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I. INTRODUCTION

Resale price maintenance ("RPM") is one of the current hot topics in the antitrust community, not only in the Europe and China, but also in Brazil. Brazil's antitrust authority ("CADE")[2] issued an unprecedented decision in February 2013—departing from previous case law—when, by majority, CADE's Commissioners took the view that RPM shall be deemed to be illegal unless the defendant is able to prove efficiencies. While fixed-price RPM and minimum-price RPM agreements are considered to be hardcore restrictions by agencies like the European Commission, until February 2013 CADE had taken the view that such practices were not presumed to be illegal, reviewing them under the "rule of reason".

This article provides an overview of what is the law and practice regarding abuse of dominance cases in Brazil and specifically discusses whether the current approach to RPMs is expected to be followed by CADE in the future.

II. FRAMEWORK FOR ABUSE OF DOMINANCE IN BRAZIL

The basic framework for abuse of dominance in Brazil is set by Article 36 of Law No. 12,529/11. Article 36 deals with all types of anticompetitive conduct other than mergers. The law prohibits acts "that have as [their] object or effect" (1) limitation, restraint or, in any way, harm to open competition or free enterprise; (2) control over a relevant market of a certain good or service; (3) an increase in profits on a discretionary basis; or (4) engagement in market abuse. Article 36 specifically excludes from potential violations, however, the achievement of market

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[2] CADE's structure includes (i) a Tribunal composed of six Commissioners and a President; (ii) a Directorate-General for Competition ("DG"); and (iii) an Economics Department. The DG is the chief investigative body in matters related to anticompetitive practices. CADE's Tribunal is responsible for adjudicating the cases investigated by the DG—all decisions are subject to judicial review.

control by means of "competitive efficiency." Under Article 2 of the law, practices that take place outside the territory of Brazil are subject to CADE's jurisdiction, provided they produce actual or potential effects in Brazil.

Furthermore, the law provides that a dominant position is presumed when "a company or group of companies" controls 20 percent of a relevant market. Article 36 further provides that CADE may change the 20 percent threshold "for specific sectors of the economy," but the agency has not formally done so to date. The 20 percent threshold is relatively low compared with the practice of other jurisdictions, especially the United States and the European Union. CADE has traditionally interpreted the expression "group of companies" to encompass companies belonging to different economic groups that could jointly abuse power in a given market, even if no single member of the group holds market power on its own.

Article 36, Section 3o, contains a lengthy, but not exclusive, list of acts that may be considered antitrust violations provided they have as their object or effect the above-mentioned acts. The listed practices include various types of horizontal and vertical agreements and unilateral abuses of market power. Enumerated vertical practices (they could be abusive if imposed unilaterally) include RPM and other restrictions affecting sales to third parties, price discrimination, and tying. Listed unilateral practices encompass both exploitative and exclusionary practices, including refusals to deal and limitations on access to inputs or distribution channels, and predatory pricing.

The new CADE has yet to issue secondary legislation setting formal criteria for the analysis of alleged anticompetitive conduct, and the agency has been relying on regulations issued under the previous law, primarily CADE's Resolution No. 20/1999. Annex II of CADE's Resolution No. 20/99 generally provides for the review of unilateral conduct under the rule of reason, as they might have pro-competitive effects. In theory, the authorities should consider efficiencies alleged by the parties and balance them against the potential harm to consumers. In practice, however, there has been no case in which the authorities concluded that a harmful conduct was legal in view of the efficiencies derived from the conduct.

In Brazil, the Anglo-American common law concept of binding judicial precedent (i.e., *stare decisis*) is virtually non-existent, which means that CADE's Commissioners are under no obligation to follow past decisions in future cases. Under CADE's internal regulations, legal certainty is achieved only if CADE rules in the same way at least 10 times, after which the ruling is codified via the issuance of a binding statement. To date, CADE has issued nine binding statements, all related to merger review but one.[3]

III. CADE'S CASE LAW ON RPM AND MSRP

Over the last years, CADE has reviewed a variety of cases involving vertical practices, especially concerning manufacturer's suggested retail price ("MSRP"), also known as recommended resale price ("RRP"). According to CADE's traditional view, a supplier may recommend that resellers charge a given price for goods and/or services. However, for such

[3] Binding Statement No. 7, which provides that it is an antitrust infringement for a physicians' cooperative holding a dominant position to prevent its affiliated physicians from being affiliated with other physicians' cooperatives and health plans.

practice to be legal, a supplier may not stop supplying goods or put pressure on resellers charging or advertising below or above that price; also, recommended price lists shall be available to the final consumer.

CADE also has taken into account whether the structure of the affected market creates incentives for all the resellers to follow the suggested prices (conditions of entry, and other factors that may affect rivalry, e.g., scope of competition among resellers).[4] This is more subjective and prevents parties from having absolute legal certainty as to the legality of suggested price lists.

The landmark MSRP case in Brazil is known as the "Kibon case," adjudicated by CADE in 1997.[5] Kibon is an ice cream producer and the conduct at issue was the price lists sent by Kibon to its resellers. The complaint was filed by the Bakery Association of the State of São Paulo, which stated that the price list affected the freedom of its members to charge prices for the ice cream. The agency did not find a violation of Brazil's antitrust law as they were only recommended prices and Kibon did not put pressure on resellers to charge such prices. CADE also highlighted the fact that there were no sanctions imposed on resellers that offered below the set prices and no threats to stop supplying such resellers.

The same conclusion was reached by CADE in 1999, while reviewing a case involving price lists by Volkswagen to its resellers,[6] and again in 2011, while reviewing a case involving book editors.[7] In all such decisions, CADE stressed the fact that MSRP and RPM can differently impact competition and shall be assessed under different standards. While MSRP is not harmful to competition, RPM could be and should be assessed under the "rule of reason".

Under the "rule of reason" standard, CADE dismissed a RPM case in 2011 regarding a producer of water filters and purifiers—Everest[8]—and its distributors. Although Everest adopted RPM practices, CADE concluded that the market structure did not generate anticompetitive effects. The agency also stated that RPM was conceived to avoid having discount retailers free riding on the service provided by other retailers and there were potential efficiencies associated with the practice.

IV. CADE'S CHANGE OF APPROACH REGARDING RPM

More recently, however, in February 2013, CADE sanctioned auto-parts manufacturer SKF for setting minimum resale prices,[9] imposing a fine equivalent to 1 percent of SKF's total

[4] *See* Administrative Proceeding No. 148/94 – Defendant: Kibon; Administrative Proceeding No. 08000.018299/1996-86 – Defendant: Livraria Eldorado Brasília Ltda; Consult No. 14/96 to CADE – Warner Lambert Ind. e Com. Ltda.; and Consult No. 20/97 to CADE – Ferrero do Brasil.

[5] Administrative Proceeding No. 148/94.

[6] Administrative Proceeding No. 0089/1992 – Defendant: Koerich S/A Comércio de Automóveis, Amauri Peças e Veículos Ltda. and Volkswagen/Autolatina do Brasil

7 Preliminary investigation No. 08012.001743/2002-40 – Defendants Ed. Globo, Ed. Nova Era, Ed. Civilização Brasileira, Ed. Record, Ed. Moderna e Salamandra, Ed. LTD, Ed. Renovar, Ed. Saraiva, Ed. Rocco, Ed. Revista dos Tribunais, Ed. Nova Fronteira, Ed. Lúmen Juris e outras.

[8] Preliminary investigation No. 08012.009674/2008-16 – Defendant: Everest Refrigeração Industrial e Comércio Ltda.

[9] Administrative Proceeding No. 08012.001271/2001-44; Defendant: SKF do Brasil Ltda.; Reporting-Commissioner Cesar Mattos; adjudication date: February 22, 2013.

turnover in the year preceding the initiation of the investigations.[10] According to the decision, RPM will be deemed illegal unless defendants are able to prove efficiencies. An infringement would be found regardless of either the duration of the practice (in this case, distributors followed orders for only seven months) or the fact that distributors followed or did not follow the minimum sales prices, as CADE considered the conduct to be illegal by object.

Further elaborating, the Reporting-Commissioner Vinícius Marques de Carvalho explicitly stated that the fact that a given company has a low market share is not, in itself, a fact that enables the authority to conclude for the absence of anticompetitive effects. In its decision, the agency majorly also disregarded the efficiency defense. In fact, there is no case in CADE's case law—be it under the merger control system or prosecution of anticompetitive conduct—in which the Brazilian antitrust authority has cleared an anticompetitive merger or dismissed an anticompetitive practice based on efficiency arguments.

Effectively, CADE has changed its approach from "rule of reason" to a modified *per se* test, in which the conduct is presumed to be illegal, and parties would in theory have an efficiency defense. This new approach shows an enhanced skepticism or outright disregard towards the role of efficiencies in vertical practices, a trend which seems to be at odd with the increasing role played by economics in antitrust analysis. It seems CADE has not been (and will continue not to be[11]) shy about intervening, taking an European approach towards RPM and distancing from the more recent U.S. approach.

[10] Administrative Proceeding No. 08012.001271/2001-44; Defendant: SKF do Brasil Ltda.; Reporting-Commissioner Cesar Mattos; adjudication date: February 22, 2013.

[11] It should be pointed out that, out of the six CADE Commissioners (excluding the President), there are currently two openings and two other Commissioners will have their terms expired by mid-2014. This makes any exercise to anticipate what would be the likely position to be taken by the Commission in a given subject harder.