

Loyalty Rebates under EU Competition Law: Set Sail Again from *Intel v. Commission*

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Abstract

This article focuses on loyalty rebates under EU competition law and attempts to provide recommendations to competition authorities, courts and undertakings (especially dominant undertakings) based on the EU experience. It also clarifies the concept of the AEC test, which takes into account the contestability of demand and analyzes whether as-efficient competitors can profitably spread out the loss of disloyalty (i.e., the amount of rebate) within the scope of the contestable share of demand, in order to determine whether the market will be foreclosed.

Prior to *Intel*, there was a fragmentation in the analysis approach to loyalty rebates in EU competition law, namely the “form-based approach” and the “effects-based approach.” Since loyalty rebates are not necessarily detrimental to competition, this article argues that the effects-based approach is the more appropriate choice. Nonetheless, a combination of the two approaches, removing the form-based approach’s unrebuttable presumption of the anti-competitiveness of loyalty-inducing rebates, is also a viable compromise. The EU Court of Justice took this approach in *Intel*, and this article argues that this will lead EU competition law in the right direction. Subsequently, the ECJ’s assessment framework was followed by the Commission and the General Court. At this point, the battle between the form-based approach and the effects-based approach to loyalty rebates has finally reached a truce in EU competition law.

This article applies the insights of EU competition law to the enforcement cases of Taiwan’s Fair Trade Commission, and finds that the FTC’s approach is form-based, which may lead to false positives and is not conducive to the maintenance of competition based on its merits. To this end, this article concludes the current assessment framework of EU

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competition law in the hope of urging the FTC to construct a proper and complete examination system, so as to ultimately fulfill its important responsibility of safeguarding competition and promoting consumer welfare.

Keywords: EU Competition Law, Loyalty/Fidelity Rebates/Discounts, Form-based/Formalistic Approach, Effects-based/More Economic Approach, As-Efficient Competitor Test (AEC test), Intel.