Competition Law

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Resale Price Maintenance in Brazil: The SKF Paradigm

I. INTRODUCTION

The authors must start this small article with two disclaimers: (i) it is their position and does not necessarily contains the position of the firm they are members of or any entity they work for and (ii) it is mostly a description (with choice of mentioned points and summarizations by the authors) of a case and does not aim to praise or criticize Cade´s decision.

Another point that must be clarified here – mainly for readers under the Common Law system – is that Brazil is a Civil Law country, and here we have an administrative system by which the cases are decided by an "agency" called Conselho Administrativo de Defesa Econômica (Cade). The parties that do not agree with Cade´s decisions can go to Court against them; there is also the possibility of starting with the Court directly, but most of the cases start at Cade due to its specialization.

Until the decision on the SKF case[1], which happened during a January 30, 2013 hearing in Brazil, Resale Price Maintenance (RPM) cases in Brazil were largely misunderstood, treated either as Suggested Retail Price (SRP) or incentive to collude. Different from some other practices, as cartels, RPM can generate more complex consequences, e.g., avoiding free riders. Unlike cartels, which are always harmful to competition, RPM can in some cases generate beneficial consequences. Actually, in luxury markets, we can imagine RPM as a way to position brands. As it is impossible to establish a rule as to whether effects are positive or negative – in other words, procompetitive or anticompetitive – the antitrust analysis must be a case-by-case one.

Therefore, using such decisions as precedents may become a challenge.

[1] Administrative Proceeding no. 08012.001271/2001-44.

II. THE PARADIGM

The SKF case started in 2009, when the Attorney General of Cade issued his non-binding opinion that there was no violation of Brazilian antitrust law, mostly because the market was very competitive and only intra-brand competition was affected. Here we are talking about the bearings market, in which SKF was the leading company in Brazil. Until that time, Cade was known to prosecute cartels but seldom to focus on individual and/or vertical conducts.

Reporting Commissioner César Mattos followed, in his opinion, the Attorney General´s position, stating basically that (i) there was no evidence that the practice was followed by the distributors, (ii) there was no market power (the highest was the bearing market, in which SKF had 28%), (iii) there was no significative investigation on the coercion system, (iv) there was inter-brand competition (i.e., acquirers could avoid higher prices simply by changing to other suppliers), and (v) in this specific case, SKF surrendered to its distributers, who allegedly had to fight more against the other brands than among themselves.

Commissioner Vinicius Carvalho, however, took a different direction, first showing the market shares (SKF: 28%, NSK: 23%, Fag/Ina 18%, Timken: 9%, NTN: 3%, others: 19%) and stating that even players with low market shares can violate Brazil's antitrust law by practicing RPM. Also, he mentioned that (i) an investigated cartel in the same market in France could indicate that there was a possible coordination in Brazil, (ii) as market shares were stable, intra-brand competition was not high, (iii) there were joint ventures between SKF and Timken elsewhere and they could have impacts in Brazil, as the main competitors are the same and they know the details of the market, and (iv) there is no need to demonstrate effects on the market, as the potential effects are enough. His opinion is remarkable because he reviewed all of the noteworthy American (from Dr. Miles to Leegin) and European precedents. He reminded that Brazilian law creates a presumption of dominance if a company has 20% or more of a certain market; obviously (he did not say but it is clear) this presumption is relative. Another feature of his opinion is related to the burden of proof, which relied on the defendant.

Three years later, after opinions by other Commissioners (all but one in agreement with Commissioner Carvalho), Commissioner Marcos Paulo Veríssimo issued another remarkable opinion, starting it by saying that the per se rule and the rule of reason are just different points in a scale of presumptions. He then clarified that the burden of proof on the defendant starts exactly at 20% of a market (according to Law 8884/94, art. 20, par. 3, there is the presumption of a dominant position), considering that, from this point on and regarding RPM, the defendant has to prove the efficiencies of the practice. He understood that, as the conduct is restrictive to competition, and as starting from 20% as a presumption of dominance, the defendant has the obligation to rebut the illegality but did not succeed.

III. WHAT WE LEARNED

The first noteworthy point here relates to the burden of proof; the classical view has been that the accusing authority must prove the facts supporting the accusation, and the defendant to prove the facts that may hinder the accusation. In this case, however, there were no problems on the facts – as the conduct was not denied – but on the consequences on the facts: were they pro or against competition? So, the tradition remains solid: facts have to be proven by who mentions them, either as accusation or defense.

The consequences of the facts – if and when considered real – are the main issue here. And then we come to the efficiencies: Commissioner Veríssimo was very keen on using the relative legal presumption of 20% as the limit above which a defendant has to prove the efficiencies of a certain RPM conduct. Although Commissioner Carvalho did not mention the relative legal presumption, it is clear that he tacitly referred to it. Anyway, it was learned that a high market share is not necessary in order to be able to harm the market. As an aside, Brazil's new Civil Procedure Code was not in force then, but now it adds to the argument in article 373, par. 1º, which allows a judge to revert the burden of proof when the other party can present the evidence in an easier way.

In case the companies are the same in Brazil and elsewhere, illicit conducts carried away in other jurisdictions may have consequences in Brazil (or at least bring some suspicion). This is somewhat obvious but, as it was clearly mentioned by Commissioner Carvalho as one of his rationales, we think it is an important aspect of this RPM precedent.

Another important issue mentioned in this case is that there is no need to prove effects in Brazil; potential effects of harm to competition are enough.

IV. THE AFTERMARKET

A consultation by Continental[2] – the tires company – was answered by Cade positively in a way that can be deemed as a consequence of the SKF case. Continental created a policy by which its resellers agree not to impose limitations on the resale price of passenger and light commercial vehicles tires, except for the advertised price. According to Continental, the policy aimed to preserve its business model, counting on the resellers who invested in their skilled workforce and services.

Reporting Commissioner Paulo Burnier reported that such conduct causes ambiguous effects on consumer well-being, but it was not unlawful due to three elements: (i) Continental did not have market power (as neither it nor the resellers altogether had 20% of the market), (ii) the policy was developed unilaterally by Continental, without the involvement of the resellers, who did not have any influence on it, and Cade considered that this is an argument against any possible collusive

[2] Consultation no. 08700.004594/2018-80

agreement or harmful behavior by the resellers, and (iii) Continental´s policy would be applied to all resellers nationwide, providing an equal and nondiscriminatory treatment to all agents.

The decision, however, was not unanimous, as Commissioner Cristiane Schmidt considered such conduct as illicit per se because it established unilaterally a minimum level of price to all resellers, thus generating uniform prices. The other Commissioners followed Commissioner Burnier.

V. CONCLUSION

The authors hope to have supplied some guidance as to RPM treatment by Cade in Brazil. However, as courts can either change Cade´s decisions or decide independently, this jurisprudence, albeit very helpful, can be considered still relative.

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