

N.Y. AG Investigation Raises Stakes For Intel

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Friday, Jan 11, 2008 --- Given the antitrust charges already filed against Intel Corp. in Europe and Asia, it's unlikely that New York Attorney General Andrew Cuomo's probe of the company will turn up many new facts. But if the AG's office does bring a case, it would ramp up the pressure against Intel and possibly inspire other states or the federal government to join in the litigation.

"What's new is that an agency of the government with subpoena power and a capable staff is now involved in a case within the United States," said Albert Foer, the president of the American Antitrust Institute, which wrote a letter to the Federal Trade Commission in August asking for an investigation of Intel's alleged actions.

"You've got competent attorneys in the private case, but they are quite limited by discovery rules, and discovery is moving very slowly," Foer added. "I think a government subpoena can move things along more rapidly, and you never want the government on the other side of the table if you can help it."

Shubha Ghosh, a professor at the Southern Methodist University Dedman School of Law in Dallas, said that in some ways, New York has more far-reaching investigative tools than the federal government.

"Federal antitrust laws tend to be a lot more narrow than state remedies," he said.

"New York is the pre-eminent antitrust team among the states," added David Balto, a former FTC policy director. "It is the New York Yankees of antitrust. They have a long and very successful history of taking on tough antitrust cases when the federal agencies fail to come to the plate."

Cuomo's office revealed on Wednesday that it had served a "wide-ranging" subpoena on Intel, seeking documents and information about whether the company violated New York state and federal antitrust laws by "coercing customers" to exclude rival chip maker Advanced Micro Devices Inc. from the worldwide market for a type of computer processing unit.

"After careful preliminary review, we have determined that questions raised about Intel's potential anti-competitive conduct warrant a full and factual investigation," Cuomo said. "Protecting fair and open competition in the microprocessor market is critical to New York, the United States and the

world.”

Some of the first charges against Intel go back to 2005, when Japan’s Fair Trade Commission ruled that Intel had violated its competition laws, prompting Intel to agree to a cease and desist order.

At about that time, AMD slapped Intel with its own charges in the U.S. District Court for the District of Delaware.

Then, in July 2007, the European Commission levied more charges, alleging that Intel tried to elbow AMD out of the chip industry by enticing computer hardware makers with illegal cash payments, discounts and rebates to choose its chips over AMD’s products.

Throughout all of these actions, Intel has maintained its innocence.

“We believe that the microprocessor market is competitive and is behaving as a competitive market would behave to the benefit of consumers,” Intel spokesman Chuck Mulloy said Friday.

He added that Intel had informally met with the Federal Trade Commission numerous times over the last few years, and that no formal investigation was underway. The outline of Cuomo’s investigation, he said, was simply a mirror image of the allegations made by AMD in its private lawsuit.

“We will try very hard to comply with the terms of the subpoena, to provide the information requested by the attorney general’s office and hope to convince them that our business practices are lawful,” Mulloy said.

According to Balto, Intel has argued that it legally offered its loyal customers rebates and that it is protected by antitrust safe harbors.

“These excuses that Intel has trotted around for the last 10 years have become threadbare and are unlikely to carry the day with the state attorney general,” said Balto, who does not represent any of the parties in the matter.

“I think this is the landmark monopoly case of the 21st century,” added Foer, who said he was glad to see Cuomo jump into the fray.

Though the exact scope of Cuomo’s investigation is unknown, he is likely asking for roughly the same documents that were produced in other places.

Nonetheless, these types of actions are not often coordinated across jurisdictions, according to D. Daniel Sokol, a visiting associate professor at the University of Missouri School of Law.

“You may have conflicting remedies and conflicting outcomes in cases across jurisdictions around the world,” Sokol said. “From a business perspective, that’s very difficult.”

“We still have a significant divide in how the United States and Europe view monopolization cases,” he added.

Ghosh, the SMU professor, said the Microsoft antitrust case of the 1990s was a possible bellwether of things to come in the Intel case. He added, however, that the Intel case was probably most similar to the IBM case from the 1970s and 1980s.

In that case, the charges were dropped in the United States, but IBM was required to change its business practices in Europe.

—Additional reporting by Amanda Ernst