of accounts. To this end, will be examined the legal framework pertinent to the Institute for Privileged Collaboration and the external control activity, the terms of award-winning collaboration and the leniency agreements signed by the Federal Public Prosecutor made public under the Lava Jato Operation, the specialized doctrine and the Judicial decisions and external control over these procedural instruments.

KEYWORDS:

Leniency agreement — award-winning collaboration — External Control — damage to the treasury — independence of instances — principle of the unity of State power

RESUMO:

O presente trabalho visa analisar a repercussão dos acordos de leniência e de colaboração premiada celebrados pelo Ministério Público Federal no âmbito da esfera de persecução criminal sobre o exercício das competências constitucionais e legais do Tribunal de Contas da União. O artigo busca ainda verificar se o TCU pode dispor sobre a configuração de um débito e identificar quais os requisitos que devem ser atendidos para que o colaborador na instância criminal também aufira benefícios perante a jurisdição de contas. Para tanto, serão examinados o marco jurídico pertinente ao instituto da colaboração premiada e à atividade de controle externo, os termos de colaboração premiada e os acordos de leniência celebrados pelo Ministério Público Federal tornados públicos no âmbito da Operação Lava Jato, a doutrina especializada e as decisões judiciais e de controle externo acerca desses instrumentos processuais.

PALAVRAS-CHAVE:

Acordo de leniência — acordo de colaboração premiada — Tribunal de Contas da União — dano ao erário — independência das instâncias — princípio da unidade do poder do Estado

1. Introduction

As known, administrative control duties are performed by various State bodies that, despite having specific powers, are vested with certain common powers focused on the protection of the same legal interests.

This is the case, for example, in regard to the defense of ethics, honesty, and regularity of governmental management. Both the TCU and the Public Prosecutors' Office, to name only the bodies that are the subject of this study, are constitutionally charged with protecting and, respectively, sanctioning and proposing sanctions against violations of such legal interests.

That said, it is important to study the interconnections between the control duties performed by the Public Prosecutors' Office and by the TCU, particularly when the former enters into an agreement which is substitutive or integrative of its enforcement power in exchange for information that may be useful to State control functions as a whole.

The aim of this paper is to analyze the repercussions of leniency agreements and plea bargains entered into by the Federal Public Prosecutors' Office on the authority of the Federal Accounting Court (TCU) to determine financial liability, impose the sanctions specified in law, and review the accounts of those that caused harm to the treasury.

This paper does not propose to discuss the constitutionality and legality of the so-called leniency agreements entered into by the Public Prosecutors' Office. Although the subject is of obvious academic interest, this paper will take the doctrine for granted as a normative reality in order to review the effects of the doctrine on accounting jurisdiction.

The question to be answered is whether or not the TCU, in the performance of its external control duties, is required, or at least authorized, to assess and take into account the cooperation provided by individuals or legal entities in the context of a plea bargain or leniency agreement entered into by the Public Prosecutors' Office.

If the answer to the question is yes, it will review the requirements that must be met to ensure that the plea bargain and the leniency agreement may reflect on the accounting jurisdiction. Likewise, it will review the benefits that may be granted by the TCU for the cooperation of a subject in a different instance.

As a specific question, this paper seeks to ascertain whether or not the Court can determine the configuration of a debt caused to the Federal Government treasury and, if yes, what benefits can be granted to the beneficiaries in relation to the harm that they have caused to the treasury.

For the development of the paper, the terms of the plea bargains and leniency agreements entered into by the Federal Public Prosecutors' Office and made public in the context of Operation Car Wash (Operação Lava Jato), legal rules, specialized legal authors, and court and external control decisions regarding such procedural instruments will all be reviewed.

To achieve these goals, a deductive approach will be adopted, starting from a general analysis of the subject of the study, i.e. the law, legal authors, court precedents, and the agreements entered into, until particular conclusions are reached. As for research techniques, indirect documentation, through documentary and bibliographic research, will be used.

2. Fundamentals of leniency agreements and plea bargains entered into by the Public Prosecutors' Office

Leniency agreements entered into by the Public Prosecutors' Office are bilateral legal instruments executed with a legal entity that has perpetrated acts defined as an administrative and/or civil violation and/or whose agents have perpetrated acts defined as a crime, under which the former agrees to not bring charges, file a lawsuit, or, alternatively, seek punishment, sanctions, and indemnities previously agreed upon with the beneficiary in exchange for obtaining information and evidence useful to the State's investigative activities and to the public interest.

These are procedural investigation instruments that, although not provided for in any legal rule, are currently being used by the Federal Public Prosecutors' Office within the scope of the operation known as Car Wash[1] as a

[1] According to the operation's website, Operation Car Wash is the largest corruption and money laundering investigation ever conducted in Brazil. The volume of funds misappropriated from Petrobras, the largest government-controlled corporation in the country, is estimated

tool for gathering new evidence regarding the wrongdoings perpetrated and to obtain a speedy return of misappropriated public funds.

Leniency agreements are, as much as plea bargains, a means of obtaining evidence and, therefore, are an accessory to the State's law enforcement activities, whether in the administrative or in the civil and criminal spheres. Accordingly, such instruments may be classified as administrative agreements that are part of the sanctioning power of the State.[2]

As stated above, leniency agreements entered into by the Public Prosecutors' Office are not provided for in the national legal system. They should not be confused with those instruments of the same name that are entered into by the Office of the General Superintendent of the Brazilian Antitrust Authority (CADE) under Law No. 12.529 of November 30, 2011, or with the leniency agreements executed by the highest authority of each government body or entity and, at the federal level, by the Ministry of Transparency and Supervision and Office of the Federal Controller General (CGU) under Law No. 12.846 of August 1, 2013.[3]

Based on the leniency agreement entered into by the Public Prosecutors' Office with Odebrecht S.A. on December 1, 2016,[4] it is apparent that the Federal Public Prosecutors' Office sought to anchor its authority to enter into such legal transactions in its institutional power to conduct public prosecution and to file public-interest civil actions for damages to public property. According to art. 1 of the agreement, the legal grounds relied upon by the Prosecution were:

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to be in the billions of *Reais*. This is composed by the economic and political relevance of those suspected of having participated in the corruption scheme that involved the company (BRAZIL. Federal Public Prosecutors' Office. *Lava Jato. Entenda o caso*. Available at: <http://lavajato.mpf.mp.br/entenda-o-caso>. Accessed on: May 29, 2017).

2 According to Juliana Palma, administrative agreements are divided into two categories. In substitutive agreements, the administration refrains from issuing an imperative unilateral act within its powers and terminates or refrains from filing the corresponding administrative claim. In integrative agreements, both the administration and the subject enter into an integrative agreement to enable the subsequent issuance of a final imperative and unilateral act in a speedier manner or in a manner more adequate to each case (PALMA, Juliana Bonacorsi de. *Atuação administrativa consensual*: estudo dos acordos substitutivos no processo administrativo sancionador. São Paulo: Universidade de São Paulo, 2010. pg. 190-191).

3 The Office of the Federal Controller General was extinguished by Law No. 13.341 of September 29, 2016 and replaced by the Ministry of Transparency and Supervision and Office of the Federal Controller General (CGU). Given that the authority of the CGU was transferred to the new Ministry under art. 6 of Law No. 13.341/2016, all the duties assigned to the CGU in the corporate anticorruption law are now performed by the former entity.

4 BRANDT, Ricardo *et al*. Moro homologa acordo de leniência da Odebrecht. *Estadão*, May 22, 2017. Available at: <http://politica.estadao.com.br/blogs/fausto-macedo/wp-content/uploads/sites/41/2017/01/Leni%C3%AAncia-Odebrecht.pdf>. Accessed on: May 29, 2017.

a) Art. 129, item I of the Federal Constitution;
b) Arts. 13-15 of Law No. 9.807 of June 13, 1999, which establishes rules on the organization and maintenance of special protection program for threatened victims and witnesses;
c) Art. 1, paragraph 5 of Law No. 9.613 of March 3, 1998, which establishes provisions on criminal "laundering" or concealment of assets, rights, and valuables; and on the prevention of the use of the financial system for the offenses described in such law;
d) Art. 5, paragraph 6, of Law No. 7.347 of July 24, 1985, which establishes provisions on public-interest civil actions;
e) Art. 26 of Decree No. 5.015 of March 12, 2004, which enacted the United Nations Convention Against Transnational Organized Crime (the Palermo Convention);
f) Art. 37 of Decree No. 5.687 of January 31, 2006, which enacted the United Nations Convention Against Corruption (the Mérida Convention);
g) Arts. 4-8 of Law No. 12.850 of August 2, 2013, which defines criminal organization and establishes provisions on criminal investigation, means of obtaining evidence, related criminal offenses, and criminal procedure;
h) Arts. 3, paragraphs 2 and 3, 485, item VI, and 487, item III, clauses "b" and "c" of the Code of Civil Procedure;
i) Arts. 16-21 of Law No. 12.846 of August 1, 2013, which establishes provisions on the administrative and civil liability of legal entities for the perpetration of acts against a domestic or foreign government;
j) Arts. 86 and 87 of Law No. 12.529 of November 30, 2011, which establishes provisions on the prevention and repression of violations against the economic order;
k) Arts. 840 and 932, item III of the Civil Code; and
l) Art. 2 of Law No. 13.140 of June 26, 2015, which establishes provisions on mediation against private parties as a dispute resolution method and on the self-resolution of conflicts in the governmental sphere, among others.

Most of the provisions relied upon reflect a trend in Brazilian criminal law, introduced by Law No. 9.807/1998, to allow a reduction of the sentence or the granting of pardon by the court, either *sua sponte* or at the request of the party, to a person who spontaneously cooperates with the authorities by providing clarifications that help in the investigation of criminal offenses, the

identification of the perpetrators, principals, and accomplices, or the location of the assets, interests, or values that are the subject of the crime.

This discretion conferred upon the court and the Public Prosecutors' Office, in the exercise of its powers to prosecute, bring charges, and adjudicate, reflects the functional and instrumental nature of criminal law in the protection of the legal interests of the society and of the State. In this regard, the State may refrain from imposing the sanction specified in law on a particular person in exchange for information that may lead to the punishment of other persons and to the restoration of the legal interest that was violated.

The possibility of cooperating with the authorities of competent jurisdiction to enforce the law materialized, in domestic law, the commitments assumed by Brazil before the international community since the Palermo Convention, which provided for measures against transnational organized crime, and the Mérida Convention, who addressed the fight against corruption.

According to art. 26, paragraph 1 of the Palermo Convention, each State Party shall take appropriate measures to encourage persons who participate or who have participated in organized criminal groups:

(a) To supply useful information to competent authorities for investigative and evidentiary purposes; and
(b) To provide factual, concrete help to competent authorities that may contribute to depriving organized criminal groups of their resources or of the proceeds of crime.

According to art. 37, item 1 of the Mérida Convention, each State party agreed to take appropriate measures to encourage persons who participate or who have participated in the commission of corrupt acts to "supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds" (emphasis added).

Items 2 and 3 of such article further provide that each State party should consider providing for the possibility, in appropriate cases and in accordance with fundamental principles of its domestic law, of mitigating punishment of or granting immunity from prosecution to an accused person who provides substantial cooperation in the investigation or prosecution of an offense established in accordance with this Convention.

The abovementioned provisions entail the incorporation of the principle of efficiency into criminal procedure. They bring the idea of optimization to criminal prosecution and judicial activities, according to which the court has more room to choose the most appropriate means to enforce the state's punitive claims.

It was in this context that Law No. 12.850/2013, which defines criminal organization and establishes provisions on criminal investigation, means of obtaining evidence, related criminal offenses, and criminal procedure, was enacted. The main purpose of such statute was to introduce and establish rules on extraordinary tools for investigation of crimes perpetrated by a criminal organization, including the so-called plea bargain.

A plea bargain is a procedural legal transaction with the nature of a contract.[5] It is the expression of two or more opposite but compatible wills, i.e. that of the persecuting state, represented by the Public Prosecutors' Office, and that of the beneficiary, with the aim of governing the legal relationship between the party and the state's body with the power to investigate the wrongdoings and exercise the claim.

According to art. 4 of Law No. 12.850/2013:

> The court may, upon request from the parties, grant pardon to or reduce the prison sentence by two-thirds (2/3) or replace it with restraint of rights for a person who has effectively and voluntarily cooperated with the investigation and with the criminal proceedings, if such cooperation produces one or more of the following results:
>
> I — Identification of the other perpetrators and accomplices of the criminal organization and of the criminal offenses they perpetrated;
>
> II — Revealing the hierarchical structure and division of tasks of the criminal organization;
>
> III — Prevention of criminal offenses arising from the activities of the criminal organization;
>
> IV — Full or partial recovery of the proceeds or benefits of the criminal offenses perpetrated by the criminal organization;

[5] Likewise, Fredie Didier Júnior and Daniela Santos Bonfim emphasize that a plea bargain is a bilateral legal transaction that has the nature of a contract, considering the opposing interests, which in this case are the respective benefits expected by each party from the contents of the agreement (DIDIER JUNIOR, Fredie; BOMFIM, Daniela Santos. A colaboração premiada como negócio jurídico processual atípico nas demandas de improbidade administrativa. *A&C — Revista de Direito Administrativo & Constitucional*, Belo Horizonte, yr. 17, No. 67, pg. 105-120, Jan./Mar. 2017, pg. 113).

> V — Locating any victims with preserved physical integrity (emphasis added).

By this instrument, the State seeks to obtain from the beneficiary as much information and evidence as possible in order to elucidate and prevent similar wrongdoings and to restore the *status quo ante*. The wording of the law states that the Prosecution, when negotiating a plea bargain, has ample discretion to assess the usefulness of the elements brought by the beneficiary and to propose the benefits permitted by the rule based on a notion of balance and commutativity that it alone has authority to assess.

The plea bargain and leniency agreements set forth in the anti-corruption law and in the antitrust law and those entered into by the Public Prosecutors' Office are instances of approximation of the Brazilian law with the common law system, particularly with:

> […] United States law, in which the law enforcement system has long been accustomed to the doctrine of plea bargaining, whereby the parties involved in criminal proceedings have reasonable freedom regarding the admission of guilt and the imposition of sanctions[6].

As seen above, the Federal Public Prosecutors' Office has been relying on several legal provisions by analogy as its grounds to enter into leniency agreements in the criminal sphere, with effects on administrative misconduct civil actions as well. However, the lack of a specific legal rule on such instruments raises questions among legal authors and courts, particularly as to the recognition of their effects on administrative misconduct actions.[7-8]

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[6] PINTO, José Guilherme Bernan Correa. Direito administrativo consensual, acordo de leniência e ação de improbidade. *Fórum Administrativo — FA*, Belo Horizonte, yr. 16, No. 190, pg. 49-56, Dec. 2016, pg. 52.

[7] For the impossibility of repercussion of leniency agreements entered into by the Public Prosecutors' Office in regard to administrative misconduct, see Decision No. 778.396. 20050110533584APO, 2nd Civil Panel of the Federal District Court of Appeals, March 26, 2014: "Given that the case at hand involves administrative misconduct acts, it is impossible to apply by analogy the benefits of a plea bargain and pardon by the court, which are specific to criminal law, particularly considering that the granting of the claim was based on a joint review of the contracts signed by the institute, of the amendments thereto, of the documentation originating from the Federal District Accounting Court, and of the difference found between the invoices issued." For the possibility: Single-Judge Decision, Action No. 500671718.2015.4.04.7000, Deputy Federal Judge Giovanna Mayer, Judicial District of Paraná — 5th Federal Court of Curitiba. November 17, 2015: "Art. 17, paragraph 1 of Law No. 8.429/92 prohibits any 'compromise, agreement, or settlement' in administrative misconduct actions.

The lack of specific rules on such doctrine results in a lack of parameters regarding the degree of cooperation required for an intended beneficiary to obtain the benefits from the State, the types of wrongdoings that can be reported and to have their sanction mitigated or ruled out, and, above all, the extent of the benefits that may be offered.

Despite of the questions that leniency agreements entered into by the Public Prosecutors' Office entailed, the discussion of such questions is outside the scope of this paper. Although the issue is of obvious academic interest, this paper will take the doctrine for granted as a normative reality in order to review the effects of the doctrine on accounting jurisdiction.

The relevant point for the purposes of this paper is that the legal system does not authorize the Public Prosecutors' Office to compromise, in plea bargains and leniency agreements, the amount of the damages caused to the treasury in order to give release.

In addition to the absence of a law providing for such authority, it should be reminded that the Prosecution is not a judicial and extrajudicial

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While in 1992, at the time when such Law was published, such prohibition was marginally justifiable, as we were still in the early stages of the fight against acts of misconduct, now, in 2015, such provision should be interpreted in a moderate way. This is because, if the legal system allows agreements with beneficiaries in the criminal sphere for a reduction of the sentence or even pardon by the court, there is no reason to bar the holder of the administrative misconduct claim, in this case the Federal Public Prosecutors' Office (MPF), from seeking the application of a similar remedy in the civil sphere. It should be reminded that article 12, sole paragraph of Law No. 8.249/92 allows for a type of reduction of the sanction for administrative misconduct purposes, particularly taking into account the property issues. Therefore, the agreements entered into between the defendants and the Federal Public Prosecutors' Office (MPF) should be taken into account in this administrative misconduct case." HC 127483, Federal Supreme Court. Reporting Justice: Dias Toffoli, *En Banc* Court, trial date: August 27, 2015, Electronic Case *DJe*-021 Divulg 3-2-2016 Public 4-2-2016: Syllabus: "[…]. Provision in the plea bargain on the non-penal property effects of the conviction. Admissibility. Interpretation of art. 26.1 of the United Nations Convention Against Transnational Organized Crime (the Palermo Convention) and of art. 37.2 of the United Nations Convention Against Corruption (the Mérida Convention). Incentive sanction. Subjective right of the beneficiaries in case their cooperation is effective and produces the intended results. Application of the principles of legal certainty and protection of trust. Precedent. *Habeas corpus* action entertained. Writ denied."

[8] For the possibility of compromise in public-interest civil actions and administrative misconduct actions: COSTA NETO, Nicolau Dino de Castro. Improbidade administrativa: aspectos materiais e processuais. In: SAMPAIO, José Adércio Leite. *Improbidade administrativa*: 10 anos da Lei 8.429/92. Belo Horizonte: Del Rey, 2002. pg. 379-380; FERRAZ, Sérgio. Aspectos processuais na lei sobre improbidade administrativa. In: *ibid.*, pg. 439; SANTOS, Kleber Bispo dos. *Acordo de Leniência na Lei de Improbidade Administrativa e na Lei Anticorrupção*. Dissertation (master's degree in law) — Pontifícia Universidade Católica de São Paulo, São Paulo, 2016. For the impossibility: MARTINS JÚNIOR, Wallace Paiva. *Probidade administrativa*. São Paulo: Saraiva, 2006, pg. 404-406; FIGUEIREDO, Marcelo. *Probidade administrativa*: comentários à Lei 8.429/92 e legislação complementar. São Paulo: Malheiros, 2004. pg. 262-263.

representation of the legal entities governed by domestic law — which role is performed by their respective attorneys —, and, therefore, it has no standing to dispose of interests that are proprietary to the government.

In the Federal Government sphere, the entry into settlements or compromises to prevent or terminate disputes, including judicial settlements or compromises, is reserved to the authority of the general counsel for the Federal Government, either directly or by delegation, and to the most senior managers of federal public companies, together with the corporate officer in charge of the area affected by the subject, in accordance with art. 1 of Law No. 9.469 of July 10, 1997, as amended by Law No. 13.140 of June 26, 2015.

Moreover, it should be reminded that credits held by the Public Treasury, whether of a tax nature or otherwise, are non-waivable, which prevents any negotiation of their principal amount, either by the administration itself, by its judicial and extrajudicial representation, or by the Public Prosecutors' Office in the performance of its duties to protect public property.[9]

Thus, all amounts returned under leniency agreements and plea bargains by way of indemnity to the treasury serve only as an advance payment of the damages caused to the aggrieved entities, given that the Public Prosecutors' Office has no legal authority to give release to beneficiaries on behalf of the government.

3. The use of plea bargains and leniency agreements entered into by the Public Prosecutors' Office in the external control of the government

The main purpose of this paper is to review whether or not the TCU, in the performance of its external control duties, is required to assess and take into account the cooperation provided by individuals or legal entities in the context of a plea bargain or leniency agreement entered into by the Public Prosecutors' Office.

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[9] In this regard, see REsp No. 1217554/SP, Reporting Justice: Eliana Calmon, Second Panel, trial date: August 15, 2013, *DJe* August 22, 2013. Syllabus: "[…] 7. According to the provisions of arts. 840 and 841 of the new Civil Code, the features of a compromise that prevents or terminates a dispute are (i) the existence of mutual concessions between the parties, which presupposes a waivable and disposable right, and (ii) that its subject matter is private, not public, property rights. Thus, in the case at hand, the monetary compromise ratified by the court of first instance is clearly unlawful, as it involves a non-waivable right relating to public money."

In other words, it is necessary to inquire whether the constitutional authority of the Court to determine financial liability, impute debts, and impose the sanctions specified in law are conditioned by the duties of the Federal Public Prosecutors' Office, under the supervision of the court of competent jurisdiction, regarding the protection of public interests and property.

In this regard, four hypotheses can be identified:

a) The TCU is not legally required to take into account, in its external control activity, the execution of plea bargains with the Public Prosecutors' Office, given the principle of independence of the instances;
b) The TCU is not even allowed to take into account, in its external control activity, the execution of plea bargains with the Public Prosecutors' Office, given the principle of strict legality;
c) The TCU is required to take into account, in its external control activity, the execution of plea bargains with the Public Prosecutors' Office; and
d) The TCU is not required to, but it can, assess and take into account the contents of plea bargains with the Public Prosecutors' Office whenever they involve the same facts dealt with in its own proceedings and are useful to the accounting jurisdiction, given the principle of the discretion of the accounting court in establishing the sanctions within its authority.

3.1 The TCU is not required to take into account plea bargains entered into with the Public Prosecutors' Office

The first hypothesis is that the TCU is not required to take into account plea bargains and leniency agreements entered into by the Public Prosecutors' Office, given the principle of independence of the civil, criminal, and administrative instances.

In this regard, it is appropriate to transcribe the opinion of Justice Eros Grau in the trial of Action for Writ of Mandamus No. 25.880-2/DF (Justice Eros Grau, *En Banc* Court, trial date: February 7, 2007):

> 6. The existence of a public-interest civil action to determine the same facts dealt with by the decision of the TCU under appeal here does not exclude the authority of the Accounting Court to try the petitioner. The filing of a public-interest civil action does not rule out the authority of the TCU to commence a special review of accounts and to award the reimbursement to the treasury of the amounts improperly obtained against the offender; there is independence among the civil, administrative, and criminal authorities.

In the same vein, see the following statement of Justice Walton Alencar in the leading opinion of Decision No. 344/2015-TCU-*En Banc*:

> The independence among the instances allows a same conduct to be assessed differently in criminal, civil, and administrative proceedings. Only a judgment of acquittal from the criminal court based on a recognition of material inexistence of the fact can have a repercussion on the TCU and rule out the imposition of obligations and sanctions of a civil and administrative nature (Code of Criminal Procedure (CPP), arts. 66, main provision, and 386, I).
>
> Accordingly, the administrative misconduct action, which is of a civil nature Federal Supreme Court (Federal Supreme Court (STF), ADI No. 2797), is not legally binding on the value judgments of the criminal and administrative spheres.

Thus, if the filing of an administrative misconduct action and of a criminal action does not exclude the authority of the TCU to judge accounts, determine financial liability, and impose sanctions relating to the same facts, then, logically, the execution of an agreement or compromise in the civil and criminal spheres does not interfere with the exercise of the constitutional authority of the TCU either.

After all, the existence of various bodies in charge of supervising the application of the law and administrative principles and enforcing, according to the power that has been attributed to each of them, the legal consequences arising from their powers is of the essence of the public administration control system established in the country.

Marcelo Madureira Prates discusses not only the variety of administrative sanctioning powers, each with its own separate origin, justification, limits, and regimes, but also the independence between the general administrative

sanctioning power and the sanctioning power exercised by the courts.[10] According to the Portuguese author, both powers derive from the same model and are, therefore, "independent of each other and of equal level, and the standing, existence, and limits of each of them all stem from the options concretely chosen by the lawmakers within the scope of the various situations that are presented to them in space and time."[11]

Accordingly, one concludes that the TCU is not required to take into account plea bargains before other instances when determining its sanctions.

3.2 The accounting jurisdiction is not authorized to take into account plea bargains entered into with the Public Prosecutors' Office

The second hypothesis is that the TCU, in addition to not being subject to any plea bargain or leniency agreement entered into by the Public Prosecutors' Office, is also not legally authorized to take into account the cooperation provided by private parties in civil or criminal instances.

In the absence of specific law on the granting of immunity, the reduction of sanctions, and the determination of the amount of damages to be reimbursed, the TCU is purportedly prevented from granting any benefit to the persons subject to its jurisdiction, even when they assist the investigation and the civil or criminal proceedings. After all, the Accounting Court, like any member of the public administration, is subject to the principle of strict legality, and, therefore, all its actions, particularly those relating to its sanctioning right, depend upon prior legal specification.

In this regard, it should be noted that Law No. 8.443/1992, when listing the sanctions within the authority of the TCU, did not establish the parameters that are to be taken into account in their application. Although art. 58, paragraph 3 of the Organic Law has referred the regulation of the gradation of the fine set forth in the main provision of the article according to the severity of the violation to the Internal Regulations of the TCU, such regulations merely established, in art. 268, the minimum and maximum

[10] PRATES, Marcelo Madureira. *Sanção administrativa geral*: anatomia e autonomia. Lisboa: Almedina, 2005. pg. 26.
[11] *Ibid.*, pg. 29.

amounts of the sanctions, without indicating any standard to be used by the accounting court in the determination of sanctions.[12]

The same is true of the penalties of disqualification for the exercise of a position of trust or role of trust in the government and of unsuitability for bid rigging (arts. 46 and 60 of Law No. 8.443/1992). In both cases, the law merely defined the minimum and maximum duration of the sanctions, but was silent regarding their parameters.

In this scenario, given the ample discretion conferred upon the TCU for the imposition of the sanctions within its authority, the argument that it is barred from taking into account non-procedural factors, such as a plea bargain with other instances, in the determination of its sanctions is not reasonable.

3.3 The accounting jurisdiction is required to take into account, in its external control activity, plea bargains entered into with the Public Prosecutors' Office

The third hypothesis is that the TCU is required to take into account the prior execution of plea bargains and leniency agreements by the Public Prosecutors' Office involving the same facts dealt with in its proceedings in the performance of its duties of reviewing accounts, determining financial liability, and imposing sanctions.

Such understanding is supported by the principles of legal certainty and protection of trust and the idea of unity and consistency of the State with respect to its authority over its subjects. In this regard, the various bodies of the State purportedly have a duty to act loyally towards their subjects and thus to recognize the effects and the validity of the state's decisions regarding the same subject matter, particularly those that impose sanctions or enter into agreements which are substitutive or integrative of such sanctions.

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[12] By way of example, Law No. 12.846/2013 established, in art. 7, the following criteria to be taken into account in the application of sanctions: "I — The severity of the violation; II — The benefit obtained or desired by the violator; III — Whether or not the violation was consummated; IV — The level of harm or danger of harm; V — The negative effect produced by the violation; VI — The economic status of the violator; VII — The cooperation of the legal entity for the investigation of the violations; VIII — The existence of internal mechanisms and procedures regarding integrity, audit, and encouragement to the reporting of wrongdoings and the actual application of codes of ethics and conduct within the legal entity; and IX — The value of the contracts maintained by the legal entity with the government body or entity harmed."

Such a position derives from the idea of the existence of a microsystem to fight corruption and organized crime, which imposes a uniform and harmonious conduct in the State's law enforcement activities. Incidentally, such idea is in line with the contents of the Palermo Convention, which stipulated that each State party should take measures to encourage persons to contribute to the investigative activity of the State.

Although a uniform conduct of the different control bodies is desirable, particularly in regard to wrongdoings that are subject to multiple sanctions, the immediate repercussion of the effects of plea bargains entered into by a body of the State on the authority of another is hindered by the principle of independence of instances and sometimes by the very difference between the legal interests protected by the different bodies.

Thus, the TCU is not required to immediately take into account the mere existence of a cooperation with other instances in the determination of its sanctions. For it to do so, the requirements specified below must be met.

3.4 The accounting jurisdiction can take into account, in its external control activity, plea bargains entered into with the Public Prosecutors' Office

The last hypothesis is that the TCU is not required to, but can, assess and take into account plea bargains and leniency agreements entered into by the Public Prosecutors' Office that involve the same facts or facts related to those reviewed in its proceedings.

Such possibility is a natural consequence of the ample discretion conferred upon the accounting court for the exercise of its constitutional and legal authority. Given the open nature of administrative and financial wrongdoings, the Court has an ample margin of freedom to assess the facts, evidence, culpability, aggravating or mitigating circumstances and the procedural conduct of the defendant before the State when exercising its adjudication activity.

Unlike a criminal court, the Court is not subject to strict rules such as those established in the Penal Code for the imposition of a sanction. An accounting court has greater freedom in the determination of the sanctions set forth in Law No. 8.443/1992. When determining the amount of the sanction, the Court may assess both the culpability and the conduct of the offender before the

adjudicating State, and there is no obstacle to its use of criminal law for the benefit of the persons subject to its jurisdiction.

In this case, the public interest is served by the cooperation of a private party resulting in the elucidation of the facts under investigation, in the identification of the perpetrators and principals, in the discovery of new offenses against public administration, and in the full or partial recovery of the proceeds of the wrongdoings. In this case, the Court takes into account the cooperation of the private party towards a more efficient and effective exercise of the sanctioning power of the State, particularly of the Accounting Court itself.

However, it is understood that the TCU, as a body constitutionally in charge of supervising the accounts, finances, budgets, operations, and property of the Federal Government and exercising the duties set forth in art. 71 of the Constitution, is the only body that has standing to assess the satisfaction of the public interest for purposes of granting immunity or reducing sanctions within its authority.

Consequently, the Public Prosecutors' Office cannot offer a mitigation or pardon of sanctions within the authority of the TCU as consideration to the private party in a leniency agreement or plea bargain, not least because it has no power to act before the accounting jurisdiction.

In this regard, it is appropriate to discuss whether the TCU should require the cooperation of the offender before the accounting jurisdiction, i.e. the delivery of evidence of wrongdoings and of perpetration to the Court itself, or the defendant's cooperation with the investigation and with the civil or criminal proceedings is sufficient. The question that arises is whether obtaining benefits at the external control sphere requires cooperation with the external control proceedings or the cooperation with the state's punitive claim is sufficient.[13]

In regard to the cooperation before the TCU, the provision of information and the delivery of evidence directly to the Court will probably not be allowed at first, given the confidential nature of the leniency agreements and plea bargains entered into by the Public Prosecutors' Office.[14] The sharing of such information may disrupt the investigation carried out by the Public

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[13] The existence of various control niches, each with its own authority, imposes a difficulty on the acceptance of a cooperation to the state's punitive claim. In this scenario, two alternatives are feasible: the execution of a single agreement with the participation of all the control bodies or of various agreements with each of those bodies.

[14] According to art. 7, paragraph 3 of Law No. 12.850/2013, a plea bargain ceases to be confidential as soon as the charges are received.

Prosecutors' Office or by the police authority and thereby frustrate the very purpose of such important means of obtaining evidence.

If the delivery of evidence to the TCU is not possible, it is understood that the Court may nevertheless accept a cooperation provided in the civil and criminal instances when there is an identity or merger between the facts admitted by the private party in such agreements and those dealt with in the proceedings of the Court. In such cases, it can be assumed that the cooperation with the external control activity will occur in due time, upon the lifting of the confidentiality of such agreements and subsequent referral of the evidence obtained to the Court.

In order for leniency agreements and plea bargains entered into by the Public Prosecutors' Office to be taken into account by the accounting jurisdiction, the following conditions must be met:

a) The interested person must request it;
b) The Public Prosecutors' Office must formally certify, in response to a measure taken by the TCU, the identity or merger between the wrongdoings admitted by or imputed to the private party during the fact-finding stage of the proceedings at the TCU and those dealt with in the leniency agreement or plea bargain;
c) The Public Prosecutors' Office must agree to request to the court of competent jurisdiction, as promptly as possible, the sharing of the evidence relating to the facts ascertained by the Court or immediately provide such evidence in case the sharing thereof has already been authorized by the court of competent jurisdiction;
d) The interested party cooperates with the elucidation of the wrongdoings dealt with in the external control proceedings and connected with those reported in the plea bargains and leniency agreements that have not been covered by the latter; and
e) The Court must assess, whenever possible, the effectiveness and efficiency of the information and evidence collected in the plea bargain or leniency agreement or submitted directly to the Accounting Court for its external control proceedings.

If the requirements listed above are not met, it is understood that the repercussion of the leniency agreements and plea bargains entered into by the Public Prosecutors' Office on the accounting jurisdiction is not possible.

Given the structural division of state control functions, in which several bodies are vested with their own powers and legal interests to protect, it is understood that an immunity or reduction of a sanction cannot be automatically granted in an instance due to cooperation with another instance, regardless of how efficient such cooperation was.

Only those bodies with legal or constitutional authority have standing to assess the usefulness of the cooperation of a private party to the performance of their duties and thereby refrain from imposing the sanctions established. The mere contribution with the state's punitive claim is not a useful means for obtaining automatic reduction of a sanction or immunity in external control.

Thus, the repercussion of a leniency agreement or plea bargain entered into by the Public Prosecutors'__ Office can only occur, in fact, upon the entering of proofs and evidence in the Court's case records and the actual cooperation of the private party with the external control proceedings (letter *"d"*). At the request of the party and according to the preliminary information provided by the Public Prosecutors' Office, the TCU can merely assess the possibility of staying its own proceedings in order to await the forwarding of the relevant documents by the Public Prosecutors' Office and the actual cooperation of the interested party.

4. Benefits that may be granted by the TCU on account of leniency agreements and plea bargains entered into by the Public Prosecutors' Office

Within the discretion granted to the TCU in the exercise of its sanctioning power, it is understood that the Court may reduce or refrain from imposing the sanctions within its authority on a person who has signed a plea bargain or leniency agreement with the Public Prosecutors' Office, on the conditions stipulated in the preceding chapter.

Accordingly, the TCU may refrain from imposing or reduce the following administrative sanctions:

a) A bid-rigger's unsuitability for participating in the federal public administration due to proven bid rigging (art. 46 of Law No. 8.443/1992);
b) Fine of up to 100% of the inflation-adjusted amount of the damage caused to the Treasury (art. 57 of Law No. 8.443/1992);

c) Fines for an act perpetrated with serious violation of legal or regulatory accounting, financial, budgetary, operating, and property rules or for an act of unlawful or uneconomical management which results in unjustified damage to the Treasury (art. 58, items II and III of Law No. 8.443/1992); and
d) Disqualification for the exercise of a position of trust or role of trust in the public administration (art. 60 of Law No. 8.443/1992).

The granting of such benefit requires that the facts reported in the plea bargain or leniency agreement entered into by the Public Prosecutors' Office constitute wrongdoings that may lead to the imposition of the respective sanctions provided for in the organic law of the Court. It is not possible to rule out or mitigate the sanctioning power of the TCU based on the admission of facts that are not related to the authority of the TCU, such as, for example, tax wrongdoings and wrongdoings against the financial system or against the capital market, among others.

In addition, there must be an identity or merger between wrongdoings admitted in the leniency agreement or plea bargain entered into by the Public Prosecutors' Office and those reviewed in the TCU proceedings. The information and evidence collected under such instruments must be entered in the case records and then reviewed in the respective proceedings dealing with the facts narrated, which will be the appropriate locus for the Court's decision on whether or not to grant benefits in the external control jurisdiction.

Thus, it is important to stress that the benefits in the external control jurisdiction will be assessed in each of the cases that deal with the wrongdoings reported; accordingly, they will always be referenced to a certain set of facts and wrongdoings. If the information and evidence gathered under a leniency agreement or plea bargain entered into by the Public Prosecutors' Office do not cover the subject matter of a given external control case, there is no reason for granting any benefit in such case.

Given the lack of a rule regarding the mitigation of the sanctioning power of the TCU, it is believed to be possible to apply Law No. 12.850/2013 by analogy. This is because of the analytical nature of the rule in dealing with the criteria for the execution of a plea bargain and of the closeness between criminal law and sanctioning administrative law.[15]

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[15] According to Diogo de Figueiredo Moreira Neto e Flávio Amaral Garcia, there is no absolute identity between criminal law and sanctioning administrative law, but it is recognized

Thus, in order for a person to enjoy such benefit in the accounting jurisdiction, it is understood that the cooperation provided in the judicial sphere must result or be able to result in information and evidence to the external control proceedings which enable:

a) The identification of the perpetrators and of the wrongdoings perpetrated;
b) The identification of the persons responsible for the damage caused to the treasury, if any;
c) The quantification of the damage cause to the treasury or of the benefit obtained by the perpetrators of the wrongdoings, if any; and
d) Full recovery of the damage caused to the treasury or of the benefit obtained by the perpetrators of the wrongdoings, if any.

In addition to evaluating the effectiveness and efficiency of the cooperation of the private party to the external control activity, the TCU may take into account the following elements, by analogy to art. 4, paragraph 1 of Law No. 12.850/2013: the personality of the individual beneficial and the history of the legal entity as regards the existence of convictions and sanctions imposed by the Court and the nature, circumstances, severity, and social repercussion of the wrongdoings reported.

On the basis of such set of elements, the Court may, within the ample discretion with which it exercises its sanctioning power, reduce or refrain from imposing the sanctions set forth in arts. 46, 57, 58, items II and III, and 60 of Law No. 8.443/1992.

This requires that the cooperation be useful and effective in the proceedings dealing with the wrongdoings reported and that the conditions specified in the preceding chapter be met, particularly the identity or merger between the wrongdoings admitted by or imputed to the private party during the fact-finding stage of the TCU proceedings and those dealt with in the leniency agreement or plea bargain entered into with the Public Prosecutors' Office.

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that there is a core of principles that guide the exercise by the state of its punitive power (MOREIRA NETO, Diogo de Figueiredo; GARCIA, Flávio Amaral. A principiologia no direito administrativo sancionador. *Revista Eletrônica de Direito do Estado (Rede)*, Salvador, No. 37, Jan./Feb./Mar. 2014. Available at: <www.direitodoestado.com/revista/REDE-37-JAN-2014-FLAVIOAMARAL-DIOGO-NETO.pdf>. Accessed on: Jun. 17, 2017. In the same line, see OSÓRIO, Fábio Medina. *Direito administrativo sancionador*. São Paulo: Revista dos Tribunais, 2005, pg. 165-169.

5. Benefits that may be granted by the TCU regarding debts arising from wrongdoings reported in leniency agreements and plea bargains entered into by the Public Prosecutors' Office

The various investigations carried out in the context of Operation Car Wash deal with facts that may qualify as administrative misconduct, violations and crimes against the national financial system or against the economic order, or antitrust, corruption, embezzlement, money laundering, criminal organization, or bid rigging crimes, among others.

As usually in criminal jurisdiction, the investigation and prosecution do not deal with the civil damages resulting from the wrongdoings, the determination of which is within the authority of the civil jurisdiction and of the Accounting Court. Accordingly, none of the leniency agreements entered into by the Public Prosecutors' Office examined concerned with quantifying the exact damage caused to the federal treasury.

Despite this, many agreements provided for the payment of a compensatory civil fine for the damage caused, as verified in the instruments executed with SOG Óleo e Gás S/A, Setec Tecnologia S/A, Projetec Projetos e Tecnologia Ltda., Tipuana Participações Ltda., PEM Engenharia Ltda., Energex Group Representação e Consultoria Ltda.,[16] Andrade Gutierrez Investimentos em Engenharia S/A,[17] and Odebrecht S.A.[18]

If there is no identity between the subject matter of the leniency agreements/plea bargains entered into by the Public Prosecutors' Office and the subject matter of the proceedings of the Court, the TCU will not be able to reduce the sanctions or rule out the imposition of default interest and other legal charges on any debts determined in its proceedings. The leniency agreement and the plea bargain are not a general immunity for all the wrongdoings perpetrated by the wrongdoers, but only for those admitted in the procedural bargaining instruments.

By way of illustration, if a beneficiary reports the perpetration of bid rigging, the cooperation is potentially effective to external control proceedings

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[16] LUCHETE, Felipe. MPF promete não processar dirigentes de empresas em troca de acordo. *Consultor Jurídico*, Dec. 18, 2014. Available at: <http://s.conjur.com.br/dl/17dez-leniencia. pdf>. Accessed on: Jun. 17, 2017.

[17] RITTNER, Daniel. Andrade Gutierrez tem delação homologada e devolverá R$1 bilhão. *Valor Econômico*, May 8, 2016. Available at: <www.valor.com.br/sites/default/files/infograficos/ pdf/termos_da_leniencia_AG_912_OUT7_09052016.pdf>. Accessed on: Jun. 17, 2017.

[18] Ricardo Brandt *et al.*, Moro homologa acordo de leniência da Odebrecht, *op. cit.*

investigating the perpetration of bid rigging. If the information is available, the Court may evaluate it and, if it recognizes the usefulness of the elements for the exercise of its punitive claim, reduce or refrain from imposing the sanction set forth in art. 46 of Law No. 8.443/1992. If the information is covered by confidentiality, the TCU may stay its proceedings until the agreement is performed.

On the other hand, if the cooperation deals with corruption and money laundering in the criminal sphere and does not bring any information regarding the wrongdoings being investigated in the accounting jurisdiction, such as, for example, overcharging and administrative offenses in the bidding, even if the contracts under investigation are the same, there will be no intersection between the subject matters of the agreement and of the TCU proceedings and, therefore, the cooperation will have no effect on the accounting jurisdiction.

Therefore, it is understood that, in this event, the cooperation__ is not potentially effective for the external control proceedings and should not have repercussions on them. A company may confess to having joined a cartel in the criminal sphere, identify other agents and offenses, pay a civil fine to recover the damage caused, and still have an award of debt issued against it for the perpetration of overcharging in the same contracts, because, with respect to subject matter of the TCU proceedings, there was no cooperation or it was ineffective.

However, if, in the same example, there is any connection between the facts and the offenses — e.g. the cartel enabled the overcharging, and the contracts are the same — it is understood that it is possible to take into account the cooperation in the leniency agreements and plea bargains entered into by the Public Prosecutors' Office in the external control proceedings investigating the debt, if the conditions specified in the preceding chapter are met.

If there are other offenders liable for the debt, it is understood that the effective cooperation of a private party may give rise to the granting of the following benefits, in addition to the exclusion of the fine set forth in art. 57 of Law No. 8.443/1992, all depending on the usefulness and degree of cooperation of the private party:

a) Waiver of joint and several liability in favor of the beneficiary and establishment of a debt in proportion to his participation (share) in the events;
b) Exclusion of default interest and of the applicable legal charges; and
c) An installment plan for payment according to his ability to pay.

This requires that the cooperation of the private party result or may result, cumulatively, in the exact quantification of the debt, in identification of the other offenders, and in the possibility of full recovery of the damage caused to the treasury by the other offenders plus the applicable legal charges.

If the beneficiary is solely liable for the damage caused to the treasury, the exclusion of the fine set forth in art. 57 of Law No 8.443/1992, the exclusion of default interest and of the applicable legal charges and an installment plan for payment of the debt according to his ability to pay will depend on the recognition of the good faith of the beneficiary by the Court, on the absence of other wrongdoings than those reported in the leniency agreement or plea bargain entered into by the Public Prosecutors' Office, and on the payment or commitment to pay the debt established by the TCU.

The Court cannot, for the same reasons explained in chapter 2, refrain from creating an extrajudicial enforceable instrument corresponding to the full amount of the damage caused to the treasury together with default interest. In other words, the TCU cannot establish a debt amount lower than the amount of the damage caused to the treasury plus the legal charges established in law as consideration for the cooperation of a person in a plea bargain or leniency agreement entered into with the Public Prosecutors' Office.

Although the TCU is vested with constitutional authority to create an extrajudicial enforceable instrument in favor of a federal public administration entity that has suffered a damage in the management of public assets and funds, it is not a judicial and extrajudicial representation of such legal entities — which role is performed by their respective public attorneys. Thus, the Court has no authority to compromise with legal disputes involving the direct federal public administration or its instrumentalities and foundations, which task belongs to such entities themselves, with the supervision of their public attorneys, under art. 35 of Law No. 13.140 of June 26, 2015.[19]

Moreover, one should bear in mind that credits held by the Public Treasury are unwaivable, which obviously includes those of a non-tax nature resulting from the unlawful use of public funds and assets. For these reasons,

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[19] "Art. 35. Legal disputes involving the direct federal public administration or its instrumentalities and foundations may be the subject of a compromise by adhesion relying upon:

I — An authorization from the General Counsel for the Federal Government based on settled precedents of the Federal Supreme Court or of the superior courts; or

II — An opinion from the General Counsel for the Federal Government approved by the President of the Republic."

the principal amount of such debt cannot be negotiated, whether by the administration itself, by its judicial and extrajudicial representation, by the Public Prosecutors' Office in the performance of its public property protection duties, or by the TCU itself in the performance of its external control duties.

However, it is understood that the Court may, in the performance of external control, waive joint and several liability in favor of the beneficiary and impose on him only a share of the debt. However, such remedy is only possible if it does not constitute, in itself, an insurmountable obstacle to the full recovery of debt by the other offenders. In other words, a waiver of joint and several liability is only acceptable when, in theory, the remainder of the damage can be reimbursed by the other offenders.

In this regard, it should be noted that joint and several liability is for the benefit of the creditor and, therefore, does not constitute a right of the debtor. According to art. 275 of the Civil Code, which may be applied by analogy to external control proceedings involving an obligation to redress the treasury, "a creditor has the right to claim and receive a common debt, wholly or in part, from one or some of the debtors; if the payment made was partial, all the other debtors shall remain jointly and severally liable for the remaining balance thereof."

If the beneficiary has received unlawful payments financed with public funds, i.e. he has been included as an offender because of his status as a beneficiary of improper payments, the amount of his share will be equal to the result of the division of the total amount of the damage by the number of offenders with the same legal status, i.e. beneficiaries of unlawful payments.

This procedure is justified by the fact that those who benefit from unlawful payments unjustly enrich without cause out of the public property, which imposes a duty to fully reimburse the monies improperly earned. Thus, even if there are other participants in the chain of causes of the damage to the treasury, such as public agents who authorized the improper payments and/or signed the harmful acts and contracts, it is still legitimate for the administration to charge the full amount of the debt against the offenders that benefitted from the losses. In this event, a debtor who pays the full amount of the debt has the right to claim the share of each of the co-debtors under art. 283 of the Civil Code.

If the beneficiary has caused the damage in the capacity of a public agent who perpetrated the wrongdoing, the amount of his share may be established in an amount equal to his economic benefit, which must be determined on the basis of shared evidence and information from the criminal proceedings

and recognized in the external control proceedings. In this event, the other offenders remain bound by the remaining balance of the debt under the final portion of art. 275 of the Civil Code — if the payment made was partial, all the other debtors remain jointly and severally liable for the remaining balance thereof.

In this event, the recovery of the proceeds from the violations and the entering of evidence and information that enable the full recovery of the damage against the other offenders justify the granting of the benefit to the beneficiary under art. 4, item IV of Law No. 12.850/2013, as applied to external control proceedings by analogy.

As for the legal consequences of the debt, art. 19 of Law No. 8.443/1992 requires the Court, upon reviewing the unlawful accounts and finding a debt, to "issue an award against the offender for payment of the debt, as adjusted for inflation and increased by the applicable default interest."

The TCU adopts, in order to safeguard the real value and the delay of those in debt to the Federal Public Treasury, the application of default interest at a rate of 1% per month and inflation adjustment by the Extended Consumer Price Index (IPCA) from the date of the damaging event to July 31, 2011 and by the Special Settlement and Custody System (SELIC) rate since the latter date. Such understanding was established by Decision No. 1.603/2011-TCU-*En Banc*, as amended by Decision No. 1.247/2012-TCU-*En Banc*.

According to art. 12, paragraph 2 of Law No. 8.443/1992, "upon recognition of good faith by the Court, the timely settlement of the inflation-adjusted debt shall terminate the proceedings if no other wrongdoing has been found in the accounts."

Thus, the interest on the debt and the Special Settlement and Custody System (SELIC) Rate may be waived for an offender who has signed a leniency agreement or plea bargain regarding the same facts as those reviewed by the Court when:

a) The Court recognizes his good faith and finds that there are no wrongdoings other than those reported; and
b) The beneficiary timely settles the inflation-adjusted debt or agrees to do so in installments, upon authorization from the TCU.

In this event, the cooperation of the private party towards proving the wrongdoings reported and/or found in the proceedings of the Court may be regarded as evidence of good faith, at least from a procedural point of view.

In this regard, it should be noted that the review of good faith carried out by the Court is focused on the conduct of the offenders in making expenditures and managing public assets. According to Luiz Felipe Bezerra Almeida Simões, the Court assesses the objective good faith of the offender by comparing the conduct of the agent with the duty of care required of a prudent person of discernment. If the behavior of the offender fails to meet the required standard, this will be evidence reproach ableness of his conduct, his fault, and, finally, his lack of objective good faith.[20]

However, it is believed to be possible to recognize the good faith of the offender as a party to the proceedings for purposes of application of art. 12, paragraph 2 of Law No. 8.443/1992. According to art. 5 of the Code of Civil Procedure, "a person who is in any way a participant of the proceedings shall behave in good faith." Art. 6, in turn, establishes that "all the subjects of the proceedings shall cooperate with each other to obtain, within a reasonable time, a fair and effective merit decision in the merits." Thus, it is understood that the cooperation of a private party with the TCU proceedings may be taken into account by the Court when deciding whether or not to waive default interest on the debt.

Another benefit that may be granted to the signatory of a leniency agreement or plea bargain with the Public Prosecutors' Office is an installment plan for payment of the debt without accrual of default interest, according to the ability to pay of the offender.

Art. 217 of the TCU Internal Regulations establishes that the Court or the reporting justice may authorize, at any stage of the proceedings, the payment of the amount due in up to 36 installments if provided that the proceedings have not yet been referred for judicial collection.

Despite the clarity of such provision, there are several precedents of the Court authorizing payment in installments for a period longer than that specified in the Internal Regulations due to the good faith and economic capacity of the applicant. In this regard, see Decisions No. 2.395/2017-TCU-1st Chamber, reporting justice: Benjamin Zymler, No. 6537/2016-TCU-1st Chamber, reporting justice: Bruno Dantas, and No. 5919/2011-TCU-1st Chamber, reporting justice: Walton Alencar Rodrigues.

Thus, the number of installments may be established based on the ratio between the total inflation-adjusted amount of the debt and the ability to pay of the beneficiary, to be verified by an independent audit paid by the private party.

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[20] SIMÕES, Luiz Felipe Bezerra Almeida. A caracterização da boa-fé nos processos de contas. *Revista do TCU*, v. 32, No. 88, pg. 71-74, Apr./Jun. 2001, pg. 72.

If the good faith of the offender is recognized and the payment of the debt in installments is authorized, the legal charges on each installment must be restricted to inflation adjustment. Such understanding stems from the joint interpretation of art. 12, paragraph 2 of Law No. 8.443/1992 and art. 217 of the TCU Internal Regulations and has been recognized in TCU precedents, such as Decision No. 6812/2014-TCU-2nd Chamber, reporting justice: Marcos Bemquerer.

6. Offset of the debts imposed by the Court against amounts recovered under leniency agreements and plea bargains entered into by the Public Prosecutors' Office

In addition to providing information and documents conducive to compliance with art. 4 of Law No. 12.850/2013, a recurring practice in leniency agreements and plea bargains entered into by the Public Prosecutors' Office is the beneficiary's commitment to pay a compensatory civil fine for the damage caused by the various crimes and wrongdoings perpetrated.

A question that may be asked in this regard is whether or not the amount paid by way of civil fine can be taken into account by the TCU in order to reduce the amount of the debt found in the external control proceedings.

Given that leniency agreements and plea bargains entered into by the Public Prosecutors' Office sometimes provide for payment in installments of amounts on account of various wrongdoings admitted in the respective annexes, it is understood that it is not appropriate for the TCU to reduce the amount of the debt in the decision rendered in its external control proceedings without being certain of the identity and merger between the facts addressed in its proceedings and in the agreements and without proof of actual payment of the debt.

Thus, it is understood that the Court must create an enforceable instrument against the beneficiary for the full amount of the damage attributed to him, as explained in the preceding chapter, irrespective of the fine agreed upon in the leniency agreements and plea bargains and/or of the payment thereof.

Despite this, it is understood that a beneficiary who demonstrates the identity between the causes of the debts is entitled to offset the amount paid under such agreements during the execution of the decision of the Court.

Such remedy, in addition to being legally justified, has a clear practical appeal, as the Court has no efficient means of verifying compliance with the

terms of the agreement and its scope in the course of the external control proceedings. Accordingly, the offset of debts must occur during the execution proceedings through a joint initiative of the General Counsel for the Federal Government and of the Federal Public Prosecutors' Office.

In order to give greater legal certainty to the agreement, the Court must expressly state in its decisions that the amounts paid by way of civil penalties may be offset against the debts imposed by the TCU during the execution of the debt, subject to proof of identity between the legal cause of the debts in question.

7. The effects of leniency agreements entered into by the Public Prosecutors' Office from the perspective of the TCU

The possibility of extending the effects of leniency agreements entered into by the Public Prosecutors' Office in external control proceedings was considered in Decision No. 483/2017-TCU-*En Banc*.

In such decision, the Court decided, in what concerns this research, to:

> 9.2. Stay, based on the main provision of art. 157 of the TCU Internal Regulations, until the review of the remedies mentioned in sub-item 9.4.1, its consideration of the liability of Construções e Comércio Camargo Corrêa S.A. (61.522.512/0001-02), Construtora Andrade Gutierrez S.A. (17.262.213/0001-94), and Construtora Norberto Odebrecht S.A. (15.102.288/0001-82) for the bid rigging offense, as well as the imposition of the unsuitability to bid sanction on them, by virtue of their cooperation with Federal Public Prosecutors' Office, according to the certificate submitted to this Court by the Operation Car Wash Task Force (paper No. 339);
>
> 9.3. Serve notice the Operation Car Wash Task Force, the Federal Public Prosecutors' Office, and the Public Prosecutors' Office with the Federal Accounting Court with notice of this decision and provide them with an opportunity to submit their statements within sixty days;
>
> 9.4. Clarify that:
>
> 9.4.1. The continuance of the stay mentioned in sub-item 9.2 shall depend on the submission by the Federal Public Prosecutors' Office of a commitment signed by the companies specifying the cooperation measures that may contribute to the respective external control

> proceedings of this Court;
> 9.4.2. The participation of the Federal Public Prosecutors' Office in this case, in accordance with sub-item 9.4.1, shall be monitored by the Public Prosecutors' Office with the Federal Accounting Court; and
> 9.4.3. When reviewing the remedies specified in the agreement with the Federal Public Prosecutors' Office, in accordance with sub-item 9.4.1, this Court shall decide on the potential benefits to be granted, as the case may be.

The leading opinion of such decision raised, as a preliminary issue, the possibility of granting the following benefits, in addition to the waiver of the fine set forth in art. 57 of the organic law and of default interest, to those who may cooperate with the Federal Public Prosecutors' Office for the TCU jurisdiction:

a) A benefit of discussion in the collection of the debt in the special reviews of accounts in which the beneficiaries are jointly and severally liable for the debt with other companies;
b) Recognition of good faith, with its natural effects of waiver of default interest on the amount of the debt (TCU Internal Regulations, art. 202);
c) Recovery of the debt in installments designed to respect the actual ability to pay of the companies, which must be certified by an analytical procedure conducted by independent agents of notorious international repute;
d) Deduction from each of the first installments of the debt of any amounts already advanced under the agreement entered into by the Federal Public Prosecutors' Office, which shall then become a compensatory fund, which shall result in deferral of the start of the debt payments; and
e) Exclusion of the fine proportional to the debt, which could otherwise reach up to 100% of the inflation-adjusted amount of the debt (TCU Organic Law, art. 57).

It is understood that the Court erred in attributing to the Federal Public Prosecutors' Office a role which is outside its institutional authority, i.e. to negotiate, on behalf of the Court, the cooperation measures that may contribute to the respective external control proceedings of the TCU.

In addition to attributing an undue authority to the Public Prosecutors' Office, the very efficiency of such intermediation should be questioned, as the prosecutors do not have sufficient information or knowledge of the subject matter of the external control proceedings pending before the Court to request information and evidence that are appropriate to the fact-finding of the TCU proceedings.

In addition, the Public Prosecutors' Office cannot offer benefits to the beneficiary in the accounting jurisdiction, as the activity of the Court is not bound by the exercise of a claim by the Prosecution.

Considering the novelty and interlocutory nature of Decision No. 483/2017-*En Banc*, it is necessary to await the outcome of the proceedings in order to assess the efficiency and effectiveness of the decisions made. Notwithstanding the foregoing, the Court's initiative to promote institutional dialogue with the other control bodies is commendable. Such attitude may enable the production of a decision consistent with the complexities and antagonisms of the system.

8. Conclusions

In the performance of its external control duties, the Federal Accounting Court may assess and take into account the cooperation provided by individuals or legal entities under a plea bargain or leniency agreement entered into by the Public Prosecutors' Office in the performance of its duties to determine financial liability, impute debts, and impose the sanctions specified in law.

The TCU, as a body constitutionally in charge of supervising the accounts, finances, budgets, operations, and property of the Federal Government and performing, under art. 71, its federal public administration external control duties, is the only body that has standing to assess the satisfaction of the public interest for purposes of granting immunity or reducing sanctions within its authority.

In order for leniency agreements and plea bargains entered into by the Public Prosecutors' Office to have repercussions on the accounting jurisdiction, there must be identity or merger between the facts admitted by the private person in such agreements and those dealt with in the proceedings of the Court. In such cases, it is assumed that the cooperation to the external control activity will occur in due time, upon the lifting of the confidentiality

of the agreements and the subsequent forwarding of the evidence obtained to the Court.

In addition, it is necessary that the cooperation of the private party be useful to the fact-finding of the external control proceedings, i.e. to the complete elucidation of the wrongdoing, to the identification of other offenders, if any, and to the quantification of the debt relating to the reported wrongdoings, if any, and also be accompanied by the payment of the losses caused to the treasury.

In consideration of leniency agreements and plea bargains entered into by the Public Prosecutors' Office, the Court may refrain from imposing or reduce the amount of the sanctions within its authority and waive joint and several liability for the debt in favor of the beneficiary, if any, as well as waive default interest and allow payment according to the ability to pay, all depending on the usefulness and degree of cooperation of the private party.

The Court must create an enforceable instrument against the beneficiary for the full amount of the damage imputed to him, irrespective of the fine agreed upon in the leniency agreements and plea bargains and/or of the payment thereof.

Despite this, it is understood that a beneficiary who demonstrates the identity of causes of the debts is entitled to offset the amount paid under such agreements during the execution of the decision of the Court.

Such conclusions are a compromise between the principle of independence of the instances and the principle of unity of the State unity in the protection of the public interest and in the repression of undesirable conducts. A balanced and consistent activity of the various control niches will contribute towards compliance with the international commitments entered into by Brazil for the fight against corruption.

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