

THE CONTOURS OF THE LENIENCY AGREEMENT IN THE BIDDING AND CONTRACTING ENVIROMENT

CONTORNOS DO ACORDO DE LENIÊNCIA NOS AMBIENTES DE LICITAÇÃO E CONTRATAÇÃO PÚBLICA

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ABSTRACT

The adverse effects of corruption cannot be reduced to numbers. Corruption damages democracy and efficiency. Law No. 12.846/13 symbolizes not only the commitment assumed by Brazil with international organizations many years ago but also a new promise to retract the practice of acts typified by it as offenses. Leniency agreement is an instrument capable of leveraging state ascertainments through the cooperation of the entity reached by Law No. 12.846/13 with the investigations, increasing the knowledge of the state and favoring new repressive actions. The Anti-Corruption Law refers to the leniency agreement in two stages. The targets of the second leniency agreement are the entities responsible for committing illegal acts related to public procurement.

KEYWORDS: Corruption. Damages. Democracy. Brazilian law. Leniency agreements. Possibilities. Leniency agreement and public procurement.

RESUMO

Os efeitos adversos da corrupção não podem ser reduzidos a números. A corrupção prejudica a democracia e a eficiência. A Lei nº 12.846/13 simboliza não só o compromisso assumido pelo Brasil com as organizações internacionais há muitos anos, mas também uma nova promessa de reduzir a prática de atos tipificados como ofensas. O acordo de leniência é um instrumento capaz de alavancar as determinações estatais através da cooperação da entidade alcançada pela Lei nº 12.846/13 com as investigações, aumentando o conhecimento do Estado e favorecendo novas ações repressivas. A Lei Anticorrupção refere-se ao acordo de leniência em duas etapas. Os alvos do segundo acordo de leniência são as entidades responsáveis por cometer atos ilegais relacionados aos contratos públicos.

PALAVRAS-CHAVE: *Corrupção. Danos. Democracia. Direito brasileiro. Acordos de leniência. Possibilidades. Contratos públicos.*

Summary - 1. Introduction; 2. Leniency Agreement: The origins and parallel and principal contours; 3. The Leniency Agreements in Law No. 12.846 /13; 4. Conclusion; References.

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1 INTRODUCTION

The issue of corruption is routinely related to the pecuniary damages resulting from it, as evidenced in the estimated additional costs of 25% (twenty five percent) of the public procurement contracts in developing countries or the more than 1 trillion dollars spent on bribes.

However, the adverse effects of corruption cannot be reduced to numbers. Democracy is affected when corruption allows the perpetuation of the same ruling group or otherwise interferes in the election process. Efficiency in administrative activity is harmed, thereby discouraging pristine companies from participating in procurement calls. When contracts are perpetuated with incumbent companies, there are no reasons to promote qualitative advances and so the competitive public environment is affected and technological innovation is inhibited.

As a rule, the attempts to curtail the tentacles of what each country defines as corrupt practices honor the issuance of laws aimed at suppressing nefarious actions by making individuals responsible.¹

It is clear that legislative plurality does not necessarily signal the reduction of corruption because laws are unable by themselves to break the cultural substrate that feeds dishonesty. Brazil throws this reality wide open as the legislative inflation regarding this subject² has not halted, with the desired effectiveness, the rejected behavior.

Law No. 12.846/13 symbolizes not only the commitment assumed by Brazil with international organizations many years ago

1 Of course there aren't any universal concepts for corruption because conduct repudiated in one country can be tolerated in another. Not even the concepts of international entities engaged in corruption converge. The Organization for Economic Cooperation and Development - OECD conceptualizes corruption as the abuse of public and private agents to obtain personal benefits, alluding not only to bribe-taking, but including the mention of nepotism, fraud and state capture. The International Transparency (IT) mentions that, in the broadest sense, corruption is related to the abuse of power aimed at personal benefit.

2 There are several laws that, while not referring directly to corruption, are dedicated to curbing behaviors and improving control and transparency.

but also a new promise to retract the practice of acts typified by it as offenses. Time will tell.³

2 LENIENCY AGREEMENT: THE ORIGINS AND PARALLEL AND PRINCIPAL CONTOURS

Fighting corruption happens when information and documents enable the state to know the actors and the practices. Evidently, more data allows for the enlargement of the investigative field, reaching people and uncovering facts hitherto unknown.

By analyzing the content of Article 16, one can be assured that the leniency agreement is an instrument capable of leveraging state ascertainments through the cooperation of the entity reached by Law No. 12.846/13 with the investigations, increasing the knowledge of the state and favoring new repressive actions. The entity is compensated for their cooperation with the reduction of a fine, according to §2 of Art. 16.

Thus, legal entities that practice any of the illegal acts in art. 5 will be submitted to the administrative accountability process, stated in Articles 8 to 13, which may be impacted by the celebration of the leniency agreement - an item already revealed by Law No. 12.529/11, of November 30, 2011, which restructured the Brazilian System for the Defense of Competition (BSDC) and provided for the prevention and repression of offenses against the economic order, guided by the constitutional principles of free enterprise, free

3 We have already positioned ourselves regarding the risk that, unfortunately, the implementation of anti-corruption law may bring about the possibility of creating a new environment for offering bribes in order to avoid the application of reprimands allocated by the law. "However, though created with the aim of suppressing corruption sponsored by the private sector, numerous provisions within this new legal framework, in fact, brought about considerable legal uncertainty. Some say the Anti-Corruption Law was a "shot in the foot": opening many undefined concepts has brought to light the fear that could encourage illegal pressure and extortion attempts against the business community, which would be induced to give in to illegality, so as to avoid the application of sanctions." FORTINI, Cristiana.; VIEIRA, Ariana Shermam Morais. Anticorruption Business Law: the risks of its regulation and implementation. In: REPOLÊS, Maria Fernanda Salcedo; DIAS, Maria Tereza Fonseca (coord). **Law between the public sphere and private autonomy: Transformations of public law in the democratic environment**. Belo Horizonte: Forum, 2015, p.161-184, v 2.

competition, the social function of property, consumer protection and the restraint of abuses of economic power.

Law No. 12.529/11, in Articles 86 and 87, regulates the leniency agreement under CADE's jurisdiction through its General Superintendent, to be adjusted between individuals and legal entities willing to cooperate with the investigation and the administrative process. In return, the undersigned employees of the agreement may benefit from the extinction of the punitive action of the public administration in cases where the proposed agreement has been submitted to the General Superintendent without having prior knowledge of the alleged infringement or from the reduction of 1 (one) to two thirds (2/3) of the applicable penalties.

The leniency agreement also approximates the award-winning collaboration disciplined by Law No. 12.850, of 02.08.2013. Art. 4 of said law prescribes, in the *main section*, that the judge may, at the request of the parties, grant judicial forgiveness, reduce the penalty of the deprivation of liberty by up to two thirds (2/3) or replace it by restricting rights, only if this collaboration furnishes one or more of the following results: a) the identification of the other co-authors and participants of the criminal organization and criminal offenses committed by them; b) the disclosure of the hierarchical structure and division of tasks of the criminal organization; c) the prevention of criminal offenses arising from the activities of the criminal organization; d) the total or partial recovery of the product or benefit of criminal offenses committed by the criminal organization; e) the location of any victim with their physical integrity preserved. Law No. 12.850/13 determines parameters to reduce or dismiss the penalty, which, however, do not destroy the discretion of the judge.^{4 5}

4 Art. 4 §1 In any case, granting the benefit will take into account the collaborator's personality, nature, circumstances, gravity and the social impact of the criminal act and the effectiveness of the collaboration.

5 The same discretion exists in the leniency agreement. However, while with the award-winning collaboration there is a judge to decide, or someone technically capable and, in principle, less susceptible to pressures, in the leniency agreement, as the applicator is the controller, their real technical and functional independence, in practice, especially in smaller municipalities, are in doubt.

3 THE LENIENCY AGREEMENTS IN LAW NO. 12.846 /13

The Anti-Corruption Law refers to the leniency agreement in two stages. It dedicates itself first and with much more intensity, albeit unsatisfactorily, to the leniency agreement defined in Art. 16. We have already written about the leniency agreement after the advent of Provisional Measure 703/15, not converted into law.⁶

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- 6 In an article co-authored with Professor Edimur Ferreira de Faria about the leniency agreement as disciplined in Art. 16, we criticized the wording of the law, which was enhanced by the expired Provisional Measure 703/15. Among several corrections to the wording of the law, we criticized the expressions associated with the leniency agreement. We said: “Initially, the main heading of Art. 16, by introducing the leniency agreement, provides for its celebration with the “legal entities responsible for carrying out actions and the investigated facts foreseen by this law.” The word “responsible” sounds like a recognition of guilt. That is, by admitting the practice of illicit behavior as described in Art. 5 of Law No. 12,846 / 13, the entity forwards a request aimed at celebrating the leniency agreement while considering the possibility of attenuating or even remitting the penalty. The idea of “confession” is reinforced when considering items I and III of the main heading of Art. 16 and items II and III of §1 of the same article. Items I and III (among others) in the caput of Art. 16 enumerate what the collaboration via the leniency agreement must provide. In terms of the items mentioned, it is expected that the collaboration by the “responsible entity” will result in the identification of “anyone else responsible for infringement, when appropriate” by the celebrant entity and its cooperation with the investigation “in view of its objective responsibility”. Identifying “the others involved” indicates that the entity recognizes itself as the author of the reprehensible conduct as described in Art. 5. The same occurs when the entity makes itself available for investigation, “in view of its objective responsibility”. The wording of items II and III of §1 of Art. 16 emphasizes the assumption of “guilt.” Item II of §1 provides that the entity “completely cease its involvement in the infringement investigated from the date the Agreement was proposed.” Item III, in turn, again mentions the commitment of the legal entity to cooperate with the investigations, given its “strict liability”. All these devices appear to contradict paragraph 7 which states that “A rejection of the proposed leniency agreement will not be an acknowledgement of committing any wrongdoing.” Paragraph 7 aims at legally avoiding the entity, whose effort to celebrate a leniency agreement did not prosper, being considered guilty. It is clear that the intention is to motivate the entities to propose the agreement by eliminating fears that might scare them away. The constant protective mantle of §7 aims to prevent any punishment based on the document through which the celebration of the agreement is requested. The question, however, is not so simple. First because the way Art. 16 and §1 are written is, at least, inappropriate. The mention of the word “responsible”, the cessation of involvement in the offense and the identification of others responsible mirrors a recognition, by the proponent entity, that there was, indeed, the commission of an illicit act. Consequently, from the beginning, a lack of care with the wording, which could and must be improved by using other words, can be perceived. It would be much better, for example, if the caput of the mentioned article stated “eventually responsible.” Surely then the leniency agreement would be

In the cited regulation, the leniency agreement is perceived as a legal adjustment established by the Federal Government, the States, the Federal District and the Municipalities, with legal entities of private law, to which were attributed the commission of unacceptable acts, according to the same legislator.

The original wording of the law, resurrected after the death of Provisional Measure 703/15, highlights, tacitly, the benefits of the leniency agreement disciplined by Art. 16 in light of the public interest - “the identification of others involved in the offense, when appropriate; and the quick obtention of information and documents proving the illicit activity under investigation.”

§1 of Art. 16 sets out the minimum conditions for the celebration of the leniency agreement. The conditions are as follows, given the non-conversion of PM 703/15: the entity’s commitment to cease its involvement in the conduct of infraction from the date the Agreement was proposed; the recognition of their participation in the infringement and the recognition of their duty to cooperate fully and permanently with the investigations and the administrative process by appearing, at their own expense, whenever summoned or convened.⁷

§2 of Art. 16 states the benefits granted to the legal entity’s signatory of the leniency agreement, namely:

- a) exception from sanctions provided in item II of the *caput* of Art. 6 and item IV of Art. 19, both from the law under examination;
- b) reduction of the fine provided in item I of the *caput* of Art. 6 of the law by up to two thirds.⁸

seen with less fear. FORTINI, Cristiana; FARIA, Edimur Ferreira. The contours of the leniency agreement after Provisional Measure. 703/15: The promise of success or uncertainties scenario. *Magazine Due in Altum*. Law books. Vol. 8, n. 15, Jan / Apr. 2016

7 With the death of the PM, the company’s commitment to promote audits, encourage whistleblowing, and the effective application of the ethics and code of conduct are no longer required in Law no. 12,846 / 13. With the death of the PM, we’re back to section I of paragraph 1 of Article 16, which says that the entity must be the first to comment on the agreement.

8 When PM 703/15 was active, the first entity to sign the leniency agreement could have

Art. 17 of Law No. 12.846/13 also addresses the leniency agreement. The device is thusly constructed:

Art. 17. The public administration may also celebrate the leniency agreement with the legal entity responsible for the commission of offenses provided for in Law No. 8666 of June 21, 1993 , with a view to the exemption or reduction of administrative sanctions laid down in their Articles 86 to 88.

It is seen that the targets of the second leniency agreement are the entities responsible for committing illegal acts defined in Law No. 8.666/93, in order to exempt or reduce the administrative sanctions provided for in Articles 86 to 88 of the aforesaid General Law.

First, it must be borne in mind that Law n° 12.846/13 is not dedicated only to containing illegal acts committed in procurement calls and the public procurement environment. It is possible, therefore, to characterize unlawfulness in another environment. Just think about the offering of an undue advantage, along the lines of Part I of Art. 5, during a Public Health inspection or the speeding up of the delivery of the charter.

It is also important to consider that Art. 17 does not make explicit reference to any of the situations described in the subparagraphs of item IV of Art. 5 of the Anti-Corruption Law. It is, conversely, referenced in Articles 86 to 88 of Law 8.666 / 93, whose reprimands are not necessarily related to the practice of corruption.

The inadequacy of the wording of Art. 17 raises doubts about the scope and application of the leniency agreement in this environment .

It would be possible to adduce that the leniency agreement, disciplined in Art. 17, would only have scope over the practice of the offenses in the subparagraphs of item IV of Art. 5 of Law No. 12,846 / 13; behavior that could also attract the sanction under Law 8.666 / 93. Strangely, the legislature refers only to the sanctions of Law 8.666 / 93, ignoring the bidding of Art. 7, which addresses the penalty of impediment, unidentified (although with some similarity) to that described in Art. 87, III of the General Law.

more pronounced benefits, including its complete remission.

In this sense, the leniency agreement in Art. 17 would be used when, in the face of situations provided for in Art. 5, section IV, one cogitates the penalty disciplined in Law 12.846/13 as well as the incidence of the reprimands of the procurement law. Thus, the leniency agreement to be celebrated would minimize or alienate the incidences of sanctions beyond those which are described in Law 12,846 / 13.

Such an interpretation would make great sense especially before the issuance of PM 703 /15 and after the return to the original wording of Law 12.846/13 (the same as it stands today). This is because, then as now, the first leniency agreement, that is the one disciplined in Art. 16, does not provide for the removal of sanctions regulated in Law 8,666 / 93, or any other law that addresses the scenario of bidding and public contracting. And, of course, the sanction of the declaration of unsuitability established in section IV and the prevention and suspension mentioned in section III, both in Art. 87 of Law 8.666 / 93, affect or may affect, much more significantly, the entity compared to the fine and the vexatious exposure provided for in Art. 6 of the Anti-Corruption Law.

In this line of interpretation, a single leniency agreement would expand its tentacles, promoting more significant advantage to the signatory entity.

With the advent of PM 703/15 and while the cited regulation produced its effects, Art. 17 will lose its purpose if one follows this line of thought, considering that the leniency agreement in Art. 16 had come to produce the effect that was hitherto assigned to the leniency agreement in Art. 17; namely, to eliminate or minimize the sanctioning according to the Bidding Law.

According to the PM, item I of paragraph 2 of Art. 16 provided that the leniency agreement would also exempt the entity from penalties restricting the right to participate in bids and celebrate contracts, governed by Law No. 8,666 / 93, and other rules dealing with bids and contracts, as is the case of Law No. 10,520 / 02, which provides for severe punishment of the impediment in Art. 7. The reflections of Art. 16 of the leniency agreement were,

therefore, extended for the duration of PM 703/15, making that leniency agreement much more attractive than it is today.⁹

Commenting on it, we wrote:¹⁰

The first observation is that the greatest benefit that a legal entity may obtain from the leniency agreement is to get rid of reprimands like the declaration of unsuitability (Art. 87, IV of Law 8.666 / 93), and also the suspension and impediment (art. 87, III of Law No. 8,666 / 93).

The importance of having a reduced or remitted fine cannot be ignored, but for those who are about to be penalized or have already been so with the declaration of unsuitability, getting rid of the latter penalty will be the biggest boon.

This is because the declaration of unsuitability will almost certainly cause the death of enterprises, especially considering the temporal and geographical effects of the reprimand.

Although it is important to protect the contracts already signed, because the penalty cannot go back and achieve a perfect legal act, the sanction prevents new contracts, and makes the survival of the company almost unfeasible, with extremely damaging consequences to the company itself and innocent third parties (employees, suppliers and shareholders among others). Rising unemployment and falling revenue are some of the harmful effects and must be accounted for when there is an administrative decision. Considering these forecasts, we must meditate on the measures to be adopted. More than cogitating the serious penalties referred to in items III and IV of Art. 87 of the law, the most attention must be given to the commitment to fully repair the damage caused and the effective adoption (or improvement) of integrity mechanisms must be honored. The celebration of the leniency agreement is thus healthier. The exemption of restrictive sanctions on the right to bid and hire as well as the sanctions described in Art. 6, II of Law No. 12,846 / 13, does not seem to stain the principle of unavailability of public interest. It is the complete opposite. The leniency agreement is an instrument to safeguard the interests of the community, whether to elucidate the past by obtaining information via private cooperation or

9 In truth, with the insecurity surrounding the PM even with the insertion of §§11 to 14 into Art. 16, today it is difficult to understand which entity would be attracted to celebrate it.

10 FORTINI, Cristiana; FARIA, Edimur Ferreira. The contours of the leniency agreement after Provisional Measure. 703/15: The promise of success or uncertainties scenario. *Magazine Due in Altum*. Law books. Vol. 8, n. 15, Jan / Apr. 2016

to safeguard the future with the assumption of duty, by the legal entity, to create or enhance the integrity mechanisms.

Considering the present logic, while PM 703/15 lasted, the only function of Art. 17 of the leniency agreement, in exchange for cooperation which characterizes the adjustment, would be to benefit entities that had practiced the unwanted acts described in Art. 5 of the Anti-Corruption Law *before the enactment of Law 12.846/13* and would not be reached by inaugurated punishments within the Anti-Corruption law, given the non-retroactivity of the law, but that could already be reprimanded in light of the Bidding Law. In this sense, aiming to get rid of the sanctions set out in the Bidding Law, the entities would propose the leniency agreement disciplined in Art. 17.

Thus, according to the first line of interpretation, Art. 17 of the leniency agreement would not exactly be a new adjustment, different from that disciplined in Art. 16. In fact, care would be taken to possibly favor the signatory entity, therefore expanding the attractiveness of the setting to foresee benefits not contemplated in the initial scope.

Thus, offenses linked to item IV of Art. 5, which would impose sanctions in the Anti-Corruption Law environment and also the Bidding Law, would be addressed in one setting with greater benefit to the signatory entity. However, if Art. 16 were ever to be altered again, as it was when the PM was active, the sole purpose of Art. 17 would be to “compensate” the collaborating entity, whose unlawful act preceded the Anti-Corruption Law, with the elimination or mitigation of the penalties to which it would be subject, considering the regulations concerning bidding and contracts.

Anyway, the whole line of interpretation offered above does not rule out another conclusion, considering the abysmal writing and line construction adopted by the legislator. It does not seem to us to be the best conclusion, even though it is still worth exposing, and that is why we adopted the interpretive approach already presented.

The second possibility of interpretation arises from the legislative choice to split the discipline of the leniency agreement into several articles.

The choice of separate articles suggests that there would be two instruments. The first would be the leniency agreement in Art. 16 and the second would be the instrument provided for in Art. 17.

To the choice of two articles and not the introduction of Art. 17 as a paragraph of Art. 16, which suggests a duality of adjustments, is added the fact that the second instrument (Art. 17) refers specifically to offenses provided for in Law No. 8,666/93¹¹ and not the offenses described in the Art. 5. There may be some correspondence between them, but not necessarily.

But, even with that, it is still difficult to defend the total isolation of the leniency agreement in Art. 17, except, as previously stated, regarding actions taken before the incidence of Law 12,846/13.

Let's see.

Art. 86 disciplines the fine for an unjustified delay in the execution of the contract, which does not have, at least initially, any relation to the offenses described in Art. 5 of Law No. 12,846/13. The aforementioned fine is applied without necessarily giving the recipient the scope of the illicit practice embraced by the Anti-Corruption Law. But although it is presumed that the leniency agreement in Art. 17 is another one, independent of its predecessor, how can it be admitted that they could celebrate it by a mere breach

11 As regards the penalties indicated in the items of Art. 87 of Law 8.666 / 93, there is a need to promote a prior appointment. The legislator did not say what conduct may give rise to the incidence of each penalty. The caput of Art. 87 refers to the total or partial non-performance of the contract without considering the criteria that led of the administrative decision. It is clear, from even a quick glance, that the conclusion is a staggering of penalties, as it, the aggravation of punishment, is indisputable on the path from items I to IV. The power to elect the failure mechanism was reserved to the administrator, obviously assuming that the best choice depends on the specific case of variables. It seems, however, that the law should have indicated, at least by example, the path to be taken by the administrator, indicating the omissive / commissive acts to justify each of the sanctions without stifling administrative authority. The lack of parameters generates uncertainty and allows, in practice, the coexistence of different understandings within the same entity, despite analogous circumstances.

of contract when it is inserted in the law that addresses illegal behavior? One would have to admit that the Anti-Corruption Law could predict the leniency agreement in the face of unknown behavior encompassed by it, which sounds, at the very least, strange.

The fact that the law does not specify the conditions for the celebration of the leniency agreement in Art. 17 also draws attention. No assumptions are explicitly offered and nothing is said about cooperation. The competent body to conduct negotiations and to celebrate the leniency agreement is not stated. In fact, almost nothing is said in Art. 17.

However, we must assume that the leniency agreement always presupposes the cooperation of the infringing entity which, by assuming the position of partner, is honored with certain benefits. So it should also be within Art. 17, despite the legislative timidity. One might even think that the legislature expressly said nothing in Art. 17 because it had done so previously, a fact that became unnecessary repetition after being previously stated.

But what is the possible cooperation if Art. 17 could be applied in the face of contractual breach, which in no way corresponded to the illicit acts described in the Anti-Corruption Law? What could the entity interested in lessening the state reprimand offer if its conduct, omissive or commissive, translates to breach of contract, but does not have any relation to corrupt practices? If there is no data to be provided and no snitch involved, the atmosphere for the leniency agreement does not exist.

That is the central argument that leads us to reject the individuality of the leniency agreement in Art. 17, considering more logical the first interpretation provided herein. It should be recalled that Federal Decree No. 8,420 / 15 takes care of both leniency agreements together, a fact that favors the ponderations register here, though not as the sole foundation.

4 CONCLUSIONS

The reflections we have offered are not subject to changes because the law demands maturity. We do not discard the review of what has been written here. There are many doubts about

innumerable aspects of Law No. 12,846 / 13, uncertainties that are enhanced when facing Art. 17, a very little dissected article in the Law.

Regardless, if the practical application of the “institute” invites more and more debate, one cannot help commenting that the discipline of both leniency agreements offer very little attraction to the entities, especially after the short life of PM 703/15.

Once an agreement has been presented and negotiations have started, it seems impossible or at least difficult to contain the repercussions, without offering greater protection, as opposed to exposure to which the legal entity is subject. A shield would exist if the leniency agreement were capable of preventing other attacks or if it were linked to the participation of the Public Ministry and the Public Advocacy.

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