

CLIENT ALERT

Federal Trade Commission Charges Intel With Anticompetitive Conduct; Commits to Expedited Administrative Trial and Decision

December 16, 2009

After years of investigation, the FTC today joined the governmental attack on Intel's market position and behavior in microprocessors. The administrative complaint announced today alleges that Intel engaged in a "course of conduct" designed to preserve its x86 microprocessor monopoly position against technology advances by both AMD and Via Technologies as well as by producers of graphics microprocessors such as Nvidia. The anticompetitive conduct is alleged to include 1) making misleading statements about the market-readiness of Intel's own products, 2) offering coercive bundled pricing and tying of Intel's products resulting in below cost pricing, and 3) specifically designing Intel compiler software to degrade the performance of non-Intel chips running the software.

To address the effects of the alleged conduct, the FTC proposes a laundry list of remedies. These would include a series of provisions to limit "the manner in which Intel uses threats, bundled prices, quantity discounts, and other offers to encourage exclusivity or to deter competition or unfairly raise the price of its microprocessors or GPUs," and might also include restrictions on the development by Intel of products that interfere with the performance of competitors' products, among other restrictions. The FTC has set the matter for expedited administrative trial under its recently amended Rules of Practice, and is committing to bring the case to trial in September of 2010, and issue a Commission decision within twenty months, or by August of 2011.

Of particular note is Commissioner Rosch's separate statement, concurring and dissenting in the Commission's decision. Commissioner Rosch notes that the case should be framed as a "pure Section 5" case, and should not include tag-along Section 2 allegations. This has public policy implications as Intel is currently subject to legal challenges by the NY Attorney General and private parties. Commissioner Rosch specifically stated that "The Commission should not enable those plaintiffs to free ride off the Commission's work . . . [n]or should it put itself in a position where an unfavorable outcome in those cases may be cited against it." Commissioner Rosch may be reacting to the more than 3 dozen class action complaints that were filed in the wake of the FTC's most recent "pure Section 5" settlement with the National Association of Music Merchants, Inc. (NAMM), and may wish to clarify that any enforcement that arises from the FTC's complaint today cannot be the basis for private, follow-on litigation. Commissioner Rosch further notes that, "as a matter of policy", the FTC's complaint should be crafted so as not to "spend public resources on a duplicate claim."

This case is a critical first step in the new FTC's effort to define the boundaries of Section 5 of the FTC Act. As Chairman Leibowitz and Commissioner Rosch note: "Section 5 is clearly broader than the antitrust laws, but it is not without boundaries, and the Commission will clearly describe and stay within those boundaries if this case comes before it to review." The business community and the antitrust bar will pay very close attention to the broader implications of this case on the FTC's view of allegedly abusive behavior by dominant firms.

Links:

- [FTC Press release](#)
- [Administrative complaint \[PDF\]](#)

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Ryan C. Tisch

Partner – Washington, D.C.

Phone: +1.202.624.2674

Email: rtisch@crowell.com