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NEW DEVELOPMENTS ON THE ANALYSIS OF RESALE PRICE MAINTENANCE IN BRAZIL

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Abstract

For a long time, resale price maintenance was considered as a practice illegal per se by U.S. Courts, due to its high potential to generate anticompetitive effects. The ideas and the strong rhetoric based on law and economics of the Chicago School slowly changed the way resale price maintenance was analyzed. In 2007, the Supreme Court overruled a precedent that had considered the practice as illegal per se for almost 100 years. In Brazil, the Administrative Council for Economic Defense (CADE) has built of over time a strong case law regarding resale price suggestion and

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distribution of price suggestion lists by professional associations, but resale price maintenance lacked solid precedents. However, the authority has recently judged a leading case on the subject. Thus, this study will seek to analyze the basis for the assessment of resale price maintenance cases by CADE in the future, as well as to provide the legal background for the antitrust approach in such cases based on Brazilian and American case law.

***Key words**: resale price maintenance, competition, Brazilian Antitrust Law, law and economics.*

NUEVOS DESARROLLOS EN EL ANÁLISIS DEL MANTENIMIENTO DE LOS PRECIOS DE REVENTA EN BRASIL

Resumen

Por mucho tiempo, el mantenimiento de precios de reventa fue calificado como una práctica per se ilegal en las Cortes de los Estados Unidos, por considerarse que era muy probable que generara efectos anticompetitivos. Las ideas y la retórica de la Escuela de Chicago, basadas en derecho y economía, lentamente cambió la forma en que se analizaba el mantenimiento de precios de reventa. En 2007, con una sentencia hito, la Corte Suprema revocó un precedente que consideraba a esa práctica como ilegal per se, que había estado vigente por casi 100 años. En Brasil, El Consejo Administrativo de Defensa Económica (CADE) ha construido, con el tiempo, una fuerte línea jurisprudencial sobre precios sugeridos al público y distribución de listas de precios sugeridas por asociaciones profesionales, pero el mantenimiento de precios reventa no tiene precedentes claros. Sin embargo, la autoridad ha juzgado, recientemente, un caso sobre este asunto (que se distancia de la regla de la razón). Este estudio analizará las bases

de los casos de mantenimiento de los precios de reventa que ha analizado el CADE en el futuro, además de dar el trasfondo para el acercamiento a estos casos desde el derecho de la competencia, con base en precedentes de Brasil y Estados Unidos.

Palabras clave: mantenimiento de precios de reventa, competencia, Derecho de la Competencia en Brasil, derecho económico.

Introduction

Resale price maintenance is a restriction on price formation imposed by producers on their retailers and is generally used to avoid competition among products of the same brand in the downstream market. This practice was, for a long time, considered illegal *per se* by the American Courts due to its potential to reduce or eliminate intra-brand competition and facilitate cartel, serving as a mechanism to monitor price.[1]

The *per se* approach was predominant in the analysis of resale price maintenance until the ideas of the Chicago School started to gain weight in the enforcement of antitrust laws[2]. These new theories called for a more rigorous economic analysis of business practices previously considered harmful by antitrust policymakers. In this sense, the Chicago scholars were able to identify economic efficiencies that had been ignored by the traditional antitrust approach. Specifically in the case of resale price maintenance, it was argued that the practice could improve the sales effort of retailers, providing them with incentives and reasonable profit margins to invest in new efficient strategies and mechanisms to sell their products. Additionally, resale price maintenance could

1 See Herbert Hovenkamp, *Federal antitrust policy*, 471 (West Publishing Co., 2005).

2 For a summary (and criticism) of the ideas brought by the Chicago School, see Herbert Hovenkamp, *Federal antitrust policy*, 69-71 (West Publishing Co., 2005).

enable companies to prevent their retailers from adopting predatory behavior against each other and to avoid the free rider problem, i.e., an opportunist retailer that "takes a ride" in its rival's investment.

Therefore, resale price maintenance could be a valuable mechanism to provide incentives for retailers to invest in their sales capabilities, which would ultimately benefit consumers, and would avoid predatory and inefficient intra-brand competition. At the same time, although resale price maintenance could, at some extent, reduce competition, it would not completely eliminate rivalry in the market, since the inter-brand competition (i.e., competition among products of different brands) would still exist.
Despite the strong rhetoric of the Chicago School, based on a rigorous economic approach and more thorough analysis of the economic efficiencies generated by business practices, American Courts kept considering resale price maintenance as a harmful practice until recently. It was only in 2007 that the U.S. Supreme Court recognized that resale price maintenance could generate efficiency and pro-competitive effects and, therefore, should not be considered illegal *per se*.

In Brazil, the Administrative Council for Economic Defense ("CADE") has traditionally made difference between resale price suggestion and resale price maintenance, considering the former as legal and the latter as harmful and illegal. Therefore, the main issue in analyzing cases regarding resale prices in Brazil is to determine whether the practice relates to resale price suggestion or resale price maintenance. In addition, CADE has faced several cases regarding the creation and distribution of price suggestion lists by professional associations.

The analysis of these practices by CADE usually takes into account the structure of the market and specific conditions of the practice being scrutinized, such as the existence of punishment for companies that do not comply with the suggested prices. Although

CADE has built of over time a solid case law regarding the antitrust approach of resale price suggestion and price suggestion lists, resale price maintenance did not have solid precedents until recently, when two important cases on the subject were judged.[3]
The purpose of this paper, therefore, is to analyze CADE's approach toward resale price maintenance in view of the cases that were recently judged. In addition, this study will also analyze the issues in connection with resale price suggestion and price suggestion lists distributed by professional associations, which are somehow similar to resale price maintenance. Additionally, the experience of the American Courts in dealing with resale price maintenance will also be taken into account, in light of the strong influence that the American case law has over other jurisdictions.

CADE has a long-standing tradition of applying a law and economics approach, mostly based on consequential reasoning and the assessment of economic efficiencies. This type of approach is specially valuable when analyzing practices such as resale price maintenance, which may generate negative effects to some extent but may also create important efficiencies and incentives to enhance competition. Thus, this study will seek to analyze the basis for the assessment of resale price maintenance cases by CADE in the future, as well as to provide the legal background for the antitrust approach in such cases based on Brazilian and American case law.

1. Resale price maintenance and the american case law

During most of the twentieth century, American Courts have scrutinized the effects caused by resale price maintenance under various perspectives and have established the basis for the analy-

3 CADE, administrative proceeding no. 08012.001271/2001-44, Reporting Commissioner Cesar Mattos, judged on January 30, 2013, and CADE, preliminary investigation no. 08012.009674/2008-16, Reporting Commissioner Elvino de Carvalho Mendonça, judged on October 5, 2011. See below.

sis of the practice. American case law in connection with resale price maintenance is currently used by many antitrust authorities throughout the world. In this sense, any discussion regarding resale price maintenance must be preceded by the analysis of the leading cases in connection with the subject in the United States of America.[4] Therefore, the following paragraphs provide for a brief outline of the leading cases of American case law in connection with resale price maintenance.[5]

The first case addressing resale price maintenance was *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[6] judged in 1911. The case was related to a claim filed by a medicine producer against one of its retailers. According to the claim, the retailer had entered into combination and conspiracy with others in order to breach an agreement setting forth minimum resale prices.

According to the claimant, the minimum resale price agreement was established due to the overly aggressive competition between its retailers, which was cannibalizing their profit margins and affecting the reputation of the products' brands.

The U.S. Supreme Court, however, ruled against the medical producer, deciding that the sole purpose of the minimum resale price agreement was to injure competition by controlling the trade of medicines.[7] In this sense, the Court concluded that the agreement

4 In addition to that, CADE often uses American case law to establish the basic assumptions of its decisions.

5 We make reference to our previous paper regarding resale price maintenance, where a more detailed description of these cases can be found. See Bruno D. Werneck, Gustavo F. Coelho & Ricardo V. Mafra Alves da Silva, *Resale Price Maintenance and the Brazilian Antitrust Law*, 7 Rev. de Derecho de la Competencia, 221 (2011).

6 220 U.S. 373 (1911).

7 By using the precedent *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, 220 U.S. 373 (1894), the U.S. Supreme Court decided that restrains of trade were only acceptable if they generated benefits for the parties involved and the public, without injuries to none of the parties.

was intended to avoid competition among retailers and its effects were equivalent to a cartel.[8]

A few years later, the U.S. Supreme Court judged the case *United States v. Colgate & Co.*,[9] which also became an important leading case involving resale price maintenance. The case established that, although vertical restrictions on price were unlawful, producers could deny entering into agreement with dealers that did not agree with the proposed price policy.[10]

The precedent established in *United States v. Colgate & Co.* was further developed in *Monsanto Co. v. Spray-Rite SVC. Corp.*,[11] which determined that producers may only set forth contractual restrictions or refuse to deal if they do so independently, without entering into combination or conspiracy with others. Moreover, the U.S. Supreme Court decided that any concerns shown by the producer regarding resale prices and eventual contacts with retailers to exchange information regarding prices were not sufficient reasons to rule out the applicability of the precedent *United States v. Colgate & Co*. Therefore, the "Colgate Doctrine", as it became known, was understood as referring to a unilateral conduct of the producer rather than a conspiracy to establish minimum

8 "[T]he complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant cannot be regarded as sufficient to support its system."

9 250 U.S. 300 (1919).

10 Accordingly, the case established that the Sherman Act does not forbid companies to refuse carrying out business that were thought to be inconvenient. Thus, the U.S. Supreme Court stated that "the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal, and, of course, he may announce in advance the circumstances under which he will refuse to sell".

11 465 U.S. 752 (1984).

resale prices. In this sense, if there were evidence that the producer had entered into any kind of agreement with its retailers to set minimum prices, rather than unilaterally refusing to deal with retailers that did not comply with such minimum prices, the "Colgate Doctrine" would not be applicable and the practice would be deemed as a resale price maintenance agreement subject to the *per se* rule.

The precedents of the U.S. Supreme Court in connection with resale price maintenance were highly criticized by scholars affiliated with the ideas of the Chicago School. Authors like Robert Bork[12] and Richard Posner[13] argued that resale price maintenance could, in fact, generate efficiency and be pro-competitive. The ideas of the Chicago School had great influence over the analysis of antitrust cases, introducing the use of rigorous economic rationale to assess the effects of business practices[14].

Resale price maintenance had been considered as a practice unlawful *per se* until 2007, when the precedent established in *Dr. Miles Medical Co. v. John D. Park & Sons Co.* was overruled in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[15] The case involved a minimum price agreement with the purpose of controlling aggressive retailers that were affecting sales, reducing profit margins and injuring the reputation of the product.

In spite of early precedents, the U.S. Supreme Court decided that resale price maintenance should be analyzed under the rule of reason, since it could generate efficiency and pro-competitive effects. According to this precedent, some of the benefits that could be generated by resale price maintenance are to: (i) enhance re-

12 Robert Bork, *The Antitrust Paradox*, 289 (The Chicago Press, 2nd ed. 1993).

13 Richard Posner, *Antitrust Law*, 89 (The Chicago Press, 2nd. ed. 2001).

14 For a more detailed explanation of the ideas spread by the Chicago School, See Paula A. Forgioni, *Os fundamentos do Antitruste*, 168-178 (Editora Revista dos Tribunais, 5th ed. 2012) and Herbert Hovenkamp, *Federal antitrust policy*, 69-71 (West Publishing Co., 2005).

15 551 U.S. 877 (2007).

tailers' sales capabilities; (ii) reduce incentives to free-riding; and (iii) attract new competitors to the market by granting reasonable profit margins. On the other hand, the U.S. Supreme Court also highlighted that resale price maintenance could generate anticompetitive effects, such as to: (i) facilitate cartels;[16] and (ii) serve as an instrument by dominant players to abuse their market power.

2. Brazilian Case Law

2.1 A necessary differentiation: resale price maintenance and resale price suggestion

Throughout time, CADE has distinguished between resale price suggestion, resale price maintenance and the creation and distribution of price suggestion lists by professional associations.

In analyzing and understanding the issues involving resale price suggestion, resale price maintenance and price suggestion lists, as well as CADE's approach toward each one of these practices, it is important to keep in mind how the Law no. 12,529/2011 (the "Brazilian Antitrust Law") qualifies them. Accordingly, resale price suggestion and resale price maintenance are usually analyzed under article 36, paragraph 3, item IX, of the Brazilian Antitrust Law, which deems anticompetitive the practice to "impose on distributors, retailers and agents, competing in the downstream markets of products and services, resale prices, discounts, payment conditions, minimum or maximum output, profit margin or

16 Herbert Hovenkamp affirms that the resale price maintenance in Dr. Miles case was actually imposed by dealers: "[o]ne year earlier the Dr. Miles signed a consent decree agreeing not to participate with drug retailers in the horizontal price fixing of drugs. Park was an 'aggressive cutter' – a pharmacy that did not participate in the cartel, but instead cut prices. RPM was clearly being used to facilitate horizontal collusion". See Herbert Hovenkamp, *Federal antitrust policy*, 471 (West Publishing Co., 2005).

any other relevant business conditions." On the other hand, price suggestion lists distributed by professional associations are usually addressed under article 36, paragraph 3, item II, of the Brazilian Antitrust Law, which condemns the practice of "promoting, obtaining or influencing the adoption of uniform or coordinated action among competitors." Thus, while resale price maintenance and resale price suggestion are treated as vertical restraints, distribution of price suggestion lists by professional associations is deemed as a practice with the purpose of creating incentives towards cartelization.[17] Notwithstanding, CADE has decided[18] that the same rationale is applicable to both resale price maintenance or suggestion by producers and price suggestion lists by professional associations.

Most of CADE's cases regarding practices over resale price are related to resale price suggestion rather than resale price maintenance. In this sense, the majority of these precedents are divided between cases related to price suggestion by producers to their retailers and price suggestion lists published by professional associations.[19]

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17 See vote rendered by Commissioner Cesar Mattos in CADE, preliminary investigation no. 08012.005994/2004-65, Reporting Commissioner Fernando de Magalhães Furlan, judged on November 11, 2009: "not only the imposition of price by force is punishable ("to obtain"), but the suggestion effectively adopted by competitors with some market power is also subject to penalty ("to influence"). [...] If rivals believe that the equilibrium intended by the price suggestion is expected by other competitors, the result becomes closer to a collusion, with injuries to society's welfare."

18 CADE, administrative proceeding no. 08012.009922/2006-59, Reporting Commissioner César Costa Alves de Mattos, judged on June 23, 2010.

19 See, for example, CADE, administrative procedure no. 08012.011518/1994-06, Reporting Commissioner João Bosco Leopoldino da Fonseca, judged on July 28, 1999; CADE, administrative procedure no. 08000.000125/1995-02, Reporting Commissioner Roberto Augustos Castellanos Pfeiffer, judged on May 6, 1998; CADE, administrative procedure no. 08000.020238/1994-62, Reporting Commissioner Mércio Felsky, judged on November 4, 1998; CADE, administrative procedure no. 08000.018302/1996-99, Reporting Commissioner

The administrative proceeding no. 148/1994,[20] related to a complaint filed by bakeries involving a supposedly unlawful price suggestion by a food company, is usually considered the first and leading case regarding vertical price fixing.[21] In its decision, CADE has distinguished between resale price imposition and resale price suggestion, deciding that the former should be rendered unlawful, while the latter should be allowed. The establishment of resale prices by the producer would be considered an imposition and, therefore, unlawful, if: (i) the producer has market power; (ii) the structural conditions of the market enable the producer to impose its will on retailers; (iii) the producer has set forth any contractual provision or agreement imposing penalties for non-compliance with the proposed resale price; and (iv) the practice effectively results in uniform behavior by retailers.

The existence of market power is a *sine qua non* condition for the effectiveness of any unilateral restriction such as resale price maintenance, as CADE itself has decided on several occasions.[22]-[23]

Mércio Felsky, judged on January 20, 1999; CADE, administrative procedure no. 145/1993, Reporting Commissioner Arthur Barrionuevo Filho, judged on September 10, 1997; CADE, administrative procedure no. 61/1992, Reporting Commissioner Lucia Helena Salgado e Silva, judged on February 14, 1996; and CADE, administrative procedure no. 08012.007460/1997-74, Reporting Commissioner Thompson Almeida Andrade, judged on September 27, 2000.

20 CADE, administrative proceeding no. 148/1992, Reporting Commissioner Leônidas Rangel Xausa, judged on October 22, 1997.

21 The assumptions established in this case were later used in CADE's response to a consultation by a food company in connection with resale price suggestion practice. See CADE, consultation no. 20/1997, Reporting Commissioner Leônidas Rangel Xausa, judged on October 22, 1997.

22 For instance, CADE, preliminary investigation no. 08012.008443/2007-04, Reporting Commissioner Fernando de Magalhães Furlan, judged on December 16, 2009, and CADE, preliminary investigation 08012.005994/2004-65, Reporting Commissioner Fernando de Magalhães Furlan, judged on November 11, 2009, among others.

23 However, as it will be further detailed in this study, some Commissioners have recently indicated that unilateral practices may be harmful even if undertaken by companies without market power.

Basic behavioral economics dictate that if a company without market power decides to adopt anticompetitive behavior, consumers will simply shift to other competitors, rendering the practice ineffective.

Certain structural conditions, such as high barriers to entry, are also necessary for the effectiveness of the abuse of market power. If a company with market power imposes resale price maintenance on its retailers in a highly contestable market, resulting in a price increase, new competitors will enter the market and reestablish competition.[24-25]

The existence of a mechanism to enforce resale prices is also necessary in order to consider a practice unlawful. It may be a contractual penalty or even a threat of retaliation in case of noncompliance. Regardless of the nature of such enforcement mechanism, it must be able to compel the retailers to adopt the proposed resale price.[26]

Finally, a practice may only be considered illegal if it effectively produces negative effects.[27] In this connection, CADE has

24 In this sense, see vote of Commissioner Leônidas Rangel Xausa in CADE, administrative proceeding no. 148/1992, Reporting Commissioner Leônidas Rangel Xausa, judged on October 22, 1997: "intense inter-brand competition, in addition to the low barriers to entry, atomization of the market, as well as the fact that the product is not essential, make virtually impossible any attempt of price imposition to obtain extraordinary profits or attain market domination."

25 CADE has developed specific standards that are used to determine whether the structural conditions of a market facilitate or do not facilitate the abuse of economic power. For a detailed explanation of these standards, see Bruno D. Werneck, Gustavo F. Coelho & Ricardo V. Mafra Alves da Silva, *Resale Price Maintenance and the Brazilian Antitrust Law*, 7 Rev. de Derecho de la Competencia, 234-237 (2011).

26 See CADE, administrative proceeding no. 08000.020294/1996-03, Reporting Commissioner Ricardo Villas Bôas Cueva, judged on July 19, 2006 and CADE, preliminary investigation no. 08012.008443/2007-04, Reporting Commissioner Fernando de Magalhães Furlan, judged on December 16, 2009.

27 As will be further explained in this study, CADE has ruled by majority that resale price maintenance is assumed to always produce negative effects, regardless of being proved by evidence or not.

developed the focal point theory to evaluate the consequences of the suggestion of resale price, establishing that the focus of any antitrust analysis must be primarily the effects rendered by the practice.[28] Accordingly, if a practice does not produce anticompetitive effects or, otherwise, if the efficiencies created by such practice overcome the harmful effects, the practice will not be rendered unlawful.[29]

2.2 The Everest case: the first resale price maintenance scheme judged by CADE

Until 2011, CADE had addressed an indefinite number of cases regarding resale price suggestion and resale price lists distributed by professional associations. According to the case law that had been built over the years, the main aspect that made a clear difference between price suggestion and price imposition was the existence of a mechanism enabling the producer to effectively enforce resale prices on its retailers. In this sense, until 2011, CADE had not analyzed any practice deemed as a real resale price maintenance.

It was only in the Everest case[30] that the agency analyzed, for the first time, a resale price maintenance agreement, established by a company of the water filter and drinking fountain markets. During investigation, the Secretariat of Economic Law focused on the structure of the downstream market and concluded that the company had substantial market share in some sectors and

28 CADE, preliminary investigation no. 08012.005994/2004-65, Reporting Commissioner Fernando de Magalhães Furlan, judged on November 11, 2009, and CADE, administrative proceeding no. 08012.009922/2006-59, Reporting Commissioner Cesar Costa Alves de Mattos, judged on June 23, 2010.

29 The same rationale is applied in the analysis of transactions. According to paragraph six of Article 88 of Brazilian Antitrust Law, transactions showing potential to be harmful may be approved nevertheless if the resulting net effects are positive.

30 CADE, preliminary investigation no. 08012.009674/2008-16, Reporting Commissioner Elvino de Carvalho Mendonça, judged on October 5, 2011.

could abuse its economic power.[31] Notwithstanding, the Secretariat considered that the practice could not generate anticompetitive effects due to high price elasticity of demand, and CADE's Attorney Office[32] and the Federal Public Prosecutor Office agreed with its conclusions[33].

In the judgment of the case, CADE used the same arguments as the Secretariat of Economic Law to decide for dismissal. Therefore, the agency decided that, although there was evidence that the defendant had sufficient market power to cause harm with a resale price maintenance agreement, there was also enough evidence that the structure of the market and price elasticity of demand would impair the creation of any anticompetitive effects. Also, the agency relied on the possible efficiencies of resale price maintenance to justify its conclusions, stating that the quality of post-sale services was essential in the water filter and drinking fountain markets and resale price maintenance could work as a mechanism to prevent free-riding.

Thus, in the judgment of the Everest case, CADE relied on the previous case law that it had built until that moment and used the market structure and possible efficiencies as justifications to dismiss the case.

2.3 The SKF case: leading case for the analysis of resale price maintenance in Brazil

The SKF case[34] refers to a resale price maintenance scheme established by a company that markets rolling bearings, retainers,

31 Technical opinion of the Department of Economic Protection and Defense (DPDE), of December 3, 2009.

32 ProCADE Opinion no. 50/2010.

33 Federal Public Prosecutor Office Opinion no. 311/2010/AARAS/CADE.

34 CADE, administrative proceeding no. 08012.001271/2001-44, Reporting Commissioner César Costa Alves de Mattos, judged on January 30, 2013.

grease and lubricants, maintenance equipment and monitoring equipment in Brazil. Due to the high complexity of the case and the attention that it attracted during its judgment, the SKF case will likely serve as the main reference in future cases related to resale price maintenance.[35]

The case was started due to a document titled "Preliminary Remedies," in which the producer established minimum prices to be followed by dealers and penalties in case of noncompliance with the proposed prices. The Secretariat of Economic Law, CADE's Attorney Office and the Federal Public Prosecutor Office recommended the dismissal of the case on the basis that the producer lacked market power and there were not sufficient structural conditions in the market to enable the practice.

The Reporting Commissioner of the case followed the recommendations and voted for dismissal.[36] According to his vote, the effects of resale price maintenance are ambiguous; there were no evidences in the SKF case indicating the existence of incentives to establish minimum price as a way to increase the producer's profits, and the intense inter-brand competition would prevent any eventual attempt to cartelize the downstream market. Commissioner Olavo Chinaglia also voted[37] for the dismissal of the case, arguing that CADE had not successfully evidenced either the negative effects of the practice, or the existence of market power and structural conditions to render resale price maintenance effective.[38]

In his dissent[39], Commissioner Vinícius Marques de Carvalho held the practice unlawful. In this sense, the Commissioner deter-

35 The use of the SKF case as the reference in future resale price maintenance cases in Brazil was constantly stated throughout its judgment by CADE's Commissioners.

36 Vote rendered in the CADE's 455th Ordinary Judgment Session.

37 Vote rendered in the CADE's 498th Ordinary Judgment Session.

38 Thus, Commissioner Olavo Chinaglia followed, in his vote, the guidelines for the analysis of resale price maintenance previously established by CADE's case law.

39 Vote rendered in the CADE's 483rd Ordinary Judgment Session.

mined the condemnation of the defendant based on the following facts: (i) there was enough evidence of market power by the defendant; (ii) there were reasons to be believe that the definition of the affected market was actually more strict than that used by the Secretariat of Economic Law; (iii) practices may yield anticompetitive effects and be considered unlawful even if undertaken by one or more companies without market power; and (iv) foreign case law indicates that, as a general rule, resale price maintenance always generates negative effects, and the defendant has the burden to prove otherwise. In addition, according to the Commissioner, companies involved in resale price maintenance agreements are more likely to have information regarding the effects of the practice and, therefore, should have the burden to demonstrate that the efficiencies of the practice are capable of overcoming its harmful effects.

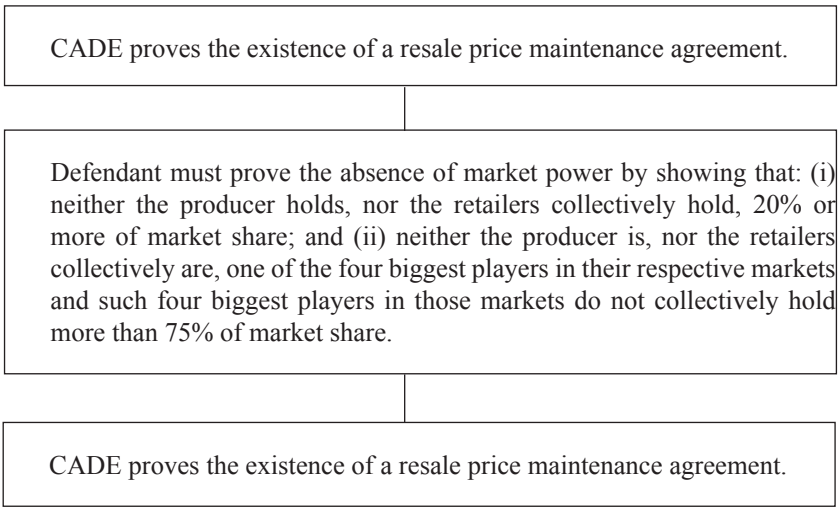
Subsequently, Commissioner Marcos Paulo Verissimo issued his vote[40] furthering the arguments and legal grounds brought by Commissioner Vinícius Marques de Carvalho. In his vote, the Commissioner argued that the *per se* illegality and the rule of reason should be understood as two opposite extreme edges of the same scale of presumptions.[41] Accordingly, since the effects generated by resale price maintenance are ambiguous, but considering at the same time that it always results in harmful consequences such as price increase, the Commissioner concluded that the practice should be placed near the illegality edge of the scale of presumptions. Thus, CADE should always deem resale price

40 Vote rendered in the CADE's 15th Ordinary Judgment Session under the new antitrust law.

41 As stated by the Commissioner, "I understand that what we call rules 'of reason' and 'per se' are nothing more than two opposite extremes of the same scale of presumptions (some absolute, others relative) that the law uses to address, pragmatically, the various anticompetitive practices, placing some of them near the presumption of illegality and others near the presumption of legality, and placing several others in intermediary positions [...]."

maintenance as an illegal practice, unless the defendant is able to provide, on a case-by-case basis, sufficient evidence showing that it has created enough efficiencies to overcome the harmful effects. Moreover, the Commissioner refuted the general assumption that there is no practice unlawful *per se* in accordance with the Brazilian Antitrust Law, mentioning the cartel as a practice that would be considered anticompetitive under any circumstance.

In summary, Commissioner Marcos Paulo Verissimo defended that the analysis of resale price maintenance should be performed as follows:



According to the Commissioner, such rationale should not be used if resale price maintenance was imposed by retailers on the producer, in which case no defense would be admissible. It is important to note, unlike Commissioner Vinícius Marques de Carvalho, Commissioner Marcos Paulo Verissimo considered the existence of market power as an essential condition to render resale price maintenance unlawful. However, given the fact that the Brazilian market is highly concentrated, it is very likely that

most companies and their retailers will fail to prove the absence of the market power under the test proposed by the Commissioner. In any case, since the vote issued by Commissioner Vinícius Marques de Carvalho prevailed in the final judgment, it is uncertain whether practices may or may not be condemned if carried out by companies without market power.

On January 30, 2013, CADE's final decision was issued, condemning the defendant and holding the resale maintenance price illegal by the majority of votes.

3. Resale price maintenance in brazil: what to expect?

The first two resale price maintenance cases judged by CADE will set the pace for the judgment of similar cases in the future. However, although the SKF case was judged only two years after the judgment of the Everest case, one can notice a substantial difference in CADE's approach towards each of them.

Whereas, in the Everest case, CADE followed the guidelines for the analysis of resale price maintenance previously established by the case law of the agency, the SKF case was judged under a new set of assumptions. In this sense, CADE had never stated (or even indicated in any other case or rule) that practices setting forth minimum resale prices would be presumed illegal until proven otherwise by the defendant, even though the agency had several opportunities to do so.

Nevertheless, the most remarkable aspect of the SKF case is not the sudden change of standard for the analysis of resale price maintenance, but the presumption that the practice will always generate negative effects and the argument that the practice could be harmful even if carried out by a competitor without market power.

According to the Brazilian Civil Procedure Code, which is applicable in antitrust cases,[42] the burden of proof will fall on the claimant in relation to its allegations and on the defendant in relation to any fact that contradicts the arguments of the claimant.[43] In this sense, CADE cannot simply assume that resale price maintenance is capable of creating negative effects. In addition, the economic theory has already proven that resale price maintenance can also generate efficiencies and those are not presumed according to CADE's rationale. Thus, when facing a resale price maintenance agreement, CADE should not only prove that the practice effectively existed, but also that it generated anticompetitive effects. If the agency is successful in proving that the practice harmed competition, the only defense left for the defendant will be to demonstrate that resale price maintenance agreement generated enough efficiencies to overcome the negative effects of the practice. To presume that an allegation is true without proving it is against the Brazilian laws, and such presumption should not be used by CADE in future cases. In doing so, CADE would be circumventing a requirement set forth by the Brazilian Civil Procedure Code, shifting the agency's burden of proof to the defendant.
In addition to the presumption of illegality, CADE also stated that companies without market power may harm competition. The immediate consequence of this statement is that, in future cases, the agency will not need to prove that the defendant had enough market power to harm competition. The agency will simply have to demonstrate, theoretically, that the practice could generate harmful effects and, depending on the nature of the practice under analysis, such negative effects would be presumed to exist.

In summary, in future resale price maintenance cases, CADE's only burden will be to prove the existence of the agreement. Ac-

42 See article 115 of the Brazilian Antitrust Law.

43 Article 333 of the Law no. 5,869/1973.

cording to the understanding set forth in the SKF case, CADE will not be required to demonstrate that the defendant had market power or that the practice generated any anticompetitive effect. In this context, resale price maintenance will be treated similarly to the cartel, which is not reasonable. While the cartel hardly generates any efficiency and has the immediate effect of restricting output, resale price maintenance may generate important efficiencies and will only have the potential to create harmful effects depending on the structure of the market.

Conclusion

Resale price maintenance has ambiguous effects on competition. Still today, more than a hundred years after the subject was first addressed by antitrust laws, it is uncertain whether the practice is beneficial or harmful to competition.

Throughout the years, CADE has built a solid case law regarding resale price suggestion and suggestion price lists, setting forth the basis and standards for the analysis of resale price maintenance cases that would be submitted to its judgment. In this context, the agency indicated that the mere suggestion would be deemed as an imposition of resale price and thus judged as a resale price maintenance practice in the presence of an enforcement mechanism by the producer on its retailers. In addition, resale price maintenance would be judged under the rule of reason, which means that CADE would have to prove that the practice generated an anticompetitive effect in order to hold it illegal.

When CADE judged the first resale price maintenance case (the Everest case), it followed the guidelines and standards previously set forth. In this sense, the agency proved that the defendant had market power, but decided that, given the structure and characteristics of the relevant market, the practice would generate enough efficiencies to overcome the harmful effects.

The SKF case, however, was judged under a completely different set of presumptions and standards than those established previously by CADE through its case law. It was judged according to standards that were unknown to the defendant even during the analysis of the case, which may have effectively impaired any possibility of establishing an appropriate defense strategy. In this sense, Commissioner Olavo Chinaglia stated that "to shift the burden of proof to SKF [the defendant] means to assume that all the evidence gathered during the seven years of investigation [...] had no relevance since the beginning, given that the only viable defense [for SKF] was to prove the existence of economic efficiencies[...]".[44]

Regardless of the outcome of the case, some of the standards and understanding set forth in the SKF case are unacceptable under Brazilian law and should not be applied in the future. To presume that resale price maintenance is illegal until proven otherwise although economic reasoning clearly demonstrates that the practice is capable of generating both negative and positive effects is against the allocation of burden of proof set forth by the Brazilian Civil Procedure Code. Also, stating that a practice may generate harm even if it is carried out by a company without market power is unreasonable. Basic behavioral economics dictates that consumers will simply shift to another competing product if a company without market power restricts output.

Finally, the Brazilian Antitrust Law sets forth generic and abstract rules, using broad and open-ended terms, which must be shaped by CADE's case law into rules that companies are able to follow and lawyers are capable to understand and explain to their clients. The sudden change of rules and odd standards used by CADE in the judgment of the SKF case only adds to the hostile

44 In addition, Commissioner Olavo Chinaglia stated that all the evidence gathered throughout the investigation that was being disregarded by CADE indicated the absence of any harm to competition generated by the practice.

environment for business that Brazil presents. The inconsistency in the agency's understanding regarding resale price maintenance (and the indication that the same understanding may be applied in other types of practices) creates legal uncertainty and does more harm than good to competition and social welfare.