February 2010

On Fidelity Discounts (FLEC, Art. 10, VIII)

Discussion topics

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

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0. In this Note a proposal is made for a "reverse reading" of Article 10, VIII of the Federal Law of Economic Competition (FLEC).

1. FLEC's article 10 lists, in eleven sections, commercial practices that may be subject of analysis for their likely negative effects on competition. Such practices are denominated "relative monopolistic practices" and grossly refer to "vertical restraints". Section VIII indicates:

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;

2. It is worth mentioning that such conduct, to be sanctioned, would have to be carried out by an economic agent with substantial power in the relevant market. The negative effects could take place in the same relevant market or in a substantially related market.

3. At first sight section VIII above seems to indicate that "necessarily" the agent wit substantial power is the one who decides "to grant discount or incentives" to another agent so that this latter accepts the condition to become, say, an "exclusive dealer" of the former.

4. **<u>Nevertheless, a "reverse reading" of such section is also valid.</u>**

Thus take an economic agent A with substantial power in relevant market “a” (say at the retail level of a productive chain); an economic agent B who competes in market “b” (say at the production level), within a competitive environment. An arrangement between A and B exists such that, the producer A “grants” incentives to B, for B to be an exclusive retailer for A products.

One may observe a contract signed by A and B, such that even though A is the economic agent with market power, it “accepts” the exclusivity condition as long as B “grants” discounts or incentives as determined by A.

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