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On May 13th the European Commission levied a fine of $1.45 billion on Intel for violating its competition law rules by offering volume-based rebates to dealers and to computer manufacturers. The rebates were deemed to have excluded Intel's rival, AMD, from the market for computer chips. Intel is also alleged to have pressured dealers and manufacturers to set limits on the quantity of AMD chips that they would purchase.

The case raises troubling issues when compared to American antitrust law, with respect to procedure and with respect to its impact on the competitive incentives of large firms.

There are questions of interpretation and evidence here, as in any other case. Intel disputes the claims that they set limits on AMD chips and that they acted with an intention to exclude AMD. From Intel's perspective, this is just a case of price competition. The EC has pitched the case as one of exclusionary dealing involving several anticompetitive strategies.

Questions of interpretation and evidence are best left to the courts. As a commentator looking at the case from a distance, I have little worthwhile to offer on the substance of these issues. However, one point I think is worth noting is that there is a process for evaluating questions of evidence and interpretation in the EU that appears to be quite different from that in the United States.

The process at the European Commission is one that many Americans would view as combining the roles of prosecutor, judge, and jury. The EC's findings, on questions of evidence and interpretation of facts, have not been presented and tested in an independent court. Moreover, when the EC finally ends up in an independent court, the Court of First Instance, strict deference doctrines come into play requiring the Court of First Instance to accept the findings, the interpretation, and the analysis of the EC. These deference principles would continue to apply if Intel appealed to the European Court of Justice. It is unclear that the EC's evidence, or interpretation of its own evidence, will ever be rigorously examined.

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This is a troubling approach. If it were adopted in the United States (and at one time it was adopted under the early version of the National Labor Relations Act), it would lead to due process challenges, and probably would be overturned on constitutional grounds. The challenges could be cast as separation of powers issues or as matters of fundamental fairness, but at its core the issue comes down to having a single entity assert control over the prosecution of its case and the assessment of its analytical merit.

EC officials are not troubled because they view themselves as an independent scientific body, relatively invulnerable to any biases that might seep in from a desire to win their own cases. That view would be considered unacceptable in U.S. courts. Even though the Federal Trade Commission ("FTC"), our closest equivalent to the EC, views itself as scientific in approach, it gets rough handled on a regular basis on questions of evidence and proof in American courts. Occasionally it loses its cases because it cannot prove its own factual allegations before an Administrative Law Judge or in a federal court. And once the FTC finds itself in a federal appellate court, there is in most cases very little deference given to the agency on questions of fact, interpretation of evidence, or analysis. Admittedly, the D.C. Circuit recently enhanced the FTC's power in the *Whole Foods* case, but that enhancement is limited to merger enforcement and to the narrow though important matter of preliminary injunctions. In cases in which the FTC prosecutes under Section 5 of the FTC Act, it still enters courts that have shown no tendency to defer to its analysis.

The troubling features of the EC process imply that as much as Intel may differ with and complain about the way the EC has pitched the case (as exclusion rather than price predation), it may never get a chance to rigorously examine this issue in court. The factual and interpretive underpinnings of the case examined on appeal, if Intel chooses to appeal, will be those constructed by the EC. And while the Court of First Instance has shown a willingness in the recent past to send merger cases back to the EC on the ground that it had not presented sufficient evidence to supports its allegations, it has had a consistent record of deference in monopolization cases. In short, the EU appeals process, on matters of monopolization, does not appear to go very deeply into the core of the case—into questions of evidence, interpretation, analysis, and proof. The result is a process that is relatively biased (in comparison to the United States) in favor of the enforcement agency.

If we step away from the issues of process and evidence and look at this case as one involving volume discounts, then we see an immediate conflict with U.S. law on monopolization. The U.S. Supreme Court examined monopolization through volume discounts, similar to the ones offered by Intel, in *Brooke Group v. Brown and Williamson*. The Court said in *Brooke Group* that in order to maintain a predation action, the plaintiff

has to show that the defendant set its price below its own incremental cost, and that market conditions suggest that the defendant will be able to recoup the losses it suffered from pricing below cost.

The *Brooke Group* test was designed precisely to screen out a large number of predatory pricing claims. The goal of the test is to permit only those claims in which there is a plausible likelihood of intentional consumer harm to proceed all the way to a final judgment in court. The test aims to set stringent requirements that prevent plaintiffs from using ambiguous evidence on the firm's conduct—for example, the mere fact that it cut its prices—as evidence of anticompetitive intent. The test is an objective screen, in the sense that its application is not affected by subjective evidence (such as memoranda, emails, etc.) suggesting that the defendant had an intention to exclude its rival.

The EC's decision in Intel appears not to impose such requirements and to be based largely on the inference that Intel's conduct suggested an intention to exclude a rival. The use of ambiguous evidence to infer an intention to exclude is precisely what the Supreme Court tried to prevent lower courts from doing in *Brooke Group*. Moreover, the distance from the United States in terms of the law is amplified by the process issues discussed above; specifically, the deference principles adopted by the EU courts.

The *Brooke Group* decision sent a strong signal to large firms that they would not be prosecuted under the U.S. antitrust laws for price competition. The Intel case weakens that signal, so much so that it would not be a great exaggeration to say that it reverses *Brooke Group*, at least for those firms that have to compete in the global market.

This is undesirable because there were good reasons for the *Brooke Group* test: the difficulty of distinguishing price predation from price competition as well as the substantial costs of false convictions for predation. The *Brooke Group* test sought to reduce uncertainty and to reduce the costs of false convictions. One major cost of false convictions is the discouragement of price competition.

The Intel decision, coupled with the U.S. Assistant Attorney General Varney's repudiation of the 2008 Section 2 report, have combined to magnify the uncertainty associated with trans-Atlantic monopolization law. The consumer welfare effects are ambiguous as a general matter. On one hand, consumers might gain to the extent that big firms are discouraged by the legal uncertainty from taking steps that exclude competitors. On the other hand, consumers may lose to the extent firms refrain from competing vigorously.

But in some particular areas, the consumer welfare effects are easier to identify. In areas involving typically pro-competitive conduct, such as price cuts, the discouragement of competition is likely to be more costly than the compliance effect.

The reason, as Frank Easterbrook famously noted, is that competition still remains in effect, in most cases, when firms gain monopoly power through anticompetitive conduct. But when firms are deterred from competition by the threat of punishment, then competition is suspended. Moreover, when the law discourages firms from competing, it becomes a tool that is used by some firms to distort and further weaken market competition.

The one benefit that I can see as a certain result of the emerging trans-Atlantic antitrust enforcement regime is that this is a good time to be an antitrust lawyer. The wages of antitrust lawyers will rise relative to others as firms seek their advice on how to do business on a global market. I suspect enrollment in the antitrust course I teach will increase as market signals find their ways to students. I suspect consumers in general will be poorer, but the prospects for antitrust specialists look good.