

LENIENCY AGREEMENTS FOR CORRUPTION
CONTROL: A CASE STUDY OF THE 2013 BRAZILIAN
ANTI-CORRUPTION LAW

By

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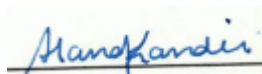
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Abstract

This research presents the results of an exploratory analysis of the Brazilian leniency agreements for corruption control, which the 2013 Anti-Corruption Law introduced. The structure of the Brazilian policy was analyzed, considering the mechanisms proposed by existing literature on leniency agreements for corruption in the economic field and the legal framework and context in which the leniency agreements were introduced.

In summary, this study shows, based on information made available by the Office of the Comptroller General, that the 2013 Anti-Corruption Law, which established strict civil liability for legal entities involved in corrupt acts, as well as administrative fines, and allowed for the reduction of these penalties through leniency programs, led to significant amounts in restitutions for the Brazilian public administration. The study also suggests some scenarios in which similar policies might lead to positive results and recommends further exploring potential causal mechanisms uncovered by the analysis.

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Abbreviations

AGU – Attorney General's Office

BRL – Brazilian real

CGU – Office of the Comptroller General

M&A – Mergers and acquisitions

OECD - Organization for Economic Cooperation and Development

UNCAC – United Nations Convention against Corruption

USD – American dollars

Introduction

Leniency agreements for corruption control are fairly common and well-known in Brazil. Every year, mainstream media outlets report on agreements between public authorities and famous multinational corporations involving the recovery of impressive amounts for the public administration. Although this policy has been used for more than seven years in Brazil, there are few studies outside the economic academic field about leniency programs for corruption.

The existing literature is incipient and primarily based on experimental economic models based on a game theory approach. In summary, the authors in the economic field suggest caution in the use of leniency agreements (i.e., reduction in the penalty for parties who self-report in exchange for providing information for authorities on illegal activity¹) as a tool for corruption control. Their main argument is that these policies might increase opportunistic behavior by raising the pay-off of reporting. This more significant incentive to report would then help dismantle corrupt activities that depend on collusion (i.e., illegal conduct that depends on two or more parties agreeing to work together to achieve an unlawful outcome).

According to the game theory principles², a change in pay-offs, such as the one derived from the implementation of asymmetric penalties and incentives to self-report, might shift the equilibrium from cooperation (i.e., in this case, collusive behavior) to deviation (i.e., in this case, self-reporting). Thus, this strand of the literature suggests using the tools of leniency agreements, whistleblower rewards, and asymmetric penalties to increase the benefits a party

¹ Johan Ysewyn, Leniency, Global Dictionary of Competition Law, Concurrences, Art. N° 12160.

² Steve Tadelis, *Game Theory: An Introduction* (Princeton ; Oxford: Princeton University Press, 2013).

would receive for self-reporting, therefore changing the incentives and penalties to control corruption.

The existing literature is also debating how these policies should be structured to generate positive results for corruption by analyzing, mostly in experimental studies, causal mechanisms such as (i) the benefits that should be granted by the leniency agreements to incentivize reporting (i.e., use of rewards or exemption of penalties); (ii) the use of asymmetrical penalties for specific types of bribery; and (iii) need for a comprehensive harmonized legal framework.

While the use of self-reporting policies is still experimental for corruption control, leniency agreements are largely used in the field of antitrust to deter cartels. Leniency agreements in antitrust can be found in the United States of America and the European Union and are recommended by the Council of the OECD as an effective policy to deter hard-core cartels³.

There are also leniency policies for corruption already implemented in both Mexico and Brazil⁴. Given the experimental and emerging literature in the field, this study provides a detailed exploratory analysis of the Brazilian leniency agreements for corruption control, introduced by the 2013 Brazilian Anti-Corruption Law, to add a real-life example to the existing literature.

In summary, national or foreign legal entities can propose and, if accepted, enter into leniency agreements with the Brazilian public administration to report corrupt practices in which the

³ “Recommendation Concerning Effective Action against Hard Core Cartels - OECD,” accessed May 10, 2023, <https://www.oecd.org/daf/competition/recommendationconcerningeffectiveactionagainstharcocartels.htm>.

⁴ Reinaldo Diogo Luz and Giancarlo Spagnolo, “Leniency, Collusion, Corruption, and Whistleblowing,” *Journal of Competition Law & Economics* 13, no. 4 (December 1, 2017): 729–66, <https://doi.org/10.1093/joclec/nhx025>.

company was involved. These agreements may reduce penalties for corrupt behavior, also introduced by the 2013 Anti-Corruption Law.

This study aims to provide insights into the effective structuring of leniency agreements for corruption control. It seeks to address the research question: *"how can leniency agreements be designed to promote corruption control effectively?"* To explore this, the study investigates the utilization of leniency agreements to enhance accountability, particularly concerning legal entities. Accountability is widely recognized as a crucial component in the literature on corruption control.

However, considering the highly experimental nature of the existing literature, as well as the limited information available on the agreements due to their confidentiality, this study is merely exploratory, and its objective is to serve as a stepping stone for future research on leniency agreements on corruption, especially in the public policy field.

To accomplish this objective, the case study in this research was divided into two parts. The first part involved an analysis of the contextual factors surrounding the introduction of leniency agreements. This analysis examined the legal framework for corruption control at the time and considered the events that led to the enactment of the 2013 Anti-Corruption Law, which significantly impacted the perception of corruption in Brazil.

The second part of the study focused on the structure of the leniency policy in Brazil and the analysis of the initial results of the policy. By doing so, the study aimed to gain insights into how the leniency agreements were designed and implemented and verify if there are any indicators of their effectiveness in combating corruption.

The main result of this analysis is that it does exempt legal entities from paying for the damages caused due to corrupt behavior. On the contrary, the agreements are structured to make companies assume strict liability for the damages caused, which led to substantial amounts in restitution for the Brazilian public administration since the enactment of the policy.

Since the implementation of the 2013 Anti-Corruption Law, companies agreed to pay around 4 Billion dollars in the agreements of which the Brazilian public administration already collected 1,7 Billion dollars⁵. Considering these substantial amounts, this research suggests further exploring the use of leniency policies designed similarly to the Brazilian policies as an effective tool for asset recovery.

The research also showed that the agreements were used mainly by multinational corporations for continuous grand corruption schemes, which this study suggests should be further explored. This study also suggests exploring the mechanisms of corruption investigations and corporate M&A operations, or other circumstances that lead to changes in the administration of a corporation, as a potential mechanism that might lead to the proposition and execution of leniency agreements for corruption control.

⁵ Controladoria-Geral da União, “Painel Acordo de Leniência,” Eletronic, Eletronic (<https://www.gov.br/cgu/pt-br/assuntos/integridade-privada/acordo-leniencia>: CGU, May 29, 2023), <https://app.powerbi.com/view?r=eyJrIjoiZTU2MWI0MjYtY2EzOS00NzYyLTg3MWQyYWE3MmFiMmY0ODM4IiwidCI6IjY2NzhkOWZILTA5MjEtNDE3ZC04NDExLTVmMWMxOGRlZmJiYiJ9>.

Chapter 1- The use of asymmetric penalties, leniency agreements, and whistleblower rewards for corruption control

To fully comprehend the subject of the current research, it is essential to examine the existing literature, which stems from economic theory on corruption, that cautiously suggests, primarily based on game theory logic, the use of asymmetric penalties (i.e., different treatment for passive and active corrupt activity⁶), leniency agreements, and whistleblower rewards (i.e., the monetary incentive offered by authorities to reward whistleblowers for the disclosure of information⁷) as effective policies to change the incentives and penalties of corruption.

Although the strand of theory is mainly based on a game theory approach, the logic of the interventions derives from the economic theory on corruption that considers rent-seeking behavior (i.e., behavior that maximizes profits without adding value⁸) as the leading cause of corruption.

According to the explanations provided by Klitgaard⁹, an agent will be corrupt when, in their judgments, the benefits of being corrupt are greater than the likely costs of corruption. These costs, in turn, depend on the person's own ethical, cultural, and religious standards, the action of their peers, and how big the pay-off is compared to the deviation from the responsibilities.

⁶ Maria Berlin, Bei Qin, and Giancarlo Spagnolo, "Leniency, Asymmetric Punishment and Corruption: Evidence from China," *SSRN Electronic Journal*, 2018, <https://doi.org/10.2139/ssrn.3167345>.

⁷ "Whistleblower Dictionary," Brown, LLC, accessed May 10, 2023, <https://ifightforyourrights.com/whistleblower/whistleblower-dictionary/>.

⁸ "The A to Z of Economics," The Economist, accessed May 9, 2023, <https://www.economist.com/economics-a-to-z>.

⁹ Robert Klitgaard, *Controlling Corruption* (Berkeley, Calif.: Univ. of California Press, 1988), 69-73.

The possibility of getting caught and punished and the type of punishment (e.g., loss of employment, fines, criminal, civil, and administrative penalties, public disgrace) are also considered as part of the cost of corruption.

Considering this rationale, in which the corrupt wrongdoers would calculate the pay-offs and act accordingly to the incentives and penalties of the corrupt activity, the economic theory of corruption control often suggests policies that aim to change the incentive structure. As summarized by Andvig et al.¹⁰, the economic literature suggests, as a method of corruption control, changes in the following aspects: (i) payment: salary and other benefits; (ii) monitoring: internal controls (e.g., supervising and control systems, standards of performance of employees, recruitment and selections procedures for personnel, rules, and procedures) and external controls (e.g., external auditor independence, public transparency, and judicial control); (iii) statutory penalty: the size of the penalty and administrative sanctions; (iv) governmental regulations and procedures (e.g., licenses, fees)¹¹.

Based on this framework, it can be concluded that the literature advocating for leniency agreements in corruption control draws its theoretical foundation from game theory and the economic theory of corruption. Consequently, the literature proposes the implementation of self-reporting policies coupled with a reduction in statutory penalties. This approach aims to alter the penalties and incentives associated with corruption, thereby changing the penalties and incentives and serving as a mechanism to dismantle corrupt activities.

¹⁰ Jens Andvig, Odd-Helgee Fjeldstad, Inge Amundsen, Tone Sissener & Tina Soreide, 'Research on corruption: A policy-oriented survey'; commissioned by Norad, December 2000, particularly pp. 10-21

¹¹ The idea here is that reducing and simplifying regulations and procedures would lead to less opportunities for corruption. For example, if seven licenses are necessary to open a company in a certain economic field, reducing the licenses necessary would also reduce the opportunity the agents would have for rent-seeking behavior.

In one of the most influential papers in the field, Buccirosi and Spagnolo developed a stylized economic model to analyze how leniency agreements would impact "*sequential and occasional illegal transactions*" activities (i.e., activities that are expected to happen only once but depend on another party complying with their obligation in the future), concluded that these agreements classified as moderate (i.e., that cancel or reduce expected penalties without giving rewards for self-reporting) might have pernicious effects in one-off illegal acts¹².

Although the model suggests that moderate leniency would deter illegal long-term collusion, the study proposes that these policies may provide enforcement mechanisms for players who, in a sequential transaction, were the first to comply with the arrangement¹³.

The rationale is that in illegal transactions that continue for a certain period, the subjects in the interaction have ways to enforce and punish each other for non-compliance. If one of the parts deviated, the other participants could also turn or exclude the one that deviated from future illegal activities. However, in occasional sequential illicit transactions, the threat of self-reporting and celebrating a leniency agreement that might reduce the penalties or even reward the party who reported might serve as an enforcement mechanism to guarantee the effectiveness of illegal transactions.

The mechanism uncovered by Buccirosi and Spagnolo's influential article is that the parties that would deviate from the occasional sequential collusion to maximize their profits in occasional sequential illegal transactions may not deviate anymore due to the credible threat of

¹² Paolo Buccirosi and Giancarlo Spagnolo, "Leniency Policies and Illegal Transactions," *Journal of Public Economics* 90, no. 6–7 (August 2006): 1281–97, <https://doi.org/10.1016/j.jpubeco.2005.09.008>.

¹³ Ibid.

another participant, most likely one that already complied with its part of the corrupt behavior, of seeking a leniency agreement¹⁴.

Lambsdorff and Nell proposed a solution for this problem by developing a model including leniency agreements and asymmetric penalties¹⁵. Their model suggests that bribes could be disestablished by a model in which the expected criminal sanctions for accepting a bribe are low and for providing favorable treatment for the briber are high. As for the part responsible for paying the bribe, the penalties should be high for paying the bribe but not for accepting the illicit favorable treatment. Although other studies suggested the use of asymmetric penalties only for specific types of bribes, mostly for transactions involving power imbalances among corrupt wrongdoers, this study suggested the use of asymmetric penalties for all kinds of bribery.

Lambsdorff and Nell also suggest that for leniency agreements to work, they should be structured before detection and be laid down in legal codes to impact both players' belief of reciprocity and, thus, destabilize the illegal partnership. According to the authors, leniency post-detection left for the judiciary's discretion might not lay down the incentives clearly enough to disrupt unlawful alliances due to the law enforcement and judiciary discretion to enter into the leniency agreements.

Even though Lambsdorff and Nell's piece provides some solutions for the problems observed in the literature, the model only considered criminal sanctions. It is unclear how the civil and administrative penalties that exist in most countries for corruption would affect the model. Moreover, the article's authors recognized that a legal model containing asymmetric penalties

¹⁴ Buccirosi and Spagnolo, "Leniency Policies and Illegal Transactions."

¹⁵ Johann Graf Lambsdorff and Mathias Nell, "Fighting Corruption with Asymmetric Penalties and Leniency," January 1, 2007.

would be challenging to implement because it would go against the provision of the United Nations Convention against Corruption (UNCAC) that established that countries should penalize both passive and active bribery¹⁶.

Around 2014, experimental models suggesting asymmetric punishment for bribery kept being proposed by various authors. Again, basing their analysis on a game theory approach, different authors suggest that giving what some authors defined as harassment bribes should be legal¹⁷. The idea is to change the pay-offs and stimulate reporting. The self-reporting, in turn, would help authorities obtain information about corrupt activities and punish agents involved with bribery for reducing the act of bribing public officials that is common and even institutionalized in some public organizations and regions.

The rationale is that for a type of bribe in which the briber is paying for accessing a service or a right that they would have the legal right to obtain (i.e., harassment bribes), the act of giving a bribing should not be treated as a crime. The idea is to treat the bribe payer, in these particular cases, as a victim of the authority that requested the bribe, due to the authority having the power to limit the right a person/legal entity has to access a public service or good through corrupt activities.

In the only empirical study in the field¹⁸ in which the authors used micro and macro data to analyze the effects of the Chinese 1997 Anti-Corruption Law, that introduced asymmetric

¹⁶ The UNCAC provision does not provide that the parties should be penalized the same for active and passive bribery what could lead to a system that establishes moderate asymmetric penalties (i.e., a reduction of the penalty for one of the parties).

¹⁷ Karna Basu, Kaushik Basu, and Tito Cordella, *Asymmetric Punishment as an Instrument of Corruption Control*, Policy Research Working Papers (The World Bank, 2014), <https://doi.org/10.1596/1813-9450-6933>. Klaus Abbink et al., “Letting the Briber Go Free: An Experiment on Mitigating Harassment Bribes,” *Journal of Public Economics* 111 (March 2014): 17–28, <https://doi.org/10.1016/j.jpubeco.2013.12.012>.

¹⁸ Maria Berlin, Bei Qin, and Giancarlo Spagnolo, “Leniency, Asymmetric Punishment and Corruption: Evidence from China,” *SSRN Electronic Journal*, 2018, <https://doi.org/10.2139/ssrn.3167345>.

penalties and leniency programs, results showed that these policies failed to improve detection and promote corruption deterrence. In summary, China approved a law that gave a more substantial legal status to leniency agreements and provided asymmetric punishments for cases involving harassment bribes by not considering the bribe-giver guilty of a corruption crime. The Chinese 1997 Anti-Corruption Law also reduced criminal penalties for corruption in general, including penalties for bribe-takers.

Although many explanations could be given for the lack of deterrence in this case (e.g., lack of political will, anthropological/cultural factors), the study concluded, considering the economic approach towards corruption, that the policy adopted in China did not deter corruption, because it failed to generate the necessary asymmetry between the parties that self-reported and the parties that were reported, which made the punishment for both parties more lenient¹⁹. It is also argued that the leniency towards the reported party/agent makes it easier for them to retaliate against the whistleblower, thus decreasing the reporting incentives.

The mechanism uncovered is the need to design policies to increase asymmetries to create an actual conflict of interest among the parties conspiring to engage in corrupt behavior²⁰. The article also indicates that the failure to achieve these mechanisms might lead not only to ineffectiveness in corruption control but might also be exploited by corrupt agents²¹.

The necessary attention to policy design, especially for a comprehensive legal approach towards leniency agreements, was also explicitly pointed out by Luz and Spagnolo²², which evaluated *"whether the legal system presents any solution to limiting the risk that legal*

¹⁹ Berlin, Qin, and Spagnolo, "Leniency, Asymmetric Punishment and Corruption."

²⁰ Ibid.

²¹ Ibid.

²² Luz and Spagnolo, "Leniency, Collusion, Corruption, and Whistleblowing."

provisions against corruption undermine the effectiveness of leniency programs against bid rigging in public procurement"²³ and concluded that the alignment of legal provisions are necessary to guarantee that the leniency agreements would be effective mechanisms against corruption²⁴.

This same study also highlights the importance of harmonizing administrative, civil, and criminal penalties for corruption, as well as the harmonization of penalties applicable to legal entities and individuals, to guarantee that the leniency agreements would generate the necessary incentives to promote self-reporting²⁵.

The main argument is that a corrupt company or legal entity might not report corrupt behavior or activities to antitrust or anti-corruption bodies if there is a chance of being penalized by other authorities²⁶. This could also happen in cases involving leniency agreements for legal entities in which individuals acting on the company's behalf could still be held responsible for the corrupt behavior²⁷.

The need for a holistic legal approach was also discussed in an economic study by Abbink and Wu²⁸, that conducted a laboratory experiment of a stylized bribery game and suggested that regimes in which both the bribe takers and bribe givers can self-report "*are highly effective in deterring bribes being exchanged and corrupt favors being granted*"²⁹, especially in cases in which the parties believe they would not interact again in the future.

²³ Luz and Spagnolo.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Klaus Abbink and Kevin Wu, "Reward Self-Reporting to Deter Corruption: An Experiment on Mitigating Collusive Bribery," *Journal of Economic Behavior & Organization* 133 (January 2017): 256–72, <https://doi.org/10.1016/j.jebo.2016.09.013>.

²⁹ Ibid.

Although the literature in the field is still incipient, the studies propose an innovative economic approach to corruption control. The literature also uncovered some interesting mechanisms for the effectiveness of this type of policy and some potential caveats that need to be considered during the implementation of these policies.

This literature, however, is not substantiated by many empirical studies and is mainly based on experimental economic models. The field also lacks the analysis of real-life examples and policies adopted by Latin American countries that introduced leniency agreements for corruption control. Moreover, most studies only considered one type of corrupt activity, usually bribery, and fail to consider the entire system of penalties and incentives, including criminal, administrative, and civil penalties for various forms of corrupt behavior.

Previous studies show that leniency agreements for corruption control have only been adopted in Mexico and Brazil³⁰. This study, therefore, aims to analyze policies adopted in Brazil through the lenses of the public policy field, focusing on the leniency programs for legal entities implemented by the Brazilian 2013 Anti-corruption Law.

The main objective of this study is to analyze the policy adopted in Brazil, as well as explore the context in which the policy was introduced and the data on the agreements already signed, and present a key case study that could be further explored to expand the empirical literature in the field. This study also aims to explore the causal mechanism in the literature and propose new causal mechanisms for the effectiveness of the policy, which can be used to form new hypotheses and expand the theoretical studies in the field.

³⁰ Luz and Spagnolo, “Leniency, Collusion, Corruption, and Whistleblowing.”

Chapter 2 – Research Design

Anti-corruption policies are generally assessed considering the concepts of "corruption" and "corruption control". Although the definition of "corruption" is contested, this study considers corruption as the *"misuse of government power for private gain"*³¹, per the broadly used definition provided by Transparency International.

"Corruption control", in turn, will be considered as the measures adopted for fighting corruption, such as the *"disclosure of corruption and its risks, enforcement of rules or reform, and establishment of high standards for performance including ethics and integrity"*³².

The literature suggests that "corruption control" should be evaluated and measured considering the following sub-concepts: "transparency", "accountability", and "governmental integrity".³³ Since the Brazilian leniency agreements for corruption aim to provide a legal mechanism to promote self-reporting of corrupt legal entities and, thus, increase the rate of corrupt activities that are uncovered, it is important to explore the concept of "accountability", that involves both "answerability" (i.e., the rights of citizens to request a response to questions about government decision-making and the obligation of government to respond³⁴) and "enforcement" (i.e., capacity to ensure that action is taken, and mechanisms for redress³⁵).

The indicators presented in the literature for evaluating the sub-concepts of "accountability", such as "public-sector performance", "public user experience with bribery", and the "incidence

³¹ Transparency International http://www.transparency.org/whoweare/organisation/faqs_on_corruption/2/.

³² Trapnell, Stephanie. (2015). User's Guide to Measuring Corruption and Anticorruption.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

with which the transparency and accountability problems are resolved to the satisfaction of key stakeholders"³⁶ measure these concepts at a high governmental level, and, despite being effective to evaluate policies with a broader impact (e.g., anti-corruption reforms), are not adequate to correctly assess the success of a specific policy, such as the leniency agreements with legal entities proposed in the Brazilian 2013 Anti-Corruption Law.

Given this limitation and the experimental nature of the research in the field presented in Chapter 1, this case study is exploratory. It aims to provide an initial understanding of the practical use of leniency agreements for corruption control by analyzing the framework laid down in the 2013 Brazilian Anti-Corruption Law. The analysis will explore how the policy might increase accountability as well as the enforcement and will be conducted taking into consideration the following theoretical framework:

Table 1 – Analytical framework for investigating mechanisms discussed in the specialized literature on the structure of leniency agreements for corruption control.

Author/Article	Mechanisms suggested	Analysis
Buccirossi and Spagnolo, " <i>Leniency Policies and Illegal Transactions.</i> "	<p>1) Moderate leniency agreements would deter long-term continuous illegal activities.</p> <p>2) Moderate leniency agreements might be exploited to enforce on-off occasional illegal interactions and, therefore, would not deter sequential and occasional illegal activities.</p>	<p><i>Are the Brazilian leniency agreements for corruption control moderate?</i></p> <p><i>If so, do the results indicate that the leniency agreements are used for long-term continuous corrupt activities or one-off interactions?</i></p>
Lambsdorff and Nell, " <i>Fighting corruption with asymmetric penalties and leniency.</i> "	<p>3) Asymmetric criminal sanctions for bribery and ex-ante leniency may be exploited to destabilize corrupt arrangements.</p>	<p><i>Does the Brazilian legal framework provide asymmetric penalties for bribery?</i></p> <p><i>Does the Brazilian legal framework establish ex-ante leniency agreements that might be exploited to destabilize corrupt agreements?</i></p>

³⁶ Stephanie Trapnell, *User's Guide to Measuring Corruption and Anticorruption*, 2015.

Berlin, Qin, and Spagnolo, <i>"Leniency, Asymmetric Punishment, and Corruption."</i>	<p>4) <i>The strengthening of leniency and reduction in sanctions for both parties in a corrupt transaction would not improve the detection and deterrence of corrupt activities.</i></p> <p>5) <i>Asymmetric incentives and penalties for the party that reported the corrupt activity and the party that was reported would work to promote deterrence</i></p>	<i>Does the 2013 Brazilian Anti-Corruption Law reduce sanctions for both parties in a corrupt act?</i>
Luz and Spagnolo, <i>"Leniency, Collusion, Corruption, and Whistleblowing"</i>	6) <i>Legal harmonization of criminal, administrative, and civil liability is necessary to make leniency agreements effective against public procurement collusion schemes.</i>	<i>Is the Brazilian framework for controlling public procurement collusion schemes comprehensive and harmonized?</i>
Klaus Abbink and Kevin Wu, <i>"Reward Self-Reporting to Deter Corruption: An Experiment on Mitigating Collusive Bribery,"</i>	<p>7) <i>Enabling both parties to self-report is highly effective in deterring bribes being exchanged and corrupt favors being granted.</i></p> <p><i>Observation: The literature suggests this mechanism would be most pronounced when agents are uncertain whether they will interact with one another in the future.</i></p>	<i>Does the Brazilian legal framework allow for both parties to self-report?</i>

Source: Own Elaboration

This study presents the framework merely as a guide for analyzing the design of the Brazilian leniency policy. Considering the experimental nature of the mechanism suggested in the field, which does not take into consideration all types of corrupt activities, does not suggest any indicators for the analysis of the policy, and does consider all types of penalties (e.g., civil, criminal, and administrative), as well as the limited data on the leniency agreements due its confidential nature, rather than proving a hypothesis derived from the mechanism presented in the literature, this study only aim to present the leniency agreements for corruption in light of the literature and explore a practical case in which this type of policy was implemented.

As it is typical of exploratory studies, the analysis results will be presented to propose new mechanisms that should be further explored for the effectiveness of these policies and suggest future lines of research and hypotheses.

The case study of the Brazilian leniency policy for corruption control will be divided into two parts. The first one consists of understanding the context in which the policies were inserted. Essential aspects, such as the legal framework previously set in place for holding legal entities liable for corrupt activities, the 2013 protests in Brazil, and Operation Car Wash, will be explored to understand the results of the Brazilian policies in a specific context.

The documents analyzed to illustrate the context are mainly the previously established laws that aimed to hold companies liable for corrupt activities, the discussions presented in the Bill of the 2013 Anti-Corruption Law, and academic articles and news articles about the 2013 General Protests and Operation Car Wash.

The second part will consider how Brazil's leniency agreements for corruption control were structured by analyzing the laws and regulations of the 2013 Brazilian Anti-Corruption Law, presenting the data available on the agreements already signed, and exploring how they are being used for corruption control. Considering the lack of data on the agreements between legal entities and some Brazilian states and municipalities³⁷, this study will focus solely on the leniency agreements of the Brazilian Federal Government.

³⁷ Although it was possible to find news articles with information about dozens leniency agreements signed with the Brazilian states and municipalities, the public database “Portal da Transparência” only listed five leniency agreements with these authorities: See <https://portaldatransparencia.gov.br/sancoes/acordos-leniencia/19600012>; <https://portaldatransparencia.gov.br/sancoes/acordos-leniencia/19400110>; <https://portaldatransparencia.gov.br/sancoes/acordos-leniencia/17100118>; <https://portaldatransparencia.gov.br/sancoes/acordos-leniencia/19000118>; <https://portaldatransparencia.gov.br/sancoes/acordos-leniencia/19300110>

Three data sets compiled by Federal Comptroller General Office (CGU) are available on the Brazilian Open Data website regarding these agreements. Redacted copies of the agreements, general information on the leniency policy (e.g., number of agreements, the monetary value of the agreements, amounts restituted to the public administration), as well as news articles written by CGU, are also accessible through the institution's website.

The analysis presented in the second part of the case study results from the compilation and analysis of the available public information. The complete lists of documents and datasets analyzed for the presentation of the results of the Brazilian leniency program are listed on "Annex I".

For ethical purposes, given the confidential nature of the leniency agreements and data privacy reasons, this study will not present as an annex a copy of the information compiled on the legal entities that entered into leniency agreements with the Brazilian Federal Government. The analysis, however, references the specific sources used (i.e., all public governmental information) or the compilation of sources, which allows for the verification of the information and data presented in the study. These measures are taken to ensure the integrity and fairness of the research and to respect the privacy and rights of the parties involved

It is also important to highlight that this research only used the public information made available by national and international public institutions to generate its results presented in the second part of the case study. This research refrained from utilizing information from cases that are still pending to uphold the presumption of innocence for the companies and individuals involved. Furthermore, it avoided misusing information made public by authorities without proper redaction and also refrain from revealing any connections derived from such information.

The cases study is one of the first qualitative studies conducted in the field and aims to use the tool of thick description to provide a complete understanding of how the policy was designed in Brazil, as well as to suggest some preliminary explanations of the results of the policy considering the context in which the policy was implemented.

This study intends to contribute to the field considering that the 2013 Brazilian Anti-Corruption Law is arguably the most advanced in implementing leniency agreements for corruption control, thus becoming a key case study for the preliminary exploration of mechanisms.

Chapter 3 – Analysis: The Leniencies Agreements in the 2013 Brazilian Anti-Corruption Law

3.1. Context of the implementation of the 2013 Brazilian Anti-Corruption Law

3.1.1 Justification for the Bill and Considerations on the Brazilian legal framework

The project that resulted in the 2013 Anti-Corruption Law, aimed at addressing gaps in Brazilian corruption framework, was put forward by CGU and Brazilian Attorney General's Office (AGU) in 2010³⁸. The bill sought to incorporate the provisions of international anti-corruption agreements previously ratified by Brazil³⁹, while also making reference to the 1996 Inter-American Convention Against Corruption, the 1997 OECD Anti-Bribery Convention, and the UNCAC.

The arguments supporting the bill highlighted a significant gap in the Brazilian anti-corruption framework, namely the absence of specific provisions for the criminalization and stipulation of liability for corrupt acts committed by legal entities involving foreign public officials. Additionally, it highlighted the challenges in proving civil liability for corrupt activities perpetrated by legal entities under the Brazilian legal system, which at the time required demonstrating "fault" on the part of the companies⁴⁰.

³⁸ Congresso Nacional, "Projeto de Lei nº 6.826-A, de 2010," Pub. L. No. 6.826-A, de 2010 (n.d.), accessed May 23, 2023.

³⁹ Executive Branch, "Mensagem Nº 52/2010," Pub. L. No. 52/2010 (n.d.), accessed May 23, 2023.

⁴⁰ Ibid

Interestingly, leniency agreements were not initially included in the original draft of the Anti-Corruption Law bill presented by CGU. This mechanism was only later incorporated into the bill after contributions presented by the Brazilian Institute of Business Law⁴¹. The bill's justification explained its inspiration in the successful implementation of leniency agreements in Antitrust Law⁴².

To fully grasp the primary outcomes and potential effectiveness of the 2013 Brazilian Anti-Corruption Law, it is crucial to consider the legal framework within which it was introduced. The key elements of the Brazilian legal framework aimed at holding legal entities accountable are summarized below:

- i. Generally, legal entities are not criminally liable in Brazil. The Brazilian Federal Constitution only establishes the possibility of criminal liability of legal entities for environmental crimes (article 225, paragraph 3⁴³)⁴⁴.
- ii. To establish civil liability for illicit acts in Brazil, it is necessary to prove "fault", which can sometimes be difficult for the public authorities. According to Article 186 of the Brazilian Civil Code⁴⁵, civil liability depends on proving: (i) fault; (ii) damages; and (iii) a causal link between fault and damages. To establish "fault", in turn, it is necessary to prove "negligence", "omission", or "recklessness".

⁴¹ Renata Machado Dos Santos Gomes and Rodrigo Fontenelle De Araújo Miranda, "Os Caminhos Da Política Pública Anticorrupção e as Influências Internacionais: O Caso Da Lei Nº 12.846/2013," *Revista Da CGU* 11, no. 18 (March 11, 2019): 17, <https://doi.org/10.36428/revistadacgu.v11i18.132>.

⁴² Executive Branch, Mensagem nº 52/2010.

⁴³ Brazilian Federal Constitution (1988), https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.

⁴⁴ The Brazilian Federal Constitution also the possibility of criminal liability for legal entities for cases of crime against the economic and financial order, this provision, however, was never properly implemented by an ordinary Law and, thus, is not enforceable.

⁴⁵ Brazilian Civil Code (2002), https://www.planalto.gov.br/ccivil_03/leis/2002/110406compilada.htm.

- iii. The Brazilian Public Prosecutor's Office has a large scope of attributions. Among these attributions, the institution must promote civil investigation and public civil action to protect, prevent, and repair damages caused to the diffuse collective rights and public interest (article 25, IV, "a" ⁴⁶). The Public Prosecutor's Office instrumentalizes the protection of this right through a specific judicial proceeding, a Public Civil Action, to seek damages and establish the obligation to perform or not perform a particular act or activity (i.e., civil liability). However, providing proof to guarantee civil liability can be hard for authorities, as seen above.
- iv. The Brazilian Federal Court of Accountants has the attribution to audit the *"accounts of administrators and other persons responsible for federal public funds, assets, and other sums of money, as well as the accounts of any person that causes loss, misapplication, or other irregularities that result in losses to the public treasury"*⁴⁷ (article 71⁴⁸). Decisions of the Court resulting in the imposition of a debt or fine shall have the effectiveness of an enforceable title (article 71, paragraph 3⁴⁹).
- v. The 1992 Brazilian Administrative Improbability Law⁵⁰ penalized legal entities that entered into specific public contracts and arrangements with the Brazilian Public Administration (article 2nd, sole paragraph). These penalties were established for the conducts considered corruption under the Transparency International definition and, if enforced through judicial proceedings, might result in the restitution of the

⁴⁶ Brazilian Public Prosecutor's Law (1993), https://www.planalto.gov.br/ccivil_03/leis/18625.htm#:~:text=LEI%20N%C2%BA%208.625%2C%20DE%2012%20DE%20FEVEREIRO%20DE%201993.&text=Institui%20a%20Lei%20Org%C3%A2nica%20Nacional,Estados%20e%20d%C3%A1%20outras%20provid%C3%AAs.

⁴⁷ "The Court." Tribunal de Contas da União (Brazilian Court of Audit). Accessed May 24, 2023. https://portal.tcu.gov.br/en_us/english/inside-tcu/the-court/.

⁴⁸ Brazilian Federal Constitution (1988), https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.

⁴⁹ Ibid.

⁵⁰ Brazilian Administrative Improbability Law (1992), https://www.planalto.gov.br/ccivil_03/leis/18429.htm.

illegal profits derived from the illicit activity, fines calculated based on the damages caused, prohibition from entering into contracts with the Brazilian Public Administration for a certain period, and obtaining tax credits and incentives.

- vi. The 2011 Brazilian Antitrust Law⁵¹ establishes as an infraction against economic order to agree, join, manipulate, or adjust with competitors, in any way, prices, conditions, privileges, or refusal to participate in public bidding (article 36, paragraph 3, I, "d"). The penalty for infractions against the economic order is, for companies, a fine of a one-tenth percent (0.1%) to twenty percent (20%) of the gross sales of the company, group, or conglomerate in the last fiscal year before the establishment of the administrative proceedings.
- vii. The 2011 Brazilian Antitrust Law⁵² also provides the possibility to enter into leniency agreements and terminate any punitive action of the public administration or reduce one to two-thirds of the applicable penalty. Under the terms of these provisions, the agreements can be proposed with individuals or legal entities that cause violations of the economic order if they effectively cooperate with the investigations and administrative proceedings (article 86).

Given this legal framework, it is possible to conclude that the system for holding legal entities accountable has enforcement problems due to the lack of criminal accountability and the difficulties in proving civil liability and, therefore, collecting reparations and damages, as well as the fines and other penalties laid down in the 1992 Brazilian Administrative Improbity Law.

The legal system, however, has substantial penalties for bid-rigging and an antitrust system that provides leniency agreements, as well as external control bodies, namely the Brazilian

⁵¹ Brazilian Antitrust Law (2011), https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/112529.htm

⁵² Ibid.

Public Prosecutor's Office and Brazilian Federal Court of Accountants, that could investigate/audit and hold legal entities accountable for corruption.

Besides the liability of legal entities for corrupt acts, Brazil had (and still has) a legal framework that follows international practices and agreements. The system provides several mechanisms for holding individuals accountable for corruption, such as criminal penalties for active and passive corruption (articles 317 and 333⁵³), as well as other crimes such as irregular use of public money (article 315⁵⁴), malfeasance (article 319⁵⁵), and illicit acts in public bids (articles 89 to 99⁵⁶), that can also be considered corruption under the Transparency International definition.

Furthermore, in light of the mechanism proposed by Lambsdorff and Nell⁵⁷, which advocates for implementing asymmetric criminal sanctions to disrupt corrupt arrangements, it is worth noting that the Brazilian Criminal Code imposes equal penalties for both passive and active corruption. Specifically, the Criminal Code stipulates a penalty range of two to twelve years of imprisonment and associated penalties. Consequently, the Brazilian system lacks a framework incorporating asymmetric bribery penalties.

The legal framework also provides several mechanisms for holding public agents civil and criminally liable for corrupt acts, as well as provisions establishing that public agents might be exonerated and lose their political rights due to proven corrupt activity. Most of these provisions are presented in the 1992 Brazilian Administrative Improbity Law.

⁵³ Brazilian Criminal Code (1940), https://www.planalto.gov.br/ccivil_03/decreto-lei/del2848compilado.htm.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Brazilian Public Procurement Law (1993), http://www.planalto.gov.br/ccivil_03/leis/18666cons.htm.

⁵⁷ Johann Graf Lambsdorff and Mathias Nell, "Fighting Corruption with Asymmetric Penalties and Leniency."

3.1.2. Events that impacted "corruption" and "corruption control" in Brazil

Some events happening at the time of the enactment of the Brazilian 2013 Anti-Corruption Law impacted the public's perception of corruption. In June 2013, Brazil faced its biggest demonstrations in 20 years⁵⁸. The protests, which lasted through June and July of 2013, happened in 388 Brazilian cities⁵⁹ and amounted to more than 1,25 million demonstrators on its biggest day.

The protests started due to an increase in the price of public transportation tickets in Sao Paulo, the biggest Brazilian city. After intense media coverage, citizens from various parts of Brazil joined the protests⁶⁰. Over the following days, the main focus of the protests shifted from the price of public transportation tickets to unrest towards the poor quality of public services and public corruption⁶¹.

In this scenario, less than two months after the start of the protests, the 2013 Anti-Corruption Law was enacted after three years of discussions in the Brazilian Congress, citing the protests as one of the main reasons for the approval⁶².

⁵⁸ “Maiores manifestações em 20 anos tomam cidades do Brasil,” *DW*, June 18, 2013, http://www.planalto.gov.br/ccivil_03/leis/18666cons.htm.

⁵⁹ “Manifestações foram realizadas em 388 cidades do país.,” *UOL*, June 21, 2013, <https://noticias.uol.com.br/ultimas-noticias/agencia-estado/2013/06/21/manifestacoes-foram-realizadas-em-388-cidades.htm>.

⁶⁰ “Manifestações de ‘Junho de 2013’ Completam Cinco Anos: O Que Mudou?,” *Globo*, June 20, 2018, <https://revistagalileu.globo.com/Revista/noticia/2018/06/manifestacoes-de-junho-de-2013-completam-cinco-anos-o-que-mudou.html>.

⁶¹ “5 anos depois, o que aconteceu com as reivindicações dos protestos que pararam o Brasil em junho de 2013?,” *BBC Brasil*, June 9, 2018, <https://www.bbc.com/portuguese/brasil-44353703>.

⁶² “Medida Provisória Nº 703, de 2015,” Pub. L. No. 703, de 2015, accessed May 24, 2023, <http://www.senado.leg.br/atividade/rotinas/materia/getPDF.asp?t=186529&tp=1>.

Another important historical event that impacted the public's perception of corruption in Brazil was Operation Car Wash, started in 2014, before the regulation of the 2013 Anti-Corruption Law. According to Costa et al.⁶³, the Car Wash Operation interrupted a national historical pattern in which corruption revelations did not result in Punishments and "[...] challenged the long Brazilian tradition of impunity for the rich and powerful"⁶⁴.

According to the information available at the Federal Public's Prosecutor Office⁶⁵, the operation resulted in 553 indictments, BRL 4.3 billion in restitution to the public's treasuries, and BRL 14.7 billion of estimated restitutions. Operation Car Wash also led to the arrest of several politicians and of the directors of the biggest infrastructure and construction companies in Brazil, which was unprecedented in Latin America⁶⁶.

Although several studies pointed to serious problems involving due process during Operation Car Wash and its negative impact on companies in critical economic sectors⁶⁷, some scholars, which understanding is perfectly exemplified by Bullock and Stephenson⁶⁸, defended that the operation represented more than an anti-corruption investigation but a mindset against corruption and impunity in Brazil.

⁶³ Costa et. al, "Anticorruption Policies in Brazil and the Operation Car Wash: Institutional and Economic Analysis," in *Lessons of Operation Car Wash: A Legal, Institutional and Economic Analysis* (Woodrow Wilson International Center for Scholars, 2020), https://www.wilsoncenter.org/sites/default/files/media/uploads/documents/BI-09212020-Car%20Wash%20Report_v2.pdf.

⁶⁴ Ibid.

⁶⁵ Ministério Público Federal. "Resultados." Accessed 24 May 2023. <https://www.mpf.mp.br/grandes-casos/lava-jato/resultados>.

⁶⁶ "Brazil charges executives with corruption," *Financial Times*, July 24, 2015, <https://www.ft.com/content/272d4f92-321f-11e5-8873-775ba7c2ea3d>.

⁶⁷ Maria Virginia Nasser, "Estado Investidor e Governança" (São Paulo, Universidade de São Paulo, 2019), https://www.teses.usp.br/teses/disponiveis/2/2133/tde-04092020-173655/publico/3329238_Tese_Parcial.pdf.

⁶⁸ Bullock, Jessie W., and Matthew C. Stephenson. "How Should Lava Jato End?" In *Corruption and the Lava Jato Scandal in Latin America*, edited by Paul Lagunes and Jan Svejnar, 213-214. New York: Routledge, 2020.

Therefore, it is possible to conclude that the 2013 Brazilian Anti-Corruption Law was introduced in a scenario in which the public's perception of corruption and impunity rapidly shifted. The tolerance towards corruption decreased in the population, and anti-corruption operations defied the sense of impunity.

The context presentation does not intend to be comprehensive. This analysis aimed to provide a general picture of the Brazilian legal framework, as well as the main events at the time, to try and establish the conditions in which mechanisms would be successful and, therefore, explore in which cases the structure and mechanisms of the Brazilian policy might be replicated and generalized to generate similar results.

Considering this context, this research suggests the exploration of the leniency agreements for corruption control designed similarly to the Brazilian model in systems in which it is challenging to hold legal entities civil and criminally liable for corrupt acts. In this context, leniency agreements can be used to promote asset recovery.

3.2. The policy design of the Brazilian leniency agreements for corruption control and exploration of the data available on the agreements

The 2013 Anti-Corruption Law⁶⁹ was published in the Brazilian Federal Gazette on August 2nd, 2013, and entered into force on January 30, 2014, 180 days after its publication. Despite its popular name (e.g., the Brazilian Anti-Corruption Law), it has a limited scope. It only

⁶⁹ Brazilian Anti-Corruption Law (2013), https://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2013/Lei/L12846.htm.

provides rules for legal entities' administrative and civil liability for corrupt acts against Brazilian and foreign public administration⁷⁰.

In its first two articles, the Anti-Corruption Law overcame some of the main gaps in the Brazilian legal framework by instituting administrative and civil liability of legal entities for corrupt acts against foreign governments, as well as against the Brazilian public administration, and by institutionalizing the strict civil and administrative liability for legal entities for corrupt practices that were of interest or beneficial for the legal entities.

The introduction of strict civil liability is crucial because it allows for its imposition regardless of the defendant's intent to cause harm or their reasonable care⁷¹ (i.e., can be imposed without proving "fault"), thus facilitating the payment of restitution, as well as fines, applied to legal entities due to corrupt behavior.

In the 2013 Anti-Corruption Law, the acts of corruption were defined as acts against national or foreign public assets, against the principles of the public administration, or against national agreements in which Brazil is a party, and listed as follows:

- i. promising, offering, or giving, directly or indirectly, an undue advantage to a public official or a third party related to him (i.e., bribery);
- ii. frustrating or defrauding, through adjustment, combination, or any other practice, the competitive nature of a public bidding procedure (i.e., bid-rigging);
- iii. preventing, disturbing, or defrauding the performance of any act of a public bid proceeding or contract.

⁷⁰ The law defined foreign Public Administration as organs and state entities or diplomatic representations of a foreign country, of any level or sphere of government, as well as legal entities controlled, directly or indirectly, by a foreign country (article 5, paragraph 1). For the purposes of the law, international organizations were equated to foreign public administration (article 5, paragraph 2), which lead to the conclusion that the provisions of the law would also be applicable to corrupt acts of legal entities against international organizations.

⁷¹ "Strict Liability," n.d., <https://doi.org/10.1093/oi/authority.20110803100537286>.

- iv. hindering investigation or inspection activities by public agencies, entities, or agents or intervening in their activities.
- v. financing, funding, sponsoring, or in any way subsidizing the practice of illicit acts foreseen in the 2013 Brazilian Anti-Corruption Law;
- vi. use an individual or individuals or legal entity to hide or disguise its real interests or the identity of the beneficiaries of the acts performed.

The 2013 Anti-Corruption Law also established the possibility of holding legal entities administratively liable through a specific administrative procedure also instituted by the Law, called "PAR". This procedure might result in substantial monetary penalties for the company.

According to Article 6 of the 2013 Brazilian Anti-Corruption Law, the administrative penalties for legal entities that practice the crimes laid down in the Law are (i) a fine in the amount of 0.1% to 20% of the gross revenue of the legal entity in the last fiscal year before the beginning of the administrative process, which could never be less than the advantage gained from the corrupt act, when it is possible to estimate it⁷²; or (ii) extraordinary publication of the condemnatory decision in a newspaper of high circulation.

As established in Article 7, the penalties should be applied considering: (i) the severity of the infraction; (ii) the advantages obtained or intended by the infraction; (iii) the consummation or not of the infraction; (iv) the degree of injury or danger of the infraction; (v) the negative effect produced by the infraction; (vi) the economic status of the violator, and the (vii) the degree of cooperation of the legal entity during the investigations. Specific provisions on how the Public Administration should impose the fines are laid down in the regulatory decrees of the Anti-

⁷² In cases in which it is not possible to use the gross revenue of the legal entity, the penalty should be between BRL 6,000.00 and BRL 60,000.00 (article 6, paragraph 4).

Corruption Law (Federal Decrees #8420/2015⁷³ and #11.129/2022⁷⁴). These penalties, however, do not exclude the obligation of the company to restitute damages caused by the corrupt activities, which would be collected through a judicial procedure.

There are also provisions instituting substantial penalties for legal entities that can only be applied by the judiciary, namely: (i) forfeiture of assets, rights, or values that represent an advantage or profit directly or indirectly obtained from the infraction (article 19, I); (ii) suspension or partial interdiction of the legal entities activities (article 19, II); (iii) compulsory dissolution of the legal entity (article 19, III)⁷⁵; and (iv) prohibition against receiving incentives, subsidies, grants, donations or loans from public agencies or entities, and public financial institutions, or those controlled by the public administration, for a minimum period of one and a maximum of five years (article 19, II).

As for the leniency agreements for corruption control, the 2013 Brazilian Anti-Corruption Law provides that agreements can lead to a 2/3 reduction of fines calculated in the terms provided in Article 6, an exemption of the publication of a condemnatory decision, and an exemption from the prohibition against receiving incentives, subsidies, grants, donations or loans from public agencies or entities (article 16, paragraph 2).

By analyzing these provisions, it is possible to conclude that despite including the possibility of entering into leniency agreements, the 2013 Brazilian Anti-Corruption law straightened the framework for holding legal entities liable for corruption, thus increasing the accountability for

⁷³ Regulation of the 2013 Brazilian Anti-Corruption Law (2015), https://www.planalto.gov.br/ccivil_03/ Ato2015-2018/2015/Decreto/D8420impressao.htm.

⁷⁴ Regulation of the 2013 Brazilian Anti-Corruption Law (2022), https://www.planalto.gov.br/ccivil_03/ Ato2019-2022/2022/Decreto/D11129.htm#art70.

⁷⁵ According to the 2013 Brazilian Anti-Corruption Law the compulsory dissolution of the legal entities can only be applied when it is proven that: (i) the legal entity has been used customarily to facilitate or promote the practice of illicit acts; or (ii) it has been constituted to conceal or disguise illicit interests or the identity of the beneficiaries of the acts performed.

these entities without changing the criminal, administrative and civil penalties applicable for public agents or individuals also responsible for corrupt activities. Hence, it can be inferred that the Brazilian leniency agreements cannot be understood as a policy that strengthened leniency and reduced sanctions for both parties, which according to the mechanism proposed by Berlin, Qin, and Spagnolo⁷⁶, would lead to its failure.

The 2013 Brazilian Anti-Corruption Law also establishes that leniency agreements should be proposed by legal entities responsible for the practice of the corrupt acts established by the Law and executed/signed by the highest authority of each public agency or entity, provided that such collaboration results in (i) the identification of the others involved in the infraction, when applicable; and (ii) the timely provision of information and documents that prove the illicit act under investigation (article 16).

Following the framework established by the 2013 Anti-Corruption Law, Public Administration can only enter into leniency agreements for corruption control with legal entities. There are also three cumulative conditionalities for the use of the agreements, the legal entity has to: (i) be the first one to cooperate with the investigation of the corrupt activity (article 16, paragraph 1, I); (ii) terminate its involvement in the corrupt activity entirely from the date the company proposes the leniency agreements for the public authorities (article 16, paragraph 1, II); and (iii) admit the corrupt wrongdoing and fully cooperate with the investigation (article 16, paragraph 1, III).

Although the signing of leniency agreements proposed by legal entities depends on the arbitrary decision of the public administration, which is evident in various provisions of the Law that

⁷⁶ Berlin, Qin, and Spagnolo, “Leniency, Asymmetric Punishment and Corruption.”

use the term "*can enter into leniency agreements*", Brazilian legal framework has explicit provisions establishing specific conditions for entering into agreements with the public administration and terms for the collaboration.

There are also documents on CGU's website with explanations and guidelines on how to enter into leniency agreements, how the amount of the fines will be calculated, and a compilation of all the laws and regulations regarding the use and instrumentalization of the leniency policy⁷⁷.

In conclusion, despite the discretionary power of the public administration, the Brazilian legal framework has effectively established rules for engaging in leniency agreements. These rules align with Lambsdorff and Nell's⁷⁸ mechanism, which suggests using *ex-ante* leniency agreements provided by laws and regulated to dismantle corrupt collusion.

One possible indicator of the effectiveness of the Brazilian leniency agreements for corruption control is the number of leniency agreements proposed and signed/executed since the regulation of the 2013 Anti-Corruption Law in 2015. According to the information made available by CGU⁷⁹:

- i. 84 proposals for leniency agreements were received.
- ii. 25 leniency agreements were signed between the Federal Government and legal entities;
- iii. 32 proposals were terminated without the signing of leniency agreements;
- iv. 21 proposals for leniency agreements are currently being negotiated.

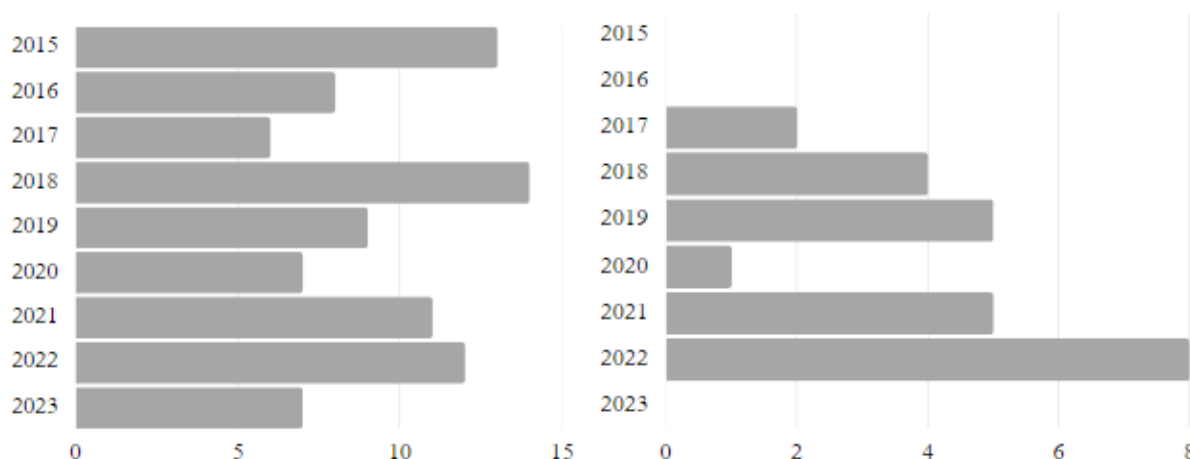
⁷⁷ "Acordo de Leniência," Controladoria-Geral da União, accessed June 1, 2023, <https://www.gov.br/cgu/pt-br/assuntos/integridade-privada/acordo-leniencia>.

⁷⁸ Johann Graf Lambsdorff and Mathias Nell, "Fighting Corruption with Asymmetric Penalties and Leniency."

⁷⁹ Controladoria-Geral da União, "Painel Acordo de Leniência."

As for the distribution of the agreements over the years, although the number of agreements proposed and signed each year varied, it is possible to observe that since its regulation, the leniency policy kept being proposed by the legal entities and used by the Brazilian Federal Government, as seen in the graph below:

Graph 1- Number of leniency agreements proposed by legal entities (left) and signed (right) by the Brazilian Federal government each year.



Source: Graph plotted with the information available on "Painel Acordos de Leniência"⁸⁰

Moreover, due to the news articles written and published by CGU, listed in Annex I, it is also possible to infer the motivation that led to the proposition of leniency agreements. According to news articles:

- i. 9 out of 25 companies spontaneously self-reported;
- ii. 3 out of the 9 companies that spontaneously self-reported mentioned that the initiative was taken after an M&A operation and, thus, a change in control in the company;

⁸⁰ Controladoria-Geral da União.

- iii. 13 out of the 25 companies that proposed the leniency agreements were being investigated by the Brazilian Federal Police; and
- iv. 8 out of the 13 companies were being investigated in Operation Car Wash.

Considering this information, besides studying the effectiveness of *ex-ante* leniency agreements, this study suggests exploring other mechanisms that might lead to the initiative of proposing leniency agreements, such as police investigations of corrupt activities and corporate M&As, as well as changes in the companies' administration.

As for the legal entities with attribution to propose leniency agreements, the provisions of the 2013 Anti-Corruption Law would apply to all companies, whether incorporated or not, regardless of the type of organization or corporate model adopted, as well as to any foundations, associations of entities or persons (article 1, sole paragraph). The Law also provided that it could apply to foreign companies which have their head office, branch, or representation in Brazilian territory, incorporated in fact or Law, even if temporarily (article 1, sole paragraph).

Despite these provisions, the data available shows that all the legal entities that signed leniency agreements were corporations. The profile of the corporations is also important. 72% of the agreements involved companies registered in Brazil, and 28% with companies registered abroad. Moreover, it is noticeable just by looking at the list of companies that entered into leniency agreements with the public administration that more than 75% of the companies are well-known multinational companies and arguably one of the biggest in their fields⁸¹.

⁸¹ Controladoria-Geral da União, “Painel Acordo de Leniência.”

The fields in which these corporations operate are also important economic sectors, namely construction, petrol and gas, food processing, aviation, car manufacture, car rental, tourism, technology, and pharmaceuticals. There is also a high concentration of companies (48%) in the construction and petrol & gas sectors (12%)⁸².

Although it is possible to speculate why companies belonged to a specific economic sector, given the focus of the federal police investigations at the time of the proposition of the agreements⁸³, why the public administration only entered into leniency agreements with corporations, most of which are multinational companies needs to be explored further. Some aspects, such as access to specialized legal assistance, the public administration's will and discretion to enter into the agreements, and the type of corruption being investigated at the time, might also come into play⁸⁴.

Another important aspect of the analysis results is the potential leniency agreements have to generate substantial restitution and penalties for the public administration. According to provisions of the 2013 Anti-Corruption Law, by entering into leniency agreements, the legal entities accept strict liability and agree to pay, in installments, the amount owed in restitution (i.e., damages and the return of profits derived from the corrupt activity) and penalties.

Another crucial aspect regarding the enforcement and compliance with the Law pertains to the legal status of leniency agreements. These agreements are executive titles, simplifying the process for public authorities to enforce the payment of owed amounts. In this context, there is

⁸² Companies that work with ship construction, paint production, and construction for the energy sector were considered under the “construction sector”.

⁸³ The Operation Car Wash investigated frauds in public contracts in the construction sector and involving Petrobras (i.e., a semi-public owned company in the Petrol and Gas sector), which can explain the high concentration of companies in the field of construction and oil and gas.

⁸⁴ Although it is possible to verify the corporations that successful entered into leniency agreements, the information on the legal entities that proposed leniency agreements is confidential.

no need to establish proof of damages, as the judiciary's role is primarily to execute assets to collect restitution and penalties agreed upon in the agreements. This streamlined approach facilitates the implementation of leniency agreements and expedites the recovery of funds by the relevant authorities.

The existing data on the signed leniency agreements reinforce the potential effectiveness of restitution through this mechanism. The cumulative value of these agreements stands at BRL 18,303,789,248.17⁸⁵ (around USD 4 billion). This substantial sum reveals the considerable amount of funds being returned due to these agreements.

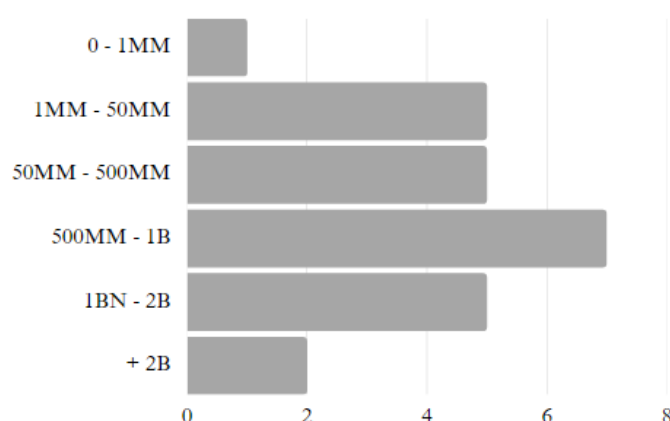
Of the total amount, around BRL 15,339,058,535.72 (around USD 3,75 billion) are owed in restitutions, and BRL 2,004,511,364.63 (around USD 444 million) are owed due to the penalties laid down in the 2013 Anti-Corruption Law. Some agreements also include penalties derived from the 1998 Administrative Improbity Law⁸⁶.

As it is possible to observe in the data below, the leniency agreements are being used mainly for grand corruption cases. 7 out of the 25 agreements involve values between BRL 500 Million and BRL 1 Billion, 5 out of the 25 agreements involve values between BRL 1 Billion and BRL 2 Billion, and two agreements involve values bigger than BRL 2 Billion:

⁸⁵ Controladoria-Geral da União, “Painel Acordo de Leniência.”

⁸⁶ This data was compiled considering mainly the information available on CGU's dataset called “Acordos de Leniência”. When the information was not available in the dataset, the content of the redacted leniency agreements was checked.

Graph 2 - Number of leniency agreements per monetary value



Source: Graph plotted with the information available on "Painel Acordos de Leniência"⁸⁷

Regarding compliance with the agreements, data shows that BRL 8,733,931,763.91 (around USD 1,750,286,926.45) were already paid to the proper authorities. Moreover, 4 out of 25 agreements were fully complied with⁸⁸, and only one was terminated due to the lack of payment of the installments⁸⁹.

The mechanisms that led to the use of the Brazilian leniency agreements primarily for grand corruption also need to be further explored, especially considering the lack of provisions in the 2013 Anti-Corruption Law and its regulations on the size of the cases. Again, the will of the public administration to enter into these agreements and what corruption cases are being investigated might be influencing the monetary value of the leniency agreements.

Another important result observed in the data is the nature of the reported corrupt practices. Although the detailed description of the illegal activities is confidential, by compiling the information in the news articles, redacted leniency agreements, and information made available

⁸⁷ Controladoria-Geral da União, "Painel Acordo de Leniência."

⁸⁸ "Acordo de Leniência," Controladoria-Geral da União, accessed June 1, 2023, <https://www.gov.br/cgu/pt-br/assuntos/integridade-privada/acordo-leniencia>.

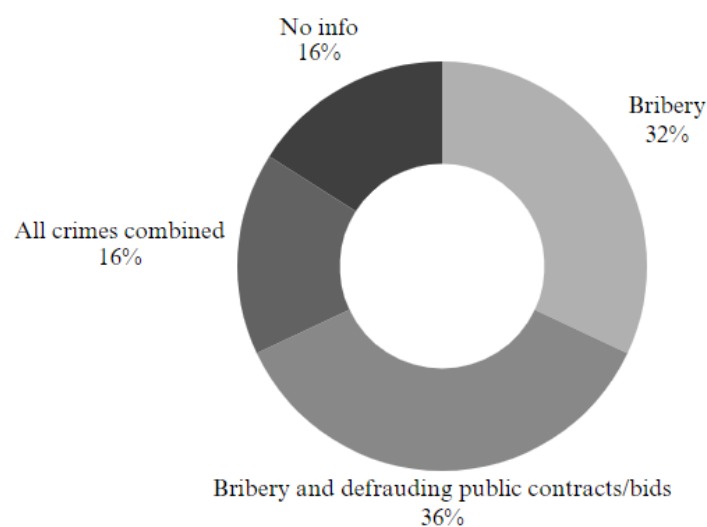
⁸⁹ The termination of the agreement was suspended until the judgement of the appeal made by the company.

on the American Department of Justice website listed in Annex I, it was possible to conclude that at least 21 out of the 25 leniency agreements involved continued corrupt practices. For the remaining 4 (four) agreements, there was no information on whether the corrupt acts were continuous or occasional.

The "continued" nature of the corrupt activities was inferred due to mentions of bribery and defrauding of multiple public contracts/bids in the same organs and institutions, references to illicit activities in a specific period of time, usually over the years, and mentions of hundreds of public agents and legal entities involved in the corruption schemes.

The analysis of the data available also showed that the crimes included in the leniency agreements were complex corruption schemes that combined multiple corrupt acts. As seen in the graph below, 16% of the leniency agreements involved a combination of all the corruption acts listed in the 2013 Anti-Corruption Law, and 36% of the agreements involved both bribery and defrauding of public contracts:

Graph 3 - Corrupt acts involved in the leniency agreements



Source: Graph plotted with the information listed in Annex I.

For the analysis of this data, it is important to refer to the causal mechanism proposed by Buccirosi and Spagnolo⁹⁰, which suggests that the use of moderate leniency agreements, as the ones established by the 2013 Brazilian Anti-Corruption Law⁹¹, would successfully deter continued corruption, but might lead to the exploitation of leniency agreements as a tool for enforcing on-off occasional illegal interactions.

Although the data does not allow for the analysis of the exploitation of leniency agreements in one-off cases, there is a noticeable trend towards using leniency agreements for complex continued corruption acts, which this study suggested should be explored in future research.

As for Luz and Spagnolo's mechanism of need for legal harmonization of administrative, civil, and criminal penalties and liabilities⁹², following the international guidelines established by UNCAC, the 2013 Brazilian Anti-Corruption Law establishes that the liability of the legal entities did not exclude the liability of its managing officers and other individuals that were responsible or participated in the corrupt activity (article 3).

There are also provisions explicitly establishing that the application of the 2013 Anti-Corruption Law does not exclude the attributions of the Brazilian Antitrust bodies and institutions with attribution to investigate economic crimes and infractions (article 29), which included bid-rigging practices and the penalties established by the 1992 Administrative Improbability Law and the Brazilian Public Procurement Laws.

⁹⁰ Buccirosi and Spagnolo, "Leniency Policies and Illegal Transactions."

⁹¹ As seen in the description above, the 2013 Brazilian Anti-Corruption Law establishes that leniency agreements might lead to an exemption of certain punishments and partial exemption of fines. According to the literature, the establishments of exemptions without the provisions of rewards for self-reporting categorizes a moderate leniency agreement.

⁹² Luz and Spagnolo, "Leniency, Collusion, Corruption, and Whistleblowing."

The possibility of being punished by other entities might lead to a lack of reporting of bid-rigging schemes, as per the mechanism laid down by Luz and Spagnolo⁹³. The ample scope of attribution of the Brazilian Public Prosecutors Office and the Brazilian Court of Accountants discussed in the context might also lead to the lack of reporting of other corrupt acts, which should be investigated further.

One last consideration when harmonizing the Brazilian legal system is the whistleblower protection mechanism introduced in 2020. This mechanism provides that any individual that reports criminal activities perpetrated against the public administration deemed reasonable by the public authorities might be rewarded: (i) complete protection against retaliation of public authorities; (ii) exemption from civil or criminal liability concerning a report made in good faith; and (iii) preservation of anonymity. In addition, the Law established the possibility of a reward to the whistleblower for up to 5% of the recovered amount when the information resulted in the recovery of goods stolen from the government. (article 4 of the Federal Law # 13.608/2018).

Before introducing the mechanism in 2020, individuals could collaborate in criminal investigations through a proceeding called "colaboração premiada" in exchange for a reduction of the criminal penalty that would be appreciated during the judicial proceedings by a judge.

According to the mechanism suggested by Abbink and Wu⁹⁴, the introduction of self-report mechanisms both for individuals and public agents, combined with the leniency agreement for legal entities, would be effective in deterring bribes being exchanged and corrupt favors being

⁹³ Luz and Spagnolo.

⁹⁴ Abbink and Wu, "Reward Self-Reporting to Deter Corruption."

granted, especially in situations in which the parties are uncertain whether they would meet in the future.

In conclusion, the preliminary results show that the Brazilian leniency agreements for corruption have been actively employed since their regulation, particularly by multinational corporations, and demonstrated initial positive results regarding their effectiveness in promoting the restitution of public funds and dismantling continued grand corruption schemes.

Conclusions and Recommendations

The general context and the legal framework explored in this research reveal the challenges identified in the Brazilian legal system for the accountability of legal entities for corrupt activities. Prior to the enactment of the 2013 Anti-Corruption Law, difficulties arose from the absence of criminal liability for legal entities involved in corrupt acts and the complexities associated with proving the companies' civil liability in court.

At the time, there was also a gap in the Brazilian legal framework in the provision of liability for legal entities for corrupt acts against foreign public administration. Combined with growing civil unrest regarding public corruption, these factors further emphasized the need for the approval of the 2013 Anti-Corruption Law.

In 2013, the Brazilian Anti-Corruption Law introduced to the legal system the concept of strict liability for legal entities for the damages caused to the national and foreign public administration. The implementation of the framework of leniency agreements by the 2013 Law allowed for a reduction or exemption of the penalties in exchange for proving information regarding the corrupt acts and other parties involved (if applicable).

Based on the policy design presented in this work, it was concluded that the Brazilian leniency agreements for corruption control: (i) can only be used by legal entities; (ii) aim to recover damages and illicit profits resulting from corrupt acts, evident through their legal status as executive titles, the requirement of strict liability and mandatory payment of damages and illegal profits.

Regarding the existing literature on the use of leniency agreements in the context of corruption, it can be concluded that Brazilian leniency agreements, considering the analysis framework

presented in Table 1: (i) are moderate, providing only partial exemption or reduction of certain penalties, (ii) lack asymmetrical criminal sanctions for bribery, (iii) is well-defined by laws and regulations, allowing their execution before and during investigations, (iv) reinforce the liability of legal entities in general; (v) do not preclude other investigative bodies from examining the same practices (e.g, Antitrust organ., Brazilian Federal Court of Accountants, Public Prosecutor's Office s), and (vi) are part of a framework that allows both individuals and legal entities to self-report corrupt activities.

Regarding the findings, this analysis revealed that the leniency agreements model, implemented under the 2013 Anti-Corruption Law, effectively dismantled corrupt acts in a minimum of 25 cases. 19 out of the 25 cases agreements involved grand corruption cases with total values varying from BRL 50 Million and BRL 2.2 Billion.

Moreover, it was observed that 84% of the cases involved continued corrupt acts and 52% complex schemes involving at least two corrupt acts established in the 2013 Anti-Corruption Law. The findings of this study highlight the necessity of examining the mechanisms for the predominant use of Brazilian leniency agreements in dismantling persistent grand corruption schemes involving multinational corporations, as opposed to addressing cases of petty corruption or isolated instances of corrupt behavior.

Additionally, data revealed that in three out of the 25 signed leniency agreements companies mentioned mergers and acquisitions as reasons for self-reporting. In other cases, it was inferred that corporations self-reported due to their involvement in anti-corruption police investigations. This study also suggests to explore further the motives for companies to seek to propose leniency agreements.

In Brazil, one of the main outcomes of the implementation of leniency agreements was the substantial amounts recovered by the state in the form of restitutions and penalties. At this moment, BRL 18 Billion is owed to the Brazilian public administration from already signed leniency agreements, while more than BRL 4 Billion have already been restituted, indicating its potential use as an asset recovery mechanism.

Despite the indications of the successful use of leniency agreements to dismantle some grand corruption operations and recovering public assets, the extent to which leniency agreements may help to increase the accountability of legal entities and corruption control in Brazil is harder to assess, given the lack of data on the total amounts generally involved in grand corruption cases and the amounts previously collected in restitutions due to corrupt procedures.

Nevertheless, Brazilian leniency agreements represent a potentially successful non-criminal asset recovery tool that seems to present better results to dismantle continuous corrupt schemes. In this sense, this study suggests further analysis on the use of leniency agreements as a tool for improving civil liability of corrupt legal entities in countries with legal frameworks similar to Brazil.

With the structure and results of the Brazilian leniency policy for corruption in mind, a possible hypothesis that may be employed in future studies on the effectiveness of leniency agreements as anti-corruption tools is that moderate leniency policies properly laid down in laws and regulations, and that demand the payment of restitutions and improve the conditions for holding companies liable for corrupt acts, might be successful initiatives of public asset recovery.

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Annex I – Data and Documents Consulted and Analyzed

Date of access	Type of document	Source/Repository	Link
May 31 2023	Dataset	CGU / Brazil Open Data	https://portal.datatransparencia.gov.br/download-de-dados/acordos-leniencia/20230527
May 31 2023	Dataset	CGU / Brazil Open Data	https://dadosabertos-download.cgu.gov.br/CGUPJ/CGUPJ.csv
May 31 2023	Dataset	CGU /CGU Website	https://app.powerbi.com/view?r=eyJrIjoiZTU2MWI0MjYtY2EzOS00NzYyLTg3MWQtYWE3MmFiMmY0ODM4IiwidCI6IjY2NzhkOWZILTA5MjEtNDE3ZC04NDExLTVmMWMxOGRlZmJiYiJ9
31 May 2023	Redacted leniency agreements	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/integridade-privada/acordo-leniencia/acordos-celebrados
May 31 2023	News article	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/noticias/2022/12/cgu-e-agu-celebram-acordo-de-leniencia-no-valor-de-r-583-milhoes-com-empresa-de-processamento-de-alimentos
May 31 2023	News article	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/noticias/2022-periodo-eleitoral/cgu-e-agu-celebram-acordo-de-leniencia-de-r-14-milhoes-com-a-empresa-gol-linhas-aereas-inteligentes-s-a
May 31 2023	News article	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/noticias/2022/05/cgu-e-agu-celebram-acordo-de-leniencia-de-r-110-milhoes-com-empresas-relacionadas-ao-grupo-hypera-s-a
31 May 2023	News article	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/noticias/2022/12/cgu-e-

Date of access	Type of document	Source/Repository	Link
			agu-assinam-acordo-de-leniencia-com-a-keppel-offshore-marine
May 31 2023	News article	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/noticias/2022/12/cgu-e-agu-celebram-acordo-de-leniencia-de-r-74-3-milhoes-com-empresas-do-setor-de-turismo
May 31 2023	News article	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/noticias/2022/12/cgu-e-agu-celebram-acordo-de-leniencia-de-r-14-5-milhoes-com-empresa-de-tecnologia
May 31 2023	News article	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/noticias/2022/04/cgu-e-agu-celebram-acordo-de-leniencia-de-r-109-milhoes-com-empresas-por-ilicitos-na-coleta-de-lixo-hospitalar-em-unidades-de-saude
31 May 2023	News article	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/noticias/2022/12/cgu-e-agu-assinam-acordo-de-leniencia-com-a-uop-llc
31 May 2023	News article	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/noticias/2021/10/cgu-e-agu-assinam-acordo-de-leniencia-com-a-rolls-royce-plc
May 31 2023	News article	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/noticias/2021/06/cgu-e-agu-celebram-acordo-de-leniencia-de-r-86-milhoes-com-empresas-por-ilicitos-em-projeto-com-a-petrobras
May 31 2023	News article	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/noticias/2021/02/leniencia-cgu-agu-e-mpf-celebram-acordo-com-a-samsung-heavy-industries
May 31 2023	News article	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/noticias/2021/06/cgu-e-agu-celebram-acordo-de-leniencia-

Date of access	Type of document	Source/Repository	Link
			com-as-empresas-sicpa-e-ceptis-no-valor-de-r-762-milhoes
May 31 2023	News article	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/noticias/2021/10/cgu-e-agu-assinam-acordo-de-leniencia-com-statkraft-energias-renovaveis-s-a
31 May 2023	News article	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/integridade-privada/acordo-leniencia/acordos-firmados/CarRental.pdf
31 May 2023	News article	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/noticias/2019/07/cgu-divulga-acordo-de-leniencia-firmado-com-a-braskem-s-a
31 May 2023	News article	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/noticias/2019/07/cgu-e-agu-celebram-acordo-de-leniencia-com-a-camargo-correa
31 May 2023	News article	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/noticias/2019/11/cgu-e-agu-assinam-acordo-de-leniencia-com-nova-participacoes-s-a
31 May 2023	News article	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/noticias/2019/11/cgu-e-agu-assinam-acordo-de-leniencia-com-grupo-oas
May 31 2023	News article	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/noticias/2019/06/cgu-agu-mpf-e-doj-firmam-primeiro-acordo-de-leniencia-global-no-ambito-da-lava-jato
May 31 2023	News article	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/noticias/2018/12/cgu-e-agu-assinam-acordo-de-leniencia-de-r-1-49-bilhao-com-a-andrade-gutierrez

Date of access	Type of document	Source/Repository	Link
May 31 2023	News article	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/noticias/2018/04/cgu-e-agu-assinam-acordo-de-leniencia-com-as-agencias-mullenlowe-e-fcb-brasil
May 31 2023	News article	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/noticias/2018/07/acordo-de-leniencia-com-a-odebrecht-preve-ressarcimento-de-2-7-bilhoes
May 31 2023	News article	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/noticias/2018/07/acordo-de-leniencia-com-a-sbm-offshore-ressarcira-r-1-22-bilhao-a-petrobras
31 May 2023	News article	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/integridade-privada/acordo-leniencia/acordos-firmados/bilfinger.pdf
31 May 2023	News article	CGU /CGU Website	https://www.gov.br/cgu/pt-br/assuntos/noticias/2017/07/cgu-e-agu-assinam-acordo-de-leniencia-com-o-utc-engenharia
May 31 2023	News article	CGU /CGU Website	https://www.justice.gov/opa/pr/gol-linhas-reas-inteligentes-sa-will-pay-over-41-million-resolution-foreign-bribery
May 31 2023	News article	US Department of Justice	https://www.justice.gov/opa/pr/samsung-heavy-industries-company-ltd-agrees-pay-75-million-global-penalties-resolve-foreign
May 31 2023	News article	US Department of Justice	https://www.justice.gov/opa/pr/honeywell-uop-pay-over-160-million-resolve-foreign-bribery-investigations-us-and-brazil