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# European Competition Law The Intel Case

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**Support to China's Sustainable Trade and Investment System**

支持中国可持续贸易和投资体系

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# A Brief History of Intel Case

- In October 2000, **AMD** submitted a formal **complaint** to the Commission, alleging that Intel had engaged in exclusionary marketing arrangements
- On 13 May 2009, the European Commission **fined** Intel **€1.06bn** for abuse of dominance under Art. 82 TEC (now Art. 102 TFEU) (COMP/C-3/37.990-Intel) and ordered to “cease and desist” practice
- The Commission found that Intel had engaged in two abusive practices relating to x86 central processing units (CPUs)
- In July 2009, Intel appealed the Commission’s decision (pending) (Case T-286/09)

# Intel's Dominant Position in the x86 CPU Market

- Essentially only two competitors since 2000:
  - Intel with a market share of more than 70% (1997-2000)
  - AMD with a market share of less than 30%
- Significant barriers to entry:
  - significant sunk costs in R&D, IP and production facilities; Intel's strong brand status; and product differentiation
- OEMs' insufficient buyer power
- Intel held a dominant position in the x86 CPU market

# Intel's Abusive Exclusionary Conduct

“A single, continuous strategy aimed at foreclosing AMD from the market”

## 1. Conditional rebates and payments

Intel awarded rebates to OEMs on condition that they purchased all or almost all of their CPUs from Intel

The Dell logo, consisting of the word "DELL" in a stylized blue font with a diagonal line through the "E".The Lenovo logo, featuring the word "lenovo" in a blue, lowercase, sans-serif font.The HP logo, featuring the letters "hp" in white inside a blue circle, with the word "invent" in a smaller font below it.The NEC logo, featuring the letters "NEC" in a bold, blue, sans-serif font.

## 2. Naked restrictions

Intel awarded payments to MSH (Europe's largest PC retailer) on condition that it sells exclusively Intel-based PCs



# Conditional Rebates

## ~Intel's Fidelity Rebates~

- Dell (Dec 2002 ~Dec 2005): exclusive sourcing
- HP (Nov 2002 ~ May 2005):
  - Sourcing at least 95 % of its corporate desktop x86 CPUs;
  - Selling AMD-based business desktops only to SMB and GEM customers (restrictions on the marketing and commercialisation of HP's AMD-based desktops);
  - Prohibition of sales by HP's channel partners of AMD-based business desktops; and
  - Delaying the launch of its AMD-based business desktop (D315) in the EMEA region by six months
- NEC (Oct 2002 ~ Nov2005): Sourcing at least 80% of its client PC x86 CPU requirements worldwide
- Lenovo (2007): Exclusive sourcing for notebooks

# Conditional Rebates

## ~ Conditional Rebates under Case Law 1 ~

- A number of EU court cases in which ‘loyalty’ rebates, ‘target’ rebates and ‘fidelity’ rebates have been found abusive
- “a system of *fidelity rebates*, that is to say discounts conditional on the customer’s obtaining all or most of its requirements (...) from the undertaking in a dominant position” constitutes an abuse of dominance  
*(Hoffmann-La Roche v Commission)*
- Fidelity rebates: *per se* illegal (at least some of the EU case-law suggest so)
- Formal approach: An “equally-efficient-competitor” test

# Conditional Rebates

## ~ Conditional Rebates under Case Law 2 ~

- Target rebates: If the target is met, rebates are awarded (not directly linked to loyalty)
- “any system under which discounts are granted according to the quantities sold during a relatively long reference period has the inherent effect, at the end of that period, of increasing pressure on the buyer to reach the purchase figure needed to obtain the discount ...”

*(Michelin v Commission (Michelin I))*

- Due to their **loyalty-inducing effect**, target rebates have been found abusive in several cases
- No need to perform effects-based economic analysis (*British Airways*)



# Conditional Rebates

## ~ Conditional Rebates under Case Law 3 ~

- But rebates can be **pro-competitive**, even when they have a loyalty-inducing effect, being considered as often simple manifestations of the competitive process
- An onerous task for the dominant undertaking to provide a cost justification

# Conditional Rebates

## ~ Conditional Rebates under New Guidance 1 ~

- “**Guidance** on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings” (In December 2008)
- ‘**Conditional**’ rebates: “rebates granted to customers to reward them for a particular form of purchasing behaviour”
- When granted by a dominant firm, conditional rebates can have foreclosure effects
- When the conduct is likely to lead to anticompetitive foreclosure, the Commission intervenes (**not *per se*** illegal)
- The “**equally-efficient-competitor**” test to evaluate the foreclosure effect

# Conditional Rebates

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# Conditional Rebates

~ Conditional Rebates under New Guidance 3 ~

## The equally-efficient-competitor test

Pricing benchmarks:

Long-run average incremental cost (LRAIC)

Average avoidable cost (AAC)

(i) The effective price  $>$  LRAIC

(ii) The effective price  $<$  AAC

(iii)  $AAC < \text{The effective price} < LRAIC$

(i) Incapable of foreclosing

(ii) Capable of foreclosing

(iii) Other factors need to be taken into account

...Difficult to apply these benchmarks

Two other parameters:

- **Contestable share:** Amount of a customer's purchase requirements that can realistically be switched to a competitor in any given period – can be highly subjective
- **Relevant time horizon:** Time over which the infringement occurred – can also be subjective

## ~ Analysis of Intel Case Under New Guidance ~

- An important competitive constraint by AMD
- Intel was an unavoidable trading partner: AMD cannot compete on equal terms for each individual customer's entire demand
- AMD products were a viable alternative to those of Intel
- The high threshold of the rebates: All or almost all of the supply needs
- The individualised thresholds
- Lack of transparency as to the exact proportion of the rebates that would be lost in case of sourcing from AMD
- A possibility that the rebates withdrawn would be allocated to competing OEMs

Likely to lead to exclusionary effects

→ Apply the equally-efficient-competitor test

# Conditional Rebates

## ~ Commission's Approach in Intel Case 1 ~

- **The level of the rebates** granted was *de facto conditional* upon OEMs' sourcing their x86CPUs exclusively or, within defined segments, almost exclusively from Intel
- The rebates granted constitute **fidelity rebates**
- Fidelity rebates: "*discounts conditional on the customer's obtaining all or most of its requirements (...) from the undertaking in a dominant position*"
- Exclusionary Fidelity rebates = **per se an abuse** of dominance (unless objectively justified). If *per se* an abuse:
  - No need to perform effects-based economic analysis
  - No need to prove an actual market foreclosure

- The Commission, nevertheless, carried out the equally-efficient-competitor test
- An “as efficient” competitor would have had to offer its x86 CPUs to OEMs at a price which was below its AAC
- In the case of MSH, the “as efficient” competitor would have had to offer compensation payments which would have resulted in a net price below its AAC

Likely to have anticompetitive foreclosure effects



# Conditional Rebates

## ~ Objective Justifications and efficiencies 1 ~

- The dominant undertaking may justify its abusive conduct by demonstrating that
  - it is objectively necessary; or
  - it produces substantial efficiencies which outweigh any anti-competitive effects on consumers
- The dominant undertaking must provide all the evidence necessary for justification

Intel's arguments:

- (i) Meeting competition: rebates were a legitimate response to price competition from its rivals and thus met competition
- (ii) Efficiencies not otherwise achievable: lower prices, scale economies, other cost savings and production efficiencies

Both not accepted as flawed:

- (a) The arguments were related to conduct the EU Commission did not object to and not to conduct the Commission object to
- (b) None of the efficiency defences provide a relevant justification. There are other pricing systems that would have less adverse impact on competition

# Naked Restrictions 1

- Intel made payments to OEMs on condition that they delay, cancel or restrict the distribution of specific AMD-based products
- For instance, payments conditioned on
  - HP selling AMD-based business desktops only to SMEs, only via direct distribution channels
  - ACER postponing the launch of an AMD-based notebook

# Naked Restrictions 2

- Intel's conduct had a material effect on the OEMs' decision-making
  - As a consequence, AMD-based products did not reach the market and consumers ended up with a lesser choice than they otherwise would have
  - No objective justification or efficiency
- ➔ Intel's conduct constitutes an abuse of a dominant position

# Global Enforcement

- Japan: A cease and desist order (2005) and two damages actions
- Korea: a 26 billion won fine (US\$25 million) (2008)
- US: District Court of Delaware + class action (2005~)
- Settlement of All Antitrust and IP Disputes between AMD and Intel (2009)



Q & A

Thank You!

謝謝

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