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Intel and McAfee—Antitrust is "Getting it Right" in High Tech

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I. INTRODUCTION

The European Commission has just (January 26, 2011) approved the acquisition by Intel of McAfee, following the U.S. Federal Trade Commission's ("FTC") clearance last December. The decision announced by Commissioner Almunia is particularly interesting from a policy perspective because it is conditional on compliance with various commitments offered by Intel, and because it is, in principle, open to challenge before the General Court of the European Union - a Court well known for its readiness to overturn unsatisfactory merger decisions.

High technology is a difficult area for antitrust regulators. Ensuring genuine competition is vital for the innovation that facilitates economic growth across the globe, and which enhances the quality of our lives. But the products and services involved can often be explained to those outside the engineering community only "at a high level" or by using analogies with more everyday concepts with which lawyers, economists, and courts can associate. Frankly, it is often hard to distinguish between real problems and mere opportunism by complainants.

II. RIVAL INTERPRETATIONS OF THE TRANSACTION

When Intel announced its purchase of McAfee in August 2010, it explained that the acquisition reflected the fundamental role that security now plays in online computing. As Paul Otellini, Intel's president and CEO, said:

> In the past, energy-efficient performance and connectivity have defined computing requirements. Looking forward, security will join those as a third pillar of what people demand from all computing experiences.

Intel was seeking the "breakthroughs in effectively countering the increasingly sophisticated threats of today and tomorrow" that hardware-enhanced security would bring. The company emphasized that Intel and McAfee were home to two of the most innovative research labs in the high-tech world, and together they would explore future product concepts to further strengthen security in the cloud as well as for the myriad of computers and devices people use in their everyday lives.

Thus, Intel explained, what we should expect from the merger is an enhanced prospect of innovation in an area that is, indeed, vital for business and consumers alike. But at least some of McAfee's competitors appear to have expressed concerns to the European Commission that the transaction could, instead, lead to a reduction in competition among cyber security providers.

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Intel is, of course, a very successful organization. By revenue, it is the world's largest semiconductor chip maker.In light of Intel's market position, complainants argued, Intel might favor its new McAfee business by interfering with interoperability between its processors and the endpoint security solutions offered by McAfee's rivals. Similarly, Intel might bundle McAfee's products into Intel's hardware, thus achieving a prevalence that rivals simply could not match.

III. THE PRINCIPLES AT STAKE

Anyone with a passing interest in European competition policy will recognize these complaints as echoing the European Commission's 2004 abuse of dominance findings against Microsoft, which were upheld in Court, and which ultimately led to fines on Microsoft totaling well over a billion euros.

Interoperability is today recognized as a fundamental value in European competition policy.For information and communications technology, it is often the key to innovation. Without interoperability among different brands of mobile phones, and with the equipment of different infrastructure providers, we would still be using old "land line" phones no different from those of our grandparents. And in the *Microsoft* case in 2004, the Commission found that barriers to interoperability between Microsoft's omnipresent Windows operating system for PCs and rival operating systems installed on servers designed to enable users to work closely together by sharing files, printers, and other resources, were squeezing out competition—and innovation—from that market.

But interoperability as an antitrust concept is about enabling competitors to design their own products, with the best and most useful functionalities they can conceive, and then to sell those products in the marketplace without being ambushed by an inability to interoperate properly with another—dominant—product that their customers have to use.

The prohibition of the abuse of dominance, now contained in Article 102 of the Treaty on the Functioning of the European Union, may require a dominant firm to give its rivals a great deal of technical information in order to ensure interoperability, perhaps much more than it would wish. But there is a clear conceptual dividing line between interoperability and copying or making a rival platform using compulsorily licensed technology.

The *Microsoft* case is viewed by many as a "defeat" for that company. But Microsoft was successful on one very important point of principle. The original request from Sun Microsystems included information on Windows that would enable Sun to write a layer of software to run on top of Sun's Solaris operating system and make it appear to applications as if it were Windows. Applications written for Windows would be able to run on Solaris. Customers could avoid buying Windows altogether, but still get all the benefits of the Windows application environment.The Commission recognized this as having nothing to do with interoperability and as discouraging innovation and platform competition. It declined to pursue Sun's complaint on this point. Thus Microsoft continued to earn the rewards it had earned by producing an environment attractive to application developers, and Sun retained the incentive to develop its own, competing application environment.

Turning next to the bundling issue raised in the *Intel/McAfee* case, it is important to recognize that combining technologies together can—depending on the facts—create great benefits.Today, we all enjoy the ability to take photographs on our mobile phones, and then send them to our friends directly from the phone. We would not be impressed if a camera maker

alleged that the phone manufacturers are illegally tying imaging technology to devices for wireless audio and data transmission.

On the other hand, the experience of the *Microsoft* case is that, in other circumstances, tying can be genuinely destructive of competition and choice for consumers. In that case, the Commission found that there was no objective justification for forcing computer manufacturers to purchase Microsoft's media player as part of Windows. All this did was prevent computer manufacturers from exercising a meaningful choice between rival media players when deciding which ones to include in their computers. Ultimately, therefore, tying cases all depend on the reality and extent of the benefits for users offered by the combination of different technologies.

IV. *INTEL/McAFEE*—GETTING IT RIGHT

Of course, the FTC chose not to challenge the transaction as it stood, while the European Commission chose instead to condition its approval on Intel's commitments. But this difference of approach may be more apparent than real. Unlike the FTC, to approve a transaction in Phase I, the European Commission must adopt a reasoned decision that it has no "serious doubts" that the transaction might "significantly impede effective competition." And its decision may be challenged in Court. Thus a greater readiness to condition approval on commitments might be understandable.

The commitments accepted by the Commission respect the principles outlined above and, in our view, represent the sound application of policy. In particular, it is noteworthy that Intel commits to provide information necessary for software to "utilize" new functionality in Intel processors that is utilized by endpoint security products sold by Intel (formerly McAfee). Thus customers will continue to enjoy a competitive choice between security products, all able to use Intel processors in the customer's devices. Just as importantly, and as in *Microsoft*, there is no obligation on Intel to enable rivals to replicate the characteristics of Intel's processors in platforms to be offered to customers as a fundamental alternative to buying those very same Intel processors.

Similarly, there is no commitment that would restrain Intel from combining its hardware with McAfee's security technologies. There is a provision for royalty-bearing access to any malware detection engine added to Intel processors, but this seems rather improbable in any event. The fundamental point is that Intel is not restrained from exploring the opportunities offered by its acquisition to make genuine improvements in security for users across the globe.

Applying the antitrust rules in the Information and Communication Technologies ("ICT") environment is not an obvious matter. Establishing sound principles and applying them is the key to success. In our view, that is exactly what the FTC and the European Commission have done in the *Intel/McAfee* case.