

CASE STUDY—*AMD v. INTEL*

ANTITRUST AND COMPETITION PRACTICE

Client
AMD

On November 12, 2009, Advanced Micro Devices Inc. (AMD) and Intel Corporation (Intel) announced the settlement of their epic antitrust dispute. As part of that settlement, Intel agreed to pay US\$1.25 billion, which is one of the largest private settlements in the history of Sherman Act Section 2 litigation. Intel also agreed to refrain from certain business practices that AMD had alleged to be anticompetitive. As part of the settlement, the parties also renewed their long-standing patent cross-license agreement and included language to clarify that AMD can freely operate its business using multiple foundries.

Industry
MICROPROCESSORS

Areas of expertise

DAMAGES ANALYSIS
ECONOMETRICS
SINGLE-FIRM CONDUCT ANALYSIS

Economists Douglas Bernheim, Thomas Lys, and Mark Watson were retained by AMD and submitted expert reports in AMD's antitrust case against Intel Corporation. The reports were credited by Chuck Diamond of O'Melveny and Myers LLP, lead counsel for AMD, as a significant factor leading to the settlement.

Dr. Bernheim, Bates White Partner and Professor of Economics at Stanford University, offered a variety of opinions on liability issues related to AMD's allegations that certain Intel business practices foreclosed AMD, harmed competition, and served to maintain Intel's alleged monopoly, in violation of Section 2 of the Sherman Act. Dr. Bernheim's lengthy report addressed a number of critical antitrust questions, including the circumstances under which "exclusionary conditions" are anticompetitive and the appropriate tests to apply in various situations. Exclusionary conditions are conditions in an agreement between a seller and a buyer that make discounts, rebates, or other material considerations contingent on the buyer restricting its business dealings with one of the seller's rivals.

Dr. Bernheim identified a method to determine whether or not conditions of the sort allegedly placed by Intel on its dealings with its customers are anticompetitive, independent of any comparison of prices and costs. He also examined the question of the appropriate measure of costs in those circumstances in which a price cost test is appropriate. Professor Bernheim also examined the extensive discovery record in the case to assess the anticompetitive versus procompetitive balance of Intel's conduct.

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Dr. Watson, Professor of Economics at Princeton University and a Bates White Academic Affiliate, conducted an econometric study to determine the extent of AMD's lost revenues attributable to Intel's alleged conduct and to distinguish the impacts of the alleged conduct from a large assortment of factors and alternative explanations.

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Dr. Lys, Professor of Accounting at Kellogg School of Management at Northwestern University, addressed questions related to the cost of microprocessor production at both AMD and Intel and calculated the lost profits that AMD suffered as a result of Intel's alleged conduct.

Bates White's team of PhD economists, accountants, statisticians, programmers, and data analysts supported these experts and O'Melveny attorneys in their investigation of the allegations and in preparation of expert reports over the course of more than four years of litigation. To determine the extent and impact of the alleged anticompetitive behavior, the Bates White team combed tens of thousands of documents identified from among the millions of documents, emails, and depositions collected from scores of companies, industry participants, and executives.

The massive electronic discovery effort, which has been described as the largest electronic document discovery collection in history, was only part of the information examined by the consulting team. In addition, computer transaction records from the litigants and from many computer makers were also processed and incorporated into Bates White's analysis. The consulting team also assisted counsel in responding to requests from antitrust regulatory agencies in jurisdictions throughout the world.

The dispute between the two companies has a long history. AMD and Intel have competed against each other in the x86 microprocessor business since 1981. That was the year that IBM introduced the IBM personal computer and required that Intel give AMD and others a license to produce the x86 processor to protect IBM against the risks associated with a single monopoly supplier. AMD eventually became, effectively, the only remaining competitor to Intel in the x86 market.

The turning point that gave rise to the antitrust concerns occurred in the mid 1990s, when AMD broke from its role as a second source manufacturer of reverse engineered Intel processor designs, and began to compete for innovation leadership by producing its own proprietary, state-of-the-art x86 processors. Over the next few years, AMD emerged as an innovation rival and potential challenger to Intel's dominance of the global x86 processor industry. By 2001, AMD's Athlon desktop processors were viewed by many as outperforming Intel's flagship Pentium-series processors, and they were offered at lower prices. In 2003, AMD introduced its award winning "Opteron" server processor, marking AMD as the technology leader with its significant design advancements and dramatically improved performance. In spite of this, AMD experienced many obstacles when it attempted to break into or expand its toehold among the world's top computer makers. In its lawsuit, AMD alleged that this state of affairs was the result of Intel's conduct and that this conduct amounted to illegal exclusionary tactics.

In 2005, AMD brought suit against Intel in the U.S. District Court for the District of Delaware alleging among other things, violation of Section 2 of the Sherman Antitrust Act. AMD asserted that Intel possessed monopoly power in the worldwide market for x86 processors and that it maintained that power through "a relentless, worldwide campaign to coerce customers to refrain from dealing with AMD." Specifically, AMD alleged that Intel employed payments for exclusivity, rebates, and other support conditional on the recipient restricting its business with AMD, as well as threats of retaliation against OEMs launching AMD-based models in strategically important market segments.

Intel's response characterized its conduct as aggressive price-based competition of the sort that makes consumers better off. AMD, it argued, lost business opportunities for reasons it claimed were unrelated to Intel's conduct, such as disappointing products, a weak brand image, or execution issues.

More details related to Intel's alleged conduct can be found on the European Commission website: http://ec.europa.eu/competition/sectors/ICT/intel_provisional_decision.pdf.

Details of the AMD and Intel settlement can be found on the United States SEC website as exhibit 10.1 of Intel's 8-K filing on November 12, 2009. The link is <http://www.sec.gov/Archives/edgar/data/50863/000005086309000213/exh101.htm>.