

No leeway for sustainability agreements in Brazil

29. August 2023

On 21 June, Brazil's competition authority (*CADE*) issued an unprecedented decision relating to sustainability agreements when approving a joint venture (*JV*) between leading traders of agricultural commodities worldwide (Cargill, Louis Dreyfus, ADM). In the absence of specific guidelines pertaining to horizontal cooperations, CADE seized the moment presented by the transaction to establish more comprehensive guidance as to its view on sustainability agreements in the context of B2B sector-specific data management systems (see press release [here](#)).

The JV with seat in the Netherlands will create a global B2B data platform to track and standardize sustainability measurement in agricultural supply chains. The collaboration aims to facilitate data collection, organisation and management on sustainability performance of suppliers, such as water usage, deforestation, labour conditions etc.

Interestingly, the case bears certain resemblances to the Catena-X initiative, a joint venture in the automotive sector aimed at creating a data network with uniform standards for the automotive supply chain. Following the restrictions imposed by CADE to approve Catena-X last year (see press article [here](#)) - a decision remarkably strict as opposed to the position taken by all other competition authorities dealing with the case around the globe - , there was anticipation surrounding CADE's decision this time, particularly to if and how the sustainability rationale would be welcomed.

The decision

When assessing the context of the transaction, CADE acknowledged the ever-growing challenges faced by agribusiness stakeholders to gather sustainability-related information in the agriculture production chain. It particularly referred to extensive due diligence procedures now required by new legal frameworks such as the European Union Deforestation Regulation (EUDR) (see our briefing on the EUDR [here](#)).

Also, when addressing the scope of the agreement, the Rapporteur extensively referred to the sustainability chapter of the revised EU Horizontal Guidelines, particularly the section that refers to the creation of non-binding datasets with information on suppliers that have (un)sustainable value chains (see section 9.2 [here](#)).

Yet, in the competitive assessment, CADE raised concerns with greenwashing, that is: stakeholders misusing the sustainability agenda to engage in anticompetitive conducts.

Therefore, the sustainability goals were not enough for CADE to refrain from addressing the competition risks related to (i) market foreclosure by means of discriminatory treatment and (ii) exchange of competitively sensitive information.

Concerns on market foreclosure/discrimination were ultimately dismissed on the basis that the platform (i) does not aim to be a benchmark provider, as it will not act as an accreditation entity nor develop a sustainability label, (ii) is available to any participant in the supply chain, on commercially reasonable terms, and (iii) provides no commercial advantages to the applicants.

As to the risks related to the exchange of competitively sensitive information, CADE found the data security solutions and the comprehensive Antitrust Protocol (including the appointment of a Chief Compliance Officer) presented by the parties to be satisfactory. The Protocol assures that (i) users' access to sustainability data will be limited to that of their own supply chains, as well as (ii) the JV's own employees have limited access to competitively sensitive data.

Ultimately, while the JV was understood to fall within the concept of a sustainability agreement, CADE remained committed to the standard assessment of collaborations among competitors, with no apparent leeway given due to the sustainability goals.

Why was the position on Catena-X different?

The agribusiness JV presents similarities to the Catena-X initiative, which aimed at developing a standardised and interoperable data infrastructure across the automotive value chain, as well as intermediate the commercialization of applications developed by third parties. The collaboration intended to enhance the development of solutions in the automotive sector, including applications to achieve sustainability goals (e.g., determining the carbon footprint of specific automotive production stages).

CADE's Tribunal expressed discomfort with some aspects of the Catena-X cooperation, particularly with the extent of information exchange possibilities through – what CADE perceived as – a comprehensive data pooling mechanism (while, in fact, the cooperation was mostly designed for bilateral exchanges among non-competitors).

It is noteworthy that, during the screening, the companies involved expressly refuted CADE's view on the nature of the platform and demonstrated that the platform should instead be understood as a technical infrastructure which would enable users to exchange non-competitively sensitive data with each other (e.g., interruptions in the supply chain, such as defects/faults and their resolution, or calculation of CO₂). The involved parties stressed that data would be exchanged between suppliers and their customers – e.g., car manufacturer and its first-tier supplier – but not between competitors.

However, CADE maintained its position that Catena-X lacked a clearly defined scope, both for the data exchange and the specific data applications. To address such concern,

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CADE requested a more robust antitrust compliance system and, consequently, unilaterally set a number of behavioural remedies, which were considered impossible to implement by the parties involved. As pointed out, CADE's position was remarkably restrictive and stood alone among that of other enforcers worldwide (i.e. Chile, South Korea, Poland, Germany and Ukraine), who had no concerns against the platform and did not impose any remedies.

In contrast, CADE seemed more at ease with the agribusiness JV' narrower scope, which it considered to better delineate the extent and recipients of the envisaged data sharing. Also, CADE took the view that the agribusiness sustainability platform would exclusively facilitate personalized access to information solely between business partners, while precluding any form of exchange among competing entities (as mentioned above, the same was brought forward in Catena-X but CADE refused to see it). Lastly, CADE expressed clear appreciation with what it considered to be robust information security and antitrust compliance solutions proactively put forth by the applicants.

Key takeaways

Deviating from the approach followed by European counterparts, CADE's decision-making showcases a sceptical approach when it comes to approving sector-specific data management platforms driven by sustainability goals in the context of horizontal collaborations. The underlying message appears resolute: the inclusion of robust antitrust assurances, coupled with well-structured compliance and governance frameworks, transcend a mere display of goodwill by the applicants, but stand as an essential prerequisite for the clearance of such transactions.

Therefore, for the foreseeable future, it appears unlikely that sustainability goals will be enough to turn CADE away from its established approach to evaluating horizontal cooperation through the lens of a traditional consumer welfare framework. With a view to the confusion caused by CADE's decision on Catena X, however, the latest case at least gives some hope that CADE is keen not to let this be perceived as its "gold standard" but to return to some form of reason.

BLOMSTEIN and its competition team will continue to closely follow developments related to sustainability agreements worldwide. We are at your disposal at any time to answer questions. Please do not hesitate to contact [Anna Huttenlauch](#) or [Carolina Vidal](#).