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ANTITRUST TRADE AND PRACTICE

Expert Analysis

Potential for Convergence in US/EU Enforcement Post-Intel


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On Sept. 6, 2017, the Court of Justice of the European Union (ECJ), the EU's highest court, set aside a 2014 General Court of the EU (EGC) judgment that upheld a €1.06 billion fine imposed by the European Commission (Commission) on Intel for abuse of its monopoly position. At the heart of the ECJ's decision was its holding that the EGC improperly failed to consider evidence presented by Intel that the challenged conduct—a loyalty rebate program—did not foreclose competition or harm customers. In so holding, the ECJ made clear that in evaluating foreclosure arguments the EGC must "examine all of the applicant's arguments seeking to call into question the validity of the Commission's finding," including economic evidence of exclusionary effects in well-defined markets. Judgment of 6 Sept. 2017, *Intel v. Commission*, C-413/14 P, EU:C:2017:632.

In recent years, antitrust commentators have written often about the divergent approaches to antitrust enforcement in the United States and EU, especially with respect to theories of monopolistic harm. Front and center in these discussions have been the Commission investigations and penalties levied against American tech giants, such as Google, Amazon, Apple and, of course, Intel, for allegedly abusing dominant market positions, which stand in stark contrast to the U.S. antitrust authorities' decisions not to challenge the same or similar conduct. In fact, this column addressed the issue following the Commission's decision to levy formal charges against Google in 2015 related to the Internet giant's search practices, in which we underscored the differences between the Commission's decision and the Federal Trade Commission's decision not to challenge those very same practices, highlighting the U.S. emphasis on harm to consumers in contrast to the EU's apparent focus on competitor harm and desire to open markets. Shepard Goldfein and James Keyte, "EU and Google: Study in Divergence for Antitrust Enforcement," N.Y.L.J., May 12, 2015.

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The Intel decision, however, foretells a significant shift in antitrust enforcement in the EU—a shift that may well lead to more *convergence* between U.S. and EU approaches to antitrust enforcement. By requiring the EGC (and, in turn, DG Comp, the EU enforcement body) to consider economic evidence regarding the competitive effects of the challenged conduct, the ECJ is mandating a move to a more rule of reason-like analysis, including the type of empirical economic analysis that historically has been employed far more often in the United States. While the impact of

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this decision remains to be seen, it is no doubt a welcome development for companies that have found themselves in the crosshairs of the Commission under *per se*-like theories or analysis that presumes certain types of unilateral conduct are inherently anticompetitive.

The Commission's Initial Fine

On May 13, 2009, following almost a decade of complaints and investigations, the Commission issued a decision finding that Intel had abused its domination position in the x86 microchip market in violation of Article 82 of the European Commission Treaty. Commission Decision of 13 May 2009 in COMP/C-3 /37.990—Intel. In a press release explaining its decision, the Commission boiled its decision down to the notion that Intel had engaged in two forms of anticompetitive conduct: First, "Intel gave wholly or partially hidden rebates to computer manufacturers on condition that they bought all, or almost all, their x86 CPUs from Intel" (Press Release, EUROPEAN COMMISSION, May 13, 2009, IP/09/745 ("Commission imposes fine of €1.06 bn on Intel for abuse of dominant position; orders Intel to cease illegal practices.")); and second, "Intel made direct payments to computer manufacturers to halt or delay the launch of specific products containing competitors' x86 CPUs and to limit the sales channels available to these products." Id.

With respect to the former, the Commission asserted that EU case law generally prohibits arrangements whereby a company with a dominant market position provides discounts to customers—through rebates or otherwise—conditioned on those customers obtaining all or most of their requirements from the dominant company. Accordingly, the Commission's position was that Intel's conduct was, in a sense, per se unlawful, irrespective of the competitive effects. Nonetheless, the Commission also performed "as-efficient competitor test" to analyze the competitive effects of Intel's conduct. That test asks whether challenged conduct by a dominant company is exclusionary by assessing whether it would foreclose a competitor that is as efficient as the dominant company. Based on its application of this test, the Commission concluded that, in the alternative, Intel's rebate program would foreclose competition.

The Commission ordered Intel to cease its loyalty rebate program and other similar practices, and levied its €1.06 billion fine, which, at the time, was the largest antitrust fine handed down by the Commission.

The EGC Decision

Unsurprisingly, Intel appealed the record fine to the EGC, asserting on the foreclosure point that the Commission had failed to meet its burden of proof. Intel essentially argued that the Commission's decision was based on form over substance—it penalized Intel for employing the exclusivity rebate program without establishing proof that the program could or, in fact, did foreclose the market to competitors or otherwise harm consumers. Intel also argued that, to the extent the decision was based on the AEC test, the Commission's analysis was flawed. In particular, Intel argued that the Commission ignored evidence that Intel's competitors had gained share in the relevant market during the period under review, which ran counter to any conclusion that the program resulted in meaningful market foreclosure.

As it turned out, the EGC did not seriously consider the Commission's application of the AEC test, finding instead that it was not required to assess whether the rebate programs resulted in market foreclosure. Judgment of 12 June 2014, *Intel v. Commission*, T-286/09, EU:T:2014:547. According to the EGC, since Intel's rebate program was, by its nature, capable of curtailing competition in light of Intel's position in the market, there was no need. Specifically, the EGC state that it is "not necessary to show that [exclusivity rebate programs] are capable of restricting competition on a case by case basis in the light of the facts of the individual case." Press Release, GENERAL COURT OF THE EUROPEAN UNION, June 12, 2014, No 82/14 ("The General Court upholds the fine of €1.06 billion imposed on Intel for having abused its dominant position on the market for x86 central processing units between 2002 and 2007."). Further, the ECG found that even if the rebate program did not entirely foreclose competition, the "mechanism of exclusivity" still made access more difficult for competitors. In Intel's view, this too elevated form over substance.

The ECJ Decision

Again Intel appealed, this time challenging the EGC's decision before the ECJ, which proved receptive to Intel's arguments. The ECJ set aside the EGC's decision, finding error in the EGC's failure to examine Intel's proffered evidence regarding foreclosure before condemning its exclusivity rebates as an abuse of monopoly power. In so holding, the ECJ identified factors relevant to determining whether exclusivity rebates constitute an abuse of monopoly power, including the share of the market covered by the rebates and the terms—e.g., length and amount. The ECJ further held that the AEC test is relevant and a should be applied to determine the potential for exclusivity rebates to exclude competitors in each particular case. As a result, the ECJ remanded the case to the EGC for consideration of that test, as well as the foreclosure evidence presented by Intel.

Implications

It may be too early to assert that the Intel decision represents a paradigm shift in EU antitrust enforcement, but only barely. For starters, the ECJ did not hold that Intel's exclusivity rebate program is *not* an abuse of dominance; it merely remanded the case for the EGC to consider additional evidence. The EGC may find that the Commission's application of the AEC test establishes that the program unduly foreclosed competition, and therefore violated EU law. In addition, the holding may be limited to the factual context of this case—i.e., exclusivity rebate programs.

On the other hand, this decision has the potential to impact broadly how abuse of dominance cases are analyzed in the EU. In the wake of the Intel decision, the Commission will be hard pressed to argue—and EU courts similarly will be hard pressed to accept—that conduct by a purportedly dominant firm can be condemned as abusive absent analysis of the competitive effects of the challenged conduct. At the very least, the decision fortifies the right of companies under investigation to offer detailed evidence and arguments concerning competitive effects of the challenged conduct, and requires the Commission and EU courts to evaluate that evidence and those arguments. As a result, while structural arguments almost certainly will continue to carry more weight in the EU than in the United States, effects analysis now has a better seat at the table in the EU, just as it does in the United States.

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This development is especially encouraging for large U.S. tech companies that have been the focus of the Commission in recent years. Just this past June, the Commission levied a €2.4 billion fine against Google—more than double the €1.06 billion fine against Intel—for prioritizing its own shopping platforms in search results, a practice that, according to the Commission, stymied competition and innovation. Press Release, EUROPEAN COMMISSION, June 27, 2017, IP/17/1784 ("Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service."). Google already has filed to appeal the decision, and the Intel decision will likely be front and center. *See* Sam Schechner and Natalia Drozdiak, "Google Appeals Record $2.9 Billion EU Antitrust Fine," Wall St. J., Sep. 11, 2017. The Google and Intel fines relate to but two of the Commission's tech-related investigations. Others include the Commission's investigation of Google for practices related to its Android mobile operating system, and its investigation into Qualcomm's chipset practices. Press Release, EUROPEAN COMMISSION, April 15, 2015, "Commission opens formal investigation against Google in relation to Android mobile operating system."; Press Release, EUROPEAN COMMISSION, Dec. 18, 2015, IP/15/6217, "Commission sends two Statements of Objections on exclusivity payments and predatory pricing to Qualcomm." While the Intel decision will by no means deter these investigations, it may level the playing field by ensuring that tech companies can present qualitative and quantitative arguments addressing the merits of the matter and, and that these arguments will have to be addressed by DG Comp and the EGC.

In the end, whether the Intel decision—or more decisions like it—will be transformative on the subject of convergence of EU and U.S. antitrust enforcement and law remains to be seen; but, for our part, we strongly suspect that it will be.