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GUIDE

Parameters for submitting evidence in leniency applications

CADE

Ministry of Justice and Public Security

Administrative Council for Economic Defense

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Administrative Council for Economic Defense (CADE)

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Content

1. Introduction

Leniency agreements signed with the Office of the Superintendent General of CADE (SG/CADE), provided for in Article 86 of Law 12529/2011 (the Brazilian Competition Law), must result in (a) the identification of other parties involved in the antitrust practice and (b) the gathering of evidence in the form of information and documents that prove the violation reported or under investigation.

For this purpose, CADE accepts any data or record that provides a reasonably clear description of an incident that can be assigned into a category of violation provided in Article 36 of Law 12529/2011 (the Brazilian Competition Law).

The agreement is signed considering the outcome of proceedings, i.e. a future situation. The Competition Law establishes that documents and information of a proceeding initiated from a leniency agreement will prove the violation (in the future); however, they do not need to prove it at the moment the agreement is signed. It is only after the due process that the violation should be proven. Taking into account the time gap between the moment the leniency application is assessed and the moment the proceeding is heard, we can presume at least two hypotheses in which the expectations of proof fall short.

The first hypothesis is a leniency agreement that lacks evidence at the time of its execution but that has high expectations that ex officio administrative actions carried out during fact-finding will suffice to prove the violation, which includes defendants collaborating through other means, such as Cease and Desist Agreements. Nevertheless, the investigative actions or defendants' collaboration may not achieve the expected outcome.

A second hypothesis is the possibility that the Office of the Superintendent General and the Tribunal have different positions about the pieces of evidence of a proceeding.

Although both bodies concur in which type of data proves an anticompetitive practice, they may have opposing opinions as to which pieces of evidence provide a reasonable degree of certainty about an antitrust practice in a given case.

As a procedural rule, in signing a leniency agreement, the Office of the Superintendent General analyses the evidence presented in the application. On the other hand, the Tribunal of CADE is the one that renders the judgement.

The leniency agreement is of great advantage to the Tribunal of CADE for its ability to find against wrongdoers based on information and documents presented by one of those involved in the violation. Therefore, the Office of the Superintendent General works to better assess the probability that a given leniency agreement will lead to a guilty judgement.

This goal may be achieved by providing a clearer definition of the evidential criteria for conviction, which derives from precedent decisions of the Tribunal of CADE. As precedents set standards for future decisions, by knowing them in detail, the Office of the Superintendent General increases its ability to sign agreements that will result in a judgement against the non-signatories.

Thus, analyzing the case law of CADE's Tribunal on cartel conduct is important in leveraging the ability to assess leniency applications.

It should be stressed, however, that investigative actions are preeminently dynamic. Therefore, the Office of the Superintendent General may consider accepting leniency applications even when they fall short of the case law standards, provided it offers a plausible strategy to produce evidence later. Leniency applications may not have evidence enough to result in a decision against the defendant if the evidence presented in the applications allows for investigative measures that, in CADE's experience, have led to complementary information and documents that ultimately prove the facts. Without prejudice to other circumstances observed in the proceeding at issue, the practice is more easily investigated if it comprises a fairly recent and highly coordinated violation with known suspects.

2. Standard of Proof

Standard of proof can be understood as the *level of certainty*[1] necessary to prove a legal fact[2] based on the evaluation of one or more pieces of evidence.

Discussions on the standard of proof arise from the common law system[3].

One of the reasons for it is historical. In the 12th century, England had itinerant justices who had to trust the fact-finding of local communities to adjudicate cases. Thus, in this scenario, the jury arises as a trier of fact.[4]

The other reason, resulting from the first one, regards a relevant legal distinction in Common Law between decreeing the law (a judge's duty) and finding the facts (jurors' duty) [5]. Therefore, the standards are instructions a judge gives to juries and that the juries should consider during the evaluation of evidence.

Continental law disregarded these standards as for centuries each kind of evidence had a predetermined and fixed probative value (the so-called "legal proof" system). This system was mostly abandoned at times of liberal revolutions and

[1] "It is said to be given by (1) the degree of confidence in the evidence; (2) the fact-finder's subjective degree of belief, i.e. the mental or psychological state of the decision-maker; or (3) the strength of evidence, i.e. how much the evidence confirms an allegation." Susan Haack, *Evidence Matters: Science, Proof, and Truth in the Law* (New York: Cambridge University Press, 2014), p. 17, 52.

Several authors criticise the standards for their reliance on the subjective conviction of the decision-maker, considering its lack of criteria and the resulting impossibility of an intersubjective control of the decision. Jordi Ferrer Beltrán, *Valoração racional da prova* (Salvador: JusPodivm, 2021), p. 247.

[2] An event that comes within the scope of a legal provision and leads to legal consequences. In leniency agreement negotiations, violations are the most important legal facts.

[3] Maria João Melícias, 'Did They Do It? The Interplay between the Standard of Proof and the Presumption of Innocence in EU Cartel Investigations', *World Competition Law and Economics Review*, 35/3 (2012), pp. 471–509.

Frederick E. Vars makes a good distinction between different standards of proof. "Did O.J. Simpson kill his ex-wife Nicole Brown Simpson and her friend Ronald Goldman? A criminal jury said no; a civil jury said yes.' These seemingly inconsistent verdicts can be reconciled because the juries answered different questions. The issue before the criminal jury was whether O.J. was proved guilty beyond a reasonable doubt. The issue before the civil jury was whether it was more likely than not that O.J. killed Nicole and Ronald. Taken together, the juries indicated that they believed O.J. probably did it, but that there was room for reasonable doubt. Absolute certainty is generally unattainable in legal proceedings. As a result, triers of fact, like the O.J. juries, are given guidance on how to resolve uncertainty. A primary guide is the standard of proof-the level of confidence or type of evidence required to decide a case one way or another." Fredrick E. Vars, 'Toward a General Theory of Standards of Proof', *Catholic University Law Review*, 60/1 (2011).

[4] Michele Taruffo, *Uma simples verdade: o juiz e a construção dos fatos*, (São Paulo: Marcial Pons, 2016), p. 37.

[5] Frederick Schauer, *Thinking like a lawyer: a new Introduction to Legal Reasoning*, (Cambridge: Harvard University Press, 2009), p. 206.

codification, in the 18th and 19th centuries, in favour of a system of "free conviction", "intimate conviction", or the free assessment of evidence[6].

In the common law system, instructions to jurors in jury trials have a degree of legal certainty that varies according to what is intended (the production of evidence, a compensation order, a prison sentence, etc). In this way, they have the function of “distributing the risk of error” throughout the proceeding.

Of course, any mistake in evidence assessment is not welcomed in the exercise of governmental power, whether the mistakes are false positives or false negatives. Nevertheless, as errors are inevitable, not fully knowing the facts imply consequences that vary according to the values scale of different contemporary democracies. An error in the criminal law leads to the imprisonment of an innocent person; in civil law, the error of not compensating a victim is no less serious than the error of finding a defendant wrongfully held liable for civil wrongdoing[7]. In the common law system, this generally means there is a greater standard of proof in criminal proceedings than in civil proceedings.

The preponderance of the evidence, commonly applied in civil proceedings, only demands the decision-maker is convinced the legal fact is more probable than not. For this reason, research quantified it like 51% probability of truth[8]. Naturally, this percentage is merely illustrative and does not consider a detailed assessment of facts. The probabilities intend to determine how jury instructions should be given to reach a verdict that satisfies the judgement criteria.

The second standard of proof is "clear and convincing evidence", i.e. evidence that shows the assessed fact is highly probable[9] – with at least 71% probability of truth[10].

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[6] Giovanni Tuzet, 'Assessment criteria or standards of proof? An effort in clarification', *Artificial Intelligence and Law*, 28/1 (2020), pp. 91–109.

[7] See Schauer (n. 5 above), p. 222; John Kaplan, ‘Decision theory and the factfinding process’, *Stanford Law Review*, 20 (1968), pp. 1065–1092; *In re Winship*, 397 U.S. 358 (1970) and *Speiser v. Randall*, 357 U.S. 513 (1958).

[8] Dorothy K. Kagehiro and W. Clark Stanton, ‘Legal vs. quantified definitions of standards of proof’, *Law Hum Behav,* 9 (1985), pp. 159–178, DOI: 10.1007/BF01067049

[9] *Colorado v. New Mexico*, 467 U.S. 310 (1984).

[10] Kagehiro and Stanton (n. 8 above).

This standard is usual in civil actions that produce graver effects, such as concerning citizenship, involuntary commitment, parental rights, succession matters, etc[11]. Finally, criminal trials[12][13] require the highest standard of proof, requiring confidence in the evidence is beyond a reasonable doubt (illustrated as 91% probability of truth or over)[14][15].

Although the idea of formalising standards of proof in this manner is particular to the common law system, the civil law system, which Brazil adopts, also requires a reasonable level of confidence and coherent precedents. The idea comes from the principle of isonomy that requires that, in facing the same situation, different people should make the same decisions, except when a modification is justifiable.

Thus, we can use here the notion that rules also demand a certain standard of proof to have a practical effect. Regardless of the legal system, both legal precedents and rules need a coherent application to be truly enforced, including in the evaluation of evidence.

[11] Tuzet (n. 6 above).

[12] Search and seizures and other criminal provisional measures may require a lower standard of proof, such as probable cause (fair expectations of finding proof of a crime in private premises). In the event a police authority has reasons to believe there is some risk, the standards are also lower, such as reasonable belief or reasonable suspicion.

[13] The contemporary use of the beyond-a-reasonable-doubt standard faces much criticism in the literature: from the fact that it is not sufficiently clear to guide the jury about how to decide on facts to difficulties in discerning the strength of a subjective belief that does not need any justification (jury decisions demand no explanation) from that of a rationally justified belief. Moreover, even in criminal law, many of the currently imposed penalties (fines, alternative punishment, etc.) are not as serious as when this demanding standard was set (times in which death penalties were common). Additionally, today there are resources to correct a miscarriage of justice we did not have before. Larry Laudan, 'Is Reasonable doubt reasonable?', *U of Texas Law, Public Law Research Paper* No. 144, 2003, DOI: 10.1017/S1352325203000132

[14] Kagehiro and Stanton (n. 8 above).

[15] For Tillers and Gottfried the probability of truth is around 95%. Peter Tillers and Jonathan Gottfried 'Case Comment–United States v. Copeland, 369 F. Supp. 2d 365(E.D.N.Y. 2005): A Collateral Attack on the Legal Maxim That Proof Beyond a Reasonable Doubt Is Unquantifiable?', *Law, Probability and Risk*, 5 (2006), pp. 135–157. On the other hand, Franklin considers the highest standard above 80%. James Franklin, 'Case Comment–United States v. Copeland, 369 F. Supp. 2d 365 (E.D.N.Y. 2005): Quantification of the "proof beyond reasonable doubt" standard', *Law, Probability and Risk*, 5 (2006), pp. 159–165.

3. Absence of a predetermined legal value for evidence

As a rule, the Brazilian procedural law includes no legal provision that attributes fixed values to evidence[16]. There are, however, a few exceptions, such as Article 158 of the Brazilian Criminal Procedure Code and Article 1227 of the Brazilian Civil Code. The former determines that a direct or indirect corpus delicti test is required if there is indicia of violation and that a guilty plea is not enough evidence to circumvent it. The latter establishes interest in real property and transfer of property between living persons are only legal if registered at the Land Registry in which the real property is registered, except in the cases provided in the same Civil Code. In the exceptions, the law requires a specific kind of evidence for certain legally relevant facts.

For facts that do not demand specific evidence, the rule is to admit any type of evidence and require explicit and rational grounds for the decisions. In short, judges state the grounds for their decisions based on rationality, carefully described beliefs, and accordingly to observed and proven experience. This methodology is known in Brazil as *convencimento motivado*, which establishes judges should give the reasons for their decisions. Frequently, similar evidence is given an identical value in different cases. Adopting criteria previously used in other proceedings, such as in the system of binding case law, provide law enforcement bodies with consistent judicial decisions; thus, people know what to expect when presenting a body of evidence in court. To some extent, experience grants value to evidence – although decision-makers can have some liberty as to precedents, whether because they believe the legal reasoning of a precedent case does not entirely appl to the case at issue due to different facts, or even because they understand this legal reasoning should be reviewed.[17]

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[16] There are, however, exceptions, such as the fact that an individual's marriage is proved only by its registration at a register office. We call "legal proof" the system of rules that predetermine the value of evidence.

[17] The Federal Administrative Proceeding Law (Law 9784/1999) establishes administrative rulings should include its reasoning – not only as a principle but as a compulsory requirement:

> *"Article 50. Administrative acts should be well reasoned, making the legal facts and reasons explicit whenever they*
>
> *I. deny, limit, or affect rights or interests;*
>
> *II. impose or aggravate rights, duties, or sanctions;*
>
> *III. decide administrative proceedings for civil-servant examinations or selection processes;*

Below, we mention evidence that was essential to decisions to dismiss proceedings or find against the defendants. We took into consideration cases from 1993 to 2020 in which one or more defendants were found guilty of antitrust violations. We picked the proceedings in which CADE found against the defendants because they made explicit what evidence effectively proved the existence of violations[18]. As leniency agreements usually happen in cartel cases, cartels were the predominant violation in the examples we provided.

4. Review of CADE's case law

Based on its experience with leniency negotiations and comparative and regulatory analyses, CADE research of its Tribunal's precedent decisions for administrative proceedings of cartels and induction of concerted practices issued between 1993 and 2020.

To this end, first, examples of evidence the Tribunal used in demonstrating cartel activities were collected. Next, the Tribunal's considerations were divided into the following categories: (1) direct evidence of agreement; (2) indirect evidence of agreement; (3) evidence of the practice's effects in Brazil; (4) sufficient evidence; (5) insufficient evidence, when presented in isolation; (6) valid evidence; (7) evidence used to distinguish hard-core and soft-core cartels.

See each of these topics below, with the most relevant precedent decisions for each of them.

IV. exempt from procurement requirements due to specific circumstances provided by law or declare procurement processes infeasible in the situation in question.

V. decide administrative appeals;

VI. derive from a mandatory review;

VII. fail to apply a well-established precedent on the matter or differ from official expert opinions, reports, and proposals;

VIII. annul, revoke, stay, or confirm an administrative act."

[18] Except for Item 4.6, "Insufficient evidence, when presented in isolation", in which we used precedents from proceedings that, due to insufficient evidence, were dismissed or had the allegations against one or more defendants dismissed.

4.1. Evidence from cartel cases heard by the CADE Tribunal

There have been many examples of evidence of cartel practices throughout the last 27 years. Understanding these cases can assist in finding and selecting documents, as well as in private or public investigations.

1. Agreements signed with foreign antitrust authorities: cooperation agreements signed by cartel participants with foreign antitrust authorities. See cases no. 08012.001395/2011-00, 08012.001376/2006-16, 08012.001127/2010-07[19], 08012.001029/2007-66, 08012.005255/2010-11, and 08012.004599/1999-18.

2. Schedule/notebook notes: handwritten notes in a cartel participant's schedule, notebook, or equivalent, suggesting contact/agreement between competitors. See cases no. 08700.010769/2014-64, 08012.011980/2008-12, 08012.005882/2008-38, 08012.004674/2006-50, 08012.006130/2006-22, 08012.000820/2009-11, 08012.011142/2006-79, 08012.004702/2004-77, and 08012.002493/2005-16.

3. Suppliers' declarations to customers: printed or electronic individual communication sent to customers about price rises or other trade conditions that derive from an anticompetitive agreement. See cases no. 08012.000820/2009-11, 08012.001020/2003-21, 08012.004365/2010-66, and 08012.004039/2001-68.

4. Suppliers' joint declaration to customers: printed or electronic joint communication sent to customers, through membership associations or unions, about price rises or other trade conditions that derive from an anticompetitive agreement. It does not include declarations via mass media such as radio, TV, or written media. See cases no. 08700.002632/2015-17[20], 08012.007011/2006-97, 08012.006685/2004-11, and 08012.005004/2004-99.

5. Presentations or other documents used in meetings: printed or electronic documents elaborated to present data and support discussions held in meetings of

[19] Administrate proceeding split from case no. 08012.010932/2007-18.

[20] Administrate proceeding split from case no. 08012.006764/2010-61.

unions, membership associations, or competitors. See cases no. 08700.004617/2013-41 and 08012.002127/2002-14.

6. Meeting minutes: formal written records of the issues discussed and agreed in meetings held in membership associations, unions, or amongst competitors. Usually, meeting participants expressly or tacitly validate minutes. At times, signatures are omitted for different reasons. See cases no. 08012.001377/2006-52, 08700.004617/2013-41, 08700.002632/2015-17[21], 08012.004674/2006-50, 08012.005882/2008-38, 08012.002812/2010-42, 08012.001127/2010-07[22], 08012.009606/2011-44, 08012.005928/2003-12, 08012.003745/2010-83, 08012.000283/2006-66, 08012.009088/1999-48, and 08012.002127/2002-14.

7. Printed invitations and agendas for membership association or union meetings: printed meeting invitations and agendas sent or personally delivered to members of membership associations/unions. See case no. 08012.004039/2001-68.

8. Foreign antitrust authorities' decisions against defendants: foreign jurisdictions' decisions on whether a violation was commited and its perpetrators. See cases no. 08012.005930/2009-79, 08012.010932/2007-18, and 08012.004599/1999-18.

9. Bilateral or multilateral documents for agreements between competitors: documents that stipulate the general terms for market competitors to coordinate their behaviour. Formally, these documents are called Agreements, Memorandums of Understanding, Cooperation Plans, amongst others. Note these are typically legal agreements; however, if they deviate from their purposes in their elaboration or enforcement, the result is an antitrust violation. See cases no. 08700.004617/2013-41, 08012.001377/2006-52, 08012.001376/2006-16, 08012.005930/2009-79, 08012.005882/2008-38, 08012.009885/2009-21, 08012.010932/2007-18, 08012.010362/2007-66, 08012.009888/2003-70, 08012.002127/2002-14, 08012.006989/1997-43, and 08012.009118/1998-26.

[21] Administrate proceeding split from case no. 08012.006764/2010-61.

[22] Administrate proceeding split from case no. 08012.010932/2007-18.

10. Printed or electronic internal documents (except for e-mails): printed or electronic communication documents exchanged between members of the same company or membership association, suggesting contact/agreement between competitors. See cases no. 08012.011980/2008-12, 08700.004617/2013-41, 08012.001376/2006-16, 08012.005255/2010-11, 08012.004702/2004-77, and 08012.009888/2003-70.

11. Bilateral or multilateral e-mail exchange between competitors: electronic messages sent to or received from competitors through the internet. See cases no. 08012.001395/2011-00, 08012.004280/2012-40, 08012.001377/2006-52, 08012.011980/2008-12, 08700.004073/2016-61, 08700.004617/2013-41, 08700.007938/2016-41[23], 08012.002812/2010-42, 08012.005882/2008-38, 08012.004674/2006-50, 08012.001376/2006-16, 08012.006130/2006-22, 08012.001127/2010-07[24], 08012.008821/2008-22, 08012.000820/2009-11, 08012.010932/2007-18, 08700.011276/2013-60[25], 08012.011853/2008-13, 08012.011142/2006-79, 08012.011027/2006-02, 08012.004702/2004-77, 08012.009888/2003-70, and 08012.001826/2003-10.

12. Internal e-mails that mention communication between competitors: e-mails exchanged between employees of the same company or business group that mention contact between competitors. See cases no. 08700.004073/2016-61, 08700.007938/2016-41[26], 08012.001377/2006-52, 08700.004617/2013-41, 08012.005882/2008-38, 08012.006130/2006-22, 08012.005255/2010-11, 08012.011027/2006-02, and 08012.004702/2004-77.

13. Economic evidence: economic analyses of market behaviour, price levels, profit margin changes, amongst others. See cases no. 08700.010769/2014-64, 08012.011668/2007-30, and 08012.011142/2006-79.

[23] Administrate proceeding split from case no. 08700.004631/2015-15.

[24] Administrate proceeding split from case no. 08012.010932/2007-18.

[25] Administrate proceeding split from case no. 08012.009611/2008-51.

[26] Administrate proceeding split from case no. 08700.004631/2015-15.

14. Fax sent to competitor(s): telephonic transmission of documents or pictures sent to competitors via a facsimile device. See cases no. 08012.001377/2006-52, 08700.004617/2013-41, 08012.004674/2006-50, 08012.001127/2010-07[27], and 08012.008850/2008-94.

15. Legally authorised sound recordings: legally authorised recordings of oral communication made by a third party in a given environment without the interlocutors' knowledge. See cases no. 08012.004039/2001-68 and 08012.010215/2007-96.

16. Sound recordings made by a participant to an antitrust practice: oral communication between two cartelist interlocutors recorded without their knowledge by another cartelist who was in the same environment. See cases no. 08012.009382/2010-90, 08012.007356/2010-27, and 08012.009462/2006-69.

17. Legally authorised telephone tapping: legally authorised recordings of phone communication by a third party without interlocutors' knowledge. See cases no. 08700.010769/2014-64, 08012.009382/2010-90, 08700.002821/2014-09, 08012.008821/2008-22, 08012.008850/2008-94, 08012.011853/2008-13, 08012.011668/2007-30, 08012.004573/2004-17, 08012.010215/2007-96, 08012.007149/2009-39, 08012.009888/2003-70, 08012.000283/2006-66, 08012.001826/2003-10, 08012.004036/2001-24, and 08012.002299/2000-18.

18. Meeting attendance list: printed or electronic attendance list with the names of the participants who attended a meeting between competitors. See case no. 08012.004039/2001-68.

19. Instant messages exchanged between competitors: real-time text conversations between competitors via internet-based software or short message service (SMS). See case no. 08700.011276/2013-60[28].

[27] Administrate proceeding split from case no. 08012.010932/2007-18.

[28] Administrate proceeding split from case no. 08012.009611/2008-51.

20. Tax receipt or other document proving conditions of sale: documents detailing the customer, number of sold products, price, and conditions of sale. See case no. 08012.004036/2001-24.

21. Media news or interviews: media statements indicating the coordination of prices or other commercial conditions. See case no. 08012.004712/2000-89.

22. Bids or their drafts: bids and draft bids submitted by companies within the scope of government procurement. See case no. 08012.004280/2012-40.

23. Phone records of telecommunication companies: call detail records (made and/or received calls) between two telephones. The cases selected included phone calls made or received by two representatives of competing companies, or between representatives and a party relevant to the adoption of the coordinated practice. See case no. 08012.001395/2011-00.

24. Reports, notices, or newsletters sent to members: documents produced by membership associations or unions and sent to its members covering market news, competitively sensitive information, and/or suggestions for anticompetitive agreements. See case no. 08012.004674/2006-50.

25. Spreadsheets/tables/lists organising shared or agreed information between competitors: documents in the form of spreadsheets, tables, or lists providing details on prices, price rises, discounts, cost analyses, market division, the allocation of projects and market quotas, amongst others. See cases no. 08012.001377/2006-52, 08700.004617/2013-41, 08012.011980/2008-12, 08700.007938/2016-41[29], 08012.001376/2006-16, 08012.005882/2008-38, 08012.001127/2010-07[30], 08700.011276/2013-60[31], 08012.010932/2007-18, 08012.004365/2010-66, 08012.004086/2000-21, and 08012.002493/2005-16.

26. Testimonies: reports by participants of leniency programmes and signatories of cease and desist agreements, as well as testimonies and charges grounded

[29] Administrate proceeding split from case no. 08700.004631/2015-15.

[30] Administrate proceeding split from case no. 08012.010932/2007-18.

[31] Administrate proceeding split from case no. 08012.009611/2008-51.

on their memory. See cases no. 08012.011980/2008-12, 08700.004073/2016-61, 08700.010769/2014-64, 08012.001377/2006-52, 08012.004674/2006-50, 08012.009382/2010-90, 08012.005255/2010-11, 08012.001127/2010-07[32], 08012.000820/2009-11, 08012.006685/2004-11, 08700.011276/2013-60[33], 08012.004365/2010-66, 08012.011142/2006-79, 08012.011668/2007-30, 08012.004039/2001-68, 08012.004573/2004-17, 08012.004702/2004-77, 08012.009888/2003-70, 08012.000283/2006-66, 08012.001826/2003-10, 08012.002493/2005-16, 08012.004086/2000-21, 08012.009088/1999-48, and 08000.015337/1997-48.

4.2. Direct evidence of an agreement

"A cartel is any agreement or concerted practice between competitors to fix prices, divide markets, allocate market quotas or restrict production, rig bids in government procurement, or that has any competitively sensitive information as its object. By causing price rises and supply restrictions and offering no economic benefit, cartels inflict serious harm to consumers, making goods and services unavailable for some and unnecessarily expensive for others". [34]

We consider direct the kind of evidence that is directly linked to the illegal practice it attempts to prove, that is, an agreement to coordinate competitors' behaviour and thus avoid or diminish competition.

There are several ways to provide direct evidence of collusive agreements in cartels: reports and testimonies; communication between competitors (e-mails, chat messages, fax, mail, etc.); internal communication mentioning the agreement (e-mails, chat messages, etc.); unilateral documents providing information on the agreement (notes in a schedule, spreadsheets, etc.); documents shared between competitors

[32] Administrate proceeding split from case no. 08012.010932/2007-18.

[33] Administrate proceeding split from case no. 08012.009611/2008-51.

[34] Brasil, CADE, Perguntas Frequentes. http://en.cade.gov.br/cade/servicos/perguntas-frequentes/perguntas-sobre-infracoes-a-ordem-economica. Retrieved: 31 May 2021.

(meeting minutes, spreadsheets, etc.); transcriptions of tapped calls; amongst others. This type of evidence has a high probative value.

The content (or the body) of evidence must include competitors' coordinated actions, interests, and intent especially aimed to:

i. Fix prices: competitors agree on prices, price rises, or discounts. See cases no. 08700.001422/2017-73, 08700.004073/2016-61, 08012.011980/2008-12, 08700.010769/2014-64, 08012.002812/2010-42, 08012.005930/2009-79, 08012.000820/2009-11, 08012.008847/2006-17, 08012.010932/2007-18, 08012.007818/2004-68[35], 08012.007033/2006-57, 08012.004365/2010-66, 08012.011668/2007-30, 08012.007149/2009-39, 08012.005495/2002-14, 08012.009888/2003-70, 08012.000283/2006-66, 08012.002493/2005-16, 08012.004599/1999-18, 08012.000099/2003-73, 08012.004036/2001-24, 08012.002299/2000-18, and 08000.015337/1997-48.

ii. Limit the number of products: competitors agree on limiting the volume of production or sales of a product or the frequency in which a service is supplied. See cases no. 08012.011980/2008-12, 08012.000820/2009-11, 08012.005930/2009-79, 08012.010932/2007-18, 08012.004599/1999-18, and 08012.002127/2002-14.

iii. Divide the market: competitors divide the market by customers, suppliers, regions, or periods amongst themselves. See cases no. 08012.002812/2010-42, 08012.001376/2006-16, 08012.005930/2009-79, 08012.004365/2010-66, 08012.009888/2003-70, 08012.000283/2006-66, 08012.004599/1999-18, 08012.004086/2000-21, and 08012.002127/2002-14.

iv. Fix prices, conditions, or benefits in public procurement or abstaining from participating: the strategies adopted by bidders to restrain, distort, or harm competition

[35] Administrate proceeding split from case no. 08012.004702/2004-77.

comprise cover bidding[36]; bid suppression[37], at times through fake consortia; bid rotation[38]; market, bid, or procurement lot allocation[39]; and subcontracting[40]. See cases no. 08700.010409/2015-43[41], 08700005615/2016-12[42], 08012.001377/2006-52, 08700.004617/2013-41, 08012.004280/2012-40, 08012.001376/2006-16, 08012.006130/2006-22, 08012.009382/2010-90, 08012.009645/2008-46, 08012.008850/2008-94, 08012.010932/2007-18, 08012.001273/2010-24, 08700.011276/2013-60[43], 08012.008184/2011-90, 08012.009885/2009-21, 08012.000030/2011-50, 08012.010362/2007-66, 08012.008507/2004-16, 08012.011853/2008-13, 08012.006199/2009-07, 08012.006989/1997-43, and 08012.009118/1998-26.

Inciting concerted practices is also illegal per the Brazilian antitrust legislation. Thus, the following are also relevant evidence:

v. Influencing the adoption of concerted practices: unions, membership associations and outsourced consulting firms can exceed their organisational roles and

[36] Cover bidding is "arranged to give an appearance that bidders are competing against each other. This sort of arrangement happens when individuals or companies agree on submitting proposals concerning at least one of the following: (1) One of the competitors agrees on submitting a proposal with prices higher than the ones offered in the proposal submitted by the bidder chosen to win the procurement process; (2) A competitor deliberately submits a proposal that is too overpriced to be accepted; or (3) A competitor submits a proposal with specificities that are known to be unacceptable to the purchaser". (CADE's Guide for Fighting Cartels in Procurements, 2019. Available at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/guide-for-fighting-cartels-in-procurements_version_01-10.pdf).

[37] "Bid-suppression schemes involve agreements among competitors in which one or more companies agree to refrain from bidding or to withdraw a previously submitted bid so that the designated winner's bid will be accepted. In essence, bid suppression means that a company does not submit a bid for final consideration. In essence, bid suppression means that a company does not submit a bid for final consideration." (Guidelines for Fighting Bid Rigging in Public Procurement. OECD, 2012).

[38] "Conspiring firms continue to bid, but they agree to take turns being the winning (i.e., lowest qualifying) bidder." (Guidelines for Fighting Bid Rigging in Public Procurement. OECD, 2012).

[39] "Competitors carve up the market and agree not to compete for certain customers or in certain geographic areas. Competing firms may, for example, allocate specific customers or types of customers to different firms, so that competitors will not bid (or will submit only a cover bid) on contracts offered by a certain class of potential customers which are allocated to a specific firm. In return, that competitor will not competitively bid to a designated group of customers allocated to other firms in the agreement." (Guidelines for Fighting Bid Rigging in Public Procurement. OECD, 2012).

[40] The designated contract winner undertakes to compensate the companies that cooperated through bid suppression or cover bidding by subcontracting, thus sharing the uncommonly high profits earned with the illegal collusive agreement. (Guidelines for Fighting Bid Rigging in Public Procurement. OECD, 2012).

[41] Administrate proceeding split from case no. 08012.003321/2004-71.

[42] Administrate proceeding split from case no. 08012.001273/2010-24.

[43] Administrate proceeding split from case no. 08012.009611/2008-51.

coordinate or facilitate the adoption of agreements or concerted practices between their members. See cases no. 08700.004617/2013-41, 08012.008507/2004-16, 08000.010791/1994-41, 08012.002127/2002-14, 08012.003208/1999-85, 08012.004036/2001-24, 08012.007515/2000-31, 08012.004712/2000-89, 08012.002299/2000-18, 08012.005769/1998-92, 08000.008994/1994-96, 08000.020238/1994-62, 0145/1993, 0158/1994, 0155/1994, and 0157/1994.

Cartel agreements and concerted practices usually aim at developing many activities other than the collusive agreements, such as monitoring compliance with the agreement and sanctioning deviating participants, submission of bids at a fixed price, suppression of bids, entry barriers, creation of fake consortia, amongst others. Evidence related to such actions directly prove cartels but are only considered direct evidence inasmuch as the records confirm the content of the arrangement. Moreover, one should note that affirming the existence of a collusive practice is a prerequisite for the analysis of the evidence of cartel activities; that is, direct evidence of other activities depends on the existence of a collusive agreement.

4.3. Indirect evidence of an agreement

Indirect evidence (also known as circumstantial evidence) does not directly prove an agreement but is useful to understand the conduct under investigation, possibly leading to a finding that results from logical inference. The indirect evidence is "not the principal fact but a different one from which a rational conclusion on the principal fact can be reached." Hence, "this type of evidence offers adjudicators information that can only be used to draw an inference that ultimately leads to the principal fact of the case"[44].

A kind of circumstantial evidence often used in cases adjudicated by the authority is the probability of a cartel being formed in a specific market, according to the structure and history of this market. Although not as robust as direct evidence or even other types

[44] Michele Taruffo, *A prova*, (São Paulo: Marcial Pons, 2014), p. 58.

of indirect evidence, such information helps understand a communication proved by direct evidence or other indirect evidence.

Signs of a collusive agreement's monitoring can be considered direct or indirect evidence, according to the content and circumstances of the communication.

4.3.1. Economic evidence

Some market features facilitate collusive agreements. Additionally, certain economic phenomena of a market have collusion as their most probable cause. Researched by the economics, these situations – together with other assessed evidence – help develop a comprehensive understanding of the phenomenon under investigation. The Tribunal of CADE has repeatedly found the following to be circumstances that facilitate collusion:

1. Features of the market: Product homogeneity, similar cost structure, transparent prices or conditions of sale, high barriers to entry, low price elasticity of demand, and market concentration are structural conditions that facilitate collusion. See cases no. 08700.010769/2014-64, 08012.001377/2006-52, 08012.010744/2008-71, 08012.000820/2009-11, 08012.011791/2010-56, 08012.008847/2006-17, 08012.009885/2009-21, 08012.010932/2007-18, 08012.011853/2008-13, 08012.011142/2006-79, 08012.006199/2009-07, 08012.007149/2009-39, 08012.009888/2003-70, 08012.001826/2003-10, and 08012.002127/2002-14.

2. Close personal or professional relations: Having family or common business partners in companies' management positions may enable the sharing of information and create a situation in which there is no competition, possibly giving rise to actions to fake competition. See cases no. 08012.000742/2011-79, 08012.011791/2010-56, 08012.008184/2011-90, and 08012.011142/2006-79.

3. Membership associations: They are bodies that inherently coordinate the activities of companies or members[45]. However, it is common that they deviate from

[45] As to the anticompetitive risks of membership associations' meetings, Gesner Oliveira and João Grandino Rodas paraphrased Adam Smith, saying: "In its classic 1776 work, The Wealth of Nations, Smith stated that 'People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy

their functions and illegally coordinate anticompetitive practices such as cartels or the sharing of sensitive information. See cases no. 08012.011791/2010-56, 08012.009462/2006-69, 08012.001273/2010-24, 08012.005004/2004-99, 08012.001826/2003-10, and 08012.002299/2000-18.

4.3.2. Evidence of collusive agreement oversight

The stability of an anticompetitive agreement depends on mechanisms to monitor its implementation and punish participants who deviate from its rules. The sharing of sensitive information is, at large, what enables these mechanisms.

If a piece of evidence that proves monitoring activities also confirms the content of these arrangements, it is direct evidence. If the content of the arrangements cannot be confirmed but only inferred, it is indirect evidence. Even in case one cannot safely infer the existence of an agreement from a piece of evidence, this piece may nonetheless prove an infraction of exchange of sensitive information, considering its potential effects. A third hypothesis is that the practice constitutes lawful communication if it cannot potentially lessen competition.

Therefore, to prove illegal cartel activity, the evidence must indicate the existence of the following:

1. Mechanisms to monitor an agreement and to punish nonconforming participants: There must be formal or informal manners to oversee the implementation of the anticompetitive agreement, in addition to sanctions imposed on participants who deviate from it. Coercion, threats, and even reprisals are usual whenever a non-complying participant is discovered. See cases no. 08700.010409/2015-43[46], 08700.010769/2014-64, 08012.001377/2006-52, 08012.011980/2008-12, 08012.001376/2006-16, 08700.002632/2015-17[47], 08012.002414/2009-92, 08700.002821/2014-09, 08012.010744/2008-71, 08012.000820/2009-11,

against the public, or in some contrivance to raise prices'." Gesner Oliveira and João Grandino Rodas, *Direito e economia da concorrência*, (São Paulo: Renovar, 2005), p.40.

[46] Administrate proceeding split from case No. 08012.003321/2004-71.

[47] Administrate proceeding split from case 08012.006764/2010-61.

08012.003321/2004-71, 08012.005930/2009-79, 08012.008850/2008-94, 08012.011791/2010-56, 08012.005255/2010-11, 08012.001127/2010-07[48], 08012.006764/2010-61, 08012.008847/2006-17, 08700.011276/2013-60[49], 08012.007356/2010-27, 08012.010932/2007-18, 08012.011668/2007-30, 08000.009354/1997-82, 08012.011142/2006-79, 08012.004573/2004-17, 08012.007149/2009-39, 08012.002959/1998-11, 08012.001003/2000-41, 08012.004472/2000-12, 08012.004039/2001-68, 08012.010215/2007-96, 08012.001826/2003-10, 08012.004086/2000-21, 08012.002127/2002-14, 08012.004036/2001-24, and 08012.002299/2000-18.

2. Sharing of competitively sensitive information, even when there is no evidence of sanctions: These are interactions between competitors, whether direct or mediated by third parties (such as unions or membership associations), aimed at sharing competitively strategic data, such as prices, conditions of sale, and customer portfolios. The shared data is disaggregated, not public, and may refer to a current or a future situation; it is employed to monitor compliance with the agreement[50]. See cases no. 08700.001422/2017-73, 08700.010769/2014-64, 08012.001377/2006-52, 08700.007938/2016-41[51], 08012.004280/2012-40, 08700.004617/2013-41, 08700.004073/2016-61, 08012.011980/2008-12, 08012.001395/2011-00, 08012.001376/2006-16, 08012.002414/2009-92, 08012.004674/2006-50, 08012.010744/2008-71, 08012.009382/2010-90, 08012.000820/2009-11, 08012.003321/2004-71, 08012.005930/2009-79, 08012.008850/2008-94, 08012.011791/2010-56, 08012.005255/2010-11, 08012.001029/2007-66, 08012.008821/2008-22, 08012.010932/2007-18, 08012.008847/2006-17,

[48] Administrate proceeding split from case No. 08012.010932/2007-18.

[49] Administrate proceeding split from case No. 08012.009611/2008-51.

[50] When cartels cannot be inferred from the evidence, this practice can be deemed an independent violation of sharing competitively sensitive information. See case no. 08700.001486/2017-74 and the definition rendered by the rapporteur of case no. 08700.001422/2017-73: *"Thus, there is a distinction between the sharing of competitively sensitive information and a softcore cartel. To distinguish between these practices, one should analyse not only how sensitive the shared information is but also if the evidence collected in the proceeding – i.e. the elements of the case at issue – prove the existence of coordination or a structured agreement between market players. If that is not the case, I believe the practice should be classified as the sharing of competitively sensitive information, which calls for an examination of its effects. However, if the communication is essentially about an agreement or arrangement, the practice should be considered a cartel and, thus, examined as a per se violation".*

[51] Administrate proceeding split from case no. 08700.004631/2015-15.

08700.011276/2013-60[52], 08012.001273/2010-24, 08012.009462/2006-69, 08012.007818/2004-68[53], 08012.011853/2008-13, 08012.011142/2006-79, 08012.001794/2004-33, 08012.002959/1998-11, 08012.004039/2001-68, 08012.010215/2007-96, 08012.001826/2003-10, 08012.004086/2000-21, and 08012.002127/2002-14.

4.3.3. Evidence of ignorance of the law

In making a finding that a given violation happened and a defendant is guilty of it, it is useful to prove the defendant knew the practice was illegal. Demonstrating a wrongdoer understood the illegality of the practice, was concerned with this fact and tried to conceal the practice usually are grounds for inferring the existence of an agreement. Moreover, in calculating the sanction, a defendant's understanding of the illegality of an act is an aggravating factor as it suggests a lack of good faith. Therefore, one should look for evidence that demonstrates the following:

1. Mechanisms to conceal the agreement: Parties to an anticompetitive agreement employ abbreviations, aliases, codes, and other strategies to conceal or make it difficult to identify the terms and participants. See cases no. 08012005069/2010-82[54], 08012.001395/2011-00, 08012.001376/2006-16, 08012.006130/2006-22, 08012.008821/2008-22, 08012.008847/2006-17, 08012.010932/2007-18, 08700.011276/2013-60[55], 08012.011853/2008-13, 08012.009611/2008-51, 08012.010215/2007-96, 08012.007149/2009-39, 08012.002127/2002-14, and 08012.007515/2000-31.

2. Concern with the investigations or knowledge of the investigations: Participants of collusion who know they are under investigation or show concern about being investigated by competent authorities. See cases no.

[52] Administrate proceeding split from case no. 08012.009611/2008-51.

[53] Administrate proceeding split from case no. 08012.004702/2004-77.

[54] Administrate proceeding split from case no. 08012.000820/2009-11.

[55] Administrate proceeding split from case no. 08012.009611/2008-51.

08700.010769/2014-64, 08012.011142/2006-79, 08012.001003/2000-41, 08012.005495/2002-14, and 08012.001826/2003-10.

3. Express reference to the illegality of a practice or repeat offences: Participants show, in their communication, familiarity with antitrust legislation and state the practice is illegal or have undisputed knowledge of its illegality due to previous conviction. See cases no. 08012.005255/2010-11, 08012.000820/2009-11, 08012.006969/2000-75, 08012.011027/2006-02, and 08012.004472/2000-12.

4.4. Evidence of a practice's effects in Brazil

CADE's precedents agree that cartels are punishable because they are per se violations, that is, the authority presumes they have a deleterious effect on competition or consumer welfare.[56]

Debate on international cartels, however, demands not only evidence of the practice, but also that CADE demonstrates it has jurisdiction over the matter by showing the connection between the international cartel and the Brazilian market. An international cartel is one whose activities are managed from abroad. The link with the Brazilian market exists when the practice effectively or potentially affects transactions in the Brazilian territory (Article 2 of Law 12529/2011).

In establishing CADE's jurisdiction over a practice carried out abroad, one should look for evidence with these characteristics:

1. Direct or indirect mentions of Brazil or Brazilian customers: Documents that demonstrate the agreement included Brazil, South America, Latin America or even the global market without expressly excluding Brazil. The same applies to mentions of

[56] As an example, see the opinion of Commissioner Marcos Paulo Verissimo in case no. 08012.006923/2002-18 and the following documents: document no. SEI 0752279 (Commissioner Mauricio Bandeira Maia's opinion in case no. 08700.009879/2015-64); document no. SEI 0793414 (Commissioner Luiz Braido's opinion in case no. 08012.007011/2006-97); document no. SEI 0534141 (Commissioner Paula Azevedo's opinion in case no. 08012.000758/2003-71); document no. SEI 0264382 (Commissioner Alexandre Cordeiro's opinion in case no. 08012.009645/2008-46); and document no. SEI 0583001 (Commissioner João Paulo Resende's opinion in case no. 08012.001377/2006-52).

Brazilian customers. See cases no. 08012.003970/2010-10, 08700.003735/2015-02, 08012.002414/2009-92, 08012.010932/2007-18, and 08012.004599/1999-18.

2. Dependence on the affected product's imports: The data must show Brazil's dependence on the importation of the affected product, in addition to the defendants' broad participation in supplying the product. Whenever the practice has an impact on intermediate goods, it is important to demonstrate the input constitutes a great part of the final good's value. See cases no. 08700.009167/2015-45, 08012.011980/2008-12, 08012.001395/2011-00, 08012.001376/2006-16, 08012.005255/2010-11, and 08012.004599/1999-18.

3. Meetings in the Brazilian territory: If proved that meetings between participants happened in the Brazilian territory, one should also indicate its effects on the country, as the territory criterion is met as per Article 2 of Law 12529/2011. See cases no. 08012.002414/2009-92, 08012.011027/2006-02, and 08012.004702/2004-77.

4.5. Sufficient evidence

To prove a cartel and to be convinced the defendants are guilty of it, CADE's Administrative Tribunal requires the administrative proceeding has strong and robust evidence of the conduct. Such body of evidence must preferably include the following features:

1. Diverse evidence and/or indicia: A body of evidence made of several pieces of evidence and/or indicia of many kinds that come from a variety of sources is usually recognised and persuasive. See cases no. 08012005069/2010-82[57], 08700.003735/2015-02, 08012.000820/2009-11, 08012.001029/2007-66, 08012.011142/2006-79, 08012.010215/2007-96, 08012.000283/2006-66, and 08012.002127/2002-14.

2. Corroborating evidence and/or indicia: Evidence and/or indicia that confirm each other in a proceeding make up a cohesive, coherent, and harmonic body of evidence. See cases no. 08012.001395/2011-00, 08012.011980/2008-12,

[57] Administrate proceeding split from case no. 08012.000820/2009-11.

08700.010320/2012-34, 08700.007938/2016-41, 08012.001376/2006-16, 08012.006130/2006-22, 08012.010744/2008-71, 08012.001029/2007-66, 08012.000820/2009-11, 08012.009611/2008-51, 08012.011142/2006-79, and 08012.011027/2006-02.

3. Decisions reached solely on the grounds of indirect evidence: A firm body of evidence solely made up of indirect evidence can lead to a guilty verdict. See cases no. 08012.005069/2010-82, 08700.005615/2016-12, 08012.004422/2012-79, 08012.000820/2009-11, and 08012.001273/2010-24.

4. The existence of an agreement to manipulate the market is beyond a reasonable doubt: Cases dismissed once the Tribunal found a reasonable doubt about the existence of arrangements to manipulate the market. See cases no. 08012005069/2010-82[58], 08700.001422/2017-73, 08700.007938/2016-41[59], 08700.010769/2014-64, 08700.011276/2013-60[60], and 08012.007149/2009-39.

5. Agreement/guilty verdict in other jurisdictions: The fact in another jurisdiction a defendant was found guilty or signed an agreement pleading guilty of a violation, in addition to evidence proving said violation had effects on Brazil, favours the conclusion on the existence of an illegal agreement – whether totally or partially executed abroad – punishable in the Brazilian territory. See cases no. 08012.001395/2011-00, 08012.001376/2006-16, 08012.001127/2010-07[61], 08012.001029/2007-66, 08012.005930/2009-79, 08012.010932/2007-18, 08012.005255/2010-11, 08012.011027/2006-02, and 08012.004599/1999-18.

6. Confession: A confession or admission of participation in an antitrust practice, especially in settlement agreements executed with CADE or other Brazilian authorities in charge of cartel prosecution, in addition to other evidence that shows signs of an agreement to manipulate competition, have helped to make a finding of a

[58] Administrate proceeding split from case no. 08012.000820/2009-11.

[59] Administrate proceeding split from case no. 08700.004631/2015-15.

[60] Administrate proceeding split from case no. 08012.009611/2008-51.

[61] Administrate proceeding split from case no. 08012.010932/2007-18.

cartel. See cases no. 08700.007938/2016-41[62], 08012.006685/2004-11, 08700.006551/2015-96[63], 08012.010932/2007-18, 08012.003745/2010-83, and 08012.011027/2006-02.

4.6. Insufficient evidence, when presented in isolation

Often, some evidence presented in isolation, without corroboration of other direct or indirect evidence, has been considered insufficient to prove either that a violation has been committed or that the defendant has partaken in it. See the most frequent cases below:

1. Unilateral documents or accounts: Accounts from employees or third parties, as well as notes and internal communication recorded by a single party to a proceeding, especially if an employee, is not considered sufficient evidence of anticompetitive conduct **in isolation**. See cases no. 08012.011980/2008-12, 08012.001395/2011-00, 08012.004674/2006-50, 08012.004422/2012-79, 08012.001029/2007-66, and 08012.009906/1999-94.

2. Economic evidence and parallel behaviour: Similar behaviour as to prices and price rises may have reasons other than a cartel; thus, they cannot be considered **in isolation** to find a defendant guilty. See cases no. 08012.007866/2007-07, 08700.003447/2015-40, 08012.007196/2009-82, 08012.009988/2006-49, 08012.002921/2007-64, 08012.002925/2009-12, 08012.009906/1999-94, 08012.000444/2002-98, 08012.000921/2000-53, 08012.006059/2001-73, 08012.005545/1999-16 08012.001198/2007-04, 08012.001112/2000-42, 08012.008166/1999-14, and 08012.004241/2003-51.

3. Phone records: One cannot infer the anticompetitive content of communication between competitors **solely based on phone call records** if the topic of these calls is unknown. See cases no. 08012.001395/2011-00, 08012.004422/2012-79, and 08700.009161/2014-97[64].

[62] Administrate proceeding split from case no. 08700.004631/2015-15.

[63] Administrate proceeding split from case no. 08012.000030/2011-50.

[64] Administrate proceeding split from case No. 08012.000774/2011-74.

4. Reference to an individual or legal entity in third parties' communication: The **mere mention** of an individual or legal entity in third parties' communication, such as intercepted communication, cannot prove the participation of the individual or entity in an anticompetitive practice. See cases no. 08700.009879/2015-64, 08700.000729/2016-76, and 08012.007356/2010-27.

5. Documents without date and/or authorship: The lack of signature or author and impossibility of proving its date of publication (if before or after the alleged practice), or even difficulties in checking its veracity, make it impossible to prove **in isolation** someone guilty. See cases no. 08700.004617/2013-41 and 08012.006667/2009-35.

6. Being copied in an email: It is not possible to determine whether a defendant participated in an anticompetitive practice based **only** on emails in which he or she was copied. Even if a defendant is the main recipient of an email, this fact may not be enough to find he or she was engaged in the violation, especially if the defendant does not answer it or does not show agreement. In assessing this kind of evidence, one should also consider the position the defendant holds in the company. See cases no. 08700.011474/2014-05, 08700.004617/2013-41, and 08012.002812/2010-42.

7. Scheduled meetings or mentions of meetings: By themselves, the mere scheduling of meetings or reference to them in communication between competitors cannot allow inference of its anticompetitive goal or content. See cases no. 08012.011980/2008-12, 08700.004617/2013-41, 08012.004422/2012-79, and 08012.004241/2003-51.

8. Anonymous tips: The credibility and evidential value of anonymous tips derive from the substantial evidence collected, not from mere accounts (Article 5, Paragraph 4 of the Brazilian Constitution of 1988). See cases no. 08012.007196/2009-82, 08012.000998/1999-83, and 08012.006768/2000-78.

We highlight that this document presents precedents in which proceedings have been dismissed in their entirety or concerning one or more defendants due to insufficient evidence. The precedents shown here only include decisions by the collegial

body and only the positions that were affirmed by different judgements. We did not consider positions adopted in dissenting opinions.

4.7. Validity of evidence presented

In a proceeding, we only admit lawfully obtained evidence. Evidence obtained by infringing rights is considered illegal. In some cases, the evidence demands a special procedure that, if not followed, affects its validity. This may occur, for instance, if the production of certain evidence requires legal authorisation (e.g. a search and seizure without a warrant or a recording of a phone conversation that breaches the law).

In admitting evidence, another frequent and relevant question concerns granting the right to full answer and defence[65] in the administrative proceeding.

The CADE Tribunal has often mentioned the validity of evidence concerning the topics below:

1. Evidence produced by other bodies[66]: CADE also admits evidence produced in proceedings adjudicated by different bodies that may corroborate other evidence presented in the administrative proceeding. For this purpose, the evidence must have been admitted in the original proceeding (and thus have fulfilled the legal requirements for that). If a piece of evidence demands legal authorisation to be produced, the same applies to be used in the administrative proceeding adjudicated by CADE. See below a few instances of this kind of evidence and their respective precedents:

a. Telephone tapping: When none of the parties to a conversation knows it is being recorded. Thus, legal authorization is required. The following administrative proceedings used evidence from criminal cases, authorised by the competent authority.

[65] Constitution of Brazil of 1998, Article 5, Item LV: "in judicial or administrative proceedings, litigants and defendants, in general, are ensured the right to make full answer and defence, with all the means and resources inherent to it".

[66] Precedent 591: "Using evidence from administrative disciplinary proceedings, provided it is legally authorised and that the right to make full answer and defence is granted". (PRECEDENT 591, FIRST SECTION, adjudicated on 13 September 2017, published in Diário de Justiça Eletrônico in 18 September 2017.

See cases no. 08700.010409/2015-43[67], 08700.010409/2015-43[68], 08700.010769/2014-64, 08700.002821/2014-09, 08012.009382/2010-90, 08012.008850/2008-94, 08012.008847/2006-17, 08012.011853/2008-13, 08012.011668/2007-30, 08012.007149/2009-39, 08012.004472/2000-12, 08012.010215/2007-96, 08012.002959/1998-11, 08012.005495/2002-14, 08012.001826/2003-10, 08012.004036/2001-24, and 08012.002299/2000-18.

b. (Criminal) search and seizure: Search and seizures of documents in premises where they may be located must be previously authorised by law. The following proceedings used evidence from criminal cases, with the competent authority's permission. See cases no. 08012.004280/2012-40, 08012.004674/2006-50, and 08012.000820/2009-11.

c. Evidence produced in other administrative proceedings: It is also possible to use the evidence collected in other administrative proceedings. See case no. 08012.005928/2003-12.

d. Evidence produced in a foreign jurisdiction: Evidence presented in an administrative proceeding can come from a different jurisdiction. See case no. 08012.004599/1999-18.

2. Recordings made by one of the parties to the communication: Audio and video recordings made by one of the parties to the communication can be used even without authorisation from the other parties to the communication. Producing this kind of evidence does not require legal authorisation, except in the cases of telephone tapping and interception of data from third parties' communication. See cases no. 08012.008215/2006-45, 08012.009382/2010-90, 08012.002568/2005-51, 08012.009462/2006-69, 08012.007356/2010-27, 08012.002921/2007-64, 08012.006019/2002-11, 08012.001826/2003-10, and 08012.007515/2000-31.

[67] Administrate proceeding split from case no. 08012.003321/2004-71.

[68] Administrate proceeding split from case no. 08012.003321/2004-71.

3. Civil search and seizures: This kind of measure, set forth in Law 12629/2011[69] (the Brazilian Competition Law), is adopted at the fact-finding stage of an administrative proceeding and aims to select and confiscate documents in targeted premises. It depends on previous legal approval. As the success of a search may depend on the investigated party's knowledge of it, the right to full answer is delayed. See cases no. 08012.006130/2006-22, 08012.009611/2008-51, 08012.004702/2004-77, and 08012.001826/2003-10. All evidence discovered during a lawful search is admitted, even if fortuitous, as seen in case no. 08012.006130/2006-22.

4. Documents in foreign languages: If a practice was committed abroad and has had anticompetitive effects in Brazil, any foreign-language document presenting evidence of this practice is admitted, including judgements and settlement agreements from other jurisdictions. To be valid in CADE's administrative proceedings, the documents must be written in Portuguese or be accompanied by a sworn translation[70]. See cases no. 08700.004617/2013-41, 08012.005255/2010-11, 08012.010932/2007-18, and 08012.002925/2009-12.

5. Expert report: It is a study on a fact or document prepared by someone with technical knowledge of the matter at issue. A particularly complex object of analysis can increase the quantity and quality of the information in a proceeding. CADE admits reports that respect the right to make full answer and defence. See cases no. 08012.008215/2006-45[71], 08012.010744/2008-71, 08012.002921/2007-64[72], and 08012.001826/2003-10.

[69] Article 13, Item VI, Subitem d: "request from the judicial branch, through the Office of the Attorney General at CADE, search and seizure warrants for objects, documents of any sort, as well as ledgers, computers and electronic files belonging to firms or individuals, which are of interest to any administrative enquiry or administrative proceeding launched to impose sanctions for antitrust violations. Article 839 to 843 of Law 5869/1973 is to be applied, when appropriate, without the need for filing a proceeding within the judicial branch".

[70] Law 6015/1973, "Article 129. To be binding upon third parties, the following documents must be notarised: (...) Paragraph 6: All foreign documents, accompanied by their respective translations, to be effective in bodies of the Union, States, Federal District, Cities, and Territories in any instance, court, or appellate court".

[71] Although the expert report presented in case no. 08012.008215/2006-45 was admitted in the body of evidence, it could not be considered evidence because it failed to observe the right to full answer and defence in its production.

[72] Although the expert report presented in case no. 08012.002921/2007-64 was admitted in the body of evidence, it could not demonstrate the existence of any illegal activity as it lacked the dates, the company involved and the name of its employees. Moreover, it included inaudible passages, noise, and had no anticompetitive content.

4.8. Evidence of a practice's degree of coordination

CADE's precedents categorise cartel conduct into softcore and hardcore cartels depending on how organised a cartel is. Penalties imposed by CADE grow according to a cartel's degree of coordination. It is important to remember that "the difference between a hardcore and a softcore cartel is in the coordination of the agreement, and not in its presumed negative effects"[73]. The CADE Tribunal assigned the following cartels into these categories:

i. Hardcore cartel: It is an agreement between competitors "with a certain degree of coordination, aimed at fixing prices and conditions of sale, allocating customers, fixing production levels, or preventing the entry of new companies into the market. This kind of cartel operates through an established mechanism of coordination, e.g. regular meetings, operational guidelines, codes of conduct, etc. Therefore, it does not occur by accident but by formulating lasting mechanisms to attain its goals"[74]. Hardcore cartels often, but not necessarily, have monitoring and retaliation mechanisms. Since these cartels intend to perpetuate market manipulation, they tend to be considered particularly serious, although it is always necessary to analyse the case at issue and the practice's circumstances. The Tribunal found defendants guilty of participating in hardcore cartels in the following proceedings: Cases no. 08012.011980/2008-12, 08700.010769/2014-64, 08012.002812/2010-42, 08012.004674/2006-50, 08700.001859/2010-31, 08012.001376/2006-16, 08012.007011/2006-97, 08012.006130/2006-22, 08012.000820/2009-11, 08012.001600/2006-61, 08012.002568/2005-51, 08012.008847/2006-17, 08012.010932/2007-18, 08012.001273/2010-24, 08012.005004/2004-99, 08012.011668/2007-30, 08012.011142/2006-79, 08012.003745/2010-83, 08012.002959/1998-11, 08012.004702/2004-77, 08012.005495/2002-14, 08012.002127/2002-14, and 08012.002299/2000-18.

[73] Syllabus of case no. 08700.001422/2017-73.

[74] Case no. 08012.002127/2002-14. Document no. SEI 0124996, opinion by the rapporteur of the case, Commissioner Luiz Carlos Delorme Prado. The case was heard in 2005; nonetheless, the position taken in this opinion has been adopted in recent decisions, such as in case no. 08012.001376/2006-16, heard in 2018.

ii. Softcore cartel: This kind of cartel is "an act of coordination between companies with a similar goal to that of a hardcore cartel, but of a fortuitous, not organised, nature. This is the case when a group of companies decides to gather to agree on a price rise, often as a result of an external event that affected them at the same time. The action may be considered fortuitous as it was not based on a permanent arrangement to coordinate the actions of the involved companies"[75]. Since it is a one-time event, it is usually not as serious as a hardcore cartel – although it can be, depending on the circumstances. Softcore cartels were seen in the following proceedings: Cases no. 08700.001422/2017-73, 08012.004280/2012-40, 08012.004422/2012-79, 08012.008215/2006-45, and 08012.006019/2002-11.

5. Conclusion

The above research on precedents represents an important tool to help the Office of the Superintendent General negotiate leniency agreements. It assists CADE in examining the probability of discovering an anticompetitive practice and finding non-signatories of the leniency agreement guilty of the practice. Therefore, the conclusions and cases listed above should be taken into account when screening leniency applications filed with the Office of the Superintendent General.

The Tribunal has admitted several types of evidence in deciding on the existence of cartels and their participants. In this regard, leniency applicants have several kinds of evidence to consider using when heading towards internal investigations. Ranging from the minutes of a meeting to internal and external email exchanges, from economic evidence to expert reports, there are many ways of substantiating claims with evidence.

Amongst the several types of evidence presented, CADE particularly values direct evidence, as it is directly connected to the allegedly illegal practice. Nonetheless, CADE may enter a judgement against a defendant based on pieces of indirect evidence[76], as

[75] Case no. 08012.002127/2002-14, document no. SEI 0124996, heard in 2005. Case no. 08012.006019/2002-11, document SEI No. 128309, heard in 2008. These are opinions rendered by the rapporteur of these cases, Commissioner Luiz Carlos Delorme Prado. Despite being issued some time ago, the same position has been adopted by recent decisions, such as in case no. 08012.004422/2012-79, heard in 2018.

[76] Evidence that proves the circumstances through which one can infer a violation.

long as there are many of them and they converge to the same understanding of the facts.

Moreover, the research showed the Tribunal prefers a holistic[77] and systemic assessment of the evidence. Thus, a body of evidence with a diversity of mutually corroborated direct/indirect evidence can be considered sufficient to prove a defendant is guilty of an antitrust violation. If these conditions are met, a violation can be proved even on the grounds of indirect evidence alone. Additionally, guilty decisions, agreements signed with other jurisdictions, and offenders' confessions can assist an adjudicator in making findings regarding an antitrust violation and its wrongdoer.

For practices that occurred abroad, it is crucial to show the practice potentially or effectively affected the Brazilian market.

[77] The holistic approach should not be understood as a perspective to support narratives irrespective of their quality or their relevance in a body of evidence. The holistic approach is defended in Susan Haack's take on civil liability, for instance:

"The epistemological argument is that, under certain conditions, a congeries of evidence warrants a conclusion to a higher degree than any of its components alone would do; the legal argument, interlocking with this, is that our evidence law encourages a kind of atomism that can actually impede the process of arriving at the conclusion most warranted by the evidence".

What would be these conditions? According to Susan Haack, a combination of pieces of evidence allow for a more conclusive finding than the individual pieces of evidence when, and only when,

(i) it helps support a finding (the evidence and conclusion fit in the same narrative);

(ii) it enhances the "independent security" of evidence favourable to the conclusion (the evidence is secure, independently from parties' allegations about it) or reduces the "independent security" of evidence unfavourable to the conclusion;

(iii) it enhances comprehensiveness of the body of evidence (e.g. evidence obtained from different sources or through different methods that points in the same direction).

Thus, this idea covers three different dimensions as to the way each piece of evidence is integrated into the conclusion.

However, Ronald Allen is even closer to a holistic approach, as he defends the merits of the explanatory narratives as an important part of the decision-making process,

"An explanation is, others things being equal, better to the extent that it is consistent, simpler, explains more (consilience), better accords with background beliefs (coherence), is less ad hoc, and so on; and is worse to extent it betrays these criteria (...) Explanations do not explain evidence in its entirety; explanations explain aspects of evidence. Explanations rarely explain why A; they explain why A rather than B. The inferential interests at stake pick out the appropriate contrasts (or "foils") – whether we want to explain why A rather than B or why A rather than C (or D, etc.). A verdict will (and should) be rendered for the better (or best available) explanation, whether one of the parties' or another constructed by the fact-finder. If the proffered explanations truly are equally bad (or good), including additionally constructed ones, judgment will (and should) go against the party with the burden of persuasion."

Some evidence presented in isolation, however, was deemed insufficient for a guilty verdict. The Tribunal's most commonly rejected evidence are the following: documents presented by a single party, especially when the party is an employee of the reported company (the signatory of a leniency agreement or cease and desist agreement); documents with financial records showing parallel behaviour; telephone records; references to individuals or legal entities in third parties' communication; documents without an author and/or a date; being copied in an email; scheduled meetings and/or reference to meetings; and anonymous tips.

In contrast, these have regularly been admitted as evidence by the Tribunal: telephone recordings made by a party to the call; evidence produced in non-criminal search and seizures, as long as legally authorised, including evidence found by chance; evidence produced in other proceedings, including criminal proceedings that include legally authorised telephone tapping and search and seizures; documents in foreign languages; and expert reports. It is important to highlight the right to full answer and defence must always be respected.

Finally, the evidence presented influences the Tribunal's assessment of the level of coordination of a cartel and, consequently, the levied punishment. When the evidence is at least able to show that an anticompetitive arrangement is lasting and well organised, with a structure that includes mechanisms to monitor compliance and punish deviating behaviour, the practice is considered a hardcore cartel. Conversely, when the evidence demonstrates it is a one-time and not organised practice, the practice is considered a softcore cartel.