

# Exclusive dealing and loyalty rebates after *Intel*

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# *Intel*: a framework, not a set of answers

- On 6 September 2017, the Court of Justice delivered its (long awaited) ruling in *Intel*
  - The first instance judgment was set aside and the case was referred back to the General Court
  - The judgment refines the analytical framework for the assessment of exclusive dealing and loyalty rebates under Article 102 TFEU
  - It also clarifies a set of principles about the scope of the notion of abuse: as a matter of principle, Article 102 TFEU is concerned with equally efficient rivals

# *Intel*: a framework, not a set of answers

‘133. it must be borne in mind that it is in no way the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, the dominant position on a market. Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market’

Case C-413/14 P, *Intel*

# *Intel*: a framework, not a set of answers

‘137. In that regard, the Court has already held that an undertaking which is in a dominant position on a market and ties purchasers — even if it does so at their request — by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking abuses its dominant position within the meaning of Article 102 TFEU, whether the obligation is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate. The same applies if the undertaking in question, without tying the purchasers by a formal obligation, applies [...] a system of loyalty rebates, that is to say, discounts conditional on the customer’s obtaining all or most of its requirements — whether the quantity of its purchases be large or small — from the undertaking in a dominant position’.

Case C-413/14 P, *Intel*

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‘138. However, that case-law must be further clarified in the case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects’.

Case C-413/14 P, *Intel*

# Intel: a framework, not a set of answers

‘139. In that case, the Commission is not only required to analyse, first, the extent of the undertaking’s dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market’

Case C-413/14 P, *Intel*

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- The essence of the judgment (or clarification) can be summarised relatively easily
  - Exclusive dealing and loyalty rebates are treated as ‘by object’ infringements, in the sense that they are prohibited irrespective of their effects
  - These practices are presumed to be capable of restricting competition (as ‘by object’ infringements are under Article 101 TFEU)
  - *Intel* clarifies that a dominant firm can provide evidence showing that the practice is not capable of restricting competition
  - If evidence in this sense is provided, the authority must establish that the practice is capable of excluding equally efficient rivals

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- On the other hand, the judgment is relatively succinct and does not develop some key concepts (an *arrêt-cadre*, not an *arrêt-loi*):
  - Is the clarification provided in Intel a matter of substance or a procedural matter alone?
  - What does capability mean? Some cases suggest that the threshold is relatively low (see e.g. T-Mobile in the context of Article 101 TFEU)
  - Does the dominant firm need to provide ‘convincing evidence’ within the meaning of *Tetra Laval*? Is it sufficient that the claims have an ‘air of reality’?



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- Some of the most widely discussed questions relate to the Guidance Paper and, in particular, the ‘as efficient competitor’ test:
  - Is the Commission required to apply, as a matter of law (Article 102 TFEU), the ‘as efficient competitor’ test in rebate cases?
  - If the test shows that equally efficient rivals would not be driven out of the market, can an abuse be still established? Under what circumstances?