

# Weil Briefing: Antitrust/Competition

December 18, 2009

## **FTC Sues Intel, Alleging Unfair Methods of Competition and Monopolization**

On December 16, 2009, the Federal Trade Commission (FTC) filed an administrative complaint against Intel Corp., the world's leading manufacturer of personal computer microprocessors, charging that Intel has unlawfully used its market dominance to suppress competition and strengthen its monopoly in the personal computer microprocessor and related markets. The administrative complaint (<http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf>) was filed only one month after Intel agreed to pay \$1.25 billion to its main competitor, Advanced Micro Devices, to settle a civil suit involving similar antitrust allegations. Intel has also been accused of antitrust violations by the European Commission and the New York State Attorney General. The FTC's charges, brought principally under Section 5 of the FTC Act as an "unfair method of competition" (claims under Section 2 of the Sherman Act were also asserted), go beyond the allegations in those actions, and serve as a signal that the FTC will seek an expansive reading of its Section 5 jurisdiction.

In its complaint, the FTC alleges that Intel has waged a systematic campaign to block its competitors' access to the market by, among other things, (1) threats and rewards aimed at leading personal computer manufacturers, inducing them to avoid purchasing central processing units (CPUs) manufactured by Intel's competitors; and (2) redesigning "compiler" software to make it falsely appear that competing CPUs were inferior to Intel's.

The FTC charges that Intel has also employed similar unlawful practices against manufacturers of graphics processing units (GPUs) and related products that could pose a threat to Intel's monopoly power. The complaint alleges that there is a "dangerous probability" that Intel's unfair methods of competition could allow it to extend its already existing CPU monopoly into the GPU microprocessor market.

The complaint reflects the FTC's evolving policy of using Section 5 to challenge conduct that may fall short of the reach of the Sherman and Clayton Acts. For example, the complaint asserts that Section 5 gives the FTC "a unique role in determining what constitutes unfair methods of competition" and also provides it with the power "to stop in their incipiency" acts that, if allowed to continue, would violate the Sherman and Clayton Acts. The complaint also challenges Intel's pricing at below cost, but the FTC defined "below cost," for purpose of a Section 5 claim, to mean average variable cost plus a suitable portion of fixed costs, as opposed to below average variable (marginal) costs, which is the most common standard applied by courts.

The FTC seeks very extensive relief, including an order preventing Intel from using threats, bundled prices and other means that allegedly encourage exclusive dealing. It also proposes that Intel be required to submit certain business decisions for FTC pre-approval and allow the FTC to monitor many of Intel's practices.

In an accompanying statement outlining the rationale for bringing a stand-alone Section 5 unfair method of competition claim (<http://www.ftc.gov/os/adjpro/d9341/091216intelchairstatement.pdf>), Chairman Leibowitz and Commissioner Rosch explained that the FTC had chosen to pursue such claims in response to recent court decisions limiting the antitrust relief available to private plaintiffs. Consequently, “some conduct harmful to consumers may be given a ‘free pass’ under antitrust jurisprudence, not because the conduct is benign but out of a fear that the harm might be outweighed by the collateral consequences created by private enforcement.” Thus, “it is more important than ever that the Commission actively consider whether it may be appropriate to exercise its full [and unique] Congressional authority under Section 5.” Commissioner Rosch filed a separate statement, dissenting from the Commission’s choice to include “tag-along” claims under Section 2 of the Sherman Act; for policy reasons, including preserving the FTC’s freedom to assert Section 5 claims without encouraging derivative private antitrust litigation (private plaintiffs cannot use Section 5 finding as a *prima facie* evidence of an antitrust violation), Commissioner Rosch would have preferred to proceed solely under Section 5.

We will continue to monitor this case and the FTC’s intent to use its Section 5 powers and will be providing updates regarding any significant developments. If you have any questions regarding this matter, we would be happy to assist or discuss with you.

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