The Intel saga

What it means for competition policy

*by **Christopher Kelly** and **Lisa Lernborg***

Cases such as Microsoft and GE/Honeywell have seen the European Commission and the US antitrust authorities reach substantially different outcomes on the same or similar factual bases. But the US leg of Intel's global competition-law saga suggests that US antitrust enforcement policy regarding unilateral conduct might be moving closer to the EU's. Is this a one-off, or a sign of things to come?

A break from the past?

During his election campaign, President Obama vowed to "reinvigorate antitrust enforcement, which is how we ensure that capitalism works for consumers". He promised "an antitrust division in the Justice Department that actually believes in antitrust law. We haven't had that for the last seven, eight years". Christine Varney, Obama's choice as assistant attorney general in charge of the antitrust division of the US Department of Justice (DoJ), echoed this rhetoric when she withdrew the prior administration's policy statement on Sherman Act section 2. Announcing "a shift in philosophy," Varney said that "the antitrust division will be aggressively pursuing cases where monopolists try to use their dominance in the marketplace to stifle competition and harm consumers."

These signals of newly vigorous enforcement indicated that faith in markets' ability to self-correct was no longer to be a guidepost for US antitrust policy. The New York Times quickly recognised the new policy as more closely aligned with the Commission than before; so did a Wall Street Journal commentator, who called the realignment "a huge mistake".

However, the DoJ has yet to bring a case bearing out its break with the previous administration's section 2 policy. The situation is different, though, at the Federal Trade Commission (FTC). In suing Intel last December exclusively under section 5 of the FTC Act (Section 5), which bans "unfair methods of competition", the FTC moved beyond what the DoJ could ever do under section 2, whose requirement for monopolisation sets a high burden on plaintiffs to show conduct fundamentally inconsistent with competition on the merits. As Intel's discounting presumably profited its computer manufacturer customers, some US courts would have been sceptical of a section 2 challenge. Freed from the Sherman Act, the FTC adopted what amounts to an EU-style abuse-of-dominance theory.

The Intel story

By its own account, Intel has sold between 70% and 85% of the x86 microprocessors (also called central processing units or CPUs) for use in computer systems. Intel has competed aggressively, in particular with its principal competitor, Advanced Micro Devices (AMD). The result has been a series of enforcement actions by several competition authorities and private plaintiffs even before the FTC filed suit:

- In 2005, after the Japan Fair Trade Commission ruled that Intel had abused its monopoly power, Intel accepted a cease-and-desist order. Also in 2005, AMD sued Intel in US federal and Japanese courts; the case settled in November 2009 with Intel paying AMD $1.25bn.
- In 2008, the South Korea Fair Trade Commission fined Intel $26m for offering rebates to PC makers in return for not buying competitors' CPUs.
- In May 2009, the EU slapped Intel with a €1.06bn fine for abuse of dominance, the largest fine for such conduct under EU competition law to date.
- As the AMD case was settling, the New York state attorney general beat the FTC to the punch, suing Intel in US federal court for violations of Sherman Act section 2 and the matching New York State antitrust statute, characterising Intel's discounting as "bribery" of its OEM customers.
- The following month, the FTC filed its administrative suit.

After this global series of cases that seemingly addressed the same basic concern, what did the FTC's case add to the EU one?

In the EU case, Intel was given a hefty fine and also required to desist from the specific practices the Commission identified: (1) rebates given to computer manufacturers on the condition that they bought all (or almost all) of their CPUs from Intel; (2) payments to a major retailer for only stocking computers with Intel CPUs; and (3) direct payments made to computer manufacturers to halt or delay the launch of products containing a competitor's CPUs.

That AMD was still able to compete and innovate was not sufficient to negate Intel's abuse of dominance. From an EU perspective, Intel's rebate practices led to consumers enjoying less choice and prevented AMD from competing on a level playing field. This led to a determination that Intel had abused its dominant position.

Extent of the FTC's case

Given that the EC and FTC kept "each other regularly and closely informed on the state of play of their respective Intel investigations ... and [shared] experiences on issues of common interest", it is not surprising that many of the FTC's allegations are reminiscent of the European case. But the sheer scope of the FTC's case exceeded the EU's. The FTC's complaint reached beyond CPUs: the FTC staff had determined that Intel had also sought to derail competition from makers of graphics processing units (GPUs). Also, the range of conduct the FTC found "unfair" extended well beyond what the EC identified. Albeit in language less violent than the New York attorney general's, the FTC complaint enumerated a broad range of allegedly illegitimate tactics to keep Intel's competitors' CPUs and GPUs from reaching end users, including the following:

- using market-share discounts that prevented customers from buying more than a set percentage of their CPUs from Intel's rivals;

** Christopher Kelly is a partner in – and Lisa Lernborg is an associate with – Mayer Brown*

- using volume discounts and bundled discounts (discounts on one product predicated on purchase of another product) that, in the FTC's view, amounted to below-cost pricing;
- threatening customers with the loss of benefits such as discounts, technical support, guaranteed supply and patent-liability indemnification if they bought any CPUs from competitors;
- inducing computer manufacturers that bought competitive CPUs to agree to use suboptimal means of distribution for the computers containing those CPUs;
- designing its software compiler to generate object code that ran less well on competitors' CPUs, attributing the performance difference to the competitors' CPUs rather than its compiler, and allowing industry benchmarks to be developed based on the compilers' work, unfairly damaging the competitiveness of rival CPUs;
- leading Nvidia, the leading GPU maker, to develop GPUs compatible with Intel CPUs, only to curtail interoperability once it saw the GPUs as potential substitutes for the CPUs themselves; and
- delaying standards development in order to skew the standards in its favour.

Beyond competitive harm

The FTC framed this conduct in section 2 terms, alleging that Intel maintained monopoly power in the relevant x86 CPU market and attempted to monopolise a GPU market. But what the FTC's administrative suit really describes is a rough, high-stakes competition between Intel and AMD, whose technological advances and aggressive marketing forced Intel to respond in kind. This could have meant trouble for a claim guided by Sherman Act principles. But Section 5 allows the FTC to "consider public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws".

The FTC's pure Section 5 gambit, freed from Sherman Act standards, has been criticised. As one commentator put it, reliance on Section 5 evaded "the strict requirements of proof of competitive harm embedded into section 2 of the Sherman Act". Observers also noticed that AMD's survival – and its own aggressive competitive responses to Intel (including continuing innovation) – made it hard to see the consumer harm that section 2 would have demanded. More generally, the notion of unfairness is in tension with traditional US antitrust law theory. In contrast, it appears explicitly in EU competition law. In article 102 TFEU, "unfair" describes a type of prohibited conduct. Moreover, in Michelin II, the Commission expressly referred to unfairness in characterising Michelin's rebate practices.

Thus liberated from the antitrust laws to pursue merely "unfair" conduct, the FTC sought even more extensive relief than the EC had obtained, ranging from prohibitions of the alleged misconduct to affirmative mandates on interactions with customers and competitors. Notably, though, the FTC did not seek to block pure volume-based discounts; its core objection was to the use of commitments that locked Intel's customers into limits on the chips that they would buy from Intel's rivals.

Prohibitions and affirmative duties

This carve-out for volume discounts is a key element of the relief that Intel agreed to in settling the FTC case. The consent order also explicitly allows Intel to win all of a customer's business if the customer has asked Intel to bid for it, and to enter into exclusive agreements with customers with which it has invested significantly in joint product development. The prohibitions FTC sought on near exclusivity are gone as well.

Even so, the consent order does contain much of the relief FTC sought. Intel may not (1) condition discounts and other customer benefits on exclusivity or on limitations on purchases of competitors' chips; (2) use bundled discounts or retroactive discounts that, under the Antitrust Modernization Commission/PeaceHealth test, would yield below-cost pricing; and (3) change any of its products so as to degrade competitive products without an improvement in the Intel product.

In addition, Intel must affirmatively:

- take extensive steps to remedy the compiler issue the FTC identified, including reimbursement of compiler customers for remedial modifications of their software;
- maintain interoperability for six years through a standard PCI bus interface, and provide an annual interface roadmap to Nvidia, its GPU competitor; and
- assist its competitors by (1) amending its licences to allow disclosure of certain licence rights to third-party foundries and customers, and (2) restraining its ability to enforce patent rights against them after a change in control.

These affirmative duties are highly unusual in the US: they appear to dictate conduct that would seem to undercut Intel's own incentives to invest in innovation. Ordinarily, for example, one would not expect a firm to risk antitrust exposure for terminating its licences to competitors that merge with customers to whom the firm has disclosed competitively sensitive information. But this is what the FTC decree does in forcing Intel to modify its licence terms. Similarly, a requirement that a firm maintain existing interfaces for a period of time appears fairly clearly to discourage innovation. The FTC, by its own account, "is concerned that Intel's past conduct has weakened AMD and [fellow x86 suppliers] Via".

One might have expected the EC to obtain relief like this; instead, it is the FTC that appears to have gone furthest to favour open competitive access to Intel's products over continued Intel innovation. But as the FTC itself has said, the consent order's terms "do not necessarily reflect the applicable legal standards under the Sherman Act, Clayton Act, or the FTC Act; indeed, the legal standards applicable to some of these practices remain unsettled by the Supreme Court and the federal courts of appeal".

Section 5 will be used again

Whether these legal standards "remain unsettled," or simply at odds with the FTC's policy views, the FTC-Intel settlement means that, for now, the US courts will not put the FTC's theories to the test. But the FTC is doubtless looking to develop more cases in winner-take-all, high-tech markets. If it succeeds, the FTC is virtually certain to utilise Section 5 again rather than subject itself, as the DoJ must, to the Sherman Act's rigours. Eventually, then, the FTC may force the issue as to whether US antitrust law, and not just one enforcement agency, is converging with EU competition law. Meanwhile, it remains to be seen if the AMD and FTC settlements will have any bearing on Intel's plans for its appeal against last year's EU decision.