

EXCLUSIONARY PRACTICES

WHERE IS THE ECONOMIC NATIONAL PROSECUTOR'S OFFICE POINTING?

The struggle to increase the market participation is an essential topic for any company.

If an enterprise has a dominant position in the relevant market, the strategies that are adopted to maintain or increase that position must conform to the standards and guidelines of our antitrust authorities, which have evolved in time.

By means of examples we will clarify which are currently the standards of the authority in connection with this matter.

If a company that has a market participation of 80% requests the retail companies (as a condition to sell them its products) that they do not market those of its competitors, clearly –and under any standard- we would be before an exclusionary practice that attempts against the legislation on free competition (example 1).

As it results obvious, an enterprise with some knowledge regarding free competition will refrain from acting in such manner.

However, it may not be discarded that the same company uses other means in order to increase its market participation, which may also be contrary to our antitrust law.

That would be the case, by way of example, if that company grants incentives or discounts to the retail enterprises to refrain from advertising or appropriately exhibiting the products of its competitors (example 2).

The same would occur if that company grants to the retail enterprises retroactive discounts calculated on growth goals (example 3).

As it may be appreciated, by means of the practices of examples 2 and 3 it could, in practice, obtain similar results to the one indicated in the first of the examples.

Special effort to put an end to the practices of the examples 2 and 3 has been made lately by the National Economic Prosecutor's Office.

Such is the case of the proceedings commenced by the Prosecutor's Office against Embotelladora Andina S.A. and Coca Cola Embonor S.A.¹ where the latter companies were accused of establishing in favour of the retailers a system of incentives subject to the condition that they refrain from advertising, exhibiting and /or marketing the so-called Colas B (such as Mc Cola, Ship, Re Cola, Kola Real and Sidra Antillanca).

A similar accusation has been made by the National Economic Prosecutor's Office to Unilever Chile S.A. In fact, the Prosecutor's Office affirms that such company with its brands Omo, Drive, Skip and Rinso has carried out a series of exclusive practices in the market of laundry detergents (both for retailers and supermarkets) through the application of incentives for exclusivity, retroactive conditional discounts and restrictions associated to the use of spaces for the marketing of other detergents.²

Conclusion.- Given this new focus of concern of the National Economic Prosecutor's Office, companies with market power must incorporate these concepts when they want to maintain or increase their market participations.

1. Ended by a settlement agreement entered into between the National Economic Prosecutor's Office and the companies Embotelladora Latinoamericana S.A., Mc Cola S.A., Castel Limitada, and Antillanca Limitada (claimant and plaintiffs), on the one part, and Embotelladora Andina S.A. and Coca-Cola Embonor S.A. (defendants) on the other, on November 15, 2011.
2. Proceedings commenced by the National Economic Prosecutor's Office against Unilever Chile S.A. on April 3, 2013.

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