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A Theoretical Discussion Regarding the Brazilian Leniency Agreement as an Instrument for Revealing Corrupt and Fraudulent Acts

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INTRODUCTION

In compliance with the Organization for Economic Co-operation and Development's (OECD) "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions", Brazilian President Dilma Rouseff signed Law nº 12,846, on August 1st, 2013 (the Corporate Liability Law – CLL, unofficially called Brazilian Anti-Corruption Law). Brazil enacted this law in order to strengthen the institutional environment of curbing corruption within the country, responding to the public's demand for increasing government transparency and integrity, and filling the existing gap concerning the liability on corporations for corrupt acts committed by their employees or agents.

The Anti-Corruption Law was influenced by the Brazilian Competition Law (Law nº 12,529, of November 11st, 2011). Similar to the competition law, the anti-corruption legal regime enables private companies to collaborate with the government to identify the entities involved in an offence and obtain information and documents related to the illegal act. In both statutes, the instrument is recognized as the *leniency agreement*.

Recently, Brazilian President Dilma Rouseff enacted Decree nº 8,420/2015, which lays down the provisions needed to implement Law nº 12,846/2013. This decree emerged as a response to the overall discontentment of the population with the recurring scandals involving government corruption, especially the outrages committed within one of the largest companies in the country: the *Petrobras – Petróleo Brasileiro SA*.[1]

The administration of Law nº 12,846/2013 and Decree nº 8,420/2015 has been a subject of fierce debate and controversy in Brazil. One of the main divergences is precisely concerning the execution of the leniency agreements, especially regarding the competence of

[1] "Dilma anuncia pacote anticorrupção em resposta às manifestações". Pragmatismo Político. March 18th, 2015. http://www.pragmatismopolitico.com.br/2015/03/dilma-anuncia-pacote-anticorrupcao-em-resposta-as-manifestacoes.html

public bodies involved in the administrative and judicial proceedings and the effects of these agreements, especially the ones executed by the *Controladoria-Geral da União* (Office of the Comptroller General). Thus, because the leniency agreement is a new facet of the Brazilian anti-corruption system, many questions remain unanswered.

There is no practical evidence of the effectiveness of this instrument so far, because the law is recent and the *Controladoria-Geral da União* has just signed the first leniency agreements. For this reason, this paper addresses a theoretical approach in order to contribute to the current debate, discussing the effectiveness of the leniency agreement as an instrument for revealing corrupt and fraudulent acts in Brazil. This analysis will focus mainly on assessing the strength of each sanction and the attractiveness of the correspondent exemption or reduction. Additionally, the paper will provide an assessment of other contingencies established by the law.

The first chapter will discuss the concept and consequences of corruption through a theoretical perspective and present the main instruments that address corruption internationally. The second chapter will introduce the Brazilian Anti-Corruption Law, and the third will discuss the features of the Brazilian disclosure program. The fourth chapter will concentrate on the characteristics of the disclosure program in United States, and the following chapter will present a comparison between both programs, discussing, finally, the effectiveness of the Brazilian program. In the conclusion, the paper will address a recommendation in order to reinforce the Brazilian regime.

CORRUPTION: A MATTER OF INTERNATIONAL CONCERN

As stated by the United Nations Office on Drugs and Crime (UNODC)[2]:

> *Corruption is a complex social, economic and political phenomenon which affects all countries around the globe. In different contexts, corruption harms democratic institutions, slows economic development and contributes to political instability. Corruption attacks the foundations of democratic institutions by distorting electoral processes, perverting the rule of law and subtracting bureaucracy of its legitimacy. This discourages investment and the creation and development of businesses, which cannot afford the 'start-up costs' required because of corruption.*
>
> *The concept of corruption is wide, including bribes and kickbacks, fraud, misappropriation of funds or any other diversion of funds by a public agent. Moreover, it can involve cases of nepotism, extortion, trading in influence, use of privileged information for personal purposes and selling of judicial sentences, among other practices.*

Corruption is a complex phenomenon, and its roots lie deep in bureaucratic and political institutions. According to the World Bank, although costs may vary and systemic corruption may coexist with strong economic performance[3], corruption represents a critical obstacle to development, growth, and the effective functioning of the rule of law.[4]

Corruption is an indication that something has gone wrong in the management of the state. Organizations designed to govern the interrelationships between the citizen and the state are used instead for personal enrichment and the provision of benefits to corrupt. The price mechanism, so often a source of economic efficiency and a contributor to growth, can destabilize the legitimacy and effectiveness of government in the form of bribery.[5]

From an economic point of view, corruption can distort capital flows from their intended purpose and deplete national wealth. It can erode macroeconomic stability, hinder the

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[2] United Nations. Office on Drugs and Crimes. "UNODC and Corruption". http://www.unodc.org/lpo-brazil/en/corrupcao/index.html.

[3] World Bank. "Helping Countries Combat Corruption: The Role of the World Bank". http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm.

[4] Tina Søreide. *Drivers of Corruption: A Brief Review*. Washington, DC: World Bank. 2014. https://openknowledge.worldbank.org/handle/10986/20457.

[5] Susan Rose-Ackerman. *Corruption and government: causes, consequences and reform* (Cambridge: Cambridge University Press, 2006), p. 9.

development of fair market structures, and spur inequality. Finally, it can reduce the effectiveness of public administration and distort public expenditure decisions by deviating resources to corruption-prone sectors or to personal enrichment.[6]

From a sociopolitical perspective, corruption alters the principles of trust that support democratic institutions, hindering the development of a strong civil society. It can be seen as a cancer that "undermines efforts to combat poverty and wastes the scarce resources of the international aid community".[7]

Corruption produces inefficiency and unfairness in the distribution of public benefits and costs. It represents an evidence that the political system is operating with little concern for the broader public interest, indicating that the structure of government does not channel private interests effectively.[8]

Understanding how to eliminate – or even just reduce – corruption is a challenging task on many levels, which demand every sort of collaboration. Actually, corruption is not an issue of developing countries solely, but a matter of international concern. In this context, countries have been cooperating with one another in every aspects of the fight against corruption, including prevention, investigation, and the prosecution of offenders.

In these times of globalization, the United Nations (UN), the Organization of American States (OAS) and the Organization for Economic Co-operation and Development (OECD) have been playing a critical function. The following sections will address each of these organizations individually and the roles they play.

Inside the OAS area of action, the countries have signed the "Inter-American Convention against Corruption", on March 29th, 1996, in Caracas, Venezuela, making an

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[6] Tina Søreide. *Drivers of Corruption: A Brief Review*. Washington, DC: World Bank. 2014. https://openknowledge.worldbank.org/handle/10986/20457.
[7] Ibid.
[8] Susan Rose-Ackerman. *Corruption and government: causes, consequences and reform* (Cambridge: Cambridge University Press, 2006), p. 226.

"effort to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance".[9]

Within the OECD, the challenge to fight international corruption subsidized the conception of the OECD's "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions". On December 17th, 1997, the OECD's Convention was signed by the member states, with the addition of Brazil, Argentina, Bulgaria, Chile and Slovakia. This Convention permits member countries to move in a coordinated manner to adopt national legislation, making it a crime to bribe foreign public officials. It provides a broad definition of bribery, requiring countries to impose dissuasive sanctions, and committing them to providing mutual legal assistance. Under OECD guidance, a rigorous process of multilateral supervision began in April 1999 to monitor compliance with the Convention and assess the steps taken by countries to implement it in national law. The Convention entered into force in 1999, and, in Brazil, it was ratified on June 15th, 2000, and promulgated by Decree nº 3,678, on November 30th, 2000.[10]

Other important instrument that addresses corruption internationally is the "United Nations Convention against Corruption", which was approved in 2003 by the United Nations General Assembly.[11] With its entry into force on December 14th, 2005, the Convention became the first anti-corruption legal instrument to establish mandatory rules to the signatory countries, providing a path for the creation of a global response to a global problem.[12]

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[9] Organization of American States. "Inter-American Convention against Corruption". https://www.oas.org/juridico/english/treaties/b-58.html.

[10] Organization for Economic Co-operation and Development. "OECD Anti-Bribery Convention: Entry into Force of the Convention". https://www1.oecd.org/corruption/oecdantibriberyconvention.htm.

[11] United Nations. Office on Drugs and Crime. "United Nations Convention against Corruption". http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

[12] United Nations. Office on Drugs and Crime. http://www.unodc.org/lpo-brazil/en/corrupcao/marco-legal.html.

THE BRAZILIAN ANTI-CORRUPTION LAW

In compliance with the OECD's "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions", Brazilian President Dilma Rouseff signed Law nº 12,846, on August 1st, 2013 (the Corporate Liability Law – CLL, unofficially called Brazilian Anti-Corruption Law).[13] This law, which became effective on January 29th, 2014, introduces strict corporate liability and provides for a combination of administrative and civil sanctions against Brazilian and foreign companies with headquarters, branches or offices in Brazil.[14] The main role of this rule is the sanction of private companies for corruption practices against the public administration and civil servants. Unlike the previous regime, in which only the public agents were administratively penalized in such cases, there now exists an administrative legal framework capable of sanctioning both public and private actors for acts of corruption.[15] In this context, the new act embraces the concept of *strict liability*, which means that it is not necessary to prove the intent or guilt of the legal person, but only the misconduct itself.[16]

The Anti-Corruption Law contains a special provision on the fraudulent practices in public bidding and government procurement, since such procedures have represented a fermenting area of corruption outbreaks that leads to inefficient allocation and use of national resources.[17]

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[13] "Brazil's new anti-bribery act goes into effect in January 2014 - is your company ready?" December 2013. http://www.blankrome.com/index.cfm?contentID=37&itemID=3224.

[14] Ana Paula Martinez and Mariana Tavares Araújo. "What To Expect From Brazil's New Anti-Corruption Law", February, 2014. http://www.ethic-intelligence.com/experts/400-what-can-be-expected-from-brazil-s-new-anti-corruption-law/.

[15] Organization for Economic Co-operation and Development. 2014. "Fighting Corruption and Promoting Competition – Contribution from Brazil", Global Forum on Competition, February 27th and 28th, 2014. http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2014)48&docLanguage=En. – p. 2.

[16] "What is a strict liability course of action?" http://law.freeadvice.com/litigation/legal_remedies/strict-liability-cause-of-action.htm.

[17] Organization for Economic Co-operation and Development. 2014. "Fighting Corruption and Promoting Competition – Contribution from Brazil", Global Forum on Competition, February 27th and 28th, 2014.

According to the OECD, a positive development introduced by Law nº 12,846/2013 is the broadening of the arsenal available to the prosecution to encourage self-reporting and uncover foreign bribery.[18] The main new instrument is the *leniency agreement*, under which self-disclosure of corrupt practices and cooperation by corporations could result in a reduction by up to 2/3 of the applicable fine and immunity from other penalties.[19] Although the law refers to *leniency*, which could induce the thought of full exemption from sanctions, this possibility does not exist within the Brazilian anti-corruption system, as will be discussed in the following section. Additionally, the authority may afford the defendant lenient treatment even if there are no additional companies involved in the investigation.[20]

So far, in practice, there is no evidence of the effectiveness of this instrument in the anti-corruption field in Brazil. The law is recent and the *Controladoria-Geral da União* has just signed the first leniency agreements.[21] For this reason, this paper addresses a theoretical approach, and discusses its effectiveness based mainly on the analysis of the strength of each sanction established by the rule and the attractiveness of the correspondent exemption or reduction, and also on the analysis of the remainder contingencies provided by the law.

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http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2014)48&docLanguage=En. – p. 2.

[18] Organization for Economic Co-operation and Development. 2014. "Phase 3 - Report on implementing the OECD anti-bribery convention in Brazil". http://www.oecd.org/daf/anti-bribery/Brazil-Phase-3-Report-EN.pdf. – p. 28.

[19] Law nº 12,846/2013, Article 16, paragraph 2 (English version). Organization for Economic Co-operation and Development. 2014. "Phase 3 - Report on implementing the OECD anti-bribery convention in Brazil". Annex 2 – Legislative Extracts. http://www.oecd.org/daf/anti-bribery/Brazil-Phase-3-Report-EN.pdf.

[20] Ana Paula Martinez and Mariana Tavares Araújo. "What To Expect From Brazil's New Anti-Corruption Law", February, 2014. http://www.ethic-intelligence.com/experts/400-what-can-be-expected-from-brazil-s-new-anti-corruption-law/.

[21] Josette Goulart. "Empresas dão início a acordo de leniência com CGU". Estadão. April 3rd, 2015.

THE DISCLOSURE PROGRAM WITHIN THE BRAZILIAN ANTI-CORRUPTION LAW

Law nº 12,846/2013 is organized in seven chapters, as following: I) General provisions; II) Wrongful acts against national or foreign public administration bodies; III) Administrative liability; IV) Administrative liability proceedings; V) Leniency agreement; VI) Judicial liability, and VII) Final provisions.

Chapter II, Article 5, defines the wrongful acts against national or foreign public administration bodies as "acts performed by the legal entities referred to in the sole paragraph of Article 1 to the detriment of national or foreign public assets, of public administration principles, or to Brazil's international commitments"[22], and these acts are specified as following:

> I - to promise, offer or give, directly or indirectly, an undue advantage to a public official or to a third party related to him/her;
> II - to demonstrably finance, defray, sponsor or in any way subsidize the performance of the wrongful acts established in this Law;
> III - to demonstrably make use of a third party, either an individual or a legal entity, in order to conceal or dissimulate the entities´ actual interests or the identity of those who benefited from the performed acts;
> IV - with respect to public bidding and government procurement:
> (a) to thwart or defraud, through an adjustment, arrangement or any other means, the competitive nature of public bidding processes;
> (b) to prevent, disturb or defraud the execution of any act related to a public bidding process;
> (c) to remove or try to remove a bidder by means of fraud or by the offering of any type of advantage;
> (d) to defraud public bidding processes or bidding-related contracts;
> (e) to create, in a fraudulent or irregular manner, a legal entity with the purpose of participating in a public bidding process or of entering into a contract with the public administration;
> (f) to gain undue advantage or benefit, in a fraudulent manner, from amendments or extensions of contracts executed with the public administration without authorization in the Law, in the notice of the public bidding or in the respective contractual instruments; or
> (g) to manipulate or defraud the economic and financial balance of the contracts

[22] Law nº 12,846/2013, Article 5 (English version). Organization for Economic Co-operation and Development. 2014. "Phase 3 - Report on implementing the OECD anti-bribery convention in Brazil". Annex 2 – Legislative Extracts. http://www.oecd.org/daf/anti-bribery/Brazil-Phase-3-Report-EN.pdf.

> executed with the public administration;
> V - to hinder investigations or inspections carried out by public agencies, entities or officials, or to interfere with their work, including the activities performed by regulatory agencies and by inspection bodies of the national financial system.[23]

Chapter III, Article 6, typifies two sanctions applicable, within the administrative sphere, to the legal entities held liable for the wrongful acts indicated by Article 5: a fine in the amount of 0.1% to 20% of the gross revenues realized in the fiscal year prior to the administrative proceedings; and the extraordinary publication of the condemnatory decision.[24] These sanctions can be applied on a grounded manner, on isolated or cumulative basis, according to the characteristics of the concrete case and to the severity of the offenses.[25] However, whether it is not possible to use the criteria of the gross revenue's value of the legal entity, the fine will range from BRL 6,000 to BRL 60,000,000.[26] Paragraph 3 of the same article dictates that the application of the sanctions does not exclude, in any case, the "obligation of full restitution for the damage caused".[27]

In conformity to Article 7, the sanctions proceedings must take into consideration some circumstances, such as: the seriousness of the offense, and the degree or risk of damage; the advantage obtained or intended, and the effect produced by the offender; the cooperation of the legal entity to the investigations; the existence of internal mechanisms and procedures of integrity, audit, and incentive for the reporting of irregularities; and the value of the contracts held by the legal entity with the damaged public agency or entity.[28]

Chapter VI, Article 18, prescribes that "the liability of the legal entity in the

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[23] Law nº 12,846/2013, Article 5 (English version). Organization for Economic Co-operation and Development. 2014. "Phase 3 - Report on implementing the OECD anti-bribery convention in Brazil". Annex 2 – Legislative Extracts. http://www.oecd.org/daf/anti-bribery/Brazil-Phase-3-Report-EN.pdf.
[24] Ibid. Article 6.
[25] Ibid. Article 6, paragraph 1.
[26] Ibid. Article 6, paragraph 1.
[27] Ibid. Article 6, paragraph 3.
[28] Ibid. Article 7.

administrative sphere does not exclude the possibility of its liability in the judicial sphere"[29]. Regarding to the judicial action, the law establishes four sanctions that can be applied to the legal person in an isolated or cumulative manner (Article 19). The first sanction is the loss of the assets, rights or valuables representing the advantage or profit directly or indirectly obtained from the wrongdoing. The second one is the partial suspension or interdiction of its activities, and the third is the compulsory dissolution of the legal entity. The last one is the prohibition from receiving incentives, subsidies, grants, donations or loans from public agencies or entities, and from public financial institutions or government-controlled entities, from one to five years.[30]

Finally, the law establishes that "the liability of legal entities does not exclude the individual liability of their directors or officers, or any other individual who is the offender, co-offender or participant of the wrongful act"[31].

As previously noted, Chapter V embraces the main important topic for the discussion of this paper: the leniency agreements. The first prescription about these instruments is that the highest authority of each public body or entity may enter into a leniency agreement with the entity liable for the wrongful acts provided for the law, and the legal entity must effectively collaborate with the investigations and the administrative proceedings.[32] Besides, such collaboration must result in (1) the identification of the ones involved in the offense, whenever applicable, and (2) rapidly obtaining information and documents that prove the wrongful acts under investigation.[33] Moreover, the legal entity must be the first one to come

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[29] Law nº 12,846/2013, Article 18 (English version). Organization for Economic Co-operation and Development. 2014. "Phase 3 - Report on implementing the OECD anti-bribery convention in Brazil". Annex 2 – Legislative Extracts. http://www.oecd.org/daf/anti-bribery/Brazil-Phase-3-Report-EN.pdf.
[30] Ibid. Article 19.
[31] Ibid. Article 3.
[32] Ibid. Article 16.
[33] Ibid. Article 16, items I and II.

forward and manifest its willingness to cooperate with the investigations.[34] In addition, the private entity must stop any involvement in the illicit act as soon as a leniency agreement is proposed.[35] Finally, the leniency agreement does not exempt the legal entity from its obligation to make full restitution for the damage caused[36]; its execution interrupts the statute of limitation of wrongful acts provided for the Law[37]; and its denial will not result in the confession of the wrongful act under investigation[38]. In the event of violation of the leniency agreement, the entity will not be allowed to enter into a new one for three years, starting on the date that the public administration becomes aware of the breach[39].

In regards to sanctions, it is possible to identify four main outcomes related to the execution of a leniency agreement. First, the agreement can exempt the legal entity from two sanctions: (1) extraordinary publication of the condemnatory decision, and (2) prohibition from receiving incentives, subsidies, grants, donations or loans from public agencies or entities and from public financial institutions or government-controlled entities (item IV of Article 19).[40] Second, the leniency agreement can reduce the applicable fine by up to two-thirds.[41] Otherwise, the leniency agreement does not exempt the legal entity from any of the other sanctions specified in Article 19 of Law nº 12,846/2013 (items I, II and III).

Additionally, according to Article 17, leniency agreements can be executed with legal entities held liable for the wrongful acts provided for Law nº 8,666, of June 21st, 1993, in order to exempt them from the sanctions set forth in Articles 86, 87 and 88 of this law.[42] In sum, the sanctions set forth in these articles consist of (1) warning; (2) fines for delays and

[34] Law nº 12,846/2013, Article 16, paragraph 1, item I (English version). Organization for Economic Co-operation and Development. 2014. “Phase 3 - Report on implementing the OECD anti-bribery convention in Brazil”. Annex 2 – Legislative Extracts. http://www.oecd.org/daf/anti-bribery/Brazil-Phase-3-Report-EN.pdf.
[35] Ibid. Article 16, paragraph 1, item II.
[36] Ibid. Article 16, paragraph 3.
[37] Ibid. Article 16, paragraph 9.
[38] Ibid. Article 16, paragraph 7.
[39] Ibid. Article 16, paragraph 8.
[40] Ibid. Article 16, paragraph 2.
[41] Ibid. Article 16, paragraph 2.
[42] Ibid. Article 17.

compensatory fines; (3) suspension from participating in a public procurement and debarment from contracting with government by up to two years; and (4) declaration of the contractor's lack of good standing in a proper administrative proceeding.[43]

Recently, Brazilian President Dilma Rouseff enacted Decree nº 8,420/2015, which lays down the provisions needed to implement Law nº 12,846/2013. This decree assigns the elements for the administrative proceedings designed to investigate the illegal acts and to ascertain liabilities; it specifies the parameters for the sanction's dosimetry; and it details the procedures related to the execution of the leniency agreements.[44]

With this brief view about the Brazilian Anti-Corruption Law, the following chapter will focus on the description of US disclosure program.

[43] Law nº 8,666, of June 21st, 1993, Articles 86 and 87. http://www.planalto.gov.br/ccivil_03/leis/l8666cons.htm.
[44] Decree nº 8,420, of March 18th, 2015. http://www.planalto.gov.br/CCIVIL_03/_Ato2015-2018/2015/Decreto/D8420.htm

THE DISCLOSURE PROGRAM WITHIN THE UNITED STATES LEGAL FRAMEWORK: FROM A VOLUNTARY TO A MANDATORY DISCLOSURE POLICY

In the United States, by 2007, the Federal Acquisition Regulation (FAR)[45] Council remarked that the Defense Federal Acquisition Regulation Supplement (DFARS)[46] was considered not strong enough to increase contractor compliance with ethical rules of conduct.[47] At that time, DFARS provided that contractors should have: "(1) a written code of ethical conduct; (2) ethics training for all employees; (3) periodic reviews of compliance with their code of ethical conduct; (4) internal audits, external audits, or both; and (5) disciplinary action for improper conduct"[48]. Furthermore, DFARS embraced a voluntary disclosure program, which encouraged contractors to timely report "any suspected violation of law regarding government contracts"[49] to appropriate government officials, and to cooperate "with any government agency responsible for either investigation or corrective action"[50].

Essentially, this voluntary disclosure program had been based on the following four criteria: "the contractor voluntarily disclosing the potential fraudulent action must (1) not be motivated by the recognition of imminent detection, (2) have status as a business entity, (3) take prompt and complete corrective actions, and (4) fully cooperate with the government in any ensuing investigation or audit"[51].

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[45] "The Federal Acquisition Regulation (FAR) is a substantial and complex set of rules governing the federal government's purchasing process. Its purpose is to ensure purchasing procedures are standard and consistent, and conducted in a fair and impartial manner." US Small Business Administration. "Federal Acquisition Regulation (FAR)". https://www.sba.gov/content/federal-acquisition-regulations-far

[46] "A supplement to the FAR that provides DoD-specific acquisition regulations that DoD government acquisition officials – and those contractors doing business with DoD – must follow in the procurement process for goods and services." Defense Contract Audit Agency. "DFARS – Defense Federal Acquisition Regulation Supplement". http://www.dcaa.mil/dfars.html.

[47] United States Government Accountability Office. "Defense Contract Integrity: Opportunities Exist to Improve DOD's Oversight of Contractor Ethics Programs". Report to Congressional Committees. September 1999. http://www.gao.gov/assets/300/295617.pdf - p. 10.

[48] Ibid. p. 8.

[49] Ibid. p. 8.

[50] Ibid. p. 8.

[51] United States Government Accountability Office. "DOD Procurement: Use and Administration of DOD's Voluntary Disclosure Program", Report to the Chairman, Subcommittee on Administrative Oversight and the

Nevertheless, this program had become ineffective, the number of voluntary disclosures had been relatively small, and the dollar recoveries had been modest.[52] The rates of reporting indicated that there was a peak shortly after the beginning of the program in 1986 (fifty-eight reports in a one-year period), and that, by the end of 2008, when the program was eventually replaced by a new regime, the U.S. government received less than 10 disclosures per year.[53]

After conducting an extensive proposed rulemaking and public comment process, the FAR Council finally amended the FAR, in order to impose new ethics requirements on government contractors and to bolster the disclosure program. As a result, on November 12nd, 2008, the FAR Council settled two main innovations under the disclosure rule:[54]

(1) new requirements under the "Contractor Code of Business Ethics and Conduct" (subpart 3.10 of the FAR); and

(2) new causes for suspension[55] or debarment[56] (subparts 9.406-2 and 9.407-2 of the FAR).

A - New requirements under the "Contractor Code of Business Ethics and Conduct"

The main innovation within the "Contractor Code of Business Ethics and Conduct" comprehends the business ethics and conduct clause applicable to all contracts with a value in excess of $5 million and a period of performance in excess of 120 days (known as "covered

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Courts, Committee on the Judiciary, U.S. Senate. February 1996. http://www.gao.gov/archive/1996/ ns96021.pdf. – p. 5.

[52] Ibid. p. 5.

[53] Brian D. Miller. "The Federal Acquisition Regulation Mandatory Disclosure Rule Program at the U.S. General Services Administration Office of Inspector General". http://www.gsaig.gov/?LinkServID=DA671464-E1CB-543C-4E17C0DADEEE5485.

[54] Robert K. Huffman and Frederic M. Levy. *Guide to the Mandatory Disclosure Rule – Issues, Guidelines, and Best Practices. Report of the Task Force on Implementation of the Contractor Code of Business Ethics and Conduct and Mandatory Disclosure Rule*. American Bar Association, 2010 – p. 10-16.

[55] "'Suspension' means action taken by a suspending official under 9.407 to disqualify a contractor temporarily from government contracting and government-approved subcontracting; a contractor that is disqualified is 'suspended'." FAR, Subpart 2.1 – Definitions.

[56] "'Debarment' means action taken by a debarring official under 9.406 to exclude a contractor from government contracting and government-approved subcontracting for a reasonable, specified period; a contractor that is excluded is 'debarred'." FAR, Subpart 2.1 – Definitions.

contracts"), even those qualified as small businesses.[57] This clause requires that, within 30 days after contract award[58], the contractor must:

(1) "have a written code of business ethics and conduct and make a copy of the code available to each employee engaged in the performance of the contract"[59];

(2) "exercise due diligence to prevent and detect criminal conduct; and (…) promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law"[60]; and

(3) "timely disclosure in writing, to the agency Office of Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of the contract or any subcontract thereunder, the contractor has 'credible evidence' that a principal, employee, agent or subcontractor has committed: (a) a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of United States Code (USC); or (b) a violation of the civil False Claims Act (FCA)"[61].

In addition to the four basic requirements mentioned above, the new clause also sets forth that all "covered contractors" must have "business ethics awareness and compliance program and internal control system"[62].[63] With respect to internal control systems, the regulation prescribes that they must "establish standards and procedures to facilitate timely discovery of improper conduct in connection with government contracts; and ensure corrective measures are promptly instituted and carried out"[64]. Among the minimum requirements for the

[57] United States Federal Acquisition Regulations. March, 2005. Subparts 3.1004 - "Contract Clauses" and 52.203-13 - "Contractor Code of Business Ethics and Conduct".
[58] According to the FAR, Subpart 52.203-13 (b) (1), the specified period is applicable only when the contracting officer does not establish a longer period.
[59] United States Federal Acquisition Regulations. March, 2005. Subpart 52.203-13 (b) (1) (i) and (ii).
[60] Ibid. Subpart 52.203-13 (b) (2) (i) and (ii).
[61] Ibid. Subpart 52.203-13 (b) (3) (i) (A) and (B).
[62] Ibid. Subpart 52.203-13 (c).
[63] These requirements are not applicable whether "the contractor has represented itself as a small business concern pursuant to the award of [the] contract or if the contract is for the acquisition of a commercial item as defined at FAR 2.101". FAR. Subpart 52.203-13 (c).
[64] United States Federal Acquisition Regulations. March, 2005. Subpart 52.203-13 (c) (2) (i) (A) and (B).

internal control system, there are at least two directly related to the mandatory disclosure of wrongful acts. First, the contractor's internal control system shall provide for timely disclosure, "whenever the contractor has credible evidence that a principal, employee, agent, or subcontractor of the contractor has committed a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C. or a violation of the civil False Claims Act (31 U.S.C. 3729-3733)".[65] Additionally, it shall provide for full cooperation[66] with any government agencies responsible for audits, investigations, or corrective actions.[67]

Regarding to the mandatory disclosure, the obligations for contractors subject to the internal control systems requirements are broader than the obligations applicable to all "covered contracts", since the former obliges the contractor to make the disclosure regarding *any* of its government contracts, and the latter obliges the disclosure *only* of violations in connection with the contract that includes the clause.[68] However, as will be discussed further, the rule created a new requirement for suspension and debarment that applies to all contracts, regardless of whether the clause is included. Consequently, in practice, all contractors are effectively subject to a mandatory disclosure requirement with respect to all their government contracts, regardless of whether the clause appears in any given contract or subcontract.

The rule prescribes that the disclosure requirement for an individual contract continues until at least three years after the final payment on the contract, in the case of contractors subject to the requirement of internal control systems. Thus, the contractor must

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[65] United States Federal Acquisition Regulations. March, 2005. Subpart 52.203-13 (c) (2) (ii) (F).

[66] According to the FAR Subpart 52.203-13 (a) (1) and (2) (i) (ii), full cooperation means "disclosure to the government of the information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct", including "providing timely and complete response to government auditors' and investigators' request for documents and access to employees with information".
Full cooperation does not require disclosure of information covered by the attorney client-matter privilege or work product doctrine; and any officer, director, owner or employee to waive his or her Fifth Amendment rights.

[67] United States Federal Acquisition Regulations. March, 2005. Subpart 52.203-13 (c) (2) (ii) (G).

[68] Robert K. Huffman and Frederic M. Levy. *Guide to the Mandatory Disclosure Rule – Issues, Guidelines, and Best Practices. Report of the Task Force on Implementation of the Contractor Code of Business Ethics and Conduct and Mandatory Disclosure Rule*. American Bar Association, 2010 - p. 13-14.

disclose any credible evidence of a covered violation on a contract subject to the clause, even if the violation occurred prior to the date the clause became applicable to the contractor. Furthermore, contractors subject to internal controls requirements must have a system in place to report covered violations on any of their federal contracts or subcontracts, unless the final payment on the contracts occurred more than three years before the internal control system requirement first became applicable to the contractor.[69]

Finally, the rule requires that the contractor must include the substance of the clause 52.203-13 (including its own requirement) in subcontracts that have a value in excess of $5,000,000 and a performance period of more than 120 days. In other words, this provision subjects all subcontractors (and their subcontractors) whose subcontracts meet the $5 million/120 days threshold to all the basic requirements, as well as the requirements for an internal control system and business ethics awareness and compliance program if they are other than small businesses and commercial item contractors.[70]

B - New causes for suspension or debarment

The rule dictates a new cause for debarment in item 9.406-2 of FAR. Primarily, the officials may debar a contractor, based on the evidence of knowing failure by a principal to timely disclose to the government credible evidence[71] of: "(A) violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; (B) violation of the civil False Claims Act (31 U.S.C. 3729-3733); or (C) significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in 32.001".[72]

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[69] Robert K. Huffman and Frederic M. Levy. *Guide to the Mandatory Disclosure Rule – Issues, Guidelines, and Best Practices. Report of the Task Force on Implementation of the Contractor Code of Business Ethics and Conduct and Mandatory Disclosure Rule*. American Bar Association, 2010 - p. 14.

[70] Ibid. p. 15-16.

[71] The credible evidence must be in connection with the award, performance, or closeout of the contract or a subcontract thereunder. - Subparts 9.406-2 (b) (1) (vi) and 9.407-2 (a) (8).

[72] United States Federal Acquisition Regulations. March, 2005. Subparts 9.406-2 (b) (1) (vi) and 9.407-2 (a) (8).

As well, the rule created a new cause for suspension in item 9.407-2 of FAR. Essentially, the officials may suspend a contractor suspected of knowing failure by a principal to timely disclose to the government credible evidence[73] of: "(i) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; (ii) Violation of the civil False Claims Act (31 U.S.C. 3729-3733); or (iii) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in 32.001".[74]

Regarding these new causes, it should be noted that subpart 3.1003 of FAR outlines that a contractor may be suspended or debarred for failure to timely disclose, "*whether or not the clause at 52.203-13 is applicable.*"[75] In other words, all contractors are effectively subject to a mandatory disclosure requirement with respect to all their government contracts, regardless of whether it is a "covered contract" or not.

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[73] The credible evidence must be in connection with the award, performance, or closeout of the contract or a subcontract thereunder. - FAR. Subparts 9.406-2 (b) (1) (vi) and 9.407-2 (a) (8).
[74] United States Federal Acquisition Regulations. March, 2005. Subparts 9.406-2 (b) (1) (vi) and 9.407-2 (a) (8).
[75] FAR. Subpart 3.1003 (a) (2).

COMPARISON BETWEEN THE UNITED STATES AND THE BRAZILIAN DISCLOSURE PROGRAMS, AND ANALYSIS ABOUT THE EFFECTIVENESS OF THE BRAZILIAN LENIENCY AGREEMENT

The elements concerning the main characteristics of the United States and the Brazilian disclosure programs provide a theoretical basis for a discussion regarding the effectiveness of the leniency agreement as an instrument for revealing corrupt and fraudulent acts in Brazil. The US and Brazilian regimes are radically different. The former establishes mandatory disclosure provisions applicable to all government contracts, whereas the latter gives incentives for corporations that come forward and cooperate in a voluntary way with the investigations.

The central characteristic of the US program is that disclosure is mandatory and the punishable offence is precisely the absence of disclosure. Hence, debarment and suspension are consequences of the "silence" of the companies. In contrast, within the Brazilian program, the punishable offences are the wrongful acts prescribed by the Article 5 of the law, and the execution of a leniency agreement can result in the exemption or reduction of the sanctions indicated by the rule, in exchange for effective collaboration of companies with the investigations.

Law nº 12,846 has no provision establishing that disclosure must occur before the detection by the government of the fraudulent act, neither giving distinct benefits for wrongdoers who have not yet been exposed from those who have already been uncovered. However, the law requires that the leniency agreement may only be executed if the legal entity is the first one to come forward to cooperate with the investigations.

This specific requirement is based on the theory of the prisoner's dilemma[76]. This

[76] "The prisoners' dilemma is the best-known game of strategy in social science. It helps us understand what governs the balance between cooperation and COMPETITION in business, in politics, and in social settings.
In the traditional version of the game, the police have arrested two suspects and are interrogating them in separate rooms. Each can either confess, thereby implicating the other, or keep silent. No matter what the other suspect

strategy seems to work well for cartels, where there is coordination between the companies and, in theory, each company has all the facts needed to incriminate the others. However, in the case of corruption, an illegal act can occur based not only on collusion with other companies, but on the connivance of public officials, and, therefore, information from more than one company could be essential to obtain evidences of the wrongful acts.[77]

However, the requirement of "being the first one to disclose" is no longer an absolute condition, since Decree nº 8,420/2015 establishes that the company must be the first one to come forward *only when relevant*.[78] Thus, it seems that in Brazil the authorities may afford the legal benefits of the leniency agreement to an entity, even if there are no additional companies involved in the investigation.

There are several factors that can affect a companies' decision of disclosing illegal practices to public authorities. Disclosure can represent financial loss, because it can mean the end of a company's involvement in a lucrative business. Furthermore, disclosure can isolate companies from the market due to potential reputational damages. In this context of potential losses, a leniency program tends to be effective when based on severe penalties and on a strong detection system, which can impose the fear of being caught on companies.[79]

Thus, in order to address the overall effectiveness of the Brazilian leniency agreement, it is necessary to examine the strength of each sanction established by Law

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does, each can improve his own position by confessing. If the other confesses, then one had better do the same to avoid the especially harsh sentence that awaits a recalcitrant holdout. If the other keeps silent, then one can obtain the favorable treatment accorded a state's witness by confessing. Thus, confession is the dominant strategy (…) for each. But when both confess, the outcome is worse for both than when both keep silent. The concept of the prisoners' dilemma was developed by RAND Corporation scientists Merrill Flood and Melvin Dresher and was formalized by Albert W. Tucker, a Princeton mathematician." Avinash Dixit and Barry Nalebuff. "Prisioners' Dilemma". The Concise Encyclopedia of Economics. http://www.econlib.org/library/Enc/PrisonersDilemma.html.

[77] Ana Paula Martinez. "Desafios do acordo de leniência na Lei nº 12.846/2013". Revista do Advogado, Ano XXXIV, Dezembro 2014, nº 125.

[78] Decree nº 8,420/2015, Article 30, item I. http://www.planalto.gov.br/CCIVIL_03/_Ato2015-2018/2015/Decreto/D8420.htm

[79] Ana Paula Martinez. "Desafios do acordo de leniência na Lei nº 12.846/2013". Revista do Advogado, Ano XXXIV, Dezembro 2014, nº 125.

nº 12,846 and the attractiveness of the correspondent exemption or reduction. This analysis will be based on the rational assumption that stronger sanctions make correspondent exemption or reduction more attractive, and, by extension, increase the attractiveness of the leniency agreement, resulting in a more effective instrument for revealing corrupt and fraudulent acts.

As discussed previously, according to Law nº 12,846, a leniency agreement can exempt the legal entity from the extraordinary publication of the condemnatory decision and the prohibition from receiving incentives, subsidies, grants, donations or loans from public agencies or entities and from public financial institutions or government-controlled entities, from one to five years. Second, the leniency agreement can reduce the applicable fine by up to two-thirds. Additionally, according to Article 17, leniency agreements can be executed with legal entities held liable for the wrongful acts provided by Law nº 8,666/1993, in order to exempt them from the sanctions set forth in its Articles 86, 87 and 88.

It is a fact that, in Brazil, there is usually an advanced publicity of the wrongdoings and wrongdoers by media. In this context, the extraordinary publication of the condemnatory decision tends to be a weak sanction, not capable of avoiding violations of the law. Thus, within these circumstances, companies are less likely to celebrate a leniency agreement to avoid this specific penalty.[80]

The second sanction established by the law – fine from 0.1% up to 20% of the gross revenues – tends to enforce the effectiveness of the leniency agreement, since its exemption seems to be attractive to the companies.[81] Law nº 12,846/2013 does not fix objective parameters for the sanction's dosimetry, neither any kind of parameter for the reduction of the fine's amount when a leniency agreement is signed. However, the recent Decree nº 8,420/2015 has

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[80] André Luís de Carvalho. "O acordo de leniência previsto na Lei Anticorrupção Empresarial (Lei nº 12.846/2013): reforço comportamental para coibir o conluio na prática da corrupção junto à administração pública no Brasil." Universidade Católica de Brasília; 2014.
[81] Ibid.

filled this legal gap, prescribing the standards by which the seriousness of illegal acts can be assessed and the fine can be evaluated. According to the decree, in the case of an execution of a leniency agreement, the fine can reach an amount inferior to the ground limit prescribed by the Article 6º of Law nº 12,846/2013.[82] In this context, the reduction in the monetary sanction may encourage companies to assign the agreement and collaborate with the investigations.

The third sanction – prohibition from receiving incentives, subsidies, grants, donations or loans (Article 19, item IV) – is a civil one and requires a court decision. In theory, this sanction enforces the effectiveness of the leniency agreement, because its exemption is attractive to companies. However, in practice, executing this sanction may take a long time and even runs the risk of not being administered at all due to the statute of limitation, as a result of the characteristic "slowness" of the Brazilian Judiciary Branch[83]. In this context, companies can balance the risk and become less likely to make admissions to acquire the benefits of the law.[84]

It is worth noting that the prohibition from receiving incentives, subsidies, grants, donations or loans is a narrow sanction when compared to the prohibition of participating in public bidding and contracting with government, although the latter does not require a court decision, since it is an administrative penalty.[85] However, a company's debarment from contracting with government is not a sanction provided under the Anti-Corruption Law. Rather, it is a penalty assigned by the Article 87 (item III) of Law nº 8,666/1993 (Law of public bidding and government procurement), which has a more specific and restricted scope.

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[82] This possibility has become object of fierce debate in Brazil, since it seems to be in contrast with the Law nº 12,846/2013.

[83] Alessandra Duarte. "Lentidão suprema: STF leva, em média, cinco anos para julgar ações que ferem a Constituição". O GLOBO. http://oglobo.globo.com/brasil/lentidao-suprema-stf-leva-em-media-cinco-anos-para-julgar-acoes-que-ferem-constituicao-12525704.

[84] André Luís de Carvalho. "O acordo de leniência previsto na Lei Anticorrupção Empresarial (Lei nº 12.846/2013): reforço comportamental para coibir o conluio na prática da corrupção junto à administração pública no Brasil." Universidade Católica de Brasília; 2014.

[85] Marco Vinico Petrelluzzi and Rubens Naman Rizek Junior. *Lei Anticorrupção. Origens, comentários e análise da legislação correlata*. São Paulo. Saraiva, 2014.

With the enactment of Decree nº 8,420/2015, it is now clear that, whether a single act typifies a violation of both Law nº 8,666/1993 and Law nº 12,846/2013, debarment and suspension can be imposed.[86] Additionally, leniency agreements may be executed with legal entities, in order to exempt them from these penalties.[87]

As seen before, debarment and suspension are the primary consequences of a company's failure to disclose in US. Considering that they are really strong consequences, it is possible to infer that, in this respect, the Brazilian leniency agreement tends to be attractive for the companies.

Although Law nº 12,846/2013 allows the exemption of the sanction of Article 19, item IV (prohibition from receiving incentives, subsidies, grants, donations or loans), it has no provision granting an exemption of the other judicial sanctions as an outcome of a leniency agreement. In other words, a legal person can be punished with the penalties established by items I, II and III of the mentioned article, regardless being benefited, for example, with a reduction of the fine provided for Article 6 (item I), and the exemption of the sanction indicated in item IV of the Article 19. Considering that these specific sanctions[88] are much stronger than all the others that the law exempts, companies can definitely conclude that the disclosure is not advantageous.

Furthermore, according to Law nº 12,846/2013, "the liability of legal entities does not exclude the individual liability of their directors or officers, or any other individual who is

[86] According to Articles 12 and 16 of Decree nº 8,420/2015, when a single act typify violation of both Law nº 8,666/1993 and Law nº 12,846/2013, the legal entity can be punished with suspension or debarment from participating in public procurement and contracting with government, and the administrative proceedings will be carried out jointly.
[87] Decree nº 8,420/2015, Articles 28 and 40 (item IV). http://www.planalto.gov.br/CCIVIL_03/_Ato2015-2018/2015/Decreto/D8420.htm.
[88] "I - loss of the assets, rights or valuables representing the advantage or profit directly or indirectly obtained from the wrongdoing, except for the right of the damaged party or of third parties in good faith; II - partial suspension or interdiction of its activities; III - compulsory dissolution of the legal entity." Law nº 12,846/2013, Article 19 (English version). Organization for Economic Co-operation and Development. 2014. "Phase 3 - Report on implementing the OECD anti-bribery convention in Brazil". Annex 2 – Legislative Extracts. http://www.oecd.org/daf/ anti-bribery/Brazil-Phase-3-Report-EN.pdf.

the offender, co-offender or participant of the wrongful act"[89]. Under these circumstances, there remains the possibility of individual criminal and civil punishment of those involved in the corrupt act. Thus, companies could feel discouraged or even intimidated to disclose.

Finally, it is important to recognize that the leniency agreement does not exempt the legal entity from its obligation to make full restitution for the damage caused[90], and its execution interrupts the statute of limitation of wrongful acts provided by the law[91]. In the same way, neither of these contingencies provides companies with an incentive to cooperate in order to acquire the benefits of the law, and do not contribute to reinforce the agreement as an instrument for revealing corrupt and fraudulent acts.

As seen, companies could feel encouraged to disclose in the hopes of receiving a penalty reduction and exemption of debarment or suspension from participating in public procurement and contracting with the government. On the other hand, there is a strong tendency that they feel discouraged or even intimidated to disclose, regarding other contingencies related to the leniency agreement. Thus, the overall conclusion is that the outcome benefits seem to be much lower than the risks companies have to assume with the signing of a leniency agreement in Brazil. In this context, the agreement tends to be interesting only for those companies that have already been sued in the judicial sphere and for those who have already been exposed with real evidences of corruption.

To conclude, Law nº 12,846/2013 does require some enhancements in order to bolster the overall effectiveness of the leniency agreement as an instrument to uncover corrupt and fraudulent acts.

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[89] This provision is insert in Article 3º of Law nº 12,846/2013, and, an outcome of a leniency agreement, the law does not exempt from criminal and civil prosecution the directors or officers, or any other individual who is the offender, co-offender or participant of the wrongful act.
[90] Law nº 12,846/2013, Article 16, paragraph 3 (English version). Organization for Economic Co-operation and Development. 2014. "Phase 3 - Report on implementing the OECD anti-bribery convention in Brazil". Annex 2 – Legislative Extracts. http://www.oecd.org/daf/anti-bribery/Brazil-Phase-3-Report-EN.pdf.
[91] Ibid, Article 16, paragraph 9.

CONCLUSION

This paper addressed a theoretical approach in order to contribute to the current debate about the administration of Brazilian Law nº 12,846/2013 and Decree nº 8,420/2015, focusing on the discussion about the effectiveness of the leniency agreement as an instrument for revealing corrupt and fraudulent acts in Brazil.

A number of factors can affect a companies' decision of disclosing illegal practices to public authorities, and the disclosure can represent losses for companies. For this reason, a leniency program tends to be effective when based on strong penalties and on a powerful detection system, which can impose the fear of being caught on companies.

As discussed in this paper, the US and Brazilian regimes are completely distinct. The central characteristic of the US program is that disclosure is mandatory, and debarment and suspension are consequences of the absence of disclosure. Unlike, within the Brazilian program, the disclosure is voluntary, and it can result in the exemption or reduction of the sanctions indicated by the rule.

The Brazilian regime, under the Law nº 12,846/2013, adopts the instrument of the *leniency agreement*, which grants distinct benefits for those companies that effectively collaborate with the investigations and the administrative proceedings. Nevertheless, as discussed, these benefits seem to be much lower than the risks the companies have to assume with the execution of a leniency agreement.

The theoretical discussion presented in this paper demonstrates that not all the sanctions established by the Brazilian law are strong enough to make the correspondent exemption or reduction attractive. That is the case of the "extraordinary publication of the condemnatory decision" and the "prohibition from receiving incentives, subsidies, grants, donations or loans from public agencies or entities and from public financial institutions or

government-controlled entities". On the other hand, the reduction in the applicable fine and the exemption of debarment and suspension – in the case of illicit acts related to public bidding and government procurement – seem to reinforce the effectiveness of the instrument, offsetting the aforementioned impact.

However, two main features of the Brazilian legal framework tend to harm the overall effectiveness of the leniency agreement as an instrument for revealing corrupt and fraudulent acts. The first one is the absence of provision granting an exemption of the judicial sanctions specified in the Article 19, items I, II and III, of Law nº 12,846/2013.[92] Whereas these specific sanctions are much stronger than all the others that the law exempts, companies can definitely conclude that the disclosure is not advantageous. The second issue is that the law gives no exemption of civil and criminal sanctions for the directors, officers, or any other individual who is the offender, co-offender or participant of the wrongful act. In the same way, within these circumstances, companies can feel discouraged to cooperate in order to acquire the benefits of the law.

One remarkable feature of Law nº 12,846 is that it has no provision establishing that disclosure must occur before the detection of the fraudulent act, neither a provision giving distinct benefits for wrongdoers who have not yet been exposed from those who have already been uncovered.

In this context and considering the aforementioned contingencies of the Brazilian disclosure program, it is easy to conclude that the companies will be rarely willing to disclose whether they are not caught in a scheme. In other words, the agreements tend to be attractive only for those companies that have already been sued in the judicial sphere and for those who

[92] "I - loss of the assets, rights or valuables representing the advantage or profit directly or indirectly obtained from the wrongdoing, except for the right of the damaged party or of third parties in good faith; II - partial suspension or interdiction of its activities; III - compulsory dissolution of the legal entity." Law nº 12,846/2013, Article 19 (English version). Organization for Economic Co-operation and Development. 2014. "Phase 3 - Report on implementing the OECD anti-bribery convention in Brazil". Annex 2 – Legislative Extracts. http://www.oecd.org/daf/ anti-bribery/Brazil-Phase-3-Report-EN.pdf.

have already been exposed with real evidences of corruption.

Therefore, Brazilian government should modify its legal framework, in order to bolster the overall effectiveness of the leniency agreement, ensuring, for example, new benefits, especially in the judicial sphere, for companies that voluntarily disclose a fraudulent action before being uncovered by public officials.

Unless the government redesigns the leniency agreement under Law nº 12,846/2013, it runs the risk to be an instrument with a marginal role to obtain evidence of fraudulent acts, and the Brazilian anti-corruption system will continue to rely on its own capacity to uncover wrongdoings.

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