

SILENCE IS NOT GREEN: WHY GUIDANCE REGARDING SUSTAINABILITY AGREEMENTS IS CRUCIAL

O silêncio não é sustentável: por que diretrizes sobre acordos de sustentabilidade são essenciais

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Resumo. O objetivo principal desse artigo é explorar a relevância do direito concorrencial no contexto da análise de acordos de sustentabilidade celebrados entre concorrentes. O artigo aborda como as diretrizes relacionadas a tais acordos não implicam uma ampliação dos objetivos do direito concorrencial nem representam uma completa divergência da abordagem tradicional em matéria antitruste. Além disso, o artigo examina como outras autoridades e instituições estão tratando esse assunto. O artigo também busca enfatizar a necessidade de a autoridade concorrencial brasileira abordar essa questão e estabelecer suas próprias diretrizes para garantir que a busca por maior sustentabilidade não viole a concorrência. Assim, esse artigo busca promover um diálogo sobre como o direito concorrencial pode contribuir com os esforços em prol da sustentabilidade, destacando a importância de uma abordagem equilibrada e responsável para o desenvolvimento de acordos entre empresas concorrentes que visam um impacto positivo no meio ambiente e, indiretamente, na sociedade como um todo.

Palavras-chave. Sustentabilidade; Concorrencial; Acordos entre Concorrentes; Brasil; Autoridades Estrangeiras.

Abstract. This article aims at exploring the relevance of competition law in the context of analyzing sustainability agreements between competitors.

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The article discusses how guidelines related to such agreements do not imply an expansion of the goals of competition law nor a total deviation from traditional antitrust analysis. Furthermore, the article examines how other authorities and institutions are addressing this issue. The article also seeks to underscore the need for Brazil's competition authority to address this issue and establish its own guidelines to guarantee that the pursuit of a more sustainable society will not harm competition. Thus, this article aims to promote a dialogue on how competition law can foster efforts for sustainability, highlighting the importance of a balanced and responsible approach to the development of agreements between competitors that aim for a positive impact on the environment and indirectly on society.

Keywords. Sustainability; Competition; Agreements Between Competitors; Brazil; Foreign authorities.

Summary: 1. Introduction. 2. Providing guidance on sustainability agreements does not mean an expansion of the goals of antitrust nor a total deviation from traditional antitrust analysis. 3. It is crucial for Brazil to be engaged in this discussion. 4. Insights of foreign antitrust authorities can inform CADE's actions. 5. The need for CADE to take a stance. 6. Conclusion.

1. Introduction

In an era where global challenges related to climate change, resource scarcity, biodiversity loss, and environmental degradation are looming over society, the need for sustainable practices has become a pressing concern. As these challenges transcend borders and impact communities worldwide, businesses are increasingly pressured to make economic activity more sustainable by governments, shareholders, consumers, or the public as a whole.

In this context, collaborations among competitors to achieve sustainability goals⁴ have emerged as necessary and compelling. This paradigm shift is driven by the recognition that the climate change emergency cannot be adequately addressed solely by isolated efforts of individual

⁴ In 1987, the United Nations Brundtland Commission defined sustainability as “meeting the needs of the present without compromising the ability of future generations to meet their own needs.” Although the term sustainability has been linked to broader societal objectives (for example, improving working conditions), in this article the term sustainability will be intentionally narrowed to refer solely to environmental sustainability.

companies. Instead, collective action has become imperative to create fast, meaningful, and lasting impact.

Sustainability challenges are multifaceted, interconnected, and often extend beyond the purview of any single organization, necessitating a collaborative approach that can pool resources, expertise, and innovative solutions from various stakeholders. In addition, in the pursuit of sustainability, companies might face what is known as "first mover disadvantages." Being the initial organization to adopt sustainable practices can entail high costs, uncertainties about consumer response, and potential operational disruptions. Collaborative initiatives can mitigate these disadvantages by distributing costs and risks among multiple parties. This risk-sharing approach encourages more companies to embrace sustainable practices, as the collective effort reduces the burden on individual participants. Collaborative initiatives can also create a snowball effect, propelling the adoption of sustainability practices across an entire industry and even across sectors. As more companies join forces, the momentum grows, creating a domino effect that encourages even more organizations to participate. Sustainability agreements⁵ can also help to achieve desired goals faster and more efficiently than individual actions, which is itself a meaningful advantage given the urgency of the matter.

In other words, collaborations among competitors for achieving sustainability goals are a compelling response to the climate change challenges facing today's world. However, companies seeking to enter sustainability agreements can sometimes encounter a hurdle in the form of anti-trust rules aimed at preventing collusion. While competition rules play a critical role in preserving competitive markets, they can inadvertently create concerns for collaborative sustainability efforts and thus suppress initiatives that would benefit the economy and society as a whole.

In this context, competition authorities worldwide are being asked to clarify their stance on sustainability initiatives, while also ensuring

⁵ This article uses the term "sustainability agreements" to refer to cooperation between businesses in the fight against climate change and the promotion of other environmental goals.

fair competition and preventing anticompetitive behavior. However, authorities also have limited visibility on how current policies unintentionally discourage businesses from collaborating to combat climate change. Specialists have also expressed concerns with greenwashing⁶ and their perceived lack of expertise and jurisdiction of antitrust authorities to take environmental interests in consideration.⁷

Against this backdrop, this article explores why providing antitrust guidance to sustainability agreements is of utmost importance, why sustainability sets itself apart from other subjects that could potentially be considered by antitrust authorities, and why providing such guidance does not result in a complete deviation from the traditional antitrust analysis

⁶ “Greenwashing involves companies that mislead consumers by claiming that products are more sustainable than they actually are. For example, companies may exaggerate or misrepresent the sustainable qualities of a product, or they may use claims that cannot be verified, that are not relevant or that are not true. Greenwashing undermines the confidence in sustainability claims among consumers. As a result, consumers become less motivated to buy and use sustainable goods. In addition, greenwashing leads to distortion of competition. After all, companies that invest in the sustainability benefits of their products or services, and that inform consumers properly about those benefits will thus be put at a disadvantage. In the eyes of consumers, they are not able to distinguish themselves from companies that mislead consumers about the sustainability aspects of their products.” AUTHORITY FOR CONSUMERS & MARKETS (ACM). Guidelines Sustainability claims, p. 6, 2021. Available at: <https://www.acm.nl/system/files/documents/guidelines-sustainability-claims.pdf>.

See also “Green Antitrust: Why Would Restricting Competition Induce Sustainability Efforts?,” by Maarten Pieter Schinkel and Leonard Treuren, available at: <https://www.promarket.org/2021/03/26/green-antitrust-why-would-restricting-competition-induce-sustainability-efforts/>.

⁷ See, for instance, the opinion of CADE’s President, Alexandre Cordeiro, on Merger Case No. 08700.009905/2022-83: “CADE has a specific mandate, which is based on the interpretation of the current law. Over the years, the members of this authority have been interpreting both Law No. 8,884/1994 and Law No. 12,529/2011 to extract the meaning of the institutional mission of the antitrust authority. [...] Although I agree that issues such as climate change, sovereignty, consumer rights, gender equality, and labor rights are important topics in our society and that certain protective measures for these interests are necessary, I am concerned that cases like this could be used to expand the jurisdiction of the competition authority beyond that provided for in the legislation and for which it possesses the technical capacity.”

authorities are used to. We will also demonstrate that Brazil's active participation in sustainability discussions is crucial, how other international jurisdictions have navigated this topic and how their insights could lend support and encouragement to the Brazilian antitrust authority (*Conselho Administrativo de Defesa Econômica* or “CADE”) so it can take action. Finally, we will underscore the essential nature of regulatory guidance in this arena and how it can provide clarity and stimulate sustainable collaboration while preventing anticompetitive practices.

2. Providing guidance on sustainability agreements does not mean an expansion of the goals of antitrust nor a total deviation from traditional antitrust analysis

As mentioned earlier, collaborations among competitors aimed at achieving sustainability goals are gaining increasing prominence in the battle against climate change. However, some antitrust authorities are exercising caution in offering explicit guidance on these agreements, mainly due to a perceived lack of authority and expertise to consider the environmental aspects of such collaborations.

First and foremost, it is important to note that the analysis of sustainability agreements between competitors does not imply a significant deviation from the conventional antitrust assessment. Collaboration among competitors, irrespective of its objectives, squarely falls within the jurisdiction of competition authorities. The core role of antitrust authorities has historically encompassed the analysis of arrangements between competitors to prevent anticompetitive behavior, a principle deeply embedded in the foundation of antitrust policy.

This is the primary difference between sustainability and other broader concerns that antitrust authorities have been called to consider, such as poverty, labor, or gender equality. While integrating other social concerns might entail analyses not typically under the purview of antitrust authorities, evaluating a sustainability agreement involves assessing whether it restricts competition in any way and, if so, whether the compe-

titive restriction is counterbalanced by efficiencies (in this case, environmental gains) generated by the agreement – an assessment conducted routinely under the rule of reason framework.

This analysis is feasible due to the evolving environmental awareness, which has led to efforts to measure environmental interests using economic tools, which allows for an economic assessment that incorporates such interests. Environmental considerations are not only being integrated into pricing and product differentiation strategies by businesses, but financial markets are also attempting to integrate sustainability as a valuation factor and include environmental aspects into economic analysis, facilitating its inclusion in traditional efficiency assessments.

In addition, dispelling a prevailing misconception, collaborations among competitors geared towards sustainability objectives do not inevitably lead to anticompetitive outcomes such as price increases that could ostensibly conflict with the traditional consumer welfare standard. The reality is that collaboration might not exert any influence on competitive variables at all. An illustrative example is the plastic handle initiative in the Netherlands, wherein supermarket chains and soft drink suppliers, such as Coca-Cola, agreed to eliminate plastic handles on soft drink and water multipacks. The goal of the agreement was to facilitate recycling and contribute to reduced plastic usage in packaging. In evaluating this case, the Dutch antitrust authority (the Netherlands Authority for Consumers & Markets – “ACM”) endorsed the agreement, as it assisted in attaining a sustainability goal without adversely affecting consumers (e.g., no impact on product prices or variety).⁸

Similarly, mechanisms like agreements among competitors to phase out ecologically harmful products, voluntary sustainability standards, and best practices related to internal conduct (e.g., reducing plastic use in business premises) can support sustainability without necessarily

⁸ AUTHORITY FOR CONSUMERS & MARKETS (ACM). ACM is favorable to joint agreement between soft-drink suppliers about discontinuation of plastic handles, July 26, 2022. Available at: <https://www.acm.nl/en/publications/acm-favorable-joint-agreement-between-soft-drink-suppliers-about-discontinuation-plastic-handles>.

undermining competition. This reinforces that the collaborative pursuit of sustainability can coexist with principles of healthy competition, rather than inherently conflicting with them, reason why the competition and sustainability debate does not always result in a trade-off. This being said, even in the case of sustainability agreements that pose no conflict with competition law, many companies may still prefer to avoid any risks and refrain from entering such collaborations out of fear of competition law enforcement in the absence of clear guidelines on what is permissible.⁹

Lastly, but far from insignificant, lies the pragmatic dimension of this discussion. Unlike many broader social interests, sustainability stands out due to its inherent urgency in the current context where every contribution matters. The private sector is increasingly urging antitrust authorities to establish clear guidelines for such collaborations, providing stakeholders with direction on antitrust compliant sustainability initiatives between competitors. This approach not only assures legal certainty for businesses and diminishes the risk of potential sanctions but also curbs the possibility of sustainability initiatives inadvertently yielding anticompetitive effects – a perspective squarely in line with the objectives of any antitrust authority.

Furthermore, the feasibility of providing guidance on sustainability agreements by CADE extends beyond philosophical considerations, encompassing a robust legal foundation. According to Article 88, §6º of the Brazilian competition law (Law No. 12,529/2011), transactions that could eliminate competition in a substantial part of a relevant market, potentially establish or strengthen a dominant position, or result in the control of a relevant market for goods or services can be authorized, provided that

⁹ In this respect, see the white paper prepared by the global Task Force on Competition and Sustainability of the International Chamber of Commerce, which brings real-life examples of sustainability agreements “where businesses are looking to cooperate to make a significant contribution to the fight against climate change, but where fear of competition law (whether well founded or not) is inhibiting progress.” INTERNATIONAL CHAMBER OF COMMERCE (ICC). When chilling contributes to warming how competition policy acts as a barrier to climate action, November 2022. Available at: <https://iccwbo.org/wp-content/uploads/sites/3/2022/11/when-chilling-contributes-to-warming-2.pdf>.

they (i) cumulatively or alternatively: increase productivity or competitiveness; enhance the quality of goods or services; or promote efficiency and technological or economic development; and (ii) a significant portion of the benefits derived from these acts is passed on to consumers.

This provision closely resembles Article 101(3) of the Treaty on the Functioning of the European Union.¹⁰ The European rule allows agreements between competitors that restrict competition provided that certain benefits are achieved and shared with consumers. Notably, Article 101(3) has been employed as the legal foundation for sustainability agreement guidelines issued by Austria, Greece, the Netherlands, and the European Union itself.¹¹ The same reasoning applies to Article 88, §6 of the Brazilian competition law.

¹⁰ Article 101. 1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. [...]

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of: any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

¹¹ See, for example, paragraph 4 of the Austrian sustainability guidelines (Available at: https://www.bwb.gv.at/fileadmin/user_upload/AFCA_Sustainability_Guidelines_English_final.pdf), paragraph 10 and followings of the Dutch guidelines (Available at: <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-opportunities-within-competition-law.pdf>), and paragraph 13 of the Greek guidelines (Available at: <https://www.epant.gr/en/enimerosi/competition-law-sustainability.html>).

Hence, CADE not only possesses the legal mandate to furnish guidance regarding sustainability agreements, but this also harmonizes seamlessly with CADE's institutional role and its extensive expertise. Such alignment signifies that offering guidance on sustainable collaborations would not imply a departure from CADE's customary analysis but rather, represents an organic update of its roles in upholding fair competition and safeguarding consumer interests.

3. It is crucial for Brazil to be engaged in this discussion

Brazil has much to gain by taking a leading role in sustainability discussions and contributing to global efforts to environmental protection and combat climate change. Due to its tropical climate, socio-economic disparities, and developing status, Brazil faces particularly significant risks from global warming, including not only extreme weather events, but also significant economic burdens.

The agriculture industry plays a central role in the country's economy and Brazil is responsible for a significant portion of the world's supply of sugar, coffee, meat, corn, soybeans, and other commodities.¹² Although Brazil's agribusiness is equipped with cutting-edge technology, the sector is heavily reliant on natural resources, particularly water and soil fertility. This dependence renders Brazil especially susceptible to potential climate change impacts, such as reduced water availability.

In addition, the effects of climate change and environmental degradation are not uniformly distributed across nations. Regrettably, the most vulnerable countries and populations tend to bear a disproportionate burden. Poverty and social vulnerability serve as compounding risk factors, as limited access to resources and technology heightens vulnerabili-

¹² EMBRAPA. Ciência e tecnologia tornaram o Brasil um dos maiores produtores mundiais de alimentos. Available at <https://www.embrapa.br/busca-de-noticias/-/noticia/75085849/ciencia-e-tecnologia-tornaram-o-brasil-um-dos-maiores-produtores-mundiais-de-alimentos>. Access on September 8, 2023.

ties while diminishing capacity to adapt to climate change impacts. Consequently, as a developing nation that heavily relies on its natural resources, Brazil may face more severe consequences from extreme climate events.¹³

Furthermore, Brazil is endowed abundant reserves of petroleum, substantial hydropower capacity, valuable timber resources, and extensive mineral deposits. According to Brazil's Green Monitor,¹⁴ the nation ranks as the second-largest repository of forests on the planet. Notably, Brazil's per capita electrical supply sourced from renewable resources is an impressive threefold higher than that observed in many other nations. Given this context, a passive stance towards sustainability endeavors could potentially endanger Brazil's distinctive advantages and wealth to a greater extent than many other nations.

Adding to these material conditions, the Brazilian legal framework already places significant emphasis on environmental protection in numerous legislations. This commitment starts with the Federal Constitution itself, which dedicates a chapter to environmental conservation. This legislative landscape goes beyond general protection and includes specific regulations, such as the National Environmental Policy, the Law of Environmental Crimes, the National Solid Waste Policy, the Law of Water Resources, and others.

Brazil's commitment to the environmental agenda has been reinforced by the Brazilian Federal Government, which has emphasized the

¹³ IPCC, 2022: Climate Change 2022: Impacts, Adaptation and Vulnerability. Available at: https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf. Access on September 8, 2023.

¹⁴ BRAZIL'S GREEN MONITOR. Foreign Trade and International Affairs Secretariat for International Economic Affairs International Financial Markets Unit. Available at: https://www.gov.br/mdic/pt-br/assuntos/assuntos-economicos-internacionais/acompanhamento-economico/brazil-green-monitor/brazil_green_monitor-2022-04.pdf. Access on August 21, 2023.

importance of energy transition.¹⁵ Indeed, as signatory of the Paris Agreement, Brazil has pledged to (i) reduce greenhouse gas emissions in 2025 by 37%, compared with 2005; (ii) reduce emissions in 2030 by 50%, compared with 2005; and (iii) achieve climate neutrality by 2050.¹⁶

In the midst of an evolving global economic landscape, Brazil holds not only abundant natural resources but also a robust legal framework and technical expertise to protect and capitalize on them. However, the country's ability to leverage these resources and thrive in the face of climate change impacts hinges critically on the political priorities and sense of urgency embraced by future governments. In this context, CADE has a pivotal role in analyzing collaborations among competitors that further sustainability goals and in issuing guidelines that provide assurance for companies to pursue such goals while remaining in compliance with competition law.

4. Insights of foreign antitrust authorities can inform CADE's actions

A number of antitrust authorities worldwide have taken a stance on the debate around antitrust and sustainability, either by issuing guidelines or reviewing cases,¹⁷ setting an example for other enforcers globally.

¹⁵ BRAZIL. Ministry of the Environment and Climate Change. 'Queremos 100% de energia limpa', afirma Lula. Available at <https://www.gov.br/mma/pt-br/noticias/queremos-100-de-energia-limpa-afirma-lula>. Access on September 8, 2023.

¹⁶ BRAZIL. Nationally Determined Contribution to the Paris Agreement. Available <https://unfccc.int/sites/default/files/NDC/2022-06/Updated%20-%20First%20NDC%20-%20%20FINAL%20-%20PDF.pdf>. Access on September 8, 2023.

¹⁷ The ACM, for example, reviewed an agreement among competitors, including Shell and TotalEnergies, to create a high-capacity trunkline for storing CO₂ in empty gas fields. They sought ACM's informal guidance due to potential competition concerns. Shell and TotalEnergies planned to jointly provide CO₂ storage and pricing strategy for the initial 20% capacity, with no collective agreements for the remaining 80%. ACM assessed if the collaboration fell within competition rules, considering benefits for customers, society, and CO₂ reduction goals. ACM concluded that the collabora-

In this sense, authorities in the Netherlands,¹⁸ Austria,¹⁹ United Kingdom,²⁰ Greece,²¹ Singapore,²² and Japan²³ have issued their own guidelines or draft guidelines for public consultation. Other authorities, such as the Bundeskartellamt in Germany, are continuously studying and debating this matter.

Besides these enforcers, global organizations like the International Chamber of Commerce (“ICC”) and the Organization for Economic

tion was necessary for project success, outweighing competition concerns, particularly noting that competition restrictions would not apply to the remaining 80% capacity. ACM’s press release is available at: <https://www.acm.nl/en/publications/acm-shell-and-totalenergies-can-collaborate-storage-co2-empty-north-sea-gas-fields>. Access on August 24, 2023.

¹⁸ AUTHORITY FOR CONSUMERS & MARKETS (ACM). Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law. Available at: <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-opportunities-within-competition-law.pdf>. Access on August 24, 2023.

¹⁹ AUSTRIAN FEDERAL COMPETITION AUTHORITY (AFCA). Guidelines on the Application of Sec. 2 para.

1 Cartel Act to Sustainability Cooperations. Available at: https://www.bwb.gv.at/file-admin/user_upload/AFCA_Sustainability_Guidelines_English_final.pdf. Access on August 24, 2023.

²⁰ COMPETITION AND MARKETS AUTHORITY (CMA). Draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreement. Available at: https://assets.publishing.service.gov.uk/media/63fde435e90e0740de2669e7/Draft_Sustainability_Guidance_document_.pdf. Access on August 24, 2023.

²¹ HELLENIC COMPETITION COMMISSION. Technical Report on Sustainability and Competition. Available at: https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf. Access on August 24, 2023.

²² COMPETITION & CONSUMER COMMISSION OF SINGAPORE. Draft Guidance Note on Business Collaborations pursuing Environmental Sustainability Objectives. Available at: <https://www.ccs.gov.sg/media-and-consultation/newsroom/media-releases/sustainability-guidance-note-for-business-collaboration-public-consult-20-july-23>. Access on August 24, 2023.

²³ JAPAN FAIR TRADE COMMISSION. Draft Guidelines Concerning the Activities of Enterprises Toward the Realization of a Green Society under the Antimonopoly Act. Available at: <https://www.jftc.go.jp/en/pressreleases/yearly-2023/January/230118EN3.pdf>. Access on August 24, 2023.

Co-operation and Development (“OECD”) are actively engaged in discussions on this topic and are working on developing guidelines to support both businesses and regulatory bodies in navigating this debate.

Guidelines prepared by enforcers and global organizations regarding competition and sustainability indicate a consensus that collaborations between competitors aiming to combat climate change can be lawful and yield procompetitive results. These documents also reach similar conclusions on how to navigate the debate, which allow us to draw several takeaways.

Firstly, agreements between companies that are not direct competitors, such as with suppliers, customers, or providers of complementary products aimed at reducing environmental impact, are generally unlikely to raise competition concerns. Additionally, agreements among competitors that do not relate to competition parameters, like costs or prices, or have an insignificant impact on these factors, are also less likely to raise competition concerns.

The second conclusion to be drawn from documents produced by other authorities or international organizations is that competitors seeking to enter into sustainability agreements should be able to demonstrate that the collaboration is necessary to achieve sustainability benefits that would not be attainable individually or within a reasonable timeframe. This necessity can be confirmed by providing evidence of past failures, stagnant sales of sustainable products, or reluctance by customers to pay higher prices. In addition, parties should be able to demonstrate that the benefits of the cooperation agreement will be passed on to consumers, which decreases the likelihood of the agreement resulting in competition concerns.

The third key finding is that information exchange should be limited to what is essential to achieve sustainability goals, and cooperation should focus only on the specific products or processes relevant to sustainability gains. Additionally, the cooperation must be limited to what is necessary to achieve sustainability benefits, avoiding agreements on, for instance, how increased costs are passed on to customers.

The fourth conclusion is that maintaining competition in the market affected by the collaboration is crucial to reducing the likelihood of challenges from antitrust authorities.

The fifth key takeaway is that agreements among competitors to adhere to specific minimum sustainability standards can be structured to avoid concerns. This can be achieved by ensuring that the criteria are objective, transparent, and that all relevant parties have the opportunity to participate in the standard development process. Furthermore, competitors should have the flexibility to surpass these minimum standards if they choose to do so.

Finally, certain factors are commonly found to raise heightened concerns when it comes to sustainability agreements. These factors include: (i) the involvement of parties with a substantial market share, (ii) the feasibility of achieving the benefits individually, (iii) the potential for the agreement to significantly impact crucial competition parameters (e.g., costs, prices), (iv) the agreement's connection or interference with other competitive domains, and (v) a lack of compelling evidence demonstrating that consumers will derive benefits from the agreement. These findings are relevant to assist companies in designing agreements with competitors with sustainable objectives in mind. The more discussions and cases are analyzed by the authorities, the greater the reference to what may or may not raise concerns.

Guidelines and drafts prepared by other antitrust authorities and organizations that are genuinely studying and debating the issue are a fundamental tool to help CADE prepare its own guideline and set its own standards. Addressing climate change demands efforts from various angles, and both businesses and competition authorities have pivotal roles to play in this endeavor.

5, The need for CADE to take a stance

As it is evident from the aforementioned, in the current climate crisis, the importance of proactive guidance from antitrust authorities for

businesses seeking to enter into sustainability agreements cannot be overstated, given the significant risk that collaborations potentially beneficial for the environment may be discarded prematurely due to a fear, whether well-founded or not, of infringing competition law. At the same time, as companies face mounting demands to address environmental challenges, collaborations for sustainable initiatives have gained momentum. Within the Brazilian context, the issuance of clear guidelines on sustainability agreements by CADE could serve multiple purposes, including (i) mitigating legal uncertainty; (ii) preventing anticompetitive practices; (iii) fostering sustainable innovation; and (iv) aligning with initiatives of other global antitrust authorities.

By issuing clear guidelines, CADE would provide market participants with essential guidance on how common sustainability agreements can operate within the framework of the Brazilian competition law. These antitrust guidelines would offer much-needed legal certainty, enabling companies to make well-informed decisions before engaging in agreements related to environmental objectives. Given that many of the sustainability agreements that businesses seek to enter are well-known types of collaborations, and these collaborations share similar characteristics across different industries, it is feasible for CADE to provide guidance on which characteristics might infringe Brazilian competition law or not.

Common types of sustainability agreements include voluntary commitments to achieve sustainability targets, joint initiatives to establish eco-friendly logistics infrastructure, collaborative research and development efforts for greener products, collective monitoring of suppliers' compliance with environmental regulations, and cooperative endeavors to phase out non-sustainable products, among others.

In doing so, CADE would not only reduce legal uncertainty but also facilitate compliance, shedding light on business practices compatible with competition standards and averting anticompetitive behavior. Implementing measures to ensure these agreements do not harm fair competition can deter collusion while fostering transparency and accountability. For example, guidelines can provide insights into safeguards businesses can

adopt to ensure that potential information exchange does not lead to a violation of competition laws, or conditions that would render an industry standard compatible with competition law (e.g., only voluntary standards, or mandatory standards that meet certain thresholds, etc.).

Furthermore, the global concern for sustainability transcends borders, placing increasing pressure on multinational companies, which have a significant environmental footprint, to adopt sustainable practices. As mentioned above, some competition authorities around the world have already recognized this concern and issued guidelines for the development of a common framework to be considered by undertakings when entering into sustainability agreements with competitors. Indeed, it is of utmost importance to achieve a basic alignment between competition enforcers, ensuring that businesses operating in multiple jurisdictions can navigate and comply with antitrust rules while working towards global sustainability objectives that can have impacts beyond national borders.

In this context, CADE holds an advantage in potentially establishing a foundation of rules and parameters for analyzing sustainability agreements among competitors, given that the so-called associative agreements are already subject to mandatory merger filing in Brazil.²⁴ While these agreements may appear peculiar to the international antitrust community, legal professionals and enforcers of antitrust law in Brazil are well-versed in CADE's precedents that determine which agreements between competitors fall within the bounds of competition law. This existing legal framework could serve as the basis for crafting guidelines covering the main types of sustainability agreements and addressing key implementation questions in compliance with Brazilian competition law.

²⁴ Based on CADE's Resolution No. 17/2016, an associative agreement is an agreement that meets the following cumulative criteria: (i) the agreement has a period of at least two years; (ii) the agreement must create a common enterprise between the parties within the scope of the agreement; (iii) there must be sharing of risks and profits among the parties; and (iv) the parties must be competitors in the markets affected by the agreement.

In fact, CADE has a number of precedents related to collaborations for sustainability purposes, including cases involving reverse logistics,²⁵ as well as two recent decisions involving sustainability agreements. For instance, in 2022, CADE stood as the sole antitrust jurisdiction to block the global joint venture among Volkswagen, BMW, Mercedes-Benz, BASF, Henkel, SAP, Schaeffler, Siemens, T-Systems, and ZF (the Catena-X), an inclusive data ecosystem for the automotive industry. Although the Tribunal unilaterally defined remedies, the parties declined to adopt them, resulting in the transaction's blockage.²⁶ This case is noteworthy for the divergence between the Tribunal's stance and the opinion issued by CADE's investigatory unit, the General Superintendence, which had previously approved the transaction. It also highlights the differing perspectives between CADE and other jurisdictions on the same case. The provision of more specific guidance on which types of safeguards are crucial in collaborations of this nature could have potentially led to a different outcome, allowing the collaboration to move forward while also providing CADE with the assurance that no competition concern would result from the collaboration.

The second example concerns a case that CADE's Tribunal decided in June 2023, following a request for a second review. This case involved a joint venture between SustainIt, Cargill, Louis Dreyfus, and ADM, aimed at creating a platform to standardize sustainability measurements in the food and agricultural supply chain. CADE's decision emphasized the need for a robust antitrust protocol to prevent the flow of competitively sensitive information between the parties, which played a crucial

²⁵ Merger Cases No. 08700.009764/2015-70 (Parties: Alumbra Produtos Elétricos e Eletrônicos Ltda., LPS Distribuidora de Materiais Elétricos Ltda. and others); No. 08700.006989/2017-36 (Parties: Instituto Jogue Limpo and others) and No. 08700.012602/2015-19 (Parties: Associação Brasileira da Indústria Elétrica e Eletrônica and Sindicato da Indústria de Aparelhos Elétricos, Eletrônicos e Similares do Estado de São Paulo).

²⁶ Merger Case No. 08700.004293/2022-32. Reporting Commissioner Gustavo Augusto Freitas de Lima. CADE's Tribunal decision issued on December 14, 2022.

role in obtaining CADE's clearance.²⁷ While the case was ultimately unconditionally cleared, it is important to underscore that a request for a second review by CADE's Tribunal is always a concern for the parties involved in a transaction, as it can have a negative impact on the timeline of the merger review process. Once again, prior guidelines that parties could have readily observed might have averted the need for a second request, ultimately saving time and resources for both the parties involved and the authority itself.

These episodes underscore the challenge faced by both CADE and businesses in keeping pace with emerging market trends, especially as companies are increasingly expected to uphold environmental responsibility while promoting effective competition. The absence of specific policies from the antitrust watchdog to address this rapidly evolving discussion further complicates matters. This has led to delays in resolving cases that might have been handled with less complexity, much like other associative agreements previously analyzed by CADE.

Currently, CADE is not fully capitalizing on its legal synergies and expertise. By refraining from taking a more proactive stance, CADE misses the opportunity to actively contribute to the international legal framework on this issue, despite its rich know-how and experience.

In summary, Brazil is well-positioned to lead discussions on sustainability agreements among competitors, particularly considering CADE's extensive experience in analyzing associative agreements. These deliberations could lead to a synthesis that would be valuable for businesses and the antitrust community. This could be achieved through the formulation of guidelines that encapsulate CADE's position and strike a balance between collaboration among competitors and the principles of fair competition.

²⁷ Merger Case No. 08700.009905/2022-83. Reporting Commissioner Sérgio Costa Ravagnani. CADE's Tribunal decision issued on June 21, 2023.

6. Conclusion

In a world confronted by the urgent need for sustainable practices, collaborations among competitors have emerged as a powerful response to the complex challenges of climate change, resource conservation, and environmental protection. When recognizing that individual efforts are insufficient, businesses are joining forces to effect meaningful and lasting change. This collaborative approach not only pools resources and expertise but also addresses the "first mover disadvantages" that can deter individual companies from embracing sustainability.

While antitrust rules play a crucial role in preserving competitive markets, they should not inadvertently hinder these vital sustainability efforts. Providing clear guidance for sustainability agreements is paramount, assuring businesses that they can pursue environmentally responsible initiatives without fear of legal repercussions. Moreover, it aligns with global standards and advances Brazil's role in the international dialogue on sustainability.

Brazil, endowed with vast natural resources and unparalleled biodiversity, stands to gain immeasurably from proactive engagement in sustainability discussions. By taking a leading role, Brazil can preserve its unique environmental treasures while contributing significantly to global efforts against climate change.

For CADE the imperative is clear. Drawing on its extensive experience and legal mandate, CADE is well-positioned to offer guidance on sustainability agreements. This will not entail a departure from customary analysis but rather signifies an organic evolution of its role in upholding fair competition and safeguarding consumer welfare.

In conclusion, the issuance of clear guidelines by CADE would not only mitigate legal uncertainty but also foster compliance with competition standards while preventing anticompetitive practices. It represents a significant step towards a future where economic growth and environmental sustainability go hand in hand. In a world where every contribution to combat climate change matters, such guidance is not only timely but imperative.

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