European Union Court Maintains Tough Stance Against Business Practices by Firms With Strong Market Power

Article By:

McDermott Will & Emery

On 12 June 2014, the **European Union's** court of first instance, the General Court, in ***Intel v European Commission*** (Case T-286/09), condemned a number of Intel's business practices, including loyalty rebates. The General Court's approach in this case is in line with previous case law such as *Tomra* (Case C-549/10 P), which suggests that exclusionary business practices are considered anti-competitive by their very nature when undertaken by a company in a position of dominance (a concept unique to European law that can be equated to significant market power). This is despite another recent judgment, *Post Danmark* (Case C-549/10 P) which found that an effects-based analysis was appropriate for assessing conduct by dominant companies. The *Intel* case therefore indicates that the courts will continue to assess allegations of antitrust infringements by dominant companies without taking into account their effects on the market.

The *Intel* judgment reinforces the tension between the EU courts' precedents concerning unilateral conduct and the more economic, effects-based, approach advocated by the European Commission (Commission). As a result, while the Commission may be inclined to assess a case on the basis of economic effects, firms that might be considered dominant should be aware that appeals against infringement decisions are likely to be analysed under more formalistic rules that capture conduct that may not, in fact, be harmful. Going forward, companies that might be seen as dominant in their markets should therefore be particularly prudent in their business practices.

Background

On 13 May 2009, the Commission imposed a record fine of €1.06 billion on Intel, a microchip manufacturer, for having violated Article 102 of the Treaty on the Functioning of the European Union (TFEU), which is the EU antitrust rule dealing with unilateral conduct by dominant companies, between 2002 and 2007. The Commission found that Intel had abused its dominant position by operating a strategy aimed at foreclosing its competitor, Advanced Micro Devices (AMD) from the market for certain central processing units (CPUs).

This strategy, according to the Commission, took the form of rebates granted by Intel to four computer manufacturers, and payments made to a European retailer of microelectronic devices. The rebates and payments were granted on condition that the computer manufacturers purchased all, or the majority of, their microchips from Intel, and that the retailer exclusively sold computers containing

Intel’s CPUs. In addition, Intel made payments to three computer manufacturers in order to induce them to postpone or cancel the launch of AMD’s CPU-based products and/or put restrictions on the distribution of those products.
Having established that Intel was dominant in the market for certain CPUs, the Commission found that the market had been abusively foreclosed as a result of Intel’s practices.

General Court’s Statements On Exclusionary Conduct

The General Court dismissed Intel’s appeal in its entirety and refrained from assessing whether or not there were any actual, anti-competitive effects produced by the two types of anti-competitive conduct at issue.

The General Court found that the rebates granted to the computer manufacturers qualified as “exclusivity rebates” and, as such, constituted an abuse of dominance, unless they could be saved by an objective justification. Specifically, the General Court held that

> *Exclusivity rebates granted by an undertaking in a dominant position are by their very nature capable of restricting competition and foreclosing competitors from the market. It is thus not necessary to show that they are capable of restricting competition on a case by case basis.*

The payments made to the computer manufacturers were held to be deliberately anti-competitive. The General Court stated that

> *The only interest that an undertaking in a dominant position may have in preventing in a targeted manner the marketing of products equipped with a product of a specific competitor is to harm that competitor.*

Comment

The General Court’s judgment in *Intel* highlights the difference in approach between the Commission and the EU courts, with the former keen to promote an effects-based assessment and the latter taking a formulistic, rules-based approach. This creates uncertainty for companies that may be considered dominant, when they are engaging in business practices. The practical result is that, at the enforcement stage, the Commission is likely to continue to follow its own Guidance Paper, which indicates it will take an approach informed by economic discipline, while subsequent challenges to Commission decisions are, at least in the near term, likely to be governed by a more legal, formalistic approach.

In this respect, it should be noted that the European rules on abuse of dominance are stricter than the rules applied in similar circumstances in the rest of the world, particularly in the United States. The consequences of infringing Article 102 TFEU can be very severe. Not only can fines be high (up to 10 per cent of the annual turnover of the group to which the company belongs), but a party to a contract entered into with a dominant company may claim that it is void and unenforceable and bring proceedings before a national court seeking an injunction. A finding of infringement could also lead to follow-on damages actions by third parties that incurred harm as a result of the abusive behaviour.

The bottom line is that companies in a dominant position should refrain from certain practices, such as exclusivity rebates, at least in Europe.

National Law Review, Volume IV, Number 167