

GCP

THE ONLINE MAGAZINE FOR GLOBAL COMPETITION POLICY

Headline-Grabbing Intel Fine Hides Article 82 EC Enforcement Concerns

**Hazel Pearson
Sidley Austin LLP**

Headline-Grabbing Intel Fine Hides Article 82 EC Enforcement Concerns

Hazel Pearson¹

The recent decision by the European Commission to impose on the world's largest semiconductor chip manufacturer, Intel Corporation, an eye-watering EUR 1.06 billion fine for breaching EC competition law made headlines around the world. Announcing the fine, Competition Commissioner Neelie Kroes emphasized the seriousness of the offences saying, "Intel has harmed millions of European consumers by deliberately acting to keep competitors out of the market for computer chips for many years."

The Commission's decision has not yet been published and so it is difficult to draw any firm conclusions from the Intel fine and decision at this stage. However, press releases indicate that the Commission found that Intel had breached Article 82 of the EC Treaty by abusing its dominant position in the market for a type of computer chip called the x86 central processing unit (CPU). The Commission presents the Intel decision as a classic application of European competition law to rebate practices that, as described by the Commission, seem to be uncomplicated breaches of the rules. Despite this, the Commission's investigation took over eight years, during which Intel was able to continue its illegal practices. The case therefore raises significant questions about the effectiveness of the Commission's enforcement policies and practices.

The Commission started investigating Intel's rebate practices in 2000 after receiving a complaint from Intel's only significant competitor for x86 CPUs, Advanced Micro Devices, Inc. ("AMD"). The Commission's investigation found that between October 2002 and December 2007 (the infringement period), Intel had a market share of at least 70 percent.

The Commission found that Intel had committed two main types of illegal behavior:

¹ Associate, Sidley Austin LLP, Brussels. The views expressed in this article are exclusively those of the author and do not necessarily reflect those of Sidley Austin LLP, its partners, or clients. This article has been prepared for academic purposes only and does not constitute legal advice. This article is based on statements by the European Commission about its May 13, 2009 decision in COMP/37.990 Intel. No view is expressed as to whether the Commission's decision is correct. The author would like to thank Stephen Kinsella for his valuable comments.

1. Intel gave loyalty-building rebates to computer manufacturers on condition that they bought all or almost all of their computer chips from Intel

These rebates were often not mentioned in the formal contracts with Intel's computer manufacturing customers (including Acer, Dell, HP, Lenovo, and NEC), but the Commission found evidence of them during its investigation. The Commission reportedly collected a huge volume of contemporary evidence showing a co-ordinated strategy by Intel to try to force AMD out of the market for CPUs. For example, the Commission found that Intel gave one manufacturer ("Manufacturer B") rebates conditional on Manufacturer B purchasing no less than 95 percent of its CPU needs for business desktop computers from Intel.²

The Commission has taken great pains to point out that it does not object to rebates (and, specifically, volume rebates) by themselves, but rather to the conditions that Intel attached to them. Intel apparently structured its rebates so a customer would have to buy all or almost all of its CPUs from Intel. If the customer instead bought a significant proportion of its CPUs from AMD, the customer would lose the Intel rebate, not just for those CPUs it had bought from AMD, but also for the much larger volume of CPUs that it would have to buy from Intel. The Commission reports one instance where AMD offered a particular customer one million free CPUs, but the computer manufacturer only accepted 160,000: if the manufacturer had taken the one million free CPUs from AMD, it would have lost the benefit of Intel's rebates on its many millions of other CPU purchases.

2. Intel made payments to computer manufacturers to halt or delay the launch of specific products containing competitors' CPUs

The Commission's eight-year investigation also found that Intel had made direct payments to various computer manufacturers—unrelated to any particular purchases from Intel—on condition that the manufacturers cancel or delay the launch of products containing AMD chips and/or restrict their distribution. For example, Intel made payments to Manufacturer B on condition that it:

- Sold AMD-based business desktops only to small and medium enterprises;
- Sold AMD-based business desktops only via direct distribution channels (as opposed to via distributors); and
- Postponed the launch of its first AMD-based business desktop in Europe by six months.

² "Commission imposes fine of EUR 1.06 bn on Intel for abuse of dominant position; orders to cease illegal activities", Commission Press Release IP/09/745, dated 13 May 2009.

In addition, the Commission also found evidence of “naked restrictions” where Intel made payments directly to at least one major European retailer, MediaMarkt, on condition that it stock PCs containing Intel chips only.

On May 13, 2009, the Commission fined Intel EUR 1.06 billion for these very serious infringements of Article 82 EC and ordered it to cease its illegal behavior. Within hours of being informed of the Commission decision, Intel issued a statement contesting the Commission’s findings and announcing that it would appeal the decision to the European Courts.

The Commission’s Intel decision made news headlines around the world for the size of its fine. It is the highest ever fine imposed on a single company for breach of EC competition law. The fine is the first to exceed EUR 1 billion, and is significantly higher than the EUR 896 million fine imposed by the Commission on Saint-Gobain in 2008 for its role in the car glass cartel³ and Microsoft’s 2004 EUR 497 million fine for breaching Article 82 EC by bundling Windows Media Player into Windows Operating System and refusing to supply certain interoperability information.⁴

Despite this, it is questionable whether the fine is actually as high as it seems at first glance. Under EC law, the Commission is entitled to impose fines that are proportionate to the offence, so long as they do not exceed 10 percent of a company’s worldwide group turnover in the preceding business year.⁵ Under the Commission’s comparatively new fining guidelines from 2006,⁶ the calculation of a fine takes into account the market affected by the infringement, and the duration and gravity of an infringement, among other factors. According to the Commission, the Intel fine is calculated on the basis of the value of Intel’s x86 CPU sales in the European Economic Area (“EEA”). In this case, the infringement was obviously very serious and lasted five years and three months. However, the fine represents only 4.15 percent of Intel’s 2008 “relevant” turnover of EUR 25.5 billion.

Without the non-confidential version of the Intel decision, it is impossible to know the reasoning behind the level of the Intel fine or to reach conclusions about how it might compare to others imposed under the Commission’s 2006 fining guidelines. To date, very few decisions imposing fines under the 2006 guidelines have been published.

³ “Commission fines car glass producers over EUR 1.3 billion for market sharing cartel”, Commission Press Release IP/08/1685, dated November 12, 2008.

⁴ “Commission concludes on Microsoft investigation, imposes conduct remedies and a fine”, Commission Press Release IP/04/382, dated March 24, 2004. In addition to the original EUR 497 million fine, Microsoft was subsequently fined a further EUR 280.5 million in July 2006, and EUR 899 million in February 2008 for failing to comply with the original March 2004 Commission decision. See “Commission imposes EUR 899 million penalty on Microsoft for non-compliance with March 2004 Decision”, Commission Press Release IP/08/318, dated February 27, 2008.

⁵ Article 23(2) of Council Regulation (EC) No 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L1/1.

⁶ Commission Notice – “Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003”, OJ [2006] C210/2.

Even when a non-confidential version has been published, it is often so heavily redacted that it is virtually impossible to deduce general principles that could apply in future cases.⁷

The non-confidential version of the Intel decision is not expected to be published for many months. October 2009 has been posited as a possible date for publication, but the decision is 542 pages long, and if Intel continues to negotiate the redactions in the same spirited manner in which it conducted its defense,⁸ this date could easily slip further.

The Commission has in the past imposed fines that represented a higher percentage of a company's turnover. In general, higher percentage fines have tended to be imposed on smaller companies involved in cartels. In one case decided under the previous fining guidelines, a fine of between 9 and 10 percent of the company's group global revenues was imposed on a company with revenues of less than EUR 500 million per year.

Moreover, it seems likely that, had the Intel fine been imposed a year ago, before the financial crisis, it would have been significantly higher. By this reasoning, the Intel fine starts to look rather less breathtaking—an attitude reflected in the fact that both Intel and AMD's share prices barely moved on the announcement of the Commission's decision.

The markets' apparent lack of concern regarding the Intel fine also raises questions about what long-term impact the Commission's decision can have on the CPU market. Beyond any anticompetitive behavior by Intel, AMD has a more significant and persistent problem: In the CPU market there are vast efficiencies to be generated from scale and Intel is far larger than AMD. This is reinforced by "Moore's Law" (named after Gordon Moore, Intel's co-founder), which states that the number of transistors on computer chips will double approximately every two years. Intel is estimated to spend more than four times as much on Research & Development ("R&D") and innovation as AMD does. Under EC competition law, short of imposing structural remedies (which is virtually unheard of in the context of Article 82 EC), the Commission can only impose fines and prohibit anticompetitive behavior. In such circumstances, it is difficult to see what impact a decision by the Commission—even one accompanied by a fine the size of Intel's—could have on the long term competitive structure of the x86 CPU market.

⁷ See, for example, Commission decision of November 28, 2008 in Case COMP/39165, Flat Glass Cartel, recitals (470) to (552).

⁸ For instance, in October 2008, Intel brought a novel case before the Court of First Instance ("CFI") challenging the Commission's refusal to grant it access to certain documents it said were critical to its rights of defence, and asking to be given longer to respond to the Commission's supplementary Statement of Objections. Intel's claim for interim measures was rejected by the CFI in January 2009. See Order dated January 27, 2009 in Case T-457/08 R *Intel v Commission*.

The Intel decision also raises questions about the Commission's ability to adequately enforce EC competition law. According to the Commission, the Intel case is actually a fairly classic application of the rules on abuse of dominance and rebates under Article 82 EC. The infringements complained of in the decision do not appear to raise novel legal questions, and it seems that some of the more controversial allegations were dropped from the final Commission decision. For instance, the July 2007 Statement of Objection also alleged that Intel was guilty of predatory pricing by offering CPUs at below-cost when bidding against AMD-based products for strategic customers in the server segment of the market. However, predatory pricing can be difficult to prove and, so far as we know, this charge is not included in the final Commission decision.

Despite a comparatively clear-cut application of the rules on rebates, a reasonably straight-forward market (a stable duopoly), and the fact that the Commission clearly feels confident that its decision will survive an appeal, the Commission still took over eight and a half years to take a decision. Moreover, AMD had to file three complaints and sets of evidence with competition authorities.⁹

Given these facts, the Intel case looks like an ideal candidate for the imposition of interim measures, but none were imposed. Under Article 8 of Regulation (EC) No. 1/2003, the Commission has the power to adopt temporary interim measures in "cases of urgency due to the risk of serious and irreparable damage to competition." Yet, this power is very rarely used. In fact, since the entry into force of Regulation (EC) No. 1/2003 in 2004, the Commission has not adopted a single interim measures decision under Article 8, although it had adopted interim measures previously.

It seems that there is a serious disconnect between the claimed seriousness of the behavior, the supposedly abundant evidence and the allegedly straight-forward nature of the abuse on the one hand, and the fact that it took the Commission so long to actually do anything to prevent the abuse occurring on the other. Interim measures imposed by the Commission at an early stage of its investigation could have encouraged Intel to end its anticompetitive practices considerably earlier. The Intel case strongly suggests that there is something seriously wrong with the way that EC competition law, and the rules on unilateral conduct in particular, are enforced by the Commission.

Finally, Intel and companies in similar positions would do well to remember that competition law enforcement is now a global phenomenon. Intel's rebate policies have already been condemned by the competition authorities in Japan in 2005 (where no fine was imposed), and in Korea in 2008 (where Intel was fined US\$ 25 million). More significantly, the European Commission's decision seems likely to spur the U.S. antitrust authorities to renewed action: Intel's rebate practices are currently being investigated by

⁹ In 2004, AMD also went to the U.S. Supreme Court to get a ruling requiring Intel to disclose to the European Commission certain documents originally relating to a U.S. patent and antitrust violation case. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

the Federal Trade Commission and a number of state authorities. Intel also faces a class action damages claim consolidated by AMD that is due in court in 2010. AMD will no doubt look forward to using the Commission's decision against Intel as a helpful precedent—if and when the non-confidential version is eventually published.

TIMELINE

1. Oct. 2000 AMD submits first complaint about Intel to the Commission
2. Oct. 2002 Start of Article 82 EC infringement period
3. Nov. 2003 AMD submits second complaint to the Commission
4. Jul. 12, 2005 EC and national competition authorities raid Intel offices across Europe
5. Jul. 2006 AMD submits additional complaint to German competition authority (referred to the Commission in Sep. 2006)
6. Jul. 2007 Commission sends Intel a Statement of Objections
7. Dec. 2007 End of Article 82 EC infringement period
8. Jul. 2008 Commission sends Intel a second Statement of Objections
9. Dec. 2008 Commission sends Intel an additional 'Letter of Facts'
10. May 13, 2009 Commission Decision fining Intel and ordering it to cease the infringement