

EU Intel Decision Bolsters Tech Cos.' Antitrust Defenses

By Eric Kroh

Law360, Fort Wayne (September 6, 2017, 6:36 PM EDT) -- Intel scored a win Wednesday when the European Union's highest court sent a €1.06 billion (\$1.26 billion) abuse-of-dominance fine imposed on the company back to the lower court for a second look, opening up potential avenues of defense to other companies such as Google and Qualcomm that are defending against adverse decisions by the bloc's antitrust regulator.

The European Court of Justice told the General Court to re-examine whether loyalty rebates Intel Corp. offered to its customers warded off competition. The lower court did not sufficiently analyze the economic effects of the rebates when it ruled on the case in 2014, instead presuming them to be anti-competitive, the high court said.

The decision was not an unqualified success for Intel. The Court of Justice did not endorse the European Commission's argument that it did not have to provide a thorough analysis of the rebates' effects on competition, but it also did not throw out the commission's fine, which may very well be upheld by the General Court after it reconsiders the case.

Nevertheless, other companies who have been accused of dominance abuse by the commission have reason to be heartened by the decision, according to Ian Giles, a partner at Norton Rose Fulbright. With its opinion, the high court has pushed back against the commission and said it needs to consider economic evidence offered in the cases, Giles said.

"That does put the ball much more in the commission's court to take a more serious look at the economics," Giles said. "That can make it much more difficult for the commission to see through its case."

The Intel case concerns rebates the company gave to computer makers such as Dell Inc., Lenovo Group Ltd. and Hewlett-Packard Co. for buying Intel's processors instead of Advanced Micro Devices Inc.'s from 2002 to 2007.

AMD complained about the practice, and in 2009 the EC concluded that the rebates constituted an abuse of dominance by Intel. It levied a €1.06 billion penalty on the chipmaker, at the time the largest ever imposed on a single company in a dominance abuse case.

Intel challenged the decision, and in 2014 the General Court sided with the commission, saying the EC was not required to demonstrate its capability of restricting competition..

The Court of Justice, however, said Wednesday that the General Court erred by deeming the rebates to be anti-competitive by nature and not considering whether they had any redeeming competitive effects.

“It has to be determined whether the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer,” the court said.

EU courts have long been criticized for relying on old, overly formalistic case law. With the Intel decision, the Court of Justice seems to be embracing a much more nuanced, economic approach to the cases that has been advocated by lawyers and economists and even the commission’s own guidelines.

That should come as some relief to companies such as Google Inc., which is likewise defending itself from abuse-of-dominance allegations by the commission. In June the EC handed down a decision accusing Google of illegally tweaking its search algorithm to give prominent placement to its Google Shopping service. The commission’s €2.4 billion fine topped Intel’s as the largest ever in a dominance-abuse case.

The EC has two other pending dominance-abuse cases against the search company, and it has sent Qualcomm Inc. a statement of objections alleging the company forced a competitor out of the market by selling chipsets below cost.

If the companies put forth significant economic evidence in support of their conduct, that could greatly complicate the commission’s cases against them in light of the Intel ruling, Giles said.

The decision “moves the goalposts quite significantly both ... for Intel and also other cases in future,” he said.

The Intel ruling, however, is not an unequivocal win for companies accused by the commission of abusing their dominance. Richard Pike, a partner at Constantine Cannon LLP, said that although the decision is a step in the right direction toward embracing a more economic approach to the cases, it did not go as far as some had hoped.

The court does not say that the commission positively has to show that conduct is bad for competition, only that there has to be an opportunity for the accused party to show that it’s not, Pike said.

In Intel’s case, the EC did conduct an economic analysis of the company’s loyalty rebates. The commission concluded that a rival as efficient as Intel would have had to offer untenably low prices to compete with the rebate scheme, and therefore it was capable of foreclosing competition.

Because that analysis played an important role in the commission’s assessment of the scheme, the Court of Justice said that the General Court had to consider Intel’s arguments concerning the test.

The high court’s decision was more of a criticism of the lower court’s handling of the case than of the commission’s conclusions about the rebates, said Kevin Coates, a partner at Covington & Burling LLP.

“It’s really stretching it to say that the Court of Justice has said anything really about the substance of the commission’s decision,” Coates said. “It’s kicked all of that back down to the General Court.”

Upon re-examination, after weighing Intel’s arguments concerning the economic analysis, the General Court may still decide in favor of the EC, though it will likely be years before an eventual decision is handed down.

The Court of Justice also rejected Intel's jurisdictional arguments, giving the EC the green light to pursue cases that on their face do not appear to have an obvious connection to the EU, Giles said. The company's rebate regime concerned a U.S. company making chips in Taiwan that it then sold to American and Chinese companies, he said.

The commission "has been authorized effectively by the court here to assert jurisdiction over the type of conduct which has no immediate nexus to the EU," he said.

The high court also rapped the EC's knuckles for not keeping a transcript of an interview it conducted with a Dell executive during its probe of Intel. The commission had argued that the interview was informal and therefore didn't need to be recorded, but the court held that the EC is required by law to record any interview it conducts to collect information relating to an investigation.

Although the court did not find the breach to be grounds for throwing out the commission's case entirely, the holding is a useful clarification, Pike said.

"The court made it very clear that if the commission is collecting data, collecting information, it always has to record that," he said.

--Editing by Brian Baresch and Pamela Wilkinson.