

AMD, Intel Battle Wages On As EU Decision Nears

Monday, March 20, 2006 --- A decision by the European Commission in the landmark AMD-Intel antitrust case could be imminent, but experts say the complex global dispute could drag on for years unless the “Hatfields and McCoys” of Silicon Valley settle out of court.

For the last two decades, Intel and AMD have wrestled each other for the top position in the microprocessor marketplace, with suits and countersuits and broken agreements dominating their long history.

Though number one and two respectively, a huge gap exists between the two, with Intel controlling an estimated 90% of the market.

In June 2005, AMD slapped Intel with its most recent lawsuit, accusing the company of engaging in practices that unfairly restricted its access to the marketplace and led to the lopsided situation.

“Intel is illegally maintaining a monopoly in the x86 microprocessor market through threats, coercion and intimidation of its own customers,” says AMD.

Intel fired back, charging that AMD’s struggling market position is actually the result of bad business decisions and market incompetence.

But investigations into Intel’s dubious practices have sprung up elsewhere worldwide, with the European Commission and the Korean Fair Trade Commission conducting so-called “dawn raids” of the company’s offices.

Last March, Japan’s Fair Trade Commission ruled that Intel had violated antitrust laws in selling microprocessors to personal-computer makers and ordered the company to stop the practices.

As the investigations continue to unfold around the world, some are hailing the global battle as a “landmark” antitrust case that will have vast implications for the industry and monopolies in general.

“Not to overstate things but the future of the microprocessor industry and the future of consumer choice is at stake,” says Chuck Diamond, a partner with O’Melveny & Myers and lead counsel in AMD’s antitrust suit against Intel

“AMD is the sole competitor of any significance and the only alternative potential for new innovations and products,” says Diamond. “Unless AMD gets its share, this is an industry that is threatened by absolute domination.”

Diamond believes that the public is actually the most at risk, asserting that

innovation will suffer in a single-firm environment.

“Consumers expect their computers to be faster, cheaper and more efficient every year,” he says. “There won’t be any drivers for future innovation.”

In its complaint, AMD has argued that Intel has coerced major companies, particularly PC manufacturers, into using its products through financial threats and intimidation, and conditioning rebates on avoidance of AMD products.

“Intel’s economic coercion of customers extends to all levels – from large computer-makers like Hewlett-Packard and IBM to small system-builders to wholesale distributors to retailers such as Circuit City,” the complaint alleges.

“All face the same choice: accept conditions that exclude AMD or suffer discriminatory pricing and competitively crippling treatment,” the complaint reads.

While AMD contends that the industry has acknowledged the company as the better innovator in recent years, it is not enough to merely have a good product, according to Diamond.

“You need access to the marketplace,” he says. “Not just a better mousetrap.”

Indeed, the case highlights some of the challenges intrinsic to antitrust law’s ban on abuse of market power, experts say.

“We have a schizophrenic attitude toward monopolists,” says David Balto, a partner at Robins, Kaplan, Miller & Ciresi and a former policy director of the U.S. Federal Trade Commission. “We want people to compete aggressively but once you become king of the hill then we treat you very differently.”

“More light is shed on the dominant player and its practices become more under scrutiny,” says Jerry Beane, a partner in the antitrust division of Andrews Kurth. “We encourage competition and want there to be ‘builders of mouse traps’ but don’t want them to be so successful that there are no other builders.”

Market dominance, however, does not always mean that the consumer will suffer. Antitrust laws are designed to ensure that there are no artificial barriers towards competition in the marketplace but they do not exist to create a level playing field, says Balto.

“Oftentimes, the unlevel playing field is the one that will benefit the consumers,” he says.

Diamond rejects the idea that AMD’s litigation is the result of resentment over Intel’s monopoly.

“It’s not unlawful to earn a monopoly,” says Diamond. “Most businessmen aspire to be at the top of industry and topple competitors.”

AMD does not begrudge Intel’s success, but rather the way in which it has pursued this success, he says.

“There is nothing innovative about paying people not to do business with AMD,” says Diamond. “There is nothing skillful about prohibiting retailers from stocking AMD’s products.”

These are “predatory practices” that have no place in business, says Diamond, emphasizing that the consumer is the one who really loses.

Balto believes that AMD has made a good case in showing how the marketplace suffers and predicts that the courts will find the allegations against Intel “very troubling.”

“But the intriguing thing is that if the lawsuit had been brought five or six years ago, the law would have been less favorable to AMD,” says Balto.

Recent court decisions have exhibited the courts’ desire to crack down more on monopolies, with the U.S. Department of Justice’s case against Microsoft being the most famous example.

Microsoft was accused of unlawfully abusing its dominant position by bundling its Internet Explorer web browser software in with its Microsoft Windows operating system.

Though later overturned, the district court judge overseeing the case initially ruled that Microsoft had achieved an unlawful monopoly and should be broken up into two parts.

“I think [the courts] saw how anticompetitive practices in high tech markets can harm consumers and competition,” says Balto.

He believes that the recent actions abroad, particularly with Japan’s FTC, will help boost AMD’s case as it heads to trial in the United States.

“Intel will say that foreign statutes don’t matter but the U.S. is increasingly looking at what foreign antitrust officials do,” says Balto.

Nicolas Petit, co-author of the Antitrust Hotch Potch, believes that the recent actions will also affect the European Commission’s pending case.

“The fact that a number of authorities have found problems is indicative that you have a problem in the marketplace,” says Petit, a researcher at the University of Liege in Belgium.

“There is no legal value attached to it but it gives strong incentive to the Commission to delve into the case further,” he says.

Petit predicts that a decision from the EC regarding Intel will be coming within the next month.

“They are taking the case very seriously,” says Petit. “I don’t think the Commission is going to drop a case like that.”

As for the U.S. litigation, few are willing to venture a guess regarding the outcome of the case.

While many insiders fear that the litigation could drag on for a number of years, the two sides have settled their squabbles before, reaching an agreement in 1995 that halted all litigation.

“One safe prediction is that most cases settle,” says Rod Thompson, a partner at Farella Braun + Mattell LLP who specializes in antitrust litigation.

“Even the Hatfields and McCoys tend to settle sooner or later.”

--By Anne Urda, anne.urda@portfoliomedia.com

--Additional reporting by Cat Fredenburgh