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# Antitrust Issues in the European Union: Intel

RUSSELL ZIMMERER\*

## Abstract

*This article outlines the ongoing troubles of Intel Corporation in the European Union in relation to their accused violations of antitrust competition laws, set forth in Article 82 of the Treaty Establishing the European Community. The article then turns its focus to Intel's current status as a company in a "dominant position," as defined by the European Commission, and the rights and obligations that are associated with this. Additionally, the article addresses the European Commission's recent filing of a "Statement of Objections" – which states their belief in Intel's abuse of their dominant position in excluding their main rival, AMD, from the computer chip market. Finally, the article addresses the corresponding legal battle, possible ensuing penalties that may be levied against Intel, and the precedent set forth by the European Commission's battle with Microsoft.*

Antitrust issues in the European Union ("EU") are covered by the European Commission ("EC"), which is the EU's competition law enforcement agency and is "one of five major institutions intended to advance the goals of the EU."<sup>1</sup> In relation to the United States enforcement groups on antitrust issues, the EC can be compared to the "Antitrust Division, Federal Trade Commission ('FTC'), and state attorney general all wrapped into one."<sup>2</sup> However, "in many ways, EU antitrust powers are lacking when compared to those of the Department of Justice and Federal Trade Commission."<sup>3</sup> There are additional differences in the way the United States ("U.S.") deals with antitrust competition, "[s]pecifically the goal of U.S. antitrust law is the maximization of consumer welfare, while the EC protects competition by protecting competitors."<sup>4</sup> "European authorities and courts put a higher duty on dominant firms to deal fairly with their competitors," says Philip Marsden, a senior research fellow at the British Institute of International & Com-

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1. Jeffrey M. Peterson, *Unrest in the European Commission: The Changing Landscape and Politics of International Mergers for United States Companies*, 24 HOUS. J. INT'L L. 377, 381-84 (2002).

2. Robert E. Draba, *International Antitrust: Supreme Court Decides the Meaning of "Gives Rise to a Claim" and "Foreign Tribunal"*, 2 LOY. U. CHI. INT'L L. REV. 129, 138 (2004).

3. Peterson, *supra* note 1, at 400.

4. Eric S. Hochstadt, *The Brown Shoe of European Union Competition Law*, 24 CARDOZO L. REV. 287, 295-96 (2002) (footnote omitted).

parative Law. "They want to foster gentlemanly competition, a premise that is foreign to American antitrust thinking."<sup>5</sup>

The EU protects this competition under Article 82 ("Article 82") of the Treaty Establishing the European Community ("Treaty").<sup>6</sup> Article 82 states, "any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market."<sup>7</sup> The European Court of First Instance stated:

An abuse is an "objective concept referring to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."<sup>8</sup>

For a violation to be brought under Article 82, the following elements must occur: (1) "a dominant position in a relevant product and geographic market within the common market;" (2) "an abusive act; and" (3) "a potential appreciable effect on trade between Member States."<sup>9</sup> A dominant position is based on the product at issue and what geographic markets it has available to it.<sup>10</sup> "[T]he relevant product market is deemed to include all products that are interchangeable with the product in question. The relevant geographic market comprises 'an area where the objective conditions of competition must be the same for all traders,' and will normally be a single Member State, a group of Member States, or the whole of the European Union."<sup>11</sup> The court in the *Michelin* case held that "[f]or the purposes of establishing an infringement of Article 82 EC, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect."<sup>12</sup> Article 82 does not state what makes a company dominant, or what percentage of the market share they

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5. Jennifer L. Schenker, *Intel's in Hot Water*, Sept. 21, 2007, [http://www.businessweek.com/globalbiz/content/sep2007/gb20070921\\_968706.htm?chan=top+news\\_top+news+index\\_businessweek+exclusives](http://www.businessweek.com/globalbiz/content/sep2007/gb20070921_968706.htm?chan=top+news_top+news+index_businessweek+exclusives) (last visited Sept. 13, 2008). Compare this with the premise established in the United States in *Verizon Comm'ns v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (stating "the mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct").

6. Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 349) 3, art. 82. A consolidated version of this treaty can be found at: [http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C\\_2002325EN.003301.html](http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html) (last visited Sept. 29, 2007).

7. *Id.*

8. Case T-203/01 *Michelin v. Commission*, 2003 ECR II-4017

9. James S. Venit, *EU Competition Law—Enforcement and Compliance: An Overview*, 65 ANTITRUST L.J. 81, 83-84 (1996) (discussing Article 86 of the Treaty of Rome, which is now Article 82).

10. *Id.* at 84.

11. *Id.*

12. *Michelin*, *supra* note 8, at 239

must have to be considered dominant.<sup>13</sup> A company with a market share of 50 percent or more, however, will be presumed to be dominant.<sup>14</sup> Indeed, “dominance may be found with market shares between 40 or 50 percent, or even lower.”<sup>15</sup> If a company has a dominant position there is “a special responsibility not to allow its conduct to impair competition on the common market.”<sup>16</sup>

Article 82 lays out a few examples of such market abuse, and as such prohibits the following: imposing unfair purchase or selling prices, limiting production or market/technical developments to the prejudice of consumers, discriminating against trading parties (“applying dissimilar conditions on equivalent transactions”), and imposing additional, unrelated contractual terms to acceptance of the contract when they have no connection or basis with the contract.<sup>17</sup> Note that this list is not all inclusive and does not rule out other types of market abuse.

The EC has relied heavily on Article 82 to protect competition in the marketplace when dealing with abusive conduct by companies. EC Commissioner Neelie Kroes has made sure of that, pledging:

I will rigorously enforce the Treaty’s prohibition on abusive conduct. Dominant companies should be allowed to compete effectively. Putting this policy objective into a consistent legal and economic framework is an ambitious project, but it is worthwhile for the clarity it will give to companies and their advisers. Our fundamental aim is to ensure that the EU’s powers to intervene against monopoly abuses are applied consistently and effectively, not only by the Commission but also by national competition agencies and courts throughout the EU which also now apply EU competition law.<sup>18</sup>

When the EC finds that an Article 82 violation has occurred, it will conduct its investigation and upon a finding that a formal inquiry is needed, will issue a “Statement of Objections.” The European Commission has clarified that “[a] Statement of Objections is a formal step in Commission antitrust investigations in which the Commission informs the parties concerned in writing of the objections raised against them. The addressee of a Statement of Objections can reply in writing [or request a hearing] to the Statement of Objections, setting out all facts known to it which are relevant to its defense against the objections raised by the Commission.”<sup>19</sup>

Intel is a company incorporated in the United States, and its products include chips, boards, and other semiconductor products that are the building blocks integral to com-

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13. Stefan Schmitz, *The European Commission’s Decision in GE/Honeywell and the Question of the Goals of Antitrust Law*, 23 U. PA. J. INT’L ECON. L. 595 (2002).

14. Venit, *supra* note 9, at 86.

15. *Id.*, at 84. , Case T-219/99 British Airways v. Commission, 2003 E.C.R. II-5917 (stating that a market position of thirty-nine percent was a dominant market position).

16. *Michelin*, *supra* note 8, at 230.

17. Treaty Establishing the European Community, art. 82, *supra* note 6.

18. European Commission Competition Statement: Article 82 Review, *available at* <http://ec.europa.eu/comm/competition/antitrust/art82/index.html> (last visited Sept. 29, 2007).

19. Press Release, European Commission Competition Committee, Competition: Commission Confirms Sending of Statement of Objections to Intel, *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/314&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited Sept. 13, 2008) [hereinafter ECCP Press Release].

puters, servers, handheld devices, and networking and communications products.<sup>20</sup> Intel's main, if not only, competitor in the field of semiconductor products is Advanced Micro Devices ("AMD"). AMD feels that:

Intel has bullied its customers—particularly PC manufacturers—through financial threats and intimidation into entering exclusive deals, conditioning rebates on avoidance of AMD products and with threats of retaliation. These PC manufacturers now operate on small or negative margins, making them continually susceptible to Intel's economic coercion; and Intel perpetuates its hold over them to the detriment of customers and consumers who are unable to select AMD products. Intel then exacerbates PC manufacturers' financial weakness by charging monopoly prices. This trickles down to consumers, who are forced to pay monopoly prices while at the same time they are denied the freedom to choose from a full range of products.<sup>21</sup>

Apparently the EC agrees. The EC sent a Statement of Objections to Intel on July 26, 2007 regarding antitrust issues with AMD. The EC confirmed that the "Statement of Objections outlines the Commission's preliminary view that Intel has infringed the EC Treaty rules on abuse of a dominant position (Article 82) with the aim of excluding its main rival, AMD, from the x86 Computer Processing Units (CPU) market."<sup>22</sup> The CPU market at issue is a market in which "Intel is alleged to hold worldwide market share measured as 80 [percent] of the market in units and 90 [percent] of the market in revenues.[FN<sup>23</sup>] This market share clearly meets the dominant market position required to be at issue under Article 82. In the Statement of Objections, the EC has accused Intel of the following:

First, Intel has provided substantial rebates to various Original Equipment Manufacturers (OEMs) conditional on them obtaining all or the great majority of their CPU requirements from Intel. Secondly, in a number of instances, Intel made payments in order to induce an OEM to either delay or cancel the launch of a product line incorporating an AMD-based CPU. Thirdly, in the context of bids against AMD-based products for strategic customers in the server segment of the market, Intel has offered CPUs on average below cost.<sup>24]</sup>

The EC has stated that "these three types of conduct are aimed at excluding AMD from the market. Each of them is provisionally considered to constitute an abuse of a dominant position in its own right."<sup>25</sup> It should additionally be noted that the EC is also "considers that the three types of conduct could reinforce each other" and as such be "part of a single anti-competitive strategy."<sup>26</sup>

In response to the EC decision to issue the Statement of Obligations to Intel, Intel's General Counsel stated:

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20. Intel company description is available at [www.intel.com](http://www.intel.com).

21. News Release, AMD, Demand Fair and Open Competition, *available at* [http://www.amd.com/us-en/Weblets/0,,7832\\_12670\\_13443,00.html](http://www.amd.com/us-en/Weblets/0,,7832_12670_13443,00.html) (last visited Sept. 13, 2008).

22. ECCC Press Release, *supra* note 19.

23. *In Re Intel Corp. Microprocessor Antitrust Litig.*, 562 F. Supp. 2d 606 (D.Del. 2008).

24. *Id.*

25. *Id.*

26. *Id.*

We are confident that the microprocessor market segment is functioning normally and that Intel's conduct has been lawful, pro-competitive, and beneficial to consumers. While we would certainly have preferred to avoid the cost and inconvenience of establishing that our competitive conduct in Europe has been lawful, the Commission's decision to issue a Statement of Objections means that at last Intel will have the opportunity to hear and respond to the allegations made by our primary competitor. The case is based on complaints from a direct competitor rather than customers or consumers. The Commission has an obligation to investigate those complaints. However, a Statement of Objections contains only preliminary allegations and does not itself amount to a finding that there has been a violation of European Union law. Intel will now be given the chance to respond directly to the Commission's concerns as part of the administrative process. The evidence that this industry is fiercely competitive and working is compelling. When competitors perform and execute the market rewards them. When they falter and under-perform the market responds accordingly.<sup>27</sup>

AMD has applauded the issuance of the Statement of Objections, stating that "[c]onsumers know today that their welfare has been sacrificed in the illegal interest of preserving monopoly profits. . . . The EU action obviously suggests that Intel has, once again, been unable to justify its illegal conduct."<sup>28</sup> Intel has pointed out that receiving a Statement of Obligations is a far cry from being found guilty of anticompetitive behavior.<sup>29</sup>

While a true statement, this is likely the beginning of a long and expensive legal battle—just ask Microsoft. Microsoft was the target of an EC antitrust investigation in 2004 on this same issue—abuse of a dominant market position.<sup>30</sup> The Microsoft decision dealt with Microsoft being fined €497 million (\$686 million) “for infringing the EC Treaty rules on abuse of a dominant market position (Article 82) by leveraging its near monopoly in the market for PC operating systems onto the markets for work group server operating systems and for media players” resulting in conduct that hindered innovation in the markets to the detriment of consumers.<sup>31</sup> Microsoft challenged the imposition of such a substantial fine, but the EU Court of First Instance upheld the fine.<sup>32</sup> When a company is found guilty of abusing a dominant market position in violation of Article 82, the remedy is the imposition of substantial fines.<sup>33</sup>

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27. News Release, Intel, Intel States its Actions in Europe Benefit Customers (July 7, 2007), available at [http://www.intel.com/pressroom/archive/releases/20070727corp.htm?iid=pr1\\_releasepri\\_20070727r](http://www.intel.com/pressroom/archive/releases/20070727corp.htm?iid=pr1_releasepri_20070727r) (last visited Sept. 29, 2007).

28. Press Release, AMD, European Commission (EC) Charges Intel with Antitrust Violations (July 27, 2007), available at [http://www.amd.com/us-en/Corporate/VirtualPressRoom/0,,51\\_104\\_543-118586,00.htm](http://www.amd.com/us-en/Corporate/VirtualPressRoom/0,,51_104_543-118586,00.htm) (last visited Sept. 13, 2008).

29. Intel News Release, *supra* note 27.

30. Press Release, European Commission Antitrust Committee, Commission Welcomes CFI Ruling Upholding Commission's Decision on Microsoft's Abuse of Dominant Market Position (Sept. 17, 2007), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/359&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited Sept. 29, 2007) [hereinafter Commission Welcomes CTF Ruling].

31. *Id.*

32. *Id.*

33. Treaty Establishing the European Community, art. 82, *supra* note 6.

The EC has stated that fines are “of utmost importance in deterring companies from breaking [antitrust] competition rules.”<sup>34</sup> Under the guidelines set forth, for each infringement the basis amount of the fine is to be “based on a percentage of its yearly sales of the product relating to the infringement, in the geographic area concerned, and may be up to 30 [percent] of the relevant sales. . . . [i]n the case of repeat offenders, the EC may increase the fines by up to 100 [percent],” with each prior being used as justification.<sup>35</sup> Fines however, are not the only enforcement option available—treaty rules allow for injunctive relief, as well as damages.<sup>36</sup>

Damages can serve several purposes in antitrust law, mainly to compensate those who have suffered a loss as a result of the infringing anti-competitive behavior and to be used as a deterrent, thus contributing to maintenance of effective competition in the marketplace.<sup>37</sup> Current EC Commissioner Neelie Kroes has found damages to be the right result, stating “businesses and consumers in Europe have a right to damages if they have lost out as a result of the anti-competitive behavior of others”<sup>38</sup> The Courts have agreed. The Court of Justice of the European Communities has found that “effective protection of the rights granted by the Treaty requires that individuals who have suffered a loss arising from an infringement of Articles 81 or 82 have the right to claim damages.”<sup>39</sup> Most recently, in the Microsoft case, the EC had its powers to fix fines and payments challenged. The EC responded by imposing an additional definitive penalty payment of €280 million for non-compliance of the 2004 antitrust competition decision, a decision which was upheld by the European Court of First Instances (the “Court of First Instances”).<sup>40</sup>

With the Court of First Instances ruling supporting their findings, the EC could have a newfound confidence in dealing with Intel. As stated earlier, the EC has reserved the right to impose heavier fines and penalties when a company has repeat offenses. The Court of First Instances has stood behind the EC, stating:

[T]he fact that in the past the Commission imposed fines of a particular level for certain types of infringement does not mean that it is estopped from raising that level, within the limits set out in Regulation No 17 and in the Guidelines, if that is necessary in order to ensure the implementation of Community competition policy.”<sup>41</sup>

Intel is a company that has repeat offenses. It has found itself repeatedly in the crosshairs of antitrust enforcement proceedings. AMD has filed formal complaints with the EC, as well as with the respective commissions in Japan, South Korea, and Germany.<sup>42</sup> Most

34. European Union Preparatory Acts, Report from the Commission: Report on Competition Policy EU: COM (2007) 358 (June 25, 2007) [hereinafter Report on Competition Policy].

35. *Id.*

36. Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, EU: COM (2005) 672.

37. *Id.*

38. Commissioner Neelie Kroes, European Commission Competition Statement, Actions for Damages, available at <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/index.html> (last visited Sept. 29, 2007).

39. *Id.*

40. See Report on Competition Policy, *supra* note 34. See also Commission Welcomes CTF Ruling, *supra* note 30.

41. *Michelin*, *supra* note 8, at 254.

42. Simon Aughton, *Intel Charged with Abusing Market Position by EU*, available at <http://www.itpro.co.uk/news/121225/intel-charged-with-abusing-market-position-by-eu.html> (last visited Sept. 29, 2007).

recently, "South Korea's Fair Trade Commission has completed its two year-long investigation into business practices of Intel, and concluded that the company violated South Korean antitrust regulations."<sup>43</sup> In particular, the South Korea Fair Trade Commission "focused on rebates the chipmaker offered to computer manufacturers as a way to steer them away from products from rival companies like AMD."<sup>44</sup>

Additionally, in 2005, Japan found Intel guilty of antitrust practices, stating that "Intel abused its monopoly power to exclude fair and open competition, violating Section 3 of Japan's Antimonopoly Act," a result that Intel did not dispute.<sup>45</sup> In that case, Japan's Fair Trade Commission found that Intel coerced one manufacturer to buy 100 percent of its CPUs from Intel, while another manufacturer was forced to curtail its non-Intel purchases to 10 percent or less.<sup>46</sup> In Japan, the mechanisms used to achieve these results included various rebates and marketing practices, including "the 'Intel Inside' program and market development funds provided through Intel's corporate parent in the United States."<sup>47</sup> At this time, AMD Japan is currently seeking over fifty-five million dollars in damages from the antitrust issue in Japan alone.<sup>48</sup> These practices employed by Intel, if found in the EC case, would also clearly violate Article 82's prohibitions.

This all comes at a time when AMD has filed several pending litigations against Intel. AMD filed suit in U. S. Federal Court in 2006, alleging the same types of anti-competitive behavior. In the U. S. case, AMD is again alleging antitrust infringements and monopolistic behavior in violation of the Sherman Act, which is the U. S. equivalent to Article 82. The Sherman Act, in relevant parts, states:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding ten years, or by both said punishments, in the discretion of the court.<sup>49</sup>

The difference in the nature and scope of the fines are astounding, as the United States is far more lenient. Notice that under the U. S. code Intel can only be fined a maximum of \$100 million dollars.<sup>50</sup> This is relatively small in comparison to the past fines the EC has shown they can levy, as exemplified by the almost one billion dollars they fined Microsoft.

43. Geoff Duncan, *Intel Violated South Korea Antitrust Laws* DIGITAL TRENDS, Sept. 11, 2007, available at [http://news.digitaltrends.com/news/story/14146/intel\\_violated\\_south\\_korea\\_antitrust\\_laws](http://news.digitaltrends.com/news/story/14146/intel_violated_south_korea_antitrust_laws) (last visited Sept. 13, 2008).

44. *Id.*

45. Press Release, AMD News Room, Tokyo District Court Denies Intel K.K. Argument To Keep Evidence Obtained By JFTC of Illegal Business Practices From The Public Record (Dec. 16, 2005), available at [http://www.amd.com/us-en/Corporate/VirtualPressRoom/0,,51\\_104\\_543-103376,00.html](http://www.amd.com/us-en/Corporate/VirtualPressRoom/0,,51_104_543-103376,00.html) (last visited Sept. 29, 2007). See also *AMD Japan K.K. v. Intel K.K.*, Case No. Heisei 17(Wa) No. 13151 (Tokyo Dist. Ct. June 30, 2005); *AMD Japan K.K. v. Intel K.K.*, Case No. Heisei 17(Wa) No. 4 (Tokyo High Court June 30, 2005).

46. *AMD Japan K.K.*, Case No. Heisei 17(Wa) No. 4.

47. *Id.*

48. The Associated Press, *AMD Japan Seeks \$55 from Intel Japan*, available at [http://www.amd.com/us-en/assets/content\\_type/DownloadableAssets/AP\\_0605\\_1.pdf](http://www.amd.com/us-en/assets/content_type/DownloadableAssets/AP_0605_1.pdf) (last visited Oct. 7, 2007).

49. Sherman Act, 15 U.S.C. § 2 (2004).

50. *Id.*

An economic study issued by Dr. Michael A. Williams, Director, ERS Group, found that Intel has extracted monopoly profits from microprocessor sales of more than sixty billion dollars in the period 1996-2006.<sup>51</sup> Dr. Williams said, "Intel has extracted \$60 billion in monopoly profits over the past decade; over the next decade consumers and computer manufacturers would save over \$80 billion from a fully competitive market."<sup>52</sup> Looking at what Article 82 allows for the EC to do in respect to fines, those figures could lead to a penalty of up to \$20 billion dollars. Intel has stated that they look forward to the EC inquiry and the opportunity to clear itself, but this could turn out to be a very costly accusation. The EC has shown it can and will protect consumers and foster competition—just ask Microsoft.

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51. Press Release, AMD News Room, New Economic Study Finds Intel Extracted Monopoly Profits of \$60 Billion Since 1996, *available at* [http://www.amd.com/us-en/Corporate/VirtualPressRoom/0,,51\\_104\\_543~118720,00.html](http://www.amd.com/us-en/Corporate/VirtualPressRoom/0,,51_104_543~118720,00.html) (last visited Oct. 7, 2007).

52. *Id.*