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US Court Broadens Access to US-located Information For Use in EC Antitrust Investigations

On 6 June 2002, the US Court of Appeals for the Ninth Circuit held that a US federal district court could order discovery on behalf of a complainant in an EC antitrust investigation. The decision has broad implications for potential use in EC antitrust investigations of US courts to obtain US-located information by complainants, subjects of investigations, and by the European Commission itself.

Under 28 USC §1782, US district courts are authorized to require testimony or document production from a person within the district for use in a proceeding in a foreign or international tribunal. The request can come from the tribunal itself, or from "any interested person."

AMD and Intel are competing producers of microprocessors used in personal computers. In 2000, AMD filed a complaint with the European Commission claiming that Intel had abused its dominant position in the EU market for microprocessors. In October 2001, AMD sought an order under 28 USC §1782 in the US District Court for the Northern District of California, to require Intel to produce documents and transcripts of testimony from a private patent infringement suit in which Intel had been a party. (The case was then pending and has since been settled.) AMD asserted that it had reason to believe the documents and testimony were relevant to its EC complaint. Intel objected, arguing that the EC investigation was not a "proceeding in a foreign or international tribunal" within the meaning of §1782. The district court agreed with Intel, and AMD appealed.

The Court of Appeals reversed, deciding that:

- the EC's investigation was "related to a quasi-judicial or judicial proceeding" and qualified as a "proceeding before a tribunal" for which assistance could be provided under §1782;
- AMD, as a complainant in the EC investigation, was an "interested person" entitled to seek assistance; and
- discovery under §1782 did not require that the foreign jurisdiction's rules would themselves allow discovery of the kind sought in the US court. (Note, however, that there appears to be a split among the courts of appeal on this point.[1])

[1] The First and Eleventh Circuits require a showing that the applicant could obtain comparable discovery in the foreign proceedings. In re Application of Asta Medica, 981 F.2d 1, 5-7 (1st Cir. 1992); In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago, 848 F.2d 1151, 1156 (11th Cir. 1988). The Second and Third Circuits do not require a showing that the material sought would be discoverable in the foreign proceeding. Euromepa, SA v. R. Esmerian, Inc., 154 F.3d 24, 28 (2d Cir. 1998); In re Bayer AG, 146 F.3d 188, 193 (3d Cir. 1998). The Fourth and Fifth Circuits distinguish between requests from private parties and requests from a foreign tribunal, not imposing a foreign discoverability requirement on requests from the latter. In re Letter of Request from Amtsgericht Ingolstadt, Fed. Republic of Germany, 82 F.3d 590, 592-93 (4th Cir. 1996); In re

The court remanded the case to the district court to consider AMD's request on the basis that the request fell within the ambit of §1782.

Implications of the decision. Although the court's decision deals with a request by the complainant in an EC investigation, its reasoning would seem to open the door to requests by the parties under investigation or by the European Commission itself.[2] While the Commission already has extensive evidence-gathering powers, private parties in Commission proceedings do not. The companies under investigation, and to a lesser extent complainants, have a degree of access to the Commission's file; but they have no compulsory means of obtaining documents or information directly from one another or from other private parties. Although AMD's discovery request in this case was directed at court records, §1782 could allow discovery of any type of document or information.

US firms appear frequently before the Commission in merger and non-merger investigations, as complainants or as parties. The court's decision suggests a new avenue of discovery in Commission investigations (not to mention investigations by many other non-US antitrust authorities) in which a complainant, a party, or third parties with relevant information reside or are found in the US.

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If you have any questions about the *AMD v. Intel* decision, or any US or European competition law matter, please do not hesitate to contact any of our competition lawyers at Wilmer, Cutler & Pickering:

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Letter Rogatory from First Court of First Instance in Civil Matters, Caracas, Venezuela, 42 F.3d 308, 310-11 (5th Cir. 1995).

[2] The US Department of Justice's Antitrust Division has invoked similar, although narrower, legislation in several EU Member States to get European-located evidence for use in its international cartel investigations.