



Sustainability and Competition Law in Brazil

4

José Mauro Decoussau Machado

4.1 General Framework

4.1.1 Definition of Sustainability

The concept of sustainability admits different definitions. One of the most known is the one given by the UN as “meeting the needs of the present without compromising the ability of future generations to meet their own needs.”¹ In the following answers, sustainability is understood as preventing the depletion of natural or physical resources so that they will remain available for society for the long term. In business and policy contexts, the concept of sustainability refers to the idea of planned and responsible development regarding the use of natural resources in economic activities to avoid or reduce environmental risks and allow the continuity of human life.

The rapporteur would like to thank his colleagues from the Study Committee in Competition from the Brazilian Intellectual Property Association – Gabriela Monteiro, Jessica Ribeiro, Lucas Antoniazzi, and Pedro Mota – for the inestimable aid with research and responding to questions.

¹United Nations Brundtland Commission (1987) Academic Impact, Sustainability, available at <https://www.un.org/en/academic-impact/sustainability>. Accessed 19 November 2022.

J. M. D. Machado (✉)
Pinheiro Neto Advogados, São Paulo, Brazil
e-mail: jmachado@pn.com.br

4.1.2 The Role of Sustainability in Competition Law

Although the promotion of sustainable development is the biggest challenge today and is present from state regulation to the agenda of international organizations and private companies, the Brazilian Antitrust law does not bring any specific provision related to sustainability nor its role in competition.

In fact, it has a more traditional approach, focused on promoting the freedom of initiative, free competition, the social function of property, consumer protection, and the repression of the abuse of economic power.

However, as the application of competition law seeks to promote human rights, efficiency, and consumer welfare, it is possible to consider sustainability as a parameter of quality (not related to price) and innovation in the control of structures and conducts. Furthermore, given that the protection of human rights and the promotion of free competition are provided for in the Federal Constitution (Articles 3, items II and III, 5 and 170, item IV), it is possible to interpret that antitrust can offer instruments for the promotion of sustainable development.

However, reconciling antitrust and sustainability values, without risking companies being punished by antitrust authorities, can be a challenge. Many environmental, social, and governance (ESG) actions would only be achieved by companies if they—usually in the position of competitors—joined efforts to this end in interdependent relationships.

The absence of a position from the competition authority, therefore, can make these companies give up on implementing sustainability projects due to the fear of penalties. This is because eventual cooperation could create incentives for information exchange and/or the adoption of uniform commercial behavior, which could, at least in theory, facilitate collusion.

Thus, it is understood that the competition authority can apply sustainability values, but this will depend on specific analysis, on a case-by-case basis. For example, a cooperation agreement between companies with a view to adopting measures favorable to the preservation of the environment, such as the development of new ecological technology or a common mechanism for reducing the negative environmental impacts of a given economic activity, can be considered as generating environmental benefits. The same structure, however, may be considered a cartel or may lead to the exclusion of competitors that will not be able to follow the actions of these other companies.

In conclusion, it is important that the antitrust community engages in a discussion about the effective role that competition law plays in creating a more egalitarian and sustainable society. This is because for companies to know the limits of their cooperation in favor of sustainability actions, it is necessary that antitrust authorities collaborate with guidelines so that companies' efforts toward a more sustainable activity are rewarded—and not punished.

4.1.3 Specific Laws and Rules That Address the Intersection Between Sustainability and Competition Law

There is no specific legislation in Brazil that uses competition law as a tool to achieve sustainable values. However, it is possible to identify an intersection between sustainability and competition law from the interpretation of Articles 170 and 225 of the Federal Constitution.

The economic order, founded on the valorization of human work and free initiative (or free enterprise), aims, through social justice (Article 170 of the Constitution), to contribute to the achievement of human dignity. For this reason, the provision that deals with economic rights includes the defense of the environment in the list of principles. Article 225, caput, of the Constitution provides for the right of everyone to an ecologically balanced environment and imposes on the government and the community the duty to defend and preserve it for present and future generations. It is, therefore, an interest of the collectivity, the holder of the interests protected by the constitutional economic order and by antitrust.

In Brazil, the Competition Authority (Administrative Council of Economic Defense (CADE)) is attentive to foreign initiatives (such as the Dutch authority's "Proposal for a Guide on Sustainability Agreements") but has not yet expressed itself on the subject. Given the importance that the topic of sustainability has gained in the agenda of Brazilian companies, it is believed that CADE will position itself in the future.

4.2 Specific Interaction and Cases

4.2.1 Brazilian Cases Where Sustainability Played a Role in the Enforcement of Competition Law

Based on publicly available information, we did not find any case in which sustainability played any role, not as a sword nor as a shield, as mentioned in the questions. In fact, so far, in Brazil, discussions related to the interaction between sustainability and antitrust have basically been developed in a few merger cases (concentration acts). However, no concrete position has been established by the Brazilian antitrust authority yet.²

²For instance, in Concentration Act No. 08700.007101/2018-63 (Vale S.A. and Ferrous Resources Limited), it was stated by Reporting Commissioner Mauricio Oscar Bandeira Maia that although the case involved several regulatory, social, and environmental matters, among others, CADE should restrict its analysis to competitive aspects within the limits of its remit. One could not expect that the antitrust authority addresses all these other aspects because it does not have a remit for this and there are other bodies with specific attributions to carry out much deeper analyses about each one of these matters.

4.2.2 Brazilian Cases of Illegal Anticompetitive Conduct or Green Washing Conduct in the Context of Sustainability Initiatives

Based on publicly available information, there have been no major cases of investigation of illegal anticompetitive conduct that occurred in the context of sustainability initiatives. Thus, there have been no cases of greenwashing conduct decided by the Brazilian antitrust authority so far.

4.2.2.1 Brazilian Cases of Genuine Sustainability Initiatives Served as a Springboard for Other Anticompetitive Behavior

Between 2010 and 2015, CADE investigated anticompetitive practices of cartels and their influence on uniform behavior in the sand market of the state of Paraná (BR). The cartel formation by the competing players was facilitated by a Term for the Adjustment of Conduct (“TAC” for its acronym in Portuguese)—a kind of settlement executed between companies and the Public Prosecutors’ Office—which was executed due to environmental concerns (Administrative Proceeding No. 08012.004430/2002-43).³

TAC included the obligations to establish an association of sand extractive industries (the Northwest Sand Extractive Industries Association or “APA” for its acronym in Portuguese) and to implement an unloading and storage terminal to be used jointly by the companies and the association. The main purpose of such a settlement was environmental preservation and the recovery of areas located on the banks of the Paraná River.

The administrative proceeding was initiated after a complaint from the Union of Retail Commerce of Hardware, Paints, Wood, Electric, Hydraulic and Construction Materials of Maringá and Region (“Simatec” for its acronym in Portuguese), which was forwarded to CADE by the Public Prosecutors’ Office of the State of Paraná (“MPE/PR” for its acronym in Portuguese).

The meetings held in the context of the association were used by the companies to exchange commercially sensitive information among the competitors. Also, the association was allegedly used to impair the growth and intensification of competition in the corresponding market.

The investigated parties (including the companies,⁴ the association, and its former president) executed Cease and Desist Agreements (“TCC” for its acronym in Portuguese) with CADE, and the administrative proceeding was suspended in March 2015.

³CADE, Administrative Proceeding No. 08012.004430/2002-43. Representantes: Simatec e Ministério Público do Estado do Paraná. Representada: Porto de Areia Cristo Rei Ltda. e outros. Relator Conselheiro Márcio de Oliveira Júnior.

⁴Baleal Indústria e Comércio de Areia Ltda., Porto de Areia do Lago Ltda., Porto de Areia Cristo Rei Ltda., Indústria e Comércio de Areia e Pedra Vera Cruz Ltda. – ME, Daniel de Oliveira Reis & Cia. Ltda., Vilmar Pasquali & Cia. Ltda., J.M. Lada & Cia. Ltda., Manoel Cruz Malassise Neto, Mineração Nova Londrina Ltda.

The TCCs' obligations included measures to address both the environmental and antitrust concerns discussed in the case, which had to be reconciled and aligned. In this regard, CADE's Commissioner, Gilvandro Araújo, expressly stated that "The parties presented a solution that mitigates both the environmental concern of the TAC of the Public Prosecutors' Office and the competition concern of CADE."

4.3 Agencies and Legislature

4.3.1 The Role of Agencies

CADE has not yet launched any specific guideline or working paper related to horizontal cooperation agreements for sustainable practices and antitrust. However, specialists⁵ stated that CADE is attentive to guidelines issued by other jurisdictions, namely, the Dutch and German authorities, and to discussing their policies to further issue a position on the matter.

Therefore, currently, there is no guidance (either collective or individual) provided by CADE to inform the market of the boundaries between common action toward sustainable practices and collusion, the latter punishable under Article 36 of Brazilian Competition Law (Federal Law n. 12.159/11). That is why scholars and attorneys have been alerting that companies are avoiding debating, establishing, or taking common sustainable measures due to a fear that CADE might question these practices and even interpret them as violations under Brazilian law.⁶

4.3.2 The Role of Legislature and Specific Committees

Neither the Brazilian legislature nor specific committees have yet discussed the legal framework for carrying common sustainable actions by companies and their treatment under competition law.

⁵D. O. Andreoli and P. Puglies (2020) Competition and sustainability: reconcilable matters, available at <https://www.demarest.com.br/wp-content/uploads/2020/10/Concorr%C3%Aancia-e-sustentabilidade-d%C3%A1-para-conciliar.pdf>. Accessed 19 November 2022.

⁶Migalhas (2020) Cooperation agreements among competitors to promote sustainable measures: which should be Cade's role?, available at: <https://www.migalhas.com.br/depeso/331669/acordos-de-cooperacao-entre-concorrentes-para-promocao-de-medidas-de-desenvolvimento-sustentavel%2D%D%2Dqual-deve-ser-o-papel-do-cade>. Accessed 19 November 2022.

What has been discussed and proposed within the Brazilian Parliament are bills and amendments concerning green certifications that could grant access to credit⁷ and preferences at public bids⁸ to companies that comply with certain sustainable practices. Nevertheless, these policies promote individual actions taken by companies and do not establish the rules to foster collaboration among private actors without infringing competition law.

Open Access This chapter is licensed under the terms of the Creative Commons Attribution 4.0 International License (<http://creativecommons.org/licenses/by/4.0/>), which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license and indicate if changes were made.

The images or other third party material in this chapter are included in the chapter's Creative Commons license, unless indicated otherwise in a credit line to the material. If material is not included in the chapter's Creative Commons license and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder.



⁷On that matter, Bill n° 735/22 proposed by Deputy Carlos Henrique Gaguim establishes a green stamp for capital market and investment companies that follow sustainable practices and grant them special conditions, such as access to federal credit and financing programs under public funds and banks. The Bill will yet be debated at the Congress' Environment and Sustainable Development Committee. More information available at <https://www.camara.leg.br/propostas-legislativas/2318833>. Accessed 19 November 2022.

⁸Bill n° 358/2020 proposed by Senator Styvenson Valentim alters the Brazilian Public Bid Federal Law (Law n. 8.666/93) in order to establish the green stamp as a tiebreaker in Public Bids.