Antitrust Regulators Target Dominant Firms

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Recent actions by the Department of Justice and the European Commission signal that they view regulation of dominant firms to be an important enforcement priority.

The European Commission announced yesterday that it had imposed a record US$1.45 billion (€1.06 billion) fine on Intel Corporation, the biggest single antitrust fine in the history of the European Union. In its decision, the European Commission found that Intel had impeded competition in the computer chip market by giving rebates to computer makers and making payments to exclude rival products from retail outlets. The Commission ordered Intel, based in Santa Clara, California, to cease the "illegal practices" immediately. The European Commission's previous record penalty for similar abuses was €497 million, imposed on Microsoft in 2004 in connection with its activities in markets for server computers and media software.

The European Commission held that, from October 2002 through December 2007, Intel had a dominant position of at least 70% market share in the worldwide market for x86 central processing units ("CPUs"), a type of computer chip. The world market for x86 CPUs is currently worth approximately US$30 billion (€22 billion) per year, with Europe accounting for approximately 30% of the market. In fining Intel, the European Commission concluded that Intel had violated Article 82 of the EC Treaty on the abuse of dominant market position by engaging in practices that the Commission found to be anticompetitive and illegal.

The European Commission found that Intel engaged in two specific practices that the Commission deemed to be illegal. First, the European Commission found that Intel gave wholly or partially hidden rebates to computer manufacturers on the condition that they purchased all or almost all their x86 CPUs from Intel. The European Commission also found that Intel made direct payments to a major retailer on the condition that it stock only computers with Intel x86 CPUs. According to the European Commission, these rebates and payments effectively prevented customers, and ultimately consumers, from choosing alternative products. Second, the European Commission concluded that Intel made direct payments to computer manufacturers to halt or delay the launch of specific products containing competitors' x86 CPUs, and to limit the sales channels available to these products. The European Commission found that these practices abused Intel's dominant market position, and harmed consumers throughout the European Economic Area. The European Commission further stated that it will actively monitor Intel's compliance with the decision while Intel has announced that it will

appeal the decision. The Intel decision is another reminder that the European Commission leads the way among world competition authorities in regulating the practices of dominant firms.

The Obama Administration has also signaled that it intends to take a more aggressive stance against exclusionary or predatory conduct by single firms in violation of Section 2 of the Sherman Act. In a speech on May 11, 2009, Christine A. Varney, head of the Justice Department's Antitrust Division, stated that the Antitrust Division would adopt a more aggressive enforcement posture against exclusionary and predatory conduct by single firms that raise prices, reduce product variety and slow innovation, thereby reducing consumer welfare. To further demonstrate the Obama Administration's commitment to more rigorous enforcement of Section 2, Ms. Varney announced that she was withdrawing the DOJ's Section 2 Report, issued under President Bush, stating that the Section 2 Report had "straightjacket[ed] antitrust enforcers and courts from redressing monopolistic abuses, thereby allowing all but the most bold and predatory conduct to go unpunished and undeterred." In doing so, the Obama Administration has aligned U.S. antitrust policy on monopolies and predatory practices more closely with the current policy and practice of the European Commission.

Notwithstanding Ms. Varney's speech, it is far from certain that U.S. courts will be receptive to the Obama Administration's more aggressive enforcement stance. In recent years, U.S. courts have raised the hurdles for claims brought under Section 2. In *Pacific Bell Telephone Co. v. linkLine Communications Inc.* the Supreme Court effectively barred price-squeeze claims under Section 2 when a defendant has no clear duty to deal with its competitors. This affirmed the Court's 2004 ruling in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, which held that a monopolist is under no duty to deal with competitors. Despite these potential obstacles, the Obama Administration appears set on reinvigorating Section 2 enforcement and dominant firms may find their business practices under greater government scrutiny than under the Bush Administration.

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