

Abuse of a dominant position: record fine imposed upon intel by the european commission

Following from the publication of its Guidance Paper on its enforcement priorities in applying Article 82 of the EC Treaty on abuse of a dominant market position^[1], the European Commission just imposed a fine of 1.06 billion Euros upon Intel Corporation (“Intel”), the world leader in microprocessors, for abusing its dominant market position^[2].

The Commission’s investigation, initially triggered by complaints filed by Intel’s main competitor, AMD, took five years. At the end of a lengthy investigative process, the Commission found that Intel’s practices were aimed at excluding its competitors from the market for computer chips called “x86 central processing units (CPUs)” (1).

This decision, which hopes to act as a significant deterrent, marks the Commission’s desire to strengthen its authority with regard to, in particular, groups of companies with a dominant EU market position (2).

1. The facts constituting abuse of a dominant position

Although the Commission did not formally apply the procedure to verify compliance with Article 82 of the EC Treaty as set forth by its Guidance Paper (which was published after the Intel case had been initiated), it did refer to the anti-competitive effects resulting from Intel’s behavior, which is evidence of abuse of a dominant position and sanctioned by the Guidance Paper^[3].

The Commission reasoned that, by providing conditional rebates and payments **(1.1)**, and by making payments aimed at preventing sales of specific rival products **(1.2)**, Intel had abused its dominant position on the EU market.

1.1. Conditional rebates and payments

The first grievances concerned rebates awarded by Intel between 2002 and 2005 to computer manufacturers on the condition that they purchase all or virtually all of their CPUs supplies from Intel. Additionally, computer manufacturers that opted to buy AMD CPUs for the part of their needs that was open to competition would lose the rebate that Intel provided for the purchase of the larger percentage of these needs for which they had no choice but to buy from Intel.

Further, the Commission reproached Intel for having made direct payments to a major retailer between 2002 and 2007 on the condition that the latter only sold Intel-based PCs in all the countries in which it was active.

In its decision, the Commission challenged the conditions in which the rebates were awarded to manufacturers, and not the rebates themselves, as these manufacturers were dependent upon Intel for a majority of their CPU supplies.

It found that Intel's behavior impaired the ability of rival manufacturers to compete and innovate, thereby resulting in reduced choice for consumers.

1.2. Payments to prevent sales of specific rival products

The second grievances concerned payments made by Intel to computer manufacturers so that these manufacturers would postpone or cancel the launch of specific products equipped with rival CPUs, and/or restrict the distribution of certain of these products.

The Commission found that these payments had the potential effect of preventing products, for which there was consumer demand, from entering the market.

2. A record fine: the Commission's desire to deter

Above and beyond the punitive aspect, the additional goal of this decision is to deter any company from breaching the anti-competition rules of the EC Treaty.

The decision was in line with the guidelines on the calculation of fines in antitrust cases that were specifically modified in 2006 by the Commission to reinforce this deterrent effect.

Pursuant to these guidelines, the amount of fines may now reach up to 30% of annual sales concerned by the breach, but cannot exceed 10% of a company's total annual turnover. This amount is then multiplied by the number of years during which the breach existed.

Further, the guidelines now set forth an "entry fee" system allowing the Commission to add to the aforementioned fine an amount between 15% and 25% of annual sales, regardless of the duration of the breach.

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Finally, significant increases in fines, up to 50% of the imposed fine, are allowed in case of repeated breach.

In this case, Intel's worldwide turnover in 2007 was 27.9 billion Euros. To determine the amount of the fine, the Commission used the value of the sales of x86 CPUs by Intel in the European Economic Area. It also took into account the duration (five years and three months) and the seriousness of the breach.

The amount of 1.06 billion Euros corresponds to 4.15% of Intel's annual turnover. The Commission could have fined Intel up to 10% thereof. Intel has three months to pay the fine.

This is the largest fine imposed by the Commission for abuse of a dominant position, as it greatly exceeds what it fined the world leader in computer software, Microsoft, in 2004.

Microsoft had been fined an amount of 497.2 million Euros for abuse of a dominant position. Microsoft elected to appeal the decision before the European Court of First Instance, which then confirmed the Commission's decision^[4].

Intel has already stated that it intends to appeal the Commission's decision, even though this will not suspend the obligation to pay the fine.

Intel managers consider that their practices did not breach EU law and that, thanks to their investments in innovation, in production capacities and techniques and in the elaboration of leading-edge technologies, Intel can award rebates that, in their opinion, indirectly benefit consumers.

[1] See article "Abuse of a dominant position: the European Commission issues a new guidance paper", published in our April 2009 e-newsletter.

[2] European Commission, decision dated May 13, 2009.

[3] See e- article "Abuse of a dominant position: the European Commission issues a new guidance paper", published in our April 2009 e-newsletter.

[4] <http://ec.europa.eu/competition/antitrust/cases/microsoft/court.html>, CFI, decision dated September 17, 2007, Commission v. Microsoft.

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