

Administrative Council for Economic Defense

Guide

Fighting Cartels in Procurements

December/2019



Ministry of Justice and Public Security
Administrative Council for Economic Defense

Guide for Fighting Cartels in Procurements

Administrative Council for Economic Defense – Cade
SEPN 515 Conjunto D, Lote 4, Ed. Carlos Taurisano

Zip Code: 70770-504 – Brasília/DF

www.cade.gov.br

Institutional Presentation

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Walter de Agra Junior

CADE Chief Economist

Guilherme Mendes Resende

Editorial Information

Coordination

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Fernanda Garcia Machado

Proofreading

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Collaboration

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Editing and Graphic Designing

Communications Unit of CADE

Translation

Arianne Mesquita Rodrigues

Bruna Queiroz Assunção

Editing and Proofreading (English)

Ariel Daltrozo Menezes

Bruna Queiroz Assunção

Nayara Kazeoka Zago

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PRESENTATION¹

This Guide for Fighting Cartels in Procurements, elaborated by the Administrative Council for Economic Defense (CADE), updates the 2008 Handbook Fighting Cartels in Procurements² by the former Secretariat of Economic Law of the Minister of Justice (SDE/MJ)³ and is aimed at assembling the experience gained by the Brazilian antitrust authority during the more than twenty years it has been fighting cartels, especially the experience related to collusion in government procurement processes.

In this regard, the main purpose with this Guide is instructing and providing assistance to all parties involved in organising and carrying out procurement processes (such as auctioneers, members of procurement committees, and other authorities responsible for investigating and penalising this sort of illegal conduct), and to society at large, regarding how to recognise the main signs of collusive behaviour in government procurements, with the intent of improving the chances of cartels being detected, prevented and penalized accordingly.

Disclaimer: This document is neither binding nor a rule (i.e. it does not change any of the provisions of the Statutes of CADE). Practices and procedures hereby described may be amended as CADE sees convenient and opportune, depending on the specific circumstances of actual cases.

This Guide is divided into four parts:

- (I) Cartels in procurements: basic notions and a brief overview of the fight against cartels in Brazil
- (II) Detecting cartels in procurements: enablers, forms of collusion and evidence
- (III) Preventing cartels in procurements: what can be done
- (IV) Crimes associated with cartels in procurements

¹We would like to acknowledge the assistance of former students from the *PinCade* program Bruna Caixeta, Elisa Sarfo, Julia Braga and Mario Norris in the researches that subsidised this document.

²The original document *Cartilha de Combate a Cartéis em Licitações* by the former Secretariat of Economic Law of the Ministry of Justice (SDE/MJ) was published in 2008 and is available only in Portuguese at: http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/documentos-da-antiga-lei/cartilha_licitacao.pdf/view.

³Duties of the SDE/MJ have been taken on by the General Superintendence of CADE, in accordance with the provisions of Law 12529/2011.

INTRODUCTION – WHAT ARE CARTELS IN PROCUREMENTS AND WHAT ARE THEIR CONSEQUENCES?

Cartels in procurement are a form of collusion amongst economic agents aimed at eliminating or restricting competition in government procurements of goods and services.

This practice changes the regular and expected conditions of effective competition in a procurement, imposing less favourable conditions for the Government to purchase goods and services, such as higher prices and inferior goods and services, or even limiting the purchase to an inferior amount than what was originally intended.

In other words, cartels in government procurements undermine the efforts of the Government to efficiently and effectively dispose of its assets to provide society with goods and services and promote the development of the country, thus being detrimental to society as a whole.

All levels of the Brazilian Government (federal, state, and local governments, as well as the government of the Federal District) allocate every year considerable amounts for the acquisition of goods and services needed to carry out their duties. Such legal arrangements allow the State to fulfil its responsibilities related to healthcare, education, public security, infrastructure and others.

In order to better use its assets, the Government must make purchases based on the best proposal for itself, considering, among other aspects, the quality and price of the good or service. The procurement must meet high standards of equity, quality and efficiency, without favouring any competitor. Therefore, it is of utmost importance that procurements be transparent and economical. These principles are closely related to competition in a procurement. Procurements with clear and widely known rules allow for a higher number of bidders, increasing competitiveness and, consequently, resulting in more advantageous proposals. Thus, for the Government, effective competition among companies in procurements is essential.

According to the Organisation for Economic Co-operation and Development (OECD)⁴, such collusions take assets from acquirers and taxpayers, weaken public confidence in the competitive process and undermine the advantages of a competitive market.

The severity of cartels in procurements: according to the OECD, considering its member countries, government procurements represent approximately 15% of their respective GDPs, and should one consider non-member countries this percentage might be even higher. In Brazil, in 2018, the Federal Government alone carried out more than 100 thousand procurement processes, totalling about BRL 48 billion⁵, an amount that shows the impact cartels have on the Treasury.

The Brazilian legal system, like those of many other countries, provides for several procurement methods, in an attempt to adapt the procurement to different situations, rationalise the contracting process and optimise the allocation of assets. Among the main methods currently being used, it is worth mentioning those provided for (1) in Law 8666/1993 (the Procurement Law); (2) in Law 10520/2002 (the Reverse Auction Law); (3) in Law 12462/2011 (the Direct Contracting Law); and (4) in Law 13303/2016 (State-Owned Companies Law).

Each one of these methods entails specific advantages and disadvantages, thus an ideal method that avoids or resolve any possible problem does not exist, be them antitrust issues or any of several other problems that affect procurements. In any case, even though no procurement method is immune from fraud, the requesting agency, following best practices, is responsible for designing notices that, on the one hand, encourage competitiveness and the participation of as many bidders as possible, and on the other hand, make it difficult for cartels to operate. Thereby, this Guide is not dedicated to any specific method of procurement, it is rather aimed at pinpointing the characteristics of government acquisitions that may facilitate collusion, the main strategies used by economic

⁴OECD. *Guidelines for Fighting Bid Rigging in Public Procurement* (2009). Available at: <<https://www.oecd.org/daf/competition/cartels/42851044.pdf>>.

⁵Data collected from the *Brazilian Federal Government Procurement Dashboard*. Available at: <<http://paineldecompras.planejamento.gov.br>>. Retrieved: 24 Jan 2019.

agents, and the most common evidence of a cartel, improving the chances of cartels being prevented and detected.

PART 1 - CARTELS IN PROCUREMENTS: BASIC NOTIONS AND A BRIEF OVERVIEW OF THE FIGHT AGAINST CARTELS IN BRAZIL

I.1. Cartels in procurements according to Competition Law

In general, a cartel consists of an agreement or practice concerted amongst competitors to fix prices, establish quotas or limit production, divide operation markets and settle any competitively sensitive variable, both in government and private procurements. It is universally considered the most outrageous economic crime⁶.

According to the OECD, cartels:

(...) harm consumers and have pernicious effects on economic efficiency. A successful cartel raises price above the competitive level and reduces output. Consumers (which include businesses and governments) choose either not to pay the higher price for some or all of the cartelised product that they desire, thus forgoing the product, or they pay the cartel price and thereby unknowingly transfer wealth to the cartel operators. Further, a cartel shelters its members from full exposure to market forces, reducing pressures on them to control costs and to innovate. All of these effects harm efficiency in a market economy⁷.

As previously mentioned, among the several types of cartel, cartels in procurements are especially devastating because they prevent or spoil the Government's chances of making purchases of quality goods and services for a

⁶See precedents set by CADE, such as: Opinion 24/2015 by the General Superintendence which launched Administrative Proceeding 08700.007351/2015-51; the Opinion by the General Superintendence which launched Administrative Proceeding 08012.008821/2008-22, and the vote of the Rapporteur of the case, Commissioner Gilvandro Vasconcelos; and the Opinion by the former SDE regarding Administrative Proceeding 08012.005255/2010-11.

Likewise, the OECD (2002) has stated that "Cartels are universally recognised as the most harmful of all types of anticompetitive conduct. Moreover, they offer no legitimate economic or social benefits that would justify the losses that they generate."

⁷OECD, *Hard Core Cartels: Recent progress and challenges ahead* (OECD Publishing, 2003), p. 8. Available at: <<https://dx.doi.org/10.1787/9789264101258-en>>.

lower price, resulting in heavy losses to the Treasury and, consequently, to taxpayers.

According to the OECD⁸, cartels result in overpricing of about 10% to 20%⁹, comparing to the price in a competitive market, causing annual losses of hundreds of billions of Brazilian reais to consumers. In terms of amounts, some of the most relevant cases of collusion are linked to government procurements¹⁰. An example in Brazil is the Security Revolving Doors Cartel (Administrative Proceeding 08012.009611/2008-51), which, according to studies by the Department of Economic Studies of CADE, the collusion resulted in overpricing of 25%¹¹.

Considered an extremely serious anticompetitive practice, cartel behaviour is covered in Law 12529/2011 (the Brazilian Competition Law), in its article 36, section 3, subsection 1 (d):

Art. 36. It is considered an economic crime, regardless of fault, each and every practice carried out anyhow, intended to or which can have the following effects, even if not successful:

(...)

Section 3. The following conducts, amongst others, insofar as they have been provided for in the head of this article or its sections, are considered economic crimes:

Section 1. agreeing, combining, manipulating or colluding with competitors, by any means:

⁸OECD. *Fighting Hard Core Cartels: harm effective sanctions and leniency programs* (2002). Available at: <www.ocde.org/competition>.

⁹Despite difficulties in estimating increases in price and, more broadly, the damages caused, a conservative estimative indicates an increase of 10% per year in prices because of cartel activity (WERDEN, 2009, p. 12). Other authors mention more alarming numbers with average overpricing in cartelised markets varying between 10% and 20%, and even reaching up to 50% (ARAUJO, CHEDE, 2012; CONNOR, BOLOTOVA, 2006). According to Connor, average overpricing for all types of cartels is of 23%, considering a long term from 1890 to 2013 (CONNOR, 2014); however, depending on the year and the type of cartel this percentage may be substantially higher, for example, from 1990 to 1999, average overpricing for international cartels was about 45.5%.

¹⁰MCAFFEE, R. Preston; MCMILLAN, John. *Bidding rings*. The American Economic Review: vol. 82, no. 3, June 1992, p. 579.

¹¹See the opinion by the Department of Economic Studies of CADE (DEE/CADE) which has been attached to the vote of Commissioner Gilvandro Vasconcelos Coelho de Araujo (Administrative Proceeding 08012.009611/2008-51).

- a) the prices of goods or services individually offered;
- b) the production or trade of a restricted or limited amount of goods, or the provision of a restricted or limited amount, volume or frequency of services.
- c) the division of parts or segments of a current or potential market for goods or services, by means of, amongst others, dividing customers, suppliers, regions or periods;
- d) the prices, conditions, advantages or non-participation in government procurements.

I.1.1. How are cartels penalised? The penalties imposed by the Administrative Tribunal of CADE¹²

According to the provisions of Law 12529/2011¹³, companies participating in cartels are subject to administrative fines imposed by the Tribunal of the Administrative Council for Economic Defense which may vary between 0.1% and 20% of the gross turnover corresponding to the field of activity related to the respective crime, in addition to other penalties such as publication of the decision in a widely read newspaper; prohibition of contracting with official financial institutions and of participating in government procurements; and divestiture of assets. Individuals involved in the practice are also subject to fines varying between BRL 50 thousand and BRL 2 billion, and, should the individuals be administrators directly or indirectly responsible for the crime, the applicable fine may vary between 1% and 20% of the one imposed to the company.

One of the most severe penalties CADE may impose to cartels in procurements is prohibiting the wrongdoer from participating in procurements for a minimum of 5 years¹⁴.

¹²As it shall be seen in item I.2, cartel is also a criminal offence according to the Brazilian Law. Thus, besides the administrative penalties imposed by CADE, individuals involved in cartels are also liable to fines and imprisonment for 2 to 5 years, in accordance with art. 4 of Law 8137/1990, which defines economic and tax crimes, as well as crimes against consumers.

¹³See Law 12529/2011, art. 37 and 38.

¹⁴The measure has similar effects to those of the declaration of ineligibility provided for in the Procurement Law (Law 8666/1993), in its article 87, section 4.

I.1.2. How are cartels detected? Cartel detection methods

Members of a cartel, aware of the unlawfulness of their behaviour and afraid of being detected, especially considering the significant increase in cartel prosecution and punishment in recent years, are often extremely careful and prudent with information, meetings and the accomplishment and implementation of their agreements, making it increasingly difficult to detect a cartel. For that reason, authorities need more elaborate detection and investigation techniques in their toolbox for a cartel investigation to be successful.

The existence of cartels can be known to CADE in many ways. It can be reported by companies or individuals involved in the collusion, in which case the informers can have their penalties reduced or even gain immunity, as it will be seen below. Third parties or other authorities can also report such practices to CADE, and the antitrust authority itself has investigation tools to use when a suspicion of cartel arises.

The main means currently used by CADE to detect cartels are listed below.

1. Leniency Agreement¹⁵

A Leniency Agreement is a mechanism aimed at bringing illegal practices to the knowledge of the antitrust authority which could, otherwise, continue to be undisclosed. At the same time, it ensures a more efficient investigation, which is why it is widely used in several countries¹⁶.

¹⁵For further information on the Leniency Program, see CADE's Antitrust Leniency Program Guide. Portuguese version available at: <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia_programa-de-leniencia-do-cade-final.pdf>. English version available at: <http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines-cades-antitrust-leniency-program-1.pdf>.

¹⁶The benefits of designing a leniency program have been studied and agreed on by several authorities worldwide. The mechanism is appointed as an important tool for effectively fighting cartels, as it: i) discourages companies from participating in cartels; ii) encourages companies to withdrawal from pre-established cartels; iii) increases the probability of detecting a cartel; and iv) increases the possibility of the conduct being punished by the Government. For more information on this matter, see: International Competition Network. *Anti-cartel enforcement manual. Chapter 2: Drafting and implementing an effective leniency policy* (2014). Available at: <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMLeniency.pdf>.

As highlighted by the OECD in its report about fighting hardcore cartels (2019, p.6), the main challenge for a policy to fight cartels is precisely its detection which is the aspect that explains the

In Brazil, the Leniency Program¹⁷ has as its premise that individuals or companies, currently or previously involved in cartels, can confess and collaborate with investigations in exchange for total immunity or partial in relation to applicable administrative and criminal penalties. The collaboration involves presenting information and documents that allow CADE to identify other co-authors and evidence of the practice reported or under investigation.

It must be emphasized that only the first individual or company to report the conduct will be granted administrative and criminal immunity, that is, exemption from monetary and nonmonetary penalties, which means the programme is a destabilising element for current cartels.

The Leniency Program is one of the most effective mechanisms for detecting, investigating and preventing anticompetitive behaviours with potential to have a negative effect on competition and social welfare. Therefore, it constitutes an important element in any policy to fight cartels.

2. Cease and Desist Agreement (TCC)¹⁸

A Cease and Desist Agreement (TCC, in its acronym in Portuguese), foreseen in article 85 of Law 12529/2011 and art. 219 through 236 of the Statutes of CADE, is an agreement that may be signed between CADE and companies and/or individuals who are not eligible to sign Leniency Agreements. In this case, the agreement is made when the investigation into the illegal behaviour is already

significance of the leniency program. In fact, a leniency program properly structured and used by an antitrust authority naturally produces an instability in running cartels and decreases the advantage of joining or forming a new coordinated anticompetitive group, since it weakens the trustworthy relationship between participants and encourages the reporting of any ongoing anticompetitive conduct to the Official Authority. For more information on this matter, see: OCDE. *Recommendation of the Council concerning Effective Action against Hard Core Cartels (2009)*. Available at: <<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0452>>.

¹⁷Provided for in art. 86 and 87 of the Brazilian Competition Law and in art. 237 through 251 of the Statutes of CADE.

¹⁸For further information on TCCs, see: *Guidelines: Cease and Desist Agreement for cartel cases*. Portuguese version available at: <http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia-tcc-versao-final.pdf>. English version available at: <http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines_tcc-1.pdf/view>.

in progress¹⁹ and, unlike the Leniency Agreement, it comes with no advantages for signatories in criminal proceedings.

Similar to what happens in the Leniency Agreement, the signatories of TCCs must also confess to their participation in the conduct, and collaborate²⁰ with investigations by providing CADE with reports containing relevant information and documents that can be used to identify or confirm the identity of other persons or companies involved in the conduct, and are evidence of the conduct²¹.

Any party who enters into a TCC with CADE receives a discount that can reach up to 50% of the expected fine in case of conviction. In addition, signing the TCC results in a halt in the investigations into any signatories, while the terms established in the agreement are fulfilled; consequently, signatories have to comply with the established obligations, including immediately ceasing their participation in the conduct under investigation.

TCCs are important mechanisms in the prosecution of cartels, as they add new information and documents to what has been obtained with the Leniency Agreement, and confirm information already known by the antitrust authority, strengthening investigations and any respective administrative proceedings.

3. Complaints and the *Clique-Denúncia* Platform for Reporting Violations

¹⁹We would like to emphasize that the Leniency Agreement may be signed during the course of the proceedings. However, this can only happen by means of a Partial Leniency Agreement that grants the Petitioner reduction of one to two thirds of the applicable penalty, as per the provisions of art. 86, section 4 of Law 12529/2011.

²⁰Regarding collaboration, it is necessary to stress that TCCs signed in more advanced stages of proceedings – as is the case, for example, if an Administrative Proceeding is already at the Tribunal – have little or almost no chance of adding relevant information to the case. Its main use, in terms of cost reduction, would be achieved by means of an early conclusion of the proceeding, avoiding future legal disputes.

²¹A TCC may be signed both with the General Superintendence and the Administrative Tribunal, with some specificities arising from the procedural moment in which the agreement has been signed.

The General Superintendence of CADE (SG/CADE) may also, depending on the amount of proof and evidence, choose to launch a Preliminary Inquiry, an Administrative Investigation or an Administrative Proceeding on the basis of a reasoned complaint by any interested party which provides evidence of an economic crime (article 66, section 1 of Law 12529/2011).

Members of the Brazilian National Congress, or of any of its Chambers, as well as members of the Secretariat of Competition Advocacy and Competitiveness (SEAE) linked to the Ministry of Economy, of regulatory agencies and of the Office of the Attorney General at CADE, in accordance to the provisions of article 66, section 6 of the Competition Law, are also eligible informers.

In addition to complaints, CADE has a tool for reporting violations, the *Clique-Denúncia* platform²², which is basically an integrated Electronic Information System, which any and every citizen can access to blow the whistle in case of knowledge of an economic crime²³.



The best way for citizens to report a violation to the General Superintendence of CADE is through the *Clique-Denúncia* platform. The reporting form is available at: <http://www.cade.gov.br/>

You can also contact the SG/CADE on the telephone number: +55 61 3221 8445

Reports may be anonymous and CADE guarantees absolute secrecy about the identity of whistle-blowers should it be requested.

4. Search and Seizure

The possibility of the Superintendence of CADE carrying out a search and seizure is provided for in article 13, section 6(d) of Law 12529/2011. Search and seizures are crucial due to the difficulty of obtaining evidence in investigations into cartels, and because there is an element of surprise which prevents the spoliation of evidence.

²²Available at:

<https://sei.cade.gov.br/sei/modulos/cliquedenuncia/formulario_denuncia.php?acao_externa=denuncia&acao_origem_externa=denuncia&id_orgao_acesso_externo=0&id_orgao_acesso_externo=0> (form for reporting a violation only available in Portuguese), or <http://en.cade.gov.br/report_a_violation> (information in English on how to report a violation by e-mail).

²³The *Clique-Denúncia* platform can be used by any citizen to file reports related to cartel activity, other anticompetitive practices, and mergers and acquisitions.

5. Economic Analysis and Screening

The General Superintendence of CADE also uses proactive tools for detecting cartels, such as screening. Screening is the use of data base, software and statistical testing applications to identify and measure any collusion risk in specific markets or sectors and to detect suspicious behaviour by respective economic agents.

1.2 Other authorities responsible for investigating and penalizing cartel conduct and other related infractions: fighting cartels in procurements in the administrative, criminal and civil domains, related infractions, and competent authorities

The Brazilian legal system defines a cartel as an antitrust offense, as per the provisions of Law 12529/2011, previously detailed. Therefore, in the administrative domain, cartels are investigated as anticompetitive conduct, e.g. a violation that negatively affects free competition is investigated and an administrative proceeding is launched by the Superintendence of CADE (article 13, section 5 of Law 12529/2011) and is later tried in the Tribunal of CADE (article 9, section 3 of Law 12529/2011) which may impose fines to individuals and companies, in addition to other penalties established by Law.

ADMINISTRATIVE LAW

Cartel in procurements as anticompetitive conduct – Law 12529/2011

Law 12529/2011 (Competition Law)

Art. 36. It is considered an economic crime, regardless of fault, each and every practice carried out anyhow, intended to or which can have the following effects, even if not successful:

Section 3. The following conducts, among others, insofar as they have been provided for in the head of this article or in its sections, are considered economic crimes:

Section 1. agreeing, combining, manipulating or colluding with competitors, by any means:

- a) the prices of goods or services individually offered;
- b) the production or trade of a restricted or limited amount of goods, or the provision of a restricted or limited amount, quantity or frequency of services;
- c) the division of parts or segments of a current or potential market for goods or services, by means of, amongst others, dividing customers, suppliers, regions or periods;
- d) the prices, conditions, advantages or non-participation in government procurements.**



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General Superintendence: investigates the practice, launches the Administrative Proceeding into a cartel in a procurement, and issues a Technical Opinion recommending whether the case should be thrown out or go to trial.

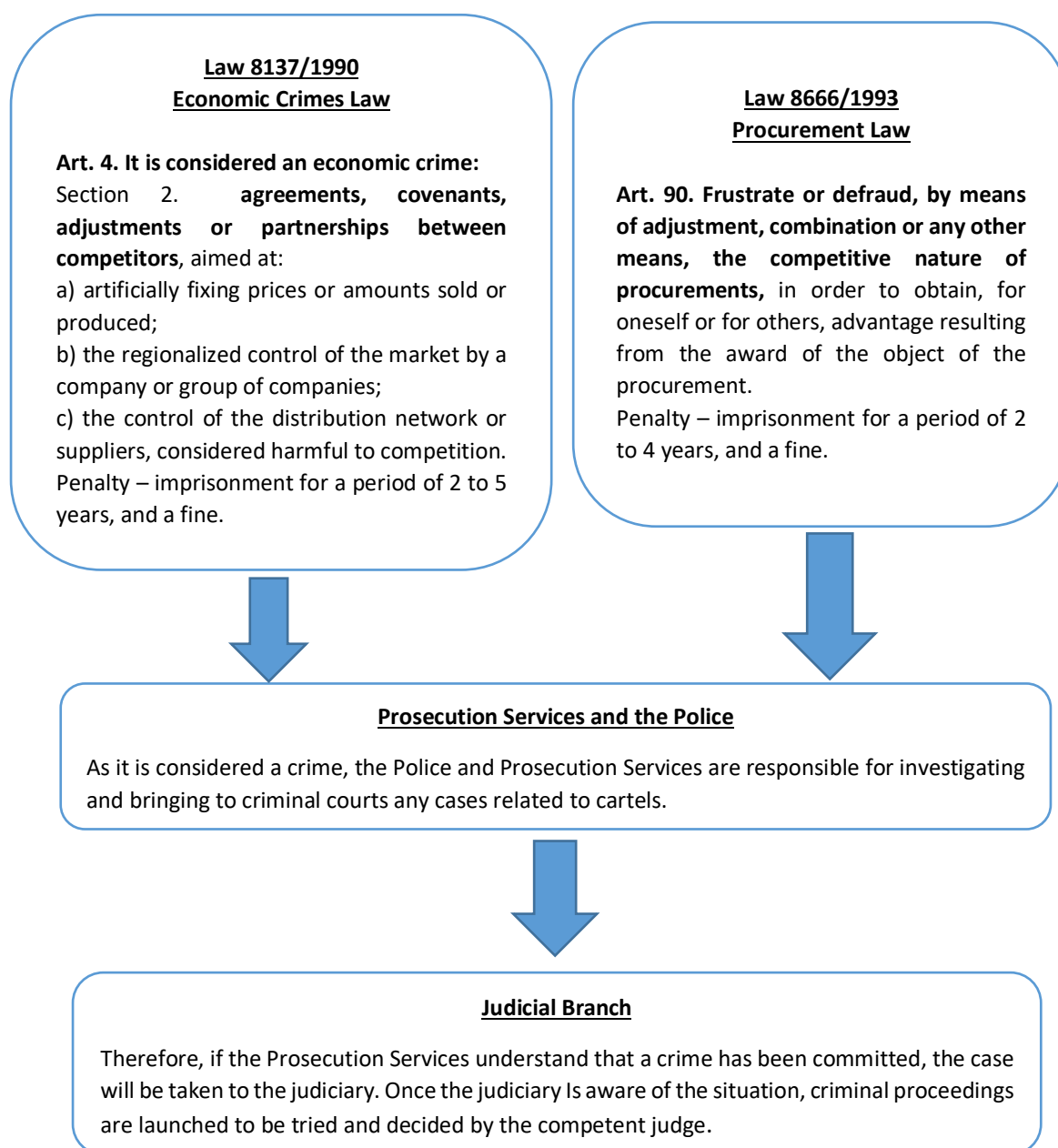
Tribunal of CADE: tries the case and imposes fines and other applicable penalties, including, in the case of cartels in procurements, the prohibition of participating in government procurements for a period of five years.

Cartel conduct is also considered an economic crime, as per the provisions of article 4 of Law 8317/1990, and in the criminal domain, is investigated by the police and Prosecution Services. In this case, individuals involved in the practice are liable to fines and imprisonment for a period of two through five years, which may be increased by one third up to one half should the crime be considered especially harmful to society, be committed by a civil servant or be related to essential goods or healthcare and life services.

Furthermore, cases of cartels in government procurements can also be considered crimes as per the provisions of article 90 of Law 8666/1993. Individuals involved in the practice are subject to fine and imprisonment for a period of two to four years.

CRIMINAL LAW

Cartels in procurements as an economic crime (Law 8137/1990) and as a crime that negatively affects procurements and acquisitions by the Government (Law 8666/1993)



Furthermore, the members of a cartel are also liable in the civil domain, subject to lawsuits for damages caused by the cartel conduct, which may be filed by any party harmed by the cartel, according to the provisions of article 47 of Law 12529/2011, as well as to civil actions by the Prosecution Services and other authorised agents.

CIVIL LAW
Damages to the Treasury and private individuals

Brazilian Federal Constitution of 1988

Art. 37. Direct and autonomous government bodies of any of the branches of the Federal, State and Local Governments, as well as the Government of the Federal District, shall observe the principles of legality, impersonality, morality, publicity and efficiency, as well as the following:

Section 4. Malfeasance in office shall result in the suspension of political rights, just cause removal from office, blocked assets and compensation for damages to the Treasury, in the form and pace provided for by law, notwithstanding any other applicable penalties.

Section 5. The Law shall establish the statute of limitations for violations, practiced by any agent, civil servant or not, resulting in damages to the Treasury, **except for the respective compensation actions.**



Law 12529/2011
(Competition Law)

Art. 47. Anyone that has been harmed, by oneself or by any parties referred to in art. 82 of Law 8078, of 11 September 1990, shall file a lawsuit, in defense of their individual interests or homogeneous individual rights, to have the economic crime stopped and receive compensation for losses and damages suffered, regardless of any ongoing administrative investigation or proceeding, which shall not be suspended due to the filing of a lawsuit.



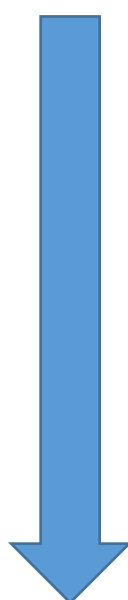
Law 7347/1985
(Civil Action)

The compensation for damages to the Treasury are liable to civil lawsuit (art. 1, section 5), which can be requested by the affected government body (the Federal Government, as well as State and Local Governments, and the Government of the Federal District; agencies, state enterprises, foundations and private companies controlled by the government),



Law 8429/1992
(Malfeasance in Office)

Malfeasance in office, in addition to penalising the government agent that committed the crime, is aimed at compensating the damages caused to the Treasury.
This action is filed by the Prosecution Services.



Civil Action (Law 10406/2002)
(Compensation)

Compensation is provided for in article 927, which establishes that “whoever causes losses to another by unlawful conduct is obliged to compensate the other party for it.”

It is important to emphasize that the conduct legally considered as cartel activity before the antitrust authority may also constitute different administrative violations, which can be analysed and investigated by other authorities, especially control agencies.

This happens because each authority, as well as the respective laws, are responsible for different legal matters; the same conduct can affect different legal assets and therefore be subject to the competence of different authorities. In other words, the Antitrust Law protects legal interests related to competition; the Anticorruption Law protects the Government; the Federal Court of Accounts Law is aimed at controlling and protecting government accounts; the Procurement Law protects the fairness of procurement processes carried out by the Government. Therefore, cartels in procurements, as a mean to restrict the competitive nature of a procurement, affect many different legal interests, thus, this sort of conduct can be investigated and punished in accordance with the provisions of other laws.

In this context, the Brazilian Federal Court of Accounts (TCU), for instance, in its role of overseeing government budgets, has a duty to monitor government procurement processes and acquisitions, and, should any fraud be detected in a procurement, the Court has the power to determine the ineligibility of bidders, and request the rendering of accounts, should it be determined that there were losses to the Treasury (art. 41, 46 and 47 of Law 8443/1992).

On the other hand, the Office of the Comptroller General of Brazil (CGU) is the control body in charge of investigating, prosecuting and trying unlawful practices that threaten public assets, including attempting to frustrate or defraud the competitive nature of procurements (article 5, section 4, and article 9 of Law 12846/2013).

With regards to Anticorruption Law, the Office of the Attorney General of Brazil (AGU) may require the blocking of assets or funds necessary to ensure the payment of fines or compensation for damages (article 19, section 4 of Law 12846/2013). At last, it is important to emphasize that the Office of the Attorney General is authorised to file Civil Actions aimed at receiving damages for any losses suffered.

ADMINISTRATIVE LAW

Cartels in procurements according to the provisions of Law 12846/2013

Law 12846/2013 **(Anticorruption Law)**

Art. 5. For the purposes of this Law, is it considered a harmful practice for national or foreigner Governments, all conducts by legal entities, mentioned in art. 1, section 1, that threaten national or foreigner public assets, Government principles, or international commitments made by Brazil, and are defined as follows:

Section 4. with regard to procurements and acquisitions:

a) frustrating or defrauding, by means of adjustment, agreement or any other means, the competitive nature of government procurements;



Office of the Comptroller General of Brazil (CGU)

CGU has power to investigate, prosecute and try any unlawful behaviour listed in the anticorruption law, such as fraud in procurements which may be related to agreements between bidding companies (art. 9 of Law 12846/2013).



Office of the Attorney General of Brazil and Prosecution Services

The Attorney General and Official Legal Services Providers/Prosecution Services may require the blocking of assets or funds necessary to ensure the payment of fines or compensation for damages (art. 19 of Law 12846/2013).

As aforementioned, the same conduct considered an antitrust violation may be classified as different administrative violations, of which it seems important to mention fraud in government procurements, corruption and managerial wrongdoing. The differences and correlation between such practices are detailed in the last section of this Guide, which is dedicated to crimes related to cartels.

PART II - DETECTING CARTELS IN PROCUREMENTS: ENABLERS, FORMS OF COLLUSION AND EVIDENCE

II.1. Which aspects enable cartel formation? Characteristics of government procurement markets favourable for the creation of cartels, and for the monitoring of cartels in procurement processes

Some particularities of the government procurement market, in Brazil and abroad, have major implications for both the prevention and the fight against cartels in government procurements. Amongst the main structural elements of government acquisitions which facilitate cartel formation as well as the monitoring by cartel members²⁴, it is worth mentioning:

(I) Consistency of products and services, absence of substitutes and minor technological changes: when products and services to be acquired have minor or no difference amongst them, it is easier to come to an agreement, because the members of a cartel will need to define together only one variable which can be easily controlled and measured: price. This is particularly common in government acquisitions because in most procurements there are no significant quality and/or technological differences amongst products and services to be acquired, as most procurements are for common goods and services. Besides, when there are few substitutes for a product, or yet, when a product does not involve major changes in terms of technology, companies are more confident of the success of their agreement and are sure it will last for a longer time.

(II) Market conditions, stability of demand and recurrence of government procurements: significant alterations in demand or in supply conditions tend to destabilize possible collusive agreements in course. On the other hand, a constant and predictable demand by the Government increases the risk of collusion. The consequence of this – in addition to companies having access to the term of current contracts – is the facility to make agreements and arrange possible future rewards, or even to maintain long-term agreements, since it reduces the costs involved in monitoring cartel activity and makes it easier to discipline any potential deviant behaviour.

²⁴ See: OECD. *Competition and Procurement* (2011); and OECD. *Guidelines for Fighting Bid Rigging in Public Procurement: helping governments to obtain best value for money* (2009). Both available at: <www.ocde.org/competition>.

(III) Maintenance of notice provisions: the recurrent need to contract services and purchase products for government maintenance leads officials responsible for procurements to maintain notice provisions unaltered over time, thus reproducing the content of notices in several consecutive procurements, which brings predictability to the interaction amongst competitors and stability to the terms that support the collusive agreement.

(IV) Transparency: information related to government procurements are public by nature, as a result of the constitutional provision that requires disclosure of all administrative processes, and is a necessary mechanism for effective oversight of government activities. However, it also allows companies unrestricted access to commercial information that, in private markets, are considered commercially sensitive data. In government procurements, companies know the prices charged by competitors (commercial proposals), technical and quality characteristics of the products and services offered (government notice rules and qualification documents), costs (price breakdown spreadsheets), commercial strategies (record of participation in government procurements), contract portfolio (supporting experience documentation), amongst other information. In this sense, such structural characteristics reduce the costs involved in monitoring and disciplining deviant behaviour by the companies participating in the anticompetitive agreement.

(V) Restricted number of competitors: the probability of collusion in government procurements increases when there is only a few number of companies with technical and economic capacity to provide the good or service. The fewer the number of agents in the market, the easier it is for them to enter into an agreement.

(VI) Entry barriers: Should a market have high entry barriers (e.g. in case entering a market is costly, difficult or slow), the companies in that market are protected from competitive pressure by potential new competitors, which facilitates the establishment and maintenance of collusive agreements, and allows cartel members to abuse of their joint market power. In the case of government acquisitions, reviewing entry barriers might involve, at times, reviewing the respective procurement notices. Procurement notices are the documents that establish the rules that will control the interaction amongst competitors (aspects

related to price, quantity, quality, technology, execution deadline, contract period, etc.} seeking to reproduce the competitive environment that, in theory, would prevail in private markets. However, this reproduction is faulty, since the government procurement notices have provisions that exclude some potential competitors (due to requirements related to prior experience, technical expertise, technical qualification, fulfilment of tax liabilities, etc.), therefore, being effectively an entry barrier.

(VII) Necessity of a successful procurement: the difficulty the Government faces to react to significant price increases (because it is not feasible, to cancel and/or postpone the contracting of certain goods and services), makes price fixing at supra competitive levels, in several procurements, a viable and successful strategy, leaving the Government at the mercy of artificial conditions established by bidders.

(VIII) Frequent interactions between bidders: another aspect that facilitates collusion is the existence of markets in which contact between bidders are frequent and continuous. Whether because the same companies usually participate of a great amount of procurements in that market or because they interact through associations or events in the field. Such contacts facilitate the establishment of a common strategy, as well as the monitoring and disciplining deviant behaviour by cartel members. In Brazil, where procurements are decentralized (each management unit carries out its own procurement processes to meet its needs), the frequency of contact between companies in certain sectors can be quite meaningful.

II.2. Difficulties in detecting cartels in government procurements and the importance of circumstantial evidence

In order to prove the existence of collusive agreements, the antitrust authority may use both direct (documents that prove the material existence of the agreement between bidders) and circumstantial evidence²⁵. Due to the

²⁵Article 239 of the Brazilian Criminal Code defines circumstantial evidence as a set of stated incidents – even if at random – which may, by induction, allow for the inference that a crime has been committed.

difficulty of obtaining direct evidence, circumstantial evidence is an important mean for proving there are agreements in place.

During investigations into cartels in government procurements, the use of circumstantial evidence is common, especially concerning suspicious behaviour of participants that deviate from what would be expected in a regular procurement, in which competition amongst competitors actually happens. E.g.: proposals with similar errors, rotation of winning bidders amongst competitors, and the existence of pattern in the price margin of the proposals presented.

Circumstantial evidence result from active interpretation (e.g. logical inferences, economic reviews and deductions) by the authority, of facts and evidence that, taken together, might prove the anticompetitive conduct, since no other plausible explanation can account for such behaviour by the investigated parties²⁶.

On the one hand, cartel participants that have direct evidence of an agreement, make a lot of effort to keep the conduct a secret. On the other hand, antitrust authorities face all these strategies adopted by cartel members to destroy and tamper with evidence²⁷ by making use of circumstantial evidences which play an important role in proving the existence of collusive agreements, as seen in international precedent.

GLOBAL USE OF CIRCUMSTANTIAL EVIDENCE

The Department of Justice of the United States, the body responsible for the criminal prosecution of antitrust conduct in the United States, has already suggested convicting cartels in government procurements based on circumstantial evidence¹. There are, yet, other precedents that support the possibility of using circumstantial evidence in cases of investigations into collusive agreements:

Indeed, it is axiomatic that the typical conspiracy is "rarely evidenced by explicit agreements," but must almost always be proved by "inferences that may be drawn from the behaviour of

²⁶CONSIDERA, C., DUARTE, G.F.S. *A Importância de Evidências Econômicas para a Investigação de Cartéis: A Experiência Brasileira* (Universidade Federal Fluminense, 2005).

²⁷GUERRIN, M., KYRIAZISYM, G. *Cartels: Proof and Procedural Issues* (1992), p. 266.

the alleged conspirators." Thus, an antitrust plaintiff may prove the existence of a combination or conspiracy by providing either direct or circumstantial evidence sufficient to "warrant a . . . finding that the conspirators had a unity of purpose or common design and understanding, or a meeting of the minds in an unlawful arrangement".²

The European antitrust authority also agrees to the use of circumstantial evidence to prosecute cartels³. See, for instance, an excerpt from the decision of the European Court of Justice in the case of Aalborg Portland A/S and others v. Commission, which reviews an appeal against the decision of the European Commission that convicted a cartel in the European cement market⁴.

Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum.

Even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction.

In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.⁵

The international literature also follows the same approach. The OECD collected information on the use of circumstantial evidence by different antitrust authorities. Amongst the main conclusions, the following stand out:

2. The better practice is to use circumstantial evidence holistically, giving its cumulative effect, rather than on an item-by-item basis. (...)

4. There are two general types of circumstantial evidence: communication evidence and economic evidence. Of the two, communication evidence is considered to be the more important.⁶

Furthermore, it is also important to note that, according to the Anti-Cartel Enforcement Manual prepared by the International Competition Network⁷, the way in which each jurisdiction determines the evidence necessary to prove the

existence of cartels differs. However, regardless of whether the evidence reviewed is direct or circumstantial, it is necessary to observe the following evidence, amongst others:

- 1 – Evidence that indicates prior knowledge of information about prices or bids given by a competitor;
- 2 – Evidence that indicates competitors have discussed bids or have come to an agreement regarding their bids;
- 3 – Evidence of monitoring of agreements;
- 4 – Evidence that a particular customer or contract is exclusive for a specific company;

¹United States v Champion International Corporation Case, 557 F.2d 1270 (9th Cir. 1977), related to cartel in government procurements for the sale of timber. See: OECD. *Prosecuting Cartels without Direct Evidence* (2006), p.174.

²ES Development, Inc. v. RWM Enterprises, Inc., 939 F.2d 547 (1991). United States Court of Appeals for the Eighth Circuit. Available at: <<https://cite.case.law/f2d/939/547/>>. Retrieved:22 Sep 2020.

³See, for instance, the decision of the European Court Justice on the “Dyestuffs Case” (ICI vs Commission, Case 48/69, 1972, §§66-68). Available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61969CJ0048&from=EN>>. Retrieved: 3 May 2013.

⁴Cases IV/33.126 and 33.322 – Cement. Available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31994D0815&from=EN>>, Retrieved: 3 May 2013.

⁵Aalborg Portland A/S and others v Commission (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P). Available at: <<http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d0f130d58a5500806a674a49b719cceb5a3d6dae.e34Kaxilc3eQc40LaxqMbN4Oah0Se0?text=&docid=48825&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=299626>>. Retrieved: 3 May 2013.

⁶See: OCDE. *Prosecuting Cartels without Direct Evidence* (2006), p. 9-11.

⁷See: ICN. *Anti-Cartel Enforcement Manual* (2008), p. 13.

THE SOLAR HEATER CASE

(Administrative Proceeding 08012.001273/2010-24)

CASE SUMMARY

The Administrative Proceeding was launched in 2012 to investigate an alleged cartel in government procurements for the acquisition of solar heaters for low-income houses built by the Housing and Urban Development Company of the State of São Paulo (CDHU).

The investigation showed some companies combined prices and divided the market in procurements for the acquisition of solar heaters by CDHU; such agreements were implemented by means of suspension/withdrawal of proposals in procurements – in addition to a regular rotation of winning bidders for several lots – and the use of the strategy commonly known as bidder collusion in in-person reverse auction.

The case was tried by the Tribunal of CADE in 2015. A majority decided for the conviction of all companies involved, and threw out the case against an association and two individuals. In addition to imposing a fine, the Tribunal also decided for the imposition a nonmonetary penalty: the inclusion of the companies in the Brazilian Consumer Protection Registry (*Cadastro Nacional de Defesa do Consumidor*) which was created as a means to keep track of companies found guilty of economic crimes].

CIRCUMSTANTIAL EVIDENCE

In this case, the use of circumstantial evidence was noteworthy because, taken as a whole, they led to the conviction of the companies. Amongst the evidence, it was particularly important the similarities observed in the prices listed in the proposals submitted by different companies for lots in procurements. The proposals (submitted in sealed envelopes), were at times completely identical – to the cents – too remarkable to be by coincidence, as explained by the Rapporteur of the case, Commissioner Márcio de Oliveira Júnior, in his vote:

310. (...) typical price and market agreements are followed by manoeuvres in procurement processes aimed at emulating competitiveness. Such actions are taken to conceal the anticompetitive nature of the agreement, since an anticompetitive agreement cannot be expected to be formally written in a contract and signed. For this reason, the authorities responsible for investigating and trying these cases must consider different types of evidence to unveil a cartel.

311. Evidence must essentially show: (i) the similarities in the behaviour of competitors in procurements, (ii) that companies participating in the cartel won the desired lots or allowed a company chosen by them to be the winner, (iii) there is a rotation to lose or win lots based on cover biddings and bid suppression/withdrawal, (iv) the existence of entry barriers, (v) the existence of communication channels or transparency forums that facilitate competitors to share information amongst them. In

this sense, the type of evidence – whether direct or circumstantial – is irrelevant, since the whole body of evidence is considered in court rulings. What may be different in a case based on circumstantial evidence from a classic case based on direct evidence is the greatest effort required in the discovery and examination to identify the elements that evince the economic crime.

312. The case files indicated (i) the occurrence of price fixing and bid suppression/withdrawal to favour cartel participants, (ii) the winners of each lot were those chosen by the cartel, (iii) the bidding phase was used for bid rotation for the Defendants to simulate competition, (iv) entry barriers that favoured the offer of products to larger companies, coincidentally, the size of the companies on trial, (v) the Defendants used ABRAVA – the Brazilian Association for Refrigeration, Air Conditioning, Ventilation and Heating – to increase transparency in this market, as the majority of companies that participated in the procurement were part of it. (...)

314. In this Administrative Proceeding, I observed there are odd coincidences related to the prices of several of the lots, which similarities in the price of inputs (hereby considered as the goods and services included in the lots) and the full homogeneity of all aspects that shape the prices cannot account for. Neither was there any explanation for how prices contained in sealed envelopes for five different lots were similar, always including the same company – Enalter –, which gave up its right to bid every single time

Hence, it is clear the importance of circumstantial evidence, and its broad acceptance by different antitrust authorities for investigating and understanding how cartels operate.

It is important to observe that circumstantial evidence have no value separately, at the risk of depreciating evidence, despite being a relevant indicator for the detection of cartels by the authorities. The collected evidence must be assessed as a whole, in order for evidence and circumstances to be interpreted at once, making the valuation of such evidence an interpretive ruling.²⁸ Thus, the conduct of each company must be assessed both by comparing it with the conduct of other competitors and with the situation of the market in question.²⁹

Therefore, it is possible to state that, especially in the case of cartels in government procurements, there are circumstances that, when reviewed

²⁸ICI vs Commission, Case 48/69, 1972, §68.

²⁹GUERRIN, M., KYRIAZISYM, G. *Cartels: proof and procedural issues* (1992), p. 266.

together, indicate there is no other rational explanation for the behaviour of bidders, except the existence of a previous anticompetitive agreement amongst them; such evidence is fundamental for the detection and investigation of cartels in procurements, especially considering the increasing difficulty of finding any sort of direct evidence.

II.3. Types of collusion: the main strategies used by companies to form cartels in procurements

Cartels in procurements may assume different forms, combining one or more strategies in order to negotiate the illegal agreement. The strategies used by cartel members, especially in government procurements, as a general rule, involve reducing competition and artificially allocating contracts, in a private manner, between companies that are supposed to be competing against each other. In this sense, the simultaneous use of common strategies allows these agents to completely define the market, by allocating everything from contract portfolios, contracting agencies, geographical areas, though billing, amongst other criteria, all of it aiming at distributing any additional profits resulting from the reduction of competitive pressure.

II.3.1. Cover Bidding

Cover bidding (also known as cover pricing, and complementary or courtesy bidding) is the most common way of establishing collusion schemes amongst competitors. It is arranged to give an appearance that bidders are actually 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.

Some real-life cases involving cover bidding are detailed below:

THE CARTEL CASE RELATED TO OUTSOURCED LAUNDRY SERVICES FOR HOSPITALS IN RIO DE JANEIRO (OPERATION "DIRTY LAUNDRY")
(Administrative Proceeding 08012.008850/2008-94)

CASE SUMMARY

The Administrative Proceeding was launched in 2008, and was aimed at investigating a potential cartel to defraud government procurements for laundry services for hospitals in Rio de Janeiro. The investigation showed that representatives of companies operating in the sector, in several occasions, engaged in phone calls and held in-person meetings aiming at sharing commercial sensitive information such as prices, amounts of commercial proposals, contract portfolios, etc. The purpose of these contacts was to work towards agreements to divide the market division, submit cover bidding proposals and impose entry barriers for potential new competitors. Additionally, it was shown that their union operated to facilitate the establishment of these agreement amongst companies.

The case was tried by the Tribunal of CADE in 2016. The Tribunal decided for the conviction of all the defendants, with the exception of two individuals, one of which because of a Cease and Desist Agreement.

COVER BIDDING

The use of the cover bidding strategy was evident in this case, for instance, because of price lists including quoted prices and prices for "coverage" that had to be higher than the winning one. The cover prices and even the sum of the amounts defined for each participant of the agreement were established. Cover bidding was one of the main strategies used for the implementation of the anticompetitive agreement in procurements.

FIGURE 1³⁰

COMO A PROLAV DEVE UM HOSPITAL A
BRASIL SUL, O FATURAMENTO DEVERA'
SER:

$$79.000 + 20.000 \stackrel{\text{ALEX.}}{=} 99.000 \times 3,65 = \text{R\$ } 361.350$$

OU

$$79.000 + 21.800 \stackrel{\text{SALG.}}{=} 100.800 \times 3,65 = \text{R\$ } 367.920$$

OBS. A BRASIL SUL RETIRARA' OU TROCARA
A PROPOSTA DO MARCILIO DIAS, DANDO
COBERTURA A LIDO

FIGURE 2³¹

LOTES	QUILOS	PREÇO COTADO	PREÇO DE COBERTURA
Prolav			
Lagoa	28.0	3,64 3,64	3,65
Pinçl	3.5	3,64 3,63	3,65
Fernando Magalhães	19.5	3,64 3,63	3,65
Salgado Filho	21.8	3,64 3,64	3,65
Ipanema	23.0	3,64 3,64	3,65
*****	93.8	*****	*****
São Seb.			
Maternidade Carmoia Dutra	32.0	3,62 3,62	3,63 ou acima
Piedade	14.2	3,62 3,62	3,63 ou acima
*****	46.9	*****	*****
B. Sul.			
Andaraí	38.0	3,66 3,66	não cotar ou 3,66
Miguel Couto	35.0	3,66 3,64	não cotar ou 3,66
*****	73.0	*****	*****

INTERNATIONAL PRECEDENT

³⁰Figure 1 is a piece of evidence which was attached to the case files of the public version of the aforementioned Administrative Proceeding (§159 of the vote of the Rapporteur of the case, Commissioner Ana Frazão). It details a cover bidding to be submitted by companies involved in the collusion.

³¹Figure 2 is another piece of evidence which was attached to the case files of the public version of the aforementioned Administrative Proceeding (§161 of the vote of the Rapporteur of the case, Commissioner Ana Frazão). It is a price list detailing a new proposal for market division which includes the prices to be submitted by cartel members in the proposals for each lot of the procurement.

THE CARTEL CASE RELATED TO MEDICAL DEVICES (INDIA)

CASE SUMMARY

The case concerns an anticompetitive conduct related to the manipulation of procurement proposals for supplying, installing, testing and commissioning a Modular Operation Theatre (MOT) and a Medical Gas Ammunition System (MGMS) for the Sports Injury Centre (SIC) of the Safdarjung Hospital, in New Delhi. The companies investigated were: (i) PES Installtions Pvt. Ltd. (PES); (ii) MDD Medical Systems Pvt. Ltd. (MDD); and (iii) Medical Products Services (MPS).

COVER BIDDING

The Competition Commission of India (CCI), after assessing the proposal forms submitted by the parties, stated that “not only was there the same typographical error in the price calendar, but the same dates were also mentioned in the various sections of the proposal forms submitted by PES and MDD. The Indian antitrust authority also observed that the same typographical errors appeared in the different proposals because the bidders shared printed copies of the price calendar format amongst themselves to be able to prepare and file the bidding documents together. Besides, according to the CCI, the coincidence of the errors observed in the forms submitted by bidders indicated they colluded to manipulate the procurement process. Therefore, the CCI concluded that the three competitors had indeed an agreement and, according to what was established in such agreement, PES and MPS submitted complementary proposals that were incredibly overpriced in comparison with the proposal submitted by MDD.

II.3.2. Bid suppression and bid withdrawal

The bid suppression strategies involve agreements amongst competitors for one or more companies to refrain from competing or withdrawing previously submitted proposals, so that the winner of the procurement is the bidder chosen by the cartel.

Therefore, the company can choose not to participate in the procurement from the beginning (what we call bid suppression) or withdraw its proposal in the middle of the process, in order for the other cartel member to win.

Two cases in which this strategy was used are detailed below:

THE DUCT CONSTRUCTION CARTEL IN SÃO PAULO **(Administrative Proceeding 08012.009885/2009-21)**

CASE SUMMARY

The Administrative Proceeding was launched in 2010, based on a Petition submitted by the Basic Sanitation Company of the State of São Paulo (SABESP), which mentioned some alleged irregular behaviour by the companies SAENGE and CONCIC in a procurement (International Request for Proposals CSO 53542/07).

The case was tried by the Tribunal of CADE in 2015. The Tribunal voted for the conviction of all investigated parties, with the exception of a single individual.

BID SUPPRESSION

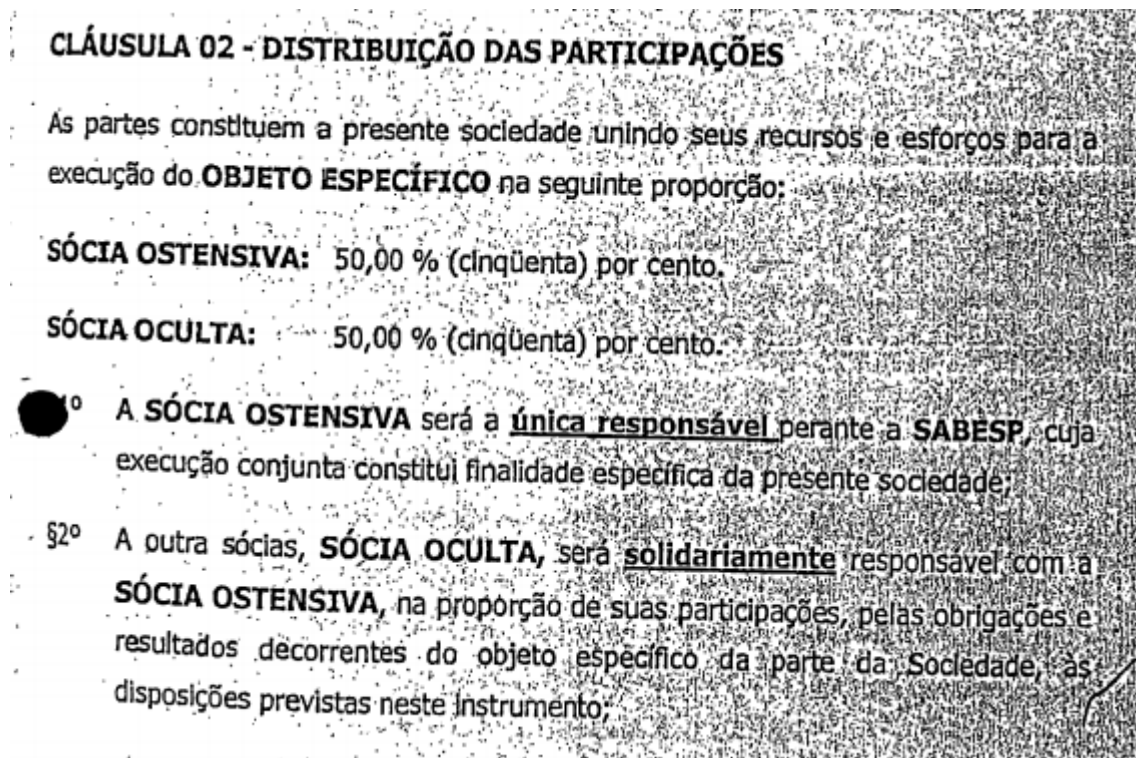
The bid suppression was evinced because, after winning the first phase, the company CONCIC simply stopped submitting the documentation requested by SABESP within the established deadline. After its disqualification from the procurement, SAENGE was declared the winner.

Subsequently, SABESP became aware of the existence of a partnership agreement between CONCIC and SAENGE, regarding the construction related to the procurement process, which had been signed before the end of the procurement process, when CONCIC was still in first place. Under the terms of the "Private Partnership Agreement for Specific Purposes" (*Instrumento Particular de Constituição de Sociedade em Cotas de Participação de Propósito Específico*), the legal business was aimed at "the joint execution of the construction works of Lot 3 of the Mambu/Branco Water Production System of Baixada Santista". Therefore, considering the withdrawal of the company that was in first place resulted from the private agreement, and in view of the rest of the evidence related to the nature of the contract, the moment it was signed

and the economic incentives that motivated the agreement, the non-submission by CONCIC of the documents required was considered as a suppression of its initial proposal.

FIGURE 3³²

Private Agreement (p. 177)



INTERNATIONAL PRECEDENT THE POWER CABLES CARTEL (EUROPEAN COMMISSION)

CASE SUMMARY

An investigation was launched because the main submarine and underground power cable producers held meetings and engaged in bilateral and multilateral talks, aiming at restricting competition in specific territories.

³²Figure 3 can be found at page 177 of the public version of the case files of the aforementioned Administrative Proceeding. The figure shows an excerpt of a clause of the private agreement, which specifies the percentage of shares that would go for each company.

BID SUPPRESSION

According to the decision of the European Commission, as of February 1999, the main submarine and underground power cable producers allocated projects according to geographical area and consumers. Additionally, information about aspects such as prices was exchanged to ensure the winning bidder would be the one chosen by the cartel. Thus, the chosen bidder would offer the lowest price, while the others submitted higher offers, suppressed their offers or submitted unattractive proposals in procurements.

The companies were also forced to share information, which allowed for the monitoring of cartel members and ensured the fulfilment of the agreements. Other actions were also taken in order to strengthen the cartel, such as a collective refusal to provide accessories or technical assistance to certain competitors.

II.3.3. Bidder collusion in in-person reverse auction

Bidder collusion in in-person reverse auction (*bloqueio em pregão presencial*) is an anticompetitive strategy characterized by an agreement between a company that supplies a specific good or service requested in a procurement process and at least two other companies. In general, these companies are involved in some sort of supply chain relationship. The purpose of this sort of agreement is minimizing the chances of bidders who are not cartel members passing to the bidding phase in an in-person reverse auction, thus restricting competition in that procurement.

The in-person reverse auction is divided into two phases:

- Phase 1 or proposal phase: the proposals which will go through to the oral bidding phase are selected, namely: the best proposal and those with prices higher than the best proposal up to the limit of 10%. **If there are not at least two proposals that fit the criteria of being higher than the best proposal up to the limit of 10%, the three best proposals are selected for the oral bidding phase:**

- Phase 2: the oral bidding phase³³, the procurement's peak competitive phase, takes place. All of those who passed to this phase become aware of the prices offered by the others and start to openly compete for the contract. Therefore, this phase allows, when there is actual competition for the contract, the Government is able to obtain the most advantageous price proposal, which results in savings for the Treasury³⁴.

Thus, when using such strategy, cartel members are aware of the proposals of one another, and one of them submits a competitive proposal with a lower price, while the others submit proposals with prices within the 10% mark. These proposals are considered cover biddings³⁵. The expectation is that only cartel members pass to the oral bidding phase. With this strategy, companies that are not participating in the collusion – whose proposals do not fall within the 10% range from the best proposal – may be artificially prevented from participating in the oral bidding phase, thus effectively removing competition in this phase of the reverse auction. Consequently, the cartel members that pass to the bidding phase, fail to submit new proposals or submit fake proposals with only a small price reduction.

Restriction of competition in reverse auctions is agreed upon because, in the absence of collusion amongst companies, proposals with values above the range of 10% would pass to the bidding phase, ensuring actual competition in the second phase of reverse auctions.³⁶

Bidder collusion in in-person reverse auctions does not always ensure that a cartel win the reverse auction, since other competitors may submit proposals with prices lower or within the 10% range, thus passing to the oral bidding phase. In

³³In the form of a reverse auction, with successive and decreasing bids.

³⁴After the bidding phase, and the selection of the best proposal by the criterion of best price, the eligibility of the company in first place is verified more quickly than in other types of procurement. In case the first placed is not deemed eligible, the eligibility of the company in second place is assessed. Both phases are crucial for the Government not to simply obtain the proposal with the best price, but the most advantageous one.

³⁵Opinion 10/2016/CGEP/PFE-CADE-CADE/PGF/AGU. Proceeding 08012.009645/2008-46, launched based on the Petition submitted by CMW Saúde e Tecnologia Importação e Exportação Ltda., informing that Support Produtos Nutricionais Ltda., supplier of "food for special medical purposes", had allegedly sold goods below the cost price, and fixed or practiced, in agreement with competitors, prices and conditions for the sale of goods in government procurements.

³⁶The strategy of bidder collusion does not apply to electronic reverse auctions, since in this type of procurement all companies with proposals qualified on the first phase can participate on the competitive phase, in which bids are presented (art. 23 of Ruling 5450/2005).

any case, collusion has a significant anticompetitive potential, since it deals with agreements amongst competitors involving variables such as prices and quantities that are considered competitively sensitive and must be assessed by CADE.

THE CARTEL CASE RELATED TO THE ACQUISITION OF PAINTS **(Administrative Proceeding 08012.006199/2009-07)**

CASE SUMMARY

The Administrative Proceeding was launched in 2012 to investigate a cartel in a government procurement (in-person reverse auction) organized by the City Hall of Lages (*Prefeitura de Lages*), in Santa Catarina, for the acquisition of painting and hydraulic materials.

The case was tried by the Tribunal of CADE in 2014, which voted for the conviction of three of the investigated companies and the imposition of a fine and compliance with ancillary obligations.

BIDDER COLLUSION IN IN-PERSON REVERSE AUCTION

Despite the relative lack of direct evidence, there was a robust set of evidence consisting mainly of economic evidence of parallel pricing and circumstantial evidence such as the visually identical proposals, which had the same spelling errors and similarities in both formatting and wording.

Such evidence proved the collusion in in-person reverse auctions, since the companies, by submitting identical prices or similar ranges to those of the initial proposals, aimed precisely at ensuring that, besides the company chosen by the cartel to be the winner of the procurement, at least one of the other two companies passed to the bidding phase. In some cases, when the use of this strategy allowed the three cartelists to pass to the bidding phase, two of them simulated competition and ended up giving up bidding for the benefit of the company chosen by the cartel to be the winner, thus effectively turning the bidding phase useless. In other cases, when bidders that were not part of the cartel passed to the bidding phase, the offenders worked on behalf of their chosen winner and against the newcomer, in order to “block” other potential competitors from submitting proposals that were actually more advantageous

to the Government. This strategy was used by the members of the cartel. This way the companies that passed to the bidding phase did not face competitive pressure from other bidders that had not passed to this phase.

II.3.4. Bid rotation

In the bid rotation scheme, the cartel members continue to compete, but agree to take turns submitting the winning proposal, either for different lots in the same procurement or for different procurements, so that each member of the cartel would have a “share”. In other words, it is a form of market division.

The way in which bid rotation is implemented may vary. The division can be done in equal amounts (same number of lots) or, for instance, in proportion to the size, market share or productive capacity of each company.

THE CARTEL CASE RELATED TO SECURITY REVOLVING DOORS

(Administrative Proceeding 08012.009611/2008-51)

CASE SUMMARY

The Administrative Proceeding was launched in 2008 to investigate a cartel in government procurements organised by Banco do Brasil and Banrisul for the acquisition of metal detector doors.

The case was tried in 2014 and the Tribunal voted for the conviction of 4 companies and 10 individuals.

BID ROTATION

The cartel members took turns submitting winning proposals, which was evinced by the conversations they had to discuss which company would win each procurement, based on previous wins. The strategy of bid rotation was also facilitated by the use of tables to keep track of the ranking of each member of the cartel, in order to determine the order in which each company would win future procurements.

FIGURE 4³⁷

10/07 às 16:51: julipaviani@hotmail.com - não vamos deixar o preço cair né

patyjesus@hotmail.com - de forma alguma

julipaviani@hotmail.com - bom vamos combina o seguinte, amanhã vc comenta com o Cleber, pode ser?

patyjesus@hotmail.com - tem escote esta

patyjesus@hotmail.com - sim (...)

15/07 16:03 patyjesus@hotmail.com - é vc que tá na disputa?

julipaviani@hotmail.com - estou na licitação...

16:03 - julipaviani@hotmail.com - meu último valor é de R\$ 83.900,00

patyjesus@hotmail.com - meu 83880,00

julipaviani@hotmail.com - qual o foi o limite que vc combinou com o cleber?

patyjesus@hotmail.com - mpci fecharia 16400,00 cada

16:04 julipaviani@hotmail.com - mas o meu limite é de 83.000,00

16:06 julipaviani@hotmail.com - 82.000,00 é o limite pra MPC

II.3.5. Market division

The strategy of market division involves a scheme to submit proposals with the intent to somehow divide the market amongst the members of the cartel. The division may refer to, for example, customer portfolio (several government bodies), type of product/service, or geographic market (region/city/state, etc.).

This strategy can be closely related to other aforementioned strategies, such as bid rotation, cover bidding, or bid suppression. Competing companies may, for example, assign specific customers or types of customers to different companies, so that other competitors do not submit proposals (or only submit fake proposals) in procurements carried out by these potential customers. In return, the competitor does not present competitive proposals to other specific groups of customers, which were assigned to other members of the cartel.

³⁷Figure 4 is a piece of evidence showing a chat conversation amongst bidders in which they are seen discussing prices agreements. It can be found at page 147 of the public case files of the Administrative Proceeding.

THE CASE OF THE INTERNATIONAL CARTEL OF MARINE HOSES **(Administrative Proceeding 08012.010932/2007-18)**

CASE SUMMARY

The Administrative Proceeding was launched in 2007 after the signing of a Leniency Agreement concerning an alleged international cartel with effects in Brazil on the market of rubber marine hoses.

The case was tried in 2015 and the Tribunal decided for the conviction of three companies and one individual and for dismissing the case against three companies and four individuals. In addition, four Cease and Desist Agreements were signed, which resulted in the dismissal of the case against the signatories.

MARKET DIVISION

The cartel was highly institutionalised and governed by rules of conduct and discipline provisions for anyone those who circumvented the agreement. It also had a "technical committee", made up of the main members of the cartel, which was aimed at scrutinising and specifying rules.

According to the "technical committee", the cartel should be organised by a coordinator and aim at: (i) maximizing prices and profits, (ii) ensuring that the winning bidder would effectively win, using cover biddings, (iii) exchanging information about price, quantity, market share, and other competitively sensitive information, (iv) monitoring compliance with the agreement and enforcing discipline amongst members, especially with regard to "project" allocation and punishment for members who violated the rules, and (v) reducing transaction costs related to attracting customers and sales strategies.

The cartel coordinator was responsible for setting the rules to be followed by the members and monitoring the compliance with the market share agreed by the companies. This person was entrusted with the task of resolving conflicts amongst participants and seeking cover biddings (which they called "support") for the winner appointed by the cartel (the "champion").

In structural terms, such cover biddings were designed based on market shares, supply records, and operation of factories. Regarding the anticompetitive conduct, the cover biddings were also drawn up based on a company's record

of compliance with the agreement, a division of the market intended to ensure specific market shares, and a balance of gains and losses amongst competitors.

FIGURE 5³⁸

"DE:

(...)

PARA: A1 [*Bridgestone*], A2 [*Yokohama*], B1 [*Dunlop*], B2 [*Trelleborg*]

DE: B3 [*ITR Pirelli/Parker*]

DATA: 08 de outubro de 1999.

Ref: Reunião com A2

Confirmamos que B3 [*ITR Pirelli*] manteve uma reunião com A2 [*Yokohama*] esta semana para discutir a situação de mercado em sua totalidade, assim como vários assuntos específicos relacionados à futura cooperação. A impressão geral que tivemos foi de que A2 [*Yokohama*] dará apoio à idéia de melhorar preços de mercado em geral e que estão felizes em cooperar em pesquisas específicas a fim de fazer com que isso aconteça. Também confirmaram que B3 [*ITR Pirelli/Parker*] atuaria como seu coordenador e será responsável pelas suas atividades no Clube para o futuro imediato, confirmando também sua concordância com relação às alocações de participações de mercado que foram discutidas na primeira reunião geral em agosto. Estas foram acordadas com segue:

A1 [*Bridgestone*]: 25%

B1 [*Dunlop*]: 25%

B2 [*Trelleborg*]: 12%

A2 [*Yokohama*] +B3 [*ITR Pirelli/Parker*]: 30%

C [*Manuli*]: 8% - Isto será também usado como um "saldo de conta" para ajudar a qualquer membro que estiver sem trabalho.

A2 [*Yokohama*] gostaria de propor um novo método de alocação de pesquisa para assegurar que cada membro tenha contas seguras nas quais será acordado que nenhuma outra empresa interferirá com o Vencedor nomeado. Os tipos de pesquisa serão classificados como segue:

INTERNATIONAL PRECEDENT

THE CARTEL CASE RELATED TO PIPES WITH THERMAL INSULATION

(BELGIUM)

CASE SUMMARY

The case was launched to investigate an alleged cartel on the market of pipes with thermal insulation.

MARKET DIVISION

At the end of the year 1990, four Danish producers signed an agreement for general cooperation in their domestic market and, as of the fall of 1991, two German producers started to participate regularly in the meetings. According to the European Commission, it was within this context that negotiations occurred,

³⁸Figure 5 is a piece of evidence attached to the public version of the opinion of the Rapporteur of the case, Commissioner Márcio de Oliveira Júnior, §269. It is a document evincing an agreement of international repercussion amongst cartellists.

which, in 1994, led to an agreement to allocate shares for the entire European market. These shares were allocated to each company by a team of directors (the presidents or CEOs of the companies participating in the cartel), both at the European and national levels. These countries included Germany, Austria, Denmark, Finland, Italy, the Netherlands, and Sweden.

In 1995, the Swedish company Powerpipe AB (the only large company that did not participate in the cartel) reported the case to the Commission, complaining that its activities in the domestic market were being hampered. In 1998, the Commission concluded there were a number of agreements and practices aimed at dividing the national market amongst producers and, more precisely, to hinder the activities of the direct competitor Powerpipe AB. A Danish cartel went on to become a European cartel with considerable effects on intra-community trade.

II.3.6. Other strategies: legal mechanisms used to implement anticompetitive strategies

a) Consortia

Article 33 of Law 8666/1993 includes the legal authorization for the establishment of consortia in government procurements, which is an important mechanism for increasing competitiveness in procurements, particularly in the case of large contracts, in which a company alone would not be able to provide the good or service requested.

However, according to Marçal Justen Filho, even though there are some cases in which consortia contribute to increase the number of participants, particularly in procurements involving complex markets or products/services, the establishment of consortia may reduce the range of competitors and make it easier for potential interested parties to negotiate agreements with one another.

It is important to mention that consortia are legitimate instruments and sometimes the only possible way to purchase the needed products or services. In some cases, they are essential to widen the range of the process, allowing smaller companies to compete with those with more capacity and/or the leaders of a market or sector. Nonetheless, this instrument, when used for something other than its intended purpose, may be harmful to procurement competition or even be used to implement anticompetitive agreements.

This happens because in certain cases consortia can create distortions intended to ensure a previously-agreed division of the market between competitors. Consider this example: in a given procurement process, there are five companies

with technical and financial capacity to separately provide the requested service or product. However, they illegally discuss the possibility of creating a consortium and agree on who will be awarded the contract and what companies will formally propose the consortium. In this case, it is dangerous to competition and to the Treasury because the companies will submit proposals with higher prices than they would have submitted in a scenario in which they faced actual competition. This is made even worse by the fact that three companies will have submitted cover bids.

This strategy was seen in the Train Cartel case³⁹, tried in July 2019. In his opinion, the Rapporteur of the case, Commissioner João Paulo Resende, stressed consortia are allowed by law and their existence alone does not imply any wrongdoing. Nevertheless, it may be used in a twisted way, resulting in what he called "shell consortia", which "reduce the competition in a procurement since potential competitors suppress their individual bids and divide parts of the product or service requested in order to give shares to the members of consortium, ultimately dividing the market between these companies".

In this regard, procuring bodies, when drafting procurement notices or designing the process itself, should be aware of their intended goal in allowing consortia to be created. And control agencies and auctioneers should know, in their turn, that although allowed by public notice, this kind of process may give rise to suspicious patterns.

b) Subcontracting

Similarly, subcontracting can be allowed in government procurements. It is a mechanism by which the winning bidder transfers part of a work or service to be carried out by a third party. In certain situations, bidders may take advantage of subcontracting to implement anticompetitive agreements, as in the case of companies that suppress their bids or cover other bids to be rewarded with a subcontract. Thus, subcontracting collaborating companies allows for the exceptionally high profits – consequence of the reduction of competition caused by the agreement signed by bidders – to be divided amongst cartel members.

Once again, this is not to say that subcontracting is always and necessarily the result of an agreement amongst bidders. However, the potential risks of subcontracting, regarding possible collusive strategies available to bidding

³⁹Administrative Proceeding 08700.004617/2013-41. § 100 of the vote of the Rapporteur of the case, Commissioner João Paulo Resende.

companies, should be analysed in the context of investigations about collusion in government procurements.

THE AIRMAIL CARTEL CASE **(Administrative Proceeding 08012.010362/2007-66)**

CASE SUMMARY

The Administrative Proceeding was launched in 2007 based on a Complaint by the Federal Prosecution Services of the Federal District, requiring an investigation into an alleged cartel in a procurement carried out by *Correios*, the Brazilian postal service, to hire airmail services.

The case was tried in 2014 by the Tribunal of CADE, which found all investigated parties guilty and imposed fines.

SUBCONTRACTING

Four days prior to the date for submitting proposals, the two investigated companies signed a “Subcontracting Commitment”, according to which the company that won any procurement lot would subcontract the other to provide 50% of the respective services. The unlawfulness and anticompetitive nature of the referred subcontracting is evident, since it was prior to the procurement and aimed at maintaining a certain previously-set allocation.

FIGURE 6⁴⁰

Imagem 1 – Objeto e firmas do Termo de Compromisso de Subcontratação

DO OBJETO

01. Toda e qualquer contratação de Serviços de Transporte Aéreo de Cargas por parte da EMPRESA BRASILEIRA DE CORREIOS E TELÉGRAFOS – ECT, que envolva qualquer das duas empresas.

02. Reunindo ambas as partes, condições de participar de todas as modalidades de licitação junto a ECT, a BETA e a SKYMASTER assim o farão, cada qual por si, apresentando as propostas comerciais que julgarem cada uma delas convenientes aos seus interesses.

03. Se a BETA e/ou a SKYMASTER forem vencedoras da Concorrência para qualquer das linhas nas licitações, compromete-se a empresa vencedora (BETA ou SKYMASTER), seja ela qual for, em caráter irrevogável e irrevogável, a realizar a subcontratação da outra, para a realização de 50% (cinquenta por cento) dos serviços de cada uma das linhas que lhe tiverem sido adjudicadas, observado o disposto no item 5.4 abaixo.

04. Este compromisso será aplicado para o conjunto dos contratos que forem adjudicados a BETA e SKYMASTER, devendo, posteriormente, ser celebrado um instrumento de subcontratação para cada um deles.

E por estarem de acordo, firmam a presente em 2 (duas) vias, perante as testemunhas abaixo.

São Paulo, 21 de Julho de 2008

BRAZILIAN EXPRESS TRANSPORTES AÉREOS LTDA
Sr. Antonio Augusto Conceição Morato Leite Filho
CPF: 761.834/838-34

SKYMASTER AIRLINES LTDA
Luiz Otávio Gonçalves
CPF: 118.533.366-53

II.4. Evidence of collusion in government procurements

Besides the market characteristics that facilitate cartel formation which were mentioned in item II.1., there is also evidence that may serve to call the attention of authorities and individuals in charge of procurement processes and acquisition procedures for the possibility of collusion. Such evidence differs from one procurement to another and are particularly linked to cases which CADE is responsible for investigating, as exemplified below:

(I) Evidence at the stage of proposal submission:

⁴⁰Figure 6 is a piece of evidence attached to the public version of the Administrative Proceeding, page 2294. It is an excerpt of the subcontracting agreement regarding the subject matter.

- Number of submitted proposals substantially lower than the usual or expected.
- Unexpected withdrawal of some companies from the procurement process, without a reasonable justification, or unexpected decrease in the number of bidders in the procurement process.
- Submission of proposals by agents that clearly would not be able to win the contract (e.g. common errors, above the reference price) or by companies that continue to submit proposals despite being repeatedly unsuccessful.
- A bidder presents several proposals or submits a proposal on their behalf and on behalf of other competing companies.
- Regular competing bidders do not submit proposals when they would be expected to do so, continuing to compete in other processes.
- Companies enter into a consortium, although they are clearly able to submit individual proposals.
- Two or more proposals:
 - Have identical price values (particularly in the case of sealed proposals).
 - Have similar wording and formatting, similar or identical errors (typing, grammatical, and spelling errors or mathematical calculations).
 - Are sent from the same address, email, or fax or have postage stamps with sequential numbers and/or that were sent from the same post office.
 - When submitted through electronic means, were created or edited by the same supplier.
 - Have similar letterhead paper, forms, or contact details.

(II) Evidence in the statements of bidders:

- Justification of proposed prices referring to “price suggested by the market,” “standard market price”, or “price list of the market”.
- Express reference to proposals submitted by competitors or to the existence of some type of agreement.
- Reference to the prerogative of a company to deal within a territory or with a specific customer.

- Declarations of business associations with detailed reference to proposals.
- Unions and business associations acting before courts or governmental agencies to prevent the participation of companies by mentioning the inadequacy of a company or proposals with impracticable prices.

(III) Evidence related to the behaviour of bidders during/at a procurement process and in the business conditions of proposals:

- Winning bidders subcontract competitors who have lost a contract, withdrawn from the process or refused to submit proposals, and/or regularly hire the same competitor.
- In a set of procurement processes, suppliers usually win the same or similar amounts of contracts.
- There is an odd and unreasonable price margin between the winning proposal and the others.
- A company requests procurement documents for itself and one or more competitors or a company submits a proposal along one or more competitors. The value of proposals significantly decreases when a new bidder enters into the procurement process; or, on the contrary, it significantly increases without bidders or costs changing.

(IV) Evidence related to the outcome of the procurement process:

- There is a rotation pattern of contract winners related to procurement lots and geographic distribution.
- The same company always wins the contracts awarded by a specific government body and others keep participating even though they always lose.
- A great variation in the prices offered in procurements for similar products or services. Disclaimer: one needs to be sure the contracts are comparable in terms of quantity, product, and timeframe.

In the face of evidence that indicate a cartel in government procurements, the government procurement official must report it to CADE by means of a reasoned complaint or the *Clique-Denúncia*, the channel available at CADE's website for anyone to report a violation. Once CADE has knowledge of the case, an administrative investigation into it will be launched.

PART III – PREVENTING CARTELS IN PROCUREMENTS

III.1. Contributions of government procurement officials to the fight against cartels

CADE's experience shows that the design of pro-competitive notices must be based on a principle to elaborate notice rules that simultaneously: (i) diminish the predictability of the main procurement baselines (such as reference price, purchased quantity, lot division, technical qualification criteria, etc.); and, thus, (ii) introduce destabilising elements into markets where there is a greater propensity of cartel activity.

Such principle should not be understood as an insult to the stability of the rules governing government procurements or to legal certainty, which are aimed at ensuring predictability for economic agents, an essential requirement for efficient and effective investments.

Thus, government procurement officials must pay close attention to the items presented below from the beginning of the drafting of a notice in order to reduce the risks associated with cartels in procurement and detect potential anticompetitive conduct amongst bidders during the process.

III.2. What measures can be adopted to mitigate the risk of having a cartel in procurements⁴¹

Considering all aspects that have already been mentioned, a brief checklist is presented below with measures that can be adopted to prevent and reduce the risk of collusion in government procurements:

(I) General recommendations:

- Request a Non-Collusive Bidding Certificate (*Declaração de Elaboração Independente de Proposta*), under the terms of Regulation no. 2, 16 Sep 2009, by the Ministry of Planning, Budget, and Management. This

⁴¹See CADE's contributions in *Medidas para estimular o ambiente concorrencial dos processos licitatórios*. Available at: <<http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/contribuicoes-cade-ppi.pdf/view>>.

document is intended as a means to require that bidders guarantee, through a document signed by their legal representatives, that their commercial proposal and bids have been prepared without sharing any commercial sensitive information with a competing company.

- Prohibit the disclosure of the reserve price/reference price, in accordance with the terms of Law 12462, 4 Aug 2011, the Differential Procurement Regime Law (*Regime Diferenciado de Contratações*).
- Review the relevance of adopting concurrent auctions – in case of more than one concession related to a similar object – in order to prevent market division (a strategy facilitated by sequential auctions).
- Plan concurrent auctions for complimentary projects – whether within the same auction or with projects that have already been included in previous procurements – in order to enable the creation of situations of super cumulative valuation in auctions, attracting both companies that are already active in the market and possible entrants. Consider the possibility of using different auction designs, in the manner of the “mixed auction model” (which combines open and closed formats) established in the Differential Procurement Regime Law, according to att. 23 and 24 of Executive Order 7581, 11 Oct 2011.
- Ensure that clarifications related to the notice – provided to interested parties in the phase prior to the submission of proposals – are offered in a virtual environment, to prevent the identification of companies.
- Avoid opportunities for representatives of any interested companies to meet in person, both in the internal and external phases (that is, the procedures conducted before and after a notice is issued).

(II) Recommendations for designing public notices:

- Consortia: consider adopting criteria that stimulate competition, encourage the participation of entrants and prevent consortia from being used as a way to “strategically reduce demand” (which is harmful for asset valuation, from the point of view of the requesting party).

- Subcontracting: establish criteria for the monitoring and registration of subcontracted companies, making registration mandatory, to prevent subcontracting being used to carry out illegal agreements and reward companies that fail to propose effective bids in the expectation of being subcontracted later. Create incentives for entrants related to the scoring criteria for the technical evaluation of proposals.

Establish different requirements for performance bonds in order to encourage competition in auctions. In Brazil, these bonds are managed and issued by the government-owned companies ABGF and FGIE.

(III) Recommendations for during the procurement process:

- Use a specific computerised system to carry out the auction, which considers the specificities of its rules⁴², to ensure there is:
 - A testing environment to emulate the auction.
 - Secrecy regarding participants and the bids offered.
- Avoid in-person stages, in order to prevent representatives of participating companies from meeting during the auction.

(IV) Recommendations on the specificities of each market and procurement contract:

- Each market has specificities, regulations, and needs that can differently affect procurement design. As an example, the regulatory, technical, quality, safety, and even competition needs during the concession period must be balanced with the need for stimulating competition in the procurement process itself, in order to achieve an ideal balance between the design of the concession contract and the public notice.
- Having a database – whether kept by the requesting bodies or other authorities – that unifies significant procurement information is essential for effectively fighting cartels in government procurements. This is because the effective monitoring of procurement procedures can have a deterrent effect, in addition to facilitating the detection of cartels.

⁴²In this regard, see the experience of ANEEL, the Brazilian Electricity Regulatory Agency.

PART IV – CRIMES ASSOCIATED WITH CARTELS IN PROCUREMENTS

IV.1. Cartel and fraud in procurements

Not rarely, fraud and cartels in government procurements are handled as a single thing – synonyms for the same illegal practice. However, as briefly explained on item I.2., although similar in several situations, such practices regard different legal concepts.

Thus, it is important to properly recognise the legal parameters of each one and convergent and divergent aspects between them since this results in different and significant outcomes, such as which competent authority is in charge of investigating and trying a case and which type of penalty is applicable in each case. Fraud in government procurements is set forth in Article 46 of Law 8443/1992, the Federal Court of Accounts Law and Article 93 of Law 8666/1993 (the Procurement Law):

Art. 46. Once fraud in a procurement process is confirmed, the Court must disqualify the bidder from federal government procurements for up to five years.

Art. 93. **Impede, disturb or defraud any procurement process:**

Penalty – 6 months to 2 years' imprisonment, and a fine.

The Procurement Law provides for a penalty ranging from six months to two years' imprisonment and a fine to anyone convicted for defrauding any procurement process. Fraud occurs when there is, during a procurement process, any misleading, deceitful action, carried out in bad faith, with the purpose of harming or deluding, or of preventing the fulfilment of a duty provided by law or by the notice of the respective procurement process.

It should be noted that in all types of fraud (whether it is related to the forgery of a mandatory document, or the delivery of a good instead of another, etc.), any fraudulent conduct in a procurement process will always endanger the fairness

and safety of government enterprises and procedures, which are protected by the Procurement Law.

It is important to emphasise that this Law defines several types of fraudulent behaviour. Amongst which there are those that endanger, simultaneously, the integrity of administrative practices and the competitive nature of government procurements, e.g. fraud conducted through arrangements or agreements (cartels), which is specifically provided for in Article 90 of this Law.

Therefore, the Prosecution Services, who are responsible for ensuring the effective observance of Government Authorities and defending the legal order, in addition to investigating, pursuing, and prosecuting any agent (public or private) whose conduct falls within the definitions of fraud established in Law 8666/1993, either in its most general form (article 93) or in the specific form of fraud related to the competitive nature of a procurement process (article 90). After the Judicial Branch assesses the reports, granting the right to defence, the corresponding criminal penalties may be imposed on any fraudulent agents. The Brazilian Court of Accounts (TCU) also has jurisdiction, in the administrative domain, to investigate and punish fraudulent conduct, according to the Brazilian Court of Accounts Law, effectively declaring the bidder ineligible.

As a deceitful practice against the Government, cartels in procurements are, at the same time, a type of fraud subject to the aforementioned criminal penalties and an economic crime, thus, CADE has jurisdiction to investigate and punish such conduct. Some cases in which cartels and fraud may be confused are listed below:

- (I) Companies participating in a procurement with common partners that are part of the same corporate group: in theory, there is no antitrust violation (cartel), but a potential fraud of the competitive nature of the procurement process;
- (II) Companies with common partners that are not clearly from the same corporate group: it may involve both an antitrust violation and fraud in a procurement process, when the close relationship between bidders may indicate the existence of a cartel and should therefore be assessed together with the rest of the evidence; or

(III) Companies with a kinship or relationship between partners: can be considered both an antitrust violation, and fraud in a procurement process, since the relationship between partners is only a circumstantial piece of evidence of a close relationship between bidders, which must be assessed together with the rest of the evidence.

Although there is an apparent misunderstanding, the main issue is recognising two different situations: (i) competing economic agents that start acting in partnership in procurements – a cartel; versus (ii) economic agents that have never competed (because they share common partners, shell companies, straw parties, etc.) and start participating in procurement processes as if they were bidders – fraud. In addition, there are some ways to defraud procurements that, besides not involving agreements between competitors, can be made unilaterally, such as the provision of misleading information by the winning company.

In the two last cases of fraud aforementioned, that is, fraud between different agents that do not really compete with each other, and fraud that did not even involve an agreement between companies, we are not facing a cartel in a procurement process and, therefore, CADE does not have jurisdiction to try these cases; the authorities with jurisdiction are the Prosecution Services and the Brazilian Court of Accounts. Therefore, even though fraud and cartels are similar, they have important differences, and to each corresponds different applicable rules and competent bodies responsible for investigating and prosecuting the cases related to them.

Fraud in government procurements as per the terms of Law 8666/1993 and Law 8443/1992

Law 8443/1992 (the Brazilian Court of Accounts Law)

Art. 41. To ensure efficient monitoring and investigation of accounts, the Court is to audit conducts carried out by those under its jurisdiction that result in revenue or expense, and must, for this purpose, particularly:

I – monitor, (...)

b) government procurement notices, contracts, including administrative ones, and covenants, agreements, arrangements, or other similar instruments, as well as the conducts referred to in Article 38 of this Law;

Art. 46. Once fraud is detected, the Court must declare the fraudulent bidder ineligible to participate in procurement processes held by the Federal Government for up to five years.

Art. 47. In audits, in case of embezzlement, misappropriation of funds, or other irregularity that results in losses to the Treasury, the Court is to immediately order the proceeding to become a case of special rendering of accounts, *with the exception of the situations provided for in Article 93 of this Law.*



Brazilian Federal Court of Accounts (TCU)

Should TCU, in its duty of supervising and auditing notices of procurement processes, in addition to contracts and covenants, detect fraud in a procurement process, the Court has jurisdiction to declare the fraudulent bidder ineligible to participate in other procurement processes for up to five years, as well as to conduct a special rendering of accounts, in the event of losses to the Treasury.

Law 8666/1993 (the Procurement Law)

Art. 93. Impede, disturb, or defraud any procurement process:

Penalty – six months to two years' imprisonment, and a fine.



Prosecution Services and Police Forces

As far as crimes are concerned, the Police forces and Prosecution Services are responsible for investigating and prosecuting cartels in the criminal domain.



Judicial Branch

If the Prosecution Services understand a crime has been committed, they report it to the judiciary, which will launch a **criminal proceeding** that will be prosecuted and tried by a judge with jurisdiction over the case.

IV.2. Cartel in procurements and corruption

Cartels in government procurement have several specificities that make the subject more complex. One of them is particularly challenging: the potential coexistence, in government procurements, of cartels and corruption (amongst cartelists and government officials).

Their coexistence and interrelation can take different forms. One possible way is, for instance, when a government official intends to gain undue advantage and contacts a company or a group of companies to offer guidance related to a procurement. On the other hand, it is also possible that members of a cartel, aiming to ensure the success of their illegal agreement, engage in corrupt actions to make the government official in charge of the process turn a blind eye or even collaborate with the agreement.

Thus, it is notable that, in the context of government procurements, the coexistence of these illegal conducts is somewhat usual and can strengthen one another, creating a type of vicious cycle that further aggravates the already severe losses caused by each conduct alone. However, it is necessary to understand that even if corruption and collusion are interconnected, they are actually separate illegal practices, i.e. one is not a prerequisite for the existence of the other, and may, in this sense, exist completely independently.

As a consequence, cartels in government procurements and corrupt conducts are violations of different natures and are separately addressed by the Brazilian legal system. Thus, it is crucial to properly recognise what characterises one and the other and the resulting effects, such as the type of penalty applicable in each case, which bodies investigate the case and impose such penalties, etc.

Cartels in government procurements, as it has already been explained, are agreements amongst bidders aimed at restricting or neutralise competition in the procurement process. Ultimately, this is the most serious type of economic crime, in which competitors are driven by the fact they have a common goal, while consumers (and the Government itself, in the case of procurements) suffer the negative effects.

The power to prevent and deter economic crimes, including cartels, falls on the Administrative Council for Economic Defense (CADE), which, under the terms of

Law 12529/2011, is the agency with jurisdiction to impose administrative penalties for the anticompetitive conducts defined in Article 36 of the Procurement Law, such as cartels in government procurements.

On the other hand, corruption is a crime against the Government, set forth in the Brazilian Criminal Code, that can be committed by a civil servant (passive corruption – Article 317) or a private individual (active corruption – Article 333), with a penalty of 2 to 12 years' imprisonment and a fine applicable in both cases.

In this sense, the Anticorruption Law (Federal Law 12846/2013) established an administrative interface that complements the performance of CADE and the Prosecution Services, aimed at making companies strictly liable – in the administrative and civil domains – for conducts harmful to the Government.

According to the Anticorruption Law, conducts that are harmful to the Government are (amongst others provided for in Article 5):

- (I) promising, offering, or giving, directly or indirectly, undue advantages to government officials or to third parties related to them – that is, active corruption;
- (II) frustrating or defrauding, by means of arrangement, agreement, or any other way, the competitive nature of government procurement processes – that is, cartels in government procurements.

Passive corruption involves requesting or receiving undue advantages, or accepting a promise of advantages for oneself or for others, directly or indirectly, even if not in office or before taking office, but related to an official position. Active corruption, on the other hand, involves offering or promising undue advantages to civil servants to have them do, omit to do, or delay performing their duties related to their position.

Criminally prosecuting agents involved in passive or active corruption is a duty of the Prosecution Services, which must take the case to the Judicial Branch, without prejudice to actions taken by administrative bodies responsible for internal and external controls, such as courts of accounts, comptrollers' offices, boards of ethics, etc.

If cartels in government procurements and corruption happen at the same time, it is all the more important that the defence of competition and the fight against

corruption also be carried out simultaneously, which demands all competent authorities take action together.

A good example of joint action is the Memorandum of Understanding signed between the Prosecution Services of the State of São Paulo (MPF/SP) and CADE, aimed at fighting cartels and working especially on leniency agreement negotiations. As the signing of leniency agreements at the administrative level also offers advantages at the criminal level, it is important that the antitrust authority and the Prosecution Services have an understanding in this matter.

Therefore, cartels in government procurements and corruption, despite being violations of a different nature and which endanger different legal interests, they can be dealt with at the same time, and thus require complementary actions by the competent authorities. The interface between the actions to be taken by the competent authorities are exemplified and summarised in the table below. It is important to emphasize that the interactions between these domains happen in a coordinated manner (because fighting corruption falls outside the jurisdiction of CADE, even though the practice is closely linked to cartels).

	<u>CADE</u> Competition Law (cartel)		<u>Office of the Comptroller General (CGU)</u> Anticorruption Law (corruption)	<u>Prosecution Services and Police Forces</u> Crimes (e.g. cartel, corruption, money laundry, etc.)
Penalties	Administrative (up to 20% of gross revenue) + prohibition to contract with the government, if applicable		Administrative (up to 20% of gross revenue) + prohibition to contract with the government, if applicable	Imprisonment + community service + fines
Type of agreement	Leniency Agreement (CADE) – Law 12529/2011 and the Statutes of CADE	Cease and Desist Agreement (CADE) – Law 12529/2011 and the Statutes of CADE	Leniency Agreement – Law 12846/2013	Plea agreements – Law 12850/2013 and others
Beneficiary	Companies and individuals (only applies to the 1 st applicant)	Companies and individuals (applies to the 2 nd and any applicant)	Companies (only applies to the 1 st applicant)	Individuals (there is usually no requirements)

		following applicants)		related to the order of application)
Jurisdiction	Signed by the General Superintendence of CADE, in consultation with the Prosecution Services	Approved by CADE's Tribunal, with no interference from the Prosecution Services	<ul style="list-style-type: none"> - Highest authority of each body or government agency - At the federal level: CGU, the Office of the Attorney General (AGU), Prosecution Services - Brazilian Court of Accounts (TCU) has jurisdiction to monitor and review the agreements (not a consensus) 	Approved by the judge at the request of the Chief of Police, Prosecution Service, or collaborator
Administrative and/or criminal benefits	Complete immunity or partial of administrative and criminal penalties (1 to 2/3) and authorisation to contract	Fine reduction by up to 50% (the Statutes of CADE) and authorisation to contract	Fine reduction (up to 2/3) and immunity or mitigation of the prohibition to contract with the Government	<ul style="list-style-type: none"> - Acquittal - Reduction of the imprisonment sentence (up to 2/3) - Alternative sentences instead of imprisonment
Civil benefits	No automatic civil benefits granted. Changes may be made to the legislation on joint and several liabilities.	No automatic civil benefits granted.	No automatic civil benefits granted.	No automatic civil benefits granted.

Source: ATHAYDE, Amanda. *Manual dos Acordos de Leniência no Brasil: teoria e prática* (2019).