

THE IMPACT OF ANTI-CORRUPTION LAW IN COMPANIES' JUDICIAL RECOVERY IN BRAZIL

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Law No. 12.846/2013, also known as the Anti-Corruption Law, in force as of January 29th, 2014, arises with the purpose of suppressing an existing gap in the Brazilian legal system regarding the accountability of legal entities for the practice of illicit acts against the Public Administration, especially for corruption acts and fraud in bids and administrative contracts. Such law gained recognition in the recent Car Wash investigations, an anti-corruption operation conducted by the Attorney General's Office in Paraná and by the Federal Police, and changes the scenario for companies involved with such transgressive activities. Certainly, the Criminal Code (Decree-law No. 2.848/1940) and the Bidding Law (Law No. 8.666/1993) already provides for illicit practices against the Public Administration, but only individuals could be punished for such crimes. With the new legislation, companies will be able to be liable, in the administrative and civil scope, even though there is no involvement by their members and/or managers.¹

If, on one side, the Anti-corruption Law esteems the political-legislative option of assigning the responsibility to legal entities for the illicit acts committed, filling the gap then existing in the Brazilian legal system, from another angle it experiments opposition. The legal entity framed in the penalties of said law, by natural limitation, does not act in its own consciousness and, therefore, it depends on wrongful or willful act of a physical agent.

The mentioned argument is supported by the assumption that it cannot be allowed that a person – including legal entities – responds for a violation unless they caused it wrongfully or willfully, in this regard being crucial that their subjective responsibility is shown, without which such penalty imposition is not legitimate.

Thus, the companies may be punished divested from the responsibility of its members and/or managers. In this regard, a political-legislative predilection could have been taken up of

¹ That is what §1 of art. 3 of the Anti-corruption Law provides: “Art. 3 The accountability of the legal entity does not exclude the individual accountability of its officers or managers or any other individual, author, co-author or accomplice of the illicit act. § 1 The legal entity will be accountable regardless of the individual accountability of the individuals mentioned in the heading.”

continuing to punish only individuals that practice the illicit and not the legal entity – legal fiction that plays relevant social–economical role as source of production of goods and services, job generators and taxpayer –, aspiring not to overload the finances of the company which has done nothing.

According to art. 6, item I of the Anti–Corruption Law, in the administrative scope, the fines imposed to convicted companies will vary in the amount of 0.1% (one tenth percent) to 20% (twenty percent) of the gross revenue of the fiscal year prior to the filing of the administrative proceeding, excluding taxes. However, the penalty cannot be lower than the accrued advantage, when the estimate is possible. If it is not feasible to use the criterion of the legal entity's gross revenue value, the fine will be from R\$ 6,000.00 (six thousand Reais) to R\$ 60,000,000.00 (sixty million Reais), as established in paragraph 4 of the aforementioned provision.

As for art. 19, item I, for instance, it provides for the legal accountability, assigning to the public entity undermined by the violating act (the Federal Government, the States, the Federal District and the Municipalities) and to the Department of Public Prosecution, the legitimacy to file a suit in order, among other measures, to confiscate the goods, rights or values which represent advantage or income directly or indirectly obtained from the violation.

Therefore, the administrative realm can impose the sanctioning fine, whilst the judicial can take back the undue advantage or income received.

The new legislation also provides for a pact which enables to mitigate the corrective for companies which collaborate with the investigations – leniency agreements. In addition to the acknowledgment of the practice of the illicit act and the whistle blowing in the process, the companies should fully remedy the damage caused to the public coffers (paragraph 3 of art. 16 of the law), counting with the incentive of the reduction in up to 2/3 (two thirds) of the value of the administrative fine applicable. The effects of the leniency agreement could be extended to legal entities part of the same economic group, *de facto* and *de jure*, provided that they execute the commitment jointly, subject to the conditions established therein (paragraph 5).

Art. 4, in that respect, in order to preserve corporate reorganizations from being drawn in order to suppress the responsibility of such specific sentenced company, instituted that the responsibility of the legal entity in case of contract amendment, transformation, incorporation, merger or demerger survives.

It must be emphasized that paragraph 1 of art. 4 reveals that, in single merger and incorporation situations, the responsibility of the successor is restricted to the obligation of payment of fine and full compensation for the damage caused, up to the limit of the transferred equity. For the case of contract amendment and

demerger, however, the successor shall pay for all succeeded debt, derived from the Anti-Corruption Law.

See the wording of such provision of the Anti-Corruption Law :

“ Art. 4. The responsibility of the legal entity survives in case of contract amendment, transformation, incorporation, merger or demerger.

§ 1 In case of merger and incorporation, the responsibility of the successor will be restricted to the obligation of payment of fine and full compensation of the damage caused, until the limit of the transferred equity, not being applicable other sanctions provided herein resulting from acts and facts occurred before the date of the merger or incorporation, except in case of simulation or evident fraud intention, duly proven.” (emphasis added)

However, the scenario is disturbing, when KPMG consulting research with 80 (eighty) large Brazilian companies shows that 80% (eighty percent) of them do not know the new law very well. This percentage was verified in survey carried out during the 40th ACI's (*Audit Committee Institute*) round table, independent initiative promoted by KPMG to discuss themes related to corporate governance, risks, *compliance*, among others.²

It is not only about companies' finances, which will remain disrupted with significant administrative fines and the legal determination of refund of advantages inappropriately obtained. The potential negative effect of the conviction shall also be taken into consideration – or even the mere release by the press that certain company is being investigated – in the amount of the company's shares negotiated in the world's main stock exchanges, the reputation, image, loss of competitive advantage of the companies implied and the possible downgrade of the credit note by the risk evaluation agencies. If leniency agreement is not executed and results in administrative and/or legal conviction, there is, in addition to that, the possibility of following the disreputable status statement of the company to prevent it from taking place in bidding and/or hiring with the Public Administration.

A uniqueness related to the national economy takes place to justify the concern with the subject. The figure of the States inductor of political economies, in the so-called “State capitalism”, combines the State forces with the capitalism forces, helping to explain results of public policies involving corporate players of the country.

The State is participant and influent, maybe more active than ever in the configuration of the Brazilian capitalism, and may be seen even as the most highlighted funding of the economical activity. Loans and funding granted by fostering agencies and banks, such as the National Bank for Economic and Social Development –

² Available on :

https://www.kpmg.com/BR/PT/Estudos_Analises/artigosepublicacoes/Documents/Advisory/pesquisa-compliance-no-brasil.pdf, Access on July 24th, 2016.

BNDES, and the acting of pension fund of servants of state-owned companies shows the existence of a leading State, which conforms and conducts the market.

There is great space, likewise, for companies to hire with the Public Administration of a continental territorial extension country, from the building of great public works to the supply of inputs for the provision of public service, such as school material and drugs. The State reform itself, with the reduction of the size of the public sector, involved the privatizations and the grants and the resulting creating of regulating agencies, making the communication and proximity of public and private spheres frequent.

This complex tangle of relations between the forces of the State with the forces of the capitalism foster an intense and repeated contact, however also seeder of a fertile land to practice acts of corruption and fraud in bidding and administrative contracts, concerning the Anti-Corruption Law – an almost three-year baby and with content unknown by 80% (eighty percent) of large national companies – as repression and correction measures to private companies.

Subsequently, a company announced by information broadcasting means for controversial relations with the State, being (i) merely investigated, having (ii) executed leniency agreement or (iii) already administratively and/or judicially convicted, is found subject to significant undermining and financial damages in their activities.

Here the path may be “inward” or, the reverse, “outward”. In the first case, there is a company that, due to scandals of illicit practices against the Public Administration, suffers successive losses regarding its finances and pleads judicial recovery. The second is configured when, in the course of the judicial recovery process originated by several grounds, an act of anti-juridicity against certain public body is found.

The judicial recovery, on the other hand, intends, in the terms of art. 47 of Law No. 11.101/2005, legal framework that governs it, to make feasible the overcome of the economical-financial crisis of the debtor, in order to enable the maintenance of the production source, of the employment of workers and of the interests of the creditors, thus promoting the preservation of the company, its social function and the fostering to the economical activity. It is therefore the legal tool to solve the corporate crisis, reorganizing the company and allowing equalization of the liability and that the performance and the operations are not stalled, giving them new chance of success.

What happens is that the recovery from a financial crisis situation is extremely hard, without the possibility of counting on new resources. At this moment of difficulty, the company needs capital to proceed with its regular activities or even for it to reinvent itself to overcome the crisis. Aware of this need, Law No. 11.101/2005 provides for some alternatives, such as benefit granted to the creditor which remains betting on the insolvent

company and which provides goods, services or even resources during the judicial recovery process (priority credits of art. 67) and the extensive examples list of means of recovery, in order to enable all feasible forms to the continuity of corporate activities (art. 50).

Among the procedures listed in art. 50 of Law No. 11.101/2005, the most known : *a)* demerger³, incorporation⁴, merger⁵ of the business company (item II); *b)* constitution of integral subsidiary⁶ (item II); *c)* alteration of the corporate control (item III); *d)* full or partial replacement of the debtor's administrators or modification of their administrative bodies (item IV); *e)* trespass of the establishment (item VII); *f)* transfer in payment of goods (item IX); *g)* creditor's company constitution (item X) or specific purpose, to award, in payment of credits, the assets of the debtor (item XVI); and *h)* partial sale of goods (item XI).

The controversy, identified in a precursor manner by professor Cássio Cavalli, in symposium at Rio de Janeiro Commercial Association, lies on defining which of the repair mechanisms of a company in judicial recovery process (art. 50) , which was or should be convicted for illicit act against the Public Administration, may cause the mentioned transfer of responsibility of art. 4 of the Anti-corruption Law, with the obligation of payment of administrative fine and/or refund of advantages unduly obtained.

The strongest argument, favorable to the transfer, is in the specific limit to the judicial recovery plan found in the heading of art. 50 of Law No. 11.101/2005, which, by listing, but not limiting, the forms of judicial recovery, determines the compliance with the “legislation relevant to each case”.

This, in case the plan provides the demerger, the incorporation or transformation of the company, or transformation of quotas or shares (item II of art. 50) ; as well as alteration of the controlling interest (item III of art. 50) and the replacement of the debtor company's administrators (item IV of art. 50) , which are types of compensation mechanisms for corporate reorganization, the applicable corporate legislation (as Law No. 6.404/1976) to each case shall be observed. If the plan, of another part, results in

³ In the terms of art. 229 of Law No. 6.404/1976, regarding stock companies, “demerger is the operation through which the company transfers installments of its equity to one or more companies, constituted to this end or already existing, extinguishing the split company, if there is version of all its equity, or dividing its capital, if the version is partial.”

⁴ In the terms of art. 227 of Law No. 6.404/1976: “incorporation is the operation through which one or more companies are absorbed by another, which succeeds them in all rights and obligations.”

⁵ In the terms of art. 228 of Law No. 6.404/1976: “merger is the operation through which two or more companies are joined to make up a new company, which will succeed them is all rights and obligations”

⁶ According to art. 251 of Law No. 6.404/1976, “the company may be incorporated, upon public deed, having as sole shareholder a Brazilian company.” There is also, according to art. 252 of the same law, the possibility of establishing a wholly-owned subsidiary with “the incorporation of all shares of the share capital to the equity of another Brazilian company.”

concentration act that shall be analyzed by the Administration Council of Economic Defense – CADE, commits the competition legislation. If, from another point of view, the plan involves corporate reorganization of company entangled with illicit act against the Public Administration, the anti-corruption legislation shall be used and, subsequently, its art. 4, surviving the responsibility to the resulting product.

Especially regarding the disposal of assets (item VII of art. 50) , it innovated Law No. 11.101/2005, as well as paragraph 1 of art. 133 of the National Tax Code, with amendments of Complementary Law No. 118/2005, regarding the so-called “insulated productive units”, popularized under the initials UPI, handling the theme of debts succession, excluding the succession of any nature, including regarding tax debts, upon legal disposal of branch or insulated productive unit in judicial recovery process.

The purpose of the legislator was clear: enable and, above all, encourage the entry of resources of the company with financial difficulties through the sale of part of its establishments and/or assets, adding the benefit of the absence of succession and, then, potentially increasing the number of buyers interested and improving the prices of such assets.

Thus, as per art. 1.142 of the Civil Code, the factory, plant, shipyard, refinery, distillery, courier, industrial or commercial establishment, with all its goods, estates, facilities, equipment, machinery, material and immaterial elements, or perhaps a separate set of these productive units, or also intangible property entitled to title of *slots* and *boltrans* in airports, judicially sold, shall belong to another company, under new control and administration.

In this sense is the wording of the sole paragraph of art. 60 :

“ Art. 60. If the approved judicial recovery plan involved judicial disposals of branches or isolated productive units of the debtor, the judge will order its performance, subject to the provision of art. 142 of this Law.

Sole paragraph. The object of the disposal will be free from any burden and there will be no succession of the bidder in the obligations of the debtor, including those of tax nature, subject to the provision of § 1 of art. 141 of this Law.”(emphasis added)

And paragraph 1 of art. 133 of the National Tax Code :

“ Art. 133. Individual or private legal entities acquiring another, under any capacity, commerce or commercial, industrial or professional facility fund, and continue the relevant exploration, under the same corporate name or under signature or individual name, is liable for the taxes, related to the fund or establishment acquired, due to the date of the act :

[...]

§ 1 The provision of the heading of this article does not apply in case of judicial disposal : (Included by Lcp No. 118, of 2005)

[...]

II – isolated branch or productive unit, in judicial recovery process. (Included by Lcp No. 118, of 2005)” (emphasis added)

Therefore, regarding the trespass of establishment, the sole paragraph of art. 60 of Law No. 11.101/2005, expresses an absolute clause which establishes that the pure, simple and sole judicial disposal of isolated branches or productive units of the debtor (item VII of art. 50) leave them entirely free and disentangled from any burden. An administrative and/or judicial sanction, whether by absence of provision of the Anti-Corruption Law or the provision in the sole paragraph of art. 60 may not reach the disposed establishment.

Be noticed that the heading of art. 60 makes reference to the “judicial disposal” and the final part of the provision details the duty of the judge, in case of ordering its performance, subject to the provision of art. 142 of the law.

Art. 142, intending to assure the impersonality and the principles of equality throughout the process, depicts :

“ Art. 142. The judge, having heard the judicial administrator and following the guidance of the Committee, if any, will order to proceed with the disposal of the asset in one of the following modalities :

I – auction, by oral bids ;

II – closed proposals ;

III – trading.

§ 1 The performance of the disposal in any of the modalities to which this article regards will be preceded by publication of announcement in widely circulated newspaper, 15 (fifteen) days in advance, regarding movables, and 30 (thirty) days in the disposal of the company or of real estate, offering the disclosure by other means which contribute to the wide acknowledgment of the sale.

§ 2 The disposal will be given by the highest value offered, even if below the evaluation value.

[...]” (emphasis added)

Art. 144 also in the same chapter, in turn, enshrines true general clause which enables the judge, before the porosity of the clause – open texture – to enable the handling of the general rule of art. 142, adjusting the right to the reality and dimension of the concrete case.

“ Art. 144. In case of justified reasons, the judge may authorize, upon reasoned requirement of the judicial administrator or the Committee, judicial disposal modalities different from the ones provided in art. 142 of this Law.” (emphasis added)

The set of problems arises when the judicial disposal of isolated branch or productive unit, in judicial recovery process, comes with corporate reorganization.

On this point, it is worth reminding that the Anti-Corruption Law, in its art. 4, enshrines the will of the legislator of limiting the transfer of responsibility by succession to certain adamant and express scenario, notably to cases of corporate reorganization, among which includes the demerger, incorporation, merger and contract amendment. Such options are considered means of judicial recovery in items II and III of art. 50 of Law No. 11.101/2005.

As successful example of judicial recovery through a corporate reorganization mechanism also instilled with judicial disposal of isolated productive units, there is the precedent of “Casa & Vídeo”, chain that commercialized household appliances and tools, in final phase of proceedings in the 5th Business Court of the Court of Justice of Rio de Janeiro and conducted by judge Maria da Penha Victorino.

The trigger of the retail crisis was the Operation “Negócios da China”, joint action of the Federal Police, Federal Revenue and Federal Prosecutor, in November, 2008, which investigated crimes of tax evasion, smuggling and money laundering by managers of the company and arrested thirteen members of the administration of the conglomerate.⁷

Three companies of the group requested recovery: “Mobilidade Comércio, Indústria e Representações LTDA” and “Lar e Lazer Comércio e Representações LTDA”, which were the operational companies, and “Paraibuna Participações LTDA”, original holder of contractual entitlement of use, enjoyment and fruition of the majority of the commercial sites of “Mobilidade” and “Lar e Lazer”.

The continuity of the performance of the economical activity occurred through segregation of the activities of the companies in recovery in three isolated productive units: “Casa e Vídeo Licenciamentos” (company which exclusive activity is the licensing of “Casa & Vídeo” brands and others for economical exploitation in the States of Rio de Janeiro, Espírito Santo and other States of the Federation); “Casa e Vídeo Rio de Janeiro” (company which activity is the operation of retail activity in the State of Rio de Janeiro, enabling expansion, web sales and telesales; and “Casa e Vídeo Espírito Santo” (company which activity is the operation of retail in the State of Espírito Santo, enabling expansion, holding store in Juiz de Fora and excluding web sales and telesales).

The judicial recovery plan, certified on October, 2009, also provided for judicial disposal of each of the productive units with the acquisition of corporate control by the stock corporation “Casa e Vídeo Holding S/A”, controlled by an investment fund

⁷ “Federal Police and Revenue make operation in large retail chain” Available on <<http://oglobo.globo.com/economia/policia-federal-receita-fazem-operacao-em-grande-rede-varejista-3815152>> Access on July 25th, 2016.

referred to as “FIP Controle”, comprised of opt-in creditors which converted their credit into shares of such fund with 50% (fifty percent) discount and by financial investors.

If, at the time of the facts, there was the Anti-Corruption Law in force, the "Casa & Video" Group could have been, given the nature of the practices harmful to the Public Administration for which it was investigated, convicted in the administrative and civil sanctions of the reference normative. Should this happen, in addition to the severely hinder the judicial recovery, there was a sensible legal antinomy between art. 4 of the Anti-Corruption Law and art. 60, sole paragraph of the Recovery Law and special affection to “Casa e Vídeo Holding S/A”.

On one side, the rule surviving the responsibility of the legal entity in case of corporate demerger and contract amendment upon illicit act before the Public Administration (art. 4). On the other side, the standard provides free from any burden the judicial disposal of branches or insulated productive units of the debtor in the judicial recovery process (art. 60 sole paragraph).

As, in the distance, it escaped from materializing the mentioned paradox, the future forecasts assertiveness.

The inclusion of OAS, one of the largest construction companies in Brazil, in the investigation of Car Wash Operation, restricted the credit offer to the company and brought doubt regarding its capacity of getting new contracts with the government. In this regard, the contractor's credit note was downgraded by the *rating* agency Standard & Poor's, in January, 2015, which resulted in the advanced maturity of its debts.⁸

It was in this scenario that, abruptly, the short term cash situation of the companies of the conglomerate suffered deterioration, occasion which caused an inevitable default in national and foreign creditors. In order to prevent bankruptcy, ten companies of OAS Group, based in Brazil and abroad, presented, in March, 2015⁹, single judicial recovery requirement, now in progress at the 1st Court Specialized in Bankruptcy and Judicial Recovery of the Court of Justice of São Paulo. OAS recovery plan was certified by the court on January 27th, 2016, being the judicial recovery concurrently granted.

In the mentioned recovery plan, there appears on page 15, items 3.1.1 and 3.1.4, as means of recovery, precisely the disposal of goods of the permanent asset with the corporate reorganization :

“ 3. Means of Recovery

3.1. Overview of the Means Recovery. For Member Companies of the OAS Group to be able to recompose the working capital necessary for the continuity of their activities and preservation of their assets, as well as for the

⁸ C. MAIA, “OAS deixa de fazer pagamento e tem rating rebaixado pela S&P”, *Valor Econômico*, January 05, 2015, <<http://www.valor.com.br/empresas/3844994/oas-deixa-de-fazer-pagamento-e-tem-rating-rebaixado-pela-sp>> Accessed on Jul 25th, 2016.

⁹ “Empresas da OAS pedem Recuperação Judicial”, Available on <<http://www.oas.com/oas-com/noticias/empresas-da-oas-pedem-recuperacao-judicial.htm>> Accessed on July 25th, 2016.

development of its business plan in a scaled manner, without loss of the DIP funding, is essential that Member Companies of the OAS Group can, within the Judicial Recovery and within the limits established by the Bankruptcy Law and by this Plan, adopt the following means of recovery :

[...]

3.1.1. Disposal of Goods of the Permanent Asset. Member Companies of OAS Group, when applicable, intent to promote the disposal and/or encumbrance of goods part of its fixed asset, except for those part of the new business plan of the Member Companies of OAS Group, in the terms of Clause 5. Thus, some of the corporate interests held by OAS will be disposed.

[...]

3.1.4. Corporate Reorganization. Member Companies of the OAS Group may undergo procedures for corporate reorganization, in order to obtain the most appropriate corporate reorganization for the development of their activities such as scaled in the context of the Judicial Recovery and the business plan resulting from the deployment of this Plan, always in the best interest of the Member Companies of OAS Group, their Creditors and aiming at the success of the Judicial Recovery.”¹⁰
(emphasis added)

Adding to the stipulation of the means or corporate reorganization in OAS's recovery plan, with the fact that the company did not succeed – at least yet – in concluding the leniency agreement with the relevant authorities (or even though executed, as it is not influent for the result), there is the eminent normative conflict scenario.

Anyway, OAS already has the judicial recovery granted and could be surprised at all moments with an administrative and/or judicial proceeding for accountability and, further along, with possible conviction. This hesitation context, especially regarding succession, unsettles and drives away potential investors of the disposal of facilities and/or goods and of the corporate reorganization, hindering the success of the group's judicial recovery.

And, finally, is the transfer of responsibility for succession verified when there is a judicial recovery with corporate recovery cumulated with the assets' judicial sale?

¹⁰ TJSP, May 19, 2015, “Plano De Recuperação Judicial De Oas S.A. – Em Recuperação Judicial, Construtora Oas S.A. – Em Recuperação Judicial, Oas Investimentos S.A. – Em Recuperação Judicial, Oas Infraestrutura S.A. – Em Recuperação Judicial, Oas Empreendimentos S.A. – Em Recuperação Judicial, Oas Imóveis S.A. – Em Recuperação Judicial, Spe Gestão E Exploração De Arenas Multiuso S.A. – Em Recuperação Judicial, Oas Investments Limited, Oas Finance Limited, Oas Investments Gmbh” Available on :
<<http://www.oas.com/lumis/portal/file/fileDownload.jsp?fileId=8A81A3934D2F94C8014E3FE249C81C4B>> Accessed on July 25th, 2016.

It is argued, by the sympathizing side, the need of ensuring the reaffirming the legal order. Therefore, no exception may be made to fail punishing a company for compensation because it is in a crisis situation.

It is known that the corruption of one of the great evils affecting the society. Political, social and economical costs it entails are notorious. The political legitimacy is committed, the democratic institutions and the moral values of the society are weakened, besides also producing an insecurity environment in the economical market, committing the economic growth and chasing new investments away. Therefore, corruption control assumes the fundamental role in the strengthening of the democratic institutions and the feasibility of the country's economic growth, being the punishments based on the Anti-Corruption Law acting as a deterrent and inhibitor factor of new practices by the social entity.

Furthermore, due to a legal reason, the Anti-Corruption Law, of 2014, is chronologically younger than the Recovery Law of 2005, and should prevail over later standard. To this principle the Latin term "*lex posterior derogat legi priori*" is designated, that is, later law waives previous laws.

And by specific criterion, the supremacy of the most specific standard to the case concerned is understood. Therefore, in case of two existing standards incoherent with one another, by providing on the conflicting object it is observed that one of them holds a more specific nature, in opposition to a more generic complexion. In the conflagration of provisions analyzed, the general norm sets out the transfer of the responsibility by succession on case of judicial disposal of isolated productive units of companies with corporate reorganization (Recovery Law). As for the specific norm, it set out the identical situation, adding the peculiarity of handling companies involved with illicit acts against the Public Administration (Anti-Corruption Law).

Moreover, it should be noted, the heading of art. 50 of Law No. 11.101/2005, which, by compiling for instance the means of judicial recovery, imposes the duty of complying with the "legislation relevant to each case", therefore engaging the transfer of responsibility laid on the Anti-Corruption Law.

Furthermore, in order to get rid of the effects of the convictions based on the Anti-Corruption Law, the companies under reorganization will have incentive to introduce in the plan and, later, operate a judicial disposal of isolated branch or productive unit, as minimum or unnecessary to overcome the crisis, but with the scope of only escaping art. 4 of mentioned law, turning it into non-applicable alignment and ignoring its original function.

Otherwise, the primary purpose of preserving the company is presented (art. 47 of Law No. 11.101/2005). Therefore, the maintenance of the production source, of the employment of the workers and the interests of the creditors should be privileged, thus promoting the preservation of the company, its social function and the trigger to the economical activity.

Eventual opposite decision, for more, could mistreat the principle of proportionality. It is worth reminding that article 8 of the new Civil Procedure Code determines that "by applying the legal system, the judge will meet the social purposes and the demands of the commonwealth", besides observing "proportionality". A measure taken with the purpose of ratifying the fight against corruption generates, as side effect, restriction to the collectivity of creditors, to the company's employees, to the Public Administration itself as recipient of taxes and the consumers (if the company under recovery is a concessionary of public services), being necessary thorough weighting between damage and benefits to evaluate the validity of the measure.

The specific criteria, in turn, may also work on the other side. As it is in the midst of a judicial recovery process, it can be understood that Law No. 11.101/2005 is the most specific to the concrete problem, the Anti-corruption Law being more generic, and applicable to the cases unregulated by special legislation (as the recovery).

And, completing the last argument, it may be sustained that the single means of judicial recovery set out in art. 50 of Law No. 11.105/2005, which does not apply the priority legislation comprises in the disposal of isolated productive unit (item VII of art. 50 of the LRF), due to the matter being expressly governed by Law No. 11.101/2005.¹¹

Whichever the alternative to be adopted, both Law No. 11.101/2005 and Law No. 12.846/2013 bring huge challenges that time and superior courts will be responsible for giving the correct solution, above all regarding a legislation painted with legal and economical paints having immediate and important reflect in the economy of the country.

While there is no right answer for the demarcation of the issue, the uncertainty on the possibility of succession of debts causes instability and inconsistency to investors and potential interested parties in the acquisition of the goods of the company in judicial recovery and/or its corporate reorganization. Those will finally cease mobilizing resources, before the huge risk of seeing the successor product of the corporate reorganization be reached by the wrath of the anti-corruption legislation.

If the legislator did not worry about minimizing this uncertainty scenario, it is a duty of the involved right operators (the recovery judgment, the Public Prosecution and the administrative authorities in charge) to establish mutual internal legal cooperation, as suggested by art. 67 and subsequent of the new CPC.

In this regard, the lesson of Minister Marco Aurélio Mello is valuable, by saying, in lecture at the University of Coimbra in July, 2015, that :

¹¹ L. AYOUNG; C. CAVALLI, "A construção jurisprudencial da recuperação judicial de empresas?". *Rio de Janeiro: Forense*, 2016. p. 231.

“

[...] The Law, by prevailing the legal security, can minimize the modern risk of uncertainties. If the Era of Uncertainties is a fact, the Law should, in favor of the citizens, act against its undesired consequences. Before this frame, here is the question that sustains this brief exposure: Does the Law still offers us safety?"¹²
(emphasis added)

If the absence of definitive answer to the question exposed does not provide safety to investors, so that they need it and predictability to conduct, plan and conform their financial investments in companies in judicial recovery; the a forementioned players should exercise a more proactive role and internal legal cooperation, as suggested by CPC–2015, intending the removal of legal uncertainties to preserve the company.

Thus, in an advanced manner and without any precipitation of judgment, it may be estimated the pricing of the value of the administrative fine and the refund of advantage or income unduly received, as well as evaluate the possibility of the company under recovery filling or not the requirements according to leniency and also budget its potential deductions. Therefore, those who wish to put money in the company will have foresight of the possible total debt of the company (including the millionaire penalties which may arise from the Anti–Corruption Law), being more able to decide whether it is worth to perform the investment and to calculate more accurately the return rate.

Such mechanism also intends to protect the shareholders of the company under recovery, minimizing speculations in the market around the value of the shares and, equally, intends to restrict the financial volatility of the company, that is, limit the variable which shows the intensity and the frequency of the variations of the different assets.

Finally, with this exposure, the intention is to cause a reflection on the legal autonomy arising from two important legislations — art. 60, sole paragraph of the recovery law and art. 4 of the anti–corruption law – which carried reflexes in the country's economy. Therefore, the participation of the recovery judgment, of the Public Prosecution and of the administrative authorities in charge is vitally important for, in an internal legal cooperation environment, as urged by art. 67 et. Seq. of the Civil Procedural Code, recently–edited, bring to light the investor interested in mobilizing resources in the company under recovery, while not defined by the case law of the superior courts, if the responsibility to the successor is transferable in case the recovery plan provides for disposal of assets shared to the corporate reorganization. Therefore, the need of estimate and predictability of the wealth mobilizer is equalized eagerly of the company for having whom

¹² M. MELLO “Direito em tempos de incertezas”, *Migalhas*, Available on < > Accessed on July 26th, 2016.

to capitalize it, while the Law does not offer the final express safety on the subject.