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American Antitrust Jurisprudence Applied to *European Commission v. Intel*

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AMERICAN ANTITRUST JURISPRUDENCE APPLIED TO EUROPEAN COMMISSION V. INTEL

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I. INTRODUCTION

In May 2009, the European Commission found that the Intel Corporation ("Intel") had abused its dominant position in the market for central processing units by unlawfully excluding competitors from the marketplace.[2] As a result of the Commission's findings, Intel was fined 1.06 billion Euros;[3] equivalent to 1.45 billion U.S. dollars, the largest fine ever levied by the Commission for breach of the European Union's competition laws.[4] The Commission's decision was based on Article 82 of the Treaty establishing the European Community ("Article 82"), which holds that a firm may not abuse its dominant position in a way that affects trade among its member states.[5]

Jurisprudence regarding this type of dominant firm behavior reflects an economic and legal dilemma faced by governments around the world concerning the regulation of large firms in the marketplace.[6] The dilemma exists because antitrust law is charged with reigning in unchallenged economic powers, which deaden competition and harm consumers, while allowing successful firms to enjoy victory in fair competition.[7] Governments develop antitrust jurisprudence in order to regulate the market amidst this dilemma. A worldwide firm, such as Intel, operates among many governments, all of which have developed separate antitrust jurisprudence reflecting different standards and values in the regulation of markets. Analyzing the European Commission's recent investigation and findings of Intel's business practices under

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2 Commission Provisional Decision COMP/C-3/37.990 – Intel, 2009, 274–76 [hereinafter Provisional Decision].

3 *Id.* at 511.

4 James Kanter, *Europe Fines Intel $1.45 Billion in Antitrust Case*, N.Y. TIMES, May 13, 2009, http://www.nytimes.com/2009/05/14/business/global/14compete.html (last visited Feb. 12, 2011).

5 Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 3, art. 82 [hereinafter EC Treaty] (Article 82 has recently been renamed to Article 102 of the Treaty on the Functioning of the European Union.).

6 ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY, 678 (West Group 2002).

7 *Id.*

American jurisprudence provides a useful comparison between European and American antitrust law.

The scope of this paper is to identify the conduct for which Intel was found in violation of the European Union's competition laws and analyze the exact same conduct under the competition and antitrust laws of the United States. Section II is an introduction to the global market in which Intel competes. Section III discusses the European Commission's case against Intel, including a pointed description of Intel's unlawful conduct. Section IV provides an analysis of Intel's European business practice, as described by the European Commission, analyzed under United States competition and antitrust jurisprudence. The last section discusses the standard that would likely be applied to Intel in a similar case heard in the United States.

II. THE WORLD-WIDE CENTRAL PROCESSING UNIT MARKET

The central processing unit ("CPU"), also known as microprocessor or processor, is considered the brains of a computer. The CPU loads the operating system and basically all computer operations run through the CPU.[8] CPU producers generally sell CPUs to Original Equipment Manufacturers ("OEMs") such as Dell, Hewlett Packard and Lenovo, which assemble computers using CPUs along with myriad hardware and software components purchased from many different producers.[9] After assembly, the OEMs sell finished computers to both consumers and retailers.[10]

The global market for producing and selling CPUs is dominated by Intel. Advanced Micro Devices ("AMD") is the only other firm considered to be a major player in the industry. Nonetheless, Intel maintains nearly an 80% market share,[11] while the two companies compete for the sale of practically every CPU throughout the world.[12] Over time, AMD has filed numerous antitrust complaints against Intel, which has spurred regulators in a number of countries to take a hard look

[8] Encyclopedia Britannica, Central Processing Unit Definition, http://www.britannica.com/EBchecked/topic/102611/central-processing-unit (last visited Feb. 12, 2011).

[9] Bureau of Labor Statistics, Computer and Electronic Product Manufacturing, http://www.bls.gov/oco/cg/cgs010.htm (last visited Oct. 20, 2010).

[10] Merriam Webster, OEM Definition, http://www.merriam-webster.com/dictionary/oem (last visited Feb. 12, 2011).

[11] IDC – Press Release, Worldwide PC Microprocessor Unit Shipments Rise 31.3% Year Over Year in the Fourth Quarter, According to IDC, http://www.idc.com/getdoc.jsp?containerId=prUS22178710 (last visited Feb. 12, 2011).

[12] In 2009, Intel captured 79.7% of the microprocessor market while AMD had a market share of 20.1%; VIA Technologies had a negligible share of the market. *See id.*

at the way Intel competes for business.[13] AMD has long felt that Intel has used its dominant position in the processor market to exert anticompetitive pressure on OEMs, placing artificial limits on AMD's capacity to compete for CPU sales. AMD's allegations are not without merit, as seen by the European Commission's investigation of Intel, which centered on Intel's business practices in the market for CPUs that were part of the "x86 family" of microprocessors.[14] Today, most desktops, notebooks, and servers throughout the world utilize the x86 family of processors.

III. EUROPEAN COMMISSION'S FINDINGS: INTEL'S ABUSE OF A DOMINANT POSITION

The European Commission's three-year investigation of Intel's potentially anticompetitive business practices found that Intel had engaged in two different types of anticompetitive behavior that violated the European Union's competition laws: (1) conditional rebates and (2) naked restraints, or pay-for-delay agreements. The anticompetitive conduct stems from Intel's business dealings with a number of OEMs—Dell, Hewlett Packard, NEC, and Lenovo—as well as two European electronics and computer retailers—Media Markt and Saturn. Media Markt and Saturn are both owned and operated by a single parent company, Media Saturn Holding ("MSH").[15] The following details the Commission's findings:

A. Conditional Rebates and Payments

According to the Commission's findings, Intel's business model included the practice of offering OEMs rebates on the condition that the OEMs agreed to buy all or nearly all of their x86 CPUs from Intel.[16] Intel made payments to MSH, the European computer retailer, conditioned on the retailer exclusively selling computers that utilized the Intel x86 CPU.[17] These exclusivity agreements, known as conditional rebates, reduced the OEM's freedom to choose from whom to purchase their x86 CPUs and harmed end-user consumers by limiting their choice of the brand of CPUs integrated in the computers in the marketplace. The ultimate effect of the rebates was that they strong-armed OEMs, forced

[13] Intel News Release, AMD and Intel Announce Settlement of All Antitrust and IP Disputes, http://www.intel.com/pressroom/archive/releases/2009/20091112corp_a.htm (Nov. 12, 2009) (last visited Feb. 12, 2011).

[14] Provisional Decision, *supra* note 2, at 279.

[15] *Id.* at 53.

[16] *Id.*

[17] *Id.* at 279.

loyalty to Intel, and distorted competition in the marketplace for x86 CPUs, resulting in the CPU market being affected by factors inconsistent with fair competition.

The Commission conducted a thorough investigation of Intel's business relationships with the major OEMs, as well as the European retailer, MSH. The findings revealed that Intel offered conditional rebates and payments that severely limited the amount of business the OEMs could conduct with non-Intel CPU producers, specifically AMD.[18]

1) Dell

The Commission found that Dell was exclusively incorporating Intel processors into its computers specifically in order to qualify for Intel's conditional rebates.[19] At one point, Dell evaluated the possibility of adding a line of AMD-based computers,[20] but concluded that entering into an agreement with AMD would have an overall negative financial impact because Intel would discontinue or reduce the amount of rebates it offered.[21] Intel never informed Dell of the exact amount by which the rebate would be reduced[22]; that uncertainness likely posed too great a risk for Dell to add the AMD-based line. With no written agreement regarding the rebate, Dell was apprehensive about dual sourcing with AMD. Thus, the rebate became a source of control for Intel and ensured that Dell would not stray from its exclusivity agreement.

2) Hewlett Packard

Much like Dell, Hewlett Packard ("HP") was required to purchase a significant percentage of their supply of processors from Intel in order to qualify for a rebate. Although HP was not required to purchase exclusively from Intel, it was nonetheless required to purchase 95% of its processors from Intel to qualify for the rebate.[23] HP was the first major OEM to offer an AMD-based business desktop, and it had plans to produce and ship a large volume of them. Ultimately however, it shipped only a limited number; the AMD-based units ended up accounting for less than five percent of HP's x86 product offering. HP confirmed that Intel's rebate was a major factor in its decision to scale down its AMD-based desktop computer plans.

[18] Kanter, *supra* note 4.
[19] Provisional Decision, *supra* note 2, at 280.
[20] *Id.* at 280–81.
[21] *Id.* at 281.
[22] *Id.* at 284.
[23] *Id.* at 287.

Worth mentioning is the fact that AMD was so interested in placing its processors in HP's computers that it offered HP one million free processors.[24] It is reasonable to assume that a company, unrestrained by anticompetitive forces, would gladly and quickly accept such an offer; however, HP only accepted a small fraction of the free processors.[25] The decision to accept only a fraction of the CPUs, an essential and expensive element in HP's product, makes little sense in a competitive, free market. Intel's rebates undoubtedly influenced HP's decision.

3) NEC

NEC's rebate, much like Dell's and HP's, was conditional on NEC purchasing at least 80% of its x86 processors from Intel.[26]

4) Lenovo

Lenovo planned to roll out an AMD-based notebook in 2007, but canceled it before the project got off the ground. According to an email circulated within the company, Lenovo "cut a lucrative deal with Intel" and thus would "not be introducing AMD based products in 2007."[27] Lenovo then became an exclusive buyer of Intel CPUs and dropped its plans with AMD.[28]

This result is particularly interesting when viewed in light of Lenovo's perception of AMD. Correspondences between Lenovo executives show that Lenovo was very interested in implementing AMD CPUs into its systems. The executives asserted that "AMD has the highest penetration in the market Lenovo is targeting for growth" and "AMD CPU prices are significantly below Intel."[29] Lenovo's cancellation of its plans regarding AMD-based notebooks strongly suggests that the agreement Lenovo entered into with Intel was, in effect, a conditional rebate. Otherwise, Lenovo would have likely rolled out an AMD-based notebook in light of the fact that Lenovo's executives were aware that AMD's CPUs were less expensive than Intel and that there was a market demand for AMD-based notebooks.

5) Media Saturn Holding

[24] *Id.* at 288–89.
[25] *Id*. HP accepted only 160,000 processors. *Id.*
[26] Provisional Decision, *supra* note 2, at 293.
[27] *Id*. at 161–62 (quoting Lenovo submission pursuant to EU investigation).
[28] *Id.*
[29] *Id.* at 296 (quoting Lenovo submission pursuant to EU investigation) (internal quotation marks omitted).

Media Saturn Holding ("MSH") is a German-based consumer electronics retailer which operates in fourteen European countries.[30] MSH is the largest personal computer retailer in Europe.[31] Intel contracted with MSH to offer certain rebate payments in exchange for MSH's promise to exclusively offer Intel-based computer systems.[32] The two companies continued a conditional rebate relationship in various forms for nearly ten years prior to the Commission's investigation.[33]

MSH actually viewed certain AMD-based products to be attractive substitutes for similar Intel products and was seriously interested in selling AMD-based computer systems. On a number of occasions, MSH entered into negotiations with AMD regarding the viability of carrying AMD products. The negotiations never materialized because the conditional rebate payments offered by Intel were always more lucrative.[34] Thus, the result was the same as with the OEMs—Intel's conditional rebates restricted MSH's freedom to choose between CPU manufactures and limited what it could offer its customers.

As evidenced by its agreements with Dell, HP, NEC, Lenovo, and MSH, Intel offered substantial economic benefits in exchange for promises of fidelity. The OEMs became captive and were strapped with golden handcuffs once they accepted the rebates. The exclusivity agreements forced the OEMs to forego business opportunities and ventures they would have otherwise pursued.

B. European Jurisprudence of Conditional Rebates

Markets that are dominated by a single firm are subject to the regulations found in Article 82 of the Treaty establishing the European Community. Article 82 prohibits firms with a dominant position from abusing their position in a way that negatively impacts competition.[35] Article 82 is enforced by the European Commission,[36] which has held that Article 82 is a tool to objectively analyze whether the dominant firm has engaged in "methods different from those which condition normal competition in products and services," and result in a weakening of competition or stifling the growth of competition in the market.[37] The

[30] *Id.* at 176.
[31] *Id.*
[32] *Id.* at 298.
[33] Provisional Decision, *supra* note 2, at 176.
[34] *Id.* at 293.
[35] *See* EC Treaty, *supra* note 5, art. 82.
[36] Provisional Decision, *supra* note 2, at 13.
[37] Case 85/76, Hoffman-La Roche v. Comm'n, 1979 E.C.R. ¶ 91; *accord* Case C-95/04, British Airways v. Comm'n, 2008 E.C.R. ¶ 66.

European Union's Court of Justice, the highest court in the Union, has also consistently held that a dominant firm illegally abuses its position, per Article 82, if it obligates a purchaser to acquire all or most of their requirement exclusively from the dominant firm, even when the obligation "is undertaken in consideration of the grant of a rebate" or within "a system of fidelity rebates."[38] Conditional rebates are "incompatible with the objective of undistorted competition within the common market."[39]

The Court's inquiry is focused on the conduct of the dominant firm in the industry and the exclusionary intent of the agreements.[40] The analysis does not consider the effect of the agreement on other market participants.[41] Thus, a dominant firm can be found to have abused its position regardless of whether its competitors suffered or were likely to have suffered foreclosure or other adverse effects. Furthermore, under Article 82, it does not matter if the other competitors in the market experienced setbacks or, even in the unlikely scenario, greater success during the time the conditional rebates were in place.[42]

C. Pay-for-Delay, Naked Restraints

On a more limited scale, Intel was found to have violated Article 82 by engaging in naked restraints; requiring OEMs through contractual provisions to delay the release of certain AMD products ("pay-for-delay").[43] Even though Intel engaged in pay-for-delay agreements on a more limited scale than the conditional rebates, the pay-for-delay agreements are perhaps more egregious because, unlike conditional rebates, which could arguably lead to efficiency enhancements such as more dedicated support and service for Intel products by the OEM or retailer, pay-for-delay agreements lack any redeeming efficiency or pro-competitive justification.[44] The only outcome of pay-for-delay agreements is that the supplier, Intel in this case, is benefited by the time the competing products are not offered in the marketplace. When the supplier is a dominant firm, like Intel, their dominance is further entrenched. End users are ultimately harmed because there is less competition and these effects usually last much longer than the agreed upon delay period.

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[38] *Hoffman-La Roche*, Case 85/76, ¶ 89.
[39] *Id.* at ¶ 90.
[40] Provisional Decision, *supra* note 2, at 277–78.
[41] *Id.*
[42] *Id.*
[43] *Id.* at 472
[44] Thomas M. Jorde & David J. Teece, *Rule of Reason Analysis of Horizontal Arrangements: Agreements Designed to Advance Innovation and Commercialize Technology*, http://www.ftc.gov/opp/global/jorde2.shtm (last visited Feb. 12, 2011).

1) Hewlett Packard

The agreement between Intel and HP included terms whereby HP had to limit and postpone its distribution of AMD-based business desktops.[45] Specifically, the agreement restricted HP from selling AMD-based desktops to mainstream business customers, and AMD products could only be purchased directly from HP rather than from HP's downstream business partners.[46] Furthermore, HP had to agree to delay the launch of the AMD computers in certain large markets for six months.[47] Naturally, these limits were injurious to AMD because its market reach via HP was delayed and relegated to nonmainstream business. By extension, the limits were injurious to end-user consumers because consumers in mainstream business were unable to purchase AMD-based HP computers. In effect, Intel had completely blocked that distribution channel.

2) Acer

Acer had planned to launch both an AMD desktop and notebook in September 2003. It delayed the launch until January 2004 in some markets and May 2004 in others.[48] Acer's decision to delay the launch was induced by pressure from Intel executives, which prompted Acer to feel that Intel funding would be decreased if it did not delay the launch as Intel desired.[49]

3) Lenovo

Lenovo entered into an agreement with AMD to launch two notebooks in 2006; the first wave of geographic markets in June and the other markets in September or October.[50] Negotiations regarding funding from Intel induced Lenovo to postpone the first wave to coincide with the second wave to take place in September or October.[51] Then the launch was postponed until 2007.[52] Ultimately, due to financial pressure Intel exerted upon Lenovo, the launch was canceled entirely.[53]

[45] Provisional Decision, *supra* note 2, at 474–76.
[46] *Id.* at 474-75.
[47] *Id.* at 475.
[48] *Id.* at 477.
[49] *Id.*
[50] *Id.* at 477-78.
[51] Provisional Decision, *supra* note 2, at 478.
[52] *Id.*
[53] *Id.*

D. European Jurisprudence of Pay-for-Delay, Naked Restraints

Article 82 is upheld as an objective, results-oriented standard applicable to the full spectrum of anticompetitive conduct by a dominant firm. European Commission case law constructs an analysis void of inspection of the smaller firm's performance during the agreement period.[54] Proper analysis of Intel's conduct leads to the inevitable conclusion that the pay-for-delay agreements caused delays and restrictions on the commercialization of AMD-based products, which in turn had a negative effect on competition among member states in violation of Article 82.

IV. INTEL'S CONDUCT ANALYZED UNDER AMERICAN ANTITRUST JURISPRUDENCE

Intel's conduct in Europe may be unique to its operations in the European Union, or it may provide a window into the type of general business practices Intel is engaged in around the globe. If Intel had made the same arrangements with OEMs and retailers in the United States, its actions would be evaluated according to American antitrust jurisprudence.

A. United States Antitrust Standards

In the United States, unilateral conduct by dominant firms is regulated by Section Two of the Sherman Act ("§2").[55] Under §2, firms are forbidden from taking steps to create or maintain a monopoly.[56] The language of the Sherman Act is often much stricter than its application, as case law has fleshed out the unacceptable unilateral conduct that tends to create or maintain a monopoly. Section 2 is composed of three different offenses by which a defendant can be brought in violation: monopolizing, attempting to monopolize, and conspiring to monopolize (conspiring is seldom alleged). The Clayton Act, the Federal Trade Commission Act, and the Robison-Putnam Act also play a role in which competition among firms is regulated in the United States.

1) Monopolization

To violate the monopolization standard of §2, the defendant must have monopoly power in the relevant market and must have acquired or maintained that power anti-competitively, as distinguished from natural

[54] *Id.* at 479.
[55] 15 U.S.C. §2 (2010).
[56] *Id.*

growth or development as a consequence of a superior product, business acumen, or historic accident.[57] Thus, not all monopolies are unlawful. The first step in a monopolization case is to determine if the defendant has monopoly power. Market share is an often-used method to determine market power; however, the question of how much market share is needed to make an inference of monopoly power is still unclear. Case law has established that a 90% share of the market is enough, while 41% is not.[58] Judge Learned Hand offered further guidance by saying that "it is doubtful whether sixty . . . percent would be enough" to establish monopoly power.[59]

A recent development in determining monopoly power is the implementation of the cross elasticity of demand test, which courts have begun to use to determine the relevant market and market power.[60] Cross elasticity of demand is an economic tool for measuring consumer response when a firm raises prices. If consumers can easily substitute another product in response to the raised price, then the product market will need to be expanded to include the product that consumers purchased after the price increase.[61] Since the relevant market was expanded to include the second product, the first producer will have a high cross elasticity of demand; market share will decrease and with it the likelihood of a finding of monopoly power. Inversely, if a producer is able to raise prices and consumers are unable to find close substitutes in response to the price increase, there is low elasticity and the market can be narrowly defined. Thus, if the producer is a dominant player in the market, there is an increased chance it will be found to have monopoly power.

Once monopoly power is established, the second prong of illegal monopolization needs to be proven: acquisition or maintenance of the

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[57] United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966). This framework is still in effect today, *see* United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

[58] Standard Oil, American Tobacco, and Aluminum Company of America had 90% share of the market and were deemed to have monopoly power. U.S. Steel's 41% was insufficient to determine monopoly power as was Standard Oil of Indiana's 26%.

[59] United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945).

[60] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956). The Court defined the appropriate market for flexible wrapping materials as compared to a market for the Du Pont-made cellophane. Definition of the market is critical to any monopoly analysis and is often the crux of the monopoly power issue. Since the relevant market was defined broadly, du Pont was found to have relatively less market share and no monopoly power. *Id*. Other econometric measurement may not literally decrease market share and yet reveal that the company's hold on market share is not as strong as it appears and questions monopoly power even in light of a high percentage of market share. GAVIL, *supra* note 6.

[61] E. THOMAS SULLIVAN & HERBERT HOVENCAMP, ANTITRUST LAW, POLICY AND PROCEDURE: CASES, MATERIALS, PROBLEMS (5th ed. 2004).

monopoly via improper, anticompetitive, exclusionary conduct.[62] Examples of improper conduct include artificial and anticompetitive barriers to entry, certain types of systematic price discrimination, tying arrangements, market leveraging, predatory pricing, price squeezing as wholesaler and retailer, refusal to deal, and other exclusionary and anticompetitive conduct.[63]

2) *Attempt To Monopolize*

To satisfy an attempt to monopolize claim, the defendant must have "(1) engaged in predatory or anticompetitive conduct, with (2) a specific intent to monopolize, and (3) a dangerous probability of achieving monopoly power."[64] The type of anticompetitive conduct in attempt to monopolize claims largely mirrors the type of conduct prohibited by monopolization claims. Intent is a major factor because the harm that the monopolization claim protects against has not occurred yet; but if intent is present it allows the government and private litigants an avenue of relief while the potentially monopolistic behavior is in its incipiency. Requiring proof of the probability of achieving monopoly power is essential to the attempt claim. If exclusionary conduct, even accompanied by malicious intent, is not likely to lead to monopoly power, consumers are not at risk of suffering from the type of control monopolists are able to exert, and consequently, no violation exists.[65]

B. *American Antitrust Standards Applied to Intel's Conduct*

If Intel had entered into conditional rebates and pay-for-delay naked restraints in the United States, it could be sued by a competitor such as AMD or one of the United States government agencies charged with enforcing American antitrust and competition laws—the Federal Trade Commission's Bureau of Competition or the Antitrust Division of the Department of Justice. Regardless of who brings the suit, the case would be tried on the foundation of United State statutes, namely Section Two of the Sherman Act and the cases that have established American competition and antitrust jurisprudence. The remainder of this section will analyze Intel's conduct of entering into conditional rebates and pay-for-delay agreements under the framework of American antitrust jurisprudence.

1) *Conditional Rebates*

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[62] GAVIL, *supra* note 6, at 593.

[63] SULLIVAN, *supra* note 61, at 649–706.

[64] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

[65] *Id.*; *see also* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

If Intel had entered into conditional rebate arrangements with OEMs in the United States, similar to its arrangements with the OEMs in Europe, a finding of anticompetitive conduct would not be as certain under United States antitrust laws as it was with the European Commission's decision. Even though the conduct of offering rebates on the basis of exclusivity appear to create or maintain a monopoly on its face, United States case law has established that only a subset of exclusionary rebates are anticompetitive.

A rebate similar to that of Intel's was at issue in Brooke Group Ltd. v. Brown & Williamson, where the United States Supreme Court held that under the Robinson-Putnam Act, which makes certain price discrimination practices unlawful, the injury is of the same general character as that "inflicted by predatory pricing schemes actionable under §2."[66] In other words, because the rebates actually decrease the price paid for the product(s), the offering of conditional rebates is analyzed under the framework of predatory pricing, which focuses on the price charged for the product in relation to the cost to produce that same product.[67] While lowering prices can be a way firms compete, it can also be a means of anticompetitive predation. The Supreme Court has cautioned: "The costs of an erroneous finding of liability are high. [T]he mechanism by which a firm engages in predatory pricing—lowering prices—is often the same mechanism by which a firm stimulates competition; because cutting prices in order to increase business often is the very essence of competition" and that "mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect."[68]

Brooke Group established a two-pronged test for determining when a company has "priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market."[69] The first prong, known as the below cost requirement, requires the plaintiff to prove that its rival has set its prices "below an appropriate measure of its rival's costs."[70] The second prong, the recoupment cost, is a determination as to whether the rival has a "dangerous probability[] of recouping its investment in below cost pricing."[71]

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[66] *Brooke Group*, 509 U.S. at 221.

[67] *Id.*

[68] *Id.* at 226 (quoting Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 122 n.17 (1986) (internal quotation marks omitted)).

[69] *Brooke Group*, 509 U.S. at 222.

[70] *Id.*

[71] *Id.* at 224

The first prong tends to show the predatory nature of the conduct. Firms that compete on the merits are not able to consistently price their products below the costs they incur to produce the products; otherwise, they would not be able remain a going concern. Predators, firms who price below cost, are altering the playing field such that other firms cannot be expected to compete and will eventually be forced out of the market. This results in the predator having increased market share and possibly gaining monopoly power. Predatory firms view the first phase of a predatory pricing scheme as an investment because it will likely lose money during the predatory pricing campaign by selling below cost, but after competing firms exit the market, the predator enters the second phase of the predatory pricing scheme. In the second phase, the firm charges monopoly, or supra-competitive, prices for the product in a market where it has gained greater market share and control. Consumers are harmed because of the price increases, and the predator can replay the strategy if it is threatened by a market entrant, further entrenching itself as a monopolist to the detriment of the consuming society.

It is important to emphasize that a low price alone is not enough to trigger antitrust liability. Low prices may be the result of a predatory pricing scheme, but they may also result from a number of efficiency based reasons, such as innovation, streamlined distribution, or improved contracts with suppliers. When low prices result from better run businesses, consumers benefit and the firm should not be subject to antitrust liability.

The second prong from Brooke Group, which is much more difficult to establish than the first, is intended to force the plaintiff to prove antitrust injury[72] and show that not only was it harmed, but the consuming public was harmed or at risk of being harmed by the rival's pricing scheme. Naturally, if a plaintiff is only able to establish below cost pricing and nothing more, the consumers are benefited because prices have been decreased and consumers are not in danger of being subject to supra-competitive prices; hence, there is no reason to reprimand or punish the rival. However, if a plaintiff can establish that a rival is capable of charging monopoly prices, after it and other competitors are forced out of the market because of the below cost pricing of a rival, then the courts take issue with the conduct as the practice will likely harm consumers in the long run.

Brooke Group involved the oligopolistic cigarette market which was not dominated by a single-firm monopolist.[73] Although there were just a

[72] Antitrust injury is generally required of all antitrust plaintiffs. A plaintiff needs to establish that they have sustained an injury of the type the antitrust laws were intended to prevent or remedy. Brunswick v. Pueblo Bowl-O-Matic, 429 U.S. 477, 489 (1977).

[73] There were six major cigarette manufacturers in the industry.

few firms in the industry, it was still a very competitive market; the defendant in Brooke Group had only a 12% market share.[74] This is in stark contrast to the near 80% market share Intel enjoyed in the CPU market. While Brooke Group was decided by the United States Supreme Court and has become the standard for conditional rebate cases, the Intel and AMD relationship more closely parallels a Third Circuit decision—Le Page's v. 3M, which involved a monopolistic market.

In Le Page's, the producer of Scotch brand tape, 3M, held a 90% share of the transparent tape market.[75] LePage's, a competitor, filed suit against 3M under §2 monopolization and attempted monopolization claims.[76] LePage's charged 3M with bundling rebates and entering into exclusivity contracts, and the Third Circuit explicitly denied 3M's Brooke Group defense.[77] 3M admitted that it was a monopolist and that it entered into exclusivity agreements, but argued that it did not violate the law because it "never priced its transparent tape below its cost," apparently in complete reliance on Brooke Group.[78] Based largely on market structure, the Third Circuit held that "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."[79] The parenthetical appears to be a direct response to 3M's Brooke Group defense because Brooke Group concerned the oligopolistic cigarette market, and 3M was a monopolist in a market for transparent tape.

3M based its defense on the first prong of the Brooke Group test—below cost pricing. The court, however, discounted the first prong for application in the monopolistic market and focused on the second prong—recoupment of losses after the period of discount pricing.[80] 3M conceded that it could recoup the lost profits it incurred during the time it instituted its pricing strategy[81] apparently under the belief that it was safeguarded by the below-cost pricing element of Brooke Group. However, because competition in an oligopoly makes it more difficult to recoup discounted pricing, the below cost requirement is a sufficient standard for courts to establish the predatory, exclusionary requirement of §2 in oligopolies. In a monopoly, however, it is easier to recoup the

[74] LePage's, Inc. v. 3M, 324 F.3d 141, 147 (3d Cir. 2003).
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.* at 141–47.
[79] *Id.* at 151–52.
[80] *Id.*
[81] LePage's, Inc. v. 3M, 324 F.3d 141, 151 (3d Cir. 2003).

investment in discounted pricing—if the monopolist successfully eliminates competition by using a discount-pricing strategy, it can then increase prices by the use of its monopoly power. To prevent this type of harm, the first prong of Brooke Group is appropriately lowered in monopoly markets, as was the case in LePage's.

To summarize, the lower LePage's standard holds that a monopolist violates §2 when it competes on any basis other than the merits, regardless of above–or below–cost pricing. Because a monopolist can easily charge supra-competitive prices and recoup lost profits from its discount-pricing scheme by raising prices once competitors are forced out of business, the hurdle of anticompetitive, exclusionary conduct is rightfully lowered. However, when dealing with an oligopoly, like in Brooke Group, the higher hurdle may be necessary.

The result is that Brooke Group is very friendly to defendants because it is extremely difficult for plaintiffs to prove that the defendant is able to recoup its investment in below cost pricing.[82] As such, Intel would be in a better position to defend its conduct under the Brooke Group standard than the LePage's standard. If Brooke Group were applied, the plaintiff would need to establish that Intel sold its processors at a price that was less than the cost to produce them, after taking into consideration the value of the rebates Intel offered to its OEM customers. Unfortunately, the European Commission's case does not provide enough facts to establish that Intel met the first prong of Brooke Group because below-cost-pricing is not a factor under Article 82. If Intel can show that it sold the CPUs for a price that was at all higher than its costs to produce them, it will prevail in an antitrust suit if Brooke Group is the standard. If the first prong of Brooke Group is satisfied and Intel is shown to have sold its CPUs for prices lower than its cost to produce them, the analysis would proceed to the second prong.

Proving the second prong—showing that the predator is able to recoup its investment in below-cost pricing—is often where plaintiffs struggle to prove their case. With the case of Intel however, proving the second prong would be rather straightforward. If AMD, the only real threat to Intel's chokehold on the CPU global market, were to exit the industry, Intel would not only have monopoly power, but it would practically be the only participant in the market. Intel would be free to raise prices for their CPUs because there would be no other viable

[82] Some schools of thought hold that it is extremely rare, almost to the point of impossible, to profitably engage in predatory pricing because recoupment is or nearly is impossible – there would need to be a market with insurmountable barriers to entry to make recoupment profitable. SULLIVAN, *supra* note 61. The court in *Matsushita* claimed that the cartel would need to charge supra-competitive prices for 30 years in order to recoup their supposed investment in predatory pricing and the barriers to entry in the television market were not so great as to keep competitors from entering the market amid monopoly pricing.

options for OEMs. Any competitor vying for a position in the market would have to overcome significant barriers to entry,[83] and Intel would have a considerable amount of time as the sole producer of CPUs to further entrench its monopoly.

It may be the case that because the probability of recoupment for Intel is so great, that the court would choose to apply LePage's standard over Brooke Group, even though La Page's is a Third Circuit decision. The make-up of the CPU market is similar to the transparent tape market in LePage's in the sense that both markets are dominated by a monopolist. If the LePage's standard was applied to Intel, it is almost certain that Intel would be found to have violated United States antitrust law. Recall that under LePage's, the monopolist would be liable if it competed on any basis other than on the merits, regardless of above-or below-cost pricing. A court would likely find that Intel's conditional rebate agreements were a form of competition not based on the merits. Furthermore, under the LePage's standard, there is no need to address recoupment because in a monopoly, the monopolist inherently has sufficient market power to recoup an investment in discount pricing.

2) Pay-for-Delay, Naked Restraints

Had Intel entered into naked restraints with OEMs, or in other words, paid to delay the release of computers using a rival's CPU, the conduct would likely be deemed unlawful per se, and the firm employing the pay-for-delay strategy would not be given an opportunity to justify the noncompetitive conduct. The relationship between Intel and the various OEMs could be categorized as supplier and retailer. OEMs are retailers because they readily sell to end-users even though they also distribute to retail centers after they manufacture the computers. Thus, their relationship is vertical.[84] Intel supplies a major component to the OEMs, who then manufacture the computers and sell them to end users.

Historically, vertical restrictions have been considered unlawful per se in the United States.[85] Even though in Continental T.V. v. GTE Sylvania, the Supreme Court held that vertical restraints are no longer illegal per se, but should be decided based on the rule of reason,[86] the

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[83] *See* Provisional Decision, *supra* note *2*, at 38–39 (discussing barriers to entry).

[84] GAVIL, *supra* note 6, at 339.

[85] Dr. Miles Med. Co. v. John D. Park & Sons Co. 220 U.S. 373 (1911) (*overruled by* Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (*Dr. Miles* held that resale price maintenance is *per se* unlawful).

[86] 388 U.S. 365. Under the rule of reason analysis "the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T.V., Inc.*, 433 U.S. at 48.

rule of reason standard was meant only to apply to vertical restraints that are justifiable by the creation of efficiencies. Vertical restraints, such as pay-for-delay agreements, are aimed at excluding a rival and devoid of an efficiency justification.[87] A firm that employs such restrictions has "no purpose but to advantage its own product by impeding rivals."[88] Thus, such conduct would likely be found illegal per se under the standard prior to Continental T.V.

Furthermore, though little case law on point exists because this type of conduct is so extreme,[89] in Conwood Co. v. U.S. Tobacco Co., the defendant, Conwood, engaged in removing and destroying the sales racks of a competing tobacco company in the retail stores wherein the two companies competed for sales.[90] The court found the exclusionary conduct to be unlawful because it was "anticompetitive, lacked an efficiency justification, and entrenched the monopolist[']s position."[91] An analogy can be drawn between the defendant's conduct in Conwood and Intel contracting with OEMs to delay or not sell AMD-based computers. Similar to Conwood, there is no purpose behind Intel delaying the launch of AMD-based computers except to advantage its own product by impeding AMD and entrenching its monopolistic position.[92]

Intel's pay-for-delay agreements could also be held illegal under the LePage's standard. The holding in LePage's is broad and prohibits all of a monopoly's competitive efforts made on a basis other than the merits.[93] Paying a retailer to postpone the launch of a competitor's product would no doubt be considered competition on a basis other than on the merits.

Another relevant case is Aluminum Company of America ("Alcoa").[94] Alcoa was a monopolist in the aluminum market, where it paid electric companies to refuse to offer power to competing aluminum producers.[95] This was a true naked restraint because Alcoa paid money solely for the agreement to withhold power from its competitors, and nothing else. Alcoa paid to keep its competitor from producing aluminum; Intel paid to keep its competitors' product from leaving the warehouse and entering the stream of commerce.

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[87] *See* Mark S. Popofsky, *Defining Exclusionary conduct: Section 2, The Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435, 463–64 (2006).

[88] *Id.* at 447.

[89] Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209, 227–28 (1986).

[90] Conwood Co. v. U.S. Tobacco Co., 290 F.2d 768 (6th Cir. 2002).

[91] Popofsky, *supra* note 87, at 447; *see also Conwood*, 290 F.2d at 768.

[92] *See* Popofsky, *supra* note 87, at 447.

[93] LePage's, Inc. v. 3M, 324 F.3d 141, 147 (3d Cir. 2003).

[94] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

[95] *Id.* at 421–22.

Intel, however, could argue that it has an efficiency justification for its conduct because it was actually in vertical relationships with each of the retailers that it entered into the pay-for-delay agreements with. If Intel can articulate an efficiency justification for contractually limiting its retailer to delay the launch of a competing product, it might take the restraint out of the naked restraint category. One efficiency justification could be that the retailer would be able to apply more time and resources toward selling and servicing Intel-based products. Although a stretch, such an argument might make the restraint appear ancillary to an otherwise efficiency-enhancing contract between a supplier and its retailer.[96] In comparison to Alcoa, Intel is certainly closer to its contract partners than Alcoa was with most of the power companies with whom it contracted. Ultimately however, Intel would be hard pressed to articulate an efficiency justification that would be the natural consequence of any OEM delaying the launch of AMD products that would hold up in litigation.

V. CONCLUSION

If Intel's European business practices were on trial in the federal courts of the United States, the result would not be as certain as the European Commission's finding of violation. The European Union's sole standard for dominant firm behavior, Article 82, is a broad restriction against the allowable conduct of businesses that control the majority of the markets they compete in. Article 82 proscribes any conduct undertaken by a dominant firm that deviates from normal competition and results in stifling the growth of competition in the marketplace.[97] European case law has established that conditional rebates are simply incompatible with the objectives of undistorted competition.[98]

In the United States, the Supreme Court's decision in Brooke Group opened the door for analysis concerning whether Intel's rebate system would likely yield monopoly profits in the long run.[99] Additionally, Brooke Group considered the ultimate effect on consumers; if rebates lower prices and are not likely to lead to supra-competitive pricing, consumers benefit from the lower prices.[100] Brooke Group also held that

[96] Ancillary restraints are viewed quite differently from naked restraints. *See* United States v. Addyston Pipe & Steel Co. 175 U.S. 211, 239–40 (1999).

[97] EC Treaty, *supra* note 5, Art. 82.

[98] Case C-95/04, British Airways v. Comm'n, 2008 E.C.R. ¶ 66.

[99] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993) (describing recoupment test).

[100] *Id.* at 222–23.

there is nothing anticompetitive about a rebate system that results in above cost pricing.[101] Punishing firms for reducing prices would likely chill competition, the very behavior the antitrust laws are instituted to protect.[102] Under the Brooke Group framework, certain conduct would be permitted that would not be permitted under European antitrust jurisprudence. Whether Intel would be held liable under Brooke Group would depend on the outcome of the below-cost-pricing and recoupment tests.

The Court might choose not to even apply the defendant-friendly Brooke Group standard and instead apply the more plaintiff-friendly LePage's standard. LePage's appears to fit Intel's situation very well and establishes a different standard for how a monopolist is regulated in rebate situations. If the court applies the LePage's standard, then Intel would most likely be found to have violated the antitrust laws concerning the conditional rebates because LePage sets a lower hurdle for plaintiffs to clear in order to show that rebate practices of a monopolist are anticompetitive and injurious to consumers. However, Le Page's is a Third Circuit decision, and Brooke Group is a decision from the United States Supreme Court; even though Brook Group was based on the oligopolistic cigarette market, the decision did not explicitly limit itself to oligopolies.

As for Intel's naked exclusion, the pay-for-delay arrangements, the conduct is almost certainly to be ruled illegal per se in American courts, similar to the European Commission's decision. Paying to delay the launch of a competitor's product is extreme behavior and violates the principles of fair competition in both the Unites States and Europe.

Studying Intel's conduct under the construct of two countries' antitrust laws is a thread in the large tapestry of comparative law. The countries satisfy their need to regulate commerce in very similar ways, but with obvious dissimilarities as well. A narrow look at Intel's conduct reveals that the issue of conditional rebates is debatable under American jurisprudence, but it is the equivalent of a per se violation under European jurisprudence. The two countries are aligned in considering extremely anticompetitive conduct such as naked restraints as violative of competition laws. Analyzing Intel's European business practices under American antitrust jurisprudence reveals that America and Europe have constructed their respective antitrust laws upon frameworks that serve slightly differing goals.

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[101] *Id.* at 223–24.
[102] *Id.* at 223.