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Vertical integration thru “agency” and article 10 of Competition Law

Discussion topic

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*This Note is personal. It does not necessarily reflect VA&BA position*

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0. *In this Note it is proposed that some “weak” form of vertical integration can hardly give place to some relative monopolistic practices as identified by the Federal Law of Economic Competition (“Competition Law”) in its article 10.*

1. A “weak” vertical integration is defined herein as:

A situation when a producer “A” hires “agency” services of an economic agent “B” so that this one sells products of A. In their contract it is established that B does not own the products, **she only charges a fee to A** for the amount of sold merchandise to the general public. Sales proceeds always belong to A.

2. Let the contract between A and B be, say, such that:

- i. B sells only products of A at a price and terms established by A; and/or
- ii. B sells only products of A in certain territories or to certain population groups or for a certain time period, or a combination thereof.

3. Then a third party “C” competitor of A might complain against such “anticompetitive exclusivity”<sup>1</sup>, and request to the competition authority to act so that:

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<sup>1</sup> **Article 10.** *If existence of any of the circumstances provided for in articles 11, 12 and 13, hereof is evidenced, the acts, contracts, agreements, procedures or combinations the purpose or effect of which is or may be to unduly displace other agents from, or substantially preclude their access to, the market, or to create exclusive advantages in favor of one or several persons are considered to be relative monopolistic practices in the following cases:*

I. *As between economic agents which do not compete with each other, the fixing, imposition or establishment of exclusive arrangements for the marketing or distribution of goods or services, by virtue of subject, geographic location or for specific periods of time, including any division, distribution or allocation of clients or suppliers; and also the imposition of any obligation not to manufacture or distribute goods or not to render services for a specific or specifiable period;*

(...)

- i. A and B should modify their contract so that C may also hire the services of B; and
  - ii. B sells products of C with no conditions except price and terms to the general public.
4. Competition Law cannot be applied:
- i. To oblige A to purchase agency services of B, least in terms demanded by a third party C. This conclusion applies even if A has substantial market power in production;
  - ii. To oblige B to sell her services to C, least in terms as demanded by C. This conclusion may be different if B has substantial market power in commercialization. In this last case, B has to sell her services in non-discriminatory terms.

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*IV. Any sale, purchase or transaction made subject to the condition of refraining from using, acquiring, selling, marketing or providing the goods or services produced, processed, distributed or marketed by a third party;*

*(...)*

*VIII. The granting of discounts or incentives on the part of producers or suppliers to the acquiring parties subject to the condition not to use, acquire, sell, market or provide the goods or services produced, processed, distributed or marketed by a third party, or the purchase or transaction subject to the condition not to sell, market or provide a third party the goods or services that are the object of the sale or transaction;*

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