



## Agribusiness

Sustainable agriculture

Law 13.986: Financing  
Brazilian agribusiness

Agribusiness in Brazil's  
highest courts

Government Relations:  
Congress and Agribusiness

Farm workers and time spent  
in transit

Rural producers and rural  
produce under the Bill to reform  
the Business Reorganization and  
Bankruptcy Law

A competition panorama:  
upcoming challenges in the  
agribusiness sector

Ethics in agribusiness:  
a valuable asset

STF 2020: impacts on  
taxation of agribusiness



## BMAReview® Special Edition

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## Contents



### 4 SUSTAINABLE AGRICULTURE



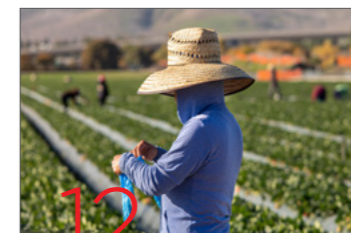
### 10 GOVERNMENT RELATIONS: CONGRESS AND AGRIBUSINESS



### 16 A COMPETITION PANORAMA: UPCOMING CHALLENGES IN THE AGRIBUSINESS SECTOR



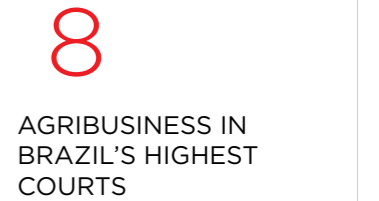
### 6 LAW 13.986: FINANCING BRAZILIAN AGRIBUSINESS



### 12 FARM WORKERS AND TIME SPENT IN TRANSIT



### 18 ETHICS IN AGRIBUSINESS: A VALUABLE ASSET



### 8 AGRIBUSINESS IN BRAZIL'S HIGHEST COURTS



### 14 RURAL PRODUCERS AND RURAL PRODUCE UNDER THE BILL TO REFORM THE BUSINESS REORGANIZATION AND BANKRUPTCY LAW



### 20 STF 2020: IMPACTS ON TAXATION OF AGRIBUSINESS

# Sustainable agriculture

► By **Márcio Pereira**

Consolidating a low carbon emissions economy in the agricultural sector aligns with the principles under the current Sector Plan for Climate Change Mitigation and Adaptation



The sustainability agenda in agribusiness draws on a number of approaches, which together give the sector greater competitiveness: the low carbon economy, biofuel, technology in agricultural production, animal welfare, biodiversity and genetic resources, and soil and water conservation and risk management, to name a few.

Consolidating a low carbon emissions economy in the agricultural sector aligns with the principles under the current Sector Plan for Climate Change Mitigation and Adaptation (Law 12.187/2009 and Decree 7390/2010), which establishes various vectors for action, such as recovery of degraded pastures, biological fixing

of nitrogen, and treatment of animal waste.

Low-carbon agrienergy is supported by the National Biofuels Policy or “RenovaBio”, as the policy is known (Law 13.576/2017). RenovaBio’s objective is to expand production of biofuels, through mechanisms such as a system of decarbonisation credits (CBIOs), with a view to making a significant contribution to reducing greenhouse gas emissions in Brazil. Established programs to support the production of ethanol and biodiesel, which are under the regulatory authority of the National Petroleum, Natural Gas and Biofuels Agency (ANP), have shown that these fuels are economically and ecologically viable, and demonstrate the potential of plant-based sources of energy like soybeans, castor beans, canola, peanuts, sunflower seeds and cottonseed.

On an equally promising front, the regulation of organic production (Law 10.831/2003 and Decree 6323/2007) has expanded market options. The legislation gives differentiated treatment to inputs intended for use in organic agriculture (“phytosanitary products approved for use in organic agriculture”), as provided for in article 170(VI) of the Federal Constitution. Since organic farming inputs are presumed to have low environmental impact and low toxicity, the legislation is designed to accelerate the registration process while still addressing concerns as to the safety, environmental impact, and agronomic effectiveness of such products.

The National Bioinputs Program (Decree 10.375/2020) is designed to meet society’s and producers’ growing demand for biologically-

based inputs in Brazil’s agricultural system, and for sustainable products. In addition, Integrated Agricultural Production, provided for under Ministry of Agriculture and Supply (MAPA) Instruction no. 27/2010, is present in the various agricultural production chains. Integrated Production focuses on employing good agricultural practices to ensure that productive processes result in quality plant and plant-based products containing levels of agricultural chemicals and contaminants that meet health and safety standards. It also favors the use of natural resources and substitution of polluting inputs, and ensures that agricultural produce can be tracked in the primary stage of the production chain.

Animal welfare has also been the subject of regulations focusing on development of practices and techniques, as can be seen from the Recommendations on Good Practices for the Welfare of Production Animals and Livestock, which covers production and transportation systems (MAPA Instruction 56/2008), and Stunning Methods for Humane Slaughter of Livestock (MAPA Instrucion 03/2000).

As for use of land and preservation of the environment, the new Forest Code (Law 12.651/2012) is one of the instruments that is intended to balance rural production with

protection of the environment, as provided for in articles 186 and 225 of the Federal Constitution. Some provisions of the Code, which impose certain conditions on the use of rural land, were challenged before Brazil’s constitutional court, the Supreme Federal Court (Constitutional Challenges ADI 4901, 4902, and 4903), but were dismissed in part. Related to the protection of forests, especially along the margins of bodies of water, the establishment of hydrographic microbasins (Law 9433/1997) for planning, monitoring and evaluating the use of natural resources is another important legal instrument for soil and water conservation projects.

Lastly, the management of risks associated with rural production is addressed in the National Program for Agricultural Zoning of Climate Risks (ZARC – Decree 9841/2019), another significant initiative directed to improving the quality and availability of data and information on climate risks for agriculture in Brazil. To date, MAPA’s Zoning studies have covered all Brazil’s states and more than 40 types of annual and perennial crops, and some agents in the finance market are now considering climate risks identified by ZARC when granting financing. This initiative will certainly be taken up by the capital markets in other types of financing transactions, such as green bonds. ◀



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# Law 13.986: Financing Brazilian agribusiness

► By **Cristiana Moreira**

Law 13.986 – the Agribusiness Law – originated in Provisional Measure 897, which was drafted by the Ministry of the Economy and submitted to Congress in October 2019

Published on April 7, 2020, Law 13.986 introduces new legal instruments to expand private financing for Brazil's agricultural sector. The Law originated in Provisional Measure 897, which was drafted by the Ministry of the Economy and submitted to Congress in October 2019.

The Law makes various changes, both in the market for securities used specifically in the agricultural sector and in the capital markets in general, but the main innovations under the Law are (a) the possibility of granting security interests in rural properties to foreign creditors, (b) the concept of segregated rural assets, and (c) the creation of Rural Land Notes.

## Security interests in rural properties and transfer of ownership and other forms of settlement of debts owed to foreign creditors:

Law 13.986/2020 makes an important change to Law 5709/1971, which imposes restrictions on sales and leases of rural properties to foreign individuals and entities, including Brazilian companies under foreign control, according to the prevailing interpretation of the legislation.

Law 13.986 amends §2 of article 1 of Law 5709 to make it clear that the restrictions do not apply:

i. to grants of security interests, including defeasible transfers of ownership to national or foreign legal entities, or

ii. in cases where property is received

in payment of transactions with national or foreign entities (or national entities controlled by foreign individuals or entities), through realization of security interests, giving in payment, or otherwise.

**Segregated rural assets:** Law 13.986 adapts a concept used in real estate development projects to allow rural assets – specifically land and all improvements to land (excluding crops, goods and equipment, and livestock) – to be segregated from the rest of a rural producer's assets so that they can serve as security for financing through Rural Property Notes (CIRs – *Cédula Imobiliária Rural*) or Rural Produce Notes (CPRs – *Cédula de Produto Rural*).

The rural assets are segregated at the owner's initiative, by registration of the segregation in against title to the affected parcel of land. Article 12 of the Law sets out the documents that must accompany the application for registration.

Once the assets are segregated, rights and obligations related to the assets remain entirely separate from the owner's other rights and obligations, and from any other assets the owner may segregate to serve as security for other financing.

Furthermore, no security interests may be granted in the segregated assets except by issuing CIRs or CPRs.

Law 13.986 also provides that while segregated,

the owner may not sell, gift, subdivide or in any other way confer an ownership interest in the assets; likewise, the owner may not use the assets as security for any obligation other than the CIRs or CPRs to which they are linked.

The Law adds that segregated assets cannot be pledged or attached in legal proceedings, and are not affected by a decree of bankruptcy, judicial reorganization or civil insolvency of the segregated assets' owner. Segregated assets will not form part of the bankrupt estate except with respect to the owner's employment, tax, and social security obligations.

**Rural Property Notes (CIRs):** Law 13.986 creates a new security that can be freely traded, representing a promise to pay in money, arising out of a financing transaction of any kind, together with the obligation to deliver the rural property (or the part of it that has been segregated) that serves as security for the financing in the event of default. If the CIR is not settled when it falls due, the creditor can immediately enforce the security interest and cause the segregated asset to be registered in the creditor's name in the relevant immovable property registry, in the same way

The rural assets are segregated at the owner's initiative, by registration of the segregation in against title to the affected parcel of land. Article 12 of the Law sets out the documents that must accompany the application for registration.

as other security interests based on defeasible transfer of ownership (articles 26 and 27, Law 9514/1997), and proceed to sell the segregated assets to pay the secured debt. If any amount of the secured debt remains outstanding after the segregated assets have been sold at public auction, the creditor will have an unsecured claim for the outstanding amount.

Legislative initiatives such as the Agribusiness Law are designed to give an additional boost to the Brazilian agricultural sector by expanding access to credit and providing greater legal certainty in agribusiness financing transactions. ◀



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# Agribusiness in Brazil's highest courts

► By **André Macedo** and **Raquel Mansanaro**

A strategic, structured approach can contribute to the formation of precedents in Brazil's highest courts

Recent years have seen significant changes in procedural law and legal proceedings in Brazil. The 2015 Code of Civil Procedure, which came into force in 2016, created mechanisms that allow Brazil's highest courts to issue decisions that will be binding on lower courts. The "repetitive appeal" mechanism, for example, is designed to streamline decision-making when the same issue is litigated in numerous cases. When such "repetitive appeals" occur, the Superior Court of Justice (STJ - *Superior Tribunal de Justiça*) can designate one appeal to be a representative case, and all cases (both at first instance and on appeal) that raise the same issue will be stayed until the STJ issues its decision in the representative case. Once issued, the STJ's decision will be binding in all the cases before the lower courts. The "general repercussion" mechanism in Brazil's highest court, the Supreme Federal Court (STF - *Supremo Tribunal Federal*), is somewhat similar. If the STF finds that a case raises issues that are of national importance and scope, it can designate it a case of "general repercussion". Decisions in general repercussion cases are binding not only on all lower courts, but also on the federal administrative authorities. In both repetitive appeal and general repercussion cases, the STJ and the STF have adopted the practice of establishing a "thesis", or brief statement of their interpretation of law on the issue in dispute.

A strategic, structured approach can contribute to the formation of important precedents in cases before Brazil's highest courts, including constitutional challenges before the STF. Even when they are not directly involved in the dispute, parties interested in the issues at stake

have the opportunity to put forward their views and inform the court by participating in public hearings and acting as *amicus curiae*.

With the growth in Brazil's agricultural sector, despite a difficult economic scenario, and the recent adoption of the Agribusiness Law (Law 13.986/2020), this is an opportune time for companies in the agricultural industry to work toward consolidating the courts' position on issues that will bring greater legal certainty to the sector, especially when the STF and STJ establish legal theses that are binding on the state and federal courts.

As an example of the courts' work, recently the 4th Panel of the STJ (which has the constitutional role of ensuring uniformity in the interpretation of federal and state legislation) decided appeal REsp 1.800.032/MT (the Pupin case), which dealt with the legal nature of registration of rural producers in the Register of Mercantile Businesses (*Registro de Empresas Mercantis*). The question was whether registration was declaratory or constitutive - in other words, whether registration merely records a pre-existing state of fact, or whether it actually transforms a rural producer into a commercial business for the purposes of the law. The issue was important because the rural producer in the case had applied for judicial reorganization, and wanted the protections against enforcement and reorganization plan to cover pre-registration liabilities.

In a majority decision, the STJ held that registration was declaratory in nature, and that consequently, "no distinction can be made in the legal regime applicable to obligations

arising prior to and after registration of rural business proprietors when they apply for judicial reorganization, and unpaid obligations and debts contracted prior [to registration] also fall within the reorganization proceeding."

Another situation that merits attention is appeal REsp 1.834.932/MT (the Viana Group), in which the STJ will decide whether a rural business proprietor (i.e. a rural producer who is a natural person rather than a legal entity) who has been in business for more than two years can apply for judicial reorganization, even if the business has been registered in the Register of Commercial Business for less than two years. The STJ's decision will establish an important precedent that is likely to be followed by lower courts in Brazil.

The Supreme Federal Court's principal role is as interpreter of the country's constitution, and it is expected to issue some significant judgments before the end of the year.

One case is of particular interest to employers in the agricultural sector. Appeal ARE 1121633/GO (Thesis 1046) deals with the validity of a provision in a collective bargaining agreement that limits or restricts an employment right that is not guaranteed in the Constitution. The collective bargaining agreement at issue in the case provides that the employer will provide transportation to workers, and that time spent in transit to work will not count as time worked.

Both the 18<sup>th</sup> Region Labor Appeals Court (Goiás) and the Superior Labor Appeals Court found that the place of work was not easily accessible and that the timetable for public transportation to the location was incompatible with working hours. They therefore held that the employees were entitled to be paid for their time in transit, despite the provisions of

the collective bargaining agreement.

When the case reached the STF, Justice Gilmar Mendes issued an order staying all proceedings in lower courts that deal with the same issue. In his view, "there is a well-founded fear that workers will once again find themselves in circumstances of legal uncertainty, through the weakening of collective bargaining." He also allowed the National Confederation of Industries to join the appeal as *amicus curiae*. A more detailed analysis of the legal questions at issue in this case can be found at p. 12 of this special edition of the BMA Review.

Interesting issues raised in other cases before the STF include renewed debate over the requirements for demarcation of indigenous lands (Appeal RE 1017365/DF - Thesis 1031, Justice Edson Fachin reporting), and the territorial scope of decisions issued in collective actions brought by the Public Prosecution Service (Appeal RE 1101937/SP - Thesis 1075, Justice Alexandre de Moraes). In the latter case, both the 3rd Region Federal Appeals Court and the STJ came to the conclusion that there was a national interest in the rights at issue, and that accordingly the effects of the decision should not have merely regional effect. The STF will now have to decide whether article 16 of Law 7347/1985 (which provides that decisions in such actions are binding within the territorial jurisdiction of the court that issued the decision) is consistent with the Federal Constitution.

The decisions in these cases will have a direct impact on agribusiness, because they deal with legal provisions that affect, either directly or indirectly, activities in the agricultural sector. Agribusinesses should therefore adopt a strategic attitude, and take advantage of opportunities to ensure that Brazil's highest courts are aware of sector interests and concerns. ◀



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# Government Relations: Congress and Agribusiness

► By **Giovani Trindade Castanheira Fagg Menicucci**

With a view to boosting production and international trade in Brazil's agricultural sector, senators and representatives have made a number of legislative proposals that put agriculture on Congress's agenda.



Agribusiness has always played a major role in Brazil's economy, but with the arrival of the pandemic, it became an economic star: agriculture was the only sector that actually grew in 2020. According to a survey by the IPEA, Brazil's Applied Economics Research Institute, "growth in agriculture's

contribution to the GNP dropped from 2% to 1.6% in 2020, but the sector continues to be the only one that is expected to close the year showing some growth."<sup>1</sup> The IPEA reports that this growth has driven Brazil's international trade, led by sales in pork, sugar, soybeans, and beef.<sup>2</sup>

With a view to boosting production and international trade in Brazil's agricultural sector, senators and representatives have made a number of legislative proposals that put agriculture on Congress's agenda. Among the more recent proposals is a bill submitted in the House of Representatives that would create

**Construction of a national agenda for the agricultural sector will necessarily involve frank and transparent dialogue with the legislative branch of government.**

an Environmental, Social and Governance Compliance Evaluation and Certification System - SISASG. Under the system proposed by Bill PL 4478/2020, a seal of compliance would be granted to producers that respect environmental, social and governance legislation and regulations, according to rules to be issued by the federal administration. The bill's sponsor, Representative Christino Aureo (PP-RJ), explains that certification of agricultural products is the "result of demands by consumers who are looking for quality, fair prices, and guarantees of environmental sustainability."<sup>3</sup>

There are also proposals to mitigate the impacts of the covid-19 pandemic on agribusiness. For example, the Senate has approved Bill PL 1543/2020, which would provide financial relief to family farmers and farm businesses that suffered losses in the sales or distribution of their produce because of social distancing measures, by authorizing financial institutions to postpone, for 12 months, overdue payments and payments falling due in the period from January 1 to December 31, 2020 under loans granted to cover agricultural costs, marketing or investments. The bill must still be reviewed and voted on by the House of Representatives.

Both houses of Congress have shown themselves to be sensitive to the problems faced in the agricultural sector, and have made time to consider various issues, such as legislation on environmental matters, easier access to credit, and incentives for exports, taking advantage of growing demand for food around the world, and promoting the implementation of infrastructure and logistics systems to ensure that produce gets to markets. Increasingly, it is clear that construction of a national agenda for the agricultural sector will necessarily involve frank and transparent dialogue with the legislative branch of government.<sup>4</sup> ◀



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<sup>1</sup> Source: IPEA - Carta de Conjuntura no. 48 - 3rd Quarter 2020.

<sup>2</sup> <https://www.ipea.gov.br/cartadeconjuntura/index.php/category/agropecuaria/>.

<sup>3</sup> Source: Agência Câmara de Notícias. Our translation.

<sup>4</sup> <https://www.jota.info/opiniao-e-analise/colunas-irelgo/o-papel-das-relacoes-governamentais-na-qualificacao-do-debate-publico-08072020>.

# Farm workers and time spent in transit

► By **Cibelle Linero**

In the rural context, the changes made by Employment Law Reform have raised some questions, especially concerning pay for time spent in transit

For employment law purposes, time spent in transit or time *in itinere* is the time workers spend getting to their workplace. As a rule, time spent in transit is not considered to be time during which employees are at the employer's disposal, and so it is left up to employees to weigh the difficulties of getting to and from work when they accept an offer of employment.

Little by little, however, the Labor Courts had taken the position that when the workplace was difficult to reach, or was not served by public transportation, time spent by employees in transportation provided by the employer counted as time worked.

The various details dealt with by the precedents were summarized in Restatements of Precedents 90 and 320 issued by the Superior Labor Appeals Court (TST - *Tribunal Superior de Trabalho*), which provide that incompatibility between the times at which the working day begins and ends and the public transportation schedule is sufficient to entitle workers to pay for time in transit; the same holds true when the employer charges workers for part or all of the cost of employer-supplied transportation; and if public transportation is available part of the way, then employees are entitled to pay only for the portion not covered by public transportation.

In the past, article 58§2 of the Consolidation of Labor Laws (CLT - *Consolidação das Leis de Trabalho*) provided for payment of time spent in transit along the same lines as the precedents, but it was amended in 2017, in the Employment Law Reform. The CLT now provides that time spent by employees in getting from their homes to their work stations (and getting back), whether by foot or other means of transportation (even if provided by the employer), is no longer included in calculating time worked by employees.

In the rural context, the changes introduced by the Employment Reform have raised some questions: Is it possible to stop



paying time in transit to employees who were receiving it when the Reform came into effect? What risks are associated with cancelling payment for time in transit? Can employers pay time in transit to some employees and not to others?

In point of fact, even before the courts could start defining a new position on these and other questions, labor unions began to deal with the issue, either through collective agreements with individual employers, providing that employees will be paid a fixed amount for time spent in transit, or through collective conventions with employer associations that set out rules very similar to those in effect prior to the Reform. Some employers therefore continue to pay their employee for time spent in transit by virtue of collective bargaining instruments.

In the absence of a collective bargaining instrument governing pay for time in transit, a cautious approach is advisable. A number of recent decisions have held that, given the rural context and the peculiarities of farm work, the amendments made to article 58 of the CLT do not apply, and consequently that when employers provide transportation to the place of work, time spent in transit counts as time worked, within the meaning of TST Restatement of Precedents 90, and article 4 of the CLT, which deals with time spent at the employer's disposal. ◀

labor unions began to deal with the issue, either through collective agreements with individual employers, providing that employees will be paid a fixed amount for time spent in transit, or through collective conventions with employer associations that set out rules very similar to those in effect prior to the Reform



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# Rural producers and rural produce under the Bill to reform the Business Reorganization and Bankruptcy Law

► By **Eduardo Guimarães Wanderley**, **Natalia Yazbek**, **Thiago Motta** and **Julia Nogueira dos Santos**

The Bill aims to overcome uncertainty over judicial reorganization of rural producers, and establishes rules giving greater protection to credit institutions in the agribusiness sector



Bill PL 4458, which was approved by the House of Representatives, the Senate on November 25, 2020, and now awaits presidential sanction. Among other things, the bill proposes changes to the Brazilian Bankruptcy Law, including the judicial reorganization of rural producers and to certain

agribusiness credit transactions.

Judicial reorganization of rural producers has long been a source of debate among legal professionals. In recent years, the main dispute is over the question of whether rural producers that are not registered as businesses in a Commercial Registry can apply for judicial

reorganization. The question arises because (1) as it now stands, the legislation governing reorganization of distressed businesses provides that, among other requirements, only business proprietors or business companies that have lawfully done business for two years or more may apply for judicial reorganization, and (2) the Civil Code provides that rural producers may be treated as business proprietors, if they are registered in the Public Register of Mercantile Businesses.

The controversy arises with respect to rural producers that have been in business for two years or more, but do not meet the registration requirement. On one side of the debate are those that argue that in such circumstances the rural producer is not entitled to the benefits of judicial reorganization; on the other are those who contend that registration is not a legal requirement for rural producers to do business, and therefore it is sufficient for the rural producer to have been in business for two years or more before applying for judicial reorganization.

Over the last few years, the Superior Court of Justice (STJ – *Superior Tribunal de Justiça*) has adopted a position aligned with the second school of thought.

Bill PL 4458 ratifies the STJ's position by expressly providing that rural producers that have done business for at least two years have standing to apply for judicial reorganization, regardless of whether they are registered.

Proof that rural producers have been in

business for two years is made by means of (1) tax accounting records, in the case of legal entities, and (2) in the case of natural persons, presentation of the rural producer's digital business accounting records, income tax returns, and balance sheet.

The bill makes it clear that the effects of judicial reorganization of rural producers extend only to debts arising out of farming activities, as shown in the rural producer's accounting records.

The bill also excludes from the effects of judicial reorganization (of both rural producers and business companies involved in agribusiness) the rural credit transactions provided for in articles 14 and 21 of Law 4825/65 (the Rural Credit Law), if they were renegotiated prior to the application for reorganization; debt contracted in the three years prior to the reorganization to acquire rural land, and security given for the debt; and debt and securities related to rural produce notes (CPRs) to be settled by physical delivery of the commodity, if all or part of the price of the commodity has been paid in advance, or the CPRs represents an exchange of inputs.

In summary, the Bill attempts to find a balance: on one hand, it seeks to resolve the legal uncertainty around the question of whether unregistered rural producers are entitled to the benefits of judicial reorganization, while on the other it provides greater protection to credit institutions in the agribusiness sector by excluding them from the effects of the reorganization. ◀



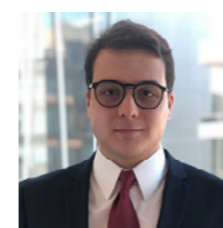
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# A competition panorama: upcoming challenges in the agribusiness sector

By **José Inacio F. de Almeida Prado Filho**

CADE's Department of Economic Studies stresses the importance of these markets for the Brazilian economy, and points to features that attract the antitrust authority's attention

In February 2020, the Department of Economic Studies (DEE - *Departamento de Estudos Econômicos*) of Brazil's antitrust authority, CADE (*Conselho Administrativo de Defesa Econômica*) issued a new installment in its *Cadernos do CADE* (CADE Journals) series: "The Agricultural Inputs Market" (*Mercado de Insumos Agrícolas*). The document presents an extensive and highly detailed analysis of CADE's experience in reviewing the markets for seed, agricultural pesticides, and agricultural machinery and equipment. It stresses the importance of these markets for the Brazilian economy, and points to features that require CADE's constant attention: the high number of mergers and acquisitions; the complexity of the markets; and the direction of the markets' technological evolution.

One of the most important conclusions in the DEE's work shines light on how the technologies in these markets complement one another. Originating in improvements in legal protections for innovations (especially biotechnological innovations), these complementary technologies have links to biotechnology, seed and agricultural pesticides, and their development is parallel and sometimes interlinked. Aside from traditional concerns over horizontal concentration and vertical integration

in any one of these markets, recent practice (confirmed by the DEE's report) reveals that CADE's attention is also directed to the portfolio effects arising out of the complementary nature and conglomeration of players' activities in the sector, and especially their ability to amplify and reinforce the effects of horizontal concentrations and vertical integrations taken individually. CADE's recent more detailed analyses, and the remedies adopted in some cases, clearly show the authority's concern with spillovers of the portfolio effects, particularly their ability to increase barriers to entry (by potentially requiring an integrated, simultaneous entry in various markets), and to reduce the capacity of equally efficient competitors to offer integrated solutions or competitive packages, with a potential leveraging of economic power from one market into another.

The process of technological innovation is continuing, and the DEE notes that new complementary innovations are likely, involving digital technologies and precision agriculture, which have the potential to bring together fertilizers and agricultural machinery to create even broader integrated solutions, making the borders between these markets even more porous. The application of digital platforms to agriculture has the potential to be the core of new



business models based on integrated packages that can bring together even more solutions in these various complementary markets. Concerns over acquisitions of innovative startups in the agricultural sector (agtechs) are likely to make them the first front on which CADE will focus its attention. The second is likely to be a continuing assessment of portfolio effects and the effects of conglomeration, and especially the ways in which they can amplify competition effects in

each market, considered individually.

The DEE also points to a trend to closer international cooperation among competition authorities. Closer cooperation serves both to improve analysis of harmonized remedies, when they are necessary (without losing sight of the fact that global remedies may supplant local remedies), and to deal with specific antitrust issues in certain jurisdictions. ◀



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# Ethics in agribusiness: a valuable asset

► By **Anna Carolina Malta Spilborghs** and **Camila Cuschnir**

In recent years, many agribusiness companies have found that high levels of compliance and transparency generate more solid and long-lasting relationships with their stakeholders.

With the adoption of the Anticorruption Law (Law 12.846/2013), which made legal entities (and not just individuals) punishable for corrupt acts, the English word compliance became common in Brazilian business and legal circles to refer to systems for preventing, monitoring and responding to the risks associated with violation of the Law. [LRO: sugestão de adaptação]

In recent years, many agribusiness companies have found that high levels of compliance and transparency generate more solid and long-lasting relationships with their stakeholders – farmers, farm businesses, cooperatives, customers, investors and collaborators.

As a result, implementation of compliance programs has multiplied, and compliance departments have taken on an increasingly strategic role within companies, actively participating in decision-making processes.

Compliance programs should not be seen as a mechanism that hampers a company's processes. To be effective, the program has to be structured according to the risks and realities of the particular business. There is no "one size fits all" compliance program, and all programs should be tailored to the particularities of their industry and reviewed frequently to take into account any new risks that may have appeared.

Compliance programs help to detect and prevent fraud, improve internal controls, and

establish a culture of integrity in the corporate environment. Doing business without a compliance program leaves a company's assets and reputation exposed.

Where violations of the law generate doubts about a company's business model, its commitment to complying with the law inspires confidence in investors, business partners, clients and consumers who value organizations that operate in an ethical manner. The economic impact of reputational damage – especially when the impact is magnified by media coverage – is not only financial losses but also lost business opportunities. In contrast, well-structured compliance programs make companies more attractive, both to business partners and to employees.

The "Selo Pró-Ética" (Pro Ethics Seal) certification by Brazil's federal Comptroller-General's Office, along with the ISO 37001 and ISO 19600 certifications, are initiatives that encourage companies from all economic sectors to develop a culture of compliance. In December 2019, the Ministry of Agriculture and Supply (MAPA – Ministério de Agricultura, Pecuária e Abastecimento) launched its "Selo Mais Integridade" (Integrity Plus Seal) with a view to promoting, recognizing and rewarding agribusiness companies and cooperatives that adopt compliance practices that support social responsibility, sustainability, ethics, transparency and risk management.



Another recent initiative by MAPA directed to the agricultural sector is the "Cadastro Agroíntegro" (Ag Integrity Register), which is designed to recognize effective first steps by agricultural companies and businesses in implementing compliance, ethics and transparency practices, even though they are still at the initial stages.

A good compliance program does more than reduce the risk of penalties and reputational damage: it gives companies greater credibility with their business partners, and can be one of their most valuable assets. ◀

**The economic impact of reputational damage – especially when the impact is magnified by media coverage – is not only financial losses but also lost business opportunities.**



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# STF 2020: impacts on taxation of agribusiness

► By **Lígia Regini** and **Leandro Cara Artioli**

Some of the decisions by Brazil's highest court have been favorable and even open up the possibility of tax refunds for businesses in the agricultural sector



The year 2020 revolutionized society across the globe. In Brazil, the state of public emergency was reflected in the unprecedented rate at which Brazil's constitutional court, the Supreme Federal Court (STF - *Supremo Tribunal Federal*) decided tax cases that had enormous impact on commerce and industry, especially in the agricultural sector.

One thing is certain: the sector is already feeling the impacts, but not all is lost. Some of the decisions rendered in 2020 are favorable and even, on a macro analysis, open up the possibility of tax refunds.

One of the big cases decided by the STF involved the question of whether social contributions attached to indirect exports. Exporters' long fight ended in success, with the STF's finding that the exemption from "social contributions" (taxes and quasi-taxes levied specifically to fund social security and other social welfare programs) applicable to exports also applies

to sales made specifically for subsequent export (i.e. sales to exporters) (Constitutional Challenge ADI 4735 and Appeal RE 759244).

This well-founded decision generates positive impacts: the first is prospective, by reducing the tax burden on future indirect exports, and the other is retrospective, because taxpayers will be entitled to claim refunds of social contributions that they have overpaid for years, which will help attenuate the financial losses caused by the covid-19 pandemic.

On another front, the STF dealt with the famous dispute over compensation for the fixing of prices by the now defunct Sugar and Alcohol Institute (IAA - Instituto do Açúcar e do Alcool), a federal government entity. The court held that the right to compensation depends on proof of actual loss in each case (Appeal RE 884.325). This conclusion threatens the claims of the companies that are still pursuing their cases against the government, given the

enormous difficulty of obtaining evidence from a time long in the past.

At the state level, the STF adopted three "Theses" (teses, or concise statements of its interpretation of the question of law at issue in the case) dealing with the most important state tax, the ICMS (*Imposto sobre a Circulação de Mercadorias e Serviços*, a value-added tax), which has given rise to "Tax Wars" between states granting rival benefits and incentives to boost investment, jobs, and local revenues.

This year, the STF decided that (i) the national body that governs ICMS policy, CONFAZ (*Conselho Nacional de Política Fazendária* - National Tax Policy Council) must unanimously approve any arrangement that permits one or more states to grant tax benefits (Constitutional Challenge ADPF 198). The decision displeased a number of states, since it allows states to block benefits by other states in a discretionary fashion, by withholding their vote on CONFAZ; and (ii) it is constitutional for the state of destination to disallow ICMS credits recorded by the acquirer of merchandise when the state of origin of the merchandise has granted unsanctioned tax benefits (Appeal RE 628.075), reversing the STF's earlier position on the question.

The STF also held that ICMS credits can be recorded on the acquisition of goods for use and consumption only when the credits are expressly provided for in a Complementary Law (which requires a higher majority than ordinary legislation) (Appeal RE 601.967). At the time this article was submitted, one of the STF's justices had issued an opinion - favorable to the taxpayer - on the question of whether ICMS taxpayers could be charged the difference in

ICMS rates in interstate transactions, based on the lack of Complementary Legislation (Appeal RE 1.287.019).

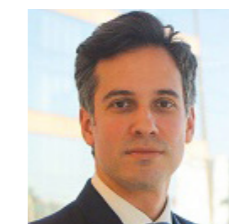
Many other issues are up for decision on the quick-moving agenda of Brazil's highest court. Among them are matters that will have a sizeable impact on agribusiness: the exemption from state and federal value-added taxes (ICMS and IPI) for agricultural pesticides, and the exclusion of ICMS in calculating employers' contributions to the social security fund for rural workers - Funrural.

In the midst of the turbulent scenario created by the pandemic and the STF's accelerated decision-making, the legislative and executive branches are talking about a tax reform that will allow Brazil to overcome the multiple problems caused by a complex system at all three levels of government - federal, state, and municipal. As a major player in the Brazilian economy, agribusiness can make an essential contribution to the tax treatment of production chains in the sector and the essential nature foodstuffs, in line with the common ideals of a simpler, less bureaucratic system, free of aberrations (such as calculating taxes on taxes), with a view to achieving a reliable degree of certainty as to the limits of taxation in this country. ◀

The state of public emergency was reflected in the unprecedented rate at which Brazil's constitutional court decided tax cases that had significant impacts in the agricultural sector



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