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Press and Information

Advocate General's Opinion in Case C-413/14 P
Intel Corporation Inc. v Commission

Advocate General Wahl considers that Intel's appeal against the imposition of a €1.06 billion fine for abuse of its dominant position should be upheld

The case should be referred back to the General Court for a fresh review

By decision of 13 May 2009,[1] the Commission imposed a fine of €1.06 billion on Intel, the US-based microchip manufacturer, for having abused its dominant position on the market for x86[2] central processing units (CPUs),[3] in infringement of the competition rules of the EU and the European Economic Area (EEA). Moreover, the Commission ordered Intel immediately to bring an end to that infringement in so far as it had not done so already.

According to the Commission, Intel abused its dominant position on the worldwide market for x86 CPUs from October 2002 to December 2007, by implementing a strategy aimed at foreclosing a competitor, Advanced Micro Devices Inc. (AMD),[4] from the market.

The Commission considered that Intel was in a dominant position on the ground that it held a market share of roughly 70% or more, and that it was extremely difficult for competitors to enter the market and to expand as a result of the unrecoverable nature of investments to be made in research and development, intellectual property and production facilities.

According to the Commission,[5] the abuse was characterised by several measures adopted by Intel vis-à-vis its own customers (computer manufacturers) and the European retailer of microelectronic devices, Media-Saturn-Holding.

Accordingly, Intel granted rebates to four major computer manufacturers (Dell, Lenovo, HP and NEC) on the condition that they purchased from Intel all, or almost all, of their x86 CPUs. Similarly, Intel awarded payments to Media-Saturn, which were conditioned on the latter selling exclusively computers containing Intel's x86 CPUs. According to the Commission, those rebates and payments induced the loyalty of the four manufacturers listed above and of Media-Saturn, and thus significantly diminished the ability of Intel's competitors to compete on the merits of their x86 CPUs. Intel's anti-competitive conduct thereby resulted in a reduction of consumer choice and in lower incentives to innovate.

On the basis of the 2006 Guidelines, the Commission imposed a fine on Intel of €1.06 billion. Intel brought an action against the Commission's decision before the General Court, seeking the annulment of that decision or, at least, a substantial reduction of the fine.[6]

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[1] A summary of the decision has been published in the Official Journal C 227 of 22 September 2009, p.13. See also Commission press release IP/09/745 of 13 May 2009 and MEMO/09/400 of 21 September 2009.

[2] CPUs used in computers can be subdivided into two categories, namely x86 CPUs and CPUs based on another architecture. x86 architecture is a standard designed by Intel for its CPUs. It can run both the Windows and Linux operating systems. Windows is primarily linked to the x86 instruction set.

[3] The CPU is a key component of any computer, both in terms of overall performance and cost of the system. It is often referred to as a computer's 'brain'. The manufacturing process of microprocessors requires expensive high-tech facilities.

[4] Prior to 2000 there were several manufacturers of x86 CPUs. However, most of those manufacturers have since exited the market.

[5] In the Commission's view, the abuse in question constituted a 'single and continuous infringement'.

On 12 June 2014[7], the General Court dismissed Intel's action in its entirety.

Intel brought an appeal against the decision of the General Court on the basis that it erred in law in (i) the legal characterisation of rebates as 'exclusivity rebates'; (ii) in the finding of an infringement in 2006 and 2007 and in the assessment of the relevance of market coverage; (iii) the classification as 'exclusivity rebates' of certain rebate arrangements that covered a minority of a customer's purchases; (iv) the interpretation of EU law concerning the absence of an obligation to record an interview which the Commission held with an executive of Dell; (v) the Commission's jurisdiction regarding Intel's arrangements in China with Lenovo; and (vi) the amount of the fine and the retroactive application of the 2006 Guidelines on the setting of fines.

With regard to the first ground of appeal, Advocate General Nils Wahl notes in today's opinion that the General Court found that the rebates granted to Dell, HP, NEC and Lenovo are 'exclusivity rebates' and, because of this classification, did not consider it necessary to consider the capability of such a rebate to restrict competition.

The Advocate General recalls the principle deriving from the Court's case law concerning the presumptive abusiveness of loyalty rebates, but notes that in practice the Court has consistently taken into account 'all the circumstances' when determining whether the impugned conduct amounts to an abuse of a dominant position. An analysis of the context of the impugned conduct aims to ascertain that it has been established, to the requisite legal standard, that an undertaking has abused its dominant position. Otherwise, conduct which on occasion is simply not capable of restricting competition would be caught by a blanket prohibition. Such a blanket prohibition would also risk catching and penalising pro-competitive conduct.

The Advocate General therefore concludes that **the General Court erred in finding that 'exclusivity rebates' constitute a separate and unique category of rebates that require no consideration of all the circumstances in order to establish an abuse of dominant position**.

In addition, the Advocate General goes on to determine that the **General Court erred in law in its alternative assessment of capability by failing to establish**, on the basis of all the circumstances, **that the rebates and payments offered by the appellant had, in all likelihood, an anti-competitive foreclosure effect.**

As regards the second ground of appeal, the Advocate General recalls that the General Court considered it sufficient to make a global assessment of the part of the market which was foreclosed on average during the period running from 2002 to 2007. On that basis, it considered it irrelevant that the market coverage was considerably smaller during the years 2006 and 2007.

In the Advocate General's view, in taking this approach, the **General Court** abandoned the criterion of 'sufficient market coverage' and therefore **failed to ascertain that the behaviour in question was capable of restricting competition in 2006 and 2007. If it had not failed to do so, it would have had to conclude that such a small tied market share is inconclusive for the purposes of establishing a restriction of competition**, which cannot be remedied by applying the concept of a 'single and continuous infringement'. The Advocate General states that each instance must also constitute an infringement in and of itself. The Advocate General therefore suggests that the second ground of appeal be upheld.

As regards the third ground of appeal, the Advocate General reiterates his view that no separate category of 'exclusivity rebates' exists. However, if the Court disagrees with this interpretation, the Advocate General considers that this ground of appeal should be upheld on the basis that **'exclusivity rebates' would be conditional upon the customer purchasing 'all or most' of its**

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[6] That amount was determined on the basis of the value of sales of x86 CPUs invoiced by Intel to undertakings established in the EEA market during the last year of the infringement (€ 3 876 827 021 in 2007). The Commission then determined a proportion of that value on the basis of the degree of gravity of the infringement (5% of a possible 30%), multiplied by the number of years of infringement (five years and three months, resulting in a multiplier of 5.5).

[7] Case T-286/09, see also press release No 82/14

requirements from the dominant undertaking, which is not satisfied in the circumstances of this case. HP and Lenovo could still purchase significant quantities of 86 CPUs from AMD.

Concerning the fourth ground of appeal, the Advocate General recalls that EU legislation requires the Commission to record interviews to ensure that undertakings suspected of infringing EU competition rules can organise their defence, and that the EU courts can review whether the Commission exercised its powers within the law. Consequently, in his view, **the General Court erred in law in holding that the Commission was not in breach of EU law by failing to organise and record a meeting as required under the applicable rules**. In fact, the **Advocate General does not agree that such a procedural irregularity could be remedied by the later note to file** provided by the Commission since that note does not record the substance of the interview that the Commission had with the Dell executive. The Advocate General therefore considers that the fourth ground of appeal must also be upheld.

In so far as concerns the fifth ground and the question whether the Commission had jurisdiction under international law to bring proceedings against Intel for its anti-competitive conduct, the Advocate General is not convinced that Intel's alleged abuse can be considered to have been implemented in the EEA. In his view, the **General Court failed to assess whether the anticompetitive effects stemming from certain agreements between Intel and Lenovo had the capacity to produce any immediate, substantial and foreseeable anticompetitive effect in the EEA** and therefore erred in applying the implementation and the 'qualified' effect criterion to dismiss Intel's arguments regarding the Commission's lack of jurisdiction.

Finally, regarding the fine imposed, the Advocate General considers that the **fact that the fine imposed was record-breaking at the time does not in itself make it disproportionate** and **Intel has failed to point to any legal error committed by the General Court which would permit the Court to assess the proportionality of the fine**.

As regards the retroactive application of the Commission's 2006 fining guidelines to conduct that partially predated them, the Advocate General considers that it is EU legislation which defines the limits of the Commission's discretion in imposing a fine for the infringement of EU competition rules, not the fining guidelines**. Provided that the fine imposed remains within the limits of that legislation, Intel cannot rely on the principle of non-retroactivity to contest the fine imposed.**

As the first to fifth grounds should be upheld, the Advocate General concludes that **the judgment of the General Court should be set aside.** However, the **Advocate General considers that the case should be referred back for the General Court to examine all the circumstances of the case** and, as the case may be, the actual or potential effect of Intel's conduct on competition within the internal market. That involves an assessment of the facts which the General Court is better placed to carry out.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

Press contact: Holly Gallagher ☎ (+352) 4303 3355

Pictures of the delivery of the Opinion are available from "Europe by Satellite" ☎ (+32) 2 2964106