



The American
Antitrust Institute

Issues at the Heart of Exclusionary Conduct:

A Briefing Paper on the *AMD v. Intel* Monopolization Litigation

April 25, 2006¹

Just as many thought the monopolization field was dead, along comes what is likely to be the next *U.S. v. Microsoft* case.

In *AMD v. Intel*, a Sherman Act Section 2 case currently pending in the U.S. District Court for the District of Delaware, Judge Joseph J. Farnan, Jr. convened a nearly two-hour scheduling conference on April 20, 2006. Although the litigation, filed in June 2005, is still in its early stages, it already appears poised to become as important and controversial an antitrust case as *U.S. v. Microsoft*.

The primary purpose of this AAI Briefing Paper is to highlight the significance of *AMD v. Intel* as a case that will affect virtually the entire high-technology sector of the global economy while at the same time it will have a dramatic effect worldwide on the jurisprudence of the law concerning dominant firms. This AAI Briefing Paper provides background both on the case itself and on a variety of developments in the monopolization field that provide further context.

AMD v. Intel is a potentially significant Section 2 antitrust case for three main reasons:

- *First*, the stakes involved in *AMD v. Intel* reflect the enormous dimensions of the market for products that employ microprocessors built around the x86 instruction set architecture, *i.e.*, a market that includes most of the notebook, desktop, workstation, and server equipment manufactured and sold in the world today. The annual-2005 market for x86 chips is estimated at around \$30

¹ The American Antitrust Institute (www.antitrustinstitute.org) is an independent, non-profit, research, education, and advocacy organization that has frequently argued in favor of aggressive enforcement of the anti-monopolization laws. The AAI is funded by a wide variety of individuals, foundations, courts, law firms, corporations, and associations. A list of all contributors of \$1,000 or more (numbering well over 100) is available on request. The list includes many high technology companies, one of which is AMD.

billion, and for the devices that make use of x86 chips at more than \$200 billion. The finding by a U.S. court that Intel improperly maintained a monopoly in the global microprocessor market through conduct prohibited by the antitrust laws would have significant economic and industrial repercussions. A primary motivation for following the events in *AMD v. Intel*, therefore, is to prepare for having to ultimately estimate the economic, legal, and industrial significance of the case within a wider context of antitrust law and competition policy;²

- *Second*, *AMD v. Intel* is likely to be important and controversial because of the challenge it presents to the international antitrust policy regime. Global convergence of competition policy may ultimately be desirable for global markets. Significant differences in competition policy create risk for international enterprises and impose other large transaction costs on firms that could ultimately harm consumers. Yet, if the U.S. and the E.U. maintain their current very different attitudes toward dominant-firm conduct, an international clash over *AMD v. Intel* is possible. This Briefing Paper, therefore, identifies some of the trans-national facets of the case;³ and,
- *Third*, the *AMD v. Intel* case arises at a time when policies toward unilateral dominant-firm conduct (as opposed to collusive conduct) have been brought into the spotlight by recent public consultations initiated by the U.S. and European antitrust enforcement agencies. In the U.S., the Joint FTC/DOJ hearings on single-firm conduct are scheduled to begin in 2006. In Europe, a public consultation by DG-Comp on the applicability of Article 82 of the Treaty to the exclusionary abuse of dominance is underway.⁴ This Briefing Paper, therefore, examines the legal background of the case, including the antitrust law of the Third Circuit, which includes the Delaware federal district in which the case is pending, other significant recent precedents, and in light of the single-firm conduct issues that are the focus of the various institutional initiatives that have commenced around the world.⁵

² Further background on the significance of the microprocessor industry and this case in it may be found in Section II, on page 7, below.

³ Further background on the international implications of the case may be found in Section III, on page 9, below.

⁴ The AAI's Response to Public Consultation on the European Commission Directorate-General for Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses (Mar. 31, 2006) may be viewed at: <<http://www.antitrustinstitute.org/recent2/491.pdf>>.

⁵ Further background on the treatment under the antitrust laws of single firm conduct both in the Third Circuit (where the *AMD v. Intel* is pending), and in light of prior significantly similar cases and global institutional initiatives on exclusionary single-firm conduct may be found in Section IV, on page 9, below.

The presence of anti-monopolization legislation throughout the world suggests a widely-held notion that there exists a line beyond which the conduct of a dominant firm stops being fair competition, or “competition on the merits,” and begins to be a violation of competition law. AMD’s complaint deserves serious attention if only because many of the same practices about which AMD is now complaining in a U.S. antitrust court are also being investigated by the European Commission and were condemned in a decision of the Japan’s Fair Trade Commission on March 8, 2005.⁶

The combination of an important fact-specific case involving dominant-firm exclusionary conduct and the concurrent large-scale institutional review of single-firm conduct under the antitrust laws makes this a particularly interesting time to be reporting on the state of monopolization law and policy.

It should go without saying (so we are saying it clearly) that the allegations in the AMD v. Intel case are at this point nothing but allegations. We intend here to make no judgment about the accuracy, completeness, or ultimate persuasiveness of the allegations or of any defenses that might be raised.

I. Initial Steps for *AMD v. Intel*

At the April 20 hearing both sides had an opportunity to present in broad strokes the issues on which discovery would be required. AMD summarized its allegations of Intel’s unlawful conduct and its theory of Section 2 liability, and Intel followed with a contrasting version of the facts in which Intel’s conduct was portrayed as lawful vigorous competition.⁷

From these statements, it already appears that the *AMD v. Intel* case will present the kind of issues that lie at the heart of the controversy over Section 2: When does conduct by a single-firm with monopoly power contravene Section 2 of the antitrust laws? And, the corollary issues, whether and what standards ought to be adopted for evaluating single-firm conduct alleged to violate Section 2?

⁶ Further background on the decision of the Japanese Fair Trade Commission may be found in Section IV-C-2, on page 13, below. The decision is available at <<http://www.jftc.go.jp/e-page/pressreleases/2005/march/050308intel.pdf>>.

⁷ The AMD legal team is led by Charles P. Diamond of O’Melveny & Myers LLP, Los Angeles, California and Frederick Cottrell of Richards, Layton & Finger, PA, Wilmington, Delaware. Intel has filed an Answer through its attorneys, Robert E. Cooper of Gibson, Dunn & Crutcher LLP of Los Angeles, Peter E. Moll of Howery LLP of Washington, D.C., and Richard L. Horwitz of Potter, Anderson & Corroon LLP of Wilmington, Delaware. The complaint is available at: <http://www.amd.com/us-en/assets/content_type/DownloadableAssets/AMD-Intel_Full_Complaint.pdf>. Intel’s responsive Answer is at: <<http://www.intel.com/pressroom/archive/releases/20050901corpamdanswer.pdf>>.

A. AMD's Perspective

AMD's characterization of the case by its lead counsel is that Intel has engaged in activities designed to frustrate an axiom of Emerson's, that in spite of AMD having built a better mousetrap, Intel has (and continues to) take steps to prevent the world from beating a path to AMD's door. This is AMD's essential Section 2 theory: That through exclusionary tactics Intel has maintained and is maintaining its market position in the microprocessor industry.

Practically speaking, only Intel and AMD have access to the intellectual property rights needed to manufacture microprocessors implementing the x86 instruction set architecture. Thus, any market share gained by one competitor must be lost by the other. That is, the global x86 microprocessor market is occupied only by Intel and AMD and the barriers to entry are extremely high.⁸

Some of AMD's allegations of unlawful exclusionary conduct by Intel depend on this zero-sum, "shared pie" structure of competition in the industry. At the April 20 hearing, counsel for AMD described three categories of behavior by Intel alleged to be anticompetitive:

- Direct payments, discounts, and price related policies with conditions that penalize microprocessor purchasers, primarily comprised of "original equipment manufacturers," or "OEMs" for shifting their demand for input product (microprocessors) away from Intel and toward AMD;
- Disciplining by Intel of its customers by, for example, delaying shipments to dissident customers, delaying the delivery of necessary technical information, or withholding microprocessor roadmap information, all of which would impose an obvious competitive handicap on the customer; and
- "Brand spoiling," by, for example, undermining AMD product launches, and engaging in other business interference tactics.

Thus, AMD alleges three types of unlawful conduct:

- Bribes by Intel, primarily to customers, not to buy chips from AMD;
- Threats by Intel, of OEMs if they order too few chips from Intel; and,
- Dirty tricks intended to undermine the rival, AMD.

⁸ The single fringe competitor licensed to manufacture the x86 chip is VIA Technologies, Inc., with 1.5% of the 2005 global market and a limited duration license. The firm is not included in the antitrust analysis.

B. Intel's Position

Intel maintains that it stands accused of merely being competitive. In court, the firm portrayed itself as trying to retain an eroding market position by engaging in vigorous competition, particularly on price. Implicit in Intel's position is that rebates, discounts, and loyalty strategies represent lawful competitive conduct, a form of the same "aggressive price-cutting" the Supreme Court arguably encouraged in its decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*⁹

Intel asserts that its success is due to the superior price, performance, reliability and innovation in its microprocessors, the reliability of its distribution network and the credibility of its delivery commitment capability. Intel argues that AMD alone bears responsibility for AMD's business failures and successes. They point out that prior to the period 2000-2003, AMD failed to properly execute in "myriad" ways, while more recently AMD's better execution and improved products have led to better business performance. Meanwhile, Intel's revenues are currently declining.

In its Answer, Intel denies that it has engaged in any unlawful conduct designed to maintain its market share or market power. Intel denies that it conditions rebates or discounts on its customers' forbearance from dealing with AMD, or that it engages in strategies designed or specifically intended to interfere with AMD's business performance.¹⁰

C. The Current Posture of the Case

The case, filed in June, 2005, has not yet entered the discovery phase. Numerous follow-on cases in federal court have been filed on behalf of alleged victims of Intel and have been consolidated under the Multidistrict Litigation procedure established in the Federal Rules of Civil Procedure. In addition, a putative class action is also pending in state court in Santa Clara County, California.

⁹ 509 U.S. 209 (1993).

¹⁰ Interestingly, Intel argues that the discounts and rebates it grants to its customers indicates that it *lacks* market power, and in particular the power to set prices above a competitive level. This may be true, as far as it goes, but the concept of market power also includes the power to exclude competition. In *AMD v. Intel*, because entry can be considered impossible, exclusionary market power for Intel would seem to translate into the power to prevent the shift of demand away from Intel's products and toward AMD's. The discounts and rebates, therefore, may simply be the price the firm must pay to retain the exclusionary market power related to the unlawful conduct AMD is alleging, which has nothing in any direct sense to do with any "aggressive price cutting," or any other form of price competition. Alternatively, of course, Intel's prices could have been inflated in the first place, so that the "discount" simply brings the price down to the "normal" level. In that case, the discounts at issue may not be payments to customers at all, but a mechanism of imposing a penalty or a fine on a customer who does not follow a policy of limiting purchases from the rival.

With respect to the main case, the court established the following deadlines at the April 20, 2006 hearing:

- May 2, 2006 Defendants to file Motion to Dismiss foreign conduct claims
- May 15, 2006 Parties to Submit a Joint Proposed Case Management Order on 441 case and MDL case
- May 18, 2006 Hearing on any disputes over Case Management Order

In addition, the parties informally consented to:

- May 22, 2006 Date for submission of Negotiated Protective Order plenary for main, MDL, and state case.
- September 2006 Court to Set Trial Date
- December 31, 2006
(with one agreed-upon extension of 30-90 days)
Completion of Document Discovery
- End-2007 Target date for Completion of all Discovery
- 1st – 3rd Quarter, 2008 Trial

The court was advised that negotiations between the parties over a court order to govern the protection of proprietary trade information were nearing a conclusion, although both parties acknowledged that some difficulty might arise in the course of discovery due to the prevalence of contractual non-disclosure agreements (NDAs) in the information technology sector.

While it can be assumed that the public will not be privy to all of the discovery materials that will be produced in the case, the parties appear to be making serious preparations to extend meaningful protection to the interests of the approximately 30 third-party witnesses, mostly OEMs that are large customers of Intel and AMD, on whom subpoenas have already been served. It is reasonable for these OEMs to demand protection from the potential multiplicity of obligations and duplication of effort that can be created when numerous cases proceed simultaneously. Nevertheless, while not all the details will be made publicly known, as long as the trial procedure continues, the customers will eventually reveal whether the kinds of tactics alleged by AMD have been or are being used by Intel.

II. Background: The Microprocessor Industry and the Significance of *AMD v. Intel*

If Intel has unlawfully maintained its monopoly in x86 microprocessors, American consumers and businesses face the prospect in the short run of higher prices and restricted consumer choice in the PC, workstation, and server markets. In the long run, moreover, in light of the virtual impossibility of entry into these chip markets, Intel's dominance risks the loss of future innovation in this most critical of industries where competition (at least as much competition as can be gotten from two competitors) is feasible.

Both AMD & Intel design and manufacture the microprocessors that are the brains of any PC, workstation, or server. Most such consumer and business computers and servers use a microprocessor that processes the x86 instruction set. For the vast installed base of PC-based equipment and software that depends on the x86 instruction set, maintaining backward and forward compatibility through newer generations of microprocessors is a major.

The installed base of implementations dependent on the x86 instruction set generates huge switching costs for any contemplated change in microprocessor instruction set architecture. Thus, the x86 instruction set is the *de facto* industry standard for the foreseeable future. As one industry executive remarked, "yet another [instruction set architecture] would be about as exciting as a new indoor plumbing standard."¹¹ The foreseeable permanence of the x86 instruction set as the standard, in turn, largely defines the competitive conditions in the microprocessor industry.

Moreover, the need to maintain forward, backward, and enterprise-wide consistency means that innovation and development in the microprocessor industry adheres to an innovation "road map." Customers seek to exploit the present state of the art by holding it stable for a pre-determined interval. Similarly, future developments must be pre-announced to make them anticipated events that customers can plan around to assure continued compatibility and a series of smooth transitions through succeeding iterations of the x86 products.

A. The Role of Intellectual Property

A key feature of x86 microprocessor fabricating is need for access and rights to the necessary intellectual property. The PC was developed and commercialized by IBM early in the 1980s. Although IBM chose to build the PC around an Intel-designed and

¹¹ Greg Papadopoulos, "Intel, It's Time to Share," from *Greg Matter* (June 7, 2005) available at: <<http://blogs.sun.com/roller/page/Gregp>>.

manufactured microprocessor, it was unwilling to be dependent on a single supplier. Accordingly, IBM required Intel to arrange for a second source for its microprocessors. In a 1982 Technology Sharing Agreement between Intel and AMD, Intel granted a license to AMD to manufacture the IBM-compatible x86 family of chips.

An arbitrator, affirmed by the California Supreme Court in 1994, determined that AMD possesses a non-exclusive and royalty-free license to any Intel intellectual property embodied in AMD's 386 microprocessor and to the x86 instruction set in perpetuity. In 1995, the two companies settled their outstanding disputes, including the antitrust issues relating to conduct alleged to have occurred prior to January 1995. The settlement also required AMD to develop its own x86 architecture. The conduct alleged in the present suit, therefore, can be understood to have occurred between 1995 and the filing of the June 2005 complaint, and to be continuing in nature.

B. The Industrial Organization of the x86 Fabrication Market

At present, Intel and AMD together supply over virtually all of the global market for x86 microprocessors. Their precise respective market shares (and the share of the market served by one other fringe competitor¹²) are subject to some dispute.

Intel's global market share has been around 80% or more for every recent year except for 2001 when measured by quantity, and approximately 90% when measured by revenue. AMD alleges that its own market share has remained at twenty percent or less since 1997 not because of natural demand conditions in the market, which would have before now shifted a larger share of microprocessor orders from Intel to AMD, but because of anticompetitive conduct by Intel that unlawfully interfered with the natural expression of that demand, *i.e.*, Intel forestalled the more rapid equalization of the market shares as between the two suppliers.

Compared to the microprocessor industry, computer equipment manufacturing engaged in by OEMs that produce desktops, portables, workstations, and servers, is highly competitive. One allegation in AMD's complaint is that the nine largest OEMs of desktop PCs account for less than one-half of the entire desktop market, and other OEM sectors are similarly comprised. Accordingly, the OEM segment may be thought of as having free-entry, but with the potential to be capacity constrained because of the monopolistic structure of the microprocessor industry.

¹² See footnote 8, above.

III. Background: The Geographic Market and the International Convergence of Antitrust Policy

AMD alleges, and Intel admits, that the relevant geographic market for x86 microprocessors is global. In the microprocessor industry, production, assembly, distribution, installation, sale, and use all occur in multiple jurisdictions in diverse global regions simultaneously.

Nonetheless, Intel is expected to file by May 3 of this year a motion asking the court to dismiss certain claims in AMD's complaint that Intel argues have only "foreign effects." Intel is expected to attempt to limit the scope of the litigation by arguing that the adjudication of conduct alleged by Intel to affect solely foreign economies exceeds the court's subject matter jurisdiction under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA).

Thus, although the case pits two *de jure* American corporations against one another in a U.S. federal court, both parties engage in extensive activities geographically removed from the U.S. as well as within the U.S. in a global market. In this context, Intel has indicated it will try to challenge AMD's right to seek judicial redress for conduct that took place abroad which AMD alleges is unlawful under domestic U.S. antitrust standards that has caused and causes AMD antitrust injury both within and outside of the U.S.

IV. Background: Prohibited Single-Firm Exclusionary Conduct

AMD v. Intel also raises allegations of dominant firm exclusionary conduct that lie at the heart of the current debate about the treatment of single-firm behavior under the antitrust laws. One important purpose of this Briefing Paper, therefore, is to review the allegations in *AMD v. Intel* in light of some important recent cases that bear on the question of when unilateral conduct by a dominant firm should be considered unlawfully anticompetitive or lawfully competitive.

Moreover, many of the issues in *AMD v. Intel* can be expected to correspond to points of controversy in the recently undertaken institutional initiatives to examine single-firm conduct and the exclusionary abuse of dominance.

A. The Legal Standards Applicable to Civil Antitrust Litigation in the Third Circuit

The antitrust jurisprudence of the U.S. Third Circuit—which includes Judge Farnan's court and out of which a number of cases dealing with dominant firm

exclusionary strategies and the limits of dominant firm behavior have arisen in recent years, is controlling. Significant cases in the area include *LaPage's Inc. v. 3M (Minnesota Mining and Manufacturing Co.)*¹³ and *United States v. Dentsply*.¹⁴

In *Dentsply*, the leading-maker of false teeth announced a policy of “single branding,” a condition it imposed on its network of dealers not to carry the products of Dentsply’s competitors. In finding the practice an anticompetitive exclusionary abuse by a dominant firm, the Third Circuit stated:

Behavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist. As we said in *LePage's, Inc. v. 3M*, 324 F.3d 141, 151-52 (3d Cir.2003), “a monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take, because there is no market constraint on a monopolist’s behavior.” 3 Areeda & Turner, Antitrust Law ¶ 813, at 300-02 (1978). Although not illegal in themselves, exclusive dealing arrangements can be an improper means of maintaining a monopoly. *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966); *LePage's*, 324 F.3d at 157. A prerequisite for such a violation is a finding that monopoly power exists. *See, e.g., LePage's*, 324 F.3d at 146. In addition, the exclusionary conduct must have an anti-competitive effect. *See id.* at 152, 159-63. If those elements are established, the monopolist still retains a defense of business justification. *See id.* at 152. Unlawful maintenance of a monopoly is demonstrated by proof that a defendant has engaged in anti-competitive conduct that reasonably appears to be a significant contribution to maintaining monopoly power. *United States v. Microsoft*, 253 F.3d 34, 79 (D.C.Cir.2001); 3 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, ¶ 651c at 78 (1996). Predatory or exclusionary practices in themselves are not sufficient. There must be proof that competition, not merely competitors, has been harmed. *LePage's*, 324 F.3d at 162.

This passage captures the current state of U.S. law in the Third Circuit. As plaintiff, AMD would appear to have the burden of establishing three essential elements to sustain its monopoly maintenance claim:

¹³ 324 F.3d 141 (3rd Cir. 2003).

¹⁴ 399 F.3d 181 (3rd Cir. 2005).

1. The defendant, Intel, possessed monopoly power;
2. and engaged in conduct with an anticompetitive effect;
3. that significantly contributed to the maintenance of monopoly power.

The court's treatment of *AMD v. Intel* is likely to reflect the perspective of *Dentsply* because both cases concern exclusive-dealing conditions as the conduct alleged to have a monopoly-maintaining anticompetitive effect.

On the other hand, it can be expected that Intel will characterize its own conduct as "pricing" conduct, the lawfulness of which should be judged by analogy with predatory pricing. This approach, however, was rejected by the Third Circuit in *LaPage's*.

Obviously, while the case could be settled anywhere along the line, the route of appeal, if it occurs, will be to the Third Circuit. Other Circuits do not necessarily share the same relatively pro-interventionist view of remedying exclusionary conduct as the Third, so there is at least the possibility of a conflict among the Circuits which could potentially set this litigation up for landmark review by the Supreme Court.

B. The Parties' Legal Perspectives

Although in its Answer Intel has denied that it possesses monopoly power, this is unlikely to be a seriously disputed issue in this case. Nor is it likely to be reasonably disputed that a separate market exists for microprocessors that implement the x86 instruction set architecture. For the balance of this Briefing Paper, therefore, it is assumed that x86 microprocessors do comprise a separate relevant antitrust market and that Intel does possess monopoly power in that market. The inquiry becomes whether and how much of Intel's conduct described in the complaint can be proven and, if so, whether it constitutes anticompetitive conduct that injured competition. The primary legal issue, therefore, is really one of fact, *i.e.*, the extent to which conduct by Intel can be proven to be anticompetitive in the context of the no-entry conditions of the x-86 microprocessor market in which only Intel and AMD compete.

When applying the legal standards of Section 2, the certainty offered by a formulaic approach that purports to describe *ex ante* which kind of conduct is anticompetitive is more apparent than real. The judiciary long ago was given the responsibility by Congress to resolve antitrust disputes and that is where such lines should ordinarily be drawn. Moreover, it is traditional for the judiciary when evaluating liability (in this case whether particular alleged conduct violates Section 2) to be guided in its decision-making by the substance of commercial arrangements rather than their form.

One key AMD allegation is that Intel engages in targeted “first dollar” discounting schemes, in which over a certain trigger quantity a discount is given for on the entire order. AMD claims that “first dollar” discounts are particularly exclusionary in the microprocessor market because, at least in the short-term, most customers must already purchase a majority of their requirements from Intel. In essence, discount strategies that penalize an OEM if an order falls below a certain percentage of the OEM’s requirements create an irresistible incentive for the customer not to shift too much (or any) of its order to AMD. AMD also alleges that such strategies have been effective in maintaining Intel’s market position and foreclosing demand for AMD products.

AMD will have to argue that were it not for the anticompetitive acts of the defendant, it would have gained substantial business from customers of Intel’s who would otherwise have dealt with AMD. Moreover, by artificially constraining its business expansion, AMD argues that Intel burdened it with a negative-feedback condition that prevented AMD from gaining the necessary traction to acquire and to continue to acquire additional market share. AMD claims that it lost profits and suffered increased capital costs as a result of Intel’s anticompetitive conduct.

Other conduct, such as “brand spoiling” and undermining product launches, is also alleged in which the antitrust injury inflicted by Intel directly interfered with AMD’s ability to engage in competition without yielding any offsetting efficiencies for Intel.

C. Other Relevant Precedents

The *AMD v. Intel* dispute arises in a global competition policy environment that is already characterized by some significant recent cases that bear on exclusionary single dominant-firm conduct. A case by the United States against Microsoft Corp. for monopoly maintenance in the PC operating system market resulted in a consent decree in 1995. While the points of comparison between that case and *AMD v. Intel* are not perfectly aligned, there is a significant similarity to the nature of the antitrust intervention obtained in that case and the type of judicial remedy currently being sought by AMD.

More recently, and of direct relevance to the *AMD v. Intel* matter, is the finding by the Japanese Fair Trade Commission that certain practices by Intel violated Japanese competition law and that such practices are similar to those of which AMD now complains.

1. *U.S. v. Microsoft (1995)*

The consent decree in *U.S. v. Microsoft Corp.*¹⁵ was the result of a Department of Justice complaint that focused on long term contracts, large minimum commitments, “per-processor” contracts, and overly restrictive non-disclosure agreements.

Several point of similarity exist with *AMD v. Intel*. In both cases a court order is sought to restrain a dominant firm from exclusivity in its dealings with customers. The long-term contracts and large minimum commitments in *Microsoft* were considered a means of ensuring that demand for a competing operating system would be locked up by current customers. The practices at the root of the 1995 consent decree were unlawful because they foreclosed demand for a rival operating system, a competition-distorting anticompetitive effect.

However, unlike the exclusive contracts and other of Microsoft’s strategies determined to be unlawful on account of their *entry-deterrence* effects, AMD does not allege entry deterrence as the alleged mechanism of the anticompetitive action of Intel’s conduct. The mechanism in *AMD v. Intel*, rather, is “switching deterrence,” in which demand is kept from AMD by strategies that discourage Intel’s customers from shifting more of their requirements to AMD.

The injunctive relief in *Microsoft*, in which a monopolist received its first antitrust court order to cease specific anticompetitive practices, however, can be presumed to bear a striking resemblance to the kind of equitable relief AMD would request from the court if it prevails on its presently pending claims against Intel.

2. **JFTC Recommendation to Intel KK**

In March, 2005, the Japanese Fair Trade Commission determined that certain practices by Intel violated Section 3 of the Japanese Antitrust Law. In particular, the Japanese competition authority found that rebate schemes that had the effect of limiting the number of AMD processors that could be purchased by Japanese OEMs were unlawful.

The English summary of the factual findings, referred to by the JFTC as a “Recommendation,” states, in pertinent part:

[Japanese Intel] from now on, shall not exclude the business activities of the competitors for the sales of CPUs by employing following conducts:

¹⁵ 1995-2 Trade Cases P 71,096 (D.D.C., Case No. Civ. A. 94-1564, Final Judgment, Aug. 21, 1995).

a) The conduct to restrict the ratio in the volume of competitors' CPUs to be incorporated into the PCs manufactured and sold by a Japanese OEM at 10 percent or less, by making a commitment to provide the Japanese OEM with the rebates and/or funds on condition that it makes MSS at 90% or more and maintain MSS at such level.

b) The conduct to, without justification, make a Japanese OEM not adopt competitors' CPUs to be incorporated into PCs in more than one groups of PCs, each of which has comparatively large amount of production volume to others, thereby making all the PCs in those groups of PCs at that OEM incorporate Intel's CPUs, by making a commitment to provide the Japanese OEM with the rebates and/or funds on condition that it change to Intel's CPUs competitors' CPUs previously incorporated into the PCs in those groups of PCs, and that it keep using Intel's CPUs in all the PCs in those groups of PCs.

This finding represents one of few instances in which the JFTC found a firm acting on its own in violation of its antitrust laws. The case also drew the most domestic and international press attention of any Japanese antitrust case in recent memory. Intel has reportedly chosen not to contest the factual findings in the Recommendation.

D. Global Institutional Initiatives

Recent international institutional initiatives to study dominant firm conduct include several institutional hearings and study groups in the United States and several in the European Union.

1. United States

a. Joint FTC-DOJ Hearings

In Vol. 71, Federal Register, No. 67, Page 17872, Friday, April 7, 2006, the DoJ and FTC jointly issued a Notice of Public Hearings and Opportunity for Comment on "Consumer Benefits and Harms: How Best to Distinguish Aggressive, Pro-Consumer Competition from Business Conduct to Attain or Maintain a Monopoly."

Both Agencies are investigating “How best to identify anticompetitive exclusionary conduct for purposes of antitrust enforcement under Section 2.” The Agencies are soliciting public comment on “two general subjects:”

(1) the legal and economic principles relevant to the application of Section 2, including the administrability of current or potential antitrust rules for Section 2, and

(2) the types of business practices that Agencies should examine in the upcoming Hearings, including examples of real-world conduct that potentially raise issues under Section 2.

In addition to these essential parameters, the Agencies provide supplementary information” which itemizes “Particular Types of Conduct for Possible Discussion,” including:

- Bundled loyalty discounts and market share discounts
- Product tying and bundling
- Exclusive dealing
- Predatory pricing
- Most-favored-nation clauses
- Product design
- Misleading or deceptive statement or conduct

The supplementary information also includes a list of wide-ranging questions about the antitrust analysis of these types of conduct. The joint Notice of Public Hearings also states:

An appropriate antitrust approach ... requires means for distinguishing permissible from impermissible conduct in varied circumstances. Moreover, those means should provide reasonable guidance to businesses attempting to evaluate the legality of proposed conduct before undertaking it. The development of clear standards that work to the advantage of consumers while enabling businesses to comply with the antitrust laws presents some of the most complex issues facing the FTC, the DOJ, the courts, and the antitrust bar. Commentators actively debate the character of conduct that implicates section 2, and the utility of different tests for distinguishing anticompetitive and pro-competitive business practices. Given these circumstances, and because “[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue,” (citing *Verizon v. Trinko*, 540 U.S. 398, 414 (2004)).

b. Antitrust Modernization Commission

The AMC has completed its hearings, which have included such topics as exclusionary conduct, and will shortly begin debating what recommendations to support. For a review of the AMC's work to date, see AAI Working Paper #05-11, Albert A. Foer, *The Antitrust Modernization Commission at Half-Time* <<http://www.antitrustinstitute.org/recent2/423.pdf>> (forthcoming in *U.S.F.L.Rev.*).

2. European Union: Exclusionary Abuse of Dominance

The European Commission is currently engaged in a comprehensive review of its antitrust laws and competition policies, including a public consultation process seeking comment on a DG-Comp Discussion Paper the focus of which is the application of Article 82 of the Treaty of Rome to exclusionary abuse of dominance.¹⁶

The D-G Competition draft Discussion Paper on Dominant Firm Exclusionary Abuses evaluates exclusionary strategies to maintain dominance in part by characterizing the extent of market (ordinarily, buyers') foreclosure caused by the potentially exclusionary abuse. In defining "abuse," the Discussion Paper refers to the following language by the European Court of Justice (D.P., para. 57):

An objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on basis of the transaction of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.
(Case 85/76 Hoffmann-La Roche & Co (1979) ECR 461)

In other words, an EC standard would seek to identify a) the foreclosure effect of Intel's alleged conducts, and b) that it was the result of 'Methods different from those which condition normal competition,' *i.e.*, that Intel's conduct was "not competition on the merits." Presumably this subsumes efficiencies, which belong to the realm of lawful competition.

¹⁶ The DG-Comp Discussion Draft can be found at <http://europa.eu.int/comm/competition/antitrust/others/article_82_review.html>. The comments of the American Antitrust Institute to the Discussion Paper are posted at: <<http://www.antitrustinstitute.org/recent2/491.pdf>>.

While the “not on the merits” element seems broad, the Discussion Paper suggests that D-G Comp is likely to utilize this breadth to analyze exclusionary conduct in light of entry conditions, economies of scale and scope, the nature of the distribution and sales networks, and the market position of the buyers in the market. All of these are important factors that may permit or prevent a dominant firm from successfully maintaining dominance through exclusionary strategies.

In this regard, the law of the Third Circuit and the European Union share the common feature that an appropriate understanding of the market conditions at play is required for the consistent and sensible assessment of the lawfulness of a particular exclusionary strategy.

Exclusivity agreements and rebate schemes by dominant firms are specifically discussed in the Discussion Paper at paragraph 139:

139. The main possible negative effect of single branding obligations and rebate systems is foreclosure of the market to competing suppliers and potential suppliers, which maintains or strengthens the dominant position by hindering the maintenance or growth of residual or potential competition (horizontal foreclosure). ... In case the buyers are retailers selling to final consumers the foreclosure may also lead to a loss of in-store inter-brand competition. In addition to the academic and policy debate in the European Commission, current enforcement initiatives are also underway.

While “foreclosure” clearly assumes an important role in the EC’s antitrust analysis, it also appears in Third Circuit jurisprudence. The Discussion draft suggests that foreclosure is “market distorting” “if it likely hinders the maintenance of the degree of competition still existing in the market or the growth of that competition” (D.P., at paragraph 58).

V. Conclusion

Injury to competition generally causes higher prices, reduced output, less innovation and reduced consumer choice. If the allegations in *AMD v. Intel* are upheld, it follows that users of PCs, laptops, workstations, servers, and any other x86 microprocessor-powered devices will have been harmed. Even more importantly perhaps, injury to competition in the microprocessor industry places at risk of stagnation the global technological supremacy of the United States.

The antitrust laws are not only concerned with preventing anticompetitive practices from raising prices to consumers. They are equally concerned with product variety, the pace and diversity of innovation, and enhanced consumer choice. In the microprocessor industry, all of these values could be implicated should Intel be found to have engaged in unlawful and anticompetitive conduct that illegally maintained its monopoly power and excluded competition not through competition on the merits.

Multiple sources for the x86 line of microprocessors, therefore, alleviates the risk of dependence on a single source and introduces technological diversity and innovation into the supply. To the extent that AMD can prove that its level of market penetration has been constrained attributable to Intel's unlawful conduct, the competitive process has been hampered, from which harm to consumers inexorably flows.

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